IN THE SUPREME COURT OF FLORIDA



**EDWARD T. JAMES,**

Appellant,

v. CASE NO. 86,834

**STATE OF FLORIDA,**

Appellee.
_____/

APPEAL FROM THE CIRCUIT COURT OF
THE EIGHTEENTH JUDICIAL CIRCUIT IN
AND FOR SEMINOLE COUNTY, FLORIDA

# ANSWER BRIEF OF APPELLEE

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## STATEMENT OF THE CASE

The State accepts James' rendition of the Case as put forth in his brief, but includes the following matters omitted from his brief.[1] The Jury voted 11-1 in favor of the death penalty for each of the murders of a-year-old Toni Neuner, and her grandmother, Betty Dick (R.451-454, 524; T.1076, 1088). James also pled guilty to armed burglary of his mother's trailer, and grand theft firearm, Case No. 93-3499-CFA (R.522; T.1087). He had admitted to burglarizing his mother's trailer and stealing three (3) of his stepfather's prized firearms in his second confession while in California, October 8, 1993, (R.609, 672-74). His sentences for Case No. 93-3237-CFA, which was the capital murder case, were ordered to run consecutive to the sentences for the burglary of his mother's trailer (T.1087).

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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 "James" or Defendant. Appellee will be identified as the "State". "R" will designate the Record on Appeal. "T" will designate the Penalty Phase Transcript, including Sentencing Hearings. "SR" represents the supplemental record. "p" designates pages of James' brief. All emphasis is supplied unless otherwise indicated.

## STATEMENT OF THE *FACTS*

### I. Aggravation

The State accepts Defendant's rendition of the facts as set forth in his brief, but offers a more complete rendition of the same. Detective **Michael** Toole testified he became involved in the investigation of the double homicide of 58-year-old Elizabeth [Betty] Dick, and her 8-year-old granddaughter, Toni Neuner, on September 20, 1993 (T.128-30). He interviewed Wendi, Toni's older sister by **a** year, at about 11 a.m. that day (T.130-32).

Wendi told Detective Toole that Saturday evening, September 19th, between 8:00 and 8:30 p.m., Toni, her two brothers [ages 2 and 4] and herself, were taken from their uncle's house to their grandmother's [Betty Dick's] house where they spent the night (T.133-34). Wendi went to sleep on the living room sofa, while her two younger brothers slept on the floor (T.136). When Wendi fell asleep, Toni was sleeping in Betty's bed (T.136).

Wendi heard James come in the front door at 11:30 p.m., and he was laughing about something (T.137).[2] Wendi went back to sleep, but was woken again when she heard screaming from her grandmother's bedroom (T.138, 140). She heard: ***"Stop, Eddie, stop, Eddie . .."***

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[2]James rented a room from Betty.

(T.140). Wendi got up and went to the entrance of her grandmother's bedroom where she witnessed James "...***choking*** and **stabbing** her **grandmother** (T.140)." She heard James say to Betty: "***If you're not dead in the count*** of ***3, I'm going to stab some more, so she wasn't, and he started some more*** (T.142)."

James knocked Wendi down, grabbed her by her neck, then by her hair, and drug her from Betty's room to the bathroom (T.142). In Wendi's own words, James:

> ...bound her hands behind her back with a white sock. He took a pillow case and tied it around her mouth area, putting it in her mouth so she couldn't say anything, and took off his shirt and bound her legs with his shirt. (T.142-43)

After James tied Wendi up, he returned to Betty's room and took her purse (T.144). Wendi was able to see this by scooting to the bathroom entrance (T.145). She saw him take Betty's car keys, purse, wallet, and noticed later that he also took jewelry (T.145). She heard James drive off in her grandmother's car, but he "returned in a very few minutes, and ... came back in the front door of the house (T.146). When James returned, he went to where Wendi was tied up in the bathroom, "...***pointed to her and laughed*** ..." (T.146). He hung around for about 5 minutes (T.146).

While Wendi was still bound in the bathroom, her aunt came to

the front door and knocked (T.146-47).[3] Wendi could not communicate with her aunt because she was gagged (T.148). She finally freed herself, looked around to see if anybody was there, and exited through the back door (T.148). She climbed over a fence in the backyard, and hid from a few cars that drove by, fearing they might contain James (T.149). Finally, she ran to her Uncle Tim's house (T.149). The first one to the door was Nicole Angel, Tim Dick's girlfriend at the time (T.149). Wendi still had the pillow case she had been gagged with around her neck (T.149) .

**Sergeant John Negri** testified that he processed the murder scene (T.154-55). Betty Dick "was nude from the waist down" underneath a quilt (T.175)." A blue handle of a small knife was found in her hair (T.175).[4] After her waterbed had been drained, a pewter candlestick holder was found (T.181). A butcher knife, which James had thrust into her back, was not discovered until the autopsy the next day (T.209).

In the room James rented, Toni Neuner's body was discovered, lying on her back, wedged between the mattress and the wall (T.192) . By her head, were a pair of girls underpants, which

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[3]She came every morning about 5:30 a.m., 6 a.m. (T.146-147).

[4]The blade had broken off. (T.181)

partially covered her face (T.192, 196, 223). Toni was completely *nude,* on her back, her ***hands were covering "the crotch area"*** (T.193).

**Doctor Shashi Gore, Medical Examiner** for Seminole County, testified he performed autopsies upon Betty Dick and Toni Neuner (T.247-90). His initial observations of Betty were that she was clothed "in a red colored pajama top, and this was extensively bloodstained and was soaking with blood (T.248)." There were multiple "penetrating-type, clean cuts," in this top (T.248). Once the top **was** removed, he noted "...multiple stab wounds on back" and discovered the butcher knife (T.250). The wound caused by the butcher knife penetrated the right lung, causing profuse bleeding in the chest cavity, in this instance at least 1 liter of blood, which was **a** significant amount, almost 1/6 of total quantity of blood (T.255-58)."[5]

Further examination revealed 2 major stab wounds on the left side of the back of her neck (T.259-60). She was also stabbed below the left eye, and her left external ear was cut (T.260). The right side of Betty's neck exhibited a pattern of bruises

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[5]Under cross-examination, Dr. Gore testified that Betty was still alive when James stabbed her with the butcher knife. He knew this because of the amount of blood in the right chest cavity, which meant her "***heart was beating at the time*** (T.307) ."

consistent with a hand grip (T.261-62). She had a stab wound in the right chest area, which penetrated the lung (T.261). Her scalp exhibited a bruise on the left side of her head (T.264-66).

Dr. Gore testified that "[t] here would be ***severe pain*** *experienced by [Betty]* (T.272) ." Her cause of death: "The result of massive bleeding and shock due to multiple stab wounds of the chest, that includes the back as well."

Dr. Gore's initial observations of Toni were that she was completely nude (T.273). There were hemorrhages ***in her eyes,*** which could have been caused by ***strangulation*** (T.276-78). There were ***"band-like contusions"*** on both sides of her neck, indicative of a "***ligature***" being used (T.281-84).

An interior examination revealed ***anal and vaginal area injuries:*** "...***roof of vagina*** wall ***was completely torn . . . free communication of the vagina, cavity of the vagina with the abdominal cavity*** (T.285-87)." Dr. Gore further testified that "***[t]he anal and the vaginal orifices appear severely stretched,*** torn ***and dilated*** (T.288)." The hymen was completely torn (T.288). These injuries were consistent with an erect male penis (T.288-89).

Dr. Gore found "...a considerable amount of blood in the pelvic cavity, and that [told him] ***she was alive at the time when she was perforated*** (T.289)." Toni's cause of death was

"asphyxiation due to strangulation probably with a ligature... (T. 290) . "

Detective Toole was recalled to testify as to the observations of the first officer, Eddie Robinson, on the murder scene (T.326). Officer Robinson observed Toni's body in a one foot space between the wall and the box spring/mattress James used as *a* bed (T.326-27). "...[A] large king size pillow was placed over her body" so you couldn't readily see the body when you entered the room (T.327) ." Officer Robinson,

> ...moved the king size pillow . . . and . . . found Toni completely nude with a ***pair*** **of** ***children's underwear placed in her mouth,*** and ***her hands holding the vaginal*** area, ***both hands holding the vaginal*** **area.** (T. **328)**

Deputy Glenn Johnson, Kern County Sheriff's Office, Bakersfield, California, was called for the purpose of introducing his October 6, 1993, videotaped interview with James after he was apprehended (T.341-422). Initially, James confessed that when he arrived in Betty's home that infamous night, he remembered anger: "... I remember I was pissed off and fed up and frustrated, just mad (T.345) ." He remembered strangling Toni, hearing the bones in her neck "popping and cracking and stuff (T.345-46)." He remembered he had a knife, swinging it and striking Betty in the back of the head (T.347). "He remembered Betty saying: "***Why, Eddie, why?*** (T.347)."

He told her: "***Don't worry about it. Give it up (T.347)***." He "was stabbing her with this one knife, ***stabbing her and stabbing her and stabbing her and stabbing her*** (T.347)."

He turned around, and Wendi was there (T.347). He took Wendi and tied her up in the bathroom (T.347). Wendi said: "Don't hurt me. Don't hurt me (T.348)." After tying Wendi up, he "***was afraid Betty wasn't dead*** (T.348)." He admitted: "***So I went back and I got*** the . . . ***big*** butcher ***knife . . . [a]nd*** juat ***stuck it right*** through ***her, I mean, deep, you know, just make sure*** (T.348)." He took a shower and changed. After, he recalled Betty worked at a jewelry store, got her purse and bag she brought home from work, and stole jewelry figuring he could pawn it (T.348). James alleged that after this, he didn't "remember nothing till like 2 days later . . . (T.349)."

As the interview progressed, his memory improved, and he began to provide more detail concerning the murders (T.359-370). When he returned to Betty's house, the lights were out, and everyone was asleep (T.358). All the kids, Wendi, Toni, Jerry and David were in the living room (T.360-61). "***[H]e was tired of the kids always being there***." He remarked to himself, "...damned kids are here again, Betty (T.363)." He went to the kitchen, made himself a sandwich, ate and then retired to his room (T.365-68). As he lay

on his bed, he just remembers "getting pissed" because the kids were there.

He again claimed not to remember about Toni, except for having his hands around her neck (T.371). He described Toni ***as*** an "[a]verage, quiet little girl (T.372)." He never had any run ins with her (T.372). He did remember choking her though and "***seeing her tongue get all swelled up*** (T.373)." He thought he was killing her (T.373). "Little bitch, ... just popped into [his] head (T.374)." Then he remembered what Toni was wearing [green shirt and white bib-like overalls] and that memory triggered a vision of what came next; ***he*** **raped** ***her*** (T.378-79). He remembered "thinking, ***'Eddie, this ain't no fun.'*** And that's when [he] threw her. [He] just grabbed her and threw her, and she was behind the bed *(T.381)*."

After discarding Toni, James described his next action as follows: "And that's when I went to Betty's room figuring, ***'well, I'll get me a grown woman . . .***" (T.382). He admitted he went to Betty's room for the purpose of having sex with her, "***but*** I *killed* ***her first*** (T.382)." He hit Betty in the back of the head with a pewter candle holder that came from his room (T.383). Betty cried: "***Why, why, Eddie , why? . . .***all of a sudden I had a knife in my hand (T.383)." He hit her maybe twice, she started to get up, and he

said: "F***, don't worry about it. Just give up the ghost," and he started stabbing her with a little knife, which broke "[i]n her head," maybe her right temple (T.384-85). That's when he saw Wendi at the door.

He grabbed Wendi and held her with his left hand, and "the knife broke (T.385-86)." "I was stabbing Betty and she was screaming: ***'Tim, I'm dying. I'm dying, Tim'*** (T.385).[6]" He took Wendi to the bathroom, tied her up, and allegedly promised to her that he wouldn't hurt her brothers or her (T.387). He left the bathroom and ***thought Betty wasn't dead yet*** (T.387). That's when he "***got the big knife***" (T.387). Betty "...was laying on her belly, and I stuck her in her back (T.387)." He left the knife in her back and ***started to have sex with Betty (T.388).*** He remembered "snatching down the bottom of her pajama . . . off (T.388)." But he ceased: "***It was just too much mess, blood and stuff*** (T.388)."

