

No. _____

IN THE SUPREME COURT OF THE UNITED STATES

JAMES BARNES
PETITIONER

VS.

SECRETARY,
FLORIDA DEPARTMENT OF CORRECTIONS

AND

ATTORNEY GENERAL,
STATE OF FLORIDA

RESPONDENTS.

ON PETITION OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
ELEVENTH CIRCUIT

APPENDIX TO THE PETITION FOR A WRIT OF CERTIORARI

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APPENDIX A

888 F.3d 1148
United States Court of Appeals, Eleventh Circuit.

James BARNES, Petitioner–Appellant,
v.
SECRETARY, DEPARTMENT OF
CORRECTIONS, Attorney General, State of
Florida, Respondents–Appellees.

No. 16-11530
|
(April 25, 2018)

Synopsis

Background: Following affirmance on direct appeal of the petitioner’s state-court convictions for first-degree murder, sexual battery, and arson, and his death sentence, 29 So.3d 1010, he filed pro se petition for writ of habeas corpus. The United States District Court for the Middle District of Florida, No. 6:13–cv–01698–KBD–DAB, Roy B. Dalton, Jr., J., 2016 WL 472631, denied the petition. Certificate of appealability was granted and petitioner appealed.

Holdings: The Court of Appeals, Julie Carnes, Circuit Judge, held that:

[1] state court determination that trial court did not violate petitioner’s right of self-representation by appointed special court counsel was not contrary to clearly established federal law, as would support habeas relief, and

[2] state court determination was not unreasonable application of clearly established federal law.

Affirmed.

Martin, Circuit Judge, filed concurring opinion.

West Headnotes (10)

- [1] **Criminal Law**
☛Waiver of right to counsel

When a defendant asserts his Sixth Amendment right to self-representation, the trial court must conduct an inquiry to ensure that the defendant’s decision to represent himself is voluntary, and that it is made intelligently and with awareness of the dangers and disadvantages of self-representation. U.S. Const. Amend. 6.

Cases that cite this headnote

- [2] **Habeas Corpus**
☛Scope and Standards of Review
Habeas Corpus
☛Review de novo

The Court of Appeals reviews the district court’s denial of a habeas claim that petitioner’s Sixth Amendment right of self-representation was violated de novo, applying the standards set forth in the Anti–Terrorism and Effective Death Penalty Act (AEDPA). U.S. Const. Amend. 6; 28 U.S.C.A. § 2254(d).

1 Cases that cite this headnote

- [3] **Courts**
☛Dicta
Habeas Corpus
☛Federal Review of State or Territorial Cases
Habeas Corpus
☛Federal or constitutional questions

For purposes of habeas review under the Anti–Terrorism and Effective Death Penalty Act (AEDPA), clearly established federal law includes only the holdings of the United States Supreme Court decisions, not Supreme Court dicta and not the opinions of other courts. 28 U.S.C.A. § 2254(d).

Cases that cite this headnote

[4] **Habeas Corpus**

☞Federal or constitutional questions

A federal court may grant habeas relief under the contrary to clause of the Anti-Terrorism and Effective Death Penalty Act (AEDPA) only if the state court applied a rule different from the governing law set forth in United States Supreme Court precedent or decided a case differently than the Supreme Court has done on a set of materially indistinguishable facts. 28 U.S.C.A. § 2254(d).

1 Cases that cite this headnote

[5] **Habeas Corpus**

☞Federal Review of State or Territorial Cases

A federal court may grant habeas relief under the unreasonable application clause of the Anti-Terrorism and Effective Death Penalty Act (AEDPA) if the state court correctly identified the governing legal principle from United States Supreme Court precedent but unreasonably applied it to the facts of the particular case; however, a state court's decision must be objectively unreasonable, not merely wrong in order to warrant relief under the unreasonable application clause. 28 U.S.C.A. § 2254(d).

2 Cases that cite this headnote

[6] **Habeas Corpus**

☞Federal Review of State or Territorial Cases

Even clear error does not meet the objectively unreasonable standard for habeas relief under the unreasonable application clause of the Anti-Terrorism and Effective Death Penalty Act (AEDPA); rather, the state court's ruling must be so lacking in justification that there was an error well understood and comprehended in existing law beyond any possibility for fairminded disagreement. 28 U.S.C.A. § 2254(d).

Cases that cite this headnote

[7] **Criminal Law**

☞In general; right to appear pro se

The Sixth Amendment right to self-representation is not absolute. U.S. Const. Amend. 6.

Cases that cite this headnote

[8] **Habeas Corpus**

☞Inquiry, advice, warnings, and assistance; waiver

Habeas Corpus

☞Death sentence

Florida Supreme Court's determination that trial court did not violate petitioner's Sixth Amendment right to represent himself by appointing special court counsel to investigate and present mitigation evidence in penalty phase of capital murder trial over petitioner's objection was not contrary to clearly established federal law, supporting denial of habeas relief; the Florida Court correctly identified *Faretta* as the controlling United States Supreme Court precedent, and accurately characterized the protections for the Sixth Amendment right of self-representation set forth in that case. U.S. Const. Amend. 6; 28 U.S.C.A. § 2254(d).

Cases that cite this headnote

[9] **Criminal Law**

☞Extent of participation by counsel

The appointment of standby counsel over defendant's objection violates the defendant's Sixth Amendment right of self-representation when the unsolicited participation of standby counsel (1) patently interferes with the pro se defendant's right to be heard or to present his own case, (2) resolves a disagreement between counsel and the pro se defendant in counsel's

favor when the defendant's choice would normally govern, or (3) destroys the jury's perception that the defendant is representing himself. U.S. Const. Amend. 6.

Cases that cite this headnote

[10]

Habeas Corpus

☛ Inquiry, advice, warnings, and assistance; waiver

Habeas Corpus

☛ Death sentence

Florida Supreme Court's determination that trial court did not violate petitioner's Sixth Amendment right to represent himself by appointing special court counsel to investigate and present mitigation evidence in penalty phase of capital murder trial over petitioner's objection was not unreasonable application of clearly established federal law, supporting denial of habeas relief; petitioner was allowed to address court freely on his own behalf throughout the criminal proceeding, he filed and argued motions, made objections, argued points of law, and questioned a witness who testified during special counsel's mitigation presentation, he was permitted to present his own theory of mitigation, which resulted in finding of non-statutory mitigator that petitioner had confessed and taken responsibility for crimes, special counsel's mitigation evidence did not conflict with petitioner's mitigation theory, special counsel's presentation was made only to judge, not jury, it occurred only after petitioner refused to present any mitigation evidence, and special counsel's presentation benefited petitioner, as it resulted in finding of additional mitigators. U.S. Const. Amend. 6; 28 U.S.C.A. § 2254(d).

Cases that cite this headnote

***1150** Appeal from the United States District Court for the Middle District of Florida, D.C. Docket No. 6:13-cv-01698-KBD-DAB

Attorneys and Law Firms

Ali A. Shakoor, Capital Collateral Regional Counsel, Temple Terrace, FL, for Petitioner–Appellant.

James Barnes, Pro Se.

Timothy A. Freeland, Attorney General's Office, Criminal Division, Tampa, FL, James Donald Riecks, Vivian Ann Singleton, Attorney General's Office, Daytona Beach, FL, for Respondents–Appellees.

Before WILLIAM PRYOR, MARTIN, and JULIE CARNES, Circuit Judges.

Opinion

JULIE CARNES, Circuit Judge:

Petitioner James Barnes, a Florida death row prisoner, appeals the district court's denial of his 28 U.S.C. § 2254 petition for writ of habeas corpus. The district court granted a certificate of appealability ("COA") as to its ruling that the state trial court's appointment of special counsel to present mitigation evidence did not violate Petitioner's Sixth Amendment right to ***1151** self-representation as recognized by the Supreme Court in *Faretta v. California*, 422 U.S. 806, 95 S.Ct. 2525, 45 L.Ed.2d 562 (1975). After review and with the benefit of oral argument, we conclude that federal habeas relief is not warranted on Petitioner's *Faretta* claim. Accordingly, we **AFFIRM**.

BACKGROUND

I. Petitioner's Crime

In 2005, while serving a life sentence for the strangulation murder of his wife, Petitioner confessed to the 1988 rape and murder of Patricia Miller. *See Barnes v. State*, 29 So.3d 1010, 1013 (Fla. 2010).¹ As recounted in his confession, Petitioner entered Ms. Miller's condominium on the night of the murder, took off all his clothes, and armed himself with a knife from the kitchen. *See id.* at 1015. After surreptitiously watching Ms. Miller for a short period of time, Petitioner confronted her and forced her at knife-point to the bedroom, where he sexually

assaulted her. *See id.* He then bound her hands and feet, sexually assaulted her again, and tried to strangle her to death with a belt. *See id.* When the strangulation attempt was unsuccessful, Petitioner killed Ms. Miller by hitting her in the head with a hammer he had found in her bedroom. *See id.* Petitioner then set fire to the bed where Ms. Miller's body lay to destroy any evidence left there before fleeing the scene. *See Barnes*, 29 So.3d at 1015.

Firefighters discovered Ms. Miller's body while responding to a fire alarm at the condominium complex. *See id.* The medical examiner autopsied the body and noted signs of attempted strangulation, but ultimately determined that Ms. Miller had died from multiple hammer strikes to her head. *See id.* Although Petitioner had attempted to destroy any evidence of the crime by setting the fire, semen was recovered from Ms. Miller and preserved for DNA testing. *See id.* Within a week of the murder, the police questioned Petitioner as a potential suspect, but he denied any involvement. *See id.* Petitioner provided a sample of his blood for DNA comparison, but the DNA testing method available in 1988 was inadequate to produce a match due to the small amount of semen that had been collected, and the case remained unsolved. *See Barnes*, 29 So.3d at 1016.

In 1998, while Petitioner was incarcerated for his wife's murder, the semen collected from Ms. Miller was retested with advanced techniques and produced a positive match to Petitioner. *See id.* Before charges were filed against him, Petitioner wrote to an assistant state attorney requesting an interview concerning the Miller case. *See id.* During the interview, Petitioner admitted to the rape and murder of Ms. Miller. *See id.* He described with accuracy Ms. Miller's physical appearance and the interior of her condominium, and he provided details of the murder, rape, and arson that were consistent with the forensic evidence that was gathered by the police. *See id.*

II. Trial and Sentencing

^[1]Petitioner was charged with murder, burglary, sexual battery by use of a deadly weapon, and arson, and the State indicated that it intended to seek the death penalty on the murder charge. *See Barnes*, 29 So.3d at 1013, 1016. At his initial appearance, Petitioner waived his right to counsel and moved to proceed *pro se*. *See id.* at 1016. The trial court conducted a hearing pursuant to ***1152** *Faretta v. California*, 422 U.S. 806, 95 S.Ct. 2525, 45 L.Ed.2d 562 (1975)² and found Petitioner competent to represent himself, but appointed standby counsel. *See id.* at 1013–14, 1016–17.

Petitioner pled guilty to all of the charges against him and waived his right to an advisory sentencing jury. *See id.* at 1014. In preparation for the penalty phase hearing, the trial judge ordered a presentence investigation report (“PSR”) to be prepared. *See id.* In addition, the judge ordered Petitioner's school records and appointed Dr. William Riebsame, a forensic psychologist, to evaluate Petitioner. *See Barnes*, 29 So.3d at 1014.

During the penalty phase proceedings, the State presented the following evidence in support of various aggravators: (1) testimony of detective Dennis Nichols that when he entered Ms. Miller's apartment he found the charred remains of her nude body on the bed, with her hands tied behind her back with shoelaces, (2) testimony of Assistant State Attorney Michael Hunt that Petitioner had written him a letter stating that a fellow inmate had persuaded him, as a converted Muslim, to confess to Ms. Miller's unsolved murder during Ramadan, (3) a videotaped interview of Petitioner describing Ms. Miller's murder, (4) testimony of the medical examiner that Ms. Miller died from blunt-force trauma following multiple blows to her head consistent with being beaten with a hammer, (5) Petitioner's confession explaining that he struck the back of Ms. Miller's head several times with the metal end of a hammer, then struck her fractured skull with the wooden end of the hammer to conceal the identity of the murder weapon, (6) forensic evidence showing that Petitioner attempted to strangle Ms. Miller prior to killing her with a hammer, and that he set her body on fire after her death, (7) DNA evidence matching semen found in Ms. Miller's body to Petitioner, and (8) an impact statement from the victim's sister stating that Ms. Miller was a nurse who loved to backpack, ride horses, hike with her dog, ski, canoe, and bird watch, and who was generous and active with the Salvation Army domestic abuse program in her community. *See id.* at 1018–19.

At the conclusion of the State's penalty phase presentation, Petitioner announced that he did not plan to present any mitigation evidence. *See id.* at 1019. Petitioner explained that, as mitigation, he would rely solely on the fact that he confessed and took responsibility for the murder. *See id.* The trial judge inquired whether Petitioner wanted appointed counsel to develop mitigation evidence, but Petitioner declined. *See id.* The judge then asked standby counsel, who had appeared at the hearing, what steps he would take to develop mitigation evidence if he was representing Petitioner. *See Barnes*, 29 So.3d at 1019. Standby counsel replied that he would gather all of Petitioner's school, medical, and mental health records, and that he would interview anyone he could locate who had ever had

substantial contact with Petitioner. *See id.* Following this colloquy, the judge continued the penalty phase proceedings and appointed special counsel to investigate any available mitigation evidence. *See id.* Petitioner objected to the appointment, reiterating that his strategy was to facilitate a final resolution of the *1153 case by confessing and taking responsibility for Ms. Miller's murder. *See id.*

The trial judge reconvened the penalty phase proceedings several months later, and again offered to appoint counsel for Petitioner. *See id.* When Petitioner declined the offer, the judge conducted a second *Faretta* inquiry and concluded that Petitioner had made a voluntary, knowing, and intelligent decision to represent himself. *See Barnes*, 29 So.3d at 1019. After the *Faretta* inquiry, special counsel presented the mitigation evidence he had discovered during his investigation. *See id.* The evidence primarily came from Dr. Riebsame, who testified that Petitioner had suffered from behavioral and emotional problems since he was young, that he had an antisocial personality disorder, and that he was under the emotional or mental disturbance of cocaine dependency at the time of the offense. *See id.* at 1020. Dr. Riebsame arrived at these conclusions by reviewing the available documentary and forensic evidence and by consulting a report prepared by a mitigation expert who had interviewed Petitioner's family members.³ *See id.* at 1019–20. Petitioner cross-examined Dr. Riebsame, but he did not offer any witnesses or other evidence and he advised the trial court that he would not submit a sentencing memorandum. *See id.*

Based on the evidence presented during the penalty phase proceedings, the trial court found six aggravators, each of which the court determined was entitled to great weight: (1) Petitioner committed the murder while under sentence of imprisonment, (2) he previously was convicted of another capital felony or felony involving the use or threat of violence, (3) he committed the murder while engaged in the commission of a sexual battery and burglary, (4) he committed the murder for the purpose of avoiding lawful arrest, (5) the murder was especially heinous, atrocious, or cruel, and (6) the murder was cold, calculated, and premeditated. *See Barnes*, 29 So.3d at 1014, n.3. The court found one statutory and nine non-statutory mitigators, each of which it determined was entitled to little or slight weight: (1) Petitioner was under the influence of an extreme mental or emotional disturbance when he committed the crime (statutory and non-statutory), (2) he came forward and revealed his involvement in the unsolved crime, (3) he took responsibility for his acts, (4) he has experienced prolonged drug use, (5) he did not have the benefit of a

loving relationship with his mother or father, (6) he was sexually abused as a child, (7) he has taken steps to improve himself, and (8) he is a functional and capable person who demonstrated by his participation in the case that he can contribute to society. *See id.* at n.4, 5. The court concluded that each aggravator, standing alone, outweighed all of the mitigating factors combined. *See id.* at 1014. It sentenced Petitioner to death for the murder, to life for the burglary and sexual battery, and to thirty years for the arson. *See id.*

III. Direct Appeal and State Post-Conviction Proceedings

The Florida Supreme Court affirmed Petitioner's convictions and sentences on direct appeal. *See id.* at 1013. Among other claims asserted in support of his direct appeal, Petitioner argued that the trial court had violated his Sixth Amendment *1154 right to self-representation, as recognized by the United States Supreme Court in *Faretta*, by appointing special counsel to investigate and present mitigation evidence during the penalty phase of his trial. *See Barnes*, 29 So.3d at 1022. The Florida Supreme Court considered and rejected Petitioner's Sixth Amendment self-representation claim on the merits. *See id.* at 1022–26. The United States Supreme Court denied certiorari. *Barnes v. Florida*, 562 U.S. 901, 131 S.Ct. 234, 178 L.Ed.2d 155 (2010).

Petitioner filed a motion for post-conviction relief pursuant to Rule 3.851 of the Florida Rules of Criminal Procedure. *See Barnes v. State*, 124 So.3d 904 (Fla. 2013). The state court denied the motion. *See id.* at 907. Its decision was affirmed by the Florida Supreme Court. *See id.*

IV. Petitioner's Federal Habeas Petition and Appeal

Petitioner subsequently filed a petition for habeas corpus in federal court pursuant to 28 U.S.C. § 2254, asserting four grounds for relief: (1) a claim that his Sixth Amendment right to self-representation was violated by the trial court's appointment of special counsel to investigate and present mitigation evidence during the penalty phase of his trial, (2) a Confrontation Clause claim arising from the trial court's allegedly erroneous admission of hearsay evidence, (3) an ineffective assistance of counsel claim based on standby counsel's failure to request a competency hearing prior to the entry

of Petitioner's guilty plea, and (4) a claim that Petitioner may be incompetent by the time of his execution, such that his execution would violate the Eighth Amendment. The district court denied all of Petitioner's claims. The court declined to issue a certificate of appealability ("COA") as to Petitioner's Confrontation Clause, ineffective assistance, and competency claims, but it granted a COA as to the Sixth Amendment self-representation issue.

Petitioner appealed the denial of his § 2254 petition, and Capital Collateral Regional Counsel ("CCRC") attorney Ali Shakoor filed a motion in this Court to expand the COA to include Petitioner's Confrontation Clause and competency claims. Petitioner responded with a *pro se* motion to discharge Shakoor as his counsel, as well as a motion to dismiss Shakoor's motion to expand the COA. In his motion to discharge Shakoor, Petitioner did not ask the Court to appoint alternate counsel. Instead, Petitioner indicated that he was specifically electing to proceed *pro se* in this habeas appeal.

Citing record evidence establishing that Petitioner was competent to represent himself, and noting that federal litigants have a statutory right to pursue their claims *pro se* pursuant to 28 U.S.C. § 1654, we granted Petitioner's motion to discharge Shakoor as his counsel. In our order granting the motion, we stated that Petitioner would "henceforth be responsible for representing himself in this habeas appeal." Nevertheless, we continued Shakoor's appointment to serve as standby counsel. We further advised Shakoor that, in his capacity as standby counsel, he would be served all pleadings in the case and should be ready to respond or resume his representation of Petitioner as directed by the Court.

In accordance with Petitioner's decision to proceed *pro se*, we denied the motion Shakoor had filed to expand the COA. We noted that Petitioner had indicated in his motion to discharge Shakoor his disagreement with any expansion of the COA. In addition, we concluded that an expansion of the COA was not warranted because Petitioner's Confrontation Clause claim *1155 was procedurally barred and his competency claim lacked evidentiary support.

By separate order, we advised Petitioner that his *pro se* brief on the Sixth Amendment self-representation issue was due on July 24, 2017. In the same order, we directed Shakoor to file a supplemental brief on the Sixth Amendment issue by August 14, 2017 and to file a reply brief within 14 days of service of the State's response. We also directed Shakoor to appear at oral argument on Petitioner's behalf.

Petitioner failed to file a *pro se* brief by the July 24, 2017 deadline. We instructed Petitioner that he could correct the deficiency by submitting a motion to file the brief out of time on or before August 14, 2017, but Petitioner also failed to comply with that deadline and failed thereafter to file any motions or briefing in support of his appeal. Shakoor filed opening and reply briefs addressing the Sixth Amendment issue, and he appeared at oral argument on Petitioner's behalf, as he was instructed to do. The State also filed a brief on the issue and appeared at oral argument.

DISCUSSION

I. Standard of Review

[2] [3] We review the district court's denial of Petitioner's Sixth Amendment claim *de novo*, applying the standards set forth in the Anti-Terrorism and Effective Death Penalty Act ("AEDPA"). *Peterka v. McNeil*, 532 F.3d 1199, 1200 (11th Cir. 2008). Under AEDPA, a federal court cannot grant habeas relief on a claim that was "adjudicated on the merits in State court proceedings" unless the state court's decision was (1) "contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States" or (2) "based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding." 28 U.S.C. § 2254(d). For purposes of AEDPA, clearly established federal law includes only the holdings of Supreme Court decisions—not Supreme Court dicta and not the opinions of this Court. *White v. Woodall*, — U.S. —, 134 S.Ct. 1697, 1702 & n.2, 188 L.Ed.2d 698 (2014).

[4] [5] [6] As is evident from the standards set out above, AEDPA "greatly circumscribe[s]" a federal court's authority to grant habeas relief on a claim that has been adjudicated on the merits by a state court. *Crawford v. Head*, 311 F.3d 1288, 1295 (11th Cir. 2002). *See also Trepal v. Sec'y, Fla. Dep't of Corr.*, 684 F.3d 1088, 1107 (11th Cir. 2012) (noting that AEDPA "imposes a highly deferential standard for evaluating state-court rulings and demands that state-court decisions be given the benefit of the doubt" (internal quotation marks omitted)). A federal court may grant habeas relief under the "contrary to"

clause only if the state court “applie[d] a rule different from the governing law set forth” in Supreme Court precedent or “decide[d] a case differently than [the Supreme Court] ha[s] done on a set of materially indistinguishable facts.” *Bell v. Cone*, 535 U.S. 685, 694, 122 S.Ct. 1843, 152 L.Ed.2d 914 (2002). A federal court may grant habeas relief under the “unreasonable application” clause if the state court “correctly identifie[d] the governing legal principle” from Supreme Court precedent but “unreasonably applie[d] it to the facts of the particular case.” *Id.* However, a state court’s decision must be “objectively unreasonable, not merely wrong” in order to warrant relief under the “unreasonable application” clause. *Virginia v. LeBlanc*, — U.S. —, 137 S.Ct. 1726, 1728, 198 L.Ed.2d 186 (2017) (internal quotation marks omitted). Even “clear error” does not meet the “objectively unreasonable” standard. *Id.* Rather, the state court’s ruling *1156 must be “so lacking in justification that there was an error well understood and comprehended in existing law beyond any possibility for fairminded disagreement.” *Id.* (internal quotation marks omitted).

Likewise, “a decision adjudicated on the merits in a state court and based on a factual determination will not be overturned on factual grounds unless [the decision is] objectively unreasonable in light of the evidence presented in the state-court proceeding.” *Miller-El v. Cockrell*, 537 U.S. 322, 340, 123 S.Ct. 1029, 154 L.Ed.2d 931 (2003) (citing 28 U.S.C. § 2254(d)(2)). Further, a state court’s factual determinations are “presumed correct” unless they are rebutted by “clear and convincing evidence to the contrary.” *Id.* (citing 28 U.S.C. § 2254(e)(1)).

II. Petitioner’s Sixth Amendment Claim

A. The Sixth Amendment Right to Self-Representation

In *Faretta v. California*, 422 U.S. 806, 95 S.Ct. 2525, 45 L.Ed.2d 562 (1975), the United States Supreme Court held that a criminal defendant has a right to represent himself at trial “when he voluntarily and intelligently elects to do so.” *Faretta*, 422 U.S. at 807, 95 S.Ct. 2525. See also *Marshall v. Rodgers*, 569 U.S. 58, 62, 133 S.Ct. 1446, 185 L.Ed.2d 540 (2013) (citing *Faretta* for the “well settled” proposition that a criminal defendant “has the right to proceed without counsel when he voluntarily and intelligently elects to do so” (internal quotation marks

omitted)). The Supreme Court’s holding in *Faretta* was based on “the long-standing recognition of a right of self-representation in federal and most state courts, and on the language, structure, and spirit of the Sixth Amendment.” *McKaskle v. Wiggins*, 465 U.S. 168, 174, 104 S.Ct. 944, 79 L.Ed.2d 122 (1984).

The Supreme Court acknowledged in *Faretta* that when a criminal defendant chooses to represent himself, “he relinquishes ... many of the traditional benefits associated with the right to counsel,” which is also guaranteed by the Sixth Amendment. *Faretta*, 422 U.S. at 835, 95 S.Ct. 2525. As such, the *Faretta* Court imposed a substantial check on the right of self-representation by requiring that a defendant “be made aware of the dangers and disadvantages of self-representation” prior to being allowed to proceed without counsel, and that the record show that the defendant, having been so advised, “knows what he is doing and his choice is made with eyes open.” *Id.* (internal quotation marks omitted). As a result of this requirement, a trial court must ensure—via what has come to be known as a *Faretta* inquiry—that a defendant who asserts the right to self-representation is “competent[] and understanding” and that he has “voluntarily” as well as “knowingly and intelligently” elected to dispense with his right to the assistance of counsel. See *id.* (internal quotation marks omitted).

¹⁷Even assuming the above requirements are met, the right to self-representation recognized in *Faretta* is not absolute. See *id.* at 834, n.46, 95 S.Ct. 2525. The *Faretta* Court noted, for example, that a “trial judge may terminate self-representation by a defendant who deliberately engages in serious and obstructionist misconduct.” *Id.* In later decisions, the Supreme Court confirmed that the right to self-representation is subject to other limitations as well. See *Indiana v. Edwards*, 554 U.S. 164, 178, 128 S.Ct. 2379, 171 L.Ed.2d 345 (2008) (holding that a state may deny a defendant the right to represent himself if he lacks the mental competency to conduct his defense, even though the defendant is competent to stand trial); *1157 *Martinez v. Court of App. of Cal., Fourth App. Dist.*, 528 U.S. 152, 154, 120 S.Ct. 684, 145 L.Ed.2d 597 (2000) (holding that a criminal defendant has no constitutional right to self-representation on appeal).

Of particular significance to this appeal, the *Faretta* Court indicated that a trial court could appoint standby counsel to aid in the defense, even over the objection of a *pro se* criminal defendant. See *Faretta*, 422 U.S. at 834, n.46, 95 S.Ct. 2525. In *McKaskle v. Wiggins*, 465 U.S. 168, 104 S.Ct. 944, 79 L.Ed.2d 122 (1984), the Supreme Court addressed in more detail the proper role of standby

counsel who is present at trial over the objection of a *pro se* criminal defendant. *See Wiggins*, 465 U.S. at 170, 104 S.Ct. 944 (“Today we must decide what role standby counsel who is present at trial over the defendant’s objection may play consistent with the protection of the defendant’s *Faretta* rights.”). The defendant in *Wiggins* argued that standby counsel’s unsolicited participation in his trial, primarily via motions practice and other arguments made to the trial judge outside the presence of the jury, deprived him of the right to self-representation as recognized in *Faretta*. The Supreme Court rejected the defendant’s argument, holding that the unsolicited participation of standby counsel did not violate *Faretta* under the circumstances. *Id.* at 173, 104 S.Ct. 944.

The *Wiggins* Court identified the core rights protected by *Faretta* as (1) the right of a *pro se* defendant to “have his voice heard” and (2) the right of a *pro se* defendant to “present his case in his own way.” *Id.* at 174, 177, 104 S.Ct. 944. To protect those rights, the Court explained, a *pro se* defendant “must be allowed to control the organization and content of his own defense, to make motions, to argue points of law, to participate in voir dire, to question witnesses, and to address the court and the jury at appropriate points in the trial.” *Id.* at 174, 104 S.Ct. 944. The record showed that the defendant in *Wiggins* had been allowed to do all of those things: he had filed and argued numerous pretrial and trial motions, conducted voir dire, made opening and closing statements to the jury, selected and cross-examined witnesses, made objections, filed requested jury charges, and elected to go to the jury at the penalty phase of the trial. *See id.* at 174–75, 104 S.Ct. 944. Furthermore, it was apparent from the record that the participation of standby counsel, albeit unsolicited, had not interfered with the defendant’s right to be heard or to present his case in his own way because the trial judge had deferred to the defendant when disagreements arose regarding trial strategy and because counsel’s participation (1) generally occurred outside the presence of the jury and, thus, did not undermine the jury’s perception that the defendant was representing himself, and (2) primarily involved routine procedural matters when it did occur in the presence of the jury. *See Wiggins*, 465 U.S. at 180–85, 104 S.Ct. 944.

In the course of its holding, the *Wiggins* Court acknowledged that “excessively intrusive participation” by standby counsel, particularly in the presence of the jury, could erode a *pro se* defendant’s *Faretta* rights under certain circumstances. *See id.* at 177, 104 S.Ct. 944. The Court reiterated that a *pro se* defendant is entitled to preserve control over the case he chooses to present to the jury and that, in the absence of the defendant’s consent, standby counsel should not be allowed to substantially

interfere with the defendant’s tactical decisions in that regard or, alternatively, to destroy the jury’s perception that the defendant is representing himself. *See id.* at 178, 104 S.Ct. 944. In proceedings outside the presence of the jury, the Court explained, standby counsel’s participation does not raise the same concerns. *See id.* at 179, 104 S.Ct. 944. In that setting, the *1158 Court reasoned, a *pro se* defendant’s *Faretta* rights are adequately protected if:

the *pro se* defendant is allowed to address the court freely on his own behalf and if disagreements between counsel and the *pro se* defendant are resolved in the defendant’s favor whenever the matter is one that would normally be left to the discretion of counsel.

Id.

B. The Florida Supreme Court’s Ruling on Petitioner’s Sixth Amendment Claim

As noted, Petitioner argued in his direct appeal that the state trial court violated his *Faretta* rights when it appointed special counsel to develop and present penalty phase mitigation evidence. *See Barnes*, 29 So.3d at 1022. The Florida Supreme Court considered and rejected that argument on the merits. *See id.* at 1023–26. The Florida Supreme Court’s ruling on Petitioner’s self-representation claim is the relevant state court decision for purposes of AEDPA review. *See Hittson v. GDCP Warden*, 759 F.3d 1210, 1231 (11th Cir. 2014) (noting that “the highest state court decision reaching the merits of a habeas petitioner’s claim is the relevant state court decision ... under AEDPA” (internal quotation marks omitted)).

In ruling on Petitioner’s claim, the Florida Supreme Court recognized that *Faretta* establishes a right to self-representation but that the right is not absolute. *See Barnes*, 29 So.3d at 1025–26 (citing *Indiana v. Edwards*, 554 U.S. 164, 128 S.Ct. 2379, 171 L.Ed.2d 345 (2008) for the proposition that “the government’s interest in ensuring the integrity and efficiency of the trial at times outweighs the defendant’s interest in acting as his own lawyer” (internal quotation marks omitted)). For example, the Florida court observed, *Faretta* is not violated when a state requires a severely mentally ill but otherwise competent defendant to be represented by counsel. *See id.* at 1025. Honing in on the particular issue presented by Petitioner’s case, the Florida court cited *Martinez v. Court*

of Appeal of California, Fourth Appellate District, 528 U.S. 152, 120 S.Ct. 684, 145 L.Ed.2d 597 (2000) and *McKaskle v. Wiggins*, 465 U.S. 168, 104 S.Ct. 944, 79 L.Ed.2d 122 (1984) for the principle that standby counsel can, consistent with *Faretta*, participate in a *pro se* defendant's trial without the defendant's consent "as long as that participation does not seriously undermine the appearance before the jury that the defendant is representing himself." See *Barnes*, 29 So.3d at 1026 (internal quotation marks omitted and alteration adopted).

Applying *Faretta* and its progeny, the Florida Supreme Court held that special counsel's investigation into and presentation of mitigation evidence did not violate Petitioner's self-representation rights under the circumstances of this case. See *id.* First, the court emphasized that special counsel's mitigation presentation did not occur in the presence of the jury, an important factor in the Supreme Court's case law addressing the proper role of standby counsel in a *pro se* defendant's trial. See *id.* at 1024. Second, the court observed that special counsel's mitigation presentation supplemented, but did not conflict with or undermine, the mitigation strategy pursued by Petitioner, which was to rely on the fact that he confessed and took responsibility for the murder. See *id.* at 1026. To that end, the Florida court noted that the trial judge found as a mitigating factor that Petitioner had confessed to his involvement in the crime and accepted responsibility for his acts. See *id.*

Finally, the Florida Supreme Court found it significant that special counsel's mitigation presentation occurred during *1159 the penalty phase of a capital trial, with its attendant obligation to ensure that the defendant "received individualized sentencing and that the death penalty is fairly and constitutionally imposed." See *Barnes*, 29 So.3d at 1026. The Florida court explained that it was reluctant to accept Petitioner's *Faretta* argument in this context, stating:

We decline to hold, as [Petitioner] requests, that a trial court may never consider other mitigation contained in the record or appoint special mitigation counsel to assist the court, where a *pro se* defendant's refusal to present mitigating evidence impedes or prevents the trial court's exercise of its constitutional duty to provide individualized sentencing.

Id.

C. Analysis

^[8]There is no basis to conclude that the Florida Supreme Court's denial of Petitioner's Sixth Amendment self-representation claim was either "contrary to" or an "unreasonable application" of Supreme Court precedent, or that it resulted from an "unreasonable determination of the facts." See 28 U.S.C. § 2254(d). Consequently, federal habeas relief is not warranted on the claim, and the district court properly denied it.

We first note that the Florida Supreme Court reasonably construed the Supreme Court precedent derived from *Faretta* and its progeny. See *Barnes*, 29 So.3d at 1025–26. As correctly summarized by the Florida court, *Faretta* establishes a right to self-representation for criminal defendants, but the right is not absolute. See *id.* In particular, and as further recognized by the Florida court, the participation of standby counsel, even over the objection of a *pro se* defendant, is consistent with *Faretta* as long as counsel does not seriously interfere with the defendant's opportunity to present his own case or undermine the jury's perception that the defendant is representing himself. See *id.* at 1026 (citing *Martinez*, 528 U.S. at 162, 120 S.Ct. 684 and *Wiggins*, 465 U.S. at 187, 104 S.Ct. 944). Because the Florida court identified *Faretta* as the controlling precedent, and accurately characterized the protections set forth in *Faretta* and developed in subsequent Supreme Court case law, it cannot be said that the Florida court's decision was "contrary to" clearly established federal law.

^[9]Nor was the Florida Supreme Court's decision an "unreasonable application" of *Faretta*. Again, to trigger habeas relief under the "unreasonable application" clause, a state court's ruling must contain an error that so obvious that it is "beyond any possibility for fairminded disagreement." *Woodall*, 134 S.Ct. at 1702 (internal quotation marks omitted). Applied in the context of *Faretta* and subsequent Supreme Court precedent such as *Wiggins*, such an error would require, at the very least, the unsolicited participation of standby counsel in a manner that (1) patently interfered with a *pro se* defendant's right to be heard or to present his own case, (2) resolved a disagreement between counsel and the *pro se* defendant in counsel's favor when the defendant's choice would normally govern, or (3) "destroy[ed] the jury's perception that the defendant [wa]s representing himself." See *Wiggins*, 465 U.S. at 174, 178, 104 S.Ct. 944. In rejecting Petitioner's *Faretta* claim, the Florida Supreme Court reasonably concluded that special counsel's participation

in Petitioner's trial did not violate any of these.

[10]First, the record supports the Florida Supreme Court's finding that Petitioner's core *Faretta* right to be heard was adequately vindicated. *See Wiggins*, 465 U.S. at 174, 104 S.Ct. 944. Petitioner does not dispute that he was "allowed to address *1160 the court freely on his own behalf" throughout his criminal proceeding. *See id.* at 179, 104 S.Ct. 944. He filed and argued motions, made objections, argued points of law, and questioned a witness who testified during special counsel's mitigation presentation. *See Barnes*, 29 So.3d at 1013–20. He made the strategic decision to plead guilty and to proceed without a jury at the penalty phase of his trial, and he was permitted to present his own theory of mitigation, which resulted in the trial court finding as a non-statutory mitigator that Petitioner had confessed to his crime and taken responsibility for his actions. *See id.*

Further, the record supports the Florida Supreme Court's finding that special counsel's mitigation presentation did not substantially erode Petitioner's *Faretta* rights. The presentation supplemented, but did not conflict with, Petitioner's asserted theory of mitigation, and it was made to the trial judge, rather than to a jury. *See Wiggins*, 465 U.S. at 179, 104 S.Ct. 944 ("A trial judge, who ... receives a defendant's original *Faretta* request and supervises the protection of the right throughout the trial, must be considered capable of differentiating the claims presented by a *pro se* defendant from those presented by standby counsel."). Moreover, the presentation occurred during the penalty phase of a capital trial, after Petitioner had refused to present any mitigation evidence whatsoever, thus limiting the trial judge's ability to provide the "individualized sentencing" required in that context. *See Kansas v. Marsh*, 548 U.S. 163, 174, 126 S.Ct. 2516, 165 L.Ed.2d 429 (2006) ("The use of mitigation evidence is a product of the requirement of individualized sentencing.").

