

IN THE CIRCUIT COURT OF THE
FIFTH JUDICIAL CIRCUIT, IN
AND FOR CITRUS COUNTY, FLORIDA

CASE NO. 2005 CF 298

THE STATE OF FLORIDA,

Plaintiff,

vs.

JOHN EVANDER COUEY,

Defendant.

CITRUS COUNTY
BETTY STRICKLAND
FILED
2007 AUG 24 P 2:56

SENTENCING ORDER

On March 7, 2007, John Evander Couey was tried by a twelve person jury in Miami-Dade County, Florida this, after a defense change of venue motion was granted. He was convicted of the First Degree Murder of Jessica Marie Lunsford, Burglary of a Dwelling with Battery, the Kidnapping of Jessica Marie Lunsford, and Sexual Battery, Upon a Person Under Twelve Years of Age. These crimes took place between February 23, 2005, and March 7, 2005 in Citrus County, Florida.

The penalty phase of the trial for John Evander Couey, was commenced on March 12, 2007. Both the State and the Defense presented additional testimony, evidence and arguments with respect to the applicable aggravating and mitigating circumstances, in accordance with §921.141, Fla. Stat. (2006).

On March 14, 2007, the jury, by a vote of 10 to 2, returned an advisory verdict for the imposition of the death penalty. Post-jury trial proceedings were held in Inverness, Citrus County, Florida. On July 17, 2007 this court conducted a *Spencer* hearing, pursuant to *Spencer v. State*, 615 So. 2d 688 (Fla. 1993). The court also received sentencing memoranda from the State and Defense.

The trial court's responsibilities in preparing a sentencing order on a death penalty case are four-fold: 1) Analyze; that is to conduct a thoughtful and comprehensive analysis of the evidence, 2) Weigh; to assign to each mitigator that has been established, the appropriate weight, 3) Compare; to weigh the aggravating circumstances against the mitigating ones, and 4) Express; to set forth in the court's own hand and words the analysis, findings, weight assigned and comparison.

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The court has set forth below its individualized consideration of the aggravating and mitigating circumstances presented by the State and the Defendant, to determine the appropriate sentence pursuant to §921.141, Fla. Stat. (2006).

In weighing the aggravating circumstances against the mitigating circumstances, this court is well aware that the process is not one of a quantitative nature, i.e., it is not simply a counting process. Instead, this Court must look to, and weigh, the nature of each aggravating circumstance and of each mitigating circumstance to determine the appropriate sentence for John Evander Couey.

The court's determination is based upon all of the evidence presented during the guilt and penalty phases before the jury, as well as the proffer and arguments at the *Spencer* hearing.

FACTUAL BACKGROUND

Mark Lunsford lived with his nine year old daughter, Jessica Marie Lunsford and his parents, Archie and Ruth Lunsford, at their home in Homosassa, Citrus County, Florida. On February 24, 2005, Mark Lunsford returned home at approximately 5:45 a.m. He heard the alarm clock ringing in his daughter's bedroom. After showering, Mark could still hear the ringing of the alarm and went into his daughter's room to check on her. He found that his daughter was not in her bed or her room. He also noticed that a purple stuffed dolphin, which he had won for Jessica at the Florida State Fair the week before, was also missing. According to his mother, Ruth Lunsford, the purple dolphin was her favorite toy.

He asked his mother, who also lived in the trailer, if Jessica was with her. She was not; Ruth called 911. Deputy Juan Santiago of the Citrus County Sheriff's Office was one of the first deputies to respond to the Lunsford's residence around 6:20 a.m. to investigate a "missing person's" call. Once the deputy secured the residence, he looked for Jessica two or three times inside of the trailer.

Later that day, other law_enforcement_agencies, including aviation and canine units from Marion County, Sumter County and Hernando County Sheriff's Offices, Florida Department of Law Enforcement (FDLE), Florida Wildlife Commission (FWC) as well as civilian volunteers, on foot and horseback, joined in a concerted and wide-ranging effort to find Jessica.

Subsequent investigation at the scene of the burglary revealed the point of entry to be through the rear screen door, of the Lunsford trailer which bore an "L" shaped cut of six inches by six inches (6"x 6").

The Defendant John Evander Couey, lived with his sister Dorothy Dixon, in her trailer which was near the Lunsford's home. The two trailers were approximately sixty-five (65) yards apart and were within sight of one another. Residing in the trailer with the

Defendant were Ms. Dixon and her boyfriend, Matt Dittrich, her daughter, Madie Secord, Maddie's estranged husband, Gene Secord and her two year old son, Joshua.

They were awakened by the police activity which surrounded the neighborhood. Ms. Dixon testified that all the occupants spent the morning looking outside the window watching the police scour the area. The Defendant also came out of his room, which was the middle bedroom, and looked on with the rest of them. He then returned to his room. On the days that followed the frantic search for Jessica, the Defendant remained primarily in his room.