After he plunged the big knife in Betty's back, he "went and took a shower ... ['c]ause ***blood was a13*** over ***me*** (T.390)." Wendi was still in the bathroom when he showered (T.390-91). He got dressed, threw together some clothes, stole Betty's purse and her jewelry bag "[a]nd that's where I got my money for traveling at

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[6]Tim Dick, her son.

(T.392-93)." Betty's car keys were in her purse (T.393). He threw his stuff in the car and took off (T.333). He remembered **beeping *his horn to the neighborhood*** as he drove off as "***[a]*** gesture, Like, yeah, ***ha, ha . ..***" (T.393-394).

James related his cross country trek, and then remembered how Toni got in his room (T.396-408). Toni got in his room because he "grabbed her up on the couch (T.411)." Unfortunately, Toni just happened to be the first one he came across (T.412). When he grabbed her up by the throat, "...***her eyes opened*** (T.412)." He choked her in the living room and drug her in his room by the throat (T.412, 414). He grabbed Toni up and said in her face, "You little bitch (T.413)." Toni "...tried to grab my hands . . . but it was just too late (T.413) ." He was looking right at her face as he choked her, "[and] ***watch[ed] her eyes bulge and tongue bulge...*** **(T.417)** ." He described the various positions he placed Toni in while he raped her, basically using her as an instrument or tool for his own sexual gratification (T.420). But: "***It weren't working. It weren't no fun*** (T.420)." That's when he went for Betty **(T.421)**

Given the impact of this videotape, the trial court determined that only portions of James' October 8th audiotape would be related to the jury through Sgt. Johnson (T.422-44). At this interview,

detectives from Casselberry, Florida, were present (T.444). In this interview, James admitted that he returned to stab Betty with the butcher knife, "...*[j]ust to make sure . . . [he] was concerned with her not being dead* (T.446)." He admitted he probably ***stabbed her more than 20 times "before she*** *actually* ***lost*** **consciousness"** (T.452).[7] "...***[W]hen I seen Wendi, it was like, oh, my God, what did I do*** (T.453-54)?" He stopped stabbing Betty because "the [small] knife broke" and "Wendi was crying (T.458-59)." That made him feel "bad". Again, he stabbed Betty with the butcher knife "***to make*** *sure* ***she was dead*** (T.460)." When he rolled Betty over on her back, with the butcher knife still implanted, he remembered saying to himself: "***Let them figure this out*** (T.461-62)." He ripped the phone out of the wall "for purposes of getting away (T.463)."

The trial court's conclusions on aggravating circumstances upon these facts was as follows:

> A. AGGRAVATING FACTORS OF THE MURDER OF TONI **NEUNER**
>
> *1.* The defendant was previously convicted of another capital felony or of a felony involving the use or threat of violence to the person.
>
> The defendant committed the Capital Felony of First Degree Murder by murdering Betty Dick during the same incident that he murdered Toni Neuner. He

[7]Betty was stabbed 23 times.

pleaded guilty and was convicted by this court after having confessed to law enforcement and the court heard testimony as to the murder of Betty Dick during the penalty phase. This aggravating circumstance was proved beyond a reasonable doubt.

2. The capital felony was committed while the defendant was engaged in the commission of a sexual battery.

The defendant was convicted by this court in case number 93-4019-CFA of Vaginal and Anal Sexual Battery upon Toni Neuner, a child of eight (8) years of age. The testimony during the penalty phase trial clearly established that these two (2) counts of sexual battery were committed during the cause of Toni Neuner's murder. Toni was first strangled by the defendant and then vaginally and anally raped by him while she was still alive and aware of what was going on to some extent. The fact of her being alive is demonstrated by the testimony of Shashi Gore, M.D., the Seminole County Medical Examiner, that he found 80 milliters of blood from her vaginal area in her abdominal cavity (the child was raped so brutally that it tore away the roof of her vaginal wall, causing the vaginal area and abdominal area to become connected), and that very little, if any, blood would have been found had she died prior to the sexual batteries because upon death the heart stops. The indication that she was aware to some extent of what was going on is demonstrated by the testimony that when her body was found her hands were covering her vaginal area after she had been flung by the defendant across the bed onto the floor between the wall and the bed. This aggravating circumstance was proved beyond a reasonable doubt.

3. The capital felony was especially heinous, atrocious, or cruel.

Toni Neuner's death was caused by lack of oxygen, a cause of death consistent with strangulation.

The defendant admitted that he picked Toni up from the couch by her neck. He saw her eyes open and they looked at each other. He looked at her eyes as he squeezed her neck until her eyes and tongue bulged out. He strangled her with such force that the medical examiner found band-like contusions on the right side of her neck and similar pattern contusions on the left side of her neck leading him to believe that the defendant had used a ligature. Toni knew the defendant well, and one can only imagine the fear and horror that she felt when her eyes opened and she felt her neck being strangled and the air being cut off from her during this murder as she looked in the defendant's face. This aggravating circumstance was proved beyond a reasonable doubt.

B. AGGRAVATING CIRCUMSTANCES OF THE MURDER OF **BETTY DICK**

1. The defendant was previously convicted of another capital felony or of a felony involving the use or threat of violence to the person. The defendant committed the capital felony of First Degree Murder by murdering Toni Neuner during the same incident that he murdered Betty Dick. He committed a felony involving the use of violence by committing the crime of Aggravated Child Abuse upon Toni Neuner during the same incident that he murdered Betty Dick. He plead guilty and was convicted by this court of each of those crimes after having confessed to law enforcement, and the court heard testimony as to both the murder of Toni Neuner and the aggravated child abuse of Toni Neuner during the penalty phase. This aggravating circumstance was proved beyond a reasonable doubt.

2. The capital felony was committed while the defendant was engaged in the commission of or an attempt to commit sexual battery and kidnaping. After the defendant murdered Toni Neuner he went to Betty Dick's bedroom where she was asleep in her bed. **He** said in his confession that the reason he

went to Betty was to "get sex with a real woman". She was asleep in her bed. He picked up a candle stick and hit her, which awakened her. He then began to stab her and pulled her bed clothes up so that he could have intercourse with her. In his confession he said that the reason he did not have intercourse with her after he stabbed her to death was because there was so much blood around that he lost interest. He pleaded guilty and was convicted by this court of attempted sexual battery of Betty Dick and sufficient testimony was elicited during the penalty phase trial to show that the murder was committed while the defendant was engaged in said attempt to commit sexual battery.

After the defendant began to stab Betty Dick, he was interrupted by the entry into Betty Dick's bedroom of Wendi Neuner, the sister of Toni Neuner. He stopped stabbing Betty Dick and took Wendi Neuner to another room in the house where he tied her up against her will. He then went to the kitchen and obtained a larger knife and went back into Betty Dick's bedroom and stabbed her one more time. The defendant pleaded guilty to kidnaping Wendi Neuner and **was** convicted by this court and the court heard sufficient testimony during the penalty phase trial to show that the murder of Betty Dick was committed while the defendant was engaged in the commission of the kidnaping of Wendi Neuner.

This aggravating circumstance was proved beyond a reasonable doubt.

**3**. The capital felony was especially heinous, atrocious, or cruel.

Betty Dick's death was caused by massive bleeding and shock from twenty-three (23) stab wounds. The defendant went to Betty Dick's bedroom after murdering Toni Neuner. He struck her with a candle stick with such force that it caused a contusion in the deeper layer of the scalp. The blow awakened

> Betty Dick, and she opened her eyes and said "Why, Eddie, why?" He then stabbed her with a short knife in her back, on the back of her neck, and in the left side of her face just below the eye. Because of the short blade that was used, Betty Dick did not die but was heard crying "Tim, I'm dying," which apparently is what awakened Wendi Neuner. The medical examiner testified that the use of a knife with a short blade created wounds that caused severe pain. Twenty-two (22) wounds made by the short-bladed knife were found by the medical examiner. Betty Dick's cries for help show that she was conscious for much of the time that she was being stabbed. In his confession the defendant said that he knew that she was still alive and therefore stabbed her with the large knife to make sure she was dead after he tied up Wendi Neuner. In the defendant's second confession he related the resistance of Betty Dick, and that she tried to push him away with her feet. He estimated that he stabbed her more than fifteen (15) times before she quit struggling. This aggravating circumstance was proved beyond a reasonable doubt. (R.525-31; T.1089-95)

## II. Mitigation

In addition to that which James divulged in his rendition of the facts, Dr. Gutman's cross-examination revealed that he met with James one time, for no more than 60 to 80 minutes, 10 months after the murders (T.513). James exhibited **no organic brain** ***damage*** (T.514). In reaching his conclusions, Dr. Gutman did not review any police or crime scene reports (T.515). He did not review either of James' confessions (T.515-16). He did not review any statements of individuals who may have observed James before the

murders (T.515-16). In fact, Dr. Gutman admitted that James "***knew what he was doing at the time he committed these crimes . . . the consequences of*** his ***actions . . . [and] at the time he*** was ***doing it that it was wrong...*** " (T.519). James performance IQ is in the superior range, and his full **scale** IQ is in the high **average range (T.520).**

**Sarah Jarrett,** Nursing Supervisor at Seminole County Jail, compared James physical condition when he was returned from California, after 3 weeks on the run from authorities, to his appearance at the **time** of the penalty phase (T.539-540). However, under cross-examination she admitted she had not seen him prior to his apprehension, or what he looked like at the time of the murders (T.541-42).

**Terry Maloney** testified that he had worked with James on numerous jobs, and James "was **a** good, hard worker (T.544)." He saw James drunk on occasions, and the only drugs he knew James ingested was marijuana (T.547). On cross-examination, he was impeached with his deposition statement in which he offered his opinion that James "did not have an alcohol problem..." (T.551-52). James liked to drink, but he did not do it on **a daily basis** (T.560). The only thing he ever saw James drink was beer (T.560).

When it came time for **Jere Pearson** to testify on James behalf,

the trial court observed "...the way he's walking around, he appears to be under the influence or something (T.561)." When asked as to his consumption, Pearson admitted having one drink and taking prescribed Valium (T.562-63). The court informed him: "...[Y]ou are not coming into my courtroom and testifying at 11:30 in the morning after you've been drinking. This man's not sober (T.564)." The court further remarked:

> THE COURT: . . . I'm going to tell you, Mr. Andersen [One of James' counsel], and tell you, sir, Mr. Pearson, that **we want *to hear your testimony, and you're welcome to come back in the morning and we'll be glad*** to ***hear it, but you are not to have anything to drink past midnight if you want*** to ***testify in my courtroom tomorrow.***
>
> MR. PEARSON: Yes, sir. (T.564-65)

Mr. Anderson stated that there was a problem with this scenario, because Pearson needed to testify before Dr. Buffington, who **was** only available that afternoon (T.565). The court inquired whether there could be a stipulation (T.565). The State could not stipulate because Pearson had "...given two different statements, and they've been considerably different one to the other (T.565-66)." The Court expressed ***a*** willingness to review Pearson's testifying in the afternoon pending the results of an Intoxilyzer test, for which purpose he was remanded to custody (T.567).

After **a** lunch recess the Court observed for the record:

> THE COURT: All right. The jury's still in the lounge. That needs to be on the record.
>
> I understand that you all have been made aware that Mr. ***Pearson blew a point one two two on the sheriff's Intoxilyzer,*** one of them was at twelve twenty-six, and the other was at twelve thirty. (T.590)

James' counsel proposed an audiotape of Pearson's deposition, taken in the State Attorney's Office, be played for the jury (T.591).

The prosecutor remarked as to his past encounters with Pearson:

> MR. STONE: He [Pearson] appeared to be **a** little off every time I've seen him, Judge. The first time he was pretty bad at the P.D.'s Office, he was noticeably under the influence.
>
> The second deposition we did in my office, not as bad as the first time, but you can tell he was on it. (T.591-92)

The Court noted for the record:

> THE COURT: . . .
> But something else has been brought to my attention by security, and I want to tell you, and you may already know it, I have to live with my conscience.
>
> Apparently ***he had beared*** **some** ***ill will*** **towards** ***the Defendant based upon what he told the officer who took him*** **for** ***his Intoxilyzer test.***
>
> Now, that's just rank hearsay, but I want to make you aware of it. (T.592)

James' counsel was aware of such, remarking that Pearson had stated something of the sort at one of his depositions (T.592).

