IN THE SUPREME COURT OF FLORIDA

EDWARD T. JAMES, **Case No. SC06-426**

Appellant,

v.

STATE OF FLORIDA,

Appellee.
_____/

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

ANSWER BRIEF OF APPELLEE

BILL McCOLLUM
ATTORNEY GENERAL

BARBARA C. DAVIS
ASSISTANT ATTORNEY GENERAL
Fla. Bar #410519
444 Seabreeze Blvd. 5th FL
Daytona Beach, FL 32118
(386) 238-4990
Fax # (386) 226-0457
COUNSEL FOR APPELLEE

TABLE OF CONTENTS

TABLE OF AUTHORITIES
CASES

Knight v. State,
923 So. 2d 387 (Fla. 2005) 25

STATUTES

MISCELLANIOUS

STATEMENT OF THE CASE AND FACTS

This Court summarized the procedural and factual history in the opinion on direct appeal:

> On October 19, 1993, the grand jury in and for Seminole County, Florida, returned an indictment charging Edward James with two counts of first-degree murder, one count of aggravated child abuse, one count of attempted sexual battery, one count of kidnapping, one count of grand theft, and one count of grand theft of an automobile. On April 5, 1995, James 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. The plea did not include an agreement as to sentence. The State sought the death penalty for each of the murders that occurred in this case, and on May 30, 1995, James proceeded to a penalty phase trial before a jury.
>
> The record reflects that on the evening of Sunday, September 19, 1993, James attended a party at Todd Van Fossen's house. James rented a room from one of the victims in this case, Betty Dick, and lived about two blocks away from the Van Fossens. He arrived at 6 p.m. and stayed until approximately 10:30 p.m. Todd's girlfriend, Tina, noticed that James seemed intoxicated by the end of the evening and asked him if he wanted to spend the night, but James declined. James drank between six and twenty-four cans of beer during the party, as well as some "shotguns"--three beers drunk through a funnel in a very short period of time. Shortly after leaving the party James ran into Jere Pearson who lived nearby and was returning from the Handy Way convenience store. Jere Pearson was interviewed by the assistant state attorney and the assistant public defender before trial. An audiotape of the interview was played for the jury during the trial.[1]
>
> [1]Jere Pearson was called by the defense to testify at trial, but came to court intoxicated. Mr. Pearson failed an Intoxilyzer test and the

trial judge refused to let him testify at that time. As an alternative to Pearson's testimony, defense counsel proposed that the audiotape of the interview with Pearson conducted at the State Attorney's Office be played for the jury. The state agreed to defense counsel's proposal and James told the court that he also agreed with his counsel's proposal.

Pearson stated that when the two met, James was on his way to visit Tim Dick, the victim's son, and his girlfriend, Nichole, who also lived nearby. They stopped and talked for about ten minutes and Pearson watched James ingest about ten "hits" of LSD on paper. James told Pearson he had been drinking at Todd Van Fossen's party, but he appeared sober to Pearson.

After briefly visiting Tim Dick and Nichole where he drank some gin, James returned to his room at Betty Dick's house. When he entered the house, James noticed that Betty Dick's four grandchildren were asleep in the living room.[2] One of the children, Wendi, awoke briefly when James arrived. She observed that he was laughing and appeared drunk. James went to the kitchen, made himself a sandwich and retired to his room. Eventually, he returned to the living room where he grabbed Betty Dick's eight-year-old granddaughter, Toni Neuner, by the neck and strangled her, hearing the bones pop in her neck. Believing Toni was dead, he removed her clothes and had vaginal and anal intercourse with her in his room. Toni never screamed or resisted. After raping Toni, he threw her behind his bed.

[2]Wendi Neuner, Betty Dick's nine-year-old granddaughter, testified at trial that the children were supposed to spend the night with their uncle, Tim Dick, and his girlfriend Nichole, but did not because Tim and Nichole were drunk on Sunday evening.

James then went to Betty Dick's bedroom where he intended to have sexual intercourse with her. He hit Betty in the back of the head with a pewter candlestick. She woke up and started screaming, "Why, Eddie, why?" Betty's screaming brought Wendi Neuner to

the doorway of her grandmother's bedroom where she saw James stabbing Betty with a small knife. When James saw Wendi he grabbed her, tied her up, and placed her in the bathroom. Thinking that Betty was not dead, James went to the kitchen, grabbed a butcher knife and returned to Betty's room and stabbed her in the back. James removed Betty Dick's pajama bottoms, but did not sexually batter her.

Covered with blood, James took a shower in the bathroom where Wendi remained tied up and then threw together some clothes and belongings. He returned to Betty's room and took her purse and jewelry bag before driving away in her car. James drove across the country, stopping periodically to sell jewelry for money. He finally was arrested on October 6, 1993, in Bakersfield, California, and gave two videotaped confessions to police there. A videotape containing the relevant portions of James' statements was played for the jury.

Dr. Shashi Gore, the chief medical examiner for Seminole County, testified that he performed autopsies on Betty Dick and Toni Neuner. Betty Dick suffered twenty-one stab wounds to the back with the knife still embedded. The wounds damaged both lungs, the liver, and the diaphragm and fractured several ribs. Dick also suffered major stab wounds to the left side of the neck, below the left eye, and on the left ear. A knife blade was also discovered in Dick's hair. Dick died of massive bleeding and shock from the multiple stab wounds to her chest and back. Dr. Gore opined that she died within a few minutes of her assailant's attack.

Toni Neuner suffered contusions to her lips and hemorrhaging in her eyes caused by lack of oxygen from strangulation. Gore opined that the extensive force necessary to create the contusions on her neck indicated that a ligature had been used. Dr. Gore also found contusions around the anal and vaginal orifices. The roof of the vaginal wall was completely torn. Although the substantial amount of blood pooled in the pelvic cavity indicated that Toni Neuner was alive at the time she was sexually assaulted, Dr. Gore could not state that she was conscious when she was raped.