When the rest of the occupants of Ms. Dixon's trailer took a short trip to Orlando, the Defendant remained behind. A few weeks later, long after the Defendant had abandoned the trailer, law enforcement officers arrived and asked Ms. Dixon for permission to check the house. Consent was given. Ms. Dixon admitted that on the night of Jessica's disappearance she had smoked crack cocaine with her boyfriend and watched T.V. in their bedroom, which remained on all night. Ms. Dixon testified that it was a \$20 rock of cocaine and small for the price. Ms. Secord testified that on February 24, 2005 she had briefly stepped outside, and while she stood on the steps of her trailer, someone from the Sheriff's Office asked her if she had seen a missing girl from the neighborhood. She said she had not, but that the law enforcement officers could look around the trailer in the yard.

Ms. Secord further testified that on March 4, 2005, a few days after the search had begun, her uncle, the Defendant, asked her to buy him a bus ticket to Savannah, Georgia. He told her to buy the ticket for him because he did not have a Florida identification card. Ms. Dixon gave the Defendant \$200 for the ticket. Ms. Secord bought the ticket for him and he left for Georgia. He was tracked to Georgia, arrested, and returned to Florida.

Following further investigation, on March 14, 2005, at approximately 6:00 p.m., Detective Dave Canaday of the Citrus County Sheriff's Office returned to Ms. Dixon's property. While at her home, he asked Ms. Dixon for permission to search her trailer. She consented to the search; thereupon Det. Canaday took several photographs of the trailer's interior, including the middle room which, as previously referenced, was the Defendant's bedroom. Ms. Dixon testified that nobody had been in that room since the Defendant left for Georgia.

Det. Canaday took close-up photographs in the middle bedroom of some green pillows and a mattress that remained behind. There appeared to be blood stains on both the pillows and mattress. The detective secured these items as well as other objects found in this room. They were then sent them to the Florida Department of Law Enforcement ("FDLE") crime lab in Tampa.

On March 18, 2005, Detective Cannaday, Detective Holder, and other investigators from The Citrus County Sheriff's Office along with Dr. Steve Cogswell, of the Medical Examiner's Office went to Ms. Dixon's address where they discovered Jessica Marie Lunsford's remains. Her body was found in a hole, dug directly adjacent to

the rear steps of Ms. Dixon's trailer. This area of Citrus County is generally rural and wooded. The displaced soil had been raked over with oak leaves.

It took five (5) hours, for the detectives to dig a "sister grave" next to the hole containing her body, and to recover her remains. The "sister grave technique" is a method of recovery used by forensic detectives to accurately measure the location and depth of a buried body. They located her body. She appeared to be covered in plastic bags. Jessica's body was actually enclosed inside of two (2) black plastic trash bags. The bags were tied on opposite ends. The inner-most bag enclosing Jessica's body was tied in a knot over her head. The outer-most bag, enclosing and surrounding both she and the inner bag, was tied at her feet. Jessica's body was found in a seated position with her knees up. Her hands were secured with speaker wire wound around her wrists. The stuffed, purple dolphin, found missing from her room along with her on February 24, 2005, was tucked in her arms.

The victim, Jessica, had managed to poke through the inner-most trash bag with her right index and middle finger. Further examination by Dr. Cogswell, revealed that Jessica had been sexually abused just prior to her death and, that she was alive when placed in the two plastic bags. Further; according to the medical examiner, Jessica had suffocated to death sometime between the end of February and the beginning of March, 2005.

Madie's husband, Gene Secord testified that he had been in the Citrus County Jail for a period of time after the Defendant's return to Florida. Mr. Secord asked him why he had done such a thing and the Defendant responded that that "it was in the past and he had to forget about it", and, "if his sister would have loved him more he wouldn't have done this".

Jessica's death, in the doctor's opinion, took anywhere from one to eight minutes (1-8). At trial, witnesses were called who testified that the Defendant described in detail how he had murdered Jessica. The Defendant had the child step into the first bag, before he knotted it over her head; he then over-wrapped her from head to feet with the second bag. Further forensic examination by Dr. Cogswell revealed the cause of death to be asphyxiation.

Further examination by the doctor of the child's body area revealed a vaginal hemorrhage at the 6 o'clock position. No other injuries were noted. He testified that this injury was caused by an object that was too large to stretch the child's vagina; thereby causing tearing and a fair amount of bleeding.

The doctor found that there were only red blood cells on the injury site; but no white blood cells were found. The doctor testified that the absence of white blood cells; which are produced in the human body to begin the healing process, indicated to him that death was within hours of the injury. The two holes found in the inner bag were caused by the child's futile attempt to dig her way out of the grave with her fingers. All of the foregoing indicated a smothering which resulted in death by asphyxiation.