The following exchange then transpired:

> THE COURT: Just make sure you know that.
>
> Well, I want to do everything I can within the bounds of reason for Mr. James to put on his case, but I can't let the man come in here with point one two two and testify.
>
> MR. ANDERSON: I understand, Your Honor.
>
> If the State has no objection, we'd like to play the tape of his deposition. (T.592-93)

After some discussion the State agreed with Mr. Anderson's proposal (T.593-94).

Pearson's Intoxilyzer result was placed in the record as Court's Exhibit A, and the Court inquired of James whether he agreed with his counsel's proposal, to which he remarked: "My lawyer thinks it's best, I agree (T.595)." The Court disposed of Pearson as follows:

> THE COURT: Okay. Mr. Pearson, you're drunk, you're legally impaired, under the influence. You cannot testify in this matter, so I'm going to release you from custody because I said I would.
>
> I want you to leave this courthouse and do not ever come back into this courthouse ever again when you've been drinking. (T.596)

James called Betty Dick's son, Tim, to the stand, and he testified that he witnessed James do "acid" a couple of weeks before the murders (T.604). However, under cross-examination he

testified as to James' condition the night of the murders: "*He* was *fine. I've seen him on drugs and I've seen him not on drugs. To my knowledge, I don't think he was on drugs* (T.605)." Tim also testified that James did not appear drunk and that such was "*just an excuse* (T.605)."

Nicole **Jarvis**, Tim's girlfriend at that time, similarly testified that she had seen James drunk and under the influence of **drugs** before (T.615-16). The night of the murders, James did not seem either drunk or under the influence of drugs (T.616). She further testified that James did not have any problem hopping on his bike and riding to Betty Dick's house when he left their place (T.617)

Pearson's rambling audiotape deposition was played, in which he testified he ran into James cutting across a field, coming from the Van Fossen party, between 10 and 11 p.m. the night of the murders. Allegedly, he witnessed James do "10 hits of acid." He claimed James *was on foot*.[8] Pearson appeared sober to him.[9]

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[8]Recall, Nicole testified James hopped on his bike and rode toward Betty Dick's house (T.617). Recall also, that the Court noted on the record that Pearson said something to an officer while taking the Intoxilyzer, which indicated he had feelings of "ill will" against James, something his counsel was aware of. (T.592)

[9]Of course given Pearson's track record, anyone would.

**Dr. Buffington** testified that James had a "decreased **ability** to judge [his] surroundings, judge [his] control" based upon his consumption of alcohol and LSD prior to the murders (T.708-11). However, he did not definitively testify that James' capacity to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was substantially impaired (T.711). Dr. Buffington explained the interruption of Betty Dick's murder through Wendi serving as "a trigger or sense of reality..." (T.711-12).[10]

Under cross-examination, Dr. Buffington admitted that in the 15 to 20 criminal cases he appeared as an expert witness, all were on behalf of defendants (T.719). He also expressed his opposition to the death penalty when he was deposed (T.721-22). He admitted that alcohol has a tendency to decrease a male's ability to achieve and sustain an erection (T.746). In his conclusions regarding James' alcohol intake prior to the murders, he completely disregarded James own admissions regarding Toni's rape in his October 6, 1993, confession (T.746).

As to the remainder of James' case in mitigation, the State will accept his rendition of the same in his brief, but includes

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[10]Recall, James took care of Wendi by tying her up and proceeded to get a butcher knife to make sure Betty **was** dead.

the following matters. **James** testified he "***never*** had an adverse ***effect"*** when he took LSD (T.884). He further testified, he "***always had good*** **experiences** ***on LSD*** (T.884)." ***He did not remember taking LSD prior to the murders*** (T.885). Under cross-examination he belittled his own expert, Dr. Gutman, for spending such a short while with him.

James key witnesses in mitigation were Dr. Gutman and Dr. Buffington (T.485-542, 661-764). The trial court's findings of fact regarding Statutory Mitigating Factors based upon their testimony was as follows:

> 1. The capital felony **was** committed while the defendant was under the influence of extreme mental or emotional disturbance.
>
> The defendant's proof of this mitigating circumstance consisted of testimony from **E. Michael Gutman, M.D.** that the defendant exhibits passive/aggressive personality traits and depression which can best be described as dormant or smoldering combined with the testimony of **Dr. Daniel E. Buffington, a clinical pharmacologist at** the University of South Florida, who testified that the synergistic effect of the large amounts of alcohol ingested by the defendant and LSD usage of ten (10) to twenty-five (25) hits at 10:00 p.m. to 11:00 p.m. the evening before the crime would have acutely increased and exacerbated the passive/aggressive personality traits so that they would have emerged without the normal checks and balances to keep the outbursts under control. His testimony was that this interplay of alcohol and LSD caused the defendant to be under the influence of extreme mental or emotional disturbance within a

likely degree of medical certainty. While there is some dispute in the evidence as to the amount of alcohol ingested by the defendant on the night of the murder, there is no question that he drank a great deal of alcohol that night. The ingestion of LSD is another matter. The only evidence that the defendant ingested LSD on the night of or the night before the murders is the testimony of **Jere Pearson.** This witness was obviously impaired when he came to court to testify at the trial. He was remanded by the court for an intoxolizer [sic] test which revealed that his blood alcohol level was above the legal impairment limit. Because of this he was not allowed to testify and his testimony was presented by his deposition. ***Hi8 testimony*** as ***to the circumstances of the defendant taking the ten (10) to twenty-five (25) hits*** **of** ***LSD (he said both at different times) was contrary to the other evidence in the case. Other witnesses testified that he is an alcoholic. His testimony was so lacking in credibility that the court must conclude that there is no competent evidence that the defendant ingested the LSD.*** Even the defendant says he cannot remember doing so. Dr. Buffington's testimony was that his conclusion that the defendant was under the influence of extreme mental or emotional disturbance could not have been based upon excessive use of alcohol or the use of cocaine, which the defendant claims he used on a regular basis. Without the LSD and the synergistic effect this mitigating factor is not proved, and the court so finds.

2. The capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was substantially impaired.

Basically the testimony presented to prove this mitigating circumstance is the same testimony that was presented to prove the other statutory mitigating factor. **Dr. Buffington's** conclusion that the defendant's ability to conform his conduct

to the requirements of law was substantially impaired was based upon his reliance that the defendant had used LSD within a short period of time as heretofore set forth, which the court has found was not proven. However, in his confession the defendant indicated that he had a tremendous rage which caused him to commit these murders and these other crimes. He also acknowledged that he knew what he was doing when he was stabbing Betty Dick was wrong, and the realization came from either the blood that he saw or when he saw Wendi enter the room. Dr. Buffington theorized that Wendi Neuner might have been a reality trigger which brought him back to his senses. ***It is significant that even after he realized what he was doing was wrong he continued to stab Betty Dick, discontinued the activity to kidnap Wendi Neuner, and then returned with the larger knife to complete his*** task. It is clear from the record and the testimony that the defendant was suffering from alcohol addiction and he had abused alcohol and illicit drugs over a long period of time. This court is reasonably convinced that the defendant's capacity to conform his conduct to the requirements of law was substantially impaired from his long history of drug and alcohol abuse, and the court finds that this statutory mitigating circumstance has been proved as to each murder.

The court has given this mitigating circumstance significant weight. Except for this one incident which resulted in all of these crimes, there is no evidence that the defendant has ever committed violent crimes in the past.[11] (R.532-33; T.1095-97)

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[11]The record reflects a police incident report dated February 25, 1991, which stated that a woman "with extensive head and facial injuries" reported that her boyfriend [James] beat her up (R.109-206). On April 9, 1991, a Prosecutor's report reflected that the victim came to court under subpoena and said she couldn't remember James beating her up (R.207). The case was nolle prossed (R.210-13). The record further reflects that James

## SUMMARY OF THE ARGUMENT

**I.**

James first claim concerning improper prosecutorial comments during closing argument is procedurally ***barred*** in that he did not voice a contemporaneous objection, and he did not precede his motion for mistrial with a request for a curative instruction. On the merits, the record clearly demonstrates the trial court correctly exercised its sound discretion in determining there was not an "absolute necessity" for a mistrial. Error, if any, was most assuredly harmless.

II.

The standard instruction on heinous, atrocious or cruel has repeatedly passed constitutional muster. James' second claim is ***procedurally barred*** for failing to offer an alternative instruction. Any error was harmless beyond a reasonable doubt because the 2 murders were heinous, atrocious or cruel under any definition.

**III.**

The murder of 8-year-old Toni Neuner was heinous, atrocious or

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was arrested for aggravated battery on 11/23/91, when he shot one Michael Simpsons through a door with a .410 shotgun (R.229-38). That case too was nolle prossed based upon insufficient evidence (R.286). See also his own mother's sworn statement (R.689-767).

cruel beyond a reasonable doubt. Even if it were not, any error was harmless in light of the two remaining strong aggravators, the Capital Murder of her grandmother, and 2 counts of Capital Sexual Battery upon Toni.

IV.

The trial court correctly exercised its discretion in giving the State's special jury instruction regarding contemporaneous crimes as prior convictions, and declining to provide James' special instructions on non-statutory mitigators. It was also correct in declining James' invitation to error by not giving any mitigatory instructions.

V.

The trial court correctly exercised its broad discretion in finding that the statutory mitigator, "under the influence of extreme mental or emotional disturbance," was not proven. The only evidence James ingested LSD the night of the murders came from a drunk who bore him ill-will. Even James himself testified he did not remember taking LSD that infamous night. Any error would be harmless because what James complains was not a statutory mitigator, was in fact considered as a non-statutory mitigator.

VI.

The trial court conscientiously weighed the aggravating

circumstances against the mitigating evidence and concluded that death was warranted. James' sentences for 2 heinous murders of an 8-year-old girl and her grandmother were proportionate when compared to similar cases.

## ARGUMENT

### *POINT* I

THE TRIAL COURT CORRECTLY EXERCISED ITS SOUND DISCRETION REGARDING ALLEGED IMPROPER PROSECUTORIAL COMMENTS DURING CLOSING ARGUMENT.

James first claim, found at pp.15-17 of his brief, is ***procedurally barred.*** He waited until the prosecutor had completed his closing argument before objecting to the alleged improper comments. Further, at that time he failed to move to strike the comments, and he did not request a cautionary instruction to disregard them prior to his request for a mistrial. Beyond that, the record is clear the trial court correctly exercised its sound discretion in determining there was not an "absolute necessity" for a mistrial. There was no error, but even if there was, it was harmless beyond a reasonable doubt given James detailed confessions to the atrocious murders he committed, and the fact that he did not want his counsel to even object to the alleged improper comments.

Recently, this Court reiterated the standard of review

regarding an attorney's arguments to a jury as espoused in *Breedlove* v. State, 413 So. 2d 1, 8 (Fla.), cert. ***denied, 459*** U.S. 882 (1982):

> Wide latitude is permitted in arguing to a jury. ***Thomas v. State,*** 326 So. 2d 413 (Fla. 1975); ***Spencer v. State,*** 133 So. 2d 729 (Fla. 1961), ***cert. denied,*** 372 U.S. 904, 83 S.Ct. 742, 9 L.Ed.2d 730 (1963). Logical inferences may be drawn, and counsel is allowed to advance all legitimate arguments. ***Spencer.*** The control of comments is within the trial court's discretion, and an appellate court will not interfere unless an abuse of such discretion is shown. ***Thomas; Paramore v. State, 229 so.*** 2d ***855*** (Fla. 1969), ***modified, 408 U.S. 935, 92*** S.Ct. 2857, 33 L.Ed.2d 751 (1972). A new trial should be granted when it is "reasonably evident that the remarks might have influenced the jury to reach a more severe verdict of guilt than it would have otherwise done." ***Darden v. State, 329 so.*** 2d 287, 289 (Fla. 1976), ***cert. denied, 430*** U.S. 704, 97 S.Ct. 308, 50 L.Ed.2d 282 (1977). Each **case** must be considered on its own merits, however, and within the circumstances surrounding the complained of remarks. ***Id.*** Compare Paramore ***with Wilson v. State, 294 So.*** 2d 327 (Fla. 1974).