Toni Neuner died of asphyxiation due to strangulation.

Dr. E. Michael Gutman, a psychiatrist, testified as a mental health expert witness on James' behalf. He conducted neuropsychological tests on James in August of 1994. Dr. Gutman learned that James' father and grandfather had been alcoholics and James used crack cocaine, LSD, cocaine, marijuana, alcohol, and pills. In Dr. Gutman's opinion, James suffers from alcohol dependence and has an addictive craving for alcohol which he is unable to break. James has above average intelligence and his performance IQ is in the superior range.

James told Dr. Gutman that on the day of the offense, he had been drinking, had used crack cocaine and cannabis, and had taken some pills. He could not remember if he had taken LSD in the hours preceding the offense. Dr. Gutman determined that James has a passive aggressive or an addictive personality. In his opinion, James suffers from polysubstance dependence and abuse, as well as severe dysthymia, a chronic depressive disorder. James also has unresolved conflicts associated with being abandoned by his father.

Dr. Daniel E. Buffington, a clinical pharmacologist at the University of South Florida, testified for the defense about the effects of alcohol and drug addictions. He explained that if a person like James has an underlying psychological problem, LSD ingestion will most likely unmask it and allow it to come to the surface. The acute phase of affectation due to LSD ingestion is two to twelve hours after ingestion. Possible reactions to LSD include, among others: a psychotic adverse reaction which is accompanied by hallucinations; a psychodynamic/ psychedelic experience which results in a slow emergence of the subconscious idea or psychological condition; and a cognitive psychedelic reaction which overcomes an individual's ability to control himself.

Dr. Buffington opined that if James had drunk between twenty and thirty cans of beer between the hours of 6 and 11:30 p.m., he most likely had a blood alcohol level of more than three times the legal limit. If

James ingested ten "hits" of LSD, about 200 micrograms at a minimum--which is a heavy dose--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 a.m. The description of the crimes is consistent with the effects that the LSD and alcohol would have had on James. Dr. Buffington explained that such a large dose of LSD could have caused a physical or mental breakdown and a sudden release of aggressive action in someone like James, who suffers from a passive aggressive personality.

Dr. Buffington concluded that James was most probably under the influence of extreme mental or emotional disturbance due to his psychotic reaction and psychodynamic/psychedelic reaction to LSD. James further suffered from a decreased ability to control his behavioral pattern.

Betty and John Hoffpauir testified that they had known James for years. Once James made Betty Hoffpauir's grandson some golf clubs just out of kindness. James worked off and on with John Hoffpauir in his lawn business and would never take any money for helping him.

Betty Lee, who also testified on James' behalf, knew James through her daughter, who had lived next door to Betty Dick. When Betty Lee would visit her daughter, she often would see James playing with Toni and Wendi Neuner out in the front yard. James was also always willing to help Betty Lee's daughter whenever she called on him.

Anthony Mancuso is a volunteer with the Seminole County Correctional Facility and counsels inmates on religious matters. He testified that James is well-liked by the jail personnel as being a non-trouble maker. Once when Mancuso was ill, James wrote him a letter that Mancuso believes reflects James' spiritual growth while in custody. Mancuso explained that he has seen an incredible change in James since he entered the facility.

James also testified on his own behalf at the penalty phase. He was born in Pennsylvania in 1961. At the age

of ten, he learned that his biological father had left him when he was just a baby. He eventually went to live with his biological father in Indianapolis when he was fourteen. However, James' father turned out to be a drug dealer and introduced James to marijuana. James moved with his father to Massachusetts, but his father returned to Indianapolis without James two weeks after the move. James has never heard from his father since that time. James subsequently moved to Florida with his mother after she separated from her second husband. He started experimenting with drugs, including marijuana and PCP, and eventually dropped out of school. He did get his GED, however, and entered the army at age seventeen. He started using more drugs in the army and received a general discharge under honorable conditions. James then spent eighteen months hitchhiking around the country and ultimately had a son who was born in March of 1983. James went to San Francisco where he graduated from a computer learning center. One day, James received a phone call from his son's mother who threatened to kill his son unless James would take him. James returned to Florida and took custody of his son, Jesse. However, James soon realized he was not prepared to raise his son, and his drinking and drug usage increased. His drug abuse caused his relationship with his girlfriend to break up and he distanced himself from his son. From James' birthday on August 4, 1993, until the day of the offense on September 20, 1993, James was steadily intoxicated. James feels ashamed for what he did, especially because he loved Betty and her grandchildren and felt that they were like his own family. James explained that he does not believe his drug abuse excuses his conduct, but it does help to explain it. On the other hand, James also testified that he had never had an adverse reaction when he took LSD and always had good experiences. In addition, he did not remember taking LSD prior to the murders.

Following deliberations, the jury returned advisory penalty recommendations of death for each of the murder convictions. At the subsequent sentencing hearing held on August 18, 1995, the trial court confirmed the previous adjudications of guilt and sentenced James 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, James was sentenced to life in prison on the kidnapping charge, fifteen years on each count of the aggravated child abuse and attempted sexual battery, and five years on each count of grand theft--all to run concurrent with each other, but consecutive to the sentences on the capital sexual batteries.

The trial court followed the jury's recommendation and imposed a sentence of death for each of the first-degree murder convictions and filed a sentencing order in support of the death penalty. In aggravation, the trial court found that: (1) each murder was heinous, atrocious or cruel; (2) James was contemporaneously convicted of another violent felony; and (3) each murder was committed during the course of a felony. The trial court also considered sixteen mitigating circumstances applicable to this case, to include the statutory mitigator that James' ability to appreciate the criminality of his conduct or conform his conduct to the requirements of the law was substantially impaired due to drug and alcohol abuse; and that James was under the influence of moderate mental or emotional disturbance at the time of the offense. The trial court gave both of these mental mitigators "significant weight." The trial court attributed "some weight" to James' past acts of kindness and helpfulness to friends; and his genuine shame and remorse for his offenses. The trial court attributed "substantial weight" to James' full cooperation with authorities in confessing to the crimes and entering pleas of guilty to the offenses he remembered and "no contest" to those he "truly [did] not remember." Additionally, the trial court attributed "some weight" to James' good conduct while incarcerated. In that regard, the trial court finally noted in mitigation that James is capable of offering assistance to others while in custody and serving as an example to others about the negative consequences of illicit drug use.