Later, during the penalty phase of the trial, Dr. Cogswell opined the following: that based upon the double sealing of the garbage bags with knots, at opposing ends, the oxygen and carbon dioxide exchange rate increased thereby causing more labored breathing on the part of the suffering victim. Jessica would be expected to have lost consciousness first. He testified; that at a minimum, she would have lost consciousness no less then one and a half (1-1/2) minutes and that it may have been as long as two and one-half (2-1/2) minutes. The total time, from placement in the hole until death, could have been from one to eight (1-8) minutes.

Det. Brian Spiddle was part of the recovery team at the Dixon trailer. He measured the depth of Jessica's body, from the top of the ground down to her body as, one foot (12 inches).

Steven Stark, a senior crime scene lab analyst from the Tampa Regional FDLE office was also asked to come up and help with the investigation. Mr. Stark found a glass table top that was taken into evidence. Additionally, pillows, and clothes from the Defendant's middle room closet, and speaker wire were seized. Mr. Stark testified that the wire appeared to be a makeshift antennae and that it ran from inside of the Defendant's room, up to the roof of the trailer, through his bedroom window.

Mr. Stark also collected fingerprints from the interior of Defendant's closet and he processed stains that appeared to be blood inside that closet. Later, he determined that Jessica's left thumb fingerprint and the Defendant's right index and left index fingerprints were both found in a Domino's pizza box, located in the Defendant's room. Jessica's fingerprints were also found in the interior of the Defendant's closet. The interior area of the closet, wherein Jessica was confined, was just over nine (9) square feet.

Ms. Roshalle Gatemann, a forensic DNA specialist working for FDLE, testified that Jessica's DNA and the Defendant's DNA were found as a "mixture of DNA" on the mattress found inside of the Defendant's room. The Defendant's semen was also found on this mattress. In addition, Jessica's DNA profile, her blood, and the Defendant's DNA profile, his semen, were also found in stains contained in one of the green pillows.

The previously referenced speaker wire; seized by Mr. Stark, was later examined by Jerry Cirino from FDLE. He was qualified as an expert witness in the field of Fracture Match Analysis. He testified that the speaker wire, which was found binding Jessica's wrists, matched the wire that was recovered from the Defendant's middle bedroom.

While incarcerated at the Citrus County Jail, the Defendant admitted to two Corrections Officers, Officers John Read and Nathalia Windham, that he committed the crime and described the manner of Jessica's abduction and murder.

Beginning with Officer Read; the Defendant said that he first noticed Jessica playing in a yard and thought that she was five or six (5 or 6) years old. The Defendant

later observed Jessica playing outside her house. On impulse, the Defendant said that he entered her home on the night in question. He said he went to Jessica's house to burglarize it. The Defendant said that he went into Jessica's room and awakened her. He told her that he would take her to see her father and, he permitted Jessica to take her stuffed, dolphin with her. The Defendant then took her over to the trailer where he kept her for three days. The Defendant also admitted to Officer Read that he had "intercourse" with Jessica. Officer Read testified that the Defendant made crude, vulgar and repulsive comments about his sexual experience with a nine year old child. The Defendant also admitted that he hid Jessica in the closet when the police started looking around and, that he panicked when law enforcement brought the canine units around the trailer.

During the guilt phase of the trial, Officer Read was asked by the prosecutor if the Defendant ever explained why he decided to kill Jessica. Read testified that the Defendant told him "that he could not bring himself to directly kill her either by -- by his own hands, but that he panicked when the police came by with dogs and they were sniffing around".

He then dug the hole and told Jessica that he would take her back to her house, but that he did not want anyone to see them so she should climb into a plastic bag. He knotted the bag over her head and then wrapped a second plastic bag over her knotting it at the bottom, opposite the first knot and he buried her alive with her purple dolphin. The Defendant told the officer that Jessica was alive when he put her in the hole.

Officer Windham then testified that the Defendant told her that, he first saw Jessica playing in the yard. He entered the Lunsford trailer through the screen door. He took Jessica out of her bedroom and let her take the stuffed purple dolphin with her. He told the officer he kept Jessica for three days and that he had sex with her. The Defendant repeated and expanded on the crude and vulgar description of sex with the child. He said the plastic bag was used so no one would see her.

Det. Holder was recalled to the stand to relate further comments that the defendant made to him. The Defendant complained that the media was blowing this out of proportion, stating that "this kind of thing happens everyday". The Defendant told Det. Holder that he didn't know why he did it and that he wished he could take it back. The Defendant also said that drugs made him do it. He also said that this wouldn't have happened if his sister had paid him more attention.

Corrections Officer Slanker testified that many months earlier, the Defendant complained that he didn't mean to kill Jessica. Officer Slanker quoted the Defendant as stating: "My biggest regret is that I've lost everything."