Standby counsel Shakoor cites in his supplemental brief the decision of the Fifth Circuit on direct review that the appointment of independent mitigation counsel violated the right of a defendant to represent himself, *United States v. Davis*, 285 F.3d 378 (5th Cir. 2002), but his reliance on that decision is misplaced. The decision of a federal court of appeals is not, and does nothing to change, "clearly established federal law" within the meaning of AEDPA. *See Woodall*, 134 S.Ct. at 1702 & n.2. And it does not matter that the Fifth Circuit disagreed with the reasoning of the Florida Supreme Court so long as there was "any possibility for fairminded disagreement." *LeBlanc*, 137 S.Ct. at 1728 (internal quotation marks omitted). For the reasons that we have explained, the state court's

interpretation of the relevant Supreme Court precedents was not "objectively unreasonable," irrespective of whether we would agree with it on direct review. *Id.* (internal quotation marks omitted).

The case before the Fifth Circuit also was different from this appeal in two key respects. First, the independent counsel presented mitigation evidence to a sentencing jury, *see Davis*, 285 F.3d at 380, and we have explained that *Faretta* and its progeny place crucial weight on the "jury's perception." *Wiggins*, 465 U.S. at 178, 104 S.Ct. 944. Barnes waived his right to an advisory jury, and mitigation counsel appeared only before the judge. Second, the Fifth Circuit concluded that "Davis's strategy was in direct conflict with the independent counsel's approach." *Davis*, 285 F.3d at 385. In contrast, we have explained that the Florida Supreme Court reasonably determined that the presentation by special counsel did not conflict with Barnes's asserted theory of mitigation.

Shakoor also argues that some of the information presented by special counsel was aggravating, including evidence that Petitioner had been a pyromaniac from an early age, that as a child he had assaulted family members and peers in various settings, and that his score on a psychological *1161 assessment conducted by Dr. Riebsame classified him as a psychopath. Contrary to Shakoor's suggestion, there is no evidence in the record that special counsel's mitigation presentation prejudiced Petitioner.⁴ Rather, it appears that the mitigation presentation inured to Petitioner's benefit because it resulted in the trial court finding numerous additional mitigators, including the statutory mitigator that Petitioner was "under the influence of a mental or emotional disturbance at the time of the offense" and the non-statutory mitigators that he "had an abusive childhood, lacked a loving relationship with his parents, and was a functional and capable person with a capacity to contribute to society." *See Barnes*, 29 So.3d at 1026.

Further, it is clear from the record that the trial judge obtained all of the allegedly aggravating information from sources other than special counsel's mitigation presentation, and that the judge would have been privy to that information even if special mitigation counsel had not been appointed. Florida law requires the preparation of a PSR in all death penalty cases where the defendant waives mitigation or refuses to present mitigation evidence. *See Fla. R. Crim. P. 3.710(b)* (requiring the preparation of a "comprehensive" PSR when a capital defendant refuses to present mitigation evidence); *Muhammad v. State*, 782 So.2d 343, 363 (Fla. 2001) (announcing the PSR requirement, which later was adopted as a procedural rule).⁵ In accordance with that

requirement, the trial judge ordered that a PSR be prepared in Petitioner's case. The PSR, which was provided to the trial judge on May 17, 2007 and supplemented on November 16, 2007, contains all of the information Petitioner claims is aggravating.⁶

Specifically, the PSR describes a long history of criminality, violence, and drug use beginning when Petitioner was fifteen years old and continuing until Petitioner murdered his wife when he was 35. The "family history" section of the PSR states that Petitioner had assaulted his mother and sisters, including one incident during which he broke his sister's nose by punching her in the face, and that he had been diagnosed as a sociopath. The "mental health" section of the PSR states that Petitioner had been seen by a psychiatrist and psychologist beginning at the age of six for behaviors such as stealing, being cruel to other children, and exposing himself sexually, and that he lacked remorse for his actions and "seemingly show[ed] no emotion." The PSR also reveals that Petitioner had issues with aggression and "firesetting" at a young age. Special counsel's attempt during the mitigation presentation to cast this information—already available to the trial judge as a result of the PSR—in the best light possible in terms of Petitioner's culpability could not possibly have prejudiced Petitioner.

Finally, there is no support for finding that the Florida Supreme Court's decision *1162 was based on an unreasonable determination of the facts. Standby counsel Shakoor vaguely asserts in his brief that the state court proceedings "resulted in decisions that w[ere] based on an unreasonable determination of the facts, in light of the evidence presented in the State court." But Shakoor does not cite any evidence in support of that assertion, nor even specify the factual findings he claims were unreasonable. In fact, the parties appear to agree on the essential facts underlying Petitioner's *Faretta* claim: (1) Petitioner asserted his right to self-representation in his criminal proceeding and the trial judge found, after conducting a *Faretta* inquiry, that he was competent to proceed without a lawyer, (2) Petitioner decided to plead guilty and waived his right to an advisory jury, (3) during the penalty phase of his proceeding, Petitioner refused to present any mitigation other than the fact that he had come forward and accepted responsibility for his crime, (4) the trial judge, over Petitioner's objection, appointed special counsel to investigate and present any available mitigating evidence, and (5) special counsel presented mitigation evidence to the trial judge, including evidence regarding Petitioner's background and record. These facts, which were the basis of the Florida Supreme Court's decision on Petitioner's *Faretta* claim, are

undisputed and well-supported in the record, meaning they were reasonably determined by the Florida court.

CONCLUSION

For the above reasons, we **AFFIRM** the district court's order denying federal habeas relief on Petitioner's Sixth Amendment self-representation claim.

MARTIN, Circuit Judge, concurring:

I concur in the opinion of the majority. I write separately in appreciation of the state trial judge's appointment of special counsel for Mr. Barnes. This appointment by the state trial judge allowed development and presentation of mitigation evidence, even here, where Mr. Barnes refused to participate in that process.

The courts are charged with ensuring that death sentences are imposed only in a manner consistent with constitutional requirements. "[C]onsideration of the character and record of the individual offender and the circumstances of the particular offense [is] a constitutionally indispensable part of the process of inflicting the penalty of death." Woodson v. North Carolina, 428 U.S. 280, 304, 96 S.Ct. 2978, 2991, 49 L.Ed.2d 944 (1976) (plurality opinion). Without knowledge of a person's individual history and characteristics, "the fundamental respect for humanity underlying the Eighth Amendment" cannot be given. Id.

After the State presented its case for aggravation, Mr. Barnes "refused to present any evidence of mitigation and announced that he would rely only on the fact that he came forward and took responsibility for the murder." Barnes v. State, 29 So.3d 1010, 1014 (Fla. 2010). His refusal meant the sentencer—here, the trial judge—would not be able to fully consider Mr. Barnes's character and background. So if the judge had not intervened to develop the record, the "process of inflicting the penalty of death" would have proceeded without one of its "constitutionally indispensable" components. See Woodson, 428 U.S. at 304, 96 S.Ct. at 2991; see also Eddings v. Oklahoma, 455 U.S. 104, 112, 102 S.Ct. 869, 875, 71 L.Ed.2d 1 (1982).

This trial judge did not let that happen. Over Mr. Barnes's objection, the judge ordered a pre-sentence investigation

(“PSI”), a mental health evaluation, and school records, also appointing special counsel to investigate and present mitigation. *1163 *Barnes*, 29 So.3d at 1014.¹ With the help of an investigator, special counsel then prepared and presented a mitigation report to the court. That report revealed that Mr. Barnes’s mother was an alcoholic who showed her children no affection; that Mr. Barnes’s father was cold and physically abusive; and that Mr. Barnes was likely sexually abused as a child. And special counsel presented the testimony of Dr. Riebsame, a forensic psychologist, who indicated that Mr. Barnes was suffering from an extreme mental disturbance while murdering and sexually assaulting Ms. Miller. Upon reviewing Mr. Barnes’s guilty plea and the record created through Barnes’s own representation of himself, the trial judge found three non-statutory mitigators. But with the help of the PSI, the mitigation report, and Dr. Riebsame’s testimony, that judge then found six additional mitigators. These included one statutory mitigator—that Mr. Barnes was suffering from an extreme emotional disturbance at the time of the offense—and five non-statutory mitigators.² Clearly, the information provided by special counsel and the PSI allowed the court to more “accurately gauge [Mr. Barnes’s] moral culpability.” See *Porter v. McCollum*, 558 U.S. 30, 41, 130 S.Ct. 447, 454, 175 L.Ed.2d 398 (2009).

Our jurisprudence guarantees Mr. Barnes, and others like him, the right to represent themselves, even when facing a sentence of death. This guarantee can, of course, be in tension with the obligation of courts to individually assess every defendant facing a death sentence. See *McKaskle v. Wiggins*, 465 U.S. 168, 177–78, 104 S.Ct. 944, 950–51, 79 L.Ed.2d 122 (1984) (explaining that the “core” of the right to self-representation is a *pro se* defendant’s “actual control over the case he chooses to present,” which requires ensuring that standby counsel does not “make or substantially interfere with any significant tactical decisions”). This trial judge did a commendable job of balancing both commands. And, as the majority has explained, the Florida Supreme Court’s validation of that judge’s actions in this regard was neither contrary to nor an unreasonable application of clearly established federal law.

All Citations

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Footnotes

- 1 We take the facts surrounding Petitioner’s crime, which are undisputed, from the Florida Supreme Court’s ruling on Petitioner’s direct appeal. See *Barnes v. State*, 29 So.3d 1010, 1013, 1015–16 (Fla. 2010).
- 2 In *Faretta*, the Supreme Court held that an accused has a Sixth Amendment right to represent himself in his criminal trial when he “knowingly and intelligently” elects to do so. *Faretta*, 422 U.S. at 835, 95 S.Ct. 2525. When a defendant asserts his right to self-representation under *Faretta*, the trial court must conduct an inquiry to ensure that the defendant’s decision to represent himself is voluntary, and that it is made intelligently and with awareness of the “dangers and disadvantages of self-representation.” *Id.*
- 3 Dr. Riebsame had attempted to evaluate Petitioner in 2006, but was unable to provide a full diagnosis of Petitioner’s mental condition at that time because Petitioner refused to cooperate. See *Barnes*, 29 So.3d at 1019. The specially appointed mitigation counsel asked Dr. Riebsame to attempt a reevaluation based on documentary evidence and witness interviews. See *id.*
- 4 We recognize, of course, that the lack of prejudice does not resolve the *Faretta* issue presented by this case. See *Wiggins*, 465 U.S. at 177, n.8, 104 S.Ct. 944 (explaining that the denial of a *pro se* defendant’s *Faretta* rights is “not amenable to ‘harmless error’ analysis. The right is either respected or denied.”). But in response to Shakoor’s argument, we think it important to note that no prejudice resulted.
- 5 Petitioner’s appeal does not challenge the constitutionality or validity of the PSR requirement as applied to his case.
- 6 Indeed, the PSR contains information that is a great deal more aggravating than any information contained in Dr. Riebsame’s testimony. In particular, the PSR includes Petitioner’s graphic and detailed description of his prolonged sexual assault of Ms. Miller on the night of her murder.
- 1 “[T]o ensure reliability, fairness, and uniformity in the imposition of the death penalty” when a defendant refuses to present mitigation evidence, Florida trial judges must order a comprehensive PSI and require the State “to place in the record all evidence in its possession of a mitigating nature.” *Muhammad v. State*, 782 So.2d 343, 363–65 (Fla. 2001).

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When these records “alert the trial [judge] to the probability of significant mitigation,” Florida encourages the trial judge to call its own mitigation witnesses or appoint special counsel for that purpose. Id. at 364. In my view, the Eighth and Fourteenth Amendments surely encourage similar procedures and may well require them.

- 2 The judge also found a non-statutory mitigator that duplicated the extreme emotional disturbance statutory mitigator.

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APPENDIX B

2016 WL 472631

Only the Westlaw citation is currently available.
United States District Court, M.D. Florida,
Orlando Division.

James BARNES, Petitioner,
v.
SECRETARY, DEPARTMENT OF
CORRECTIONS, et al., Respondents.

CASE NO. 6:13-cv-1698-Orl-37DAB

Signed 02/08/2016

Attorneys and Law Firms

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ORDER

ROY B. DALTON JR., United States District Judge

*1 This case is before the Court on the Petition for Writ of Habeas Corpus (Doc. 1) filed by James Barnes. Pursuant to the instructions of the Court, Respondents filed a Response to the Petition for Writ of Habeas Corpus (Doc. 21). Thereafter, Petitioner filed a Reply to the Response (Doc. 25). For the reasons set forth below, the petition is denied.

I. STATEMENT OF FACTS AND PROCEDURAL HISTORY

The factual history, as set forth by the Supreme Court of Florida, is as follows:

The facts of the murder, based upon Barnes' written and taped statements, and as shown in the forensic evidence presented during the penalty phase, are summarized here. On the night of April 20, 1988, Barnes went to Patricia "Patsy" Miller's condominium unit, located at the River Oaks Condominiums in Melbourne, Brevard County, Florida. He did not know Ms. Miller, although he may have encountered her before at the condominium complex, where he knew several of the residents, or at Satellite Beach. Once he arrived at Miller's condominium, he took off all his clothes in order not to leave evidence and obtained entry by removing a screen and entering through a bedroom window. Barnes admitted that he went there with the intent to both rape and kill Miller. Once inside, he armed himself with a knife from the kitchen. After surreptitiously watching Miller go about her normal activities for a short period of time, he confronted her in the bathroom and forced her at knife-point to the bedroom where he sexually battered her. He then bound her hands behind her back with shoelaces that he had removed from some tennis shoes, tied her feet together, and sexually battered her again. Barnes admitted that he tried to strangle her to death with a belt which he had removed from her terrycloth robe but was not successful, so he then bludgeoned the back of her head with a hammer that he found in her bedroom.

Barnes confessed that he took a bank card from her wallet but could not later make it work at an ATM. He also collected everything he touched in Miller's residence, as well as the clothing Miller was wearing, and placed them in a bag. Barnes then set fire to the bed where Miller's body lay in order to eliminate forensic evidence left there. Before leaving in his car, Barnes took all the items that he had bagged, as well as the window screen that he had removed, and left to dispose of the items at another location.

Shortly after 11 p.m., firefighters responded to a fire alarm at the condominium complex and found Miller's charred body face down on the bed in her master bedroom, with her hands bound behind her back with shoelaces. There were varying degrees of burns over her body. The Medical Examiner testified that the cause of death was blunt-force trauma from multiple blows to Miller's head consistent with being beaten with a hammer. Signs of attempted strangulation, including a fractured hyoid bone, which the doctor testified would have taken a great deal of force to accomplish, were also discovered in the autopsy. The Medical Examiner determined that Miller's body was set ablaze after she died from the multiple blows to her

head. Even though Barnes attempted to destroy forensic evidence by setting the bed ablaze, sperm was recovered from Miller and was preserved for DNA testing.

***2** Within one week of the murder, the police considered Barnes as a suspect and he was questioned by Sergeant Dennis Nichols of the Melbourne Police Department. At that time, Barnes denied any involvement with the murder and told Sergeant Nichols that he had never been inside Ms. Miller's apartment. He also denied knowing Miller, although he indicated he may have seen her once in Satellite Beach. Barnes agreed to give a sample of his blood for possible DNA comparison, but in 1988 the available method of DNA testing was inadequate to produce a match and the case remained unsolved.

In 1998, Barnes was serving a life sentence for the 1997 first-degree strangulation murder of his wife, Linda Barnes. With advanced techniques for DNA testing, specifically the polymerase chain reaction (PCR) test, sperm removed from Miller's vagina, which was resubmitted for testing in 1997, produced a positive match to Barnes. Subsequently, Sergeant Nichols and Brevard Sheriff's Office Lieutenant Todd Goodyear traveled to the prison to speak with Barnes about the murder, but he refused to speak to them. For unspecified reasons, charges were not filed against Barnes for the Miller murder.

In 2005, while Barnes was still incarcerated on his life sentence for murdering his wife, he wrote three letters to Assistant State Attorney Michael Hunt, a prosecutor who was involved in the case concerning the death of Barnes' wife. The letters to Hunt were dated October 10, 2005, December 7, 2005, and December 21, 2005. In the October 10, 2005, letter, Barnes requested that an interview be held at the correctional facility, with fellow inmate Sherman Insko asking Barnes questions about the Miller case, while law enforcement officers videotaped the interview.

The interview occurred on November 1, 2005. In that videotaped interview, Barnes admitted to the foregoing facts of the burglary, sexual batteries, murder, and arson. He explained how he entered the condominium unit through a bedroom window and said he was in the condominium for approximately forty-five minutes to one hour. During his interview, Barnes described with accuracy Miller's physical appearance, the interior of the apartment, and specific objects he saw in the apartment, including a bicycle, basket-weaving supplies, divorce paperwork, a stethoscope, and oversized curtains. Further, his descriptions of the

homicide, the sexual batteries, and the arson were consistent with the evidence gathered by police.

Barnes v. State, 29 So. 3d 1010, 1015-16 (Fla. 2010) ("*Barnes I*").

The State charged Petitioner with first degree murder (Count One), burglary of a dwelling with an assault or battery (Count Two), two counts of sexual battery by use or threat of deadly weapon (Counts Three and Four), and arson of a dwelling (Count Five). (Ex. A-8 at 1454-55).¹ At his initial appearance, Petitioner waived his right to counsel and moved to proceed *pro se*. (Ex. A-1 at 4-5). The trial court conducted a hearing pursuant to *Faretta v. California*, 422 U.S. 806 (1975), found Petitioner competent to waive his right to counsel, and allowed him to proceed *pro se* but appointed standby counsel. (*Id.* at 9-30). Petitioner pled guilty as charged and waived his right to a jury during the penalty phase. (*Id.* at 30-53).

The trial court held a penalty-phase *Spencer*² hearing as the penalty-phase evidentiary hearing because Petitioner waived an advisory jury. (Ex. A-3 at 393-556; Ex. A-4 at 557-707; Ex. A-5 at 708-835). At the *Spencer* hearing, the State presented evidence in support of aggravating factors, and Petitioner relied on the fact that he came forward and took responsibility for the murder as mitigation evidence. (*Id.*). Thereafter, over Petitioner's objection, the trial court appointed special counsel to investigate and present any other mitigation evidence at the continuation of the *Spencer* hearing on November 16, 2007. (Ex. A-5 at 820-48; Ex. A-7 at 1083-1281; Ex. A-8 at 1282-94).

***3** The trial court found six aggravating factors and assigned the following weight to each one: (1) the murder was committed by a person under sentence of imprisonment (great weight); (2) Petitioner was previously convicted of another capital felony or felony involving use or threat of violence (the murder of his wife) (great weight); (3) the murder was committed while Petitioner was engaged in commission of a sexual battery and burglary (great weight); (4) the murder was committed for the purpose of avoiding or preventing lawful arrest (great weight); (5) the murder was especially heinous, atrocious or cruel (great weight); and (6) the murder was cold, calculated and premeditated (great weight). (Ex. A-11 at 2030-45). The trial court found one statutory mitigator, that Petitioner was under the influence of extreme mental or emotional disturbance, which it accorded slight weight, and nine nonstatutory mitigators: (1) Petitioner came forward and admitted his involvement in the unsolved crime (little weight); (2) Petitioner took responsibility for his acts (little weight); (3) Petitioner was under the influence of a mental or emotional

disturbance (little weight as a duplicating mitigator); (4) Petitioner had experienced prolonged drug use (little weight); (5) Petitioner did not have the benefit of a loving relationship with his mother (little weight); (6) Petitioner did not have the benefit of a loving relationship with his father (little weight); (7) Petitioner was sexually abused as a child (slight weight); (8) Petitioner has taken steps to improve himself (little weight); and (9) Petitioner is a functional and capable person and has demonstrated by his action and participation in this case that he has sufficient intelligence and capabilities to contribute to society (little weight). (*Id.* at 2045-54). The trial court concluded that “each of the six aggravating standing alone outweigh all of the mitigating circumstances combined.” (*Id.* at 2055). The court imposed a sentence of death for the murder, life sentences for the burglary with battery and sexual battery counts, and a thirty-year term of imprisonment for the arson. (*Id.* at 2055-56). The Supreme Court of Florida affirmed Petitioner’s convictions and sentences. *Barnes I*, 29 So. 3d at 1030. Petitioner filed a petition for writ of certiorari with the Supreme Court of the United States, which denied the petition. (Ex. E); *see also Barnes v. Florida*, 526 U.S. 901 (2010).

Petitioner filed a motion for post-conviction relief pursuant to Rule 3.851 of the Florida Rules of Criminal Procedure. (Ex. F-3 at 478-503). The state court denied the motion. (Ex. F-5 at 702-17). Petitioner appealed, and the Supreme Court of Florida affirmed. *Barnes v. State*, 124 So. 3d 904 (Fla. 2013), *as revised on denial of reh’g* (Oct. 17, 2013) (“*Barnes II*”).

II. GOVERNING LEGAL PRINCIPLES

Because Petitioner filed his petition after April 24, 1996, this case is governed by 28 U.S.C. § 2254, as amended by the Antiterrorism and Effective Death Penalty Act of 1996 (“AEDPA”). *Abdul-Kabir v. Quarterman*, 550 U.S. 233, 246 (2007); *Penry v. Johnson*, 532 U.S. 782, 792 (2001). The AEDPA “establishes a more deferential standard of review of state habeas judgments,” *Fugate v. Head*, 261 F.3d 1206, 1215 (11th Cir. 2001), in order to “prevent federal habeas ‘retrials’ and to ensure that state-court convictions are given effect to the extent possible under law,” *Bell v. Cone*, 535 U.S. 685, 693 (2002); *see also Woodford v. Visciotti*, 537 U.S. 19, 24 (2002) (recognizing that the federal habeas court’s evaluation of state-court rulings is highly deferential and that state-court decisions must be given the benefit of the

doubt).

A. STANDARD OF REVIEW UNDER THE AEDPA

Pursuant to the AEDPA, habeas relief may not be granted with respect to a claim adjudicated on the merits in state court unless the adjudication of the claim:

(1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or

(2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

28 U.S.C. § 2254(d); *see Knowles v. Mirzayance*, 556 U.S. 111, 114 (2009); *Brown v. Payton*, 544 U.S. 133, 141 (2005). The phrase “clearly established Federal law,” encompasses only the holdings of the Supreme Court of the United States “as of the time of the relevant state-court decision.” *Williams v. Taylor*, 529 U.S. 362, 412 (2000); *see also Schwab v. Crosby*, 451 F.3d 1308, 1324 (11th Cir. 2006) (stating that the federal law relevant to this analysis is the Supreme Court of the United States precedent “in existence at the time the conviction became final”).

“[S]ection 2254(d)(1) provides two separate bases for reviewing state court decisions; the ‘contrary to’ and ‘unreasonable application’ clauses articulate independent considerations a federal court must consider.” *Maharaj v. Sec’y for Dep’t of Corr.*, 432 F.3d 1292, 1308 (11th Cir. 2005). The meaning of the clauses was discussed by the Eleventh Circuit Court of Appeals in *Parker v. Head*, 244 F.3d 831, 835 (11th Cir. 2001):

Under the “contrary to” clause, a federal court may grant the writ if the state court arrives at a conclusion opposite to that reached by [the United States Supreme Court] on a question of law or if the state court decides a case differently than [the United States Supreme Court] has on a set of materially indistinguishable facts. Under the ‘unreasonable application’ clause, a federal habeas court may grant the writ if

the state court identifies the correct governing legal principle from [the United States Supreme Court's] decisions but unreasonably applies that principle to the facts of the prisoner's case.

***4** If the federal court concludes that the state court applied federal law incorrectly, habeas relief is appropriate only if that application was "objectively unreasonable." *Id.*

Finally, under § 2254(d)(2), a federal court may grant a writ of habeas corpus if the state court's decision "was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding." A determination of a factual issue made by a state court, however, shall be presumed correct, and the habeas petitioner shall have the burden of rebutting the presumption of correctness by clear and convincing evidence. *See Parker*, 244 F.3d at 835-36; 28 U.S.C. § 2254(e)(1).

B. STANDARD FOR INEFFECTIVE ASSISTANCE OF COUNSEL

The Supreme Court of the United States in *Strickland v. Washington*, 466 U.S. 668 (1984), established a two-part test for determining whether a convicted person is entitled to relief on the ground that his counsel rendered ineffective assistance: (1) whether counsel's performance was deficient and "fell below an objective standard of reasonableness"; and (2) whether the deficient performance prejudiced the defense.³ *Id.* at 687-88. A court must adhere to a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance. *Id.* at 689-90. "Thus, a court deciding an actual ineffectiveness claim must judge the reasonableness of counsel's challenged conduct on the facts of the particular case, viewed as of the time of counsel's conduct." *Id.* at 690; *Gates v. Zant*, 863 F.2d 1492, 1497 (11th Cir. 1989).

As observed by the Eleventh Circuit Court of Appeals, the test for ineffective assistance of counsel:

has nothing to do with what the best lawyers would have done. Nor is the test even what most good lawyers would have done. We ask only whether some reasonable lawyer at the trial could have acted,

in the circumstances, as defense counsel acted at trial. Courts also should at the start presume effectiveness and should always avoid second guessing with the benefit of hindsight. *Strickland* encourages reviewing courts to allow lawyers broad discretion to represent their clients by pursuing their own strategy. We are not interested in grading lawyers' performances; we are interested in whether the adversarial process at trial, in fact, worked adequately.

White v. Singletary, 972 F.2d 1218, 1220-21 (11th Cir. 1992) (citation omitted). Under those rules and presumptions, "the cases in which habeas petitioners can properly prevail on the ground of ineffective assistance of counsel are few and far between." *Rogers v. Zant*, 13 F.3d 384, 386 (11th Cir. 1994).

C. EXHAUSTION AND PROCEDURAL DEFAULT

One procedural requirement set forth in the AEDPA precludes federal courts, absent exceptional circumstances, from granting habeas relief unless the petitioner has exhausted all means of available relief under state law. 28 U.S.C. § 2254(b); *O'Sullivan v. Boerckel*, 526 U.S. 838, 842-22 (1999); *Picard v. Connor*, 404 U.S. 270, 275 (1971). Specifically, the AEDPA provides, in pertinent part:

***5** An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted unless it appears that-

- (A) the applicant has exhausted the remedies available in the courts of the State; or
- (B) (i) there is an absence of available State corrective process; or
- (ii) circumstances exist that render such process
- (iii) ineffective to protect the rights of the applicant.

28 U.S.C. § 2254(b)(1).

In order to satisfy the exhaustion requirement, a state

petitioner must “fairly presen[t] federal claims to the state courts in order to give the State the opportunity to pass upon and correct alleged violations of its prisoners’ federal rights.” *Duncan v. Henry*, 513 U.S. 364, 365 (1995) (citing *Picard*, 404 U.S. at 275-76) (internal quotation marks omitted). The petitioner must apprise the state court of the federal constitutional issue, not just the underlying facts of the claim or a similar state law claim. *Snowden v. Singletary*, 135 F.3d 732 (11th Cir. 1998). The Supreme Court of the United States has observed that “Congress surely meant that exhaustion be serious and meaningful.” *Keeney v. Tamayo-Reyes*, 504 U.S. 1, 10 (1992). Furthermore, the Court explained:

[c]omity concerns dictate that the requirement of exhaustion is not satisfied by the mere statement of a federal claim in state court. Just as the State must afford the petitioner a full and fair hearing on his federal claim, so must the petitioner afford the State a full and fair opportunity to address and resolve the claims on the merits.

Id.; see also *Henderson v. Campbell*, 353 F.3d 880, 898 n.25 (11th Cir. 2003) (“Both the legal theory and the facts on which the federal claim rests must be substantially the same for it to be the substantial equivalent of the properly exhausted claim.”).

A federal court must dismiss those claims or portions of claims that have been denied on adequate and independent procedural grounds under state law. *Coleman v. Thompson*, 501 U.S. 722, 750 (1991), holding modified by *Martinez v. Ryan*, 132 S. Ct. 1309 (2012). In addition, a federal habeas court is precluded from considering claims that are not exhausted but would clearly be barred if returned to state court. *Id.* at 735 n.1 (stating that if the petitioner failed to exhaust state remedies and the court to which the petitioner would be required to present his claims in order to meet the exhaustion requirement would now find the claims procedurally barred, there is a procedural default for federal habeas purposes regardless of the decision of the last state court to which the petitioner actually presented his claims).

Procedural default will be excused only in two narrow circumstances. First, a petitioner may obtain federal review of a procedurally defaulted claim if he can show both “cause” for the default and actual “prejudice” resulting from the default. “To establish ‘cause’ for procedural default, a petitioner must demonstrate that some objective factor external to the defense impeded the

effort to raise the claim properly in the state court.” *Wright v. Hopper*, 169 F.3d 695, 703 (11th Cir. 1999). To establish “prejudice,” a petitioner must show that there is at least a reasonable probability that the result of the proceeding would have been different. *Henderson*, 353 F.3d at 892 (citations omitted).

*6 The second exception, known as the “fundamental miscarriage of justice,” only occurs in an extraordinary case, where a “constitutional violation has probably resulted in the conviction of one who is actually innocent.” *Murray v. Carrier*, 477 U.S. 478, 496 (1986). Actual innocence means factual innocence, not legal insufficiency. *Bousley v. United States*, 523 U.S. 614, 623 (1998). To meet this standard, a petitioner must “show that it is more likely than not that no reasonable juror would have convicted him” of the underlying offense. *Schlup v. Delo*, 513 U.S. 298, 327 (1995). In addition, “[t]o be credible, a claim of actual innocence must be based on [new] reliable evidence not presented at trial.” *Calderon v. Thompson*, 523 U.S. 538, 559 (1998) (quoting *Schlup*, 513 U.S. at 324).

III. ANALYSIS

A. GROUND ONE

Petitioner asserts the trial court violated his Sixth Amendment right to represent himself. (Doc. 1 at 4). In support of this ground, Petitioner argues that the trial court’s appointment of special counsel to present mitigation evidence after Petitioner waived his right to counsel violated his right to self-representation. (*Id.*) Petitioner notes that he chose not to present mitigation evidence and the appointment of special counsel contradicted his decision/strategy. (*Id.*).

Petitioner raised this ground on direct appeal. The Supreme Court of Florida concluded “the trial court acted properly...in appointing independent court counsel, who did not represent Barnes but was directed to assist the court by investigating and presenting mitigation.” *Barnes I*, 29 So. 3d at 1023. The Court noted that the Supreme Court of the United States has recognized that in cases in which the defendant has chosen to represent himself but standby counsel has been appointed by the trial court, “standby counsel may participate in the trial proceedings, even without the express consent of the defendant, as long

as that participation does not ‘seriously undermin[e]’ the ‘appearance before the jury’ that the defendant is representing himself.” *Id.* at 1026 (quoting *Martinez v. Court of Appeal of California, Fourth Appellate District*, 528 U.S. 152, 162 (2000)). The Court reasoned:

Because the trial court and this Court each has a constitutional obligation to ensure that Barnes received individualized sentencing and that the death penalty is fairly and constitutionally imposed, Barnes’ right to self-representation was not violated by the appointment of independent counsel under the facts and circumstances present in this case. Mitigation counsel was appointed, not to supplant Barnes as his own counsel, but to assist the court by presenting mitigation evidence where Barnes refused to do so. The mitigation was not in conflict with any evidence presented by Barnes and was not in conflict with his mitigation theory that he confessed and took responsibility. In fact, the trial court did find his confession and acceptance of responsibility to be nonstatutory mitigation. Based on the mitigation presented by special counsel, the trial court also found the statutory mitigator that Barnes was under the influence of a mental or emotional disturbance at the time of the offense, as well as nonstatutory mitigation that he had an abusive childhood, lacked a loving relationship with his parents, and was a functional and capable person with a capacity to contribute to society. Even so, after engaging in its constitutionally required weighing process, the trial court concluded that each one of the six aggravators outweighed all the mitigation found by the court.

We decline to hold, as Barnes requests, that a trial court may never consider other mitigation contained in the record or appoint special mitigation counsel to assist the court, where a *pro se* defendant’s refusal to present mitigating evidence impedes or prevents the trial court’s exercise of its constitutional duty to provide individualized sentencing.

*7 *Id.* at 1026.

A criminal defendant has a constitutional right to represent himself and conduct his own defense if he voluntarily, knowingly, and intelligently elects to do so. *Faretta v. California*, 422 U.S. 806, 807 (1975); see also *McKaskle v. Wiggins*, 465 U.S. 168, 187 (1984). However, “a State may—even over objection by the accused—appoint a ‘standby counsel’ to aid the accused if and when the accused requests help, and to be available to represent the accused in the event that termination of the defendant’s self-representation is necessary.” *Faretta*, 422 U.S. at 834 n.46. “The *pro se* defendant must be

allowed to control the organization and content of his own defense, to make motions, to argue points of law, to participate in voir dire, to question witnesses, and to address the court and the jury at appropriate points in the trial.” *McKaskle*, 465 U.S. at 174. To determine whether a defendant’s *Faretta* rights have been respected, the primary issue is whether “the defendant had a fair chance to present his case in his own way.” *McKaskle*, 465 U.S. at 177. In the context of standby counsel’s participation, the Supreme Court explained:

A trial judge, who...receives a defendant’s original *Faretta* request and supervises the protection of the right throughout the trial, must be considered capable of differentiating the claims presented by a *pro se* defendant from those presented by standby counsel. *Cf. United States v. Martinez*, 597 F.2d 509, 510-511 (CA5), *cert. denied*, 444 U.S. 979, 100 S. Ct. 479, 62 L.Ed.2d 405 (1979); *United States v. Penick*, 496 F.2d 1105, 1108 (CA7), *cert. denied*, 419 U.S. 897, 95 S. Ct. 177, 42 L.Ed.2d 141 (1974); *United States v. Reeves*, 348 F.2d 469 (CA2 1965), *cert. denied*, 383 U.S. 929, 86 S. Ct. 936, 15 L.Ed.2d 848 (1966). Accordingly, the appearance of a *pro se* defendant’s self-representation will not be unacceptably undermined by counsel’s participation outside the presence of the jury.

Thus, *Faretta* rights are adequately vindicated in proceedings outside the presence of the jury if the *pro se* defendant is allowed to address the court freely on his own behalf and if disagreements between counsel and the *pro se* defendant are resolved in the defendant’s favor whenever the matter is one that would normally be left to the discretion of counsel.

Id. at 179 (emphasis added). Consequently, standby “counsel need not be excluded altogether, especially when the participation is outside the presence of the jury or is with the defendant’s express or tacit consent.” *Id.* at 188.

In the instant case, Petitioner voluntarily, knowingly, and intelligently waived his right to counsel throughout the state court proceedings, and the state court appointed standby counsel. See Ex. A-1 at 11-37; Ex. A-2 at 195-201. Petitioner further waived his right to an advisory jury at his penalty proceeding and chose to proceed before the trial judge only. (Ex. A-1 at 51-62). Petitioner told the trial court that his “mitigation strategy” was to rely on the fact that he came forward and willingly admitted he committed the offenses. (*Id.* at 57; Ex. A-2 at 214-16; Ex. A-5 at 813-14).

*8 Pursuant to Florida law, the trial judge appointed special counsel over Petitioner’s objection to act on behalf of the court to investigate and present only mitigating

evidence. (Ex. A-5 at 816-34). Special counsel obtained various school, medical, and prison records and called a mental health expert, Dr. Riebsame, who testified Petitioner was under the influence of extreme mental or emotional disturbance at the time of the offenses. (Ex. A-7 at 1174-1205). Petitioner cross-examined Dr. Riebsame. (*Id.* at 1259-69, 1278-81). As a result of special counsel's presentation of evidence, in addition to the two mitigators offered by Petitioner, the trial judge found eight more mitigating factors, including one statutory mitigator. (Ex. A-11 at 2045-54).

Petitioner has not established that the trial court's appointment of special counsel to investigate and present mitigation evidence is contrary to, or an unreasonable application of, *Faretta*. Petitioner was allowed to represent himself throughout the state court proceedings. Petitioner filed and argued numerous motions, made objections, argued points of law, questioned witnesses, and addressed the court. Petitioner was allowed to present his theory of mitigation. Consequently, Petitioner had a fair chance to present his case in his own manner.

Moreover, the evidence presented by special counsel did not contradict Petitioner's mitigation strategy or the evidence Petitioner presented. In fact, the trial court found two mitigating factors based on Petitioner's theory of mitigation. Furthermore, special counsel was appointed to act on the behest of the trial court and not to represent Petitioner. Petitioner had an opportunity to thoroughly cross-examine the witness presented by special counsel and to object to or refute any evidence presented by special counsel. Most importantly, there was no jury in this case but only a trial judge presiding over Petitioner's penalty phase. As recognized by the Supreme Court in the context of standby counsel, "the appearance of a *pro se* defendant's self-representation [is] not...unacceptably undermined by counsel's participation outside the presence of the jury." *McKaskle*, 465 U.S. at 179. Thus, to the extent special counsel could be perceived as representing Petitioner, this perception did not unacceptably undermine Petitioner's self-representation before the trial judge.⁴

^{*9} In sum, Petitioner has not cited nor is this Court aware of any Supreme Court precedent prohibiting a state court from appointing special counsel to act on behalf of the court to investigate and present mitigation evidence in cases in which a defendant chooses to proceed *pro se*.⁵ Accordingly, ground one is denied pursuant to section 2254(d).

