IN THE SUPREME COURT OF FLORIDA

EDWARD T. JAMES,

Appellant,

vs.

STATE OF FLORIDA,

Appellee.

CASE NO. **86,834**

APPEAL FROM THE CIRCUIT COURT
IN AND FOR SEMINOLE COUNTY
FLORIDA

INITIAL BRIEF OF **APPELLANT**

JAMES B. GIBSON
PUBLIC DEFENDER
SEVENTH JUDICIAL CIRCUIT

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STATEMENT OF THE CASE

On October 19, 1993, the grand jury in and for Seminole County, Florida, returned an indictment charging Appellant, Edward T. James, with two counts of first-degree murder in violation of Section 782.04(1)(a), Florida Statutes (1993), one count of aggravated child abuse in violation of Section 827.03, Florida Statutes (1993), one count of attempted sexual battery in violation of Sections 794.011(3) and 777.04, Florida Statutes (1993), one count of kidnapping in violation of Section 787.01(1)(a), Florida Statutes (1993), one count of grand theft in violation of Sections 812.014(1) and (2)(c)(1), Florida Statutes (1993), and one count of grand theft of an automobile in violation of Sections 812.014(1) and (2)(c)4, Florida Statutes (1993). (R 23-25) On April 5, 1995, Appellant appeared before the Honorable Alan A. Dickey, Circuit Judge, and pursuant to a written agreement, entered pleas of guilty to all counts of the indictment and pleas of no contest to two counts of capital sexual battery charged by separate information. (R 178-183) By

its terms, there was no agreement as to sentence. (R 178-183)

On May 30, 1995, Appellant proceeded to penalty phase trial before Judge Dickey. (S 1-345; T 1-1084) Following deliberations, the jury returned advisory recommendations of death for each of the murder convictions. (T 1076; R 453-54) On August 18, 1995, Appellant again appeared before Judge Dickey or sentencing. (T 1085-1107) Judge Dickey confirmed the previous adjudications of guilt and sentenced Appellant to life in prison with a mandatory minimum of twenty-five years before parole eligibility on each of the capital sexual battery convictions to run concurrent with each other. Additionally, Appellant received sentences of life on the kidnapping charge, fifteen years on each of the aggravated child abuse and attempted sexual battery charges, and five years on each of the grand theft charges, all to run concurrent with each other, but consecutive to the sentences on the capital sexual batteries. On each of the first-degree murder counts, Judge Dickey imposed the death sentence and filed his sentencing order setting forth his findings of fact in support of the death penalty. (T 1086-1105; R 524-42, 543-48) Appellant filed a timely notice of appeal on August 28, 1995. (R 560-61) Appellant was adjudged insolvent and the Office of the Public Defender was appointed to represent him on this appeal. (R 550)

STATEMENT OF FACTS

On Sunday, September 20, 1993, Appellant went to Todd Van Fossen's house at approximately 9:30 in the morning to help him work on his car. (T 823) Todd's girlfriend, Tina, told Appellant that she was having a party that night for Todd and invited him. (T 823) Appellant returned to Van Fossen's at approximately 6:00 p.m. with some beer. (T 816) Appellant was one of the first to arrive and helped set up and handled the grilling during the party. (T 827) Appellant lived approximately two blocks from the Van Fossen's. (T 816) The party lasted until approximately 10:30 p.m. and Appellant stayed until the end and helped clean up. (T 828) Appellant seemed a bit intoxicated so Tina asked him if he wanted to spend the night, but Appellant declined. (T 817) Tina estimated that Appellant drank between six and twenty-four beers as well as some "shotguns" which were three beers drunk through a funnel in a very short period of time. (T 817,829) Appellant was intoxicated but not falling down drunk when he left. (T 833) During that evening, Appellant and Tina spoke about Betty Dick, the woman from whom Appellant rented a room. (T 849) Appellant showed no animosity and, in fact, praised Ms. Dick's house-keeping. (T 849) When Lisa Neuner, Betty Dick's daughter, walked over, Appellant asked her where the kids were and Lisa said they were with her brother Tim. (T 849) Appellant commented that "it's about time she gave her Mom a break," and seemed a little shocked to hear the children were not spending

the night at Betty's house. (T 849)

When Appellant left the Van Fossen's, he met up with Jere Pearson who lived nearby and was returning from the Handy Way. (T 629) Appellant told Jere he was going to Tim Dick's and his girlfriend Nichole's house. (T 630) Appellant asked Pearson if he wanted to do some LSD, but Pearson declined. (T 630) Pearson watched Appellant as he did approximately ten hits of LSD on paper. (T 630) Although Appellant said he had been drinking at Tina and Todd's, he appeared sober. (T 632,653) Appellant left Pearson and went to Tim and Nichole's house. (T 605,610) Nichole thought that Appellant might have drunk approximately two inches from a bottle of gin, but did not seem to be drunk or on drugs. (T 605,610,616) Although Lisa Neuner's children were supposed to be spending the night at Tim and Nichole's, they were not there. Wendi Neuner testified that although they were supposed to stay with Tim and Nichole, they did not because Tim and Nichole were drunk. (T 581)

When Appellant left Tim and Nichole's, he went home and arrived at approximately 11:30 p.m. (T 137) When Appellant came inside the house, he noticed that Lisa's four children were in the living room sleeping. (T 346) Wendi testified that Appellant arrived laughing and seemed to be pretty drunk. (T 137,587) Wendi woke up when Appellant came home but after he went into his bedroom, Wendi fell back to sleep. (T 137-38) Appellant did not recall some of the events of the evening, but recalled that he was quite angry when he came in the house,

mainly due to the fact that the children were there and he thought that Betty was being taken advantage of by her daughter. (T 369-70) Apparently Appellant went back out to the living room, grabbed Toni Neuner by her neck, and remembers hearing bones pop in her neck. (T 346) Although Appellant recalls strangling Toni, he does not recall having sex with her. (T 346) Apparently, however, Appellant removed Toni's clothes after he had choked her and had sex after he thought she had already died. (T 379-80) Toni never screamed or said anything. (T 375) Appellant then got up and went into Betty's bedroom, picked up a pewter candlestick, and hit Betty in the head with it. (T 382) Appellant **had** a knife and remembers swinging it and stabbing Betty in the back of the head. (T 347) Betty woke up and started screaming and saying, "Why Eddie, why?" Appellant replied, "Don't worry about it, give it up. Give it up." (T 347) Betty's screaming woke up Wendi Neuner who went to the doorway of the bedroom and saw Appellant stabbing Betty. (T 140) Appellant turned around and saw Wendi at which point he grabbed her, tied her up, and placed her in the bathroom. (T 347) Wendi asked Appellant if he was going to hurt her brothers, and Appellant told her, "No, I'm not going to hurt your brother or I'm not going to hurt you. You've been through enough pain." (T 387) Appellant then left the bathroom, and thinking that Betty was not dead, went to the kitchen and got a butcher knife and returned to Betty's room and stuck it in her back. (T 387-88) Appellant then showered, packed his bags, and prepared to leave.