AGGRAVATING CIRCUMSTANCES

The prosecution presented evidence and argued the existence of six (6) statutory circumstances to both the jury and this court: (1) the Defendant was previously convicted of a felony involving the use of violence; (2) the murder occurred during the commission of a felony; (3) the victim was a child under the age of 12; (4) the murder was committed to avoid arrest; (5) the murder was cold, calculated and premeditated; (6) the murder was especially heinous, atrocious and cruel. The jury and the court did not consider any other aggravating factors.

1. §921.141 (5) (b), Fla. Stat.- The Defendant was previously convicted of a felony involving the use of violence.

The court finds that this aggravating factor was not proven beyond a reasonable doubt. The State introduced a certified copy of the judgments of burglary with a battery in the instant case. The burglary of a dwelling with a battery does not constitute a previous felony conviction. It is a contemporaneous conviction. The battery was on Jessica Lunsford, the murder victim. *Wasko v. State*, 505 So. 2d 1314 (Fla. 1987).

In the State's Sentencing Memorandum, the State concedes that the court should not find this aggravator.

The court finds that this aggravator has not been established.

2. §921.141(5) (d), Fla. Stat.- The death occurred during the commission of a felony.

The Defendant unlawfully entered the dwelling of Archie and Ruth Lunsford, with the intent to commit an offense therein, and after making entry he then committed a battery on Jessica Lunsford by removing her from her bed and thereafter kidnapped Jessica Lunsford. Thereafter, the Defendant John Evander Couey did, being a person over the age of eighteen (18) committed a sexual battery on Jessica Lunsford, a person under the age of twelve (12). He then buried alive, causing her death. All three of the foregoing offenses are statutorily enumerated felonies.

The court finds that the State has proven this aggravator, §921.141 (5) (d), Fla. Stat., beyond a reasonable doubt and the court has given this aggravator great weight.

3. § 921.141 (5) (l), Fla. Stat.- The Victim of the Capital Felony was a child under the age of 12.

The State presented evidence that the victim, Jessica Lunsford, was under the age of 12. Jessica was nine years old, she was attending Homosassa Elementary School; she had not yet completed the third grade when she was kidnapped, sexually battered and

murdered.

The Defendant, in his sentencing memorandum, concedes that the State proved this aggravator.

The court finds that the State has proven this aggravator, §921.141 (5) (l), Fla. Stat.(2007), beyond a reasonable doubt and the court gives this aggravator great weight.

4. §921.141 (5) (e), Fla. Stat. - The murder was committed to avoid or prevent a lawful arrest.

The State presented evidence that the Defendant committed the murder to avoid or prevent a lawful arrest. Two correction officers testified that the Defendant admitted to them that he became increasingly scared when law enforcement officers continued investigating Jessica's disappearance; particularly when they starting coming around the trailer with a canine unit. By the Defendant's own statement, he related to the officers how he panicked, and after three days of having Jessica in captivity, he lied to her, telling her how he was going to take her back to her father. He told Jessica to get into a garbage bag so he could bring her back to her father without being detected. Instead, he buried her alive, causing her death by suffocation.

A few days later, the Defendant asked his niece to buy him a bus ticket with the money given to him by Ms. Dixon, because he had no identification card, this, so he could leave the state of Florida, as the search for Jessica continued and intensified.

If the victim is not a law enforcement officer there must exist "clear proof" that the dominant motive, or only motive for the murder was the elimination of witnesses. *Riley v. State*, 366 So.2d 19, 22 (Fla.1978). However this factor may be proved by circumstantial evidence from which the motive for the murder may be inferred, without direct evidence of the offender's thought process. *Preston v. State*, 607 So.2d 404, 409 (Fla. 1992).

There is no other motive for the Defendant to have killed the victim in this case. There was no financial gain, she posed no threat to the defendant, other than that as a witness to his other crimes against her, and there is no evidence of ill-will or hatred toward her.

By concealing her remains, by burial, he was attempting to gain the advantage of both time, and distance, by fleeing to Georgia. The only purpose served by killing the child was to prevent her discovery by the police and her reporting his crimes against her.

The court finds that the State has proven this aggravator, §921.141(5) (e), Fla. Stat., beyond a reasonable doubt and the court gives this aggravator great weight.

(5) §921.141 (5) (i), Fla. Stat.- The murder was committed in a cold, calculated and premeditated (CCP) manner without any pretense of moral or legal justification.