B. GROUND TWO

Petitioner contends the trial court erred in permitting hearsay evidence to be considered during the penalty phase in violation of *Crawford v. Washington*, 541 U.S. 36 (2004). (Doc. 1 at 5). Specifically, Petitioner complains that the trial court erroneously allowed the presentence investigation report ("PSI") to be introduced into evidence. (*Id.*). Petitioner argues that the PSI contained prejudicial statements and was more prejudicial than mitigating. (*Id.*). Among the statements Petitioner notes constituted hearsay are the following: (1) Petitioner "had always been a pyromaniac since an early age, and set fire to other people's homes," (2) Petitioner "is a con-artist and sociopath," (3) Petitioner "physically assaulted and threatened to kill his mother," (4) Petitioner "sexually assaulted his two sisters[,]," (5) Petitioner "killed the family cats," (6) Petitioner "beat-up children at boy scouts, little league and church," (7) Petitioner "could not be rehabilitated," (8) Petitioner's "ability to lie is noteworthy as well as his lack of remorse," and (9) Petitioner's "score of 36 on the Hare PCL-R classifies him as a psychopath." (*Id.* at 5-6).

Petitioner raised this ground on direct appeal. The Supreme Court of Florida determined the claim was procedurally barred from review and otherwise without merit. *Barnes I*, 29 So. 3d at 1026. The Court noted that Petitioner failed to make specific objections to any statements contained in the PSI and thus had not preserved the claim. *Id.* at 1026-27. The Court further reasoned that any error in the admission of the PSI was harmless because many of the statements about which Petitioner complained (1) were not contained in the PSI, (2) were admitted through the testimony of Dr. Riebsame, who was subject to cross-examination, and (3) were not included in the sentencing order. *Id.* at 1027. Finally, the Court reasoned that many of the statements about which Petitioner complained supported the extreme mental disturbance mitigator and no basis existed to find that the trial court's consideration of the PSI resulted in a death sentence in light of the weight given the six uncontested aggravators. *Id.*

The record reflects Petitioner moved to strike the PSI and generally objected to its admission. *See, e.g.*, App. A-2 at 289-95; App. A-7 at 1107-12, 1126-32. The trial judge overruled the motion and general objections, noting Petitioner needed to make specific objections to the portions of the PSI he believed constituted inadmissible hearsay. *Id.*

Petitioner did not object to any specific portions of the PSI so as to preserve the objection for appellate review under Florida law. Under Florida law, "an appellate court

may review only those questions properly presented to the trial court.” *Williams v. State*, 414 So. 2d 509, 511 (Fla. 1982) (citing *Mariani v. Schleman*, 94 So. 2d 829 (Fla. 1957)). “Proper presentation requires a contemporaneous objection” that is “specific enough ‘to apprise the trial judge of the putative error and to preserve the issue for intelligent review on appeal.’” *Id.* (quoting *Castor v. State*, 365 So. 2d 701 (Fla. 1978)). The Supreme Court of Florida found the claim to be procedurally barred from review because Petitioner failed to object to specific statements contained in the PSI. Thus, the state court denied this ground based on an adequate and independent procedural ground under state law. Thus, absent an exception to the procedural default, ground two is procedurally barred from review.

***10** Petitioner has not demonstrated cause or prejudice to overcome the procedural default. Moreover, Petitioner has not shown he is actually innocent to warrant application of the fundamental miscarriage of justice exception. Thus, ground two is procedurally barred from review.

Alternatively, assuming ground two was not procedurally barred, it is subject to denial pursuant to section 2254(d). The Confrontation Clause of the Sixth Amendment provides: “In all criminal prosecutions, the accused shall enjoy the right...to be confronted with the witnesses against him....” U.S. Const. amend. VI. In *Crawford*, the Supreme Court of the United States held that “testimonial statements” offered into evidence from witnesses who are not present to testify must be excluded if offered against the accused to establish the truth of the matter asserted. 541 U.S. at 68. The Court determined that testimonial statements include “at a minimum...prior testimony at a preliminary hearing, before a grand jury, or at a former trial; and ... police interrogations.” *Id.* Any constitutional error resulting from the admission of such testimony is subject to harmless error analysis. *See United States v. Travis*, 311 F. App’x 305, 311 (11th Cir. 2009) (noting that Confrontation Clause errors are subject to harmless error analysis); *see also United States v. Dupree*, 240 F. App’x 382, 390 (11th Cir. 2007) (concluding that violation of Confrontation Clause was subject to harmless error analysis). “[C]onstitutional error is harmless unless there is ‘actual prejudice,’ meaning that the error had a ‘substantial and injurious effect or influence’ on the jury’s verdict.” *Mansfield v. Sec’y, Dep’t of Corr.*, 679 F.3d 1301, 1307 (11th Cir. 2012) (quoting *Brecht v. Abrahamson*, 507 U.S. 619, 637 (1993)).

To the extent any of the statements contained in the PSI about which Petitioner complains were erroneously admitted into evidence, the error was harmless. None of the statements were used by the trial court to find any of

the six aggravating factors. *See* Ex. A-11 at 2030-45. Moreover, Dr. Riebsame testified that his diagnostic impression was that Petitioner exhibited symptoms of anti-social personality disorder at the time of the offenses, and he opined that as a result, Petitioner was under the influence of an extreme mental or emotional disturbance at the time of the offenses. (Ex. A-7 at 1182-85). Dr. Riebsame further noted that Petitioner displayed behaviors or criteria consistent with a psychopathic personality. (Ex. A-7 at 1188-94). Therefore, the trial judge heard evidence that Petitioner suffered from personality disorders and found a statutory mitigator to be applicable as a result. (Ex. A-11 at 2047-49). Consequently, the statements in the PSI concerning Petitioner’s mental health did not prejudice him because other similar admissible evidence was presented and found to be mitigation evidence. Additionally, none of the other statements in the PSI referenced in the petition were noted or used by the trial judge in the sentencing order. *See* A-11 at 2023-55. Finally, the trial judge found six aggravating factors based on overwhelming and unrefuted evidence and explicitly found that “each of the six aggravating factors standing alone outweigh all of the mitigating circumstances combined.” (*Id.* at 2055). Given the substantial weight afforded to the aggravators, the admission of the aforementioned statements clearly did not have a substantial and injurious effect or influence on Petitioner’s sentence. Accordingly, ground two is denied.

C. GROUND THREE

***11** Petitioner asserts standby counsel rendered ineffective assistance by failing to move for a competency determination and the trial court erred by not conducting a competency hearing. (Doc. 1 at 7). In support of this ground, Petitioner argues that standby counsel and the trial court respectively should have requested a competency determination and conducted a competency hearing because they knew Petitioner had been diagnosed with a personality disorder and “Baker Acted” and did not understand the adversarial nature of the process. (Doc. 1 at 7-12; Doc. 14 at 15-31).

Petitioner raised this ground in his Rule 3.851 motion. The Supreme Court of Florida determined that Petitioner’s claim of trial court error was procedurally barred because it was not raised on direct appeal and was otherwise without merit. *Barnes II*, 124 So. 3d at 911-16. The Court further determined that standby counsel had no obligation to request a competency determination nor did anything in the record provide standby counsel with a reasonable basis to request one. *Id.* at 917-18. The Court

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reasoned *inter alia* as follows:

In the present case, the trial court record supports the trial judge's conclusion that Barnes was intelligent, understood court procedure, and was completely capable of representing himself. As the postconviction court noted, Barnes advised the trial court at his *Faretta* hearing that he had one year of college and that he had prior experience, education, and knowledge of the court system. Barnes stated that he had taken several criminal justice courses and was a certified law clerk at the Department of Corrections. Barnes advised the trial court that he had worked in the prison law library for twenty years and had watched a criminal trial. He stated that he had never been treated for any mental illness, although he had been diagnosed as having a personality disorder. The fact that he was observed for three days at a state hospital and then released does not provide a reasonable ground for the trial judge to believe Barnes was incompetent. Similarly, the fact that Barnes told the trial court that he had once been diagnosed with a personality disorder does not obligate the trial court to order a competency evaluation. "[N]ot every manifestation of mental illness demonstrates incompetence to stand trial; rather, the evidence must indicate a present inability to assist counsel or understand the charges." *Card v. Singletary*, 981 F.2d 481, 487–88 (11th Cir. 1992) (quoting *U.S. ex rel. Foster v. DeRobertis*, 741 F.2d 1007, 1012 (7th Cir. 1984)). Moreover, we noted in *Nelson* that the fact of a prior suicide attempt and the administration of a powerful antipsychotic drug did not necessarily create a reasonable doubt of defendant's competency or render the defendant incompetent to proceed. See *Nelson*, 43 So.3d at 29.

The record reflects that throughout the trial proceedings, Barnes filed and argued numerous motions before the court. He lodged objections to evidence and comported himself well in court. The transcript of the May 2, 2006, *Faretta*/plea hearing shows that Barnes appeared alert and knowledgeable. Throughout the hearing, Barnes made clear that he understood the consequences of his decision to represent himself and to plead guilty, that he knew the possible sentence was death, and that he understood an attorney is trained to assist in such proceedings. Nothing in the record of the May 2, 2006, hearing, or thereafter, would reasonably have caused the court to doubt that Barnes was competent. In fact, the trial court stated at the *Faretta* hearing:

***12 THE COURT:** All right. Mr. Barnes, at this time then I'm going to find that you are competent. In fact, you appear to be extremely competent. Your

demeanor, the way you've addressed the [c]ourt, the way you—I mean, not only what you've said but your presentation convinces me that you are competent, you understand what is happening here today, that you have knowingly, freely and voluntarily exercised your decision to represent yourself, that you are waiving the right to counsel for no other reason other than the fact that you want to represent yourself and that you—you know, this is a knowing and intelligent waiver and that you have the capacity to make that knowing and intelligent waiver and that you understand the advantages and disadvantages of representing yourself.

....

BY THE COURT: Okay. Mr. Barnes, because I'm finding you intelligent and knowingly making this request, that you have the ability to make this request because you are intelligent and competent to make this request later down the line if you—for whatever reason your strategy, whatever that strategy may be does not work out, you're not going to be able to say well, you know, I was representing myself....And do you understand that?

A [BARNES] I understand. I'm ready to enter a plea right now on all cases.

The trial court clearly believed, based on the colloquy that occurred and on Barnes' conduct and statements, that Barnes was competent even though no formal competency evaluation or determination was made. Nothing in the trial proceedings provided a reasonable ground for the trial court to doubt Barnes' competency to proceed such that a competency evaluation should have been ordered....

...

In this case, the facts asserted by Barnes in his motion do not raise a valid question as to his competency to stand trial, and our review of the trial court record discloses no basis on which to conclude otherwise....

In denying an evidentiary hearing on this claim, the postconviction court concluded that Barnes failed to allege or identify clear and convincing evidence necessary to support a substantive claim of incompetency, stating:

Defendant cannot make the requisite showing of incompetence for a substantive claim of incompetency as shown by the record and cited in the preceding paragraphs of this Order. The Defendant consulted with standby counsel and talked

with court counsel. No counsel, prosecutor, or judge had any doubt the Defendant was not competent as shown by the record. Judge Davidson found the Defendant “extremely competent” to represent himself after learning from the Defendant that he had been Baker Acted in 1990, had been diagnosed with borderline personality disorder, and hearing Defendant’s comments regarding mitigation evidence. Judge Davidson had the opportunity to observe the Defendant on several occasions and numerous *Faretta* inquiries were conducted throughout the case because the Defendant continued to reject offers of counsel....In the subject case, there were no indications of Defendant’s incompetence, distinguishable factually from the cases cited by the Defendant in his postconviction motion. The record shows that the Defendant was not only competent, but also intelligent. There was no reason for a competency evaluation.

We agree. As discussed earlier, nothing alleged in Barnes’ motion or cited by Barnes from the record of the May 2, 2006, hearing or elsewhere in the trial record would provide any evidence, not to mention clear and convincing evidence, creating a real, substantial, and legitimate doubt that Barnes was convicted and sentenced while incompetent to proceed. Thus, for these reasons the circuit court correctly denied Barnes’ substantive due process claim without a hearing.

Id. at 912-16.

Petitioner has not established that the state court’s denial of this ground is contrary to, or an unreasonable application of, clearly established federal law. A criminal defendant must be mentally competent to stand trial.” *Drope v. Missouri*, 420 U.S. 162 (1975). “The legal test for mental competency is whether, at the time of trial and sentencing, the petitioner had ‘sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding’ and whether he had ‘a rational as well as factual understanding of the proceedings against him.’” *Adams v. Wainwright*, 764 F.2d 1356, 1360 (11th Cir. 1985) (quoting *Dusky v. United States*, 362 U.S. 402, 402 (1960)).

*13 In analyzing a claim that counsel rendered ineffective assistance by failing to obtain a psychological examination to assess the defendant’s competency to stand trial or otherwise conduct a defense, courts must consider whether a reasonable attorney should have been on notice that such an exam was necessary. *See, e.g., Devier v. Zant*, 3 F.3d 1445, 1451 (11th Cir. 1993) (concluding that “the failure of [the defendant’s] attorneys

to introduce psychological evidence as to how [the defendant’s] general mental status affected the voluntariness of his confession does not amount to ineffective assistance of counsel”). Moreover, to establish prejudice resulting from counsel’s failure to investigate and pursue a claim of incompetency, the defendant must demonstrate that “a real, substantial, and legitimate doubt” existed concerning his mental competency at the time of his trial. *Adams*, 764 F.2d at 1367 (concluding that “[s]ince the requisite doubt has not and apparently could not have then been raised, the attorney’s conduct in investigating and his decision not to pursue a claim of incompetency did not result in prejudice”); *see also Oats v. Singletary*, 141 F.3d 1018, 1025 (11th Cir. 1998) (concluding that the defendant failed to demonstrate prejudice based on counsel’s failure to adequately argue he was incompetent to proceed because the defendant failed to show that “there [was] a reasonable probability that the trial judge would have determined that [he] was incompetent to stand trial”).

The state court’s finding that Petitioner failed to demonstrate he was not competent is a factual finding entitled to a presumption of correctness. *See, e.g., Oats*, 141 F.3d at 1025 (citing *Demosthenes v. Baal*, 495 U.S. 731, 735 (1990); *Maggio v. Fulford*, 462 U.S. 111, 117 (1983)). Petitioner has not established that a real, substantial, and legitimate doubt existed concerning his mental competency at any point during the proceedings. Petitioner clearly understood the proceedings against him, including the penalties he faced if convicted, and he was able to, and in fact did, consult with standby counsel at various times throughout the proceedings. *See, e.g., Ex. A-1* at 11-30; *Ex. A-5* at 809-14, 824. The record reflects Petitioner filed and argued multiple motions, raised numerous objections, and complied with the rules of the court. Petitioner, therefore, has not demonstrated that the trial court erred by failing to conduct a competency hearing.

For these same reasons, standby counsel had no reason to move for a competency determination. Moreover, “a defendant who elects to represent himself cannot thereafter complain that the quality of his own defense amounted to a denial of ‘effective assistance of counsel.’” *Faretta*, 422 U.S. at 834 n.46. Finally, a reasonable probability does not exist that Petitioner would have been found to be incompetent had standby counsel sought a competency determination. Thus, Petitioner has not established that standby counsel was deficient for failing to request a competency determination nor has he shown that prejudice resulted from standby counsel’s failure to do so. Accordingly, ground three is denied pursuant to section 2254(d).

D. GROUND FOUR

Petitioner contends he may be incompetent at the time he is scheduled to be executed, and therefore, his execution would violate the Eighth Amendment. (Doc. 1 at 13). Petitioner raised this ground in his Rule 3.851 motion. The Supreme Court of Florida determined the ground was not ripe. *Barnes II*, 124 So. 3d at 918.

The Supreme Court of the United States had held that a *Ford*⁷ claim does not become ripe until the prisoner's execution is imminent. See *Panetti v. Quarterman*, 551 U.S. 930, 946-47 (2007). Thus, ground four is dismissed without prejudice to Petitioner's right to raise the issue when it becomes ripe for adjudication.

IV. CERTIFICATE OF APPEALABILITY

This Court should grant an application for certificate of appealability only if the Petitioner makes "a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). To make such a showing "the petitioner must demonstrate that reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong." *Slack v. McDaniel*, 529 U.S. 473, 484 (2000); see also *Lamarca v. Sec'y, Dep't of Corr.*, 568 F.3d 929, 934 (11th Cir. 2009). When a district court dismisses a federal habeas petition on procedural grounds without reaching the underlying constitutional claim, a certificate of appealability should issue only when a petitioner shows "that jurists of reason would find it debatable whether the petition states a valid claim of the denial of a constitutional right and that jurists of reason

would find it debatable whether the district court was correct in its procedural ruling." *Slack*, 529 U.S. at 484; *Lamarca*, 568 F.3d at 934. However, a prisoner need not show that the appeal will succeed. *Miller-El v. Cockrell*, 537 U.S. 322, 337 (2003).

***14** This Court finds that reasonable jurists would find this Court's assessment of ground one debatable. Thus, a certificate of appealability will be granted regarding whether the state court's appointment of special counsel to present mitigation evidence violated Petitioner's right to self-representation. Petitioner has not demonstrated that reasonable jurists would find the district court's assessment of the remaining grounds debatable or wrong. Moreover, Petitioner cannot show that jurists of reason would find this Court's procedural rulings debatable. Therefore, the Court will deny Petitioner a certificate of appealability as to grounds two through four.

For the foregoing reasons, it is **ORDERED AND ADJUDGED** as follows:

1. The Petition for Writ of Habeas Corpus filed by James Barnes (Doc. 1) is **DENIED**, and this case is **DISMISSED WITH PREJUDICE**.

2. Petitioner is **GRANTED** a certificate of appealability as to ground one and denied a certificate of appealability as to ground two through four.

3. The Clerk of the Court shall enter judgment accordingly and is directed to close this case.

DONE AND ORDERED in Orlando, Florida, this 8th day of February, 2016.

All Citations

Not Reported in Fed. Supp., 2016 WL 472631

Footnotes

- 1 References to the record will be made by citing to the particular volume and page of the advanced appendix. For example, "Ex. A at 1" refers to page one of the volume labeled Exhibit A.
- 2 *Spencer v. State*, 615 So. 2d 688, 691 (Fla. 1993) (holding that the trial court should conduct a hearing to allow the parties to be heard and to allow presentation of additional evidence before sentencing). The trial court conducted the *Spencer* hearing in this case as the penalty-phase proceeding because Barnes waived an advisory jury.
- 3 In *Lockhart v. Fretwell*, 506 U.S. 364, 372 (1993), the Supreme Court of the United States clarified that the prejudice prong of the test does not focus solely on mere outcome determination; rather, to establish prejudice, a criminal defendant must show that counsel's deficient representation rendered the result of the trial fundamentally unfair or unreliable.

Barnes v. Secretary, Department of Corrections, Not Reported in Fed. Supp. (2016)

- 4 The Court notes that any error in the appointment of special counsel in this case inured to the benefit of Petitioner because the trial court found eight additional mitigating factors as a result of the appointment. Nevertheless, a violation of the right to self-representation is not subject to harmless error analysis. *Strozier v. Newsome*, 871 F.2d 995, 997 (11th Cir. 1989).
- 5 In *United States v. Davis*, 285 F.3d 378, 381 (5th Cir. 2002), the United States Court of Appeals for the Fifth Circuit held in a mandamus action that the district court's appointment of independent counsel to present mitigation evidence at the penalty phase of a capital case violated the defendant's right to self-representation. In denying relief on this ground, the Supreme Court of Florida distinguished *Davis* from this case. See *Barnes I*, 29 So. 3d at 1024-25 (concluding that contrary to the facts in *Davis*, the mitigation evidence presented by independent counsel in Petitioner's case did not conflict with anything presented by Petitioner and there was no jury in Petitioner's case). The Court agrees that *Davis* is distinguishable because in this case there was no jury and nothing presented by special counsel conflicted with any evidence offered by Petitioner in support of mitigation. Moreover, the procedural posture of *Davis* is wholly different from the instant case. *Davis* involved a federal criminal proceeding and mandamus action, whereas the instant case is a habeas action brought by a state prisoner pursuant to 28 U.S.C. § 2254. Consequently, this case is governed by the deferential standard imposed by section 2254(d). Thus, in the absence of a determination by the Supreme Court of the United States that the appointment of special counsel to act on behalf of the state court to present mitigation evidence in a capital non-jury proceeding violates the right to self-representation, Petitioner is not entitled to habeas relief.
- 6 The competency standard for pleading guilty is the same as the competency standard for standing trial. *Godinez v. Moran*, 509 U.S. 389 (1993); *Stinson v. Wainwright*, 710 F.2d 743, 745 (11th Cir. 1983); *Malinaukas v. United States*, 505 F.2d 649, 654 (5th Cir. 1974).
- 7 *Ford v. Wainwright*, 477 U.S. 399 (1986) (holding that "the Eighth Amendment prohibits a State from carrying out a sentence of death upon a prisoner who is insane.").

APPENDIX C

124 So.3d 904
Supreme Court of Florida.

James Phillip BARNES, Appellant,
v.
STATE of Florida, Appellee.

No. SC12-875.

June 27, 2013.

As Revised on Denial of Rehearing Oct. 17, 2013.

Synopsis

Background: After his first-degree murder conviction and death sentence were affirmed on direct appeal, 29 So.3d 1010, defendant filed motion for postconviction relief. The Circuit Court, Brevard County, John M. Griesbaum, J., summarily denied motion. Defendant appealed.

Holdings: The Supreme Court held that:

^[1] claim that trial court erred in not sua sponte ordering a competency determination prior to accepting guilty plea could have been raised on direct appeal and was thus procedurally barred;

^[2] trial court had no obligation to order a competency evaluation sua sponte prior to accepting defendant's guilty plea;

^[3] acceptance of defendant's guilty plea to first-degree murder and imposition of death penalty without ordering a competency evaluation sua sponte did not violate defendant's substantive due process rights;

^[4] standby counsel's failure to move for a competency determination prior to trial court's acceptance of pro se defendant's guilty plea to first-degree murder was not ineffective assistance of counsel; and

^[5] postconviction claim that defendant would be incompetent at time of execution was not ripe for review.

Affirmed.

West Headnotes (22)

^[1] **Criminal Law**
☛Necessity for Hearing

A defendant is normally entitled to an evidentiary hearing on a postconviction motion unless (1) the motion, files, and records in the case conclusively show that the movant is entitled to no relief, or (2) the motion or particular claim is legally insufficient. West's F.S.A. RCrP Rule 3.851.

3 Cases that cite this headnote

^[2] **Criminal Law**
☛Necessity for Hearing

An evidentiary hearing must be held on an initial postconviction motion whenever the movant makes a facially sufficient claim that requires factual determination. West's F.S.A. RCrP Rule 3.851.

2 Cases that cite this headnote

^[3] **Criminal Law**
☛Burden of proof
Criminal Law
☛Necessity for Hearing

To the extent there is any question as to whether a postconviction movant has made a facially sufficient claim requiring a factual determination, the Court will presume that an evidentiary hearing is required; however, merely conclusory allegations are not sufficient, and the defendant bears the burden of establishing a prima facie case based on a legally valid claim. West's F.S.A. RCrP Rule 3.851.

1 Cases that cite this headnote

- [4] **Criminal Law**
☛ Interlocutory, Collateral, and Supplementary Proceedings and Questions

To uphold the trial court's summary denial of claims raised in an initial postconviction motion, the record must conclusively demonstrate that the defendant is not entitled to relief. West's F.S.A. RCrP Rule 3.851.

Cases that cite this headnote

- [5] **Criminal Law**
☛ Interlocutory, Collateral, and Supplementary Proceedings and Questions
Criminal Law
☛ Judgment, sentence, and punishment

When reviewing the circuit court's summary denial of an initial postconviction motion, the appellate court will accept the movant's factual allegations as true and will affirm the ruling only if the filings show that the movant has failed to state a facially sufficient claim, there is no issue of material fact to be determined, the claim should have been brought on direct appeal, or the claim is positively refuted by the record. West's F.S.A. RCrP Rule 3.851.

2 Cases that cite this headnote

- [6] **Criminal Law**
☛ Review De Novo

Because a court's decision whether to grant an evidentiary hearing on a postconviction motion is ultimately based on written materials before the court, its ruling is tantamount to a pure question of law, subject to de novo review. West's F.S.A. RCrP Rule 3.851.

Cases that cite this headnote

- [7] **Criminal Law**
☛ Post-conviction proceeding not a substitute for appeal

Defendant's claim that trial court erred in not sua sponte ordering a competency determination prior to accepting guilty plea to first-degree murder and related offenses could have been raised on direct appeal and was thus procedurally barred in postconviction proceedings.

Cases that cite this headnote

- [8] **Criminal Law**
☛ Right to plead guilty; mental competence
Sentencing and Punishment
☛ Examination

Defendant's behavior throughout pretrial proceedings and the plea hearing process did not give trial court reason to question defendant's competency to proceed, and thus, trial court had no obligation to order a competency evaluation sua sponte prior to accepting defendant's guilty plea to first-degree murder and sentencing him to death; defendant was intelligent, understood court procedure, and was completely capable of representing himself, and neither his prior state hospital stay nor his personality disorder diagnosis rendered an evaluation necessary. West's F.S.A. RCrP Rule 3.210.

Cases that cite this headnote

- [9] **Criminal Law**
☛ Initiation by prosecution or sua sponte by court; absence of request

For purposes of deciding whether to order a competency evaluation sua sponte, the issue is whether any information coming before the court before or during trial provided reasonable

ground to believe that the defendant's mental condition was such that he was incompetent. West's F.S.A. RCrP Rule 3.210.

Cases that cite this headnote

[10]

Criminal Law

⚡Preliminary proceedings

The appellate court will uphold the trial court's decision as to whether a competency hearing is necessary absent an abuse of discretion. West's F.S.A. RCrP Rule 3.210.

1 Cases that cite this headnote

[11]

Mental Health

⚡Mental disorder at time of trial

Not every manifestation of mental illness demonstrates incompetence to stand trial; rather, the evidence must indicate a present inability to assist counsel or understand the charges.

Cases that cite this headnote

[12]

Sentencing and Punishment

⚡Evidence in mitigation in general

In a capital sentencing case where the defendant waives mitigation, the trial court could require the State to place in the record all evidence in its possession of a mitigating nature such as school records, military records, and medical records. West's F.S.A. Bar Rule 4-3.8(c).

Cases that cite this headnote

[13]

Constitutional Law

⚡Capital punishment; death penalty

Criminal Law

⚡Right to plead guilty; mental competence

Acceptance of defendant's guilty plea to first-degree murder and imposition of death penalty without ordering a competency evaluation sua sponte did not violate defendant's substantive due process rights, as defendant did not demonstrate behavior that would cast a real, substantial, and legitimate doubt as to his competency throughout pretrial proceedings, the plea hearing process, or sentencing. U.S.C.A. Const.Amend. 14; West's F.S.A. § 916.12(1); West's F.S.A. RCrP Rule 3.210.

Cases that cite this headnote

[14]

Constitutional Law

⚡Incompetency or Mental Illness

The due process guarantee prohibits states from trying and convicting mentally incompetent defendants. U.S.C.A. Const.Amend. 14.

Cases that cite this headnote

[15]

Criminal Law

⚡Evidence

A petitioner raising a substantive claim of incompetency is entitled to no presumption of incompetency and must demonstrate his or her incompetency by a preponderance of the evidence.

Cases that cite this headnote

[16]

Mental Health

⚡Mental disorder at time of trial

A defendant is considered "competent to stand trial" if he has sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding, and if he has a

rational as well as factual understanding of the proceedings against him.

Cases that cite this headnote

Const.Amend. 6.

3 Cases that cite this headnote

[17]

Criminal Law

⚡Doubt as to competency; reasonable cause or grounds

A petitioner is entitled to an evidentiary hearing on a substantive incompetency claim if he or she presents clear and convincing evidence to create a real, substantial and legitimate doubt as to his or her competency.

Cases that cite this headnote

[20]

Criminal Law

⚡Counsel of defendant's choice or defendant pro se

A defendant who represents himself has the entire responsibility for his own defense even if he has standby counsel and cannot later claim that the quality of his defense was a denial of effective assistance of counsel. U.S.C.A. Const.Amend. 6.

2 Cases that cite this headnote

[18]

Criminal Law

⚡Evidence, Information, or Conduct Invoking Inquiry

Sentencing and Punishment

⚡Examination

There is no blanket requirement that all capital defendants be evaluated for competency, even those who appear pro se. West's F.S.A. § 916.12(1); West's F.S.A. RCrP Rule 3.210.

Cases that cite this headnote

[21]

Criminal Law

⚡Necessity of conviction, judgment, or sentence

Postconviction claim that defendant would be incompetent at time of execution as to render the death penalty in his case cruel and unusual was not ripe for review on appeal from summary denial of the postconviction motion, as the death warrant had not yet been issued at the time of appellate review. U.S.C.A. Const.Amend. 8.

3 Cases that cite this headnote

[19]

Criminal Law

⚡Counsel of defendant's choice or defendant pro se

Standby counsel's failure to move for a competency determination prior to trial court's acceptance of pro se defendant's guilty plea to first-degree murder could not support an ineffective assistance of counsel claim; standby counsel's role did not extend to seeking a competency determination on defendant's behalf, and defendant was advised that, as a pro se defendant, even with standby counsel, he was responsible for his own representation. U.S.C.A.

[22]

Sentencing and Punishment

⚡Mentally ill or incompetent persons

The Eighth Amendment prohibits a State from carrying out a sentence of death upon a prisoner who is insane. U.S.C.A. Const.Amend. 8; West's F.S.A. RCrP Rule 3.811(a).

Cases that cite this headnote

Attorneys and Law Firms

***907** Ali Andrew Shakoor, Capital Collateral Regional Counsel–Middle Region, and Richard E. Kiley and James Viggiano, Assistant Capital Collateral Counsels, Tampa, FL, for Appellant.

Pamela Jo Bondi, Attorney General, Tallahassee, Florida, and Kenneth S. Nunnolley, Senior Assistant Attorney General, Daytona Beach, FL, for Appellee.

Opinion

PER CURIAM.

James Phillip Barnes, a prisoner under sentence of death, appeals the order of the circuit court denying his initial motion to vacate his conviction for first-degree murder and sentence of death filed under Florida Rule of Criminal Procedure 3.851. Because the order concerns postconviction relief from a capital conviction for which a sentence of death was imposed, this Court has jurisdiction under article V, section 3(b)(1), Florida Constitution. For the reasons expressed below, we affirm the circuit court's denial of postconviction relief.

BACKGROUND AND FACTS

Barnes was convicted of the 1988 first-degree murder of Patsy Miller in Melbourne, Florida. He was not arrested for that murder and other related charges until some years later when, while in prison for another murder, he confessed to the Miller murder. He subsequently waived counsel and, with standby counsel, entered a guilty plea to all the charges. After Barnes waived mitigation and waived a penalty phase jury, the trial court appointed court counsel to investigate and present mitigation. After the penalty phase, Barnes was sentenced to death and to terms of imprisonment for the related charges of burglary of a dwelling with an assault or battery, two counts of sexual battery by use or threat of a deadly weapon, and arson of a dwelling. This Court affirmed his convictions and sentence in *Barnes v. State*, 29 So.3d 1010 (Fla.), cert. denied, — U.S. —, 131 S.Ct. 234, 178 L.Ed.2d 155 (2010).

The facts of the murder, based upon Barnes' written and

tape-recorded statements and upon the forensic evidence at the penalty phase, show that on the night of April 20, 1988, Barnes went to Miller's condominium unit in Melbourne, Florida. Once there, he took off his clothes and entered the apartment after removing a window screen. Barnes admitted that he went there with the intent to both rape and kill Miller. Once inside, Barnes armed himself with a knife and, after secretly watching Miller go about her normal activities for a short period of time, confronted her and forced her at knife-point to the bedroom where he sexually battered her. He then bound her hands behind her back with shoelaces, tied her feet together, and sexually battered her again. Barnes admitted that he tried to strangle her with a terrycloth belt but was not successful, so he bludgeoned her in the back of her head with a hammer that he found in her bedroom.

After taking a bank card from Miller's wallet and collecting everything he touched, Barnes then set fire to the bed where Miller's body lay. Shortly after 11 ***908** p.m., firefighters responded and found Miller's burned body face down on the bed with her hands bound behind her back. The medical examiner testified that the cause of death was blunt-force trauma from multiple blows to Miller's head. Signs of attempted strangulation, including a fractured hyoid bone, were also discovered in the autopsy. The medical examiner determined that Miller's body was set ablaze after she died.

After Barnes confessed, an indictment was issued charging him with first-degree murder, burglary of a dwelling with an assault or battery, two counts of sexual battery by use or threat of a deadly weapon, and arson of a dwelling. Barnes immediately sought to waive counsel and a *Faretta* hearing was held.¹ He then represented himself throughout the proceedings with standby counsel available at all times. Immediately after the first of many *Faretta* hearings, Barnes entered an open plea of guilty and waived a sentencing jury. The trial court ordered a presentence investigation (PSI) report and also ordered that Barnes' school records be obtained. In addition, the court appointed Dr. William Riebsame, a board-certified forensic psychologist, to provide a psychological evaluation of Barnes.

After presentation of aggravating circumstances at the penalty-phase *Spencer* hearing, Barnes refused to present any evidence of mitigation and announced that he would rely only on the fact that he came forward and took responsibility for the murder. Over Barnes' objection, the court appointed special mitigation counsel to investigate and present any mitigation at a second *Spencer* hearing. After mitigation was presented, the sentencing order was entered on December 13, 2007, finding that the six

aggravating factors² outweighed the one statutory mitigator and nine nonstatutory mitigators.³ The court imposed a death sentence for the murder, separate life sentences for each of the burglary with battery and sexual battery counts, and a thirty-year sentence for the arson.

Barnes raised two issues on direct appeal: (1) whether the trial court violated Barnes' Sixth Amendment right to represent *909 himself when it appointed special court counsel to develop penalty-phase mitigation; and (2) whether the trial court reversibly erred in considering the PSI report over Barnes' objection that it contravened his constitutional right to confront witnesses against him. We held that the trial court did not violate Barnes' right of self-representation by appointing special court counsel to investigate and present mitigation, which was a proper procedure under *Muhammad v. State*, 782 So.2d 343, 364 (Fla.2001) (holding that where a defendant waives mitigation, the trial court has discretion to appoint counsel to present mitigation). *Barnes*, 29 So.3d at 1023. We also held that Barnes' claims concerning the PSI were procedurally barred and without merit. *Id.* at 1026.

Barnes filed his initial motion for postconviction relief on September 21, 2011, raising two claims, both of which were summarily denied: (1) whether his standby counsel or the trial court sua sponte should have ordered a competency hearing before allowing him to plead guilty,⁴ and (2) whether he may be insane at the time of execution. After a *Huff* hearing, the circuit court summarily denied Barnes' claims.⁵ In its order entered on January 23, 2012, the circuit court set forth the facts of the case and then concluded in pertinent part as follows:

b. The Defendant represented himself pro se throughout the guilt and penalty phases in this case in which he was charged with Ms. Miller's murder. The Honorable Judge Lisa Davidson presided over the guilt and penalty phases in this case. Judge Davidson appointed the Office of the Public Defender as standby counsel. Assistant Public Defender Phyllis Riewe served as standby counsel for the Defendant during the guilt phase and Assistant Public Defender Randy Moore served as standby counsel for the Defendant during the penalty phase.

c. On May 2, 2006, the Defendant entered an "open" plea of guilty to the charged crimes of first-degree premeditated murder (Count I)....

d. On May 2, 2006, the Defendant waived his right to a jury recommendation and requested that the Court proceed to sentencing without the benefit of the jury's recommendation as to the imposition of

life or death on Count I—First Degree Premeditated Murder. Judge Davidson found that the Defendant knowingly, freely, and voluntarily chose to forego a jury for the penalty phase. The Defendant explained that he was making a strategic decision to have a judge alone determine his sentence. (See Exhibit "A," pgs. 45, 53).

e. The Defendant represented himself pro se at the sentencing hearing and specifically chose not to present mitigating evidence or argument at the penalty phase, other than the fact that he came forward and took responsibility....

....

g. On May 11, 2006, Judge Davidson ordered that a comprehensive pre-sentence investigation (PSI) be conducted, and on February 7, 2007, Judge Davidson appointed attorney Sam Baxter *910 Bardwell as special mitigation counsel to investigate and present any other mitigation evidence because the Defendant refused to present any mitigating evidence on his behalf other than that evidence already placed on the record....

h. On November 16, 2007, the Court held a hearing at which Mr. Bardwell presented alleged mitigating evidence to the Court....

....

i. On January 12, 2012, the case management conference was held before the undersigned judge. The purpose of a case management conference was to hear argument on purely legal claims not based on disputed facts and to schedule an evidentiary hearing on claims requiring a factual determination. Fla. R.Crim. P. 3.851(f)(5)(A). The Court concludes as a matter of law that the claims in the subject motion for postconviction relief do not require an evidentiary hearing, and should be summarily denied.