(T 348) Appellant knew that Betty worked in a jewelry store so he went to her room and got her purse and took some jewelry figuring he could sell it and get money, (T 348) Appellant then got in Betty's car and left, (T 348) Appellant proceeded to drive across country stopping periodically to sell jewelry in order to get money. (T 396) Ultimately, on October 6, 1993, Appellant was arrested in Bakersfield, California, and gave two taped statements to the officer who arrested him. (T 329-32)

Dr. Shashi Gore, the chief medical examiner for Seminole County, testified that he performed autopsies on Betty Dick and Toni Neuner. (T 248,272) Betty Dick was 5' 2½" tall and weighed 180 pounds. (T 249) She had multiple stab wounds to the back with the knife still imbedded and Dr. Gore counted twenty-one stab wounds. (T 250-51) The knife wounds damaged both lungs, the liver, the diaphragm and fractured several ribs. (T 254) Ms. Dick also had two major stab wounds to the left side of the neck, but there were no abrasions on the neck. (T 259-60) She had a stab wound below the left eye and on the left ear. A knife blade was also discovered in Ms. Dick's hair. (T 219) The cause of death of Elizabeth Dick was massive bleeding and shock due to multiple stab wounds to the chest and back. (T 272) Dr. Gore opined that death would take a few minutes for Betty Dick. (T 319) At the time of her death, Toni Neuner was eight years of age 4' ½" tall and weighed 45 pounds. (T 273) Toni had contusions to her lips and hemorrhaging in her eyes caused by lack of oxygen which would have been caused by strangulation. (T

277-78) It was extensive force used to create the contusions on her neck leading Dr. Gore to believe that a ligature was used. (T 283) There were contusions found around the anal and vaginal orifices. (T 285) The roof of the vaginal wall was completely torn, but the anus and the rectum were not torn. (T 285-86) Due to the severity of the injury, Dr. Gore believed that penetration occurred. (T 286-87) There was considerable blood in the pelvic cavity indicating that Toni Neuner was alive at the time she was sexually assaulted, although Dr. Gore could not state that she was conscious when this occurred. (T 289,307,315) The cause of death of Toni Neuner was asphyxiation due to strangulation. (T 290)

Dr. E. Michael Gutman, a psychiatrist, testified that he conducted neuropsychological tests on Appellant during a two day period in August of 1994. (T 493) Dr. Gutman learned that Appellant's father and grandfather had been alcoholics and also learned that Appellant had used crack cocaine, LSD, cocaine, cannabis, alcohol, and pills. (T 494) It was Dr. Gutman's opinion that Appellant suffers from alcohol dependence and that he had an addictive craving for alcohol and was not able to break this habituation. (T 497) Appellant's general intelligence was above average and his performance IQ is in the superior range at 122. (T 499) During the testing on the scale L, which is the lie scale, which is used to detect deception and measure honesty, the normal range is 50 to 74, and Appellant scored 44 which shows exceptional honesty. (T 501) Appellant told Dr. Gutman that on

the day of the offense, he had been drinking and he had used some crack cocaine and cannabis, and had taken some pills. (T 502-3) He could not remember if he had taken LSD. (T 503) Dr. Gutman determined that Appellant exhibits a passive aggressive or an addictive personality. (T 504) It was Dr. Gutman's opinion **that** Appellant suffered from alcohol dependence and alcohol abuse, as well as poly-substance abuse and dependence. (T 505) Appellant further suffers from dysthymia, which is a chronic depressive disorder, and which was categorized as being severe. (T 506) Appellant also had unresolved conflicts associated with the abandonment of him by his father. (T 507)

Daniel E. Buffington, a clinical pharmacologist at the University of South Florida, testified regarding the effects of alcohol and drug addictions. (T 662 et seq.) Dr. Buffington stated that alcohol is a central nervous system depressant while cocaine is a central nervous system stimulant. (T 668-71) There is no normal reaction to LSD, and a person under the influence of LSD may have no outward physical presentation that they are inebriated as is typical with alcohol intoxication. (T 675) If a person has an underlying psychological problem, LSD ingestion will most likely unmask it and allow it to come to the surface. (T 675) LSD reactions are different from cocaine and are dependent on an individual's response. (T 677) Some people experience no effect while others experience highly traumatic flashbacks. (T 677) LSD intoxication is manifested by a slight increase in muscular activity, but unlike alcohol intoxication

there is no loss of muscle or motor coordination. (T 678) A person who is drunk could take LSD and feel more sober. (T 679) The acute phase of affectation due to LSD ingestion is 2 to 12 hours after ingestion. (T 683) Among the possible reactions to LSD are first, a psychotic adverse reaction which is accompanied by hallucinations; second, a non-psychotic adverse reaction which includes intense feelings of tension and anxiety; third, psycho-dynamic/psychedelic experience which results in a slow emergence of the subconscious idea/psychological condition; fourth, the cognitive psychedelic experience which causes a strong driving thought which overcomes an individual's ability to control himself; fifth, an aesthetic psychedelic reaction which people describe as an "out of body" experience; and sixth, a psychedelic peak which includes a perception that one has met "God" on an LSD trip. (T 680-82) Dr. Buffington opined that if Appellant had drunk between twenty and thirty beers between the hours of 6:00 p.m. and 11:30 p.m., he most likely had a blood alcohol level more than three times the legal limit. (T 688-92) The highest concentration would have been approximately 12:30 a.m. (T 693) If Appellant ingested ten hits of LSD this was probably a minimum of 200 micrograms of LSD which is a heavy dose. (T 700) If this was taken between 10:00 and 11:00 p.m., it would take thirty minutes to one hour to fully take effect. (T 700) When considered in conjunction with the alcohol use, the peak effect of the LSD ingestion would have occurred between 12:30 a.m. and 1:00 a.m. (T 701) Appellant's sense could have become confused

and such a large dose of LSD could completely deplete the store of neuro-transmitters thus causing a physical or mental break-down. (T 702) The ingestion of LSD by someone like Appellant who has a passive aggressive personality, could result in the sudden release or the increase in aggressive action. (T 703) The description of the crimes is consistent with the effects of the LSD/alcohol had on Appellant. (T 703) In Dr. Buffington's opinion, Appellant was most probably under the influence of extreme mental or emotional disturbance due to his psychotic adverse reaction and his psychodynamic/psychedelic reaction. (T 709-10) Appellant further suffered from decreased ability to control his behavioral pattern. (T 711) Taking the victim's car was consistent with Appellant's mind detachment and a feeling of just wanting to get away from the act so it would go away. (T 713) Short term amnesia is also normal. (T 713)