The State proved this aggravator beyond a reasonable doubt. The Defendant had observed Jessica playing outside of her house. On the night in question, he went to Jessica's home to burglarize it; and entered her room. He found her in her bed, and told her that he would take her to see her father. The Defendant then took her to the trailer, where he reported to the correctional officers, that he kept her for three days. He admitted to having "intercourse" with her. He said that he hidden her in his closet when the police started looking around the neighborhood. Defendant was scared when law enforcement officers brought the canine unit to the areas surrounding the trailer. He then dug a hole in which to bury Jessica. He told Jessica that he would take her back to her house but, that he did not want anyone to see them so she should climb into a plastic bag. Then, he tied a second plastic bag around her, tying it at the bottom; opposite the first knot. He buried her alive with her purple dolphin in the hole that he had previously dug.

The kidnapping and the murder were planned. The Defendant successfully hid Jessica in the trailer without Defendant's family detecting her presence. He dug the hole while law enforcement was searching for Jessica, as he did not want to get caught with her. He dug this hole to a depth in excess of the twelve (12) inches of soil found to be covering her body. He avoided detection in his labors. He obtained the necessary garbage bags. He convinced her to step into the first bag. He secured her fate with a second bag. He put Jessica in the garbage bags so that no one would see him with her. The Defendant put Jessica in the hole and then filled the grave with dirt.

The court specifically finds that this aggravator is proven beyond a reasonable doubt. The Defendant, by his unique thought processes described above, planned a purposeful murder. He secured the victim, kept her secreted from detection, obtained the implements for her disposal: such as the bags, shovel and rake, he choose the burial location, he choose the burial time, and he dug the hole. This demonstrates a dedicated and purposeful thought process. This was a determined, albeit savage, manner of a planned murder with absolutely no pretense of any moral or legal justification.

Doubling is a concept in Death Penalty litigation wherein the same facts could support more than one aggravator. Improper doubling is an area of Death Penalty litigation that is fraught with problems. To avoid this becoming a problem later on; sentencing judges must expressly analyze, and differentiate those facts which might lead to doubling and make separate factual assessments.

The pivotal moment that separates, CCP, considerations referenced above, from those discussed later in this order, in §921.141 (5) (h) Heinous, Atrocious, and Cruel, (HAC), is founded in the trial testimony of Officer Read. **The defendant told him that he could not bring himself to kill Jessica with his own hands. This fact, standing alone, demonstrates the cold, calculated, and premeditated intent of the Defendant.** He, John Evander Couey, had already made a conscious, informed, and reflective

decision to kill Jessica. The only thing to be decided was the manner of her murder.

This court, by delineating and separating the Defendant's plan for the murder; apart from its actual implementation, is factually finding that there are sufficient, independent facts to support CCP alone.

The planning and preparation undertaken by the Defendant, can be seen, and is found by this court to be separate and distinct from the actual commission of Jessica's murder.

The court finds that the State has proven this aggravator, §921.141 (5) (i), Fla. Stat., beyond a reasonable doubt and gives this aggravator great weight.

(6) §921.141(5)(h), Fla. Stat.- The capital felony was especially Heinous, Atrocious or Cruel (HAC).

The court finds that this aggravating factor was proven beyond a reasonable doubt. **The method of Jessica's murder, chosen and performed by the Defendant John Evander Couey, more than qualifies as especially heinous, atrocious and cruel. The cause of death in the instant case was suffocation. He caused a slow, suffering, conscious death. Jessica was placed in not one, but two plastic trash bags. She was conscious at the time of her entombment.** The Defendant told Officer Read that she was alive when he put her in the hole. She was alive when he began to shovel the dirt over her body. His actions crushed the very breath and life out of Jessica Marie Lunsford.

Dr. Cogswell, the medical examiner, testified that Jessica could have been alive for as long as five (5) minutes or even more, depending on how quickly she used up the oxygen. His testimony described the scientific fact that oxygen and carbon dioxide exchange in the lungs. When the oxygen supply is cut off, the increased levels of carbon dioxide causes breathing to become more difficult. The brain sends signals to the muscles to increase the breathing process. The child's lungs would have been increasingly laboring to expel the rising carbon dioxide level and to inhale oxygen. That became impossible as the Defendant was covering her body in a foot of soil.

With each shovel full of dirt, the weight increased to the point that she could neither inhale nor exhale; she could merely wait to die. She suffered a smothering, asphyxiating death. The medical examiner testified that she would have lost consciousness first, and then she would have died. **Jessica futilely poked two of her fingers through the inner bag, indicating that she was trying to dig her way out of what became her grave.** The facts established by the testimony of the doctor and proved beyond a reasonable doubt are that she likely lost consciousness no earlier than one- and one- half minutes after placement in the hole and could have taken as many as eight minutes to die.

Her last thoughts as she felt the soil enveloping her body, clutching her favorite

stuffed toy, with her wrists securely wired by the Defendant, can never be fathomed. Simply stated; civilized society recoils in horror at the image of the abject fear, and terror, that Jessica experienced in her final conscious minutes of life. Her only source of comfort during this horrific experience was her purple dolphin.