The order further recited that the trial judge conducted an extensive *Faretta* hearing before allowing Barnes to appear pro se and enter his plea. In that hearing Barnes disclosed that he had thirteen years of school, including one year of college, was a certified law clerk through the Department of Corrections, and had worked in the prison law library. The circuit court noted that the trial judge found Barnes to be "extremely competent," that he understood what was happening, that he understood the advantages and disadvantages of self-representation, and that he was waiving future

claims of ineffective assistance of counsel. The postconviction order emphasized that the trial judge found Barnes to be “alert, competent, and intelligent,” “very definite” in his speech, and “extremely alert,” and that on direct appeal, this Court found the plea was knowing, intelligent, and voluntary. *See Barnes*, 29 So.3d at 1020–22.

As to Barnes’ claim that the trial court erred by not sua sponte ordering a competency hearing after being told by Barnes that he had been “Baker Acted” sometime in 1990 and had at some point been diagnosed with borderline personality disorder, the circuit court held that the claim was procedurally barred because it could and should have been raised on direct appeal. To the extent Barnes was raising a substantive claim of violation of due process for being convicted and sentenced while incompetent, the circuit court denied relief, citing *Nelson v. State*, 43 So.3d 20, 33 (Fla.2010), for the holding that to assert such a claim Barnes was required to show “clear and convincing evidence to create a real, substantial and legitimate doubt” as to competency. The circuit court then concluded that the facts alleged by Barnes failed to create any real, substantial or legitimate doubt as to his competency. The circuit court also noted that neither the trial court nor the counsel who were present had any doubt about Barnes’ competency. The order concluded:

The “reasonable grounds” proffered in the Rule 3.851 motion are refuted by the record. In the subject case, there were no indications of Defendant’s incompetence, distinguishable factually from the cases cited by the Defendant in his postconviction motion. The record shows that that Defendant was not only competent, but also intelligent. There was no reason for a competency evaluation.

As to the claim that standby counsel was ineffective for failing to seek a competency determination, the circuit court denied relief, holding that a defendant who represents himself has the entire responsibility for his own defense even if he has standby counsel. Finally, the circuit court denied relief on Barnes’ claim that he may be incompetent at the time of execution because such a claim is not ripe for review until a death warrant is signed. This appeal ensued in which Barnes contends that the circuit court erred in denying his initial postconviction motion without an evidentiary hearing.

ANALYSIS

Standard of Review

[1] [2] [3] “A defendant is normally entitled to an evidentiary hearing on a postconviction motion ‘unless (1) the motion, files, and records in the case conclusively show that the movant is entitled to no relief, or (2) the motion or particular claim is legally insufficient.’ ” *Valentine v. State*, 98 So.3d 44, 54 (Fla.2012) (quoting *Franqui v. State*, 59 So.3d 82, 95 (Fla.2011)). An evidentiary hearing must be held on an initial 3.851 motion whenever the movant makes a facially sufficient claim that requires factual determination. *See Amendments to Fla. Rules of Crim. Pro. 3.851, 3.852, & 3.993*, 772 So.2d 488, 491 n. 2 (Fla.2000). “[T]o the extent there is any question as to whether a rule 3.851 movant has made a facially sufficient claim requiring a factual determination, the Court will presume that an evidentiary hearing is required.” *Walker v. State*, 88 So.3d 128, 135 (Fla.2012). However, merely conclusory allegations are not sufficient—the defendant bears the burden of “establishing a ‘prima facie case based on a legally valid claim.’ ” *Valentine*, 98 So.3d at 54 (quoting *Franqui*, 59 So.3d at 96).

[4] [5] [6] “To uphold the trial court’s summary denial of claims raised in an initial postconviction motion, the record must conclusively demonstrate that the defendant is not entitled to relief.” *Everett v. State*, 54 So.3d 464, 485 (Fla.2010). When reviewing the circuit court’s summary denial of an initial rule 3.851 motion, we will accept the movant’s factual allegations as true and will affirm the ruling only if the filings show that the movant has failed to state a facially sufficient claim, there is no issue of material fact to be determined, the claim should have been brought on direct appeal, or the claim is positively refuted by the record. *See Walker*, 88 So.3d at 135. Finally, “[b]ecause a court’s decision whether to grant an evidentiary hearing on a rule 3.851 motion is ultimately based on written materials before the court, its ruling is tantamount to a pure question of law, subject to de novo review.” *Seibert v. State*, 64 So.3d 67, 75 (Fla.2010) (citing *State v. Coney*, 845 So.2d 120, 137 (Fla.2003) (holding that pure questions of law that are discernable from the record are subject to de novo review)). With these principles in mind, we turn first to Barnes’ claim that the trial court, sua sponte, was required

to order a competency evaluation before allowing Barnes to plead guilty.

Discussion

[7] Barnes first contends that the trial court, sua sponte, should have ordered a competency evaluation after Barnes advised the court at his first *Faretta* hearing that he had been “Baker Acted” once in 1990 for three days for observation and at some point had been diagnosed with borderline personality disorder.⁶ Even though he is clearly competent, Barnes asks this Court to vacate his conviction and sentence and allow him the opportunity to withdraw his plea because no formal determination of competency was made at the time of trial.

***912** This Court has many times held that postconviction proceedings are not to be used as a second appeal, and that claims that were or could have been raised on direct appeal are procedurally barred in postconviction. *See, e.g., Willacy v. State*, 967 So.2d 131, 141 (Fla.2007) (holding that postconviction proceedings cannot be used as a second appeal and claims that could have been brought on direct appeal are procedurally barred); *see also Nelson*, 43 So.3d at 33 (holding that a claim that the trial court erred in not holding a competency hearing despite information suggesting incompetency is procedurally barred if not raised on direct appeal); *Carroll v. State*, 815 So.2d 601, 610 (Fla.2002) (holding that claim of inadequate competency determination should have been raised on direct appeal and is procedurally barred in postconviction proceeding); *Patton v. State*, 784 So.2d 380, 393 (Fla.2000) (holding that claim of inadequate competency hearing is procedurally barred because it should have been raised on direct appeal). Thus, Barnes’ claim that the trial court erred in not sua sponte ordering a competency determination is procedurally barred, as the postconviction court concluded.

[8] [9] [10] Even if not barred, this claim has no merit because it is conclusively refuted by the record. A reading of the hearing transcript relied on by Barnes as evidence that the trial court should have ordered a competency determination shows that nothing Barnes said or did in that hearing would provide a reasonable ground for the court to believe he was incompetent to proceed. Florida Rule of Criminal Procedure 3.210 provides in pertinent part as follows:

(b) Motion for Examination. If, at any material stage

of a criminal proceeding, the court of its own motion, or on motion of counsel for the defendant or for the state, has reasonable ground to believe that the defendant is not mentally competent to proceed, the court shall immediately enter its order setting a time for a hearing to determine the defendant’s mental condition....

“A defendant is incompetent to proceed ... if the defendant does not have sufficient present ability to consult with her or his lawyer with a reasonable degree of rational understanding or if the defendant has no rational, as well as factual, understanding of the proceedings against her or him.” § 916.12(1), Fla. Stat. (2006). “As this Court succinctly stated in *State v. Tait*, 387 So.2d 338, 340 (Fla.1980), the issue is ‘whether any information coming before the court before or during [trial] provided reasonable ground to believe that the defendant’s mental condition was such that he was incompetent.’ This Court will uphold the trial court’s decision as to whether such a hearing is necessary absent an abuse of discretion.” *Rodgers v. State*, 3 So.3d 1127, 1132 (Fla.2009) (quoting *Lawrence v. State*, 846 So.2d 440, 447 (Fla.2003), and citing *Hunter v. State*, 660 So.2d 244, 248 (Fla.1995)).

[11] In the present case, the trial court record supports the trial judge’s conclusion that Barnes was intelligent, understood court procedure, and was completely capable of representing himself. As the postconviction court noted, Barnes advised the trial court at his *Faretta* hearing that he had one year of college and that he had prior experience, education, and knowledge of the court system. Barnes stated that he had taken several criminal justice courses and was a certified law clerk at the Department of Corrections. Barnes advised the trial court that he had worked in the prison law library for twenty years and had watched a criminal trial. He stated that he had never been treated for any mental illness, although he had been diagnosed ***913** as having a personality disorder. The fact that he was observed for three days at a state hospital and then released does not provide a reasonable ground for the trial judge to believe Barnes was incompetent. Similarly, the fact that Barnes told the trial court that he had once been diagnosed with a personality disorder does not obligate the trial court to order a competency evaluation. “[N]ot every manifestation of mental illness demonstrates incompetence to stand trial; rather, the evidence must indicate a present inability to assist counsel or understand the charges.” *Card v. Singletary*, 981 F.2d 481, 487–88 (11th Cir.1992) (quoting *U.S. ex rel. Foster v. DeRobertis*, 741 F.2d 1007, 1012 (7th Cir.1984)). Moreover, we noted in *Nelson* that the fact of a prior suicide attempt and the administration of a powerful antipsychotic drug did not necessarily create a reasonable doubt of defendant’s competency or

render the defendant incompetent to proceed. *See Nelson*, 43 So.3d at 29.

The record reflects that throughout the trial proceedings, Barnes filed and argued numerous motions before the court. He lodged objections to evidence and comported himself well in court. The transcript of the May 2, 2006, *Faretta* /plea hearing shows that Barnes appeared alert and knowledgeable. Throughout the hearing, Barnes made clear that he understood the consequences of his decision to represent himself and to plead guilty, that he knew the possible sentence was death, and that he understood an attorney is trained to assist in such proceedings. Nothing in the record of the May 2, 2006, hearing, or thereafter, would reasonably have caused the court to doubt that Barnes was competent. In fact, the trial court stated at the *Faretta* hearing:

THE COURT: All right. Mr. Barnes, at this time then I'm going to find that you are competent. In fact, you appear to be extremely competent. Your demeanor, the way you've addressed the [c]ourt, the way you—I mean, not only what you've said but your presentation convinces me that you are competent, you understand what is happening here today, that you have knowingly, freely and voluntarily exercised your decision to represent yourself, that you are waiving the right to counsel for no other reason other than the fact that you want to represent yourself and that you—you know, this is a knowing and intelligent waiver and that you have the capacity to make that knowing and intelligent waiver and that you understand the advantages and disadvantages of representing yourself.

....

BY THE COURT: Okay. Mr. Barnes, because I'm finding you intelligent and knowingly making this request, that you have the ability to make this request because you are intelligent and competent to make this request later down the line if you—for whatever reason your strategy, whatever that strategy may be does not work out, you're not going to be able to say well, you know, I was representing myself.... And do you understand that?

A [BARNES] I understand. I'm ready to enter a plea right now on all cases.

The trial court clearly believed, based on the colloquy that occurred and on Barnes' conduct and statements, that Barnes was competent even though no formal competency evaluation or determination was made. Nothing in the trial proceedings provided a reasonable ground for the trial court to doubt Barnes' competency to

proceed such that a competency evaluation should have been ordered. The trial court's conclusions were similar to this *914 Court's conclusion in *Rodgers*, where we rejected the claim that a competency hearing should have been ordered, stating:

Rodgers' statements to the court showed that he understood the consequences of his decisions and that Rodgers weighed his options of a life sentence or a death sentence in a rational and careful manner. The defendant clearly showed the capacity to appreciate the proceedings and the nature of possible penalties; he showed that he understood the adversary nature of the legal process; he manifested appropriate courtroom behavior; and he was able to testify in a relevant manner.

Rodgers, 3 So.3d at 1132–33.

[12] In support of his argument that the trial court should have sua sponte ordered a competency evaluation, Barnes also cites a colloquy which occurred in the May 2, 2006, hearing when he advised the trial judge that he was waiving presentation of mitigation. The trial judge responded that he was required by law to consider mitigation and would appoint court counsel to investigate and present mitigation on Barnes' behalf despite his objection, and the following colloquy occurred:

Q [THE COURT] As much as you don't want an attorney to represent you, I need to know any mitigating factors that would help me make this decision.

A [BARNES] Okay. I believe that it would harm me greatly if you were going to appoint an attorney for the Spencer hearing. I wish to waive counsel and represent myself in the final phase. It's part of my strategy.

As far as offering mitigating circumstances, I believe that I have something in mind.

Q [THE COURT].... I'm going to appoint an attorney. Okay? I need to follow the statute. The statute says I must consider any mitigating circumstances. That—that attorney doesn't—is not being appointed for you. It's being appointed for the Court.

A [BARNES] That's ... I don't know how to put into words how you bifurcate that. I just don't understand

how you can say the Court's appointing an attorney for the Court. I mean, the State Attorney is the State's Attorney. I mean, that's his job to do that.

If you're trying to appoint somebody to protect me or defend me, I don't need that. And I don't want it.

Barnes now contends that this exchange proves he was unaware of the State Attorney's proper role and that he erroneously believed it was the prosecutor's job to present mitigation. Barnes argues that this is evidence of his incompetence because it showed his lack of understanding of the adversarial process. Even if, as Barnes contends, the colloquy refers to the prosecutor presenting mitigation, Barnes would not have been wrong. The prosecutor has an obligation to "make timely disclosure to the defense of all evidence or information known to the prosecutor that tends to negate the guilt of the accused or mitigates the offense, and, in connection with sentencing, disclose to the defense and to the tribunal all unprivileged mitigating information known to the prosecutor." *Muhammad*, 782 So.2d at 364 n. 11 (quoting Florida Rule of Professional Conduct 4-3.8(c)). We also made clear in *Muhammad* that in a capital sentencing case where the defendant waives mitigation, "the trial court could require the State to place in the record all evidence in its possession of a mitigating nature such as school records, military records, and medical records." *Id.* at 363-64 (footnote omitted). However, Barnes' statement to the court could also be interpreted as simply reiterating his strong objection to any mitigation *915 being presented. Thus, Barnes' statements in this colloquy do not provide a reasonable ground for the trial court to believe that Barnes was incompetent to proceed.

[13] [14] Barnes also makes a substantive due process claim that he was allowed to enter a plea to a capital offense while incompetent.⁷ The Due Process Clause of the Fourteenth Amendment to the United States Constitution prohibits states from trying and convicting mentally incompetent defendants. *See Pate v. Robinson*, 383 U.S. 375, 378, 86 S.Ct. 836, 15 L.Ed.2d 815 (1966); *James v. Singletary*, 957 F.2d 1562, 1569-70 (11th Cir.1992). We have held that such a claim is generally procedurally barred where the defendant failed to raise it on direct appeal. *See Nelson*, 43 So.3d at 33; *Carroll*, 815 So.2d at 610. However, such a claim has been allowed in postconviction under limited circumstances where the facts are compelling that the defendant was tried and convicted while incompetent. *See, e.g., Jones v. State*, 478 So.2d 346, 347 (Fla.1985) (postconviction claim allowed and hearing granted where affidavits and expert opinions supported claim that Jones suffered from organic brain damage and was incompetent). In rejecting a claim that the defendant was tried while incompetent in *Bush v.*

Wainwright, 505 So.2d 409 (Fla.1987), we distinguished the circumstances in *Jones* where there was a long psychiatric history indicating Jones' incompetency. *See id.* at 410-11. We held in *Bush* that the report of newly appointed experts that Bush had a learning disability, a passive and dependent personality, and possible "diffuse organic brain damage" did not sufficiently raise a valid question as to Bush's competency to stand trial.

[15] [16] [17] In this case, the facts asserted by Barnes in his motion do not raise a valid question as to his competency to stand trial, and our review of the trial court record discloses no basis on which to conclude otherwise. We explained in *Nelson*:

"[A] petitioner raising a substantive claim of incompetency is entitled to no presumption of incompetency and must demonstrate his or her incompetency by a preponderance of the evidence." *James v. Singletary*, 957 F.2d 1562, 1571 (11th Cir.1992). "A defendant is considered competent to stand trial if 'he has sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding—and [if] he has a rational as well as factual understanding of the proceedings against him.'" *Id.* at 1574 (quoting *Dusky v. United States*, 362 U.S. 402, 80 S.Ct. 788, 4 L.Ed.2d 824 (1960)). "In order to make out his substantive incompetency claim, petitioner need not ... allege any error on the part of any state actor." *James*, 957 F.2d at 1572. "[A] petitioner is entitled to an evidentiary hearing on a substantive incompetency claim if he or she 'presents clear and convincing evidence to create a real, substantial and legitimate doubt' as to his or her competency." *Id.* at 1573 (quoting *Fallada v. Dugger*, 819 F.2d 1564, 1568 n. 1 (11th Cir.1987)).

Nelson, 43 So.3d at 33 (emphasis added). In denying an evidentiary hearing on this claim, the postconviction court concluded that Barnes failed to allege or identify *916 clear and convincing evidence necessary to support a substantive claim of incompetency, stating:

Defendant cannot make the requisite showing of incompetence for a substantive claim of incompetency as shown by the record and cited in the preceding paragraphs of this Order. The Defendant consulted with standby counsel and talked with court counsel. No counsel, prosecutor, or judge had any doubt the Defendant was not competent as shown by the record. Judge Davidson found the

Defendant “extremely competent” to represent himself after learning from the Defendant that he had been Baker Acted in 1990, had been diagnosed with borderline personality disorder, and hearing Defendant’s comments regarding mitigation evidence. Judge Davidson had the opportunity to observe the Defendant on several occasions and numerous *Faretta* inquiries were conducted throughout the case because the Defendant continued to reject offers of counsel.... In the subject case, there were no indications of Defendant’s incompetence, distinguishable factually from the cases cited by the Defendant in his postconviction motion. The record shows that the Defendant was not only competent, but also intelligent. There was no reason for a competency evaluation.

We agree. As discussed earlier, nothing alleged in Barnes’ motion or cited by Barnes from the record of the May 2, 2006, hearing or elsewhere in the trial record would provide any evidence, not to mention clear and convincing evidence, creating a real, substantial, and legitimate doubt that Barnes was convicted and sentenced while incompetent to proceed. Thus, for these reasons the circuit court correctly denied Barnes’ substantive due process claim without a hearing.

[18] Barnes further contends that because “death is different,” and because he was once diagnosed as having a personality disorder, a competency determination is essential to ensure that his constitutional rights are protected and to protect the integrity of the process. However, this is neither supported by case law nor by the Florida Statutes. Section 916.12(1), Florida Statutes (2006), provides that a defendant is incompetent to proceed if he does not have the present ability to consult with his attorney with a reasonable degree of rational understanding or if the defendant has no rational as well as factual understanding of the proceedings against him. Rule 3.210 implements this statutory requirement and places the burden on counsel and the court to seek a competency determination, but only if they have “a reasonable ground to believe that the defendant is not mentally competent to proceed.” See Fla. R.Crim. P. 3.210(b). Thus, there is no blanket requirement that all capital defendants who may have once been diagnosed as

having a mental disorder be evaluated for competency, even those who appear pro se.

[19] [20] As an additional aspect of Barnes’ first issue on appeal, he contends that standby counsel was deficient in failing to move the trial court for a competency determination.⁸ Barnes contends that *917 as soon as standby counsel became aware during the May 2, 2006, hearing that Barnes was suffering from personality disorder and had been “Baker Acted” in the past, she should have requested a competency determination. The postconviction court denied the claim, concluding that standby counsel had no obligation to request a competency hearing on Barnes’ behalf because Barnes acted pro se and a “defendant who represents himself has the entire responsibility for his own defense even if he has standby counsel and cannot later claim that the quality of his defense was a denial of effective assistance of counsel,” citing *Behr v. Bell*, 665 So.2d 1055, 1056–57 (Fla.1996). The trial court also concluded that even if standby counsel had such an obligation, nothing in the record, including the transcript of the May 2, 2006, *Faretta* /plea hearing, provided a reasonable ground for standby counsel to doubt Barnes’ competency.

We held in *Behr* that “[a] defendant who represents himself has the entire responsibility for his own defense, even if he has standby counsel. Such a defendant cannot thereafter complain that the quality of his defense was a denial of ‘effective assistance of counsel.’ ” *Id.* at 1056–57 (quoting *Faretta*, 422 U.S. at 833 n. 46, 95 S.Ct. 2525). At the May 2, 2006, *Faretta* hearing, the following colloquy took place:

Q [COURT] Do you understand that at every stage of these proceedings I’m going to have standby counsel for you. You will still represent yourself. But that standby counsel will be there solely to assist you in representing yourself. But you are going to be the person to represent yourself if you decide that you still want me to allow you to represent yourself. Do you understand that?

A [BARNES] Standby counsel is solely at your discretion. And I understand that and that at any time I feel that I need to ask them [a] question they’d be there for me.

Thus, Barnes was advised that as a pro se defendant, even with standby counsel, he was responsible for his own representation.⁹ Barnes’ argument now misapprehends the role of standby counsel when a defendant is exercising his or her constitutional right of self-representation. The United States Supreme Court in *Faretta* held that a state may, over the pro se defendant’s objection, appoint

“standby counsel” to “aid the accused *if and when the accused requests help*, and to be available to represent the accused in the event that termination of the defendant’s self-representation is necessary.” *Faretta*, 422 U.S. at 834 n. 46, 95 S.Ct. 2525 (emphasis added).

Standby counsel in the instant case had no obligation to either request a competency determination for Barnes or suggest that the trial court order one. Standby counsel was designated at the outset of the *Faretta* /plea hearing with the understanding that Barnes could consult standby counsel if he wished to do so. Barnes did not elect to consult with standby counsel and insisted he was fully capable of representing himself. In any event, we agree *918 with the circuit court that regardless of whether standby counsel had any legal responsibility or authority in this case to request a competency determination, nothing in the record or the motion submitted by Barnes presents a reasonable ground for standby counsel to doubt Barnes’ competency to proceed. Thus, summary denial of this claim was proper.

[21] [22] Finally, Barnes claims that his death sentence violates the Eighth Amendment prohibition against cruel and unusual punishment because he may be incompetent at the time of execution. He concedes that this claim is not ripe for review and is being raised for federal preservation purposes only. Florida Rule of Criminal Procedure 3.811, titled “Insanity at Time of Execution: Capital Cases,” provides that “[a] person under sentence of death shall not be executed while insane to be executed.” Fla. R.Crim. P. 3.811(a). This rule essentially implements the mandate of the United States Supreme Court’s plurality decision in *Ford v. Wainwright*, 477 U.S. 399, 410, 106 S.Ct. 2595, 91 L.Ed.2d 335 (1986), that the Eighth Amendment prohibits a State from carrying out a sentence of death upon a prisoner who is insane. In order for insanity to bar execution, the prisoner must lack the capacity to understand the nature of the death penalty and why it is being imposed. *See* § 922.07(3), Florida Statutes (2012); *Johnston v. State*, 27 So.3d 11, 26 n. 8 (Fla.), *cert. denied*, — U.S. —, 131 S.Ct. 459, 178 L.Ed.2d 292 (2010); *see also Ford*, 477 U.S. at 421–22, 106 S.Ct. 2595 (Powell, J., concurring in part and concurring in the judgment) (“A number of States have more rigorous standards, but none disputes the need to require that those who are executed know the fact of their impending execution and the reason for it.” (footnote omitted)).

Footnotes

¹ *Faretta v. California*, 422 U.S. 806, 95 S.Ct. 2525, 45 L.Ed.2d 562 (1975).

As Barnes concedes, this claim is not ripe for review. We have repeatedly held that this claim may not be asserted until a death warrant has been issued. *See, e.g., Johnson v. State*, 104 So.3d 1010, 1029 (Fla.2012) (“Considering that no death warrant has been signed in this case, the postconviction court’s summary denial of Johnson’s claim was proper.”); *Butler v. State*, 100 So.3d 638, 672 (Fla.2012) (“[A] claim of incompetency to be executed cannot be asserted until a death warrant has been issued.”) (quoting *Green v. State*, 975 So.2d 1090, 1115–16 (Fla.2008)), *cert. denied*, — U.S. —, 133 S.Ct. 1726, 185 L.Ed.2d 789 (2013); *Phillips v. State*, 894 So.2d 28, 36 (Fla.2004) (“[T]his claim cannot be raised until an execution is imminent.”); *Jones v. State*, 845 So.2d 55, 74 (Fla.2003) (rejecting claim that defendant may be incompetent at the time of execution where a death warrant had not yet been signed, noting that the claim was raised to preserve the issue for federal review). Because a death warrant has not been issued in this case, the claim was properly denied.

CONCLUSION

For the reasons set forth above, we conclude that the circuit court did not err in summarily denying Barnes’ motion for postconviction relief from his conviction and sentence of death for the first-degree murder of Patsy Miller. Accordingly, we affirm the circuit court’s summary denial of Barnes’ claims.

It is so ordered.

POLSTON, C.J., and PARIENTE, LEWIS, QUINCE, CANADY, LABARGA, and PERRY, JJ., concur.

All Citations

124 So.3d 904, 38 Fla. L. Weekly Supp. 490, 38 Fla. L. Weekly Supp. 738

- 2 The trial court found the following aggravators: (1) the murder was committed by one under sentence of imprisonment or on community control or felony probation (great weight); (2) Barnes was previously convicted of another capital felony or felony involving use or threat of violence (murder of his wife in 1997) (great weight); (3) the murder was committed while Barnes was engaged in commission of a sexual battery and burglary (great weight); (4) the murder was committed for the purpose of avoiding or preventing a lawful arrest (great weight); (5) the murder was especially heinous, atrocious, or cruel (great weight); and (6) the murder was cold, calculated and premeditated (great weight). See *Barnes*, 29 So.3d at 1015 n. 3.
- 3 The trial court found one statutory mitigator, that Barnes was under the influence of extreme mental or emotional disturbance, and accorded it slight weight. *Barnes*, 29 So.3d at 1014 n. 4. The nonstatutory mitigators were: (1) Barnes came forward and revealed his involvement in the unsolved crime (little weight); (2) he took responsibility for his acts (little weight); (3) he was under the influence of a mental or emotional disturbance (duplicating the statutory mitigator) (little weight); (4) he has experienced prolonged drug use (little weight); (5) he did not have the benefit of a loving relationship with his mother (little weight); (6) he did not have the benefit of a loving relationship with his father (little weight); (7) he was sexually abused as a child (slight weight); (8) he has taken steps to improve himself (little weight); and (9) he is a functional and capable person and has demonstrated by his action and participation in this case that he has sufficient intelligence and capabilities to contribute to society (little weight). *Id.* at 1014 n. 5.
- 4 After postconviction counsel moved for a competency evaluation of Barnes, the circuit court appointed Howard Bernstein, Ph.D., and Jeffrey Danziger, M.D., to perform the evaluations. Their reports were filed in November 2011 and each concluded that although Barnes suffers from a personality disorder, he is competent to proceed. The parties stipulated to the competency evaluation reports and the circuit court found Barnes competent to proceed without objection.
- 5 *Huff v. State*, 495 So.2d 145 (Fla.1986).
- 6 The "Baker Act," sections 394.451–394.4789, Florida Statutes, also known as the "Florida Mental Health Act," provides for civil commitment for mental health care or treatment.
- 7 This type of substantive due process claim is distinguished from a "Pate" claim, which arises when the trial court fails to order a competency determination despite information raising a bona fide doubt as to petitioner's competency. See *James v. Singletary*, 957 F.2d 1562, 1572 n. 15 (11th Cir.1992). A "Pate" claim "can and must be raised on direct appeal." *Nelson*, 43 So.3d at 33 (quoting *James*, 957 F.2d at 1572).
- 8 Barnes contends that he was entitled to an evidentiary hearing to present the testimony of standby counsel Phyllis Riewe. However, he advised the postconviction judge that he had never deposed Riewe. He did not include any allegations in the motion or attach any affidavits or depositions concerning how Riewe viewed her role as standby counsel or how she interpreted Barnes' statements to the postconviction court which Barnes now contends demonstrated his incompetence. At the January 12, 2012, *Huff* hearing, Barnes' postconviction counsel argued only that he needed to present Riewe's testimony "to totally explore this issue of competency."
- 9 The advisory given to Barnes was similar to that approved in *Amendment to Florida Rule of Criminal Procedure 3.111(d)(2)–(3)*, 719 So.2d 873 (Fla.1998), in which this Court approved a model *Faretta* colloquy. In cases where standby counsel is being appointed, the model colloquy recommends that the trial judge advise the defendant: "I will appoint standby counsel to assist you. However, you will still be responsible for the organization and content of presenting your case. You still have the entire responsibility for your own defense. Do you understand that?" *Id.* at 878.

APPENDIX D

29 So.3d 1010
Supreme Court of Florida.

James Phillip BARNES, Appellant,
v.
STATE of Florida, Appellee.

No. SC08-63.

|
Feb. 4, 2010.

Synopsis

Background: After pleading guilty, defendant was convicted in the Circuit Court, Brevard County, Lisa Davidson, J., of first-degree murder, burglary with an assault or battery, two counts of sexual battery, and arson of a dwelling and was sentenced to death. Defendant appealed.

Holdings: The Supreme Court held that:

[1] defendant's guilty plea to first-degree murder was knowing, intelligent, and voluntary;

[2] there was competent, substantial evidence to support defendant's conviction for first-degree murder;

[3] trial court did not violate defendant's Sixth Amendment right to represent himself when the court appointed special court counsel to investigate and present mitigation evidence;

[4] any error in trial court's consideration of the comprehensive presentence investigation report (PSI) over defendant's objection was harmless; and

[5] death sentence in defendant's case was proportionate.

Affirmed.

West Headnotes (20)

- [1] **Sentencing and Punishment**
☛ Scope of review

Where guilt is found after a trial in a case involving the death penalty, the Supreme Court has a mandatory obligation to review the sufficiency of the evidence to support the conviction. West's F.S.A. R.App.P.Rule 9.142(a)(6).

1 Cases that cite this headnote

- [2] **Criminal Law**
☛ Arraignment and plea

When reviewing the knowing, intelligent, and voluntary nature of a plea, the Supreme Court will scrutinize the plea to ensure that the defendant was made aware of the consequences of his plea, was apprised of the constitutional rights he was waiving, and pled guilty voluntarily.

4 Cases that cite this headnote

- [3] **Criminal Law**
☛ Voluntary Character
Criminal Law
☛ Ascertainment by court; advising and informing accused

Defendant's guilty plea to first-degree murder was knowing, intelligent, and voluntary; he was made aware of the consequences of his plea, was apprised of the constitutional rights he was waiving, and pled guilty voluntarily.

4 Cases that cite this headnote

- [4] **Criminal Law**
☛ Requisites and Proceedings for Entry

There was competent, substantial evidence to support defendant's conviction for first-degree murder following his guilty plea; the factual

basis for the plea given by the State was confirmed by defendant and amply proven by the forensic evidence, and defendant confessed to the crime acknowledging that he raped victim and murdered her by first attempting to strangle her and then hitting her with a hammer.

Cases that cite this headnote

[5] **Sentencing and Punishment**
☞Counsel

Trial court did not violate defendant's Sixth Amendment right to represent himself when the court appointed special court counsel to investigate and present mitigation evidence in penalty phase of murder trial over defendant's objection; given that defendant essentially refused to provide any mitigation evidence appointment of mitigation counsel was intended to provide a safeguard to the application of death penalty and thereby ensure that the sentencing judge was apprised of adequate and relevant information upon which she could make a reasoned decision concerning the applicability of the death penalty. U.S.C.A. Const.Amend. 6.

2 Cases that cite this headnote

[6] **Sentencing and Punishment**
☞Proceedings

The death penalty is qualitatively different from any other punishment, and hence must be accompanied by unique safeguards to ensure that it is a justified response to a given offense.

Cases that cite this headnote

[7] **Sentencing and Punishment**
☞Evidence in mitigation in general
Sentencing and Punishment
☞Reception of evidence

The use of mitigation evidence is a product of the requirement of individualized sentencing; thus, in order for a trial court to carry out its duty to give each capital defendant the individualized sentencing that the Constitution requires, the court may appropriately require presentation of mitigation where a pro se defendant essentially refuses to present any evidence of mitigation. U.S.C.A. Const.Amend. 8, 14.

1 Cases that cite this headnote

[8] **Sentencing and Punishment**
☞Counsel
Sentencing and Punishment
☞Evidence in mitigation in general

Presentation of mitigation evidence by court appointed counsel in a case in which a pro se defendant refuses to present such evidence allows the Supreme Court to carry out its obligation to determine if the death sentence is proportionate.

1 Cases that cite this headnote

[9] **Sentencing and Punishment**
☞Presentation and reservation in lower court of grounds of review

Defendant's claim on appeal that trial court reversibly erred when it considered the comprehensive presentence investigation report (PSI) over his objection was procedurally barred, where defendant failed to object during sentencing phase of capital murder trial to any statements contained in the PSI.

Cases that cite this headnote

[10] **Criminal Law**
☞Reception of evidence

Harmless error analysis applies to *Crawford v. Washington* violations regarding a defendant's constitutional confrontation rights. U.S.C.A. Const.Amend. 6.

1 Cases that cite this headnote

[11] **Criminal Law**

☛Curing Error by Facts Established Otherwise

Where the evidence introduced in error was not the only evidence on the issue to which the improper evidence related, the introduction can be harmless.

Cases that cite this headnote

[12] **Sentencing and Punishment**

☛Harmless and reversible error

Any error in trial court's consideration of the comprehensive presentence investigation report (PSI) over defendant's objection was harmless; in light of the fact that the information complained of by defendant was either not contained in the PSI or was presented in live testimony subject to cross-examination there was no basis to find that had the trial court not considered the PSI, defendant would have received a life sentence rather than the death penalty.

Cases that cite this headnote

[13] **Sentencing and Punishment**

☛Harmless and reversible error

An error is harmless beyond a reasonable doubt when, after considering all the permissible evidence, a court concludes that there is no reasonable possibility that the error contributed to the jury's recommendation of death.

1 Cases that cite this headnote

[14] **Sentencing and Punishment**

☛Proportionality

Supreme Court reviews the death sentence for proportionality regardless of whether the issue is raised on appeal. West's F.S.A. R.App.P.Rule 9.142(a)(6).

1 Cases that cite this headnote

[15] **Sentencing and Punishment**

☛Aggravating circumstances in general

Sentencing and Punishment

☛Mitigating circumstances in general

The death penalty is reserved only for those cases where the most aggravating and least mitigating circumstances exist.

2 Cases that cite this headnote

[16] **Sentencing and Punishment**

☛Proportionality

To determine if the death penalty is proportionate in a given case, Supreme Court must make a comprehensive analysis in order to determine whether the crime falls within the category of both the most aggravated and the least mitigated of murders, thereby assuring uniformity in the application of the sentence; in so doing, Court considers the totality of the circumstances and compares the case with other similar capital cases.

2 Cases that cite this headnote

[17] **Sentencing and Punishment**

☛Proportionality

In analyzing the proportionality of a death sentence, the review is not a comparison between the number of aggravating and mitigating circumstances, but rather is a qualitative review by the Supreme Court of the underlying basis for each aggravator and mitigator.

4 Cases that cite this headnote

[18] **Sentencing and Punishment**

☛Proportionality

In making a proportionality analysis of death penalty, Supreme Court will not disturb the sentencing judge's determination as to the relative weight to give to each established mitigator where that ruling is supported by competent substantial evidence.

Cases that cite this headnote

[19] **Sentencing and Punishment**

☛Killing while committing other offense or in course of criminal conduct

Sentencing and Punishment

☛Vileness, heinousness, or atrocity

When compared to similar murders in which similar aggravators and mitigators were found and in which a death sentence was imposed and affirmed, the death sentence in defendant's case was proportionate, where defendant confronted the victim in her home with a knife and held her at knifepoint for forty-five minutes to an hour, threatened several times to kill her, painfully raped her both vaginally and anally and forced her to perform oral sex on him, attempted for up to forty-five seconds to strangle her, and then bludgeoned her to death with a hammer.

Cases that cite this headnote

[20]

Sentencing and Punishment

☛Vileness, heinousness, or atrocity

The finding of aggravating factor that murder was especially heinous, atrocious, or cruel (HAC) applies to murders that are accompanied by such additional acts as to set the crime apart from the norm of capital felonies; fear, emotional strain, and terror of the victim during the events leading up to the murder may make an otherwise quick death especially heinous, atrocious, or cruel.

Cases that cite this headnote

Attorneys and Law Firms

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Bill McCollum, Attorney General, Tallahassee, Florida, and Barbara C. Davis, Assistant Attorney General, Daytona Beach, Florida, for Appellee.

Opinion

PER CURIAM.

James Phillip Barnes appeals from a judgment of conviction of first-degree murder and a sentence of death, as well as convictions for burglary of a dwelling with an assault or battery, two counts of sexual battery by use or threat of a deadly weapon, and arson of a dwelling. We have jurisdiction. *See* art. V, § 3(b)(1), Fla. Const. For the reasons set forth below, we affirm the convictions and sentence of death.

BACKGROUND

James Phillip Barnes was convicted on December 13, 2007, of the murder of Patricia "Patsy" Miller, a nurse, who was killed in her condominium in Melbourne,

Florida, on April 20, 1988. Although Barnes was a suspect at the time of the Miller murder, he was not charged until after he wrote several letters to an assistant state attorney in 2005 and confessed in a recorded interview, which Barnes arranged and in which he was questioned by another inmate about the Miller murder. Even though DNA testing performed in 1997 linked him to the crimes committed against Miller, Barnes was not indicted until April 18, 2006. The indictment charged first-degree murder of Miller, as well as burglary of a dwelling with an assault or battery, sexual battery by use or threat of a deadly weapon (vaginal sexual battery), sexual battery by use or threat of a deadly weapon (anal sexual battery), and arson of a dwelling. At the time of the indictment, Barnes was already serving a life sentence for the first-degree murder of his wife, Linda Barnes, which occurred in 1997.