James v. State, 695 So. 2d 1229, 1230-1233 (Fla. 1997).

James raised seven issues on direct appeal:

> (1) that the trial court erred in failing to grant James' motion for a mistrial based on the prosecutor's improper comments during closing argument;
>
> (2) the trial court erred in overruling James' objection to the standard jury instruction on the heinous, atrocious or cruel (HAC) aggravator on the ground that it is unconstitutionally vague;
>
> (3) the trial court erred in finding the HAC aggravator as to the murder of Toni Neuner;
>
> (4) the trial court erred in instructing the jury;
>
> (5) the trial court improperly rejected the statutory mitigator that the murders were committed while James was under the influence of extreme mental or emotional disturbance; and
>
> (6) James' death sentences are disproportionate and cruel and unusual punishment under the state and federal constitutions.

James v. State, 695 So. 2d 1229, 1233 (Fla. 1997).

This Court affirmed the convictions and sentences. *James v. State*, 695 So. 2d 1229 (Fla. 1997). James filed a petition for writ of certiorari in the United States Supreme Court. The petition was denied December 1, 1997. *James v. Florida*, 522 U.S. 1000, 118 S.Ct. 569, 139 L.Ed.2d 409 (1997).

The Office of Capital Collateral Review filed a "shell" motion to vacate on May 18, 1998 (PCR 28-54). The motion was amended on November 1, 2001 (PCR 261-300). On February 20, 2002, the State filed a response to the motion to vacate (PCR 322-339). The case management ("Huff") hearing was held

February 22, 2002. (PCR 340-41). An evidentiary hearing on Claims 4, 5, and 8 was set for June 19, 2002. (PCR 349). The hearing was continued on defense motion due to hospitalization of one of James's collateral counsel and the unavailability of a defense witness. (PCR 352-53). On September 16, 2002, James then filed a "third amended" motion to vacate.[1] (PCR 359-412). The State moved to strike the third motion, and portions of the motion were stricken. (PCR 447-53, 487-89). The evidentiary hearing was re-set for January 22, 2003, continued on defense motion, and re-set for June 11, 2003. (PCR 466-67).

On March 3, 2003, James filed a *pro se* Notice of Voluntary Dismissal. (PCR 473-74). The trial judge set a hearing on the motion. (PCR 492).

At the April 11, 2003, hearing, collateral counsel informed the court that James did not want to proceed, wanted to withdraw his 3.850 motion, and wanted to discharge counsel. (PCR 586).

The trial judge asked for a copy of *Durocher*[2] and *Faretta*.[3] The attorneys located the Florida rule dealing with *Faretta*, and the judge questioned James under oath regarding the role of a lawyer in his case (PCR 587-590), the rights he was giving up

[1] There was no "second" amended motion.
[2] *Durocher v. Singletary*, 623 So. 2d 482 (Fla. 1993).

[3] *Faretta v. California*, 422 U.S. 806 (1975).

(PCR 591), and the disadvantages of representing himself. (PCR 591-92). The trial judge then questioned James about his education, which revealed that James was 42 years of age, can read, write and speak English, obtained his GED, was not under the influence of drugs, had no mental illness, and was in good physical and mental health. (PCR 590-91).

James assured the trial judge that no one had influenced his decision to discharge counsel, and no one threatened him. (PCR 591). The trial judge advised James that if he represented himself in the motion to vacate, it would be very difficult. (PCR 591-92). James understood a hearing had been scheduled in June, and that collateral counsel was prepared for the hearing and had procured witnesses. (PCR 593). James then indicated he wanted to "most definitely" dismiss the motion to vacate. (PCR 593).

The trial judge noted on the record that he had the opportunity to observe James and discuss the matter with him. There was no indication of mental problems or that he was under the influence of any controlled substance. The trial judge found James alert and intelligent, capable of exercising his best judgment. The trial judge discharged counsel. (PCR 593-94). James then stated he was aware of what the witnesses would testify to and the content of their testimony. He had spoken

with collateral counsel about the evidence. (PCR 594). James stated he wanted to withdraw the motion to vacate, and the trial judge advised him of the time limits on both state and federal review. (PCR 595). James assured the trial judge he wanted everything to be over so the State "can go ahead and proceed in carrying out its sentence." (PCR 595). The trial judge allowed James to withdraw the motion to vacate, and James thanked the judge. (PCR 595).

On April 31, 2003, the trial judge entered an Order Allowing Defendant to Withdraw Third Amended Motion for Post Conviction Relief and Discharging Collateral Counsel. (PCR 493-95). The order stated James had thirty days to appeal the order. (PCR 495).

Two-and-a-half years later, on November 4, 2005, James sent a letter to Capital Collateral Regional Counsel ("CCRC") and Governor Bush, stating he wanted to "take up my appeals again." (PCR 505, 506).[4] On November 16, 2005, CCRC filed a motion to re-appoint counsel in order to resume collateral proceedings. (PCR 501-07).

The trial judge set a hearing and ordered both CCRC and the State to file memoranda of law on the issue. (PCR 498-500). The parties filed memoranda (PCR 508-516, 517-521), and the hearing

[4] Clemency counsel was appointed for James on October 26,

took place on January 12, 2006. (PCR 522).

On January 17, 2006, the trial judge entered an Order Denying Motion to Reappoint the Office of Capital Collateral Counsel, Middle Region, Pursuant to Fla. Stat.§27.7001, to Resume Collateral Legal Proceedings. (PCR 523-26).