***Bonifay*** v. State, 21 Fla. L. Weekly S301, 5302 (Fla. July 11, 1996).

As regards a motion for mistrial this Court has opined as follows:

> ...A mistrial is a device used to halt the proceedings when the error is so prejudicial and fundamental that the expenditure of further time and expense would be wasteful if not futile. (Citation omitted). Even if the comment is objectionable on some obvious ground, the ***proper***

> ***procedure is to request an instruction from the court that the jury disregard the remarks.*** A motion for mistrial is addressed to the sound discretion of the trial judge and "the power to declare a mistrial and discharge the jury should be exercised with great care and should be done only in cases of absolute necessity." (Citations omitted.)

***Ferguson v. State, 417 so.*** 2d 639 (Fla. 1982). Normally, a curative instruction will suffice: ***Buenoana v. State, 527 So.*** 2d 194 (Fla. 1988) (witness' references to defendant having torched the victim's home to collect insurance money, a crime not charged in indictment, cured by instruction to strike and disregard); ***Staten v. State, 500 so.*** 2d 297 (Fla. 2d DCA 1986) (witness comment that defendant had been in jail for another offense cured by instruction); ***Palmer v. State, 486 So.*** 2d 22, 23 (Fla. 1st DCA 1986) (witness' comment that he thought defendant had pled guilty to crime charged could have been cured by instructions); ***Irizarry v. State, 496 So.*** 2d 822 (Fla. 1986) (witness reference to his own polygraph test cured by instruction); and ***Davis v. State,*** 461 So. 2d 67 (Fla. 1984) (same). The United States Supreme Court has recognized the weight to be given to a curative instruction, and the prejudice a defendant must experience, as follows:

> ...We normally presume that a jury will follow an instruction to disregard inadmissible evidence inadvertently presented to it, unless there is an "overwhelming probability" that the jury will be

> unable to follow the court's instruction, (citation omitted) and a strong likelihood that the effect of the evidence would be "devastating" to the defendant.

***Greer v. Miller, 483 U.S. 756, 766,*** n.8 (1987).

"Generally, ***both a motion to strike ... as well*** as *a* ***request for the trial court to instruct the jury to disregard the ... [comments] are thought to be necessary prerequisites to a motion for mistrial." Palmer v. State,*** *supra*, at ***23.*** A failure to request a cautionary instruction, or request a mistrial, constitutes waiver and demonstrates any error was harmless beyond a reasonable doubt. See *Wuornos* v. State, 644 So. 2d 1000, 1010 (Fla. 1994); *Teffeteller* ***v. State, 439*** So. 2d 840, 845 (Fla. 1993); ***State v.*** *DiGuilio*, 491 So. 2d 1129 (Fla. 1986).

The alleged improper prosecutorial comments, viewed in their entire context, were as follows:

> In this case, the Defendant's actions of the early morning hours of September 20th, 1993, speak louder than any words that can be uttered in this courtroom.
>
> The Defendant asked for mitigation because of his voluntary impairment, or perhaps voluntary intoxication as to alcohol.
>
> No one forced him to drink that alcohol. It was voluntary.
>
> He also asked you, well, consider the fact that I used drugs.

> **What** the Defendant is saying is give me the more lenient of the only two possible penalties for this, these two felonies, capital felonies, because I've committed another felony, i.e., the use and thus possession of illegal drugs.
>
> You have to determine, even if you find that the Defendant was intoxicated, you have to determine, ladies and gentlemen, how much weight you want to accord that mitigating circumstance or those mitigating circumstances.
>
> The Defendant tells us on the stand Saturday morning, Saturday afternoon, it's -- It wasn't me, it was these hands that did it, but it was the drugs and the alcohol. But again, his own witness, the expert witness in this case, Dr. Gutman, the psychiatrist, says this Defendant knew what he was doing when he was committing these murders. He admitted the Defendant knew at the time he was doing these murders, committing the murders that it was wrong, and he knew the consequences of his actions at the time he did them.
>
> From the Defendant's own mouth, he told you that he cannot say that it would be inappropriate under the circumstances of these two brutal murders for you to recommend to the Court that the death sentence be imposed for both of these two **cases.** (T.1020-21)

Note the conspicuous absence of contemporaneous objections.

Instead, James waited until the prosecutor had concluded his closing argument to voice his objection **as** follows:

> MR. ANDERSEN: I'd like to move, as my client's counsel, I feel that I should move for a mistrial on two bases.
>
> In closing argument, the State made a suggestion

that his possession of drugs was other felonies that he committed, and I felt that he was using those as nonstatutory aggravators in the way that he was applying them in his argument, and the second thing is that I think that the State's argument that Dr. Gutman said that he was not insane is unnecessarily confusing to the jury to the extent that they're not going to understand my mitigators.

One of the mitigators is, in fact, the ***Durham*** test that other states do use.

The capacity of the Defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law is **a** standard of insanity in some states.

When the State uses the right/wrong standard, and that our own expert acknowledges that he doesn't meet that, I'm afraid that it may confuse the jury, and to the extent that the argument was made in that way, that it calls for a motion for mistrial.

***I've talked this over with my client, he doesn't want me to raise them because he doesn't want to go through it again.*** But I feel it's necessary to raise them. (T.1023-24)

The trial court responded in kind as follows:

THE COURT: ***Well, as to the second matter, I'm going to deny the motion for mistrial without hearing*** any ***argument from the State. Doesn't seem to me that if the theory that because that may be a standard of insanity in a different state is going to have any*** bearing ***on this*** jury.

***There's no indication that they won't follow the law here.***

I would invite argument from the State as to the other motion that you want to make. ***(T.1024)***

The prosecutor argued as follows:

> MR. HASTINGS: With the first one, that was clearly argued in context against the mitigating factors, and, in fact, ***that did come out in evidence, that use of possession of drugs is a felony.***
>
> The Court's instructions will make it clear that that's not an aggravating factor because by no stretch of the imagination is possession or use of drugs a violent or capital felony.
>
> The Court is going to instruct them on that. So, there's certainly -- it's fair argument against his mitigating circumstances that the Court's going to read them, and it certainly would not result in any prejudice to the Defendant resulting in the jury believing that that's an aggravating circumstance. (T.1024-25)

The trial court ruled accordingly:

> THE COURT: Well, ***I agree that it was*** *in* ***context and was not presented as an*** **aggravator,** that only in response to what you know or anticipate will be argued in mitigation. ***I do wish the word felony hadn't been used as opposed to the word crime, but certainly I don't see*** *any* ***need to grant*** *a* ***mistrial as a result of it based upon the context*** **that it was** ***in and the*** *context of* ***the arguments.***
>
> So, the motion for mistrial is denied on that basis as well. (T.1025)

First, James never moved to strike the prosecutor's comments, nor did he request the trial court to provide a cautionary instruction to disregard them, constituting *waiver* of his first claim on appeal. Second, given the aforementioned facts and authorities, the trial court correctly exercised its sound

discretion in denying James motion for mistrial. His "standard of insanity argument" was found by the trial court not to be error, so there was no ground for mistrial on it.

As regards his first argument, although the trial court did not think use of the word "felony" was appropriate, given the context of the arguments, it found that it's use did not occasion an "absolute necessity" for mistrial, and soundly exercised its discretion in denying James' motion. James admitted in his confessions that he allegedly used crack cocaine excessively prior to the murders. This admission allowed for the prosecutor to draw a logical inference and advance a legitimate argument as to James use of drugs as an excuse for the murders of Betty Dick and little Toni Neuner. *Spencer v. State, supra.* The control of comments was within the trial court's discretion, and the trial court in this cause found this comment did not warrant a mistrial.

The standard of review for James first point on appeal is whether the trial court abused its discretion in failing to grant a new trial. A new trial should be granted when it is "reasonably evident that the remarks might have influenced the jury to reach a more severe verdict of guilt than it would have otherwise done." *Bonifay v. State, supra; citing to Darden.*

Given the overwhelming evidence of guilt, not the least of

which was James' own confessions, where he provided great detail of the grisly rape and murder of 8-year-old Toni Neuner, and attempted rape and murder of her grandmother, Betty Dick, it is apparent that the alleged prejudicial comments had no impact on the jury's verdict. Couple that with James admissions to his alleged excessive use of crack cocaine as an excuse for the atrocities he committed, and it is obvious that the trial court correctly exercised its sound discretion in denying James' motion for mistrial. Finally, given these facts, error, if any, was harmless beyond a reasonable doubt, particularly in view of James desire not to have his counsel move for a mistrial. *DiGuilio* ***v. State, supra.***

## POINT II

### THE STANDARD JURY INSTRUCTION ON HEINOUS, ATROCIOUS OR CRUEL GIVEN IN THIS CAUSE HAS REPEATEDLY PASSED CONSTITUTIONAL MUSTER.

Although James objected to the standard jury instruction on Heinous, Atrocious, or Cruel (H.A.C.), he never proposed an alternative instruction, thereby rendering his second point on appeal ***procedurally barred.*** ***Johnson*** v. State, 660 So. 2d 637, 648 (Fla. 1995); ***Harvey v. Dugger, 656 So.*** 2d 1253, 1258 (Fla. 1995); ***See also, Fotopolous*** *v.* ***State, 608*** So. 2d 784, 792 (Fla.), *cert.* ***denied*** 113 S.Ct. 2377 (1992). The record of the Charge Conference

reflects the following discourse regarding the standard H.A.C. instruction:

> **THE COURT:** And was unnecessarily torturous to the victim.
>
> And that is copied from the revised instructions of June, 1994.
>
> **MR. ANDERSEN:** I realize that's the revised one, but I'm still lodging an objection on vagueness, because as much time as we try to define these things, it doesn't seem to get any clearer, and this particular version of heinous, atrocious [or] cruel is, in my opinion, no better than the previous ones, and on that basis, we would object and raise the same previous objections in violation of the Florida and United States [C]onstitution.
>
> THE COURT: ***Do you have*** a ***proposed instruction to take this one's place?***
>
> MR. ANDERSEN: I do ***not.*** I really don't think one can **be** fashioned. I've read the case law, Judge.
>
> ...
>
> **THE COURT:** . . . at this point the law in Florida is that that is an aggravator, and that this is the instruction to use, and ***absent any other instruction,*** I'm going to overrule your objection. (T. 936-37)

On the merits, James' vagueness argument on pp. 18-20 of his brief should be rejected just as it was by this Court four (4) years ago in Preston ***v. State, 607*** So. 2d 404, 410 (Fla. 1992), ***cert. denied,*** **113** S.Ct. **1619 (1993):**

> ... Because of this Court's narrowing construction, the United States Supreme Court upheld the aggravating circumstance of heinous, atrocious or

> cruel against a vagueness challenge in *Proffit v. Florida, 428* U.S. 242, ..., (1976). Unlike the jury instruction found wanting in *Espinosa v. Florida,* 505 U.S. 112, . . . (1992), the full instruction on heinous, atrocious, or cruel now contained in Florida Standard Jury Instructions in Criminal Cases, which is consistent with *Proffit,* was given in Preston's case.

The same instruction found constitutionally acceptable in *Preston,* was given in James' case,[12] and his second claim, besides being procedurally barred, is foreclosed by binding precedent. See e.g., *Johnson v. State, 660* at 648; *Hannon v. State, 638 So.* 2d *39, 43,* and n.3 (Fla.1994); *Preston, supra; Power v. State, 605 So.* 2d 856, 864-865, and n.10 (Fla. 1992). Simply put, James' vagueness claim is without merit.