Betty and John Hoffpauir testified that they had known Appellant for years. (T 770-82) Once Appellant had made Betty's grandson some golf clubs just out of kindness. (T 774) Appellant worked off and on with John Hoffpauir in his lawn business and would never take any money for helping him. (T 779) Appellant always tried to be a big brother to a lot of people in the neighborhood. (T 780)

Betty Lee knows Appellant through her daughter, who had lived next door. (T 790) When Betty would visit she would often see Appellant playing with Toni and Wendi Neuner out in the front yard. (T 790) Appellant would play with them, hug them and kiss

them, and stand up for them when there was ever any trouble. (T 791) Appellant would also help Betty's daughter if she ever needed any help. (T 793)

Anthony Mancuso is a volunteer with Seminole County Correctional Facility and counsels inmates on religious matters. (T 794-95) Mr. Mancuso met Appellant in the facility and has seen an incredible change in him from the first time he entered. (T 795) Appellant is well-liked by the jail personnel as being a non-troublemaker. (T 798) Once when Mr. Mancuso was ill, Appellant wrote him a letter which shows Appellant's growth in his spiritual walk with Jesus. (T 799)

Appellant testified that he was born in Bristol, Pennsylvania on August 4, 1961. (T 857) When he was ten or eleven years of age, Appellant learned that his real father had left when he was just a baby. (T 858) Ultimately, Appellant met his real father and went to live with him in Indianapolis when he was fourteen years old. (T 859-62) Although Appellant's father was a drug counsellor, he often joked that he was doing more drugs than the people he counselled. (T 862) Appellant's father was a drug dealer who introduced Appellant to marijuana. (T 862) At one point Appellant moved with his father to Massachusetts, but after two weeks his father said he had to go back to Indianapolis and would send for Appellant shortly. (T 862) This was the last time that Appellant ever heard from his father. (T 862) Appellant then contacted his mother and went back to live with her and his stepfather. (T 862) When Appellant's mother

separated from her second husband, she moved to Florida with Appellant. (T 864) Appellant started experimenting with drugs including marijuana and PCP. (T 865) Appellant quit school but ended up getting his GED and went in the army at age seventeen. (T 866) Appellant got involved with more drugs in the army which ended up in him getting a general discharge under honorable conditions. (T 867) Appellant then spent eighteen months hitch-hiking around the country, and ultimately, had a son who was born in March of 1983. (T 869) Appellant's travels took him to San Francisco where he graduated from a computer learning center. (T 871) One day, Appellant received a phone call from his son's mother who threatened to kill his son if Appellant could not take him. (T 873) Appellant came back to Florida and took custody of his son Jesse. (T 874) However, Appellant soon realized he was not prepared to take over raising his son, and his drinking and drug usage increased. (T 875) His drug usage caused Appellant to break up with his girlfriend and made him distance himself from his son. (T 879) From Appellant's birthday on August 4, 1993, until the day of the incident on September 20, 1993, Appellant was steadily intoxicated. (T 881) Appellant feels shame for what he did and wishes there was something he could do to bring back Toni and Betty. (T 882) Appellant doesn't believe that drugs excuse what he did, but do explain it. (T882) Appellant loved Betty and the family and felt they were like his own family. (T 883)

SUMMARY OF THE ARGUMENT

POINT I: The prosecutor impermissibly urged the jury to consider non-violent felonies, to-wit: Appellant's drug usage and possession as nonstatutory aggravating factors. Additionally, the prosecutor commented that Appellant was legally sane, which factor was irrelevant with regard to the mental mitigating factors. These comments were improper and Appellant's motion for mistrial should have been granted.

POINT II: The standard jury instruction on heinous, atrocious and cruel is unconstitutionally vague.

POINT III: Although the death of Toni Neuner resulted from strangulation the murder was not heinous, atrocious and cruel since it was not accompanied by any other acts of torture and from all accounts rendered the victim immediately unconscious.

POINT IV: The trial court erred in granting the state's requested instruction concerning "previously been convicted". This Court should recede from precedent and rule that contemporaneous crimes cannot be used to prove this aggravating factor. Additionally, it was error for the trial court to refuse to instruct the jury on the specifically requested nonstatutory mitigating factors.

POINT V: The trial court erred in rejecting the statutory mitigating factor that the capital felony was committed while Appellant was under the influence of extreme mental or emotional disturbance. The unrefuted evidence supporting this

was improperly rejected by the trial court who applied an incorrect standard in assessing the credibility of a key witness.

POINT VI: The death sentences are disproportionate, accessive, inappropriate and constitute cruel and unusual punishment,

POINT I

IN VIOLATION OF THE FIFTH, SIXTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND ARTICLE I, SECTIONS 9 AND 16 OF THE FLORIDA CONSTITUTION, APPELLANT WAS DENIED DUE PROCESS AND A FAIR TRIAL DUE TO THE IMPROPER COMMENTS BY THE ASSISTANT STATE ATTORNEY DURING THE PENALTY PHASE OF HIS TRIAL.

During closing argument, the prosecutor made the following statements:

> 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.
>
> * * *
>
> 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.

(T 1020-21) Defense counsel approached the bench and made a motion for mistrial on the basis of the two comments. (T 1023) As to the first comment, defense counsel moved for a mistrial on the grounds that the argument could be interpreted as a

Suggestion that the possession of drugs was a nonstatutory aggravator, and that the second comment regarding Dr. Gutman's statement that Appellant was in essence sane, was unnecessarily confusing to the jury since legal sanity has no real relation to the statutory mitigating factors. (T 1023) The trial court simply denied the motion for mistrial as to the second basis without hearing any argument from the state. (T 1024) After hearing arguments from the state with regard to the first comment, the trial court denied the motion for mistrial although expressing concern that the state used the word "felony" in the argument. (T 1025)

With regard to the first comment concerning the state attorney's exhortation to the jury to ignore Appellant's drug usage as a mitigating factor since it constituted a felony, this was clearly error since nowhere in our statutory scheme are non-violent felonies admissible. In essence, the prosecutor's comment can be interpreted as inviting the jury to consider a nonstatutory aggravating factor, namely, these other "felonies" in arriving at their appropriate recommendation. This is clearly error. See Miller v. State, 373 So. 2d 882 (Fla. 1979) [error to consider as a nonstatutory aggravating factor the possibility that Miller might commit similar acts of violence if he were ever to be released on parole], and Riley v. State, 366 So. 2d 19 (Fla. 1978) [error to find lack of remorse as a non-enumerated aggravating circumstance].