On January 30, 2006, James wrote a letter to this Court requesting counsel be appointed to assist him in future proceedings. (PCR 577). On February 20, 2007, this Court held that the *pro se* letter would be treated as a notice of appeal of the denial of the motion to reappoint counsel and resume collateral proceedings. (PCR 576).

2005.

Time line of proceedings

December 1, 1997------Petition for writ of certiorari denied

May 18, 1998----------"Shell" motion to vacate filed

November 1, 2001------Amended motion to vacate filed

February 20, 2002-----State's response to motion to vacate

February 22, 2002-----"Huff" hearing

June 19, 2002---------Evidentiary hearing set(re-set for January 22, 2003, then, June 11, 2003)

September 16, 2002----"Third amended" motion to vacate

December 20, 2002-----State's Motion to Strike "Third Amended Motion"

February 6, 2003------Order Striking portions of Third Amended motion

March 3, 2003---------*Pro se* Notice of Voluntary Dismissal

April 11, 2003--------Hearing on *pro se* Notice of Voluntary Dismissal; Order allowing defendant to withdraw Third Amended motion

November 4, 2005------Defendant sent letter to CCRC requesting an appeal be filed on his behalf

November 16, 2005-----CCRC filed motion to re-appoint counsel; trial court ordered parties to file memoranda on the issue to re-appoint; set hearing

January 12, 2006------Hearing held on motions

January 17, 2006------Trial court entered an Order Denying Motion to Reappoint CCRC-Middle

January 30, 2006------Defendant wrote letter to FSC requesting counsel be appointed to assist him in future proceedings

SUMMARY OF ARGUMENT

CLAIMS I – VI: On March 3, 2003, the trial judge conducted a full hearing on the James' motion to discharge counsel and waive post-conviction proceedings. There has been no allegation James was not competent to waive post-conviction review or that the waiver was involuntary or unknowing. Two-and-a-half years later, in November 2005, James "changed his mind" and asked the trial judge to re-appoint counsel so he could re-file the post-conviction motion he withdrew in March 2003. The trial judge did not err in finding that the waiver proceedings were valid, post-conviction proceedings were time-barred, there was no claim of duress or undue influence which procured the waiver, and there was no claim of newly discovered evidence.

CLAIMS I-VI

WHETHER THE TRIAL JUDGE ERRED IN DENYING THE MOTION TO APPOINT COUNSEL FOR THE PURPOSE OF "RESUMING" POST-CONVICTION PROCEEDINGS WHICH HAD BEEN DISMISSED TWO-AND-ONE-HALF YEARS EARLIER AND ARE TIME-BARRED

The United States Supreme Court denied James' petition for writ of certiorari on December 1, 1997. *James v. Florida*, 522 U.S. 1000, 118 S.Ct. 569, 139 L.Ed.2d 409 (1997). James filed a "shell" motion to vacate on May 18, 1998 (PCR 28-54). The motion was amended on November 1, 2001 (PCR 261-300). On September 16, 2002, James then filed a "third amended" motion to vacate.[5] (PCR 359-412).

On March 3, 2003, James filed a *pro se* Notice of Voluntary Dismissal. (PCR 473-74). The trial judge set a hearing on the motion. (PCR 492). At the April 11, 2003, hearing, collateral counsel informed the court that James did not want to proceed, wanted to withdraw his 3.850 motion, and wanted to discharge counsel. (PCR 586).

The trial judge conducted a complete *Durocher/Faretta* hearing[6] and questioned James under oath regarding the role of a

[5] There was no "second" amended motion.

[6] Although the waiver hearing took place in March 2003, the trial judge followed the same directives this Court recently adopted in the amendments to Rule 3.851(i):

Dismissal of Postconviction Proceedings.

(1) This subdivision applies only when a prisoner seeks both to dismiss pending postconviction proceedings and to discharge collateral counsel.
(2) If the prisoner files the motion pro se, the Clerk of the Court shall serve copies of the motion on counsel of record for both the prisoner and the state. Counsel of record may file responses within ten days.

(3) The trial judge shall review the motion and the responses and schedule a hearing. The prisoner, collateral counsel, and the state shall be present at the hearing.

(4) The judge shall examine the prisoner at the hearing and shall hear argument of the prisoner, collateral counsel, and the state. No fewer than two or more than three qualified experts shall be appointed to examine the prisoner if the judge concludes that there are reasonable grounds to believe the prisoner is not mentally competent for purposes of this rule. The experts shall file reports with the court setting forth their findings. Thereafter, the court shall conduct an evidentiary hearing and enter an order setting forth findings of competency or incompetency.

(5) If the prisoner is found to be incompetent for purposes of this rule, the court shall deny the motion without prejudice.

(6) If the prisoner is found to be competent for purposes of this rule, the court shall conduct a complete (Durocher/Faretta) inquiry to determine whether the prisoner knowingly, freely and voluntarily wants to dismiss pending postconviction proceedings and discharge collateral counsel.

(7) If the court determines that the prisoner has made the decision to dismiss pending postconviction proceedings and discharge collateral counsel knowingly, freely and voluntarily, the court shall enter an order dismissing all pending postconviction proceedings and discharging collateral counsel. But if the court determines that the prisoner has not made

lawyer in his case (PCR 587-590); the rights he was giving up (PCR 591), and the disadvantages of representing himself. (PCR 591-92). The trial judge then questioned James about his education, which revealed that James was 42 years of age, can read, write and speak English, obtained his GED, was not under the influence of drugs, had no mental illness, and was in good physical and mental health. (PCR 590-91).