On pp.20-21 of his brief, James alternatively argues the standard H.A.C. instruction is constitutionally infirm on due

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[12]The instruction given in James' penalty phase was as follows:

> The crime for which the defendant is to be sentenced was especially heinous, atrocious or cruel. "Heinous" means extremely wicked or shockingly evil. "Atrocious" means outrageously wicked and vile. "Cruel" means designed to inflict a high degree of pain with utter indifference to, or even enjoyment of, the suffering of others. The kind of crime intended to be included as heinous, atrocious or cruel is one accompanied by additional acts that show the crime was conscienceless, pitiless or was unnecessarily tortuous to the victim. (R.468; T.1065)

process grounds, "...in that the instruction below relieves the state of its burden of proving the elements of the circumstance as developed by this Court in its case law (p.20)." He then provides alleged "instances" of deficiency, none of which were ever raised below. Besides raising these matters for the first time on appeal, recall that he failed to offer an alternative instruction. Therefore, his arguments as to "torturous intent", post-mortem acts, loss of consciousness, and lingering death are **procedurally barred.**

The first instance James argues is "torturous intent," which completely ignores that Florida law is, and consistently has been, that the heinous, atrocious, or cruel aggravator focuses on the perception of the victim rather than on that of the perpetrator. ***See, e.g., Stano v. State,*** 460 So. 2d 890 (Fla. 1984). Simply because a murderer "...might not have meant the killing to be unnecessarily torturous does not mean that it actually was not unnecessarily torturous and, therefore, not heinous, atrocious, or cruel." ***Hitchcock v. State,*** 578 So. 2d 685, 692 (Fla. 1990), ***cert.*** denied, 112 S.Ct. 311 (1991). It is incongruous to equate "intent to torture" with "intent to kill." To the extent that any "torturous intent" element on the part of James exists in connection with this aggravator, it is covered by the standard jury

instruction, Quite simply, there is no constitutional requirement that the jury be instructed in the manner proposed by James (for the first time on appeal) and his sentences of death should be affirmed.

In addition, James' argument totally disregards that "[t]he mind ***set*** 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). Neither of the opinions cited by James in his brief as support for this claim included the "***mental anguish***" factor. ***Porter v. State, 564 So.*** 2d 1060 (Fla. 1990); *McKinney v.* ***State, 579 So.*** 2d 80 (Fla. 1991). James' "torturous intent" claim has been expressly rejected by this Court as devoid of merit, and there is absolutely no need to visit this issue once again. ***Taylor*** v. State, 638 So. 2d 30, 34, n.4 (Fla. 1994).

Alternatively, without conceding as much, if any so called "intent" requirement were to be added to the H.A.C. aggravator, such would be a mere refinement in the law upon which a jury instruction is not required. *Vaught* ***v. State,*** 410 So. 2d 147 (Fla. 1987). Even if the proposed jury instruction should have been given, any error was harmless because the murders in this cause were heinous, atrocious, or cruel under any definition. See, e.g.,

***Henderson v. Singletary, 617 So.*** 2d 313, 315 (Fla. 1995).

As regards James argument concerning post-mortem acts, loss of consciousness **and** lingering death, this Court has instructed a trial court "...should not give instructions which are confusing, contradictory, or misleading." ***Butler v. State, 493 So.*** 2d 451, 452-452 (Fla. 1986). In the absence of an alternative instruction that should have been proposed by James below, the State argues as follows. The current H.A.C. instruction, post-dates the opinions cited by James as authority for his other "instances," and has repeatedly passed constitutional muster.[13] Besides being raised for the first time on appeal, James argument as to these missing components of the H.A.C. instruction contravenes his reason for not providing an alternative instruction below, which was that one could not be drafted (T.937).

Alternatively, and secondarily, the other alleged missing components of the H.A.C. instruction, would constitute at most, mere refinements in the law upon which a jury instruction is not required. ***Vaught v. State, supra.*** Even if James had offered an

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[13] *Jackson* ***v. State,*** 451 So. 2d 458 (Fla. 1984) and *Teffeteller* ***v. State,*** 439 So. 2d 840 (Fla. 1983). Since these cases pre-date the revised, constitutional H.A.C. instruction used in this case, it may be inferred that James' "instances" have been determined as not contributing to a clear instruction.

alternative instruction that was rejected, any error would be harmless beyond a reasonable doubt because the murders of Betty Dick and Toni Neuner were heinous, atrocious or cruel under any definition. See, e.g., *Henderson v. Singletary, supra.*

The Standard Florida Jury Instruction on the heinous, atrocious or cruel aggravator is legally sufficient, has repeatedly withstood constitutional attack, and was properly given in this case.

**POINT III**

THE MURDER OF 8-YEAR-OLD TONI NEUNER WAS HEINOUS, ATROCIOUS OR CRUEL BEYOND A REASONABLE DOUBT.

In *Sochor v. Florida,* U.S. , 112 S.Ct. **2114, 119** L.Ed.2d 326 (1992) the United States Supreme Court found as follows:

> ...[O]ur review of Florida law indicates that the State Supreme Court has consistently held that heinousness is properly found if the defendant strangled a conscious victim. *See Hitchcock v. State,* 578 So. 2d 685, 692-693 (Fla. 1990), *cert. denied, 502* U.S. ___, 112 S.Ct.311, 116 L.Ed.2d 254 (1991); *Holton v. State, 573 So.* 2d **284,** 292 (Fla. 1990); *Tompkins v. State,* **502 So.** 2d 415, 421 (Fla. 1986); *Johnson v. State,* **465 So.** 2d 499, **507** (Fla.), *cert. denied, 474* U.S. 865, 106 S.Ct. 186, 88 L.Ed.2d 155 (1985); *Adams v. State,* **412 So.** 2d *850* (Fla.), *cert. denied, 459* U.S. 882, 103 S.Ct. 182, 74 L.Ed.2d 148 (1982). . . .

James' argument on the H.A.C. aggravator, as applied to little Toni Neuner, completely ignores her ***mental anguish.*** "***Fear and emotional strain*** may be considered as contributing to the heinous nature of the murder, even **where *the victfm's death was almost* instantaneous."** *Preston v. State, 607 So.* 2d at 409-10; See *also, Hitchcock, 578 So.* 2d at 693; *Rivera v. State, 561 So.* 2d 536, 540 (Fla. 1990); *Chandler v. State, 534 So.* 2d 701, 704 (Fla. 1988); *Phillips v. State, supxa; Mason v. State, 438 So.* 2d 374 (Fla. 1983), *cert. denied, 465* U.S. 1051 (1984); *Adams v. State, supra.*

Fear, mental anguish and emotional strain exist beyond **a** reasonable doubt in the circumstances surrounding the vile murder of 8-year-old Toni Neuner, but those words do not sufficiently describe the "***abject terror***" she must have experienced when she was woken from her sleep by being lifted off the couch by her neck. The trial court's findings of fact, proven beyond a reasonable doubt, provide an accurate and vivid account of the circumstances demonstrating Toni's murder **was** heinous, atrocious ***and*** cruel:

> *3.* The capital felony was especially heinous, atrocious, or cruel.
>
> Toni Neuner's death **was** caused by lack of oxygen, **a** cause of death consistent with strangulation. The defendant admitted that he picked Toni up from the couch by her neck. ***He saw her eyes open and they looked at each other.*** He looked at her eyes as he squeezed her neck until her eyes and tongue

> bulged out. He strangled her with such force that the medical examiner found band-like contusions on the right side of her neck and similar pattern contusions on the left side of her neck leading him to believe that the defendant had used a ligature. ***Toni knew the defendant well, and one*** can ***only imagine the fear and horror that she felt when her eyes opened and she felt her neck being strangled and the air being cut off from her during this murder as she looked in the defendant's face.*** This aggravating circumstance was proved beyond a reasonable doubt. (R.526-27; T.1090-91)

The trial court's findings regarding H.A.C. in Toni's murder clearly were based upon the ***strangulation.*** James argues at pp.23-24 of his brief: "In that case,[14] the defendant described how both women struggled, shook spasmodically and ***looked into his eyes as he choked them.*** Certainly, this is not present in the instant case." Yet, the trial court in this cause specifically found: We ***saw her eyes open and they looked at each other***." (R.527; T.1091). The fact that James did not divulge whether Toni "shook spasmodically" is of no import, when one considers that the victims in ***Smith*** were adult women, and Toni was an 8-year-old child, rendering her murder far more heinous, atrocious, ***and*** cruel.

James argument found on p.25 of his brief, as to the position of Toni's hands, is a complete non ***sequitur***, in that it had absolutely nothing to do with the trial court's findings concerning

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[14] *Smith* ***v. State, 407*** So. 2d 894 (Fla. 1981).

the H.A.C. aggravator (R.526-27; T.1090-91). Rather, the position of Toni's "hands covering her vaginal area" was found under the trial court's findings concerning the second aggravator applicable to Toni's death, "while the defendant was engaged in the commission of a sexual battery (R.525-26; T.1089-90)." James argument here attempts to obfuscate a clear finding of strangulation as proving the heinous, atrocious or cruel aggravator beyond a reasonable doubt.

Also, James did not merely "push" Toni off the bed and onto the floor as alleged by him at p. 25 of his brief. Rather, the trial court found she was "*flung*" by him across the bed onto the floor, between the wall and the bed (R.526; T.1090). Prior to this, James positioned Toni in various sexual postures while he raped her, basically using her as an instrument or tool for his own sexual gratification (T.420). In *James' own* words, he remembered "thinking, *'Eddie,* this *ain't no fun.'* And that's when I *threw* her. I just grabbed her and *threw* her, and she was behind the bed (T.381)." He stuffed her panties in her mouth, covered her with a big pillow, and went to get him a grown woman, Toni's grandmother, Betty (T.327, 420-21).

Even if this Court were to find the H.A.C. aggravator inapplicable to the facts surrounding Toni's murder, which the

State does not concede is the case, any error would be harmless beyond a reasonable doubt in light of two strong remaining aggravators. *Sochor v. State, 619 So.* 2d 285 (Fla. 1993), cert. *denied, 114* S.Ct. 638, *reh. denied, 114* S.Ct. 1142 (1994). The trial court also found in aggravation regarding Toni's murder, the Capital Murder of her grandmother, Betty Dick, and the ***Capital Vaginal and*** *Anal* ***Sexual Battery*** of Toni (R.525-26; T.1089-90).

Toni's death was not only tragic, it was the epitome of heinous, atrocious or cruel. James confessed that ***Toni opened*** **her** ***eyes and they looked at each other,*** when he grabbed her up from the couch by the throat. Whether James intended to inflict a high degree of pain, or unnecessarily torture Toni is of no consequence, because the focus is on Toni's state of mind not James'. It is ***"the fear and horror that she felt when her eyes opened and she felt her neck being strangled and the air being*** *cut off* ***from her during this murder*** *as* ***she looked in the defendant's face*** (R.527; T.1091)" that proves H.A.C. beyond a reasonable doubt for her murder. **A** murder the medical examiner said was ultimately caused by "***asphyxiation due to strangulation probably with a ligature . . .*** (T.***290)***." It does not matter when Toni lost consciousness, because we know she was conscious initially.

## POINT IV

THE TRIAL COURT CORRECTLY EXERCISED ITS DISCRETION REGARDING ITS INSTRUCTIONS TO THE JURY.

James' fourth point on appeal contains three separate arguments, which the State shall address in the order they appear in his brief.

A. **State's Special** Instruction

James concedes on appeal, as he did below (T.929-32), as follows:

> ...this Court has ruled that violent felonies committed contemporaneously with the capital crime can qualify for this circumstance if the crime involved ***mul tiple*** victims or separate episodes. *Pardo* ***v. State,*** 563 So. 2d 77 (Fla. 1990); ***Wasko v.*** State, 505 so. 2d 1314 (Fla. 1987).

He argues on pp.27-28 of his brief that "[t]he rationale of Wasko seems to be that contemporaneous convictions should not be used if they arise out of a single criminal episode," and that "this Court ... recede from its previous holdings and extend the rationale of Wasko." However, this Court in Wasko specifically distinguished cases involving ***multiple victims*** [as in this cause] or separate incidents as follows:

> Contemporaneous convictions prior to sentencing can qualify as previous convictions of violent felony and may be used as aggravating factors. (Citations omitted.) These cited case, however, involved ***multiple victims in a single incident or***

***separate incidents combined in a single trial.*** (Citations omitted.)

***Wasko,*** at 1317.

It was the use of a contemporaneous conviction on the same victim in ***Wasko,*** which rendered that case "...factually distinguishable from other cases where a contemporaneous conviction has been found to be proper support for this aggravating factor." ***Wasko,*** at 1318. Therein lies the true rationale of Wasko. By distinguishing such cases, this Court continued to follow clear precedent holding that contemporaneous convictions of a violent felony may qualify as an aggravating circumstance, "***so*** long ***as the two crimes involved multiple victims or separate episodes***." *Pardo* v. ***State, supra,*** at ***80; citing to Wasko.*** There is no reason to recede from clearly established precedent which makes sound legal sense.[15]

This Court has clearly delineated the wide discretion a trial judge has regarding jury instructions as follows:

As this Court explained in ***State v. Bryan, 287***

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[15]James argues at p.27 of his brief that this Court's interpretation regarding multiple victims and separate incidents does not comport with legislative intent. One need only review the Florida legislatures listed reasons for departure under 8921.0016 Fla. Stat. (1994) [See particularly (n)(1)] to understand that this Court's view on this matter is entirely consistent with legislative intent.