The Florida Supreme Court has held that asphyxiation, when perpetuated upon a conscious victim, involves foreknowledge of death, extreme anxiety, and fear, and that this method of killing is one to which the factor of HAC is applicable. See *Rutherford v. State*, 545 So. 2d 853, 865 (Fla. 1989).

The method of killing in the instant case, burying a conscious child alive, as well as the evidence of her fear, emotional strain, and physical distress and she struggled to breathe, establishes HAC beyond a reasonable doubt.

This court specifically finds that this aggravator is not doubled with any other one. For, it is in the method of her murder, separate and apart from the planning that, even standing alone, would and does support this aggravator.

HAC is among the weightiest factors in Florida's sentencing calculus. *Sireci v. State*, 825 So.2d 882, 887 (Fla. 2002).

The court finds that the State has proven this aggravator §921.141 (5) (h), Fla. Stat., and gives this aggravating factor great weight.

MITIGATING CIRCUMSTANCES

The Defendant, in his Sentencing Memorandum had argued that there are two (2) statutory mitigating factors proven at trial. The first being that the crime for which the Defendant is to be sentenced was committed while he was under the influence of extreme mental or emotional disturbance; §921.141.(7) (b), Fla. Stat., and; secondly, that the capacity of the defendant to appreciate the criminality of his conduct and to conform his conduct to the requirements of law was substantially impaired §921.141.(7) (e), Fla. Stat.

The Defendant further argued, in his Sentencing Memorandum, that there are twenty-one (21), non-statutory mitigators.

This Court is bound by the requirements founded in the landmark case of *Campbell vs. State*, 571 So. 2d 415 (Fla. 1990), which mandates that a sentencing court must expressly evaluate in its written order each mitigating circumstance; both statutory and non-statutory, proposed by the defendant to determine whether it is supported by the evidence and whether, in the case of non-statutory factors, it is truly of a mitigating nature. This review and independent consideration must address each proposed mitigator separately.

In his Memorandum in Support of Life, the Defendant advanced another statutory

mitigator that was absent from his final Sentencing Memorandum. Specifically, the Defendant argued that he had no significant history of prior criminal activity §921.141 (7) (a), Fla. Stat., This court feels that since it has been raised, it must be addressed per *Campbell, supra*.

Between the Memorandum in Support of Life and the Sentencing Memorandum, the Defendant has raised the following statutory and non-statutory mitigators:

- 1) no significant history of prior criminal conduct
- 2) extreme emotional or mental disturbance
- 3) inability to appreciate the criminality of his conduct
- 4) (a) that the Defendant has been a nonviolent prisoner;
(b) that the Defendant was born prematurely to a mother who was 16;
(c) that he suffered from a birth defect in that the size and shape of his ears were irregular;
(d) that his mother gave him to different family members to be raised;
(e) that his father was an abusive alcoholic;
(f) that he has a history of substance abuse;
(g) that he behaved appropriately in court. All of these circumstances are addressed below.

1. §921.141 (7) (a), Fla. Stat. - No Significant Criminal History.

There is no record evidence presented that the defendant has any prior criminal history.

The court gives this mitigator little weight.

2. §921.141 (7) (b), Fla. Stat. - Extreme Emotional or Mental Disturbance.

The defense called several experts to testify that he suffered from a subaverage IQ and that he suffers from brain damage. Dr. Richard Carpenter testified that he is a licensed psychologist. He was contacted by Dr. Berland in early February to assist with the administration of an IQ test. Dr. Carpenter gave Defendant the Wexler Adult Intelligence Survey 3 (WAIS-3). Defendant scored a 68 on the verbal portion, a 65 on the performance portion, and had a combined full scale score of 64. This score of 64 falls into the mental retardation range.

Dr. Wu, a medical doctor who specializes in brain imaging, testified that Defendant has an asymmetry in his right temporal lobe. The front side is less active than the left side of the brain. According to Dr. Wu, this indicates an abnormal nervous system, which is consistent with Defendant's auditory hallucinations and history of head injuries and consistent with Defendant's WAIS-3 subtest results. According to Dr. Wu, Defendant's brain has problems regulating impulses, which is consistent with pedophilia.

Dr. Berland testified that he administered the Minnesota Multiphastic Personality

Inventory (MMPI). He testified that he can detect mental illness through the MMPI that he can't find by other means. On the 1995 MMPI, Defendant had an elevated L scale, which indicated delusional paranoid thinking. It also indicated he had some character problems, such as anti-social personality disorder. In the 2005 MMPI, Defendant also had a high L scale. His F scale, which indicates chronic mental illness, was elevated. Defendant suffers from hallucinations. Dr. Berland opined that the statutory mitigator of extreme mental or emotional disorder was established.