James assured the trial judge that no one had influenced his decision to discharge counsel, and no one threatened him. (PCR

> the decision to dismiss pending postconviction proceedings and discharge collateral counsel knowingly, freely and voluntarily, the court shall enter an order denying the motion without prejudice.
>
> (8) If the court grants the motion:
> (A) a copy of the motion, the order, and the transcript of the hearing or hearings conducted on the motion shall be forwarded to the Clerk of the Supreme Court of Florida within 30 days; and
> (B) discharged counsel shall, within 10 days after issuance of the order, file with the clerk of the circuit court 2 copies of a notice seeking review in the Supreme Court of Florida, and shall, within 20 days after the filing of the transcript, serve an initial brief. Both the prisoner and the state may serve responsive briefs. Briefs shall be served as prescribed by rule 9.210.
>
> (9) If the court denies the motion, the prisoner may seek review as prescribed by rule 9.142.

In re Amendments to Fla. Rules of Crim. Procedure 3.851, 945 So.2d 2d 1124, 1130 (Fla. 2006).

591). The trial judge advised James that if he represented himself in the motion to vacate, it would be very difficult. (PCR 591-92). James understood a hearing had been scheduled in June, and that collateral counsel was prepared for the hearing and had procured witnesses. (PCR 593). James then indicated he wanted to "most definitely" dismiss the motion to vacate. (PCR 593).

The trial judge noted on the record that he had the opportunity to observe James and discuss the matter with him. There was no indication of mental problems or was under the influence of any controlled substance. The trial judge found James alert and intelligent, capable of exercising his best judgment. The trial judge discharged counsel. (PCR 593-94). James then stated he was aware of what the witnesses would testify to and the content of their testimony. He had spoken with collateral counsel about the evidence. (PCR 594). James stated he wanted to withdraw the motion to vacate, and the trial judge advised him of the time limits on both state and federal review. (PCR 595). James assured the trial judge he wanted everything to be over so the State "can go ahead and proceed in carrying out its sentence." (PCR 595). The trial judge allowed James to withdraw the motion to vacate, and James thanked the

judge. (PCR 595).

On April 31, 2003, the trial judge entered an Order Allowing Defendant to Withdraw Third Amended Motion for Post Conviction Relief and Discharging Collateral Counsel. The order stated:

ORDER ALLOWING DEFENDANT TO WITHDRAW
THIRD AMENDED MOTION FOR POST CONVICTION RELIEF
AND
DISCHARGING COLLATERAL COUNSEL

> This action is taken by the court upon the "Notice of Voluntary Dismissal" filed herein by the defendant, pro se. Because the defendant is represented by the Capital Collateral Representative and because pro se notices are not authorized when counsel is representing a party, the court scheduled a hearing to determine whether the defendant actually wanted to discharge his counsel and withdraw his post conviction motion. *Shepard v. State,* 391 So.2d 346 (Fla. 5th DCA 1980); *Durocher v. Singletary,* 623 So.2d 482 (Fla. 1993).
>
> The court scheduled a hearing on the matter, transported the defendant to the Seminole County Jail and allowed him to consult with collateral counsel. The court then asked collateral counsel about the defendant's intentions and collateral counsel advised that the defendant wanted to discharge counsel and withdraw his motion. The court then conducted an extensive *Faretta* type inquiry of the defendant, under oath, to determine if the defendant understood the consequences of waiving collateral counsel and withdrawing his post conviction relief motion.
>
> The court is satisfied that the defendant is alert, intelligent, capable of exercising his best judgment and that he understands the consequences of discharging counsel and withdrawing his motion and that his decision to do so has been made after giving the matter the careful consideration such a decision

deserves. The court has had the opportunity to see and hear the defendant and is satisfied that he is competent to make the decision he has reached. Accordingly,

IT IS ADJUDGED:

1. Capital Collateral Counsel are withdrawn from representing the defendant.

2. The Third Amended Motion To Vacate Judgment And Sentence With Request For Leave To Amend is withdrawn.

3. The evidentiary hearing scheduled June 11, 12 and 13, 2003, on the defendant's postconviction relief motion is cancelled.

4. The defendant is notified that the time for filing for relief in the Federal District Court under the provisions 28 U.S.C.A. § 2263 is severely limited as follows:

> (a) Any application under this chapter for habeas corpus relief under section 2254 must be filed in the appropriate district court not later than 180 days after final State court affirmance of the conviction and sentence on direct review or the expiration of the time for seeking such review.
>
> (b) The time requirements established by subsection (a) shall be tolled--(1) from the date that a petition for certiorari is filed in the Supreme Court until the date of final disposition of the petition if a State prisoner files the petition to secure review by the Supreme Court of the affirmance of a capital sentence on direct review by the court of last resort of the State or other final State court decision on direct review;
>
> (2) from the date on which the first petition for post-conviction review or other collateral relief is filed until the final State court disposition of such petition; and (3) during an additional period not to

exceed 30 days, if—

> (A) a motion for an extension of time is filed in the Federal district court that would have jurisdiction over the case upon the filing of a habeas corpus application under section 2254; and
>
> (B) a showing of good cause is made for the failure to file the habeas corpus application within the time period established by this section.

5. The time for filing an appeal from this order is thirty days from the date hereof.

(PCR 493-95). (Emphasis supplied)

James did not appeal the order. Two-and-a-half years later, on November 4, 2005, James sent a letter to Capital Collateral Regional Counsel ("CCRC") and Governor Bush, stating he wanted to "take up my appeals again." (PCR 505, 506).[7] On November 16, 2005, CCRC filed a motion to re-appoint counsel in order to resume collateral proceedings. (PCR 501-07).

The trial judge set a hearing and ordered both CCRC and the State to file memoranda of law on the issue. (PCR 498-500). The parties filed memoranda (PCR 508-516, 517-521), and the hearing took place on January 12, 2006. (PCR 522).

On January 17, 2006, the trial judge entered an Order Denying Motion to Reappoint the Office of Capital Collateral

[7] Clemency counsel was appointed for James on October 26, 2005.