> So. 2d 73, 75 (Fla. 1973), cert. ***denied, 417*** U.S. 912, . . . (1974), the standard instructions should be used to the extent applicable in the judgment of the trial court. However, the trial judge still has the responsibility to "'properly and correctly ... charge the jury in each case'" ***id.*** (Quoting In ***re Standard Jury Instruction in Criminal Cases, 240 so.*** 2d 472 473 (Fla. 1970), and the judge's decision regarding the charge to the jury "has historically had the presumption of correctness on appeal." ***Id.***

*Kearse* ***v. State,*** 662 So. 2d 677, 682 (Fla.1995). This Court has further opined:

> A trial judge in a criminal case is not required to give solely those instructions that are contained in the Florida Standard Jury Instructions. The standard instructions are "a guideline to be modified or amplified depending upon the facts of each case." ***Yohn v. State, 476 so.*** 2d 123, 127 (Fla. 1985).

*Cruse* ***v. State, 588*** So. 2d 983 (Fla.), ***cert. denied, 504*** U.S. 976 (1991). Finally, the District Court of Appeal of Florida, Fifth District, has delineated the standard of review regarding issues involving jury instructions accordingly:

> Trial judges have wide discretion in decisions regarding jury instructions, and the appellate courts will not reverse a decision regarding an instruction in the absence of a prejudicial error that would result in a miscarriage of justice. ***Goldschmidt v. Holman,*** 571 So. 2d 422 (Fla. 1990).

***Sheppard*** v. State, 659 So. 2d 457 (Fla. 5th DCA 1995).

The trial court's ruling on this matter was as follows:

> THE COURT: Okay. So, I've obviously considered it, I'm overruling it because the law, the construction of that statute by the Florida Supreme Court over and over has been to the contrary, and it is, indeed, the law that these are aggravating circumstances, these other violent crimes that are in evidence, even though they were contemporaneously committed with the capital felonies, and ***I'm*** going ***to grant the State's request to give this instruction, even though it is not exactly the same as the standard instruction, because the standard instruction does not address the fact that*** **contemporaneous** ***crimes are prior convictions*** **for** ***the purpose of this sentencing proceeding.*** ... (T.932)

It's **ruling,** was clearly within its wide discretion, and **was** correct in light of the aforementioned authorities. Even if there was error, which the State does not concede, it would be harmless beyond a reasonable doubt because the trial judge was simply following precedent. *Kearse v. State, supra,* at 682; *State v. DiGuilio, supra.*

**B. James' Special Instructions on Nonstatutory Mitigators**

"This **Court has repeatedly** rejected Finney's next claim that the trial court must give specific instructions on the non-statutory mitigating circumstances urged." *Finney v. State, 660* So. 2d 674, 684 **(Fla.** *1995); Jones v.* State, 612 So. 2d 1370 (Fla. 1992), *cert. denied,* 114 S.Ct. 112, 126 (1993); *Robinson v. State,* 574 So. 2d 108 (Fla.), *cert. denied,* 502 U.S. 841 (1991). Further, **this Court specifically rejected** James' **argument** regarding Fla.

Std. Jury Instr. (Crim) 81 as follows:

> Likewise we find no merit in Robinson's next argument, that the trial court erred in refusing to instruct the jury on specific nonstatutory mitigating circumstances. Robinson suggests that the "catch-all" instruction, which explains to the jury that they may consider any aspect of the defendant's character or record and any other circumstances of the offense, (footnote omitted) denigrates the importance of the nonstatutory mitigating circumstances. We do not agree that the instruction requires or encourages jurors to consider everything within these categories as a single factor, thereby distorting the weighing process. (Citation omitted.) ***The instruction is*** not ***ambiguous, and we find no reasonable likelihood that the*** jurors ***understood the instruction to prevent them from considering and weighing any "constitutionally relevant evidence."*** (Citation omitted.)

At the Penalty Phase Charge Conference, the following exchange transpired regarding James' special instructions on nonstatutory mitigation:

> THE COURT: And Mr. Andersen, you concede that you don't have any authority that says that the Court has to give all that?
>
> MR. ANDERSEN: ***I concede that the case law does not require the Court to give the requested nonstatutory mitigating circumstances that the Defense proposes.***
>
> THE COURT: Well, then, I'm not gonna do it. So, I'm gonna deny the request to give all eighteen of them. (T. 948)

Clearly, the trial court correctly exercised its discretion in not

instructing on James' special requested instructions regarding his alleged nonstatutory mitigating circumstances. Error, which in light of the aforementioned authorities does not exist, would be harmless beyond a reasonable doubt given the strong aggravation, which included two Capital Murders, and two Capital Sexual Batteries. ***State v.*** *DiGuilio,* ***supra.***

C. **James' "All or Nothing" Approach**

Alternatively, James argues at p.32 of his brief, "that it was error for the trial judge to deny Appellant's request that no specific mitigating factors be instructed." James argued below that if the trial court would not give his 18 special nonstatutory mitigating instructions, then it should "not give the aggravating factors or the mitigating factors that are listed (T.948)." Instead, the trial court should give his requested "alternative statement that says the mitigating circumstances you may consider, if established by the evidence, are any aspect of the Defendant's character or record, and any other circumstances of the offense (T. 958-59) . "

James proposal, if the trial court had risen to the bait, would have created error in light of clear precedent emanating from

the United States Supreme Court.[16] In *Lockett* v. ***Ohio, 438*** U.S. 586, 605 (1978), the Court held that a statute may not preclude the sentencer from giving independent weight to evidence of the defendant's character and record or the circumstances of the offense which might justify a less severe penalty than death. Later, in ***Hitchcock*** v. Dugger, 481 U.S. 393, 394 (1987), the Court held that "'the sentencer' may not refuse to consider or 'be precluded from considering' any relevant mitigating evidence." ***Quoting Skipper v. South Carolina, 476*** U.S. ***1, 4 (1986); Accord*** *Eddings* ***v. Oklahoma, 455*** U.S. 104, 110 ***(1982); Lockett, 438*** U.S. at 606-07).

As previously delineated, the trial judge has the responsibility to properly and correctly charge the jury in each case, and the judge's decision regarding the charge to the jury has historically had the presumption of correctness on appeal. ***Kearse*** v. ***State, supra,*** at 682. Not only does a trial judge have wide discretion regarding jury instructions, but the same applies as to "whether a mitigating circumstance has been established." ***Foster*** *v.* ***State,*** 21 Fla. L. Weekly S324, S326 (Fla. July 18, 1996).

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[16]It would have also provided grounds for an ineffective assistance of trial counsel claim in a Rule 3.850 motion for post-conviction relief.

Clearly, the trial court correctly exercised its discretion in not following defense counsel's proposal. There can be no error where the trial court simply adhered to U.S. and State law regarding mitigation.

**POINT V**

THE TRIAL COURT CORRECTLY EXERCISED ITS BROAD DISCRETION IN FINDING THAT THE STATUTORY MITIGATOR, UNDER THE INFLUENCE OF EXTREME MENTAL OR EMOTIONAL DISTURBANCE, WAS NOT PROVEN.

The standard of review for a claim of error in failing to find a mitigating circumstance has been delineated by this Court as follows:

> The trial court, in considering allegedly mitigating evidence, must determine whether the facts alleged in mitigation are supported by the evidence. ***See Rogers v. State, 511 So.*** 2d 526, 534 (Fla. 1987), ***cert. denied,*** 484 U.S. 1020, ... (1988). After making this factual determination, the trial court must then determine whether the established facts are of a kind capable of mitigating the defendant's punishment. (Footnote omitted.) The decision as to whether a mitigating circumstance has been established is within the trial court's discretion. See Preston v. State, 607 So. 2d 404 (Fla. 1992), ***cert. denied, 507*** U.S. 999, ... ((1993); ***Lucas v. State, 568 So.*** 2d 18 (Fla. 1990).

***Bonifay v. State,*** 21 Fla. L. Weekly S301 (Fla. July 11, 1996).

This Court has supported a trial court's finding of

insufficiency regarding evidence of this mitigator several times where a defendant allegedly ingested alcohol and/or drugs before murdering the victim[s]. See ***e.g., Foster v. State, supra,*** at S326-27 (Alleged uncontroverted expert testimony including defendant's abused background, mental retardation, deprived childhood, poor upbringing, organic brain damage, alcoholism, and under the influence of alcohol at the time of the murder insufficient to prove extreme mental or emotional disturbance); ***Sochor v. State, 619 So.*** 2d at 285 (Evidence that defendant was drinking on night he killed victim and that he became a violent person when drinking insufficient); ***Preston v. State, supra*** (Expert testimony that defendant suffered from poly-substance abuse and was under influence of PCP, his testimony that he took PCP, and evidence that he smoked marijuana and drank alcohol on night of crimes insufficient); *Bruno* ***v. State,*** 574 So. 2d 76 (Fla.), ***cert. denied,*** 112 S.Ct. 112 (1991) (Defendant had long history of drug abuse and psychiatrist testified that such left him with some brain damage; judge had discretion to discount much of psychiatrist's opinion since he had opportunity to evaluate defendant's mental capacity while he testified at length at penalty phase); ***Cook v. State, appeal after remand,*** 581 So. 2d 141 (Fla. 1991) (Notwithstanding defendant's contention that he had ingested

cocaine, marijuana and alcohol on day of murder; there was positive evidence that his mental capacity was not severely diminished on night of killings); ***Johnston v. State,*** 497 So. 2d 863 (Fla. 1986) (Trial court correct notwithstanding defendant's claim that he took ***LSD*** on night of murder and that he suffered from mental disorders).

Uncontroverted opinion testimony can be rejected, "especially where it is hard to square with the other evidence at hand." ***Wuornos v.*** State, 644 So. 2d 1000, 1010 (Fla. 1994) (Citation omitted.); See also, ***Foster v. State,*** supra, at S327. Further, a mitigating factor "...can be deemed 'controverted' if there is any contrary or inconsistent evidence in the guilt or penalty phases or if evidence of the factor is untrustworthy, improbable, or unbelievable. *Walls*." ***Wuornos,*** at 1010, n.6. "As long as the court considered all of the evidence, the trial judge's determination of lack of mitigation will stand absent a palpable abuse of discretion." ***Foster*** at S327; ***citing Provenzano v. State,*** 497 So. 2d 1177 (Fla. 1986), ***cert. denied, 481*** U.S. 1024 (1987).

The trial court's findings regarding this mitigating circumstance were as follows:

> *1.* The capital felony was committed while the defendant was under the influence of extreme mental or emotional disturbance.
>
> The defendant's proof of this mitigating

circumstance consisted of testimony from **E. Michael Gutman, M.D.** that the defendant exhibits passive/aggressive personality traits and depression which can best be described as dormant or smoldering combined with the testimony of **Dr. Daniel E. Buffington, a clinical pharmacologist** at the University of South Florida, who testified that the synergistic effect of the large amounts of alcohol ingested by the defendant and LSD usage of ten (10) to twenty-five (25) hits at 10:00 p.m. to 11:00 p.m. the evening before the crime would have acutely increased and exacerbated the passive/aggressive personality traits so that they would have emerged without the normal checks and balances to keep the outbursts under control. His testimony was that this interplay of alcohol and LSD caused the defendant to be under the influence of extreme mental or emotional disturbance within a likely degree of medical certainty. While there is some dispute in the evidence as to the amount of alcohol ingested by the defendant on the night of the murder, there is no question that he drank a great deal of alcohol that night. The ingestion of LSD is another matter. The only evidence that the defendant ingested LSD on the night of or the night before the murders is the testimony of **Jere Pearson.** This witness **was** obviously impaired when he came to court to testify at the trial. He was remanded by the court for an intoxolizer [sic] test which revealed that his blood alcohol level was above the legal impairment limit. Because of this he was not allowed to testify and his testimony **was** presented by his deposition. ***His testimony a8 to the circzunstances of the defendant taking the ten (10) to twenty-five (25) hits of LSD (he said both at different times) was*** **contrary** ***to the other evidence in the case. Other witnesses testified that he is an alcoholic. His testimony was so lacking in credibility that the court*** **must** ***conclude that there is no competent evidence*** **that** ***the defendant ingested the LSD.*** Even the defendant says he cannot remember doing so. Dr. Buffington's testimony was that his conclusion that the

> defendant was under the influence of extreme mental or emotional disturbance could not have been based upon excessive use of alcohol or the use of cocaine, which the defendant claims he used on a regular basis. Without the LSD and the synergistic effect this mitigating factor is not proved, and the court so finds. (R.532-33; T.1095-97)

James argues at pp. 34-36 of his brief: "The trial court's findings are seriously flawed." This argument is premised upon the trial court's rejection of Jere Pearson's deposition concerning James' alleged use of LSD the night of the murders. Given the following facts, the trial court was entirely correct in discounting Pearson's alleged encounter with James around 10 p.m. the night of the murders.