The State presented evidence to contradict Defendant's experts. The State called a radiologist who testified that the scan does not indicate brain damage. Former co-workers testified as to the Defendant's abilities. He exhibited adaptive functioning while employed and was a good worker.

This court recognizes that the statutory mitigating circumstance of extreme mental or emotional disturbance does not require evidence of insanity or lack of legal responsibility. *Francis v. State*, 808 So.2d 1140 (Fla. 2002). This circumstance is established if there is evidence of a mental or emotional condition that interfered with, but did not obviate the Defendant's knowledge of right and wrong. *Ponticelli v. State*, 593 So.2d 483 (Fla. 1991).

This court finds that the Defendant is not mentally retarded. This court held an *Atkins* hearing, *Atkins v. Virginia*, 536 U.S. 304 (2002), and entered an order making detailed and specific factual findings based on the witnesses testimony. This court found that the Defendant's I.Q. score is 78.

The Defendant does not suffer from brain damage. He does have a personality disorder with antisocial features and does suffer from paranoia, and has a history of substance abuse. The court also finds the greater weight of the evidence reflects that the Defendant's condition did not rise to the level of extreme mental or emotional disturbance at the time of the crime. The Defendant's thinking was not disturbed, as he was fully aware of his actions.

He saw the victim playing in her yard and planned the burglary. In the darkness of the night he broke into Lunsford family trailer; stealthily, he located Jessica's bedroom and kidnapped her, and hid her in the closet for days. When he became fearful of being caught by the police, he dug a hole, he then convinced Jessica that he was going to take her to her father and told her to get into the garbage bags. He then buried her alive and had his niece buy him a bus ticket and he fled.

While the court finds that the greater weight of the evidence herein does not establish this statutory mitigating factor, the court, however, will give this factor very slight weight.

3. §921.141(7)(e), Fla. Stat. - The capacity of the Defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was substantially impaired.

Defendant contends that due to his brain damage he did not have the capacity to appreciate the criminality of his conduct or to conform his conduct to the requirement of the law. This mitigator is substantially related to the mental disturbance mitigator. Both are based on the claim that Defendant suffers from a mental defect. As such, this court reincorporates its above findings. Further, the trial testimony revealed the Defendant, after murdering Jessica, had the forethought to have a family member obtain a bus ticket for him; as he was unable to legally obtain one for himself, since he had identification.

The court finds that the greater weight of the evidence herein does not establish this statutory mitigating factor.

4. §921.141 (7) (h), Fla. Stat. - The existence of any other factors in the Defendant's background that would mitigate against imposition of the death penalty.

4(a). Defendant has been a non violent prisoner and poses no threat of harm to staff or inmates if given a life sentence.

Defendant has not committed any violent acts during pretrial incarceration in the instant case.

The court gives this moderate weight.

4(b). Defendant was born prematurely to a mother who was 16.

Defendant presented evidence that he was born shortly after his father pushed his mother out of a moving car; this while she was pregnant with the Defendant. Additionally, his mother did not know how to care for him properly. A family member related that his mother would not cradle his head and permitted it to flop around, and further she would feed him sugar-water instead of formula.

The court finds this to be of very minimal weight.

4(c). Defendant was born with a birth defect.

Defendant presented evidence that he was born with a birth defect in that his ears were misshapen. There was testimony from a family member that, while still a young child living with his aunt, that she arranged for him to have corrective surgery.

The court finds this mitigator to be of very minimal weight.

4(d). Defendant was given to various family members to be cared for and was abandoned by his mother. This claim is also raised in the Defendant's Sentencing Memorandum as, (f) and (l).

Defendant lived with various relatives through a high percentage of his youth. His mother was unable to care for him.

The court finds this mitigator has been established and is given moderate weight.

4(e). Defendant's father was an abusive alcoholic.

As stated above, in section (4)(b), the only evidence was from family members claiming that the father pushed the then pregnant mother out of a moving car. There was no corroboration of the event.

The court gives this mitigator very minimal weight.

4(f). History of drug abuse.

There was testimony that Defendant had a history of drug abuse, or substance abuse. He sniffed glue as a child. Defendant huffed gasoline when he was between 8 and 10. He used methamphetamines, and amphetamines. He started drinking at age 16 or 17. His sister testified that the day of the kidnapping they were smoking crack cocaine together. Defendant had been using crack cocaine, with family members, in the days before and leading up to the crime.

The court finds that the mitigating circumstance of history of substance abuse has been established, but gives it very little weight.

4(g). Defendant behaved appropriately during trial.

The Defendant's behavior in court was appropriate. The Court observed the interaction of the Defendant with both his attorneys as well as the Court security officials. He appeared interested, and involved with the proceedings.

The court gives this circumstance very minimal weight.

4(h). Defendant suffers from a learning disability. A similar claim is also raised in the Defendant's Sentencing memorandum as, (d).