Counsel, Middle Region, Pursuant to Fla. Stat.§27.7001, to Resume Collateral Legal Proceedings, finding:

> An initial motion for post conviction relief was filed by collateral counsel on May 27, 1998. The motion was amended and some of the claims were stricken. An evidentiary hearing was scheduled on June 11, 2003. However, before the date the motion was scheduled for hearing, the defendant filed a pro se Notice of Voluntary Dismissal. The Court scheduled a hearing to determine if the defendant truly desired to abandon his post conviction claims and conducted a *Faretta* inquiry at the hearing. *Durocher v. Singletary,* 623 So.2d 483 (Fla. 1993). On April 21, 2003, the Court entered an order allowing the defendant to discharge collateral counsel and dismissed his post conviction claims.
>
> Now, the defendant has asked collateral counsel to file a Motion to Reappoint the Office of Capital Collateral Counsel, Middle Region, Pursuant to Fla. Stat. §27.700 1 to Resume Collateral Legal Proceedings. The motion recites the fact that the defendant withdrew his post conviction relief claims after a *Faretta* inquiry and **does not allege the procedure used, or the findings that resulted, were in anyway improper.** Instead, the motion alleges that capital collateral counsel received a letter from the defendant postmarked November 2, 2005, "advising that he has reconsidered his decision and wishes to resume his post conviction appeal."
>
> The Court entered an "Order Appointing Counsel for Limited Purpose, Setting Hearing, and Directing Filing of Memorandum" on November 16, 2005. **The purpose of the order was to require collateral counsel to disclose the legal theory relied upon to reinstate the dismissed post conviction relief proceedings. The memorandum does not disclose any such theory. The time for filing a post conviction relief motion has long passed. Counsel does not claim the defendant withdrew his post conviction motion under duress, undue influence, or any other equitable ground. Nor does counsel allege there is newly discovered evidence,**

such as DNA or a new witness. The defendant has simply changed his mind, and that is not grounds for relief.

The order allowing the defendant to dismiss his post conviction proceedings was entered before the case of *Alston v. State,* 894 So.2d 46 (Fla. 2004). This Court is aware that, in *Alston,* the Supreme Court of Florida expressed concern over the problems of review of these unusual cases.

Accordingly, being as unaware of how to proceed from here as Judge Bowden was in *Alston,* this Court shall forward to the Clerk of the Supreme Court of Florida copies of the following documents "for whatever action the justices deem appropriate":

1. Notice of Voluntary Dismissal, docket #428.

2. Order Setting Status Hearing on Defendant's Notice of Voluntary Dismissal and Order to Transport, docket #431.

3. Order Allowing Defendant to Withdraw Third Amended Motion for Post Conviction Relief and Discharging Collateral Counsel, docket #438.

4. Transcript of Faretta Hearing, docket #439.

5. Motion to Reappoint the Office of Capital Collateral Counsel, Middle Region, Pursuant to Fla. Stat. §27.7001 to Resume Collateral Legal Proceedings, docket #441.

6. Order Appointing Counsel for Limited Purpose, Setting Hearing, and Directing Filing of Memorandum, docket #442.

7. Memorandum of Law Directed by Order of November 16, 2005, docket #445.

8. State of Florida's Responsive Memorandum of Law Authorized by Order of November 16, 2005, docket #446.

9. Order Denying Motion to Reappoint the Office

> of Capital Collateral Counsel, Middle Region, Pursuant to Fla. Stat. §27.7001 to Resume Collateral Legal Proceedings dated January 17, 2006.
>
> The Motion to Reappoint the Office of Capital Collateral Counsel, Middle Region, Pursuant to Fla. Stat. §27.7001 to Resume Collateral Legal Proceedings is denied.

(PCR 523-526). (Emphasis supplied).

James filed a *pro se* letter with this court on January 30, 2006, which this court treated as a notice of appeal of the trial court's January 17, 2006, order.

James' post-conviction motion is time-barred. Rule 3.851(d) provides:

> (d) Time Limitation.
>
> (1) Any motion to vacate judgment of conviction and sentence of death shall be filed by the prisoner within 1 year after the judgment and sentence become final. For the purposes of this rule, a judgment is final:
>
> > (A) on the expiration of the time permitted to file in the United States Supreme Court a petition for writ of certiorari seeking review of the Supreme Court of Florida decision affirming a judgment and sentence of death (90 days after the opinion becomes final); or
> >
> > (B) on the disposition of the petition for writ of certiorari by the United States Supreme Court, if filed.
>
> (2) No motion shall be filed or considered pursuant to this rule if filed beyond the time limitation provided in subdivision (d)(1) unless it alleges:

(A) the facts on which the claim is predicated were unknown to the movant or the movant's attorney and could not have been ascertained by the exercise of due diligence, or

(B) the fundamental constitutional right asserted was not established within the period provided for in subdivision (d)(1) and has been held to apply retroactively, or

(C) postconviction counsel, through neglect, failed to file the motion.

(3) All petitions for extraordinary relief in which the Supreme Court of Florida has original jurisdiction, including petitions for writs of habeas corpus, shall be filed simultaneously with the initial brief filed on behalf of the death-sentenced prisoner in the appeal of the circuit court's order on the initial motion for postconviction relief filed under this rule.

(4) The time limitation in subdivision (d)(1) is established with the understanding that each death-sentenced prisoner will have counsel assigned and available to begin addressing the prisoner's postconviction issues within the time specified in this rule. Should the governor sign a death warrant before the expiration of the time limitation in subdivision (d)(1), the Supreme Court of Florida, on a defendant's request, will grant a stay of execution to allow any postconviction relief motions to proceed in a timely and orderly manner. Furthermore, this time limitation shall not preclude the right to amend or to supplement pending pleadings under these rules.

(5) An extension of time may be granted by the Supreme Court of Florida for the filing of postconviction pleadings if the prisoner's counsel makes a showing of good cause for counsel's inability to file the postconviction pleadings within the 1-year period established by this rule.