With regard to the second comment, regarding Dr.

Gutman's testimony, the fact that Appellant may have met the legal test for sanity is of no consequence at all. In Ferguson v. State, 417 so. 2d 631 (Fla. 1982), this Court remanded for resentencing because the trial court applied the wrong standard in determining the applicability of the mental mitigating factors. This Court noted:

> The sentencing judge, just as in Mines, misconceived the standard to be applied in assessing the existence of mitigating factors (b) and (f). From reading his sentencing order we can draw no other conclusion but that the judge applied the test for insanity. He then referred to the "M'Naghten Rule" which is the traditional rule in this state for determination of sanity at the time of the offense. It is clear from Mines that the classic insanity test is not the appropriate standard for judging the applicability of mitigating circumstances under Section 921.141(6), Florida Statutes.

Id. at 638. While the trial judge in the instant case did not refer to this comment in his sentencing order, Appellant asserts that it was error to allow the state attorney to suggest to the jury that this would be an important consideration on their part. As both comments by the prosecutor were improper, Appellant's timely motion for mistrial should have been granted. Appellant is entitled to a new penalty phase.

POINT II

IN VIOLATION OF THE FIFTH, SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND ARTICLE I, SECTIONS 9, 16, 17 AND 22 OF THE FLORIDA CONSTITUTION, THE TRIAL COURT ERRED IN OVERRULING APPELLANT'S OBJECTION TO THE JURY INSTRUCTION ON HEINOUS, ATROCIOUS OR CRUEL, WHICH IS UNCONSTITUTIONALLY VAGUE.

At the charge conference, defense counsel objected to the standard instruction on heinous, atrocious or cruel aggravating factor on the grounds that it is vague. (T 936) Defense counsel stated that he had tried to fashion a special jury instruction on the definition of heinous, atrocious and cruel, but was unable. (T 936) The trial court overruled the objection and gave the standard instruction 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 torturous to the victim.

(R 468)

Appellant submits that the current standard jury instruction remains unacceptably vague and overbroad for essentially the same reasons as the previous standard instruction which was held unconstitutional in Espinoza v. Florida, 505 U.S.

112 (1992). The current instruction on HAC is unconstitutional under Proffitt v. Florida, 428 U.S. 242 (1976) and Essinoza, supra. Although the Supreme Court order approving the instruction states that the instruction was proposed by the Standard Jury Instructions Committee,[1] this is not entirely accurate. On rehearing, the Committee proposed this instruction:[2]

> The crime for which the defendant is to be sentenced was especially heinous, atrocious, or cruel. To be heinous, atrocious, or cruel, the defendant must have deliberately inflicted or consciously chosen a method of death with the intent to cause extraordinary mental or physical pain to the victim, and the victim must have actually, consciously suffered such pain for a substantial period of time before death.

Florida Bar News, February 1, 1991, p. 2. The Committee's proposed instruction was based on cases such as Porter v. State, 564 So. 2d 1060 (Fla. 1990) wherein this Court struck the HAC circumstance where the state did not prove a torturous intent.

The instruction given in the instant case is deficient in two regards. First, it violates the Eighth Amendment in the same ways that the Court invalidated instructions in Espinoza, Proffitt, and Shell v. Mississippi, 498 U.S. 1, 111 S. Ct. 313, 112 L. Ed. 2d 1 (1990). The Supreme Court in Shell held that

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[1] The Standard Jury Instructions, Criminal Cases -- No. 90-_, 579 So. 2d 75 (Fla. 1991).

[2] See Cumfer, Instructins a Capital Sentencing Jury on Florida's Especially Heinous, Atrocious, or Cruel Aggravating Circumstance, 14 Criminal Law Section Newsletter, No. 1, 18 (October 1991).

instructions defining heinous, atrocious and cruel in terms identical to those used in the instruction below are unconstitutionally vague. While the instruction below **says** that the "conscienceless...pitiless...unnecessarily torturous" crime is "intended to be included" it does not expressly limit the circumstance only to such crimes as required by Proffitt.

The second prong of the attack on the constitutionality of the instant instruction is based on due process, 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 caselaw. For instance, the instruction does not state that there must be a torturous intent. This Court in Porter, supra, struck the HAC finding where the evidence did not show that the murder "was meant to be deliberately and extraordinarily painful." 564 so. 2d at 1063. Similarly, in McKinney v. State, 579 So. 2d 80 (Fla. 1991), this Court struck a finding of HAC where "the evidence does not show that the defendant intended to torture the victim." The instant instruction also does not state that events occurring after the victim dies or loses consciousness are to be excluded from consideration, as this Court has held in Jackson v. State, 451 so. 2d 458 (Fla. 1984). Additionally, the instant instruction does not state that a lingering death does not establish the circumstance, as this Court once again held in Teffeteller v. State, 439 So. 2d 840 (Fla. 1983).

To a **layman,** every murder will be unnecessarily torturous, conscienceless, and pitiless. See Tuilaepa v.

California, 512 U.S. , 114 s. ct. , 129 L. Ed. 2d 750 (1994) (an aggravating circumstance may not apply to every defendant convicted of a murder; it must apply only to a subclass of defendants convicted of murder). See also Arave v. Creech, 507 U.S. , 113 s. ct. 1534, 123 L. Ed. 2d 188 (1993) ("If the sentencer fairly could conclude that an aggravating circumstance applies to every defendant eligible for the death penalty, the circumstance is constitutionally infirm.")

Because the jury was given an unconstitutionally vague and overbroad instruction on a critical aggravator, and because there was significant mitigating evidence, the state cannot show beyond a reasonable doubt that the error did not effect the jury's weighing process, its penalty recommendation, or the ultimate sentencing decision. State v. DiGuilio, 491 So. 2d 1129 (Fla. 1986). Appellant's death sentence must be reversed.

POINT III

APPELLANT'S DEATH SENTENCE FOR TONI NEUNER'S DEATH WAS IMPERMISSIBLY IMPOSED BECAUSE THE TRIAL COURT INCLUDED AN IMPROPER AGGRAVATING CIRCUMSTANCE, THUS RENDERING THE DEATH SENTENCE UNCONSTITUTIONAL UNDER THE EIGHTH AND FOURTEENTH AMENDMENTS OF THE UNITED STATES CONSTITUTION AND ARTICLE I, SECTION 17 OF THE FLORIDA CONSTITUTION.