Jere Pearson showed up for **court,** allegedly to testify on James behalf, visibly intoxicated (T.561-64). The court refused to let him testify until he was sober, which James' counsel agreed with (T.564-65). However, James' could not wait until the following day because Pearson's testimony needed to precede Dr. Buffington's (T.565). The trial court asked for a stipulation, which the State could not agree to because Pearson had "...***given two different statements,*** **and** ***they've been considerably different one to the other*** (T.565-66)." The Court expressed a willingness to review Pearson's testifying in the afternoon pending the results of an Intoxilyzer test, for which purpose he was remanded to custody

(T.567).

After a lunch recess the Court observed for the record: "I understand that you all have been made aware that ***Mr. Pearson blew a point one two two on the sheriff's Intoxilyzer,*** one of them was at twelve twenty-six, and the other was at twelve thirty (T.590)." James' counsel proposed that an audiotape of Pearson's deposition, taken in the State Attorney's Office, be played for the jury (T.591). The prosecutor remarked as to his past encounters with Pearson:

> MR. STONE: ***He [Pearson] appeared to be a little off every time I've seen him, Judge. The first time he was pretty bad at the P.D.'s Office, he was noticeably under the influence.***
>
> The ***second deposition we did in my office,*** not as bad as the first time, but you ***can tell he was on it.*** (T.591-92)

The Court noted for the record: "But something else has been brought to my attention by security. . . . Apparently ***he had beared some ill will towards the Defendant based upon what he told the officer who took him for his Intoxilyzer test*** (T.592)." James' counsel was aware of such, remarking that Pearson had stated something of the sort at one of his depositions (T.592). The following exchange then transpired:

> THE COURT: Just make sure you know that.

> Well, *I want to do everything* I can within the *bounds of reason for* Mr. *James to put on his case, but 3 can't let the man come in here with point* one *two two and testify.*
>
> MR. ANDERSON: *I understand,* Your *Honor.*
>
> *If the State has no objection, we'd like to play the tape of his deposition.* (T.592-93)

After some discussion the State agreed with Mr. Anderson's proposal (T.593-94).

Besides Pearson's apparent alcoholism and voiced ill-will toward James, the **trial court** correctly **assessed** Pearson's contention that James took "...10 to 25 five hits of LSD, he said both at different times, was contrary to the other evidence in the **case** (R.533; T.1097)." Betty Dick's son, Tim, was with James just before he went to her home and committed the murders. He testified that James had done "acid" a couple of weeks before the murders (T.604). However, he also testified that James before he left that night "*was fine*" (T.605). Tim had seen him on drugs **and** when he was not on drugs, and to his knowledge, he did not think James was on drugs that night (T.605). Tim's girlfriend of the time, Nicole Jarvis, testified similarly (T.615-16).

Nicole also testified she watched James *hop* **on** *his bike* and ride toward Betty's house without any problem (T.617). In the taped deposition, Pearson claimed he ran into James cutting across

a field, coming from the Van Fossen party, between 10 and 11 p.m. the night of the murders (T.628-29). Pearson said James was on foot (T.629).

There was the discrepancy between the quantity of LSD James allegedly took. At the P.D.'s Office, Pearson, who was inebriated, claimed James did 25 hits. Later, at the State Attorney's Office, Pearson, again inebriated, although not as bad as at the P.D.'s office, said James did 10 hits. Whether James did 10 or 25 hits, Pearson's accounts are incredible, based upon the quantity involved. It is the State's position, that if James did that much LSD, he would have most likely been physically incapacitated, incapable of achieving an erection, engaging in sex, or participating in any goal oriented behavior for that matter.

Further evidence of Pearson's lack of credibility regarding James alleged ingestion of large quantities of LSD the night of the murders came from James himself. James testified he "*never had an adverse effect*" when he took LSD (T.884). He further testified, he "*always had good experiences on LSD* (T.884)." *He did not remember taking LSD prior to the murders* (T.885). Finally, a review of James confessions reveals that he recounted the murders in detail, which would not be conducive to someone on the quantity of LSD Pearson said James took.

Given these facts, the trial court correctly exercised its discretion in finding Pearson's account of James taking LSD was incredible, and properly found the "under the influence of extreme mental and emotional disturbance" mitigator was not proven. "This mitigating circumstance has been defined as 'less than insanity, but more emotion than the average man, however inflamed.'" ***Foster, supra,*** at S327. The trial court considered all of the evidence presented, and it was not a palpable abuse of discretion for it to refuse to find this statutory mitigator, particularly in view of the fact that it found as a non-statutory mitigator, ***"moderate*** mental and emotional disturbance." Id.

The decision as to whether a particular mitigating circumstance is established lies with the trial judge; reversal is not warranted simply because James draws a different conclusion. ***See Foster v. State, supra; Lucas v. State, supra; Preston v.*** State, ***supra.*** What James is really complaining "...about here is the weight the trial court accorded the evidence [he] presented in mitigation." ***Echols*** *v.State*, 484 So. 2d 568, 576 (Fla. 1986); ***citing Porter v. State, 429 So.*** 2d 293, 296 (Fla.), *cert. denied,* 464 U.S. 865 (1983). "However, 'mere disagreement with the force to be given [mitigating evidence] is an insufficient basis for challenging a sentence.'" ***Echols; citing Quince*** *v.State*, ***414 So.***

2d 85, 187 (Fla. 1982). Even if this Court found the trial court erred, which the State does not concede, it would be a harmless beyond a reasonable doubt, because what Jordan complains was not considered as a statutory mitigator, was in fact considered as a non-statutory mitigator (R.537; T.1101-02).[17] See ***Wuornos,*** at 1011; ***Lemon*** v. State, 456 So. 2d 885, 888 (Fla. 1984).

POINT VI

THE TRIAL COURT CONSCIENTIOUSLY WEIGHED THE AGGRAVATING CIRCUMSTANCES AGAINST THE MITIGATING EVIDENCE AND CONCLUDED THAT DEATH WAS WARRANTED.

This Court has delineated the standard for proportionality review 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). James received

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[17] 1) & 2) The court finds that the testimony of Dr. Gutman, Dr. Buffington, and the defendant coupled with the statements made by the defendant in his confession to law enforcement establishes that the capital felony was committed while ***the defendant was under the influence of moderate mental or emotional disturbance.*** The court has given this mitigating circumstance ***significant weight*** due to the fact that the mental or emotional disturbance which influenced him was caused largely by events in his childhood over which he had no control.

the death penalty for each of two (2) Capital Murders of 8-year-old Toni Neuner and her grandmother, Betty Dick. His argument as to this point does not separately address each murder. The State will address each murder so this Court may be afforded a clear view of why death is proportionate in both instances.

A. The Murder of Toni Neuner.

The trial court found three (3) aggravating factors were applicable to 8-year-old Toni's murder (R.525-527; T.1089-91). The first aggravator was the ***Capital Murder*** of her grandmother, Betty Dick. The second was the ***vaginal and anal Capital Sexual Battery (2 counts)*** of Toni for which the trial court found as follows:

> The testimony during the penalty phase trial clearly established that these two (2) counts of sexual battery were committed during the cause of Toni Neuner's murder. Toni was first strangled by the defendant and then vaginally and anally raped by him while she was still alive and aware of what was going on to some extent. The fact of her being alive is demonstrated by the testimony of Shashi Gore, M.D., the Seminole County Medical Examiner, that he found 80 milliters of blood from her vaginal area in her abdominal cavity ***(the child was raped so brutally that it tore away the roof of her vaginal wall, causing the vaginal area and abdominal area to become connected),*** and that very little, if any, blood would have been found had she died prior to the sexual batteries because upon death the heart stops. The indication that she was aware to some extent of what was going on is demonstrated by the testimony that ***when her body was found her hands were covering her vaginal area after she had been flung by the defendant across***

> ***the bed onto the*** **floor** ***between the wall and the bed.*** This aggravating circumstance was proved beyond a reasonable doubt. (R.525-26; T.1089-90)

The third aggravating factor found by the trial court regarding Toni's death ***was heinous, atrocious, or cruel,*** for which it found the following facts applied:

> Toni Neuner's death was caused by lack of oxygen, a ***cause of death consistent with strangulation. The defendant admitted that he picked Toni up*** *from* ***the couch by her neck.*** **He** ***saw her eyes open*** **and** ***they looked at each other. He looked at her eyes as he squeezed her neck until her eyes and tongue bulged out.*** He strangled her with such force that the medical examiner found band-like contusions on the right side of her neck and similar pattern contusions on the left side of her neck leading him to believe that the defendant had used a ***Ligature.*** Toni knew the defendant well, and ***one can*** **only** ***imagine the fear and horror that she felt when her eyes opened and she felt hex neck being strangled and the air being cut off from her during this murder as she looked in the defendant's face.*** This aggravating circumstance was proved beyond a reasonable doubt. (R.526-27; T.1090-91)

Under similar aggravating circumstances as those found surrounding the murder of Toni, where a ***child*** was the victim, this court has consistently found the death penalty was warranted. See *e.g.,* ***Schwab v. State,*** 636 So. 2d 3 (Fla. 1994) (Death sentence for Capital Murder, kidnapping and sexual battery of 13-year-old boy appropriate where aggravating factors of prior conviction of violent felony, committed during kidnapping and sexual battery, and

H.A.C. were proven beyond a reasonable doubt.); *Carroll v. State, 636 So.* 2d 1316 (Fla. 1994) (Evidence supported finding that strangulation murder and sexual battery of lo-year-old rape victim was H.A.C., warranting imposition of death penalty.); Power v. *State, 605 So.* 2d 856 (Fla. 1992), *cert. denied,* 113 S.Ct. 1863 (1993) (12-year-old victim sexually assaulted anally and vaginally, hog tied and double gagged, then stabbed.); *Sanchez-Velasco v. State, 570 so.* 2d 908 (1990), *cert. denied,* 111 S.Ct. 2045 (1991)(11-year-old child was alive for at least 3 minutes after defendant began to choke and rape her; in addition to shock of having trusted adult choking and raping her, she suffered panic of not being able to breathe; victim suffered 5 to 6 centimeter laceration or tearing to opening of vagina and 4 to 5 centimeter laceration at back of vagina, injury which was likely to cause extreme pain before child died; and injury was consistent with forcible rape of child of 11 by grown man.)

The trial court's findings on the heinous factor concerning Toni's murder speak for themselves, and sufficiently negate any argument James raises in his brief as previously argued under Point III. However, even if this Court were to find this aggravator did not apply, error would be harmless beyond a reasonable doubt given the remaining 2 strong aggravators, the Capital Murder of Betty

Dick, and the 2 Capital Sexual Batteries of Toni. See e.g., *Wuornos v. State, supra,* at 1011.

James argument as to the second aggravating circumstance for Toni's murder is another nonsequitur, which is positively disingenuous. At p. 38 of his brief he argues:

> The felony used to support this aggravating factor with regard to the murder of Toni Neuner was the offense of **aggravated *child abuse.*** The aggravated child abuse was the strangulation of Toni Neuner, the exact same act which constitutes the murder. Since this aggravating factor was not based on any other felony, the weight given to it with regard to the murder of Toni Neuner should be lessened.

Yet, the trial court's second aggravating circumstance for the murder of Toni Neuner could not be clearer:

> *2.* The capital felony **was** committed while the defendant was engaged in the commission of a ***sexual* battery.**
>
> The defendant was convicted by this court in case number 93-4019-CFA of ***Vaginal and Anal Sexual Battery upon Toni Neuner, a child of eight*** (8) **years** of age.