James' one year to file his Rule 3.851 motion began to run

on December 1, 1997, when certiorari review was denied. He filed a "shell" motion five and one-half months later on May 18, 1998, in an attempt to toll one-year time period. Assuming, a*rguendo*, that motion tolled the time and the amended motions continued to toll the time even though the third motion was partially stricken, James' time began to run again on March 3, 2003, when he dismissed his Rule 3.851 motions. Thus, assuming James could revoke his waiver and re-file an initial motion to vacate, the penultimate date to re-file a timely Rule 3.851 motion was September 16, 2003. James did not indicate any intent to revoke the waiver until he wrote to CCRC on November 4, 2005. CCRC filed the motion to re-appoint counsel on November 16, 2005, and the motion was denied January 17, 2006. The post-conviction motion was never re-filed.

The above time line shows that, construing the time periods most favorably to James, the request to re-file the Rule 3.851 motion was more than two years *past* the time allowed to file a Rule 3.851 motion. James does not fall within one of the exceptions to the time bar: new evidence, a retroactive constitutional right, or that counsel failed to file a timely Rule 3.851 motion for good cause. Counsel did, in fact, file several Rule 3.851 motions, but James voluntarily and knowingly

withdrew them after a full and fair hearing. This Court has consistently upheld time bars for claims that could or should have been raised timely. *Knight v. State,* 923 So.2d 387, 411 (Fla. 2005); *Stano v. State*, 708 So.2d 271, 275 (Fla. 1998), *Johnston v. State*, 708 So.2d 590, 593 (Fla. 1998).

Although James argues there is no authority prohibiting the trial court from allowing him to re-file his Rule 3.851 motions, the time limitations in Rule 3.851(d) clearly establish a one-year time limit preclude re-filing. The time frames for Rule 3.851 were "amended to bring finality to capital cases in a more expeditious manner. That individuals sentenced to death will not languish on death row." *Knight v. State,* 923 So. 2d 387, 414 (Fla. 2005*)*. These time frames have been challenged and those challenges have been rejected by this Court. *Vining v. State*, 827 So. 2d 201 (Fla. 2002). James' fails to explain why these time limitations do not apply to him.

One argument James advances to avoid the time-bar is that if he re-filed his post-conviction motion, it should be considered a successive motion and, since there was no ruling on the merits, are not time-barred. James cites to Rule 3.850(f) and *Wright v. State*, 741 So.2d 1146 (Fla. 2d DCA 1999), as authority. First, James' motions were dismissed, so there is

nothing to be "successive" to. Second, there was no ruling on the prior motion because James withdrew the motion and not because the court failed to rule on the merits. Third, *Wright's* motion for post-conviction relief was timely filed under Rule 3.850, and that case is inapposite.

The State also disagrees with James that this is a case of first impression. This court has already ruled in *Alston v. State*, 894 So.2d 46 (Fla. 2004), that when the trial judge conducts a proper *Durocher/Faretta* hearing and discharges counsel and dismisses the post-convictions motions, that order will be upheld. In *Alston*, this Court affirmed the trial court order finding Alston competent to proceed in his post-conviction proceedings and in finding Alston knowingly waived his rights to post-conviction counsel and proceedings. James is in a different posture than *Alston* because Alston had written a *pro se* letter within thirty days of the trial court order discharging counsel and waiving post-conviction proceedings. In the present case, James did not request review of the trial court order discharging counsel and dismissing post-conviction motions. What James has now "appealed" is the order denying the re-appointment of counsel and the re-filing of motions. Furthermore, one of the issues in *Alston* was competency to waive representation of

counsel and withdraw post-conviction pleadings. Competency was never an issue in James's case, and the trial judge even made findings on that issue in his order allowing James to withdraw post-conviction motions. The trial judge specifically noted that James was alert, intelligent, and capable of exercising his best judgment. (PCR 494).

Judge Eaton's order discharging counsel and dismissing post-conviction motions was never appealed and the jurisdictional time limits have expired to appeal that order. Even if that order could be reviewed at this point, Judge Eaton followed the *Durocher* and *Faretta* procedures. There was no question of James' competency, and there has been no allegation his April 2003 waivers were not voluntarily, intelligently, or knowingly entered. As Judge Eaton found in his November 2005 order, James "simply changed his mind." (PCR 525). As Judge Eaton also found, there were no grounds on which James relied to withdraw his previous requests. (PCR 525).

Insofar as further discussion is warranted, the State will address James' other arguments. James cites *Pike v. Tennessee*, 164 S.W.3d 257, 267 (2005), as authority he should be allowed to withdraw his waivers. In *Pike*, the Tennessee Supreme Court held that (1) a competent death-sentenced inmate may waive post-

conviction review, and (2) the inmate may revoke her waiver within 30 days. This hardly helps James. It supports this Court's decision in *Alston* that a competent death-sentenced inmate may waive post-conviction review. In fact, Tennessee has enacted a Court Rule delineating procedures trial courts should follow when a death-sentenced inmate seeks to withdraw a post-conviction petition. *Pike*, 164 S.W.2d at 260, n.3. In other words, it is perfectly allowable, as long as procedures are followed. This Court established those procedures in *Durocher* and *Faretta*, and Judge Eaton closely followed them. The *Pike* case actually hurts James because it allowed a revocation of a waiver within 30 days, the same time allowed in Florida to appeal. James did *not* ask to revoke the waiver within 30 days, even though the trial court's April 2003 order clearly stated he had 30 days to appeal the order. (PCR 495).