It is well established that aggravating circumstances must be proven beyond a reasonable doubt by competent, substantial evidence. Martin v. State, 420 So. 2d 583 (Fla. 1982) ; State v. Dixon, 283 So. 2d 1 (Fla. 1973). The state has failed in this burden with regard to the aggravating circumstance of heinous, atrocious and cruel as to the death of Toni Neuner. The court's finding of fact based in part on matters not proven by substantial, competent evidence beyond a reasonable doubt, and on erroneous factual findings, do not support this circumstance and cannot provide the basis for this sentence of death.

This Court has defined the aggravating circumstance of heinous, atrocious or cruel in State v. Dixon, supra at 9:

> It is our interpretation that heinous means extremely wicked or strikingly evil; that atrocious means outrageously wicked and vile; and that cruel means designed to inflict a high degree of pain with utter indifference to, or even enjoyment of, the suffering of others.

Recognizing that all murders are heinous, Tedder v. State, 322 So. 2d 908, 910 (Fla. 1975), this Court further defined its interpretation of the legislature's intent that the aggravating circumstance apply only to crimes especially heinous, atrocious

or cruel.

> What is intended to be included are those capital crimes where the actual commission of the capital felony was accompanied by such additional acts as to set the crime apart from the norm of capital felonies -- the conscienceless or pitiless crime which is unnecessarily torturous to the victim.

State v. Dixon, supra at 9.

As this Court has stated in Santos v. State, 591 So. 2d 160 (Fla. 1991) and Cheshire v. State, 568 So. 2d 908 (Fla. 1990), this factor is appropriate only in torturous murders which exhibit a desire to inflict a high degree of pain, or an utter indifference to or enjoyment of the suffering of another. See, e.g., Douglas v. State, 575 So. 2d 165 (Fla. 1991) (torture murder involving heinous acts extending over several hours).

The United States Supreme Court, in Sochor v. Florida, 504 U.S. , 112 S. Ct. 2114, 119 L. Ed. 2d 326 (1992), stated that this Court has consistently applied the heinous, atrocious and cruel factor to strangulation murders. However, this Court has never ruled that all strangulation murders are per se heinous, atrocious and cruel. In Smith v. State, 407 So. 2d 894 (Fla. 1981), this Court affirmed a finding of heinous, atrocious and cruel involving a strangulation murder. However, in doing so, this Court noted that the heinous, atrocious and cruel aspect of the killing deals more with the manner in which the victims are strangled. In that case, 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. In Doyle v. State, 460 So. 2d 353 (Fla. 1984), this Court again proved the finding of heinous, atrocious and cruel in a strangulation murder where the strangulation occurred over a period of up to five minutes and that prior to losing consciousness the victim was aware of the nature of the attack and had time to anticipate her death. In the instant case, given the small stature of Toni Neuner it is probable that she lost consciousness in a matter of seconds. Thus, there was no prolonged period of time in which the victim had time to anticipate her impending death. In Johnson v. State, 465 So. 2d 499 (Fla. 1985), this Court again approved the finding of heinous, atrocious and cruel in a strangulation death, but once again focused on the fact that the victim had a fore-knowledge of her death and suffered extreme anxiety and pain. In that case, there was evidence that Johnson began to choke the victim and then the victim escaped from her car and that Johnson chased her, caught her again and resumed strangulation three times to make sure she was dead. Again, there is nothing in the instant case to reflect those kind of facts. Finally, in Herzog v. State, 439 so. 2d 1372 (Fla. 1983), this Court recognized that not every strangulation murder is heinous, atrocious and cruel. In that case there was evidence that the defendant had argued with the victim on the day of the homicide and had beaten her that day. In addition, eyewitnesses testified as to the manner of death. After an unsuccessful attempt at smothering the victim, the defendant wrapped a telephone cord around her neck and strangled

her. Despite these facts, this Court found them insufficient to support a finding of heinous, atrocious and cruel since it was unclear whether or not the victim was fully conscious at the time the death occurred.

In the instant case, the evidence strongly suggests that when Toni was first accosted she was asleep and the force used caused her to lose consciousness almost immediately. Certainly, there is no indication that Toni screamed or struggled. Even the medical examiner could not state that Toni was conscious. (T 315) The trial court's statement that Toni had some awareness because when she was found her hands were covering her genital area is without <u>any</u> factual basis. It is just as likely that Toni's hands naturally landed in that position when Appellant pushed her off the bed and onto the floor.

However tragic the death of Toni Neuner was, it simply did <u>not</u> fit the definition of HAC. There is nothing to indicate that Appellant <u>intended</u> to inflict a high degree of pain, or to unnecessarily torture Toni. This aggravating circumstance must be stricken.

POINT IV

IN VIOLATION OF THE FIFTH, SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND ARTICLE I, SECTIONS 9, 17 AND 22 OF THE FLORIDA CONSTITUTION, THE TRIAL COURT ERRED IN INSTRUCTING THE JURY.

At the charge conference, the prosecutor asked for a special instruction with regard to the aggravating factor of previously convicted of a felony involving the use or threat of violence. The instruction, which was given over defense objection, was as follows:

> "Previously been convicted" means previous to this sentencing proceeding. Capital or violent felony crimes which have resulted in convictions and were committed upon **a** separate victim contemporaneously during the same criminal episode as the capital felony for which the defendant is to be sentenced are included within this definition.
>
> The crime of first degree murder is a capital felony.
>
> The crime of aggravated child **abuse** is a felony involving the use of violence to another person.

(R 463; T 1061-62) Defense counsel objected to this instruction on the grounds that it was an improper legislative interpretation since Appellant indeed had no violent felony convictions prior in time to the instant case. (T 927) The trial court overruled the objection. Appellant recognizes that this Court has ruled that violent felonies committed contemporaneously with the **capital** crime can qualify for this circumstance if the crime involved

multiple victims or separate episodes. Pardo v. State, 563 So. 2d 77 (Fla. 1990); Wasko v. State, 505 So. 2d 1314 (Fla. 1987). However, contemporaneous conviction of violent felonies on the same murder victim cannot be used as an aggravating circumstance. Schafer v. State, 537 So. 2d 988 (Fla. 1989) . Appellant submits that this Court should reconsider its prior holdings and extend the rationale in Wasko to include a prohibition against using all contemporaneous crimes to satisfy this aggravating circumstance. The rationale of Wasko seems to be that contemporaneous convictions should not be used if they arise out of a single criminal episode. It makes no sense for this rationale to require only a single victim. In State v. Barnes, 595 So. 2d 22 (Fla. 1992), this Court allowed for the habitual offender status to be found based on multiple convictions which were imposed on the same day. However, the concurring opinion notes that it believes this holding to be true only if the "prior convictions" arose out of separate incidents and not out of a single incident. Id. at 25 (Kogan and Barkett, JJ. concurring). Certainly, if the legislature had intended this aggravating factor to apply when there were multiple victims, this could have been accomplished in a much more straight forward way by simply listing as an aggravating circumstance that there were multiple victims. The legislature's silence on this issue is an indication that this Court's **interpretation of the aggravating circumstance** is **erroneous.** The requested instruction below was properly objected to and Appellant urges this Court to recede from its previous

holdings and extend the rationale of Wasko.