Therefore, James representation that "[t]he felony used to support this aggravating factor with regard to the murder of Toni Neuner was the offense of aggravated child abuse" strains credulity .[18]

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[18]James also states at p.38: "While this factor certainly exists with regard to the murder of Betty Dick... ." The State assumes he is referring again to "aggravated child abuse." In fact, nowhere in the findings as to aggravation in Toni's murder

The State would hope that this representation was inadvertently drawn from the trial court's finding that "Toni was first strangled by the defendant and then vaginally and anally raped by him while she was still alive..." (R.526; T.1090). Nonetheless, the inescapable conclusion to be reached regarding this portion of James' argument, is that it should be completely discounted ***as*** factually unsupported.

The State has already addressed James' argument concerning the trial court's finding regarding the "extreme mental or emotional disturbance" mitigator under Point V, and would simply argue that the only evidence of James' ingestion of an unbelievable quantity of LSD came from a drunk who bore ill-will towards him. James at p.39 of his brief argues "where the heinous nature of an offense results from the defendant's mental disturbance the application of the heinous, atrocious and cruel factor is lessened." The State rejoinders that for purposes of the death penalty, evidence of mental or emotional distress does not necessarily outweigh a heinous, atrocious or cruel crime, which Toni's murder absolutely

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does "aggravated child abuse" appear (R.525-27; T.1089-91). Rather, it is found in both the first and second aggravators for Betty's murder. So, in essence, James argues that an aggravating circumstance which the trial court ***found*** for Betty's murder was correct, and that the same circumstance which the trial court did ***not find*** in Toni's murder was incorrect.(R.528-29; T.1092-93).

was. See e.g., ***Ferguson v. State, 417 So.*** 2d 631 (Fla. 1982), ***appeal after remand, 474*** So. 2d 208 (Fla. 1985), ***denial of*** *post-conviction relief affirmed,* ***593 so.*** 2d 508 (Fla. 1992), ***habeas corpus denied,*** ***632*** So. 2d 53 (Fla. 1993).

As regards James argument on alleged mitigation evidence, that "the trial court found numerous factors some of which were given great weight," nowhere in the State's reading of the trial court's findings regarding either the statutory or non-statutory mitigators did it discover the trial court affording a mitigator "great weight" (R.532-41; T.1095-1105). Although it did not find that the statutory aggravator under the influence of extreme mental or emotional disturbance was proven, it gave ***"significant weight"*** to the statutory mitigator regarding James' "capacity to conform his conduct to the requirements of law was substantially impaired from his long history of drug and alcohol abuse..." (R.533-35). It also gave ***"significant weight"*** to James' first two non-statutory mitigators, which it combined for a finding that "the defendant was under the influence of moderate mental or emotional disturbance (R.535, **537; T.1099,** 1101-02)." The trial court also gave ***"substantial weight"*** to non-statutory mitigators 13 and 14, which related to James' giving statements to law enforcement officials (R.536, **539-40;** T.1101, **1103-04).** The remainder of James' non-

statutory mitigators the trial court afforded "*little*" or "*some*" weight (R.537-41; T.1102-05).[19]

The trial court conscientiously weighed the horrific aggravating circumstances surrounding Toni's murder against the mitigating evidence and correctly concluded that death was warranted. Even if this Court were to find that the H.A.C. aggravator was not applicable, the trial court would still have found that the remaining aggravating circumstances of another capital murder and 2 counts of capital sexual battery outweighed the mitigating evidence, thereby rendering any error harmless beyond a reasonable doubt. ***Wuornos v. State, supra,*** at 1011. James sentence of death for the heinous murder of little Toni Neuner was proportionate.

**B. Murder of Betty Dick**

The trial court also found three (3) aggravating factors were applicable to the murder of Toni's grandmother, Betty Dick (R.527-30; T.1091-95). Even though James attacks his sentence of death for Betty's murder tangentially, and concedes on p.38 of his brief that the H.A.C. aggravator "appears to be supported with regard to [her] murder, he is arguing that his death ***sentences*** are

[19]The trial court enumerated 16 in its Sentencing Order (R.535-37; T.1099-1101).

"disproportionate" in this cause. The trial court's findings as to the aggravating circumstances surrounding Betty's murder clearly demonstrate, as they did for Toni's murder, that death is proportionate for Betty's murder as well.

The first aggravator found regarding Betty's murder was that James was "previously convicted of another capital felony or of a felony involving the use or threat of violence to the person:" The ***Capital Murder of Toni Neuner, and*** **Aggravated** ***Child Abuse upon Toni*** **Neuner .** The remaining two aggravating circumstances are best viewed in the trial court's own findings:

> 2. The capital felony was committed while the defendant was engaged in the commission of or an **attempt to commit sexual battery** ***and kidnaping.*** After the defendant murdered Toni Neuner he went to Betty Dick's bedroom where she was asleep in her bed. He said in his confession that the reason he went to Betty **was** to "get sex with a real woman". She **was** asleep in her bed. He picked up a candle stick and hit her, which awakened her. He then began to stab her and pulled her bed clothes up so that he could have intercourse with her. In his confession he said that ***the reason he did not have intercourse with her after he stabbed her to death was because there*** **was** ***so much blood around that he lost interest.*** He pleaded guilty and was convicted by this court of attempted sexual battery of Betty Dick and sufficient testimony was elicited during the penalty phase trial to show that the murder was committed while the defendant **was** engaged in said attempt to commit sexual battery.
>
> After the defendant began to stab Betty Dick, he was interrupted by the entry into Betty Dick's

bedroom of Wendi Neuner, the sister of Toni Neuner. He stopped stabbing Betty Dick and took Wendi Neuner to another room in the house where he tied her up against her will. He then went to the kitchen and obtained a larger knife and went back into Betty Dick's bedroom and stabbed her one more time. The defendant pleaded guilty to kidnaping Wendi Neuner and was convicted by this court and the court heard sufficient testimony during the penalty phase trial to show that the murder of Betty Dick was committed while the defendant was engaged in the commission of the kidnaping of Wendi Neuner.

This aggravating circumstance was proved beyond a reasonable doubt.

3. The capital felony was especially ***heinous, atrocious, or cruel***.

***Betty Dick's*** **death** ***was caused by massive bleeding and shock from twenty-three (23) stab wounds.*** The defendant went to Betty Dick's bedroom after murdering Toni Neuner. He struck her with a candle stick with such force that it caused a contusion in the deeper layer of the scalp. The blow awakened Betty Dick, and ***she opened her eyes and said Why, Eddie, why?"*** He then stabbed her with a short knife in her back, on the back of her neck, and in the left side of her face just below the eye. Because of the short blade that was used, Betty Dick did not die but was heard crying ***"Tim, I'm dying,"*** which apparently is what awakened Wendi Neuner. The medical examiner testified that the ***use of a knife with a short blade created wounds that caused severe pain. Twenty-two (22) wounds made by the short-bladed knife*** were found by the medical examiner. Betty Dick's cries for help show that she **was** ***conscious for much*** **of** ***the time that she was being stabbed.*** In his confession the defendant said that ***he knew that she was still alive and therefore stabbed her with the large knife to make*** **sure** ***she was dead*** after he tied up

> Wendi Neuner. In the defendant's second confession he related the resistance of Betty Dick, and that she tried to push him away with her feet. He estimated that he stabbed her more than fifteen (15) times before she quit struggling. This aggravating circumstance was proved beyond a reasonable doubt. (R.525-31; T.1089-95)

Under aggravating circumstances similar to those found surrounding Betty's murder, particularly the facts he **stabbed** her 22 times with **a** steak knife, and then once more with a butcher knife to make sure she was dead, this Court has found death proportionate. Taylor ***v. State,*** 630 So. 2d 1038 (Fla. 1993) (59-year-old female victim stabbed approximately 27 times, strangled and sexually assaulted in her mobile home); Floyd v. ***State, upon remand, 569 So.*** 2d 1225 (Fla. 1990), ***cert. denied,*** 111 S.Ct. 2912 (1991) (Elderly **female** victim during robbery stabbed 12 times); ***Turner*** *v.* State, 530 So. 2d 45, 47 (Fla. 1987), ***cert. denied,*** 109 S.Ct. 1040 (1989)(Defendant broke into estranged wife's apartment and stabbed her 22 times in the presence of their daughter, then pursued, cornered, stabbed and cut roommate to death in telephone booth while she called police); ***Johnston v. State, supra,*** at 871-72 (Fla. 1986) (Elderly **woman,** who had retired to bed, strangled and stabbed 3 times completely through the neck and twice in upper chest took 3 to 5 minutes to die); ***Bertolotti v. State, 476 So.*** 2d 130 (Fla. 1985) (Victim's body discovered in her home by her husband

when he returned from work; she had been repeatedly stabbed with 2 knives, and was naked from the waist down); *Medina* v. State, 466 So. 2d 1046 (Fla. 1985) (Female victim stabbed 10 times for her car, loose cloth gag placed in her mouth, took 10 to 30 minutes to die and experienced considerable pain).

James argues at pp.37-38 of his brief:

> The aggravating factor that [he] had previously been convicted of a violent felony is supported solely by the contemporaneous convictions, [which] ...lessens the import of this aggravating factor. Terry v. State, 21 Fla. L. Weekly S9 (Fla. January 12, 1996).

The State would rely on its previous argument concerning this point, and simply add that this cause is easily distinguishable from the circumstances in Terry v. ***State, 668 So.*** 2d 954, 965-66 (Fla. 1996). This Court related those facts as follows:

> The second aggravator, prior violent felony, does not represent an actual violent felony previously committed by Terry, but, rather, a contemporaneous conviction was principal to the aggravated assault simultaneously committed by the codefendant Floyd who pointed an inoperable gun at Mr. Franco. While this contemporaneous conviction qualifies as a prior felony and a separate aggravator, we cannot ignore the fact that it occurred at the same time, was committed by a codefendant, and involved the threat of violence with an inorperable gun. ***This constrasts with the facts of many other cases where the defendant himself actually committed a prior violent felony such as homicide.***

***Id.***, at 966. The last sentence is exactly the case here and

demonstrates why this **cause** is clearly distinguishable, because James ***himself*** **actually committed** the Capital Murder of little Toni Neuner that served as one of the prior felonies.[20]

The trial court conscientiously weighed the equally horrific aggravating circumstances surrounding Betty's murder against the mitigating evidence, and correctly concluded that death was warranted. Given James concession on p.38 of his brief that "the factor of heinous, atrocious and cruel appears to be supported with regard to the murder of Betty Dick," the absence of any **real** direct challenge to her demise, and the clear focus of his argument as to proportionality on the murder of Toni, it may almost be inferred that he concedes that death is proportionate for Betty's murder. Even if this Court were to find that one of aggravators found for Betty's murder was not applicable, the trial court would still have found that the remaining aggravating circumstances outweighed the mitigating evidence, thereby rendering any error harmless beyond a reasonable doubt. **Wuornos v. State, supra, at 1011.** James sentence of death for the heinous murder of Betty Dick was proportionate, just **as** it was for that of her granddaughter.

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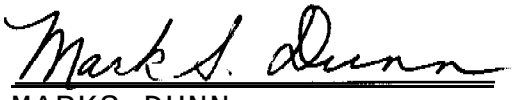
[20]The other **was** the Aggravated Child Abuse of Toni, which James concedes at p.38 applied to Betty's murder.

## CONCLUSION

Based upon the foregoing facts, authorities, and reasoning, the State respectfully requests that James' convictions and sentences be affirmed.

Respectfully submitted,

ROBERT A. BUTTERWORTH
ATTORNEY GENERAL



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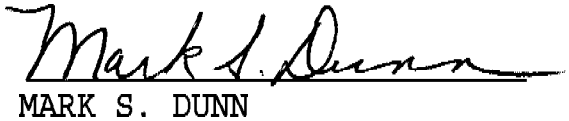
## CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing ANSWER BRIEF has been hand delivered to MICHAEL S. BECKER, Assistant Public Defender, Counsel for Appellant, 112 Orange Avenue, Suite A, Daytona Beach, FL, 32114, at the Public Defender's basket at the Fifth District Court of Appeal, this 23rd day of August, 1996.



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