Barnes immediately sought to waive counsel and was provided a full *Faretta*¹ hearing. Thereafter, he represented himself throughout the proceedings with *1014 standby counsel available at all times. On May 2, 2006, Barnes entered an open plea of guilty and waived a sentencing jury and, on May 11, 2006, the trial court ordered a presentence investigation report to be prepared. The court also ordered Barnes' school records and appointed Dr. William Riebsame, a board-certified forensic psychologist, to provide a psychological evaluation of Barnes.

After the State's presentation of evidence of aggravation at the penalty-phase *Spencer*² hearing on January 22-26, 2007, Barnes refused to present any evidence of mitigation and announced that he would rely only on the fact that he came forward and took responsibility for the murder. Over Barnes' objection, the court appointed special mitigation counsel to investigate and present any other mitigation at the mitigation portion of the *Spencer* hearing held November 16, 2007. The court entered the sentencing order on December 13, 2007, finding that the six aggravating factors³ outweighed the one statutory mitigator⁴ and nine nonstatutory mitigators,⁵ and imposed a sentence of death for the murder, life sentences for each of the burglary with battery and the sexual battery counts, and thirty years for the arson. Barnes raises two issues on appeal-whether the trial court violated Barnes' Sixth Amendment right to represent himself when it appointed special court counsel to develop penalty-phase mitigation and whether the court reversibly erred in considering a presentence investigation report over Barnes' objection that it contravened his constitutional right to confront witnesses against him. In addition, the Court has a mandatory duty to examine the sufficiency of the evidence or, in this case, the knowing, intelligent, and

voluntary nature of Barnes' plea,⁶ and to determine whether *1015 the death sentence is proportionate. We turn first to a discussion of the facts and procedural history of the case.

FACTS AND PROCEDURAL HISTORY

The Circumstances of the Murder

The facts of the murder, based upon Barnes' written and taped statements, and as shown in the forensic evidence presented during the penalty phase, are summarized here. On the night of April 20, 1988, Barnes went to Patricia "Patsy" Miller's condominium unit, located at the River Oaks Condominiums in Melbourne, Brevard County, Florida. He did not know Ms. Miller, although he may have encountered her before at the condominium complex, where he knew several of the residents, or at Satellite Beach. Once he arrived at Miller's condominium, he took off all his clothes in order not to leave evidence and obtained entry by removing a screen and entering through a bedroom window. Barnes admitted that he went there with the intent to both rape and kill Miller. Once inside, he armed himself with a knife from the kitchen. After surreptitiously watching Miller go about her normal activities for a short period of time, he confronted her in the bathroom and forced her at knife-point to the bedroom where he sexually battered her. He then bound her hands behind her back with shoelaces that he had removed from some tennis shoes, tied her feet together, and sexually battered her again. Barnes admitted that he tried to strangle her to death with a belt which he had removed from her terrycloth robe but was not successful, so he then bludgeoned the back of her head with a hammer that he found in her bedroom.

Barnes confessed that he took a bank card from her wallet but could not later make it work at an ATM. He also collected everything he touched in Miller's residence, as well as the clothing Miller was wearing, and placed them in a bag. Barnes then set fire to the bed where Miller's body lay in order to eliminate forensic evidence left there. Before leaving in his car, Barnes took all the items that he had bagged, as well as the window screen that he had removed, and left to dispose of the items at another location.

Shortly after 11 p.m., firefighters responded to a fire alarm at the condominium complex and found Miller's charred body face down on the bed in her master bedroom, with her hands bound behind her back with shoelaces. There were varying degrees of burns over her body. The Medical Examiner testified that the cause of death was blunt-force trauma from multiple blows to Miller's head consistent with being beaten with a hammer. Signs of attempted strangulation, including a fractured hyoid bone, which the doctor testified would have taken a great deal of force to accomplish, were also discovered in the autopsy. The Medical Examiner determined that Miller's body was set ablaze after she died from the multiple blows to her head. Even though Barnes attempted to destroy forensic evidence by setting the bed ablaze, sperm was recovered from Miller and was preserved for DNA testing.

Within one week of the murder, the police considered Barnes as a suspect and he was questioned by Sergeant Dennis Nichols of the Melbourne Police Department. At that time, Barnes denied any involvement with the murder and told Sergeant Nichols that he had never been inside *1016 Ms. Miller's apartment. He also denied knowing Miller, although he indicated he may have seen her once in Satellite Beach. Barnes agreed to give a sample of his blood for possible DNA comparison, but in 1988 the available method of DNA testing was inadequate to produce a match and the case remained unsolved.

In 1998, Barnes was serving a life sentence for the 1997 first-degree strangulation murder of his wife, Linda Barnes. With advanced techniques for DNA testing, specifically the polymerase chain reaction (PCR) test, sperm removed from Miller's vagina, which was resubmitted for testing in 1997, produced a positive match to Barnes. Subsequently, Sergeant Nichols and Brevard Sheriff's Office Lieutenant Todd Goodyear traveled to the prison to speak with Barnes about the murder, but he refused to speak to them. For unspecified reasons, charges were not filed against Barnes for the Miller murder.

In 2005, while Barnes was still incarcerated on his life sentence for murdering his wife, he wrote three letters to Assistant State Attorney Michael Hunt, a prosecutor who was involved in the case concerning the death of Barnes' wife. The letters to Hunt were dated October 10, 2005, December 7, 2005, and December 21, 2005. In the October 10, 2005, letter, Barnes requested that an interview be held at the correctional facility, with fellow inmate Sherman Insko asking Barnes questions about the Miller case, while law enforcement officers videotaped the interview.

The interview occurred on November 1, 2005. In that videotaped interview, Barnes admitted to the foregoing facts of the burglary, sexual batteries, murder, and arson. He explained how he entered the condominium unit through a bedroom window and said he was in the condominium for approximately forty-five minutes to one hour. During his interview, Barnes described with accuracy Miller's physical appearance, the interior of the apartment, and specific objects he saw in the apartment, including a bicycle, basket-weaving supplies, divorce paperwork, a stethoscope, and oversized curtains. Further, his descriptions of the homicide, the sexual batteries, and the arson were consistent with the evidence gathered by police.

Faretta Hearing and Guilt Phase Proceedings

Shortly after Barnes' indictment, he filed a pro se request for speedy trial and asserted a waiver of counsel. Barnes, age forty-four at the time of the hearing, appeared before Judge Lisa Davidson on May 2, 2006, with an assistant public defender as standby counsel. Barnes again stated his desire to waive counsel and represent himself. Pursuant to his request, the trial court conducted an extensive *Faretta* hearing during which the judge explained the indictment to Barnes and informed him of the maximum penalties for each count, including the fact that the first-degree murder count carried the maximum penalty of death and that the State was seeking the death penalty. Barnes was advised of his right to have an attorney appointed to represent him if he could not afford one. When asked about his education, Barnes testified that he completed thirteen years of school, and said he was "a certified law clerk," with that designation given by the Department of Corrections, and that he had worked for some years in the prison library. Barnes confirmed that he was mentally alert and had not taken any pills, drugs or alcohol within the last twenty-four hours.

When asked if he had ever suffered from a mental disorder, defect, disease, or derangement, he answered, "No." When asked if he was ever told that he had any type of mental illness, he said:

*1017 No, ma'am. I'm borderline personality disorder based on somebody's, you know, matrix.

I've read the diagnostic and statistical manual. I-I don't believe that there's any reason to think that I don't have the cognitive ability to understand what's going on

right now, ma'am.

Barnes also confirmed that he knew there may be defenses available to him and that experienced attorneys could assist him. Barnes continued to maintain that he wanted to represent himself and that he knew the pitfalls of self-representation. Barnes was informed that at every stage of the proceedings standby counsel would be there to assist if he so desired. The trial court found on the record that the requirements of Florida Rule of Criminal Procedure 3.111⁷ had been met and that Barnes was "extremely competent" and had made an unequivocal request, knowingly, freely and voluntarily, to waive counsel and represent himself. The court also found that Barnes fully understood the advantages and disadvantages of representing himself.

In this same May 2, 2006, hearing, Barnes proffered his open plea of guilty to the murder of Patricia Miller and to the other charged offenses. Prior to acceptance of the plea by the court, the State presented a factual basis for the plea, stating that the evidence would show Miller was killed by blunt-force trauma to the head, and was also strangled, in Brevard County, Florida, on April 20, 1988. The prosecutor proffered that the evidence would show she was sexually battered both anally and vaginally, and that testing of sperm left in her body was substantially consistent with Barnes' DNA profile. The prosecutor also advised the court that Barnes' November 1, 2005, videotaped statement, as well as correspondence from Barnes to the prosecutor, "detailed specifically and graphically the events of April 20, 1998, pertaining to the murder of Patricia Miller, the rape and arson as well as burglary." Barnes was then asked to state his own factual basis for the plea, after being advised that anything he said would be used against him and that he had a Fifth Amendment right to remain silent. Barnes stated that he broke into Patricia Miller's condominium, raped her twice, tried to strangle her to death, and hit her in the head with a hammer and killed her. He further stated that he set the bed on fire.

Before accepting the plea, the court confirmed that Barnes was able to read, write and speak English; that no one had forced or threatened him into pleading guilty; and that no one had promised him anything to induce him to enter a plea. He was advised of the rights he would be giving up if he entered a plea, including the right to a jury trial where the State would be required to prove every element of each offense beyond a reasonable doubt; the right to appointed counsel at trial; the right to confront his accusers and to cross-examine witnesses; the right to present defenses; the right to remain silent or to testify; and the right to appeal all matters relating to judgment and sentence. Barnes confirmed that he understood all the

rights that he would be giving up by *1018 entering guilty pleas, and confirmed that he was entering the pleas because he felt it was in his best interest. Finally, Barnes again confirmed that he understood he would be facing a sentence of life in prison or death for the charge of murder.

The trial court found that there was a factual basis for the pleas and that Barnes had voluntarily and intelligently waived his right to a jury trial and all the rights associated with it by entry of his plea to each charge. The court then accepted Barnes' guilty pleas and adjudged him guilty of the offenses. Standby counsel, who had been appointed at the outset of the proceedings, was present with Barnes at each subsequent stage of the proceedings, and the court continued to offer Barnes counsel at each critical stage. The case then proceeded to the penalty phase.

Penalty Phase Proceedings

Prior to the penalty-phase evidentiary hearing, Barnes announced that he wanted to waive a sentencing jury. The court apprised him of the nature of the sentencing phase, the importance of aggravators and mitigators, the important role that an advisory jury fills, and the fact that he could challenge aggravators and present his own mitigation for consideration by the jury. Barnes indicated that he still wanted to waive the sentencing jury. The judge offered him counsel, which he again rejected, and found that Barnes knowingly and intelligently waived an advisory jury. Barnes informed the judge that he did not plan to present any witnesses or evidence in mitigation, and the judge announced that she proposed to appoint special court counsel to investigate and present mitigating evidence. Barnes objected and said he had his own mitigation strategy in mind, which he wanted to follow.

A penalty-phase *Spencer* evidentiary hearing was commenced on January 22, 2007. Barnes was present with standby counsel. He refused a renewed offer of appointed counsel and, after another full *Faretta* hearing, the court allowed Barnes to continue to represent himself. The State presented Melbourne police detective Lieutenant Dennis Nichols, who testified that when he entered Miller's condominium apartment on April 20, 1988, he found the charred remains of Miller nude on the bed, with her hands tied behind her back with shoelaces. Photographs were also admitted showing a stethoscope hanging on the door in Miller's room and basket weaving supplies, as Barnes had described in his statement.

Assistant State Attorney Michael Hunt was called to testify concerning the series of letters that Barnes wrote to him about the Miller murder. The October 10, 2005, letter was read into evidence, in which Barnes said that inmate Sherman Insko had persuaded him, as a converted Muslim, to confess to the unsolved crime during Ramadan. In the letter, Barnes offered to give a videotaped interview but only if the interview was conducted by Sherman Insko.⁸ The November 1, 2005, videotaped interview of Barnes by Insko was played for the court as part of the State's presentation of aggravating factors.

The State also presented the testimony of the Medical Examiner that the cause of death was blunt-force trauma from multiple *1019 blows to Miller's head consistent with being beaten with a hammer. Barnes' confession letter explained that he struck the back of her head several times with the metal end of the hammer, then struck her fractured skull several more times with the wooden end of the hammer to attempt to conceal the identity of the murder weapon. The evidence also showed that Barnes first attempted to strangle Miller and that she was set on fire after her death.

Dale Gilmore, DNA supervisor of the Wuestoff Reference Laboratories, testified that the DNA testing done in 1988 was by the restriction fragment length polymorphism (RFLP) method, which required a large DNA sample. He testified that a semen sample taken from Miller was retested in 1997 using the PCR method, which requires only a small sample. The 1997 DNA testing could not exclude Barnes and, Gilmore testified, only DNA from one in 28.7 million African Americans or one in 3.8 million Caucasians would produce the same result.

Finally the State presented a victim impact statement, which was read by the victim advocate. The victim impact statement of Paula Murphy, Miller's sister, indicated that Miller was a nurse who loved to backpack, ride horses, hike with her dog, ski, canoe and bird watch. She was generous and active with the Salvation Army domestic abuse program in Brevard County. Miller was the second of ten children in a close-knit family, which will miss her immeasurably.

At the conclusion of the State's case in the *Spencer* hearing, Barnes announced that he planned to present no mitigation witnesses or evidence. The judge again offered Barnes appointed counsel and when he declined, inquired of standby counsel what mitigation investigation he would make if he were representing Barnes. Standby counsel advised the court that he would gather all school

and medical records, as well as records of every mental health expert who had seen Barnes, and would interview anyone he could locate who had substantial contact with Barnes during his life. When the trial court announced it would appoint special mitigation counsel to investigate and present mitigation, Barnes objected and argued that his strategy had been to facilitate final resolution of the case by confessing to the unsolved crimes and taking responsibility, in order to "clean the slate" and give final resolution to the victim's family. Barnes also reminded the trial judge that she had a presentence investigation report, doctor's report, and school records, which she had earlier ordered. Several days later, the court appointed special mitigation counsel, Sam Bardwell, to assist the court by investigating and presenting mitigation.

The mitigation portion of the *Spencer* evidentiary hearing took place on November 16, 2007. Barnes was again offered appointed counsel and given a full *Faretta* inquiry when he reiterated his desire to represent himself. Special mitigation counsel Sam Bardwell then presented the testimony of Dr. Riebsame, a forensic psychologist. Dr. Riebsame testified that he first attempted to evaluate Barnes after the court appointed him in 2006, but was unable to provide any actual diagnosis of Barnes' mental condition due to lack of cooperation by him. Dr. Riebsame was again asked to evaluate Barnes for purposes of the mitigation hearing and was provided materials to review, including the police report, medical examiner report, fire investigation report, DNA lab reports, witness statements, criminal records, Barnes' medical records from the Department of Corrections, intelligence test reports, Minnesota Multiphasic Personality Inventory test results from past testing, a presentence *1020 investigation report, and a mitigation report prepared for Bardwell by investigator Terry Sirois. Sirois had interviewed several of Barnes' family members to document the conditions of his early life.

Based on his review of the materials, including information about Barnes' childhood, Dr. Riebsame found that Barnes met the definition of a psychopath, in that his history showed him to be frequently in trouble with the law, deceptive, manipulative and reckless in behavior that is often dangerous to others. Dr. Riebsame testified that in a psychopathic individual, similar to what he observed in Barnes' records, there is a history of antisocial behavior and lack of conscience, lack of empathy, shallow appearance of feeling, grandiosity, predatory behavior, and typically above-average intelligence. After reviewing all the materials provided to him, his impression was that Barnes suffered from behavioral and emotional problems from an early age.⁹ He also concluded that, at the time of offense, Barnes was under the emotional or mental

disturbance of cocaine dependency, antisocial personality disorder and a personality disorder NOS (not otherwise specified) that would include borderline narcissistic characteristics. It was primarily this testimony upon which the trial court relied in finding the statutory mitigator that Barnes was under the influence of extreme mental or emotional disturbance at the time of the crime.

After Dr. Riebsame's testimony, which concluded mitigation counsel's presentation, Barnes did not offer any witnesses or evidence and advised the court that he would not submit a sentencing memorandum. We now turn to our discussion of the issues in this appeal. Our mandatory review of the sufficiency of the basis of the first-degree murder conviction will be discussed first.

ANALYSIS

Knowing, Intelligent and Voluntary Nature of the Plea

[1] [2] Barnes does not challenge his conviction for first-degree murder in this appeal, nor does he challenge the acceptance of his guilty plea. Nevertheless, this Court has a mandatory obligation to review the basis of Barnes' conviction for first-degree murder. Where guilt is found after a trial, the Court has a mandatory obligation to review the sufficiency of the evidence to support the conviction. *See Bevel v. State*, 983 So.2d 505, 516 (Fla.2008).¹⁰ In this case, Barnes was convicted after waiving his right to counsel and, after a *Faretta* hearing, was allowed to represent himself. He then entered an open plea of guilty to first-degree murder. Under these circumstances, "this Court's [mandatory] review shifts to the knowing, intelligent, and voluntary nature of that plea." *Tanzi v. State*, 964 So.2d 106, 121 (Fla.2007) (quoting *Winkles v. State*, 894 So.2d 842, 847 (Fla.2005)); *see also Guardado v. State*, 965 So.2d 108, 118 (Fla.2007); *Lynch v. State*, 841 So.2d 362, 375 (Fla.2003); *Ocha v. State*, 826 So.2d 956, 965 (Fla.2002). In such a review, this Court will "scrutinize the plea to ensure that the defendant was made aware of the consequences of his plea, was apprised of *1021 the constitutional rights he was waiving, and pled guilty voluntarily." *Winkles*, 894 So.2d at 847 (quoting *Ocha*, 826 So.2d at 965).

[3] In the present case, Barnes filed a written waiver of counsel on May 1, 2006. On May 2, 2006, the trial court

conducted an extensive *Faretta* hearing during which the judge explained the indictment counts to Barnes and informed him of the maximum penalties for each, including the fact that the first-degree murder count carried the maximum penalty of death and that the State was seeking the death penalty. Barnes was advised of his right to have an attorney appointed to represent him if he could not afford one.

Barnes testified that he also understood he was facing a possible death sentence and that there were a number of defenses that might be available to him. He said that even so, he wanted to represent himself. Barnes explained:

I'm invoking my Sixth Amendment right to assistance of counsel. I choose to defend myself.

....

The United States Constitution has inalienable rights. And one of them is that I have the right to assistance of counsel. I would also like to make sure I have the right to represent myself.

And that's the other side of the coin. I don't have many rights left in this world. That's one I have. So ... I wish to use that right.

Barnes explained that he understood the pitfalls of representing himself and confirmed that no promises or threats had been made in order to induce him to represent himself. The court found on the record that the requirements of Florida Rule of Criminal Procedure 3.111 had been met and that Barnes' request to represent himself was made knowingly, freely and voluntarily.¹¹

In this same May 2, 2006, hearing, Barnes was then allowed to proffer his open plea of guilty to the murder of Patricia Miller and to the other charged offenses. Prior to acceptance of the plea, the trial court allowed the State to present a factual basis for the plea, which the prosecutor did, stating essentially that Patricia Miller was killed by blunt-force trauma to the head, and was also strangled, in Brevard County, Florida, on April 20, 1988. Evidence showed she was sexually battered vaginally and anally and that she had sperm in her vagina, which DNA testing linked to Barnes. The prosecutor advised the court that the evidence would show Barnes entered Miller's residence where he committed the sexual batteries, attempted to strangle her, and committed blunt force trauma on her, resulting in her death. He then set fire to the bedding and her body. The prosecutor advised the court that the evidence included a videotaped statement that Barnes made November 1, 2005, and the letter from Barnes to the prosecutor, in which Barnes detailed the April 20, 1988,

murder of Patricia Miller, as well as the rapes, arson, and burglary. The court then asked Barnes to give his own factual basis for the plea, and advised him that anything he said could *1022 and would be used against him and that he had a Fifth Amendment right to remain silent. Barnes stated:

On April 20, 1988 I broke into Patricia Miller's condominium on Roosevelt Avenue in Melbourne, Florida. I raped her twice. I tried to strangle her to death. I hit her in the head with a hammer and killed her and I set the bed on fire.

The trial judge determined that Barnes understood the nature of the charges, the mandatory minimum and maximum possible penalties, the right to appointed counsel, the right to be tried by a jury and compel attendance of witnesses, the right to confront and cross-examine witnesses, the right to testify or remain silent, the right to a direct appeal of all matters relating to the judgment, and the fact that if he answered any questions about the crime, the answers could be later used against him. Barnes was told that the possible sentences he could receive for the murder were life in prison or death. *See* Fla. R.Crim. P. 3.172(c)(1)-(6). Barnes clearly acknowledged his guilt, and also stated that he believed entry of the plea was in his best interest. *See* Fla. R.Crim. P. 3.172(e).

Based on the plea colloquy, the trial court found that Barnes was alert, competent, intelligent, and definite about wanting to enter a plea. The court also found that there was a factual basis for the plea to each of the counts and that Barnes made a knowing, intelligent waiver of his right to a jury trial and all the rights associated with it. Accordingly, the trial court accepted Barnes' guilty pleas and adjudged him guilty of the offenses, including first-degree murder. Thus, the plea colloquy fulfilled the requirements of Florida Rule of Criminal Procedure 3.172, which requires that "[b]efore accepting a plea of guilty or nolo contendere, the trial judge shall determine if the plea is voluntarily entered and that a factual basis for the plea exists." Fla. R.Crim. P. 3.172(a).

[4] We conclude that Barnes' plea in this case was knowing, intelligent, and voluntary, and that he "was made aware of the consequences of his plea, was apprised of the constitutional rights he was waiving, and pled guilty voluntarily." *Ocha*, 826 So.2d at 965. Therefore, the plea and conviction were properly entered. Further, the factual basis for the plea given by the State, which was confirmed by Barnes and amply proven by the

forensic evidence, as well as Barnes' confessions, demonstrates that there was competent, substantial evidence to support the conviction for first-degree murder, as well as the other convictions in this case.

We turn now to the two specific issues that Barnes raises in this appeal, first examining whether the trial court violated his Sixth Amendment¹² right to represent himself when it appointed special court counsel to develop penalty-phase mitigation. We then discuss whether the court reversibly erred in considering a presentence investigation report over Barnes' objection that it contravened his constitutional right to confront witnesses against him.

Appointment of Special Mitigation Counsel

[5] Barnes contends that the trial court violated his *Faretta* right to self-representation by appointing special court counsel to investigate and present mitigation over his objection. He argues that as both the client and the attorney, he had the absolute right to limit the court's consideration of mitigation only to the fact that he came forward to confess to an unsolved crime and took full responsibility for his actions. He also argues that even *1023 if he did waive mitigation, the trial court violated the procedure set forth in *Muhammad v. State*, 782 So.2d 343 (Fla.2001), by appointing mitigation counsel before ordering and reviewing a presentence investigation report (PSI), and before determining, based on the PSI, that additional mitigation existed and should be investigated. We disagree with these contentions. In *Muhammad*, we held that where a defendant waives presentation of mitigation, the trial court must order a PSI. We stated that in addition to ordering the PSI:

[T]he trial court could require the State to place in the record all evidence in its possession of a mitigating nature such as school records, military records, and medical records. Further, if the PSI and the accompanying records alert the trial court to the probability of significant mitigation, the trial court has the discretion to call persons with mitigating evidence as its own witnesses.... If the trial court prefers that counsel present mitigation rather than calling its

own witnesses, the trial court possesses the discretion to appoint counsel to present the mitigation as was done in *Klokoc v. State*, 589 So.2d 219 (Fla.1991), or to utilize standby counsel for this limited purpose.

Id. at 363-64 (footnotes omitted).

Muhammad does not set forth a hard and fast rule that a trial court has no discretion to order investigation and presentation of mitigation without first reviewing a PSI and without first making an express determination that the PSI suggests the existence of mitigation. Moreover, in this case, just as we held to be proper in *Muhammad*, the trial judge did have a PSI and had ordered medical and school records before appointing mitigation counsel. Prior to the February 7, 2007, appointment of Sam Bardwell as special mitigation counsel, the court had been provided with a PSI and was aware of an August 22, 2006, report prepared by Dr. Riebsame, which indicated that Barnes had behavioral problems during childhood and was under an extreme mental disturbance at the time of the murder. Just as we held in *Muhammad*, the trial court had discretion to provide a method whereby the possible mitigation was investigated and presented after Barnes refused to present any witnesses or evidence of mitigation. Accordingly, we find the trial court acted properly in this regard in appointing independent court counsel, who did not represent Barnes but was directed to assist the court by investigating and presenting mitigation.

We are aware that the Fifth Circuit Court of Appeals has found that appointment of special mitigation counsel under certain circumstances can violate a defendant's right to represent himself in *United States v. Davis*, 285 F.3d 378 (5th Cir.), *cert. denied*, 537 U.S. 1066, 123 S.Ct. 618, 154 L.Ed.2d 555 (2002). In *Davis*, the pro se defendant contended that he wanted to continue to assert his innocence as mitigation in the penalty phase, but the trial court appointed special counsel to develop other mitigation for consideration by the court. The court found this appointment to be error under the circumstances, where the mitigation presented by special counsel directly contradicted the defendant's mitigation. The Court in *Davis* stated:

We find that the district court's decision to appoint an independent counsel violates Davis's Sixth Amendment right to self-representation. An individual's constitutional right to represent

himself is one of great weight and considerable importance in our criminal justice system. This right certainly outweighs an individual judge's limited discretion to ***1024** appoint amicus counsel *when that appointment will yield a presentation to the jury that directly contradicts the approach undertaken by the defendant.*

285 F.3d at 381 (emphasis added). The Court of Appeals further explained:

As such, *Davis's* strategy is in direct conflict with the independent counsel's approach. Because Davis's right to self-representation encompasses the right to direct trial strategy, the district court's decision to impose an independent counsel into these proceedings is overturned.

285 F.3d at 385 (emphasis added). *Davis* is distinguished from the instant case because, contrary to what occurred in *Davis*, Barnes presented no mitigating testimony or evidence. Although he contends that he had a mitigation strategy-the fact that he took responsibility for the murder-we conclude that this amounted to nothing more than the fact of his guilty plea. While presentation of evidence of remorse could constitute mitigation evidence, Barnes never offered remorse as an element of his mitigation strategy. He explained that his confession and guilty plea were prompted by his conversion to the Muslim religion and his desire to have the benefit of doing a good deed during Ramadan. Thus, we conclude that, contrary to what occurred in *Davis*, the mitigation evidence presented by independent counsel in this case did not conflict with anything presented by Barnes and did not violate his right to self-representation.

Davis is further distinguished from the instant case by the fact that in *Davis*, a sentencing jury was present and the court expressed concern that presentation of mitigation by an independent counsel in front of a jury might "give[] the independent counsel's presentation an aura of superiority over whatever is presented by the prosecution and the defense." *Id.* at 381 n. 1. This concern is not present in the instant case because Barnes waived an advisory jury. Moreover, we agree with the Supreme Court of New Jersey in *State v. Reddish*, 181 N.J. 553, 859 A.2d 1173 (2004), which refused to adopt the reasoning in *Davis*, stating:

The Fifth Circuit concluded [in *Davis*] that because the “core” of a defendant’s *Faretta* right is “his ability to preserve control over the case he chooses to present to the jury,” this right must be honored during the penalty phase “regardless of whether society would benefit from having a different presentation of the evidence.” *Ibid.* We respectfully disagree. In our view, it is difficult to square that conclusion with the Supreme Court’s mandate in *Gregg*, *supra*, and *Eddings*, *supra*, that to constitutionally impose a death sentence, the sentencing jury cannot be deprived of an opportunity to make an individualized judgment based on a fair presentation of mitigating evidence.

Id. at 1204. As the New Jersey court notes, American Bar Association, *Standards for Criminal Justice*, section 6-3.7 (2d ed.1980), states that standby counsel “may call the judge’s attention to matters favorable to the accused.” *Id.* at 604. In this case, special mitigation counsel filled that same role and assisted the court by bringing to the trial court’s attention matters favorable to Barnes.

^[6] A plurality of the United States Supreme Court in *Gregg v. Georgia*, 428 U.S. 153, 96 S.Ct. 2909, 49 L.Ed.2d 859 (1976), instructs us that “[t]here is no question that death as a punishment is unique in its severity and irrevocability.” *Id.* at 187, 96 S.Ct. 2909. Further, as that Court noted,

*1025 [T]he concerns expressed in *Furman*¹³ that the penalty of death not be imposed in an arbitrary or capricious manner can be met by a carefully drafted statute that ensures that the sentencing authority is given adequate information and guidance. As a general proposition these concerns are best met by a system that provides for a bifurcated proceeding at which the sentencing authority is apprised of the information relevant to the imposition of sentence and provided with standards to guide its use of the information.

Gregg, 428 U.S. at 195, 96 S.Ct. 2909. We also recognize that the death penalty “is qualitatively different from any other punishment, and hence must be accompanied by unique safeguards to ensure that it is a justified response to a given offense.” *Spaziano v. Florida*, 468 U.S. 447, 468, 104 S.Ct. 3154, 82 L.Ed.2d 340 (1984) (Stevens, J.,

concurring in part and dissenting in part). Appointment of mitigation counsel in this case, where Barnes essentially refused to provide any mitigation evidence, was intended to provide such a safeguard and thereby ensure that the sentencing judge was apprised of adequate and relevant information upon which she could make a reasoned decision concerning the applicability of the death penalty. This was proper in order to ensure that the severe and irrevocable penalty of death, if imposed, would be justified and not be imposed in an arbitrary or capricious manner.

^[7] ^[8] The Supreme Court in *Eddings v. Oklahoma*, 455 U.S. 104, 102 S.Ct. 869, 71 L.Ed.2d 1 (1982), reiterated the requirement of individualized sentencing in capital cases that is required by the Eighth and Fourteenth Amendments to the United States Constitution. *See id.* at 105, 102 S.Ct. 869. “The use of mitigation evidence is a product of the requirement of individualized sentencing.” *Kansas v. Marsh*, 548 U.S. 163, 174, 126 S.Ct. 2516, 165 L.Ed.2d 429 (2006). Thus, in order for a trial court to carry out its duty to give each capital defendant the individualized sentencing that the Constitution requires, the court may appropriately require presentation of mitigation where a pro se defendant such as Barnes essentially refuses to present any evidence of mitigation. Presentation of mitigation in such a case also allows this Court to carry out its obligation to determine if the death sentence is proportionate. We explained in *Muhammad*:

In all capital cases, this Court is constitutionally required to “engage in a thoughtful, deliberate proportionality review to consider the totality of circumstances in a case, and to compare it with other capital cases.” This case provides a perfect example of why the defendant’s failure to present mitigating evidence makes it difficult, if not impossible, for this Court to adequately compare the aggravating and mitigating circumstances in this case to those present in other death penalty cases.

782 So.2d at 364-65 (citations omitted) (quoting *Porter v. State*, 564 So.2d 1060, 1064 (Fla.1990)).

The Supreme Court in *Indiana v. Edwards*, 554 U.S. 164, 128 S.Ct. 2379, 171 L.Ed.2d 345 (2008), in holding that states can require otherwise competent but severely mentally ill defendants to be represented by counsel, noted that “*Faretta* ... and later cases have made clear that the right of self-representation is not absolute.” *Id.* at 2384. The *Edwards* Court also cited *1026 *Martinez v. Court of Appeal of California, Fourth Appellate District*, 528 U.S. 152, 120 S.Ct. 684, 145 L.Ed.2d 597 (2000), for the proposition that “[e]ven at the trial level ... the government’s interest in ensuring the integrity and

efficiency of the trial at times outweighs the defendant's interest in acting as his own lawyer." *Edwards*, 128 S.Ct. at 2387 (quoting *Martinez*, 528 U.S. at 162, 120 S.Ct. 684). In *Martinez*, a case involving the participation of standby counsel rather than court counsel, the Supreme Court also noted that "standby counsel may participate in the trial proceedings, even without the express consent of the defendant, as long as that participation does not 'seriously undermin[e]' the 'appearance before the jury' that the defendant is representing himself." *Martinez*, 528 U.S. at 162, 120 S.Ct. 684 (quoting *McKaskle v. Wiggins*, 465 U.S. 168, 187, 104 S.Ct. 944, 79 L.Ed.2d 122 (1984)).

Because the trial court and this Court each has a constitutional obligation to ensure that Barnes received individualized sentencing and that the death penalty is fairly and constitutionally imposed, Barnes' right to self-representation was not violated by the appointment of independent counsel under the facts and circumstances present in this case. Mitigation counsel was appointed, not to supplant Barnes as his own counsel, but to assist the court by presenting mitigation evidence where Barnes refused to do so. The mitigation was not in conflict with any evidence presented by Barnes and was not in conflict with his mitigation theory that he confessed and took responsibility. In fact, the trial court did find his confession and acceptance of responsibility to be nonstatutory mitigation. Based on the mitigation presented by special counsel, the trial court also found the statutory mitigator that Barnes was under the influence of a mental or emotional disturbance at the time of the offense, as well as nonstatutory mitigation that he had an abusive childhood, lacked a loving relationship with his parents, and was a functional and capable person with a capacity to contribute to society. Even so, after engaging in its constitutionally required weighing process, the trial court concluded that each one of the six aggravators outweighed all the mitigation found by the court.

We decline to hold, as Barnes requests, that a trial court may never consider other mitigation contained in the record or appoint special mitigation counsel to assist the court, where a pro se defendant's refusal to present mitigating evidence impedes or prevents the trial court's exercise of its constitutional duty to provide individualized sentencing. Thus, relief is denied on this claim. We turn next to Barnes' claim that consideration of the presentence investigation report in this case violated his confrontation rights.

Consideration of the Presentence Investigation Report

^[9] Barnes contends that the trial court reversibly erred when it considered the comprehensive presentence investigation report (PSI) over his objection. He asserts that this violated his constitutional confrontation rights as enunciated in *Crawford v. Washington*¹⁴ and that the information in the report was more prejudicial than mitigating. Because this claim is not preserved by specific objection below to any statements contained in the PSI that Barnes contends were testimonial hearsay, the claim is procedurally barred and without merit.

***1027** Barnes made several general objections to the PSI, arguing that it contained incorrect or prejudicial information and that it contained hearsay. However, Barnes failed to specifically identify for the trial court and specifically object to those portions of the PSI or attached investigative report that he now contends were prejudicial testimonial hearsay in violation of his Sixth Amendment rights. *See* U.S. Const. amend. VI. The trial judge advised Barnes each time he objected to the PSI that she could not make a blanket ruling and that when the time came for consideration of the PSI, "it needs to be presented and you make specific objections." Barnes never identified for the trial court any specific portions of the PSI or the attached investigative report that he believed were testimonial hearsay in violation of his confrontation rights.

^[10] ^[11] ^[12] Even if Barnes' claim were preserved, we would find it to be without merit. First, Barnes had a fair opportunity to rebut or dispute any matters contained in the PSI but did not take the opportunity to do so.¹⁵ Second, even if consideration of portions of the PSI was error, the error was harmless beyond a reasonable doubt. Harmless error analysis applies to *Crawford* violations. *See Rodgers v. State*, 948 So.2d 655, 665 (Fla.2006) (holding that any possible *Crawford* violation is subject to a harmless error analysis); *Diaz v. State*, 945 So.2d 1136, 1153 (Fla.2006) (same). Most of what Barnes now contends was prejudicial testimonial hearsay was not even contained in the PSI report. Several of the examples he cites in his brief—that he had symptoms of antisocial personality disorder, was a psychopath, and lacked conscience or empathy—were addressed in the testimony of Dr. Riebsame, who was subjected to full cross-examination during the *Spencer* sentencing hearing. Other potentially prejudicial information that he cites in his brief and contends came from the PSI was actually contained in a police investigative report from 1988 and in Dr. Riebsame's written report, neither of which was admitted into evidence or included in the PSI. "[W]here the evidence introduced in error was not the only evidence on the issue to which the improper evidence

related, the introduction can be harmless.” *Hojan v. State*, 3 So.3d 1204, 1210 (Fla.2009), *cert. denied*, --- U.S. ---, 130 S.Ct. 741, --- L.Ed.2d ---, 78 U.S.L.W. 3319 (2009). Moreover, the vast majority of the alleged testimonial hearsay now cited by Barnes was not included in the sentencing order, although that information generally supports the extreme mental disturbance mitigator that the trial court did find.

[13] As this Court stated in *Rodgers*, “[a]n error is harmless beyond a reasonable doubt when, after considering all the permissible evidence, a court concludes that there is no reasonable possibility that the error contributed to the jury’s recommendation of death.” 948 So.2d at 665. In this case, that same principle applies, and we consider whether there is a reasonable possibility that any error in consideration *1028 of the PSI contributed to the trial court’s decision to impose death. In making this determination, the Court will consider both the permissible evidence on which the trial court could have legitimately relied and impermissible evidence which might have possibly contributed to the imposition of a death sentence. *See State v. DiGuilio*, 491 So.2d 1129, 1135 (Fla.1986).