Defense counsel submitted special requested instructions on each of the non-statutory mitigating factors which it believed were established by the evidence. (T 943; R 404-22) Defense counsel further requested that if the court was not going to grant the requested instructions, then it did not want the court to instruct on any of the statutory mitigating factors. (T 943) The prosecutor argued that it was proper to instruct on the two statutory mental mitigating factors as well as the catch all mitigating factor since these were arguably supported by the evidence. The trial court ultimately ruled that it would read the two statutory mental mitigating factors and the catch all over defense counsel's objection. Defense counsel's argument against instructing on any mitigating factors was that if the court would read the two statutory mitigators but then not give the requested instructions, it would lead the jury to believe that these were the only mitigating factors since the instructions from the court take precedence over the mere argument of counsel. In rejecting this the trial court ruled:

> And, so, I'm going to do it the **way** the Florida Supreme Court says we're suppose [sic] to do it, and then if they want to change the law and they want to use Mr. James' case to change the law, I at least hope they make it something that makes more sense then what we have. That's all I ask. Reverse me if you will, but please make more sense then what we have, and I won't mind.

(T 958)

It is beyond dispute that the United States Supreme

Court's decision in Eddinss v. Oklahoma, 455 U.S. 104 (1982) requires that, in capital cases, the sentencer not be precluded from considering as a mitigating factor any aspect of a defendant's character or record and any other circumstances of the offense that the defendant proffers as a basis for a sentence less than death. Previously, the standard jury instructions were deemed faulty because they were reasonably understood to limit mitigating circumstances to those expressly contained in Section 921.141(6), Florida Statutes See Hitchcock v. Dugger, 481 U.S. 393 (1987). In an effort to clarify that a jury or trial judge is not limited in the things that may be considered in mitigation, the list of mitigating factors contained in the standard jury instructions now conclude with, "Among the mitigating circumstances you may consider, if established by the evidence, are: ... (8) any other aspect of the defendant's character or record, and any other circumstance of the offense." Fla. Std. Jury Instructions in Criminal Cases, 2d Edition, pp. 80-81. From these instructions, the jury may reasonably conclude that all mitigating factors other than those expressly provided for by statute may only be considered as a single factor as opposed to considering each segment individually and attach individual weight of each nonstatutory factor. This distorts the weighing process in favor of imposition of the death penalty in violation of the Fifth, Eighth, and Fourteenth Amendments. The law set forth in Campbell v. State, 571 So. 2d 415 (Fla. 1990), exemplifies the constitutional error that occurs when the

sentencer arbitrarily fails to consider valid mitigation in the belief that, though adequately proved as a matter of fact, the fact does not qualify in the sentencer's mind as bona fide mitigation. In Campbell, the trial court felt that a defendant's deprived and abusive childhood was not a mitigating factor at all, even though it was not controverted that Campbell had been abused as a child. Because all trial courts were experiencing problems in properly applying mitigating circumstances, this Court explained that the sentencer must weigh **certain mitigating** considerations as a matter of law if any of the following were proved to exist as a matter of fact:

1) abused or deprived childhood.
2) Contribution to community or society.
3) Remorse and potential for rehabilitation.
4) Disparate treatment of equally culpable codefendant.
5) Charitable or humanitarian deeds.

Campbell, 571 So. 2d at 419, fn. 4.

If trial judges, who are presumed to know the law and their responsibility to consider these factors under Florida law, were unconstitutionally, categorically rejecting a defendant's abused childhood and potential for rehabilitation as mitigating considerations under the rationale that even though they exist as a matter of fact they are not felt to be mitigating, so too are Florida's citizens. They are entitled to be instructed on the law just as this Court instructed the trial judges in Campbell. When there is a timely and specific written request, as was made here, there is no justification for not fully and fairly

instructing the jury in the same manner that this Court found it necessary to instruct trial judges who were improperly rejecting valid mitigating considerations that were adequately proved to exist but which were not viewed as "mitigating" to that individual judge. The introduction of nonstatutory mitigating evidence is meaningless if the jury is not instructed that they may consider it. Magill v. Dugger, 824 F. 2d 879 (11th Cir. 1987). Argument of counsel is never meant to be a substitute for the trial court's instructions concerning the law. United States v. Pediso, 12 F. 3d 618, 626 (7th Cir. 1993); Fitzserald v. Mountain States Tel. & Tel. Co., 68 F. 3d 1257, 1262 (10th Cir. 1995). The precise question presented is whether the foregoing "catch all" instruction is sufficient to inform the jury that a particular circumstance can properly be considered when defense counsel requests that the jury be specifically instructed that a particular factor adequately supported by the evidence, is valid mitigation under the law. The "catch all" instructs the jury generally that it may consider any factor of the defendant's character or the crime which mitigates the offense. See Delap v. Dusser, 513 So. 2d 659 (Fla. 1987); Floyd v. State, 497 So. 2d 1211 (Fla. 1986); Lara v. State, 464 So. 2d 1173 (Fla. 1985) [proper to instruct on all circumstances for which evidence had been presented]. It is essential that a jury be informed by the trial judge that a particular consideration as a matter of law, whether or not recognized expressly by statute, constitutes valid mitigation.

In the event that this Court deems the requested instructions were properly denied, Appellant alternatively argues that it was error for the trial judge to deny Appellant's request that no specific mitigating factors be instructed. The reason for defense counsel's request, was his belief that if the trial court instructed on the statutory mitigating factors and the jury did not consider them to be proven, that it would then be unable to conclude that anything less than these statutory mitigators should be considered. In essence, by giving the statutory mental mitigators, the trial court would be giving undue emphasis to these factors. It is this emphasis by the trial judge that defense counsel was objecting to. "Particularly in a criminal trial, the judge's last word is apt to be the decisive word." Bollenbach v. United States, 326 U.S. 607, 612 (1946); Carter v. State, 469 So. 2d 194, 196 (Fla. 2d DCA 1985). Since the mitigating factors are ostensibly for the benefit of the accused, it should be the accused's right to waive instruction thereon. Maggard v. State, 399 So. 2d 973, 978 (Fla. 1981). Appellant submits that either it was error for the trial court to deny the requested special jury instructions on nonstatutory mitigating factors, or it was error for the trial judge to deny Appellant's request that the jury not be instructed on any specific mitigating factor but rather just on a general statement regarding mitigation. In either case, Appellant is entitled to a new penalty phase.