Further, *Pike* discusses the fact that, like Florida, there is automatic review of a death sentence, and post-conviction procedures are not constitutionally required. Although the Tennessee and Florida legislatures have provided death-sentenced inmates "an opportunity to seek post-conviction relief, the legislature has not mandated post-conviction review." *Pike*, 164 S.W.2d at 262. *Pike* also cites to United States Supreme Court

cases which recognize the right of a competent death-sentenced inmate to waive further appellate review. *Pike*, 164 S.W.2d at 263, citing *Demosthenes v. Baal,* 495 U.S. 731, 735 (1990); *Whitmore v. Arkansas*, 495 U.S. 149, 165 (1990); *Gilmore v. Utah*, 429 U.S. 1012, 1016 (1976). The Court in *Pike* noted that only New Jersey mandates post-conviction review over the objection of an inmate, and that such a rule is not mandated by United States Supreme Court precedent. *Id*. at 264. Although James argues that public policy requires litigation of James' post-conviction claims, that position is clearly not supported by the case law. *Id*. at 265, citing numerous jurisdiction, including *Sanchez-Velasco v. Sec'y of Dept. of Corr.,* 287 F.3d 1015, 1033 (11th Cir. 2002), and *Durocher v. Singletary*, 623 So.2d 482, 483 (Fla. 1993).

James cites *Commonwealth v. Saranchak*, 810 A.2d 1197 (Pa. 2002), as authority. Similar to *Pike*, Saranchak discharged the Defender Association as counsel and waived post-conviction review. The Defender Association timely appealed to the Pennsylvania Supreme Court, which dismissed the appeal for lack of standing. Two weeks later, Saranchak applied for reconsideration of the dismissal, stating he did want to be represented by the Defender Association, and asked to retract

his waivers. The Pennsylvania Supreme Court stated that "in this unique situation, we will not invoke standing principles on account of the Defender Association's involvement as the ostensible, initial appellant to defeat the present effort to obtain merits review." *Saranchek*, 810 A.2d at 1200. The *Saranchek* distinguished that case from *Commonwealth v. Fahy*, 700 A.2d 1256 (1997), and "effectively limited [the case] to its facts." *Id.*

As in *Pike*, Saranchek timely pursued an appeal of his waiver. Although in *Saranchek* there was a hiccup when the court dismissed the case for lack of standing of the Defender Association, the court rescinded that dismissal when Saranchek timely appealed that decision. James obviously knows how to write to this Court to request review of a lower court order, as he did in order to obtain the present appeal. James did *not* appeal the March 2003 order, and there was no activity on his case for two-and-one-half years. James' case is closer factually to *Fahy*, the case distinguished in *Saranchek.*

In *Fahy*, the defendant waived collateral proceedings. The trial court conducted a colloquy "lasting more than an hour during which appellant clearly and unambiguously stated that he wished to waive his right to all further appeals." *Fahy,* 700

A.2d at 1259. The Pennsylvania Supreme Court held that the waiver was valid, noting that there was no expert testimony that Fahy was not competent to waive collateral review and that there was nothing in the record to indicate the defendant did not knowingly and voluntarily waive his rights. This is precisely what the trial court held in this case: that James voluntarily waived his rights, that there are no grounds to justify withdrawing the waiver, and that the Rule 3.851 motion is time barred.

Last, James cites to the Victor Farr case. In *Farr*, this Court noted that a defendants have a "right to control their own destinies" when facing the death penalty. *Farr*, 656 So.2d at 450. This Court affirmed the death sentence even though no PSI was ordered. *Farr* dealt with the scenario in which a defendant requests the death penalty and sabotages the defense case in mitigation. *Farr* is not dispositive in James' case since it involves a different situation; however, in *Farr* this Court does recognize a defendant's right to waive rights, a finding that cuts against James' argument. Although James cites to proceedings in Farr which are pending in Circuit Court, those proceedings were not made a part of this record on appeal nor are there cites to published opinions. As such, the State has

no response to those allegations.

James voluntarily waived post-conviction review and his Rule 3.851 motions were dismissed after a full and fair hearing. The trial judge did not abuse his discretion in denying the motion to withdraw that waiver where there were absolutely no grounds alleged to justify withdrawal of the previously-entered waivers or excuse the time bar. The trial judge conducted the appropriate *Durocher/Faretta* hearing and made the appropriate determinations. The fact that, as the trial judge observes, James "has simply changed his mind," does not mean he should be allowed to manipulate the judicial system or "place the trial courts in a position to be whipsawed by defendants." *See Wheeler v. State*, 839 So.2d 770, 774 (Fla. 4th DCA 2003), citing *Meeks v. Craven*, 482 F.2d 465, 467 (9th Cir. 1973). *See also Waterhouse v. State*, 596 So.2d 1008, 1011 (Fla. 1992) (A defendant may not manipulate the proceedings by willy-nilly leaping back and forth between the choices [of self-representation and appointed counsel]).

This court should affirm the trial court order denying James the privilege of re-filing a time-barred motion. In *Corcoran v. Indiana*, 827 N.E.2d 542 (Ind. 2005), the court ruled that untimely petitions for post-conviction relief would not be

entertained, even though the petitioner is sentenced to death. The Indiana Supreme Court addressed the constitutional claims raised and noted that there is no federal or state constitutional authority to require special treatment for death-sentenced defendants. James' conviction and sentence were reviewed by this Court on direct appeal and by the United States Supreme Court on certiorari review. The conviction and sentence are final. James voluntarily withdrew his post-conviction motions. This Court should affirm the trial court's denial of James' request to re-file the motions two-and-one-half years later.

CONCLUSION

Based on the foregoing arguments and authorities, Appellee respectfully requests this Honorable Court affirm the trial court order and deny all relief.

Respectfully submitted,

BILL McCOLLUM
Attorney General

_____
BARBARA C. DAVIS
Florida Bar No. 0410519
Assistant Attorney General
Office of the Attorney General
Daytona Beach, FL 32118
(386) 238-4990
Fax - (386) 226-0457

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing was furnished by U.S. mail to Carol C. Rodriguez, CCRC - Middle, 3801 Corporex Park Dr., Suite 210, Tampa, Florida 33619, this _____ day of May, 2007.

_____
Assistant Attorney General

CERTIFICATE OF FONT

I hereby certify that a true and correct copy of the foregoing Answer Brief was generated in Courier New, 12 point font, pursuant to Fla. R. App. 9.210.

_____

Assistant Attorney General