In this case, the trial court heard testimony from Dr. Riebsame that Barnes had a history of antisocial behavior, lack of conscience, lack of empathy and predatory behavior. He also testified that Barnes had a psychopathic personality. Dr. Riebsame reported that Barnes had a history of stealing, aggressiveness and fire-setting. Further, this testimony was presented in support of the statutory mitigator of extreme mental disturbance, which the trial court found in the sentencing order.

In light of the fact that the information complained of by Barnes was either not contained in the PSI or was presented in live testimony subject to cross-examination-and considering the weight of the six uncontested aggravators in this case-there is no basis to find that had the trial court not considered the PSI, Barnes would have received a life sentence. Nor can we conclude that anything contained in the PSI contributed to imposition of the death sentence. Thus, any error is harmless beyond a reasonable doubt. Because the claim is procedurally barred, and because any error would be harmless, relief is denied on this claim.¹⁶

[14] [15] [16] [17] Barnes does not challenge the proportionality of his death sentence, but this Court reviews the death sentence for proportionality “regardless of whether the issue is raised on appeal.” *England v. State*, 940 So.2d 389, 407 (Fla.2006); Fla. R.App. P. 9.142(a)(6). The death penalty is “reserved only for those cases where the most aggravating and least mitigating circumstances exist.” *Terry v. State*, 668 So.2d 954, 965 (Fla.1996). To determine if the death penalty is proportionate in a given case, we must make a “comprehensive analysis in order to determine whether the crime falls within the category of both the most aggravated and the least mitigated of murders, thereby assuring uniformity in the application of the sentence.” *England*, 940 So.2d at 407-08 (quoting *Anderson v. State*, 841 So.2d 390, 407-08 (Fla.2003)). In so doing, we consider the totality of the circumstances and compare the case with other similar capital cases. *See Duest v. State*, 855 So.2d 33, 47 (Fla.2003). This “is not a comparison between the number of aggravating and mitigating circumstances.” *Porter v. State*, 564 So.2d 1060, 1064 (Fla.1990). Instead, the review is a “qualitative review by this Court of the underlying basis for each aggravator and mitigator rather than a quantitative analysis.” *Urbini v. State*, 714 So.2d 411, 416 (Fla.1998).

[18] [19] In making a proportionality analysis, this Court “will not disturb the sentencing judge’s determination as to ‘the relative weight to give to each established mitigator’ where that ruling is ‘supported by competent substantial evidence.’ ” *Blackwood v. State*, 777 So.2d 399, 412-13 (Fla.2000) (quoting *1029 *Spencer v. State*, 691 So.2d 1062, 1064 (Fla.1996)). As we explain below, we conclude that when compared to similar murders in which similar aggravators and mitigators were found and in which a death sentence was imposed and affirmed, the death sentence in this case is proportionate.

[20] The trial court found six heavily weighted aggravators, including that the murder was heinous, atrocious or cruel (HAC) and that it was cold, calculated and premeditated (CCP). The finding of HAC applies to murders that are accompanied by “such additional acts as to set the crime apart from the norm of capital felonies-the conscienceless or pitiless crime which is unnecessarily torturous to the victim.” *Hernandez v. State*, 4 So.3d 642, 669 (Fla.) (quoting *State v. Dixon*, 283 So.2d 1, 9 (Fla.1973)), *cert. denied*, --- U.S. ---, 130 S.Ct. 160, 175 L.Ed.2d 101 (2009). “[F]ear, emotional strain, and terror of the victim during the events leading up to the murder may make an otherwise quick death especially heinous, atrocious, or cruel.” *Hernandez*, 4 So.3d at 669 (quoting *James v. State*, 695 So.2d 1229, 1235 (Fla.1997)).

PROPORTIONALITY

In this case, the trial court found HAC based on acts perpetrated by Barnes leading up to the murder as well as the method of murder. The trial court noted in the sentencing order that Barnes, who had stripped naked, confronted the victim in her home with a knife and held her at knifepoint for forty-five minutes to an hour. He threatened several times to kill her, painfully raped her both vaginally and anally and forced her to perform oral sex on him. He attempted for up to forty-five seconds to strangle her and then bludgeoned her to death with a hammer. Based on Barnes' own confession, the victim begged Barnes not to hurt her. The trial court found that Miller would have been under great emotional stress and fear during this extended period of time. Moreover, the trial court noted that any one of the six aggravators would outweigh the total of all the statutory and nonstatutory mitigators found by the court.

This case is similar to but less mitigated than *Hoskins v. State*, 965 So.2d 1 (Fla.2007), in which the victim was found with her hands bound behind her back after having been kidnapped from her home, raped, beaten and strangled. The trial court in *Hoskins* found three aggravators, including HAC and murder to prevent a lawful arrest, both of which were found in the instant case. *Id.* at 6. The trial court in *Hoskins* found one statutory mitigator and fifteen nonstatutory mitigators. On appeal, this Court found the death sentence proportionate and affirmed. *Id.* at 22. The death sentence was also affirmed in *Overton v. State*, 801 So.2d 877 (Fla.2001), where Overton broke into the victims' apartment, bound and raped the female victim, and then strangled her to death.¹⁷ The court in *Overton* found five aggravators, which were also found in the instant case-HAC, CCP, prior violent felony, murder during commission of a sexual battery and burglary, and to avoid arrest. *Id.* at 889. These five aggravators were weighed against several nonstatutory mitigators. On appeal, this Court found the sentence proportionate and affirmed. *Id.* at 905.

In *Murray v. State*, 3 So.3d 1108 (Fla.), *cert. denied*, --- U.S. ---, 130 S.Ct. 396, 175 L.Ed.2d 273 (2009), Murray was convicted of burglary of the victim's home, sexual battery and first-degree murder. She had been beaten, stabbed, sexually battered, and strangled. *Id.* at 1114. Murray declined to present any mitigation and the court

found four aggravators- *1030 prior violent felony, commission of the murder during a burglary or sexual battery or both, financial gain, and HAC. The court found five nonstatutory mitigators. *Id.* This Court found the sentence proportionate and affirmed. *Id.* at 1125. *See also Johnston v. State*, 841 So.2d 349, 361 (Fla.2002) (finding death sentence proportionate for sexual battery, beating, and strangulation where aggravators included prior violent felony, murder in course of a felony, and HAC weighed against one statutory mitigator and numerous nonstatutory mitigators).

Based on the foregoing, we conclude that the death sentence in this case is proportionate when considered in light of other death sentences that this Court has affirmed in cases involving similar circumstances of the murder, similar aggravators, and similar mitigation.

CONCLUSION

After a review of the issues raised by Barnes and after our independent review of the sufficiency of the evidence, the knowing, intelligent, and voluntary nature of Barnes' plea, and the proportionality of his sentence, we affirm Barnes' conviction for first-degree murder, as well as his other convictions, and we affirm the sentence of death.

It is so ordered.

QUINCE, C.J., and PARIENTE, LEWIS, POLSTON, LABARGA, and PERRY, JJ., concur.

CANADY, J., concurs in result only.

All Citations

29 So.3d 1010, 35 Fla. L. Weekly S85

Footnotes

- 1 *Faretta v. California*, 422 U.S. 806, 95 S.Ct. 2525, 45 L.Ed.2d 562 (1975) (requiring a hearing to determine if an accused's unequivocal request for self-representation should be granted).
- 2 *Spencer v. State*, 615 So.2d 688, 691 (Fla.1993) (holding that the trial court should conduct a hearing to allow the parties to be heard, including the defendant in person, and to allow presentation of additional evidence before sentencing). The trial court conducted the *Spencer* hearing in this case as the penalty-phase evidentiary hearing

because Barnes waived an advisory jury.

- 3 The court found the following aggravators: (1) the murder was committed by one under sentence of imprisonment (great weight); (2) Barnes was previously convicted of another capital felony or felony involving use or threat of violence (murder of his wife in 1997) (great weight); (3) the murder was committed while Barnes was engaged in commission of a sexual battery and burglary (great weight); (4) the murder was committed for the purpose of avoiding or preventing a lawful arrest (great weight); (5) the murder was especially heinous, atrocious or cruel (great weight); and (6) the murder was cold, calculated and premeditated (great weight).
- 4 The court found one statutory mitigator, that Barnes was under the influence of extreme mental or emotional disturbance, and accorded it slight weight.
- 5 The nonstatutory mitigators were: (1) Barnes came forward and revealed his involvement in the unsolved crime (little weight); (2) he took responsibility for his acts (little weight); (3) he was under the influence of a mental or emotional disturbance (duplicating statutory mitigator and given little weight); (4) he has experienced prolonged drug use (little weight); (5) he did not have the benefit of a loving relationship with his mother (little weight); (6) he did not have the benefit of a loving relationship with his father (little weight); (7) he was sexually abused as a child (slight weight); (8) he has taken steps to improve himself (little weight); and (9) he is a functional and capable person and has demonstrated by his action and participation in this case that he has sufficient intelligence and capabilities to contribute to society (little weight).
- 6 Because the conviction for which the death penalty was imposed in this case was the result of Barnes' guilty plea, our mandatory review "shifts to the knowing, intelligent, and voluntary nature of that plea." *Tanzi v. State*, 964 So.2d 106, 121 (Fla.2007) (quoting *Winkles v. State*, 894 So.2d 842, 847 (Fla.2005)); see also *Guardado v. State*, 965 So.2d 108, 118 (Fla.2007); *Lynch v. State*, 841 So.2d 362, 375 (Fla.2003); *Ocha v. State*, 826 So.2d 956, 965 (Fla.2002).
- 7 Florida Rule of Criminal Procedure 3.111, Providing Counsel to Indigents, provides in pertinent part:
A defendant shall not be considered to have waived the assistance of counsel until the entire process of offering counsel has been completed and a thorough inquiry has been made into both the accused's comprehension of that offer and the accused's capacity to make a knowing and intelligent waiver. Before determining whether the waiver is knowing and intelligent, the court shall advise the defendant of the disadvantages and dangers of self-representation.
Fla. R.Crim. P. 3.111(d)(2).
- 8 Pursuant to Barnes' motion to suppress the videotaped interview by Insko, the court conducted an inquiry to determine if Insko was an agent of the police. After taking testimony and reviewing the letters Barnes wrote to Hunt, as well as the videotape of the interview with Insko, the court ruled that Barnes' videotaped statement was freely and voluntarily given, that Barnes initiated contact with the State and appeared in the interview at his own request, and that Insko was not an agent of the police, but was an agent of Barnes. Barnes did not appeal this ruling.
- 9 Dr. Riebsame testified that he could provide "impressions" concerning Barnes' condition, but not a formal diagnosis, due to Barnes' refusal to cooperate with the evaluation.
- 10 Florida Rule of Appellate Procedure 9.142(a)(6) expressly provides that "[i]n death penalty cases, whether or not insufficiency of the evidence or proportionality is an issue presented for review, the court shall review these issues and, if necessary, remand for the appropriate relief." *Id.*
- 11 It should be noted that numerous *Faretta* inquiries were conducted throughout the case. Barnes continued to reject offers of counsel that were made at every critical stage in the proceedings, in compliance with the requirement, reiterated in *Muehleman v. State*, 3 So.3d 1149 (Fla.2009), as follows:
[W]here the right to counsel has been properly waived, the State may proceed with the stage at issue; but the waiver applies only to the present stage and must be renewed at each subsequent crucial stage where the defendant is unrepresented.
Id. at 1156 (quoting *Taylor v. State*, 596 So.2d 957, 968 (Fla.1992)).
- 12 U.S. Const. amend. VI.
- 13 *Furman v. Georgia*, 408 U.S. 238, 92 S.Ct. 2726, 33 L.Ed.2d 346 (1972).

- 14 *Crawford v. Washington*, 541 U.S. 36, 54, 124 S.Ct. 1354, 158 L.Ed.2d 177 (2004) (holding that testimonial statements are inadmissible against a defendant unless the witness appears at trial or, if unavailable, the defendant had a prior opportunity for cross-examination).
- 15 Section 921.141(1) provides in pertinent part as follows:
In the [penalty phase] proceeding, evidence may be presented as to any matter that the court deems relevant to the nature of the crime and the character of the defendant and shall include matters relating to any of the aggravating or mitigating circumstances enumerated in subsections (5) and (6). Any such evidence which the court deems to have probative value may be received, regardless of its admissibility under the exclusionary rules of evidence, provided the defendant is accorded a fair opportunity to rebut any hearsay statements.
§ 921.141(1), Fla. Stat. (2007). Barnes has not challenged the statute, but simply argues that under the circumstances of his case, he did not have a fair opportunity to rebut the hearsay.
- 16 Because we conclude that the claim is procedurally barred and even if not barred, that any error is harmless beyond a reasonable doubt, we do not reach the State's request that we recede from the holding in *Rodgers v. State*, 948 So.2d 655 (Fla.2006), that *Crawford* and the Confrontation Clause apply in capital penalty phase and sentencing proceedings. See 948 So.2d at 663 ("[A] defendant's rights under the Confrontation Clause apply to the guilt phase, the penalty phase, and sentencing.").
- 17 Overton also murdered the female victim's husband.

APPENDIX E

117

IN THE CIRCUIT COURT OF THE 18TH JUDICIAL CIRCUIT IN
AND FOR BREVARD COUNTY, FLORIDA

CASE NO.: 05-2006-CF-014592-AXXX-XX

STATE OF FLORIDA,

Plaintiff,

VS.

JAMES PHILLIP BARNES,

Defendant.

-----/

INITIAL APPEARANCE

DATE: April 27, 2006

PLACE: Brevard County Jail
Sharpes, Florida

BEFORE: The Honorable Rhonda Babb,
County Judge

These proceedings were recorded and the
following was transcribed by:

FRANCES BENGSTON,
DIGITAL/VIDEO TRANSCRIBER

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APPEARANCES
FOR THE STATE

Assistant State Attorney
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JAMES PHILLIP BARNES, PRO SE

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INDEX OF STATE'S EXHIBITS

NO.	DESCRIPTION	MARKED	RECEIVED
	NONE		

INDEX OF DEFENDANT'S EXHIBITS

NO.	DESCRIPTION	MARKED	RECEIVED
	NONE		

1 SHARPES, FLORIDA, APRIL 27, 2006

2 NOTE - Every effort has been made to
3 correctly identify speakers, but due to the
4 nature of recordings this is sometimes
5 impossible.

6 (Whereupon, these proceedings were
7 transcribed from a digital recording.)

8 THE COURT: All right. Good afternoon,
9 everyone. James Phillip Barnes?

10 All right. Good afternoon, sir.

11 What is Mr. Barnes charged with, State?

12 THE STATE: Let me look in here.

13 THE COURT: Oh, here it is. Okay. We
14 have a Grand Jury capias, that's murder in the
15 first degree, premeditated. Burglary of a
16 dwelling that was armed. Sexual battery by use
17 of great force, and arson of a dwelling.

18 And did you fill out a form for me to
19 appoint a Public Defender, sir?

20 THE DEFENDANT: No, ma'am. I filed two
21 motions with the clerk a couple of days ago. I
22 don't know if they've received the copies. One
23 was a demand for a speedy trial, and the other
24 one was a waiver of representation of counsel.

25 THE COURT: All right. You're going to

1 waive your right to counsel and represent
2 yourself is what you're saying?

3 THE DEFENDANT: Right, I requested a
4 Feretta hearing. I have two motions in my
5 cell, they wouldn't let me get them before I
6 come up here. I didn't have a -- Michael Hump
7 (phonetic) was going to be here in person, and
8 he was going to receive a copy and so was the
9 clerk, but I have already mailed two copies.
10 But I understand on a capital felony like this,
11 that that has to be in court.

12 THE COURT: Okay. If you're waiving your
13 right to a lawyer, you can certainly do that.
14 That's your call if you want to represent
15 yourself.

16 I will hear from the State.

17 THE STATE: Your Honor, if I may.

18 THE COURT: I find probable cause.

19 THE STATE: Your Honor, the matter is
20 tentatively set for Judge Davidson, who is the
21 trial judge, next Tuesday at noon, on May 2nd.

22 THE COURT: Right.

23 THE STATE: At that time Judge Davidson
24 can address the Feretta hearing, and any other
25 matters that Mr. Barnes wishes to address.

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THE COURT: Yes, sir.

THE DEFENDANT: That would be fine with
me.

THE COURT: All right. And the bond will
be set at none.

THE DEFENDANT: Correct.

THE COURT: Okay, thank you.

THE DEFENDANT: Thank you.

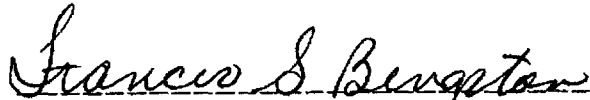
THE COURT: Good luck, sir.

CERTIFICATE OF TRANSCRIBER

STATE OF FLORIDA)
)
COUNTY OF BREVARD)

I, FRANCES S. BENGSTON, Court Transcriber,
do hereby certify that I was authorized to and
did transcribe the foregoing proceedings, and
that the transcript is a true and correct
record of the proceedings to the best of my
ability.

Done and dated this 17th day of February,
2008, at Melbourne, Brevard County, Florida.


FRANCES S. BENGSTON
DIGITAL/AUDIO TRANSCRIBER

KING
reporting & video
conference
center

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State v. James Phillip Barnes
4-27-2006
05-2006-CF-014592-AXXX-XX

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IN THE CIRCUIT COURT OF THE EIGHTEENTH JUDICIAL CIRCUIT
IN AND FOR BREVARD COUNTY, FLORIDA
CASE NUMBER 05-2006-CF-014592-AXXX-XX

Case # 05-2006-CF-014592-AXXX-XX

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010829442

STATE OF FLORIDA,

Plaintiff,

vs.

JAMES BARNES,

Defendant.

SCOTT ELLIS
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TRANSCRIPT OF PROCEEDINGS
COURT HEARING

Date: May 2, 2006
Time: 12:40 p.m.
Place: 2735 Judge Fran Jamieson Way
Viera, Florida 32940
Before: The Honorable Lisa Davidson,
Circuit Court Judge

This cause came on to be heard at the time and place
aforesaid, when and where the following proceedings were
reported by:

Margaret Eddy Sheffield, Court Reporter
Notary Public, State of Florida at Large

Brevard Associated Court Services, Inc.
14 Suntree Place, Suite 101
Viera, Florida 32940

ORIGINAL

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1 VIERA, FLORIDA; May 2, 2006

2 WHEREUPON:

3 THE COURT: Ready?

4 MR. HUNT: Yes, your Honor.

5 THE COURT: Okay. Let's bring Mr. James
6 Phillip Barnes in.

7 (Whereupon, the Defendant entered the
8 courtroom.)

9 THE COURT: Mr. Barnes, actually I'm going
10 to have you come up to the podium here. And if
11 you'll tell me your name, please?

12 THE DEFENDANT: James Phillip Barnes.

13 THE COURT: Okay. Mr. Barnes, would you
14 raise your right hand.

15 WHEREUPON,

16 JAMES PHILLIP BARNES

17 the Defendant herein, acknowledged having been duly
18 sworn and testified upon his oath, as follows:

19 THE DEFENDANT: I do.

20 EXAMINATION

21 BY THE COURT:

22 Q Okay. Mr. Barnes, we are here in case number
23 05-2006-CF-014592. There has been an indictment
24 charging you in count one with first degree premeditated
25 murder which is a capital offense.

1 THE COURT: Is the State seeking the death
2 penalty in this case?

3 MR. HUNT: Yes, your Honor.

4 BY THE COURT:

5 Q Okay. Count two is burglary of a dwelling with
6 an assault or battery. It's a first degree felony
7 punishable by life. Count three: Sexual battery by use
8 or threat of deadly weapon for a victim 12 years of age
9 or older. It's a life felony. Count four: Sexual
10 battery by use of threat of deadly weapon for a victim
11 12 years of age or older which is a life felony. And
12 count five: Arson of a dwelling which is a first degree
13 felony punishable by up to 30 years in prison.

14 Do you understand what you're charged with?

15 A Yes, I do.

16 Q Okay. Do you understand -- and there's going
17 to be a lot of do you understands. But I really --
18 before I can go to any next step I have to be clear in
19 my mind that you understand what I'm saying and what
20 we're doing.

21 If at any point you don't understand what I'm
22 saying because you didn't hear what I'm saying or the
23 words aren't clear to you, you don't know the meaning of
24 the words or you have any questions, you need to stop me
25 and let me make sure you do understand.

1 Are we in agreement with that?

2 A I understand.

3 Q Okay. Now, Mr. Barnes, I have present in court
4 with me today I have Michael Hunt who's from the State
5 Attorney's Office and Susan Garrett from the State
6 Attorney's Office. There's a gentleman sitting behind
7 them. And I'm not sure who that gentleman is.

8 MR. CIZMADIA: I'm an investigator. I work
9 for the State Attorney's Office.

10 THE COURT: And your name, please?

11 MR. CIZMADIA: My first name's John and my
12 last name's Cizmadia C-I-Z-M-A-D-I-A.

13 THE COURT: Okay. I also have from the
14 Public Defender's Office -- at the request of my
15 office we asked the Public Defender's Office to
16 have an experienced attorney present. And I've
17 got Phyllis Riewe present.

18 Ms. Riewe, would you spell your name for
19 the record; the last name?

20 MS. RIEWE: R-I-E-W-E.

21 BY THE COURT:

22 Q Okay. And Ms. Riewe is here as I'm going to --
23 I'm going to designate her as your standby counsel until
24 -- and along the way at any point if you want me to
25 appoint Ms. Riewe I will stop and have her appointed if

1 you qualify for a Public Defender.

2 And if you have any questions along the way you
3 can ask her those questions. Because I -- it's crucial
4 that you understand what's going here -- going on here.
5 And it's crucial that you have at least a standby
6 attorney who can advise you at any point.

7 Do you understand that?

8 A Is that the discretion of the Court?

9 THE COURT: Okay. Ms. Riewe, how long have
10 you been with the Public Defender's Office?

11 MS. RIEWE: This most recent time since
12 2002.

13 THE COURT: Okay. And how long have you
14 been admitted to the practice of the law?

15 MS. RIEWE: Since 1978.

16 THE COURT: Okay. And what division are
17 you in in the Public Defender's Office?

18 MS. RIEWE: Regular felony division.

19 THE COURT: Okay.

20 BY THE COURT:

21 Q Mr. Barnes -- well, let me -- to the best of
22 your knowledge has an attorney been appointed to
23 represent you?

24 A No, ma'am. And I have a defendant's waiver of
25 representation by counsel written with me. I've already

1 filed one with the State and Clerk of the Court. And
2 since this is capital felony and they're seeking the
3 death penalty, I figured I'd give the State Attorney a
4 copy right now and the clerk if you'd let me.

5 Q Okay. At first appearance or initial
6 appearance were you offered an attorney?

7 A Yes, ma'am. I waived counsel.

8 Q Okay. Now, you have an absolute right to have
9 an attorney appointed to represent you; a competent
10 attorney to represent you if you cannot afford an
11 attorney. Do you understand that?

12 A Yes, I do.

13 Q Okay. Can you afford an attorney?

14 A No, ma'am. I'm going to waive -- waive
15 counsel.

16 Q Well, it's two different questions. One is can
17 you afford an attorney?

18 A No, ma'am.

19 Q Okay. Do you have any assets whatsoever?

20 A No, ma'am.

21 Q Okay. And knowing that I would appoint an
22 attorney to represent you do you wish to represent
23 yourself?

24 A Yes, I do.

25 Q Okay. Tell me why you wish to represent

1 yourself.

2 A I was under the impression that the Court would
3 be aware that when I came here and was arraigned under
4 the indictment that I would offer a plea at that time.

5 And I would also waive the advisory jury and
6 let the Court sentence me as they so choose either to
7 life or death.

8 Q Okay.

9 A This is an 18-year-old case. So it's not
10 like --

11 Q Well, you know, I -- I understand, you know --
12 I understand that you know a lot about this case in the
13 sense that, you know, it's 18 years old and the State
14 has information, you have information.

15 But I need to have a record here.

16 A Yes, ma'am.

17 Q So that anyone that picks this record up and
18 reads it understands what happened here today and can
19 see or understand that everybody knew -- we're all on
20 the same page. Okay? So bear with me.

21 A Yes, ma'am.

22 Q Okay. Are you presently incarcerated?

23 A Yes, I am.

24 Q And you're incarcerated in Sharpes?

25 A I'm in -- at this time I was just transferred

1 back from Florida State Prison about a week ago. I'm at
2 Sharpes at this time.

3 Q Okay. And you're incarcerated in Florida State
4 Prison for what charge?

5 A Capital murder.

6 Q Okay.

7 THE COURT: Mr. Hunt, I'm going to give you
8 an opportunity to kind of give me some
9 background.

10 MR. HUNT: Your Honor, Mr. Barnes was
11 arrested in the summer of 1997 for the murder of
12 his wife Linda Barnes and was indicted I believe
13 early in 1998, indicted on a Tuesday.

14 And through negotiations with Randy Moore
15 of the Public Defender's Office and David
16 Silverman of the Public Defender's Office who
17 worked as co-counsel on behalf of Mr. Barnes,
18 the State agreed upon consultation with the
19 family to waive the death penalty in that case.

20 Mr. Barnes had been incarcerated previously
21 and had sufficient aggravators the State
22 believed to go forward at that time. However,
23 we made an agreement with Mr. Barnes through his
24 counsel to waive the death penalty.

25 He was indicted on a Tuesday, pled before

1 Judge Moxley on Friday and was sentenced to life
2 in prison. And that's where he's been since
3 then.

4 The incident that's before the Court today
5 occurred April 20th of 1988. Mr. Barnes was a
6 suspect at the time in 1988 for this murder. I
7 need not get into the facts unless the Court
8 desires at this point. But he was a suspect.
9 It wasn't until 2005 when we had sufficient
10 evidence to go forward and finally present the
11 case to the Grand Jury upon the date of the
12 indictment which was April 18th of 2006.

13 So subsequent to that, wrote Mr. Barnes,
14 advised him what had occurred and sent him a
15 copy of the indictment because he had requested
16 that previously, requested that he be advised.

17 So that's what brings us before the Court
18 today.

19 THE COURT: And then has he been in contact
20 with the State Attorney's Office indicating that
21 he wished to come here and enter a plea of
22 guilty today?

23 MR. HUNT: Yes, your Honor.

24 THE COURT: Okay.

25 BY THE COURT:

1 Q Mr. Barnes, how old are you?

2 A 44.

3 Q Okay. And you understand that you have the
4 right to represent yourself.

5 A Yes, I do.

6 Q Okay. And again, I've asked you this but I'm
7 going to ask you again. It's my understanding that
8 you've requested to represent yourself in this case
9 before the Court today.

10 A Yes, I have. And I've given you a written
11 waiver now.

12 Q Okay. And how far did you get in school?

13 A 13 years.

14 Q Did you get through the first year of college?

15 A With continuing education units, yes, ma'am.

16 Q Do you read, write the English language?

17 A Yes, I do.

18 Q Have you ever taken any legal courses?

19 A Yes, I have. But my mechanics of the law
20 probably isn't what's in question here right now. I
21 mean, I've had enough dealings with the court system to
22 know where I stand right now today.

23 Q Do you have experience, education or knowledge
24 about criminal proceedings?

25 A Yes, I do.

1 Q Tell me what experience, education and
2 knowledge you have about criminal proceedings.

3 A I've taken couple of criminal justice courses
4 and I'm a certified law clerk if that helps you at all.

5 Q Where did you take these courses?

6 A Certified law clerk I did at would have been
7 Hillsborough Correctional Institution.

8 Q What year?

9 A Nineteen ... 1980.

10 Q What -- what makes you a certified law clerk?
11 Who gave you that designation? Or what entity gave you
12 that designation?

13 A The Florida Department of Corrections has an
14 accredited course for people who seek to be a certified
15 law clerk.

16 Q So since 1980 you've been a certified law clerk
17 as designated by the Department of Corrections?

18 A Yes, ma'am.

19 Q Okay. And in that capacity do you -- are you
20 given special responsibilities or duties?

21 A Well, of course. What they're basically
22 looking for is somebody who can not only read but they
23 can put down on paper a thought. I believe that I
24 qualified under those auspices.

25 Q Any other legal experiences you've have or any

1 other experience you've had in the legal system other
2 than the fact that you've had your own cases and you've
3 had -- you became a certified law clerk in 1980?

4 Anything else that gives you experience in the law?

5 A Well, I've worked in the law library off and on
6 for 20-something years. I mean, this isn't new to me.

7 Q Okay. You know that. But I don't.

8 A Okay.

9 Q So I need -- I need a record.

10 A Okay.

11 Q Do you believe that you're mentally alert now?

12 A Absolutely.

13 Q Have you ever watched a complete criminal trial
14 in the courtroom?

15 A Yes, I have.

16 Q Which criminal trials have you watched?

17 A Mine.

18 Q And what year was that?

19 A Complete jury trial that I went through was in
20 Oklahoma, Tulsa, Oklahoma, was in 1985.

21 Q And you were charged with what?

22 A Let's see. Assault and -- aggravated assault
23 and disorderly conduct and destruction of private
24 property.

25 Q Did you represent yourself in that case?

1 A No, ma'am.

2 Q And you had a lawyer.

3 A Yes, I did.

4 Q Okay. Do you believe that you're mentally
5 alert right now?

6 A Yes, I do.

7 Q Okay. Within the last 24 hours have you taken
8 any substance that would affect your judgment?

9 A No, ma'am.

10 Q Have you taken any pills, drugs or alcohol?

11 A No, ma'am.

12 Q Okay. Do you or have you ever suffered from
13 any mental disorder, defect, disease or derangement?

14 A No, ma'am.

15 Q Has anyone ever told you; a psychologist, a
16 psychiatrist, a social worker, a licensed mental health
17 worker that you have any type of mental illness?

18 A No, ma'am. I'm borderline personality disorder
19 based on somebody's, you know, matrix.

20 I've read the diagnostic and statistical
21 manual. I -- I don't believe that there's any reason to
22 think that I don't have the cognitive ability to
23 understand what's going on right now, ma'am.

24 Q Have you ever been treated for mental illness?

25 A No, ma'am.

1 Q Have you ever been in a mental health facility?

2 A Observation. I was Baker Acted once. One
3 time.

4 Q When was that?

5 A That was about 1990.

6 Q And when you were Baker Acted did you just
7 remain at the facility for three days? Or did they send
8 you off --

9 A Three days.

10 Q (Cont'd.) To a State hospital?

11 A Three days.

12 Q Okay. I have previously told you the offenses
13 on which you've been indicted. Do you understand what
14 these -- that you've been charged with these offenses of
15 first degree murder subjecting you to either to life
16 imprisonment or the death penalty; burglary of a
17 dwelling with an assault or battery, sexual battery by
18 use or threat of deadly weapon. That's counts three and
19 four. And arson of a dwelling.

20 Do you understand you're charged with those
21 offenses?

22 A Yes, I do.

23 Q And do you understand that the State has the
24 burden in a court of law if these matters went to trial
25 to prove that you committed these offenses beyond the

1 exclusion of every reasonable doubt? Do you understand
2 that?

3 A Yes, I do.

4 Q Okay. And do you understand that these are
5 very -- I mean, they are -- the murder charge is the
6 most serious charge you could be charged with. Do you
7 understand that?

8 A Yes, I do.

9 Q Okay. And do you understand that you're facing
10 the death penalty in that -- in count one of this
11 indictment?

12 A Yes. I understand that.

13 Q Do you understand that with each of these
14 offenses there may be defenses for you. It could be
15 self-defense, intoxication to a certain extent would
16 mitigate; in certain matters, duress, insanity,
17 entrapment, mistake, necessity.

18 I mean, these are potential defenses. I don't
19 know anything about the facts of your case. But those
20 are just among the many defenses that could come up.

21 Are you aware the law pertaining to those
22 defenses?

23 A Yes, I am.

24 Q Okay. And do you understand that a lawyer in
25 order to practice law in the State of Florida has to

1 have finished law school, graduated from law school and
2 passed the Florida Bar? Do you understand that?

3 A Yes, I do.

4 Q Okay. And just by that procedure that lawyer
5 walks into the courtroom with certain knowledge and
6 education of the law. Do you understand that?

7 A Yes, I do.

8 Q And he will -- he or she will be able to
9 hopefully competently represent you in matters of the
10 rules of criminal procedure and evidence and trial
11 strategy if you would allow an attorney to be appointed
12 to represent you. Do you understand that?

13 A Yes, I do.

14 Q Okay. And do you understand that there may be
15 things in a trial or in a death penalty phase or the
16 penalty phase of the case in which an attorney who's
17 gone to law school and has had experience in criminal
18 law could guide you in a way that might be in your best
19 interest?

20 A Yes, I do.

21 Q Okay. And nevertheless you still want to
22 represent yourself?

23 A Yes, I do.

24 Q Okay. Why do you think you can -- you should
25 represent yourself versus having an attorney appointed

1 to represent you?

2 A Asking for a personal opinion of mine?

3 Q It's your opinion. I mean, I just want to know
4 why you think you want to represent yourself versus
5 having an attorney represent you.

6 A I want to make sure that the law is not
7 conspiring against me. I'm invoking my Sixth Amendment
8 right to assistance of counsel. I choose to defend
9 myself.

10 Q You use the word -- you want to make sure the
11 law was not conspiring against you?

12 A Yes, ma'am.

13 Q Okay. Explain that to me.

14 A It's simple. The United States Constitution
15 has inalienable rights. And one of them is that I have
16 the right to assistance of counsel. I would also like
17 to make sure that I have a right to represent myself.

18 And that's the other side of the coin. I don't
19 have many rights left in this world. That's one I have.
20 So I'm -- I wish to use that right.

21 Q Okay. You still -- I mean, we both agree that
22 you have the right to represent yourself if I find that
23 you're competent to make that decision. But what I'm
24 not hearing is why you think you would be -- you would
25 prefer yourself over an attorney to represent you.

1 A This is my strategy.

2 Q Okay. And in terms of a strategy, do you have
3 a goal? Do you know what your goal is?

4 A Facing the death penalty, ma'am.

5 Q Okay.

6 A All right. This is my strategy. I really
7 don't want to explain it to the judge who's possibly
8 going to sentence me.

9 Q Okay. I'm not asking you to explain your
10 strategy. I just want to make sure you have thought
11 through that strategy.

12 Because oftentimes when you have a strategy,
13 when you are the attorney with a strategy you never know
14 what's going to happen in a courtroom. You never know
15 what's going to be said or done. Attorneys are
16 surprised by what happens in the courtroom.

17 Lot of times you think a witness is going to
18 say one thing and they end up saying something
19 differently or they think one piece of evidence is going
20 to come in that doesn't come in. You know, and there's
21 all sorts of things that happen in a court of law.

22 And what I'm concerned about is when things
23 happen are you going to be in a position to rebound and to
24 regroup if your -- if you've got only one strategy as to
25 how things should happen. Are you going to be able to

1 regroup?

2 A I thought this out well.

3 Q You have.

4 A Yes, I have.

5 Q And do you understand that by having a lawyer
6 that lawyer is going to be able to preserve matters for
7 appeal that you may not have the -- the knowledge of how
8 to preserve a matter for appeal? Do you understand that
9 that can happen?

10 A I understand completely.

11 Q Okay. And not only can you get to object at
12 times but you also have to, you know, reiterate those
13 objections at certain times during the trial or you have
14 to raise issues at certain times during the trial. You
15 waive those issues for appellate review. Do you
16 understand that?

17 A Yes, I do.

18 Q Okay. And the lawyer that you would have would
19 hopefully be competent to know how to preserve issues
20 for appeal. Do you understand that?

21 A Yes, I do.

22 Q Okay. And nevertheless you feel that you still
23 want to represent yourself knowing that a lawyer may
24 have more education and more experience in the courtroom
25 than you do?

1 A Unequivocally.

2 Q Unequivocally. Okay. Do you know the rules of
3 criminal procedure?

4 A Basics. I -- I could do it if I had some law
5 books with me. I could follow you -- if you gave me a
6 case number, I could go Shepardize it and find some
7 help.

8 Q I just want to go over some of the things that
9 a lawyer would know if he or she was appointed to
10 represent you. Know the law. And in a death penalty
11 case lawyers have to have certain experience before they
12 can even represent a defendant in a death penalty case.

13 A Quite aware of that.

14 Q Okay. And lawyers who are representing
15 defendants in cases in which the Defendant would be
16 subject to death -- the death penalty -- could be
17 subjected to the death penalty would know how to
18 pinpoint and research issues that could come up.

19 A lawyer would know how to lawfully enter a
20 plea. A lawyer's in a position -- a better position to
21 negotiate for you than you are for yourself.

22 The State is unable often to talk to you
23 one-on-one because they don't want you to later say that
24 they said something or you misunderstand what they say.
25 So by not having a lawyer you preclude a lot of the

1 give-and-take that a defense lawyer would have with the
2 State.

3 A I'm not looking to give-and-take with the
4 State.

5 Q I'm just giving you your options.

6 A Okay.

7 Q The lawyer would know about how to try at least
8 plea bargain. I'm not saying that's what you want to
9 do. But often at least it's an option that, you know,
10 could be presented. And a lawyer knows how to
11 investigate the evidence, how to subpoena witnesses, how
12 to file and argue motions, how to challenge the charging
13 document.

14 There may be defects in the charging documents.
15 The lawyer knows the rules of evidence, knows how to
16 object to evidence, knows how to attack the legality of
17 gathering of evidence like the police, knows how to
18 select a jury. If this case went to a jury trial, knows
19 how to make an opening statement, how to question
20 witnesses, how to question -- cross-examine witnesses.