POINT v

IN VIOLATION OF THE EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND ARTICLE I, SECTION 17 OF THE FLORIDA CONSTITUTION, THE TRIAL COURT ERRED IN IMPOSING THE DEATH SENTENCE AND REJECTING THE STATUTORY MITIGATING FACTOR THAT THE CAPITAL FELONY WAS COMMITTED WHILE APPELLANT WAS UNDER THE INFLUENCE OF EXTREME MENTAL OR EMOTIONAL DISTURBANCE.

In discussing the mitigating factor that the capital felony **was** committed while the defendant **was** under the influence of extreme mental and emotional disturbance, the trial court made the following statements:

> One. The capital felony was committed while the Defendant was under the influence of extreme mental and 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 to twenty-five hits at ten o'clock p.m. to eleven o'clock 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 amounts 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 murder 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 Intoxilyzer 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 as to the circumstances of the Defendant taking the ten to twenty-five 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 alone 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.

(T 1095-97)

The trial court's findings are seriously flawed. The trial court's analysis of Jere Pearson's testimony reveals that the trial court's assessment of his credibility was based on his demeanor on the day of trial. The fact of the matter is Mr. Pearson did not testify on the day of trial, but rather, through stipulation, his previously recorded statement to the state

attorney was admitted into evidence. Thus, the proper way to assess his credibility was at the time the statement was made, not at the time that he appeared in court. That Mr. Pearson may have been drunk on the day that he showed up at court in no way affects the testimony that was given months prior to that date. There is simply no logical connection between the two events. The testimony of Jere Pearson was not inherently incredible and was not otherwise impeached. Through the testimony of Dr. Buffington, it is evident that LSD intoxication is not nearly as easily identifiable as alcohol intoxication. That Tim Dick and Nichole Jarvis did not feel that Appellant seemed to be under the influence of drugs, in no way refutes the testimony that Appellant had in fact taken LSD. This is especially true since at the time that Appellant saw Tim and Nichole he had just taken the LSD, and according to Dr. Buffington's testimony the effects of the LSD ingestion would not have manifested for some two hours. Additionally, it must be noted that Wendi Neuner testified that although the children were supposed to spend the night with Tim and Nichole, they did not because Tim and Nichole were themselves drunk. (T 581) Further, the fact that Appellant ingested LSD is not inherently unbelievable in light of the testimony from numerous persons that Appellant had in fact taken LSD on previous occasions. (T 599,609,624) Where such evidence is established by uncontroverted factual evidence, it must be considered in mitigation. Fead v. State, 512 So. 2d 176 (Fla. 1987) ; Cannadv v. State, 427 So. 2d 723 (Fla. 1983); and Hardwick

v. State, 521 So. 2d 1071 (Fla. 1988). Because the basis for the trial court's rejection of this mitigating factor is itself flawed, Appellant's death sentence must be vacated and the cause remanded for reconsideration of sentence.

POINT VI

APPELLANT'S DEATH SENTENCES ARE DISPROPORTIONATE, EXCESSIVE, INAPPROPRIATE, AND ARE CRUEL AND UNUSUAL PUNISHMENT IN VIOLATION OF ARTICLE I, SECTION 17 OF THE FLORIDA CONSTITUTION AND THE EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

In imposing the death penalty, Judge Dickey found that the state had proved three aggravating circumstances with regard to each of the murders: that the murder was especially heinous, atrocious and cruel; that the murders were committed in the course of a felony; and that Appellant had a prior conviction for a violent felony. In mitigation, the trial court found numerous factors some of which were given great weight. Appellant contends that the death penalty cannot stand since it is disproportionate to the crime and constitutes cruel and unusual punishment. Initially, it must be noted that Appellant is attacking the propriety of finding the HAC factor with regard to the murder of Toni Neuner. (See Point II, susra) Additionally, Appellant has also argued that the trial court improperly refused to find the statutory mitigating factor that Appellant was under extreme mental or emotional disturbance. (See Point V, susra) Appellant submits that the aggravating factors, while arguably present, should not be given much weight. The aggravating factor that Appellant had previously been convicted of a violent felony is supported solely by the contemporaneous convictions. Appellant has noted previously that this Court should recede from its previous decisions and rule contemporaneous convictions

inapplicable to prove this aggravating circumstance. (See Point IV, supra) Even if this Court does not recede, the fact that these crimes were contemporaneous and arising out of a single criminal episode lessens the import of this aggravating factor. Terry v. State, 21 Fla. L. Weekly S9 (Fla. January 12, 1996).

With regard to the aggravating factor that the murders were committed in the course of a felony, Appellant submits that this too should be given little weight. 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. While this factor certainly exists with regard to the murder of Betty Dick, it must also be noted that the murder itself is a classic example of felony murder with little, if any, evidence of premeditation. The presence of this aggravating factor is nearly an automatic finding. Thus, its import should be lessened. While the factor of heinous, atrocious and cruel appears to be supported with regard to the murder of Betty Dick, and assuming that it exists with regard to the murder of Toni Neuner, Appellant further submits that the weight given this aggravating factor should also be lessened. The trial court failed to consider that this Court has ruled that there is a definite causal relationship between the mitigating and aggravating

circumstances. See Huckaby v. State, 343 So. 2d 29 (Fla. 1977); Miller v. State, 373 So. 2d 882 (Fla. 1979). Therefore, 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. This is the situation in the instant case. The trial court found that Appellant was suffering from definite alcohol impairment. Further, the evidence is fairly clear that Appellant had in fact ingested LSD and was under the influence of this drug as well. As the trial judge himself explained, these acts were quite out of character for Appellant who had no other incidents of violence in his past. However, his findings with regard to the heinous, atrocious and cruel factor totally ignore these principles. Having placed the aggravating factors in a proper perspective, the conclusion is inescapable that the death penalty in the instant case is simply disproportionate to the crime.

The death penalty is so different from other punishments "in its absolute renunciation of all that is embodied in our concept of humanity," Furman v. Georsia, 408 U.S. 238, 306 (1972) (Stewart, J., concurring), that "the Legislature has chosen to reserve its application to only the most aggravated and unmitigated of most serious crimes." State v. Dixon, 283 So. 2d 1, 17 (Fla. 1973). See also Coker v. Georsia, 433 U.S. 584 (1987) (requirement that the death penalty be reserved for the most aggravated crimes is a fundmental axiom of Eighth Amendment jurisprudence). This Court has noted that the death penalty,

unique in its finality and total rejection of the possibility of rehabilitation, was intended by the legislature to be applied "to only the most aggravated and unmitigated of most serious crimes." State v. Dixon, supra, and Holsworth v. State, 522 So. 2d 348 (Fla. 1988). A comparison of the instant case to other cases decided by this Court leads to the conclusion the death penalty is not proportionately warranted in this case.