There was testimony that the Defendant was slow to learn things and repeated several grades in school. He had been assigned to special, remedial classes.

The court gives this very minimal weight.

4(i). The Defendant was physically, mentally, and emotionally abused as a child.

In the Defendant's Sentencing Memorandum of August 9, 2007 these three (3) claims; physical, mental, and emotional abuse, as well as a related claim, (p), are raised in separate sentences: (g), (h), and (i).

There was testimony from the Defendant's aunt, Sammy Harris that the Defendant was physically abused by his mother's boyfriend, Bobby Lindsay. He was afraid of Mr. Lindsay. He was picked on in school because of his floppy ears. His mother had given him up to be raised by other family members.

The court gives this moderate weight.

4(j). The Defendant had a speech impediment as a child.

There was testimony the Defendant did not speak clearly as a child, and stuttered. While he lived with his Aunt, she worked with him and there was some improvement.

The court gives this very minimal weight.

4(k). The Defendant cooperated with law enforcement and led law enforcement to the victim's location.

This is also, raised in the Defendant's Memorandum as, (r).

The Defendant initially fled the State of Florida. Only after he'd been apprehended in Georgia; where he, at first, denied any involvement in Jessica's disappearance, did he later make inculpatory statements; which ultimately led to the recovery of her body.

The court gives this very little weight.

4(l). The Defendant sought treatment as a mentally disordered sex offender while in the Department of Corrections in 1991 and it was never provided. This claim is also raised in the Defendant's Sentencing Memorandum as, (m).

There was testimony by a family member that the Defendant did request to be put in a treatment program. Unfortunately, he did not receive treatment.

The court gives this moderate weight.

4(m). The Defendant adapts well to a controlled environment and has been a

well behaved inmate while his case has been pending. This claim is also raised in the Defendant's Sentencing Memorandum as, (u).

There have been no complaints, either in the courtroom or from any jail wherein the Defendant, has been housed that he was not well-behaved. He does well in a controlled environment.

The court gives this very little weight.

4 (n). The Defendant suffers from mental illness.

Prior to the Spencer hearing this court conducted an Atkins hearing. The various mental health professionals were examined and cross-examined by the attorneys. The Defendant may have certain intellectual limitations but he is neither mentally retarded nor does he suffer from any mental illness.

The court gives this very little weight.

CONCLUSION

Pursuant to Florida law, the weighing of the aggravating and mitigating factors requires a careful consideration and analysis of their relative nature and quality. This is not a simple numerical comparison. This court finds that the five (5) aggravating circumstances herein, which have been proven beyond a reasonable doubt, vastly outweigh the mitigating circumstances.

Accordingly, it is hereby

ORDERED AND ADJUDGED As to Count I of the Indictment and for the Murder of Jessica Marie Lunsford, this court sentences you, John Evander Couey, to Death. It is further

ORDERED AND ADJUDGED As to Count II of the Indictment, Burglary of a Dwelling with Battery, this court sentences you, John Evander Couey, to Life consecutive to the sentence in Count I. It is further

ORDERED AND ADJUDGED As to count III of the Indictment, Kidnapping, this court sentences you, John Evander Couey to Life consecutive to Count I and Count II. It is further

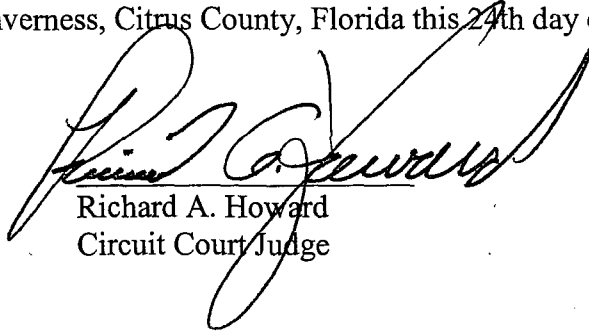
ORDERED AND ADJUDGED As to count IV of the Indictment, Sexual Battery Upon a Person Under the Age of Twelve, this court sentences you, John Evander Couey Life consecutive to Counts I, II, and III. It is further

ORDERED AND ADJUDGED, that you, John Evander Couey, be taken by the proper

authority to the Florida State Prison, and there be kept under proper confinement until the date your execution is set.

You are hereby notified that this sentence is subject to automatic review by the Florida Supreme Court.

DONE AND ORDERED in Inverness, Citrus County, Florida this 24th day of August, 2007.



Richard A. Howard
Circuit Court Judge

Copies furnished to:

- ✓ Richard Ridgway, Asst. State Attorney
- ✓ Peter Magrino, Asst. State Attorney
- ✓ Daniel Lewan, Asst. Public Defender
- ✓ Alan Fanter, Asst. Public Defender
- ✓ John Evander Couey, Defendant