21 Jury instructions are crucial in any case,
22 especially in a case in which the Defendant is looking
23 at a possible penalty the death penalty. And lawyers
24 know how to make a closing argument in a death penalty
25 matter.

1 There's also a great deal of reliance that the
2 Court has to make or at least take a hard look at
3 mitigating circumstances. And that's very important. A
4 lawyer knows how to investigate matters that might be
5 mitigating in a death penalty case.

6 Do you understand that those are some of the
7 things a lawyer could do for you if a lawyer is
8 appointed to represent you?

9 A Yes, I do.

10 Q Okay. And you may not have had the ability to
11 perform all those functions. Do you understand that?

12 A Yes, I do.

13 Q Okay. And you understand that in any situation
14 we always tell people that, you know, representing
15 yourself in any situation is not the best route to take.
16 Because sometimes you don't have the objectivity to make
17 decisions that a lawyer is going to have the ability to
18 do, you know, in a matter. Do you understand that?

19 A And duly advised.

20 Q And duly advised. Okay. That doesn't mean
21 that you won't make the ultimate decisions. You will --
22 you will have a lot of -- you will have input to what
23 your lawyer does.

24 But that lawyer can step back and see the whole
25 picture whereas when you're involved in it it's

1 sometimes very hard to step back and see the pros and
2 cons of either a decision that you make in the case or a
3 strategy that you do in a case.

4 Do you understand those limitations about
5 representing yourself?

6 A Yes, I do.

7 Q Are you doing this because you want to be your
8 own lawyer and for no other reason?

9 A For no other reason.

10 Q Has anybody promised you anything in order to
11 get to decide to represent yourself?

12 A No, ma'am.

13 Q Has anybody threatened you or forced you to
14 make the decision to represent yourself?

15 A No, ma'am.

16 Q Do you understand that at every stage of these
17 proceedings I'm going to have standby counsel for
18 you. You will still represent yourself. But that
19 standby counsel will be there solely to assist you in
20 representing yourself. But you are going to be the
21 person to represent yourself if you decide that you
22 still want me to allow you to represent yourself. Do
23 you understand that?

24 A Standby counsel is solely at your discretion.
25 And I understand that and that at any time I feel that I

1 need to ask them question they'd be there for me.

2 Q Okay.

3 THE COURT: State, are there any further
4 questions that you wish to have the Court
5 address with this Defendant regarding his desire
6 to represent himself?

7 MR. HUNT: Your Honor, there are not.
8 However, the State would request the Court make
9 a specific finding pursuant to the Faretta as
10 well as Rule 3.111 paren D, paren three of the
11 Rules of the Criminal Procedure.

12 As to his ability to represent himself I
13 think the Court has established a good record.
14 And Mr. Barnes seems alert and competent and
15 intelligent to make that decision. The State
16 would ask the Court to make those findings.

17 THE COURT: Okay.

18 MR. HUNT: Findings; basis for --

19 THE COURT: Ms. Riewe, I understand that
20 you are just standby counsel. Is there any
21 matter that you think that I have not addressed
22 or you wish me to address at this point
23 regarding Mr. Barnes's decision to represent
24 himself?

25 MS. RIEWE: It seems to me the record's

1 very thorough.

2 MR. HUNT: Your Honor, one matter that the
3 State would ask the Court to consider, if I may.

4 Mr. Barnes has already filed motions on his
5 behalf. One was the waiver of representation by
6 counsel but also a demand for speedy trial. And
7 a -- another waiver of representation of counsel
8 was handwritten which the State has -- has
9 received in addition to the typewritten one he
10 provided today.

11 THE COURT: All right. Mr. Barnes, at this
12 time then I'm going to find that you are
13 competent. In fact, you appear to be extremely
14 competent. Your demeanor, the way you've
15 addressed the Court, the way you -- I mean, not
16 only what you've said but your presentation
17 convinces me that you are competent, you
18 understand what is happening here today, that
19 you have knowingly, freely and voluntarily
20 exercised your decision to represent yourself,
21 that you are waiving the right to counsel for no
22 other reason other than the fact that you want
23 to represent yourself and that you -- you know,
24 this is a knowing and intelligent waiver and
25 that you have the capacity to make that knowing

1 and intelligent waiver and that you understand
2 the advantages and disadvantages of representing
3 yourself.

4 Is there any other findings of fact that
5 have not been made that the record needs to
6 reflect?

7 MR. HUNT: Mr. Barnes used the words
8 himself, your Honor, it's in the rule. And that
9 is unequivocal; that the State requests a
10 determination as to whether or not he made an
11 unequivocal request to represent himself.

12 THE COURT: I think he's made it. I mean,
13 I know he's made an unequivocal request to
14 represent himself. He's been very definite
15 about that.

16 And there's no doubt in my mind that that
17 request is something that he wants me to grant
18 him.

19 Is that correct?

20 THE DEFENDANT: Correct.

21 MR. HUNT: One more matter, your
22 Honor. Could the Court advise Mr. Barnes that
23 if he does represent himself, he cannot complain
24 about his representation of himself. He cannot
25 -- he waives any 3.50 or other collateral

1 appeals.

2 BY THE COURT:

3 Q Okay. Mr. Barnes, because I'm finding you
4 intelligent and knowingly making this request that you
5 have the ability to make this request because you are
6 intelligent and competent to make this request later
7 down the line if you -- for whatever reason your
8 strategy, whatever that strategy may be does not work
9 out, you're not going to be able to say well, you know,
10 I was representing myself. Because I'm making these
11 findings. And do you understand that?

12 A I understand. I'm ready to enter a plea right
13 now on all cases.

14 Q Couple of more matters. One: You know, I
15 can't help you here in the sense that, you know, whether
16 you represent yourself or you have an attorney I have to
17 treat the defense the same as I treat the State.

18 I can't help you do something simply because
19 you're representing yourself. Do you understand that?

20 A Yes, I do.

21 Q I can't give you advice when you -- you know,
22 in order to help you if you decide to represent
23 yourself. Do you understand that?

24 A Yes, I do.

25 Q Okay. And my staff, my staff attorneys, my

1 judicial assistant, my court clerks can't help you any
2 more than they would help the State if you decide to
3 represent yourself. Do you understand that?

4 A Yes, I do.

5 Q You don't get to get any extra benefits because
6 you make the decision to represent yourself. Do you
7 understand that?

8 A No favors, ma'am. I understand completely.

9 Q Okay.

10 THE COURT: Okay. Then again, I'm going to
11 find a knowing and intelligent waiver and that
12 he is competent to make the decision to
13 represent himself.

14 BY THE COURT:

15 Q Now, Mr. Barnes, at this time, do you wish to
16 enter a guilty plea?

17 A On all five counts.

18 Q On all five counts.

19 A Yes, I do.

20 THE COURT: Okay. Is the State ready to
21 proceed to that?

22 MR. HUNT: Yes, your Honor.

23 THE COURT: Okay.

24 BY THE COURT:

25 Q Mr. Barnes, you are presently in prison. Are

1 you in prison for life?

2 A Life and 45 total.

3 Q Life and 45 total. Okay. And again, right
4 here in the courtroom I've got Ms. Riewe here. If there
5 is anything you don't understand, feel free to ask Ms.
6 Riewe.

7 At the same time if you at any point want to
8 stop and have an attorney appointed to represent you, I
9 will stop at any point. Do you understand that?

10 A Yes, I do.

11 Q All right. You've already been sworn in. How
12 do you plead to first degree premeditated murder?

13 A Guilty.

14 Q And how do you plead to burglary of a dwelling
15 with an assault or battery?

16 A Guilty.

17 Q And how do you plead to sexual battery by use
18 or treat of deadly weapon of a person -- a victim 12
19 years of age or older?

20 A On both counts guilty.

21 Q And how do you plead to arson of a dwelling?

22 A Guilty.

23 Q Okay. I have already told you the maximum
24 sentence that you could receive on each of these
25 matters. What I have not told you which is probably not

1 a huge concern to you is the fines that would be -- that
2 could be levied.

3 So let's hear what would the fines be in each
4 of these matters.

5 MR. HUNT: Your Honor, I believe as to
6 counts two, three, four and five -- or two,
7 three and four it's \$15,000 and for arson of a
8 dwelling, a first degree felony, that's \$10,000.

9 THE COURT: Did you all look it up?

10 MR. HUNT: The State -- the State would
11 waive those fines.

12 THE COURT: Okay. There's not mandatory
13 fines. What I'm trying to make sure is that I
14 know that if the Defendant does not understand
15 fully what he's facing that that would be a
16 problem down the line.

17 So I want to make sure that he understands
18 what he's facing.

19 MR. HUNT: Yes. Tens of thousands of
20 dollars worth of fines potentially.

21 BY THE COURT:

22 Q The State has indicated they're not seeking any
23 fines.

24 THE COURT: State, if you'll give me a
25 factual basis?

1 MR. HUNT: Yes, your Honor. The State
2 would show through competent, admissible
3 evidence at trial that on April 20th 1988 that
4 James Phillip Barnes, the Defendant in this case
5 killed Patricia Miller by straggling Patricia
6 Miller and inflicting blunt force trauma upon
7 Patricia Miller who was, in fact, killed with
8 premeditated design.

9 Dr. Dennis Wenkle (phonetic) who was chief
10 medical examiner at the time did the autopsy on
11 Patricia Miller concluded that the primary cause
12 of death was the blunt force trauma inflicted
13 upon her head by a blunt object.

14 The evidence would show that there is
15 evidence of strangulation of Ms. Miller as well
16 as the blunt trauma which caused significant
17 injury or damage to her head. And that occurred
18 in Brevard County, Florida, April 20, 1998 as
19 did sexual battery.

20 Evidence of sexual battery upon Patricia
21 Miller; Mr. Barnes's DNA was found in her
22 vaginal cavity. As a result of the examination
23 at autopsy and vaginal swabs taken from her that
24 this occurred, a sexual battery. There's also
25 evidence of anal sexual battery. That occurred

1 at 1480 Roosevelt Avenue, Unit 101, Melbourne,
2 Brevard County, Florida was the site of the
3 burglary. The evidence would show that Mr.
4 Barnes entered into the dwelling. It's a
5 condominium complex, the specific unit occupied
6 by Patricia Miller on April 20th 1988. And that
7 was done with the intention to commit an offense
8 therein and without the consent or knowledge of
9 Patricia Miller.

10 Subsequent to the murder of Patricia Miller
11 the State would show through competent,
12 admissible evidence that Mr. Barnes set a fire
13 which was subsequent to the death of Patricia
14 Miller using available materials to wit, the bed
15 material, bedding material.

16 And that was in 1480 Roosevelt Avenue, Unit
17 101, Melbourne, Brevard County, Florida.
18 Specifically as to the sexual batteries, count
19 three, the State would show through admissible,
20 competent evidence that he placed his penis in
21 or in union with the vagina of Patricia Miller
22 and that he furthermore as to count four placed
23 his penis in or in union with the anus of
24 Patricia Miller.

25 In addition to witnesses the State would

1 call we also have admissions by Mr. Barnes; one
2 statement made November 1st of 2005 which was
3 subsequent to statements made to myself in
4 correspondence from Mr. Barnes, letters that he
5 had written me one which detailed specifically
6 and graphically the events of April 20th 1988
7 pertaining to the murder of Patricia Miller, the
8 rape and arson as well as burglary.

9 BY THE COURT:

10 Q Mr. Barnes, the State has given me a factual
11 basis. Now I need you to tell me what happened
12 regarding these offenses and the victim in this case.

13 And I want to tell you at this point that
14 anything you say can and will be used against
15 you. You're in the middle of a plea. But, you know, if
16 you elect not to make any admissions, that's your
17 decision.

18 But you do have a Fifth Amendment right to
19 remain silent. But before I go forward with this plea I
20 need to hear from you what you did regarding these
21 offenses that you've been charged with in this case.

22 A Would my statement determine whether or not you
23 accept these pleas or not? Or have you accepted them?

24 Q I've not accepted the pleas.

25 A All right. On April 20th 1988 I broke into

1 Patricia Miller's condominium on Roosevelt Avenue in
2 Melbourne, Florida. I raped her twice. I tried to
3 strangle her to death. I hit her in the head with a
4 hammer and killed her and I set her bed on fire.

5 Q Was this a random act? I mean, in other words,
6 did you have -- did you know Ms. Miller?

7 A No, I didn't.

8 Q How did you select this particular victim?

9 A It wasn't a selection. I worked there at the
10 condominium.

11 Q And this was in Brevard County, Florida?

12 A Yes, it was.

13 Q And this took place on April 20th 1988?

14 A Yes. April 20th 1988.

15 Q And you, in fact --

16 THE COURT: And did you accept that Ms.
17 Miller was over the age of 12 at the time of
18 this offense?

19 MR. HUNT: Yes, your Honor, she was.

20 THE COURT: Okay.

21 MR. HUNT: And furthermore, for
22 clarification as to the arson, the State fire
23 marshal and fire marshal of the City of
24 Melbourne determined that the cause of the fire
25 was arson using multiple sources of ignition or

1 locations of ignition there, as well, in the
2 bedding of Ms. Miller.

3 So their conclusion was it was arson as
4 opposed to accidental or otherwise.

5 THE COURT: Was there any other evidence in
6 this case besides the Defendant's admissions to
7 you?

8 MR. HUNT: Yes, your Honor. There were
9 admissions to another individual that we have on
10 this tape that occurred November 1st 2005 as
11 well as his semen was found in Patricia Miller's
12 vaginal swabs and taken at the autopsy.

13 Mr. Barnes when he was interviewed in 1988
14 said he had some casual relationship, may have
15 met her once and had never been to her
16 residence. So that was further in addition to
17 his knowledge.

18 As he indicated he had some connection with
19 this condominium complex. Also knew two young
20 ladies who lived upstairs and some guy who lived
21 upstairs from Patricia Miller. But he had
22 reason to be around the area.

23 And based upon his prior record -- he was a
24 suspect at the time but it wasn't until later,
25 until after DNA was obtained that we had

1 sufficient evidence to go forward.

2 THE COURT: Did you contact Mr. Barnes? Or
3 did Mr. Barnes contact you after 1988 regarding
4 this matter?

5 MR. HUNT: Mr. Barnes contacted me.

6 THE COURT: And what year was that?

7 MR. HUNT: 2005.

8 THE COURT: And was that through letters?

9 MR. HUNT: Yes.

10 BY THE COURT:

11 Q Okay. Mr. Barnes, some of these questions I've
12 already asked you. But I'm going to ask them again.
13 Have you taken any pills, drugs or alcoholic beverages
14 in the last 24 hours?

15 A No, I haven't.

16 Q Okay. And you do read, write, speak and
17 understand the English language.

18 A Yes, I do.

19 Q And has anybody forced you or threatened you in
20 order to enter these guilty pleas today?

21 A No, ma'am.

22 Q Has anybody promised you anything in order to
23 get you to enter guilty pleas to these offenses today?

24 A No, ma'am.

25 Q You understand that you have an absolute right

1 to have a jury trial. You have the right to have 12
2 impartial people decide your guilt or innocence. You
3 have the right to have a jury selection in which those
4 12 people would be selected through the questioning of
5 the Court and the State and either you or your attorney
6 if you desire to have an attorney appointed to represent
7 you.

8 You have the right to have -- the State has to
9 prove each and every element of each offense beyond and
10 to the exclusion of every reasonable doubt and the jury
11 -- the jury would be told that that burden is on the
12 State and the jury would be told that if the State
13 cannot meet its burden as to each and every element of
14 each offense it must find you not guilty of any offense
15 in which the State did not meet its burden.

16 You have the right to have assistance of
17 counsel at a trial. In fact, you have the right to have
18 assistance of highly competent counsel, counsel that
19 qualify to represent a person in a potential death
20 penalty matter. You have the right to even have two
21 attorneys appointed to represent you.

22 When a defendant is facing the death penalty
23 matter the Court will appoint two attorneys to represent
24 you. And both of those must have certain background,
25 legal education and experience before he or she could

1 represent a defendant in a death penalty matter.

2 You have the right at a trial to confront your
3 accusers. You have the right to cross-examine the
4 witnesses that are called by the State. You have the
5 right to have subpoenas issued and to call witnesses of
6 your own in this matter. You have the right to present
7 any defenses that you feel would be appropriate.

8 The Court may or may not allow them based upon
9 their relevance. But you have the right to present
10 defenses and at least get a ruling from the Court
11 whether those defenses could be presented.

12 You have the right to remain silent. And the
13 jury would be told that if you exercise that right they
14 could not infer any guilt because you exercised that
15 right. You have the right to testify on your own behalf
16 and you have the right again to remain silent and not
17 testify.

18 You have the right to file motions to suppress
19 evidence that you feel was gotten in violation of your
20 Constitutional rights. And you have the right to appeal
21 all matters relating to your judgment and sentencing
22 including the question of your guilt or innocence.

23 Do you understand you have all those
24 Constitutional rights?

25 A Yes, I do.

1 Q Do you understand that you're giving up those
2 rights by entering this plea today of guilty?

3 A Yes, I do.

4 Q Okay. Are you entering these guilty pleas
5 because you feel it's in your best interest?

6 A Yes, I am.

7 Q Mr. Barnes, do you have family that you're
8 close to?

9 A No, ma'am.

10 Q Have you been able to discuss this matter with
11 anyone?

12 A No, ma'am.

13 Q And yet you feel that you're competent to make
14 this decision to represent yourself and to enter this
15 guilty plea today?

16 A Yes, ma'am.

17 Q Do you want more time to think this over?
18 Because I will give you, you know, more time to think
19 this over; whether it's come back today or come back
20 tomorrow or next week or, you know, several weeks down
21 the road?

22 A No, ma'am. I understand -- I understand what
23 I've done and what's going on right now. I'm very --
24 I'm adamant in entering these pleas and the Court
25 accepting them.

1 THE COURT: Other than making findings of
2 fact regarding this plea and acknowledging what
3 he said, are there any other matters I've not
4 covered on the plea colloquy that the State
5 wishes me to address?

6 MR. HUNT: We'll defer to the Court, your
7 Honor.

8 BY THE COURT:

9 Q Well, the most important thing which I think
10 we've already addressed is that, you know, by pleading
11 guilty this Court is going to have to go through --
12 we're going to have to go through, you know, the
13 colloquy regarding the penalty phase.

14 And then you're entitled to have a Spencer
15 hearing. And then, you know, there would be a -- and I
16 would make some decisions. But, you know, in terms of
17 you understanding that there's a possibility that you
18 could receive the death penalty by me by entering this
19 guilty plea. Do you understand that?

20 A I understand that. And I'll say this verbally.
21 I understand that the Court can either sentence me to
22 life or death in the first degree capital murder,
23 premeditated murder guilt phase. I understand that.

24 Q Okay. And you understand that I would be the
25 person making that decision ultimately.

1 A Ultimately.

2 Q Okay. And when you say ultimately, you seem to
3 indicate that there may be something in between. What
4 do you think's going to happen in between?

5 A Recuse yourself for some reason. I don't
6 know. I don't -- between now and sentencing is still --
7 could be some time off unless you choose to sentence me
8 today.

9 THE COURT: All right. Then I find that
10 you have a -- that you're alert, competent,
11 intelligent. And I don't know that the record's
12 going to reflect how definite your speech is
13 unless someone pulls up the video. But you've
14 been very definite today. You've been extremely
15 alert.

16 I have -- and it's obvious to me that
17 you're intelligent and that you understand
18 what's happening here and that this is your
19 decision. You've made that very clear in your
20 words and in your demeanor.

21 You've had -- you know, you've been offered
22 several times today to have representation by an
23 attorney. And it's my understanding that you --
24 that you're waiving that right, that you wish to
25 represent yourself, that you understand the

1 charges against you and that there are potential
2 penalties that are involved in these matters,
3 that you believe that this plea is in your best
4 interest and there is a factual basis for your
5 plea not only based upon what the State has told
6 me but your own words.

7 I've taken -- I've reviewed the court file
8 and I find that you have knowingly,
9 intelligently and freely waived your right to a
10 jury trial in this matter, the right to see,
11 hear and cross-examine the State's witnesses,
12 the right to compel witnesses to testify on your
13 behalf, the right to present defenses to the
14 charges, the right to not be compelled to
15 incriminate yourself, the right to highly
16 competent counsel to represent you at trial, the
17 right to have motions to suppress and the right
18 to have the State prove each and every element
19 of each charge beyond and to the exclusion of
20 every reasonable doubt.

21 And at this time then the Court will accept
22 your plea and adjudicate you guilty of these
23 offenses.

24 Now, Mr. Barnes, the next step is you have
25 the right to have a jury trial, a jury decide

1 the penalty phase.

2 THE DEFENDANT: I would like to waive the
3 advisory jury.

4 BY THE COURT:

5 Q And again, tell me why without --

6 A That is my strategy.

7 Q Do you understand that even though you pled
8 guilty and even though this Court has found you guilty
9 based on your plea that we can still convene a jury of
10 12 people to decide whether or not -- you know, or
11 recommend -- not decide but recommend to this Court life
12 imprisonment or death?

13 A Yes.

14 Q And -- let me finish. Okay? You've been real
15 good about it. But let me get through this. You
16 haven't interrupted me and I appreciate that.

17 But a jury -- the Court must give great weight
18 to a jury's recommendation. I must do that. And if the
19 jury -- I ultimately make the decision but the jury's
20 recommendation is given great weight. During the
21 penalty phase when the jury is selected, the State can
22 present statutory aggravating circumstances regarding
23 your guilt or the penalty. So -- the penalty.

24 You in the penalty phase can challenge those
25 aggravating circumstances. At the same time you can

1 present mitigating circumstances. The mitigating
2 circumstances you present are not limited just to the
3 statutory mitigating circumstances but they can be just
4 about anything that would help that jury come to a
5 decision on recommending life or death. And so there's
6 a wide range of information that can be presented to a
7 jury in making that decision.

8 So by -- so knowing that, do you still wish to
9 waive a jury, the advisory jury?

10 A Yes, I do.

11 Q Has anybody forced you to make that decision?

12 A No, they haven't.

13 Q Has anybody promised you anything in order for
14 you to make that decision?

15 A No promises made.

16 Q Okay. And again, I'm offering you an attorney
17 to represent you at this stage so that that attorney can
18 advise you as to the pros and cons of waiving an
19 advisory jury. Do you wish me to appoint an attorney
20 for that reason?

21 A No. I wish to waive assistance of counsel for
22 that hearing, also. And since I already have one waiver
23 and the Court's been accepted I believe that you asking
24 me again is sufficient as a waiver for assistance of
25 counsel during the penalty phase of this hearing.

1 THE COURT: State, is it your understanding
2 then that if I allow him to waive an advisory
3 jury that we would go -- have a Spencer hearing;
4 that the Spencer hearing would be both sides
5 would present to me mitigating and aggravating
6 circumstances?

7 MR. HUNT: Yes, your Honor. It would be a
8 combined Spencer hearing and a sentencing
9 hearing. And then, of course, you know, the
10 Court would decide the sentence. I mean, it
11 would be an evidentiary hearing. The State
12 could present evidence as well as Mr. Barnes
13 could present evidence of mitigating factors if
14 he desires.

15 And your Honor, as to that as far as
16 scheduling if Mr. Barnes desires to go back to
17 Florida State Prison and the Court sets the
18 hearing sometime in the future, we can discuss
19 that. The State's amenable to that and may
20 prefer to do that rather than sit in Brevard
21 County Jail.

22 THE DEFENDANT: I would prefer to sit here
23 until this is resolved.

24 MR. HUNT: Okay.

25 BY THE COURT:

1 Q Mr. Barnes, do you understand that when you
2 take away the advisory jury you're taking away one
3 additional step between the ultimate decision? The
4 advisory jury can have -- its recommendation would be
5 given serious weight by this Court. And if they
6 recommend life this Court has to, you know, give -- you
7 know, due consideration to that recommendation.

8 If they give -- if they recommend death, I
9 could still override the jury. So, you know, you're
10 taking away one -- one part of the trial that could
11 still inure to your benefit by having an advisory jury.
12 Do you understand that?

13 A I understand.

14 Q Okay. The next thing I need to find out from
15 you -- and I -- and this part I have to know your
16 strategy. I mean, you're going to have to explain it to
17 me because I need to know what I need to do next.

18 If we go to an evidentiary hearing are you
19 going to present mitigating evidence?

20 A What I am most interested in avoiding is having
21 a jury determine whether it's heinous, atrocious and
22 cruel. I've already pled guilty to premeditated murder.
23 So it's CCP. Now, if we want to go to Spencer hearing
24 and the State wants to give a jury a whole bunch of
25 pictures, testimony, you know, witness statements,

1 victim impact statements, things like that, I have less
2 a chance than if I were to just plead in front of you.

3 I do understand that you're going to ultimately
4 decide whether I'll receive life or the death penalty.
5 And I understand the gravity of that. And I'm prepared
6 at this time to go forward with this. It's an
7 18-year-old case. All right? It doesn't mean that it's
8 any less important than any others.

9 But the fact of the matter is is it's taken a
10 long time to get to this point. And now that we're
11 here, let's -- instead of putting some bureaucracy in
12 front of it, you know, and slowing it down, let's go
13 ahead and take care of this. This matter needs to be
14 resolved.

15 Q Well, okay. The law requires me to do certain
16 things. You know, I have to follow the statute in terms
17 of its requirements. And as much as you may want to get
18 this resolved today I'm not going to be able to do that.

19 A Correct.

20 Q Now, but my question is is that at -- well, if
21 we have an evidentiary hearing are you just going to sit
22 over there and do nothing? Or are you going to present
23 matters to the Court that will at least, you know, help
24 me decide, you know, why I should go one way or the
25 other?

1 A I believe that my strategy so far has -- has
2 worked. Now there's a personable relationship between
3 the Court and myself instead of through an attorney, you
4 know, that I'm knowingly and willingly doing this. I'm
5 not going to give a homily if that's what you're looking
6 for.

7 Q What's a -- what you mean by you're not going
8 to give a homily?

9 A I would definitely speak on my own behalf if I
10 was challenged. But as far as bringing in any witnesses
11 as far as mitigating circumstances, I don't have any.

12 You know, if you're asking me what my resources
13 are, they're zero. The only thing I have is myself.
14 That's why I'm standing here today. And I'm going to go
15 forward with that.

16 I know how to object if something's brought up,
17 you know, that I don't feel the Court should have to
18 look at or is not required to look at.

19 Q Mr. Barnes, let me tell you where I'm -- what
20 I'm contemplating. I just went through this with
21 another matter. This Court needs to understand any
22 mitigating circumstances.

23 Even if you don't want me to know the
24 mitigating circumstances, I have to make the ultimate
25 decision. And that decision is not going to be based on

1 bias or sympathy for one -- for anybody. It's going to
2 be based on the law.

3 And what I'm contemplating is appointing an
4 attorney to represent not you but your interest in a
5 Spencer hearing.

6 A Well --

7 Q As much as you don't want an attorney to
8 represent you, I need to know any mitigating factors
9 that would help me make this decision.

10 A Okay. I believe that it would harm me greatly
11 if you were going to appoint an attorney for the Spencer
12 hearing. I wish to waive counsel and represent myself
13 in the final phase. It's part of my strategy.

14 As far as offering mitigating circumstances, I
15 believe that I have something in mind.

16 Q Well, I think what I'm willing to do is have an
17 evidentiary hearing, let both sides present what you
18 need to and what I feel, you know, is relevant to the
19 decision. And then if I'm not satisfied that -- with
20 the way that evidentiary hearing has been presented on
21 your behalf, then I think I need to appoint an attorney
22 that I'm going to have --

23 I'm going to appoint an attorney. Okay? I
24 need to follow the statute. The statute says I must
25 consider any mitigating circumstances. That -- that

1 attorney doesn't -- is not being appointed for you.
2 It's being appointed for the Court.

3 A That's ...

4 I don't know how to put into words how you
5 bifurcate that. I just don't understand how you can say
6 the Court's appointing an attorney for the Court. I
7 mean, the State Attorney is the State's Attorney. I
8 mean, that's his job to do that.

9 If you're trying to appoint somebody to protect
10 me or defend me, I don't need that. And I don't want
11 it.

12 THE COURT: Ashlee, can you print out --
13 give enough so I can give the State a copy and
14 then give the Defendant a copy.

15 THE COURT: Now, Mr. Hunt, you were going
16 to talk about an evidentiary hearing; when it
17 should be from the State's standpoint?

18 MR. HUNT: Yes, your Honor. We would need
19 approximately five weeks just to subpoena
20 witnesses, discuss, talk with witnesses. And
21 depending upon their availability we'll be
22 willing to proceed within about five weeks.

23 And your Honor, we expect that the
24 evidentiary hearing, the whole proceeding will
25 take about three days.

1 THE COURT: How long?

2 MR. HUNT: Three days.

3 THE COURT: Three days.

4 MR. HUNT: Yes, your Honor.

5 (Whereupon, there was a pause in the
6 proceedings.)

7 THE COURT: Okay. July 18th, 19th and
8 20th. Ashlee, are you going to be here?

9 July 18th, 19th and 20th? Okay. We can
10 still do it. July 18th, 19th and 20th.

11 THE DEFENDANT: Your Honor, were you going
12 to do this in front of a jury? Or have we
13 waived the jury?

14 THE COURT: I'm going allow you -- I'm
15 going to find that you knowingly, intelligently
16 waived an advisory jury in this matter and we'll
17 go straight to an evidentiary hearing in front
18 of this Court regarding the penalty phase.

19 Okay. And Ms. Riewe, you're still standby.
20 So --

21 MS. RIEWE: Your Honor, that will be
22 another member of my office. I don't think I'll
23 be technically qualified.

24 THE COURT: Okay.

25 MS. RIEWE: Should there be questions for

1 the penalty phase. And would you repeat the
2 dates for me, please?

3 THE COURT: 18th, 19th and 20th. And I
4 need to -- in fact, I want to have a status --

5 MS. RIEWE: Of May?

6 THE COURT: Of July.

7 What I need to do is then have -- I want to
8 have a status hearing the week to see which
9 attorney's going to be standby attorney for Mr.
10 Barnes.

11 MS. RIEWE: It'll either be Mr. --

12 THE COURT: I want somebody in here to look
13 at them and they're going to say they know
14 they're standby attorney. So let's come up with
15 a date for a status hearing for next week so
16 we'll know who is the standby attorney.

17 Okay. Thursday, the 11th at 8:30 regarding
18 the standby attorney. Whoever's going to be
19 that standby attorney for Mr. Barnes will need
20 to be present.

21 MS. RIEWE: Yes, your Honor.

22 THE COURT: Okay.

23 THE DEFENDANT: So that we're still reading
24 off of the same page, are you going to keep me
25 in Sharpes until --

1 THE COURT: Yes.

2 THE DEFENDANT: Thank you.

3 THE COURT: Is that what you wanted?

4 THE DEFENDANT: Absolutely. And as far as
5 anything that possibly -- as far as witnesses go
6 this is where my home was for many, many years.
7 So if there's any family left, they will be in
8 Brevard County. It would be easier for me to
9 track them down.

10 THE COURT: All right. Mr. Barnes, I'll
11 see you in a week and we'll know who your
12 standby attorney is so that you can -- if you
13 have any questions, anything you need to know
14 that attorney will, you know, be available to
15 you. Okay?

16 THE DEFENDANT: So I'll see you again when?
17 May 9th?

18 THE COURT: Yes. May 11th.

19 THE DEFENDANT: May 11th.

20 THE CLERK: The 11th at 8:30.

21 THE COURT: 8:30.

22 THE CLERK: Yes.

23 THE COURT: Okay. Thank you.

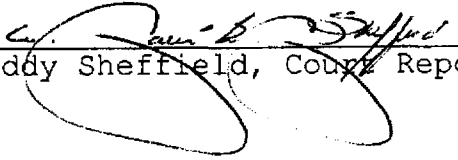
24 THE DEFENDANT: Thank you.

25 (Whereupon, the hearing was concluded.)

1
2 CERTIFICATE OF REPORTER
3
4

5 I, Margaret Eddy Sheffield, Court Reporter, do
6 hereby certify that I was authorized to and did report
7 the foregoing proceedings, and that pages 4 through 55
8 are a true and correct record of my stenographic notes.
9

10 Dated this 30th day of August, 2007.
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14 Margaret Eddy Sheffield, Court Reporter
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IN THE CIRCUIT COURT OF THE 18th JUDICIAL
CIRCUIT IN AND FOR BREVARD COUNTY, FLORIDA
CASE NO: 05 2006 CF 014592 AXXX XX

STATE OF FLORIDA

Plaintiff

vs.

JAMES PHILLIP BARNES

Defendant.

SCOTT ELLIS
2006 MAR 14 PM 12:29
BREVARD COUNTY

TRANSCRIPT OF PROCEEDING

DATE TAKEN: May 11th 2006
PLACE: Moore Justice Center
Viera, Florida 32940
BEFORE: LISA DAVIDSON
CIRCUIT JUDGE

This cause came on to be heard at the time and
place aforesaid when and where the following proceedings
were had:

LOIS DIANE DRESCHER, RPR
Court Reporter
Notary Public, State of Florida at Large

BREVARD ASSOCIATED COURT SERVICES, INC.
14 Suntree Place
Melbourne, Florida 32940

Case # 05-2006-CF-014592-AXXX-XX
Document Page # 222



ORIGINAL

222

1
2 APPEARANCE FOR THE STATE
3 SUSAN GARRETT, ESQUIRE
4 MICHAEL HUNT, ESQUIRE
5 Assistant State Attorney
6 2725 Judge Fran Jamieson Way
7 Building D
8 Viera, Florida 32901

9
10 STANDBY ATTORNEY
11 RANDALL MOORE, ESQUIRE
12 Assistant Public Defender
13 2725 Judge Fran Jamieson Way
14 Building E
15 Viera, Florida 32901

16 JAMES PHILLIP BARNES, PRO SE
17
18
19
20
21
22
23
24
25

1 THE COURT: Let's do Mr. Barnes

2 Mr. Barnes, how are you doing?

3 THE DEFENDANT: Another day in paradise.

4 THE COURT: Did I appoint a stand by
5 attorney for Mr. Barnes yet?

6 MR. HUNT: No, Your Honor, not for
7 the sentencing proceeding; just for the plea.

8 THE COURT: Well, Mr. Barnes, you have a right
9 to have an attorney and I will appoint an attorney
10 to represent you.

11 I'm going to offer that again to you
12 today.

13 Do you wish to have a public defender
14 appointed to represent you in this matter?

15 THE DEFENDANT: No, I do not.

16 THE COURT: State, what other matters do we need
17 to address?

18 MS. GARRETT: Judge, we provided Mr. Barnes
19 with a copy of the motion for a Buccal swab DNA
20 sample.

21 I have a motion for the Court with a proposed
22 order.

23 THE DEFENDANT: Your Honor, the Department
24 of Corrections has already taken a DNA sample
25 from me.

1 I don't see why I have to be subjected
2 to that again.

3 I'm on the DNA data base.

4 MS. GARRETT: As the Court may be aware,
5 the DNA data base does not provide us with
6 an evidenciary chain that you would get
7 in a courtroom proceeding.

8 What we would like to do is take the Buccal
9 swab now which would be used for a DNA comparison on
10 new evidence as well as the old evidence.

11 THE DEFENDANT: Your Honor, I'll provide
12 the DNA sample for the Melbourne Police Department
13 upon them requesting.

14 THE COURT: Let me tell you this.

15 I am going to appoint a standby attorney
16 on this motion and we will reconvene at 1:30
17 today. Talk to the standby attorney.

18 THE DEFENDANT: Your Honor, I have no reason to
19 talk to a standby attorney.

20 THE COURT: I understand that but I will give
21 you the opportunity at 1:30.

22 If you will come back and we will address
23 this motion.

24 Is there anything else? Oh, we need to get
25 a public defender here.

1 MR. MOORE: I'm here.

2 THE COURT: Mr. Moore, I didn't realize you
3 were here thus far.

4 I will appoint the public defender's
5 office as a standby attorney in this matter.

6 Mr. Barnes -- Did Ms. Riewe fill you in
7 as to what is concerned?

8 MR. MOORE: Yes, Your Honor.

9 THE COURT: Last week Mr. Barnes pled guilty
10 to first degree murder. Miss Riewe was
11 here and offered Mr. Barnes if he would
12 like to be represented by an attorney and went
13 through a Ferretta hearing.

14 He was extremely definite last week he did
15 not want to be represented by an attorney -- or
16 wanted -- a standby attorney.

17 But every single proceeding I need a standby
18 attorney here if Mr. Barnes elects to talk to you
19 that's fine and if he elects not to that is fine but
20 I want you to always to have that opportunity.

21 So Mr. Moore you can go ahead and have
22 just a moment and at least give Mr. Barnes an
23 opportunity to try to defend the motion
24 for a DNA swab.