In Fitzpatrick v. State, 527 So. 2d 809 (Fla. 1988), this Court accepted the sentencing judge's findings of five statutory aggravating circumstances, including those that showed culpable intent. Mr. Fitzpatrick had been convicted of the murder of a law enforcement officer. Mr. Fitzpatrick shot at the officer while holding three persons hostage with a pistol in an office. Mr. Fitzpatrick further established the existance of three statutory mitigating circumstances. While this crime was significantly more aggravated than Appellant's, this Court nevertheless found Fitzpatrick's actions to be "not those of a cold blooded, heartless killer," since "the mitigation in this case is substantial." Id. at 812.

In Livinsston v. State, 565 So. 2d 1288 (Fla. 1988), the defendant killed a store attendant, shooting her twice with a pistol during the commission of an armed robbery. This Court found that two aggravating circumstances (prior violent felony and felony murder) when compared to mitigating circumstances (age and unfortunate home life), "does not warrant the death penalty." Id. at 1288. Of special importance to this Court in mitigation

in Livingston is the offender's addiction to and/or intoxication from drugs or alcohol. This factor is also present in Appellant's case.

In Songer v. State, 544 So. 2d 1010 (Fla. 1989), this Court reviewed a death penalty imposed by a trial judge based on one statutory aggravating factor, that the murder of a highway patrolman was committed while Songer was under the sentence of imprisonment. Due to the presence of several mitigating factors, this Court overturned the death sentence and remanded for imposition of a life sentence despite a jury recommendation of death. The reasoning of this Court is instructive:

> Long ago we stressed that the death penalty was to be reserved for the least mitigated and most aggravated of murders. State v. Dixon, 283 So. 2d 1 (Fla. 1973), cert. denied, 416 U.S. 943, 94 S. Ct. 1950, 40 L. Ed. 2d 295 (1974). To secure that goal and to protect against arbitrary imposition of the death penalty, we view each case in light of others to make sure the ultimate punishment is appropriate.
>
> Our customary process of finding similar cases for comparison is not necessary here because of the almost total lack of aggravation and the presence of significant mitigation. We have in the past affirmed death sentences that were supported by only one aggravating factor, (see, e.g., LeDuc v. State, 365 So. 2d 149 (Fla. 1978), cert. denied, 434 U.S. 885, 100 S. Ct. 175, 62 L. Ed. 2d 114 (1979), but those involved either nothing or very little in mitigation. Indeed this case may represent the least aggravated and most mitigated case to undergo proportionality analysis.
>
> Even the gravity of the one aggravating factor is somewhat diminished by the fact that Songer did not break out of prison but merely walked away from a work release job.

> In contrast, several of the mitigating circumstances are particularly compelling. It was unrebutted that Songer's reasoning ability was substantially impaired by his addiction to hard drugs. It is also apparent that his remorse is genuine.

Songer, 544 So. 2d at 1011.

In Penn v. State, 574 So. 2d 1079 (Fla. 1991), this Court approved the trial court's finding that the murder was heinous, atrocious or cruel. In mitigation, the court found that Penn had no significant history of prior criminal activity and that he acted under the influence of extreme mental or emotional disturbance. This Court then concluded:

> Generally, when a trial court weighs improper aggravating factors against established mitigating factors, we remand for reweighing because we cannot know if the result would have been different absent the impermissible factors. Oats v. State, 446 so. 2d 90 (Fla. 1984), receded from on other grounds, Preston v. State, 564 So. 2d 320 (Fla. 1990). However, one of our functions "in reviewing a death sentence is to consider the circumstances in light of our other decisions and determine whether the death penalty is appropriate." Menendez v. State, 419 So. 2d 312, 315 (Fla. 1982). On the circumstances of this case, including Penn's heavy drug use and his wife telling him that his mother stood in the way of their reconcilliation, this is not one of the least mitigated and most aggravated murders. See State v. Dixon, 283 So. 2d 1 (Fla. 1973), cert. denied, 416 U.S. 943, 94 S. Ct. 1950, 40 L. Ed. 2d 295 (1974). Compare Smalley v. State, 546 So. 2d 720 (Fla. 1989) (heinous, atrocious, cruel in aggravation; no prior history, extreme disturbance, extreme impairment in mitigation); Songer v. State, 544 so. 2d 1010 (Fla. 1989) (under a sentence of imprisonment in aggravation; extreme disturbance, substantial impairment, age in mitigation); Proffitt v. State, 510 So. 2d 896 (Fla. 1987) (felony murder in

> aggravation; no prior history in mitigation); Blair v. State, 406 So. 2d 1103 (Fla. 1981) (heinous, atrocious, cruel in aggravation; no prior history in mitigation). After conducting a proportionality review, we do not find the death sentence is warranted in this case.

Penn, 574 so. 2d at 1083-84.

Finally, in Wilson v. State, 493 So. 2d 1019 (Fla. 1986), this Court held that the death penalty was not proportionate even though the stabbing death was found to be heinous, atrocious and cruel, and Wilson also had a prior conviction for a violent felony, and the jury recommended death. See also Morgan v. State, 639 So. 2d 6 (Fla. 1994) (fact that one of the aggravating circumstances is heinous, atrocious, or cruel does not preclude finding that the sentence of death is disproportionate).

In summary, the aggravating factors found by the trial court were either improperly found or were entitled to be given little weight. The mitigation that was presented, virtually unrebutted, clearly outweighs the aggravation and makes the death penalty disproportionate in the instant case. Appellant's sentence should be vacated and the cause remanded for imposition of a life sentence.

CONCLUSION

Based on the foregoing reasons and authorities stated, Appellant respectfully requests this Honorable Court to vacate the death sentences and **remand** the cause for a new penalty phase or, in the alternative, for imposition of life sentences.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been hand-delivered to the Honorable Robert A. Butterworth, Attorney General, 444 Seabreeze Blvd., Fifth Floor, Daytona Beach, FL 32118, via his basket at the Fifth District Court of Appeal, and mailed to: Mr. Edward T. James, #969121 (R2S16), Florida State Prison, P.O. Box 747, Starke, FL 32091-0747, this 17th day of May, 1996.

Michael S Becker
MICHAEL S. BECKER
ASSISTANT PUBLIC DEFENDER