25 MR. MOORE: I have talked to Mr. Barnes.

APPENDIX F

JAMES PHILLIP BARNES,
DEFENDANT, APPELLANT,

-vs-

STATE OF FLORIDA,
PLAINTIFF, APPELLEE,

) IN THE SUPREME COURT OF FLORIDA

)

)

) BREVARD COUNTY NO. 05-2006-CF-14592-AXXX-XX

)

) SUPREME COURT NO. SC08-63

)

)

/

R E C O R D O N A P P E A L
VOLUME V OF XIII

THOMAS D HALL, CLERK
SUPREME COURT OF FLORIDA
SUPREME COURT BUILDING
TALLAHASSEE, FL 32304

OFFICE OF THE ATTORNEY GENERAL
ASSISTANT ATTORNEY GENERAL
ATTN: KENNETH NUNNELLEY
444 SEABREEZE BLVD, 5TH FLOOR
DAYTONA BEACH, FL 32118

OFFICE OF THE PUBLIC DEFENDER
APPELLATE DIVISION
444 SEABREEZE BLVD., 2ND FLOOR. SUITE 210
DAYTONA BEACH, FL 32118

JAMES PHILLIP BARNES DOC#071551
FLORIDA STATE PRISON
7819 N W 228TH STREET
RAIFORD, FL 32026-1000

FILED

THOMAS D. HALL

APR 07 2008

CLERK, SUPREME COURT
BY TH

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IN THE CIRCUIT COURT OF THE EIGHTEENTH JUDICIAL CIRCUIT

IN AND FOR BREVARD COUNTY, FLORIDA

CASE NO. 05-2006-CF-14592-AXXX-XX

STATE OF FLORIDA,

Plaintiff,

vs.

JAMES P. BARNES,

Defendant.

Case # 05-2006-CF-014592-AXXX-XX

Document Page # 104



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FILED IN VIERA-06
CLERK OF CIR. CT.
BREVARD CO. FL.

2007 FEB 23 A 10:14

SCOTT ELLIS

TRANSCRIPT OF PROCEEDINGS

VOLUME III

(Page 316 - 443)

Date Taken: January 25, 2007
January 26, 2007
Place: 2725 Judge Fran Jamieson Way
Viera, Florida
Before: Honorable Lisa Davidson

This cause came on to be heard at the time and place
aforesaid, when and where the following proceedings were
reported by:

JULIANA M. CARY, FPR
Court Reporter
Notary Public, State of Florida at Large

KING REPORTING & VIDEO CONFERENCE CENTER, INC.
14 Suntree Place, Suite 101
Melbourne Viera, Florida 32940

ORIGINAL

1 MR. BARNES: Yes, Your Honor. I have no
2 evidence to offer.

3 THE COURT: Mr. Barnes, if there's mitigating
4 evidence that you wish to present to this Court,
5 this is the time to do it. And if you wish me to
6 appoint Mr. Moore to represent you in presenting
7 the mitigating evidence, then I will do that.

8 MR. BARNES: No, I do not wish to appoint
9 Mr. Moore to represent me. The State has and you
10 have also requested school records, PSI, doctor
11 reports, all those things. I believe that there is
12 no evidence that I can offer the Court that is
13 mitigating.

14 THE COURT: Mr. Moore, have you consulted with
15 Mr. Barnes on the mitigating evidence that he could
16 present?

17 MR. MOORE: Yes, Your Honor. And he's been
18 consistent from the beginning that he doesn't want
19 any presented. So yes, I have, at length. I told
20 him what I would do if I was his lawyer, what I'd
21 do for him, what I'd do for any client. And it
22 would be a lot more than has been done in this
23 case. But I've been limited in my role and
24 authority as standby counsel, been prevented from
25 doing any of that because I am standby counsel. I

1 have told him exactly what I would do. He says he
2 doesn't want it done.

3 THE COURT: What would you do.

4 MR. MOORE: Well, Your Honor, I would talk to
5 all family members. I've spoken to his father and
6 I can only reach them through him. And he, I asked
7 if he would help me get in touch with them. But
8 there's animosity between Mr. Barnes, senior and
9 James Barnes and he hasn't gotten back to me with
10 any contact information. I have no way to contact
11 his other family members to see if they would help.

12 I would have a full battery of psychological,
13 neuropsychological testing done. A neurological
14 workup. I would follow the recommendations of the
15 psychologists, psychiatrists. Primarily the
16 psychologists. If they recommended any anatomic
17 imaging, either MRI or functional imaging, like PET
18 scan or QEEG. I knows there's controversy about
19 that these days. There's a whole range of tools in
20 the medical field, psychological field,
21 neuropsychological field, psychiatry. All these
22 disciplines have their tools.

23 And then get all that testing done and see
24 where the testing leads, see what it suggests, what
25 it indicates. And then take from that anything

1 that would benefit the, would support an argument
2 for mitigation in this case. And very often there
3 is some mitigation in this case. When we use those
4 tools, very often it suggests that there are
5 psychological, neuropsychological and medical
6 explanations for behavior. And I have no way of
7 doing that or knowing that without eliciting the
8 aids of those disciplines.

9 MR. BARNES: If I may interrupt. I would
10 refuse any of those tests. If any doctor came to
11 talk to me, I would quote *Stell versus Smith*.

12 THE COURT: You would what now?

13 MR. BARNES: *Stell versus Smith*. There's no
14 possible way I'm going to talk to a doctor under
15 any circumstances, have an MRI, QEEG, PET scan,
16 anything. So that's superfluous that he's offering
17 that.

18 MR. MOORE: So, I mean, I could go on.

19 THE COURT: I want you to go on.

20 MR. MOORE: I would gather up his, all the
21 records, medical records, the psych records, mental
22 health records, school records, which Mr. Barnes
23 says have been obtained by the State. I would make
24 sure every expert who I had saw Mr. Barnes in the
25 health field reviews it. Then I would have them

1 compare them amongst themselves and compare notes.

2 I would talk to his, I would go to his
3 schools. I would talk to all the teachers. I
4 would talk with anybody who's had any contact with
5 him in his life. His little league coach, football
6 coach.

7 That's why these cases take so long. We talk
8 to everybody. We don't leave any stones left
9 unturned. We want to know everything we can about
10 our client. Those are the ways that we do it.
11 Those are the ways I prohibited from doing because
12 I'm standby counsel.

13 And, also, Mr. Barnes has indicated that he
14 wouldn't cooperate in any of that testing. And I
15 might attempt more aggressively if I were his
16 lawyer to try to persuade him to be more
17 cooperative. And I have developed somewhat of a
18 rapport with Mr. Barnes. He's indicated from the
19 very beginning he doesn't want any lawyer and, in
20 particular, he doesn't want me. He said in a
21 letter to Michael Hunt, I don't want Randy Moore
22 representing me. I sort of insinuated my way into
23 this situation.

24 And if I were his lawyer, I'd be more
25 assertive and I'd have more credibility to try to

1 persuade him to do these things. Whether I'd be
2 successful or not, I don't know. But I can only
3 speculate because I haven't been able -- I don't
4 have that power, I don't have that authority to
5 talk to Mr. Barnes to try to talk him into it.

6 THE COURT: Mr. Barnes, you indicated at the
7 very beginning you have a strategy and it will
8 become apparent. I don't to this day know what
9 your strategy is.

10 MR. BARNES: The apparency is simple. The
11 State claims they've had DNA evidence since 1998.
12 I didn't know that until I came back and the State
13 proffered their discovery to me. I decided to come
14 forward without any assistance.

15 I mean, there was some things -- there was
16 mechanics to this. It was ugly. I didn't know
17 that people would take advantage of a situation
18 like the way that they did. But I've come forward,
19 I've told the exact truth, everything that
20 happened, every detail so that there would never be
21 a question as to what happened in Melbourne and
22 basically man up to what I had done.

23 That was the strategy the whole time. I
24 didn't want anybody that was culpable, like an
25 attorney, to have any type of responsibility in

1 what my actions were or what the final disposition
2 would be, whether it would be life or death.

3 I understood the severity of the situation
4 when I came forward. I knew what the sequences
5 could be. I faced it. There were a few times that
6 I've doubted myself because of some of the
7 behaviors people have had towards me. I'm trying
8 to put final resolution to this case for the
9 victim's family. But I believe that has been a
10 perfect strategy.

11 Mr. Moore did let the Court know, you know, he
12 grew into sitting right next to me. As you know
13 from the very beginning, I didn't want any
14 conversation with the man. But he's a good man. I
15 mean, don't get me wrong. He's not a bad person.
16 And he's helped me quite considerably, against my
17 wishes. I don't know to say that other than it
18 just grew.

19 But, you know, I would be better off if that
20 was what was taken into consideration. That I came
21 forward, that the State has already admitted that I
22 facilitated resolution of this case. It's been
23 horrendous, it's been tough. It's been tough for
24 me to sit here and to face all this. But I've done
25 it. And now it's time for judgment.

1 You've got a PSI, doctor report, school
2 records. I'm a burned out sociopath. Simple as
3 that. I'm in my early 40s. It's one of those
4 things that happened. I clean the slate on this.
5 That has been the strategy the whole time.

6 Now I'm prepared to let you take sovereignty
7 and issue judgement in this case and sentence me as
8 appropriate, whatever it is, because it's the law.
9 And if you sentence me to life, that's appropriate.
10 If you sentence me to death, that's appropriate.

11 Now it comes down to you weigh it. The
12 aggravating circumstances against me are
13 tremendous. I think without appellate review
14 there's five of them that are going to stick and
15 they all carry great weight.

16 I've been in prison for almost ten years. I
17 have no family. I have no friends. I have no
18 relatives. I don't have a job history. The only
19 thing I have is a prison record. And it would be
20 better for me today if that's what I stood on
21 instead of having a whole bunch of doctors come
22 give me a battery of tests that I'm going to refuse
23 to cooperate.

24 As far as him saying he would talk to my
25 teachers and everything, I'm in my 40s. I mean,

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1 they're gone. As far as baseball, I left home when
2 I was 14 and the record reflects that. I've been
3 on my own for a long time. And now I'm trying to
4 just face up to what I did.

5 And that's where I stand. I'm prepared to be
6 sentenced at any time you're prepared to sentence
7 me.

8 THE COURT: Mr. Barnes, as I understand the
9 case of Mohammed, I have to consider mitigating
10 circumstances or at least have those explored. The
11 State, and I don't mean the State Attorney's
12 Office, but the State, in having the ability to
13 impose the death penalty, requires me before I make
14 a decision or life or death that I go through the
15 statute and that -- I make the decision. You don't
16 decide whether or not you live or you die. I do.
17 And then it's going to be reviewed over and over
18 and over again.

19 And before a judge can make that decision one
20 way or the other, I'm required to make sure that I
21 have everything the law requires me to have before
22 I make that decision. And if you won't help
23 yourself or you won't help an attorney present that
24 evidence -- and there may be no evidence. I don't
25 know there isn't any. I don't know if there is

1 any. But before I make that decision, you either
2 have got to allow me to appoint an attorney to
3 present mitigating evidence if there is any or I
4 will appoint an attorney to represent -- what I
5 call a court-appointed attorney to go out and see
6 if there is any mitigating evidence.

7 I only want to try this case once. And I
8 think that's probably -- we all do. It's the right
9 thing for everyone for me to do it right the first
10 time and do what is appropriate according to the
11 law the first time. Not have everyone have to go
12 through this again because I skipped a step or I
13 didn't do something I was supposed to do. And I
14 want to make sure -- and just from a moral
15 standpoint, I need to follow that statute. Legally
16 and morally, I need to follow the statute.

17 So my question to you is -- I'm going to give
18 you an opportunity to talk to Mr. Moore. If you
19 will let Mr. Moore become your attorney and let him
20 do the investigation that needs to be done, then
21 that will happen. If not, then I'm seriously going
22 to consider appointing an attorney because of the
23 Mohammed case. Because I think if I don't, I'm
24 going to end up -- depending on what my decision
25 is, there's a possibility that this case can come

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1 right back.

2 MR. BARNES: If I may, I read the Morris
3 report. It was initially referred to by me through
4 Mohammed.

5 THE COURT: You read the what report?

6 MR. BARNES: The Morris commission that came
7 together. And I got a copy of it. Mohammed was a
8 different case altogether. This man had been in a
9 state hospital. I've never been in a state
10 hospital. That was the key there. Surely you're
11 supposed to look at all mitigating circumstances.

12 I just told you I've been in prison for ten
13 years. I've got no family other than animosity.
14 There's so much -- there's so much residual effects
15 of my life that the only thing that it could
16 possibly do is hurt me worse.

17 My best effort was to come forward in this
18 case and present it on my own and take full
19 responsibility. Going outside of that, reading
20 this report -- and, of course, you referred me to
21 Mohammed. The very first time you said, I'm not
22 going to allow you to sit here and say nothing.

23 I didn't sit here and saying nothing. Those
24 things that were right, I didn't do anything.
25 Those things that I thought were wrong, I

1 challenged. It's not like I sat here and tried to
2 commit state-aided suicide. I preserved everything
3 on the record. If there had been a mistake, let
4 the appellate court of Florida deal with it anyway.
5 The Florida Supreme Court is going to have to
6 review it if you sentence me to death anyway.

7 You haven't done anything wrong. I've put
8 forth the best effort in this case. Anything
9 outside of that, if you appoint -- I'm telling you,
10 and you have to understand this, and please listen
11 with your third ear, it's going to be aggressively
12 declined. And I mean that with all sincerity.
13 Just as I meant with all sincerity what I did. And
14 I don't think that that's going to help me at all.
15 I mean that.

16 THE COURT: State, what is your position?

17 MS. GARRETT: Judge, I don't think the law at
18 this point requires the Court to do so, but I think
19 it is within the Court's authority to hire, to
20 appoint another counsel if the Court feels that it
21 wants to explore mitigation. I think Mohammed
22 requires the Court to get a PSI and look at that
23 for purposes of mitigation.

24 But I do think it's within the Court's
25 authority, if the Court wants to further explore

1 mitigation, to appoint special counsel for that
2 purpose.

3 MR. BARNES: You have a PSI.

4 THE COURT: Well, with all due respect, I
5 believe Mohammed requires it under these
6 circumstances. Mr. Barnes, no one is going to
7 require you over your objection to subject yourself
8 to any tests, physical or mental. That's your
9 decision. I cannot force you to do that. I
10 certainly can make sure that any mitigation,
11 including your conduct in prison --

12 MR. BARNES: This is the problem I'm going to
13 have and I need you to listen here with your third
14 ear. I understand what you're doing. I understand
15 what the State's doing. I've had a rough time. My
16 prison record is not going to help me a bit. I've
17 never been in a state hospital. You have a PSI.

18 When I mentioned that I would aggressively
19 repulse anybody who came near me, I mean that with
20 all my heart. And I've done the best I can. I put
21 forth my best effort. Please don't take that away
22 from me or anybody else.

23 THE COURT: We're going to go into recess
24 until 2:15.

25 (Brief recess.)

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1 THE COURT: We're back on the record with the
2 State of Florida versus James Barnes. I am going
3 to recess this afternoon. Mr. Barnes, I'm going to
4 do the necessary research so that I can satisfy
5 myself as to what my legal duty is.

6 I am very inclined at this point to either
7 appoint a counsel, what I would call Mohammed
8 counsel, or certainly give you the opportunity to
9 allow me to appoint Mr. Moore to represent you.

10 You don't get to decide how I make my
11 decision. I get to decide that. So we're going to
12 be in recess until 1:15 tomorrow. And then at that
13 point, I'll either set a sentencing date or I'll
14 appoint Mohammed counsel, or if Mr. Barnes can let
15 me whether he's going to let me appoint Mr. Moore.

16 MR. MOORE: Can I weigh in as a potential
17 appointee on the issue?

18 THE COURT: Yes.

19 MR. MOORE: Which I think would be this: I
20 already have in my knowledge, in what work I've
21 done matters which I would consider mitigating,
22 which I, if I were his appointed attorney,
23 ethically I would be prohibited from presenting
24 against his wishes. Whereas, if the Court
25 appointed a special counsel, that counsel would

1 report to the Court and not have that ethical
2 prohibition, then could present mitigating
3 evidence. So I'm offering that to the Court to
4 consider. I think I'd be ethically prohibited
5 because I'd be violating his wishes and offering up
6 whatever I had. The Court is concerned about
7 complying with Mohammed, and then I think it would
8 have to have somebody who wouldn't have those
9 ethical restraints.

10 THE COURT: I guess I wasn't clear. What I
11 meant by Mr. Barnes allowing me to appoint you is
12 appoint you with the ability to present mitigating
13 evidence, not to tell me that you're not going to
14 present anything.

15 MR. BARNES: But I can't present it. I mean,
16 let's get off this real quick. If you appoint a
17 special counsel, that person then would have the
18 ability, irrespective of Mr. Barnes' cooperation,
19 they could present evidence even if he directed
20 them not to.

21 But if it were me, if he cooperated, I might
22 be able to gather evidence, but then he might
23 prohibit me by saying you can't do this, in which
24 case I can't do it.

25 THE COURT: And then we're right back to where

1 we started.

2 State, is there anything else that you wish to
3 tell the Court before we adjourn?

4 MS. GARRETT: No, Your Honor.

5 THE COURT: Mr. Barnes, anything else other
6 than what you've already told the Court?

7 MR. BARNES: No, Your Honor. Other than am I
8 still the attorney on record for this case?

9 THE COURT: You still are representing
10 yourself. But the Mohammed counsel is court
11 appointed. And that counsel is not your attorney
12 but a court attorney. And that counsel can then,
13 you know, do the research and investigation,
14 present to me any mitigation. And there may not be
15 any mitigation. I don't know that. But at least I
16 need to know at least there was an investigation
17 and an effort to determine any mitigation that
18 would be relevant for my consideration.

19 We're going to adjourn until 1:15 tomorrow.

20 BE IT REMEMBERED, that the following
21 proceedings were resumed on Friday, January 26th,
22 at 1:15 p.m. with appearances as previously noted:

23 THE COURT: We're back on the record on State
24 of Florida versus James Barnes.

25 Mr. Barnes, yesterday we talked about whether

1 you were going to have an attorney represent you
2 and present mitigating evidence or whether I was
3 going to go ahead and appoint an attorney pursuant
4 to Mohammed.

5 And have you decided how you're going to
6 proceed?

7 MR. BARNES: I don't wish for Randy Moore to
8 offer mitigating evidence for me either. I suppose
9 the other option that you have stated would be that
10 you would appoint special counsel.

11 THE COURT: Well, you know, Mr. Moore has only
12 served as standby counsel. He's not been your
13 attorney. And I can't think of any reason while
14 remains standby counsel that he can't do the work
15 that is required.

16 MR. BARNES: There's an ethical problem with
17 that. That if I tell him not to present mitigating
18 evidence, he cannot present it. At that time, he
19 would be my attorney and I would be giving him the
20 advice that I would want him to follow.

21 THE COURT: Well, he's not your attorney.

22 MR. BARNES: At this time. What I had just
23 asked him is if the Court appointed special counsel
24 for the courts, would he still remain as standby
25 counsel. And he said, yes, he would until the end

1 of this proceeding.

2 And as the questions were asked yesterday and
3 as I had verbally put forth, that I believe that
4 the best presentation has already been given. That
5 if anybody were to try to find mitigating evidence,
6 they wouldn't and that would harm me greater at
7 sentencing hearing than it would if someone did
8 find mitigating evidence, which I know there is
9 none.

10 I mean, you could probably get a psychological
11 assessment. Somebody would agree that I had
12 emotional distress. But as far as weighing and
13 outweighing mitigating circumstances, there is
14 nothing that I could present, unless somebody found
15 out, which hasn't happened, that I was in a mental
16 institution all my life. There's no secrets
17 hidden. There's nothing to be recovered anywhere.

18 If you are going to rely on Mohammed and
19 appoint special counsel to try to produce
20 mitigating evidence, there's nothing I can do from
21 stopping you.

22 THE COURT: Mr. Moore, from your perspective,
23 is there an ethical problem with you being stand --
24 in Mohammed, it says the Court can appoint standby
25 counsel for the limited purpose of presenting

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1 mitigating circumstances.

2 MR. MOORE: Right. And I know the Court read
3 all of the descending opinions and Justice Peranti
4 addresses that. She says, as it stands, the
5 standby counsel is not presenting mitigation. So
6 a better alternative is to appoint a special
7 counsel.

8 And I have an ethical sort of disconnect
9 because the statute which creates the Public
10 Defender's Office is Chapter 27. And that
11 throughout says, once appointed, we are counsel for
12 a person. And this other entity of being a special
13 counsel contemplates that person reporting only to
14 the Court.

15 And so that's the disconnect for me. That
16 puts me in a position of being appointed to, under
17 the statute, which is the only way I can be
18 appointed, is under Chapter 27, to represent Mr.
19 Barnes and yet I'm only reporting to the Court
20 irrespective of what he wants. And I think the
21 only way around that dilemma for me is for the
22 Court to appoint a special attorney other than
23 myself. Special attorney outside the Public
24 Defender's office.

25 I think that's a conflict created by Chapter

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1 27. And I looked at -- of course, I'm sure the
2 Court did, too -- 4-1.2 in the rules professional
3 conduct. And it says that I am obligated to follow
4 my client's wishes. In certain instances -- it's a
5 little murky there. But it says if my client wants
6 to go to trial, I have to respect that. If he
7 wants to enter a plea, I have to respect that. If
8 he wants to waive jury trial, I have to respect
9 those specific things.

10 It doesn't say anything about obligation to
11 presenting evidence. I called the Florida Bar on
12 this question and they said, of course, whatever
13 the Court orders me to do I'm required to do. I
14 know that. That's a given. But they couldn't
15 really give me any guidance if under the rule I
16 would be placed in a moral dilemma and ethical
17 dilemma by exceeding his wishes if I were appointed
18 to represent him. What they are telling me is I
19 have to do what the Court tells me to do or take
20 the position written to the 5th.

21 So as far as me here talking is there is a
22 disconnect for me because if the Court appoints me
23 as his special attorney to present mitigation, then
24 that takes Mr. Barnes out of the equation. And I
25 think it's inconsistent with Chapter 27 which says

1 I shall represent the person.

2 THE COURT: From your perspective, and I'm not
3 asking you to violate any confidences of
4 Mr. Barnes, but do you feel that if you have some
5 attorney/client privilege in the sense that has
6 Mr. Barnes given you confidential information that
7 if you were his attorney, it would put you -- sort
8 of making you an attorney of record even though you
9 weren't appointed attorney of record?

10 MR. MOORE: He's given me directions that I
11 could go in that aren't of record, which I would
12 follow up. And not necessarily that I would reveal
13 now or at any time to his benefit, but they are
14 potentially fruitful in terms of generating
15 potential litigation, so. And there are thoughts
16 that I had generated that I would present as his
17 lawyer which I have learned through the course of
18 discussions with him. I can't say he directly gave
19 them to me, but they have contributed to matters
20 that I would present which would be mitigating. I
21 don't think I'd violate any attorney/client
22 privilege in doing that. I don't know if that
23 answers the Court's question or not.

24 But he's given me a number of directions to go
25 in inadvertently because he has consistently said

1 he doesn't want any mitigation presented. But
2 throughout my numerous meetings with him,
3 discussion with him, I have thought, well, if I
4 were the lawyer, I'd do these things. And I listed
5 some of them yesterday. And there are probably
6 many other things, too, if I had to make a list.

7 THE COURT: All right. Thank you.

8 State, anything that you wish to argue?

9 MS. STEWART: No.

10 MS. GARRETT: No, Your Honor.

11 THE COURT: As I said to you yesterday,
12 Mr. Barnes, and I'll say to Mr. Moore and to the
13 State and to the people who are interested in this
14 case and have been attending, that, you know, my
15 first goal is to give you due process. I have an
16 obligation to do that. Whether or not you want it,
17 that's my obligation. And in doing that, I'm sure
18 the process is a peer process. That's the way the
19 statute is set up so I go through those factors and
20 I make a determination based on those factors. Not
21 on your wishes or how you want the Court to rule,
22 but on what I'm required legally to do.

23 If I even was inclined to take a shortcut
24 here, what would happen is down the road, despite
25 even if your wishes were not to even pursue an

1 appeal, if you -- down the road, the court is going
2 to look at this, any court is going to look at this
3 with a fine-toothed comb to make sure your due
4 process rights were followed and adhered to.

5 So from my obligation in addition to what is
6 in the best interest of you and the State of
7 Florida, I am going to appoint special counsel for
8 the Court, what we call a Mohammed attorney, to --
9 because that's the case we would be relying on, to
10 present mitigating factors to the Court. And I
11 encourage you to cooperate with that attorney, but
12 I can't make you cooperate. And that attorney,
13 after doing the research he or she does, may
14 determine there are no mitigating factors. And
15 that's what you're representing to the Court.
16 Judge, there are no mitigating factors. That's
17 what you're telling me.

18 But I don't have the type of extensive
19 investigation that needs to be presented to say,
20 you know, we've looked at this, we've looked at
21 this and there is no mitigation. If the attorney
22 tells me that, that's one thing, if there's been an
23 investigation. But at this point, I feel like I've
24 got to have that independent investigation as to if
25 there is, are any mitigation.

1 It slows the process up, but I think what it
2 slows up in the short run, in the long run will be
3 to the benefit of everybody, including the
4 resources of the system and including most
5 importantly your due-process rights.

6 Yes.

7 MR. BARNES: For the record then, my strategy
8 from the beginning is to come forth and facilitate
9 final resolution of this case. And I feel it would
10 be prejudicial at this time to take that strategy
11 away from me. I understand you're going by a new
12 statute. You offered Hakeem Mohammed to me the
13 first time I was in this courtroom.

14 But I had a strategy from the very beginning.
15 And that was present this on my own, take full
16 responsibility and put no culpability on anybody
17 else. There are no secrets. There was no lies
18 told here. Everybody knows the details.

19 For you to appoint special counsel for the
20 Court is beyond my purview. I have nothing to do
21 with that and I understand that. This is for the
22 courts. And you're saying it purifies the process.
23 But the process was purified and that was my
24 strategy. Now you have taken that away from me.

25 So for the record, I felt that if there was

1 any mitigating evidence that would have been
2 offered, it would mine to take full responsibility
3 and facilitate final resolution of this case
4 because I benefitted in no way in doing this.
5 There is nothing I benefitted from financially or
6 emotionally or psychologically or -- there was no
7 benefit in this. So that's where I leave it with
8 the Court, just for the record.

9 THE COURT: Mr. Barnes, your mitigation -- to
10 come forward, take full responsibility and come to
11 a resolution, that mitigation isn't diminished by
12 the Court taking this action. This is the Court's
13 action. Not your action. So everything you have
14 done up to this point, it does not in any way get
15 diminished because I decide, because I feel bound
16 to appoint counsel to bring forth any mitigation.

17 So we will have a status hearing in two weeks.
18 Let's come up with a date in February. Maybe
19 February 9th. February 9th at 8:00 we'll have a
20 status hearing.

21 So at that point, I would have located and
22 determined who the special counsel will be. And,
23 in addition, I don't know if -- is Ms. Garcia here
24 from the probation and parole? I thought you said
25 she was going to be here.

1 VIERA, FLORIDA, FEBRUARY 9, 2007

2 THE COURT: Mr. Bardwell, you had been
3 appointed pursuant to the Mohamed case to
4 represent not the defendant; you're not his
5 attorney. You are the Court's attorney. Have
6 you read Mohamed?

7 MR. BARDWELL: I did read it by the way.

8 THE COURT: I didn't mean that.

9 MR. BARDWELL: I am familiar with it. I
10 kind of thought when you say that you're pro se,
11 you're pro se -- I guess apparently they don't
12 have that kind of courage to finally eliminate
13 the untenable position of a lawyer who has an
14 uncooperative client.

15 THE COURT: He is not your client, and Mr.
16 Barnes doesn't want you.

17 MR. BARDWELL: All I really need to know is
18 what's the scope of what I am supposed to do.
19 First of all, do I prepare the presentation of
20 evidence or is it a report? And also in terms of
21 mitigators, are we talking about extrinsic
22 mitigators or do I have to prepare legal
23 arguments and intrinsic mitigators which would
24 have been brought out during previous
25 proceedings? In that case I would need a

1 transcript, so I kind of need to know the scope
2 of what I'm really supposed to do.

3 THE COURT: We have transcripts for you. We
4 ordered them, so they are available. In fact, if
5 you ask Chris, I think they are on top of those
6 boxes right by my door; so we've got the
7 transcripts of the Spencer Hearing. We are aware
8 the defendant did not -- I'm going to go through
9 it. He pled guilty, first-degree murder. He
10 waived the penalty phase in terms of a jury, and
11 we went right to a Spencer Hearing. He
12 represents himself. Mr. Moore has been stand-by
13 counsel. Really, Mr. Barnes is very intelligent
14 and he is doing a very good job in his
15 representation; but when it came time to present
16 mitigators Mr. Barnes's position -- Mr. Barnes,
17 you can correct me if I am misstating your
18 position -- is, Judge, there are no mitigators.
19 My best mitigator is that I came forward.

20 He is the one who contacted the State
21 Attorney's Office. He is the one that wrote to
22 Michael Hunt and Detective Nichols letters. He
23 came forward. But for his cooperation I think
24 that from his standpoint the case may not have
25 been resolved. I think that's his mitigators,

1 what he did to facilitate the resolution of this
2 case. There is no other mitigators, and I am not
3 comfortable in that representation until I've had
4 an independent counsel.

5 You may come up and say, Judge, I have done
6 everything that he asked me to do and he is
7 actually correct there are no mitigators; or here
8 are some mitigators. Mr. Barnes already said he
9 is not going to cooperate with any PEP scans or
10 any neurologicals. You can ask him again; but
11 he's been very clear that he doesn't want
12 anything set up. I don't think are you're going
13 to get any help from him; but I'm going to
14 encourage you because I did have this happen in
15 another case, State of Florida versus Jason
16 Tucker. I appointed Mr. Lawrence from Seminole
17 County because there were so many conflicts among
18 all the attorneys in Brevard.

19 I think your best route in terms of the way
20 to proceed is to talk to Mr. Lawrence because I
21 thought he did exactly what should have been
22 done. He had an investigator do a lot of the leg
23 work, get records, et cetera -- school records,
24 and he presented a case. He presented it and Mr.
25 Tucker -- his attorneys did not say anything. He

1 had instructed his attorneys not to say anything,
2 not to do anything but just sit there; and that's
3 what happened. I think Mr. Lawrence is the best
4 route for you in terms of how it was done.

5 MR. BARDWELL: So I'm to prepare the
6 presentation of the evidence in an adversarial
7 process, notify the State of all my witnesses and
8 everything like that. The other thing is the
9 sociological aspect and the medical aspect,
10 that's independent of reading the transcripts; so
11 do I have to also read the transcripts and come
12 up with any kind of intrinsic mitigators, and
13 then do I have to present a balancing of
14 mitigators versus aggravators? That's what I
15 need to know.

16 THE COURT: Yes.

17 MR. BARDWELL: And that would be presented
18 in having sort of like a second Spencer Hearing?

19 THE COURT: Yes.

20 MR. BARDWELL: Judge, then I think I
21 understand what I need to do.

22 THE COURT: And I really, really encourage
23 you to talk to Mr. Lawrence. It was new
24 territory for me; but if you get to a point that
25 you're saying I'm really not sure where I'm going

1 -- because I want to have status hearing. Mr.
2 Barnes wants this concluded. He wants it
3 concluded; so if you're getting to a point that
4 you need some directions from the Court, I have
5 appointed someone to do the PSI who did the PSI
6 in Mr. Tucker's case.

7 Here you are. You're here. You're very
8 good.

9 MS. GARRETT: Ms. Lopez has come today.
10 Actually she does have some information for the
11 Court when you're ready.

12 MR. BARDWELL: I seem to recall this fellow
13 was on death row at the time; is that right?

14 MR. MOORE: Part of serving life, but not on
15 death row.

16 MR. BARDWELL: All right. Was there a PSI
17 done on his?

18 THE COURT: It was, and I had that PSI; and
19 then it was updated. We had an updated PSI;
20 however that updated PSI relies heavily on prior
21 PSIs that are old, old, old.

22 Ms. Lopez did a really good job in the other
23 case; so the Tucker case is one that at time I'm
24 using as a road map.

25 MR. BARDWELL: Okay. Well, that's fine. I

1 think I can go from here.

2 THE COURT: Mr. Lawrence did use an
3 investigator; and although I know your cap in
4 terms of your fees, I don't think it involves an
5 investigator. I mean the use of investigator is
6 independent of what you get.

7 MR. BARDWELL: I don't get anything.

8 THE COURT: You would get a contract.

9 MR. BARDWELL: So you need to authorize it.
10 The JAC's got all kind of caps. I'll prepare an
11 order. I think they authorize a certain amount
12 for mitigation. I might have to exceed that. I
13 have a good understanding here.

14 THE COURT: Ms. Lopez, how are you doing? I
15 do apologize for last time because I kept calling
16 you the wrong name.

17 MS. LOPEZ: I got some records that I pulled
18 out through RDC file. There is indication that
19 when he was previously incarcerated in DOC that
20 he underwent some treatment while in custody.
21 And of course based on HIPAA, DOC wouldn't
22 release them to me; so when I spoke to Ms.
23 Garrett, she indicated to me that I should bring
24 that up to the Court, that in fact there would be
25 a court order that directs Lake Butler North

1 Florida Reception Center, Rene Howser, their
2 files basically, to admit records and we may be
3 able to ascertain some of the records of what he
4 attended while in custody.

5 THE COURT: I encourage you to because
6 again Tucker is my road map. Bill Respress worked
7 very closely with you last time in the Tucker
8 case to facilitate I think what you needed done
9 and then you worked very closely with Mr.
10 Lawrence. I'm going to ask you again to work
11 with the State if there is needs to do certain
12 motions or Mr. Bardwell, because I want you to
13 get what you're legally entitled to get.

14 MS. LOPEZ: I never spoke to Mr. Lawrence
15 the last time at all. I dealt with Mr. Respress
16 and the investigator you appointed. I met with
17 him one time.

18 THE COURT: Those things need to come
19 through with a hearing. Mr. Barnes has a right
20 in terms of the records you want to get. He may
21 object based on his right, HIPAA or whatever, and
22 we have to deal with that. I can't just sign
23 blank orders.

24 MR. BARDWELL: Does Mr. Barnes properly
25 preserve for appeal his right to waive this

1 proceeding?

2 Judge, Carter versus State was a terrible
3 little experience for me because I had the exact
4 situation. It was even worse, the guy had some
5 history. So that's why. Had that been preserved
6 so the Supreme Court can finally reach a decision
7 as to what a person can waive. I'd like to see
8 that somebody kind of give us a definitive answer
9 to the bar. It's almost professionally an
10 untenable position, legal fiction.

11 I just want to make sure that somebody in
12 the Supreme Court will recognize that lawyers
13 generally -- we are criticized no matter what we
14 do and then there is going to be a capital
15 collateral fellow coming there expecting me to
16 read the man's mind. I am hoping that he's
17 preserved the right to proceed in the fashion
18 that he wishes independent of the Court's will,
19 so we can hone this issue down to make sure when
20 it comes to the future we'll have a little more
21 guidance.

22 Mr. Barnes, do you understand what I'm
23 saying?

24 THE DEFENDANT: Yes, and I would like to
25 object to this proceeding on the Sixth Amendment

1 Right; but I understand.

2 MR. BARDWELL: So what you really want is to
3 proceed without any input that I might gain on
4 your own behalf?

5 THE DEFENDANT: That's right.

6 MR. BARDWELL: Judge, I recognize as we're
7 all in here, I'm obviously not my counsel. I'll
8 reserve for hopefully a grouping at some
9 particular point in time and I'll proceed with
10 this lady and I'll prepare an order. I want to
11 use Terry Serolis who I used in the past.

12 Are you going to give me any information at
13 all?

14 THE DEFENDANT: I would not like to answer
15 any questions at this time.

16 MR. BARDWELL: What I'm trying to figure out
17 is, in the future here the capital collateral
18 people are going to criticize my inability to
19 overcome your will; so it might be a futile act
20 for me to discuss this case with you.

21 THE DEFENDANT: I am vigorously opposed to
22 the appointment of any counsel to this date. I'm
23 still vigorously opposed to all of that.

24 MR. BARDWELL: I'll go through the motion,
25 Judge, just because I'm going to have to be

1 acting defensively which some lawyers have to do
2 when forced in this position. I hate to be in
3 there just instead of the manner which I choose
4 to work with counsel and the defendant in
5 whatever capacity.

6 THE COURT: Before you go, let me just talk
7 to Mr. Barnes.

8 Mr. Barnes, you stated your objection for
9 the record. Is there anything else that you want
10 the Court to know? Because you do represent
11 yourself. Mr. Moore is here. As I said to you,
12 in every hearing I will make Mr. Moore your
13 attorney because you are indigent and you have
14 the right to be represented by an attorney. I
15 know you formed somewhat of a working
16 relationship with Mr. Moore; but if you wish him
17 to represent you, I'll appoint him as your
18 attorney.

19 THE DEFENDANT: No, I do not. I would like
20 any of these documents that Mr. Bardwell would
21 receive, that I would also receive the exact same
22 copies of everything.

23 MR. BARDWELL: So any activities that's
24 generally documented you want a copy.

25 THE DEFENDANT: Absolutely.

1 action probably against your custodian
2 and that it the would have reports regarding -- I'm
3 just guessing, acts that the State found
4 reprehensible and it might be reports of
5 social histories; might be home studies;
6 it might be psychological reports.

7 I don't know what they have but that is
8 what I'm seeking.

9 THE DEFENDANT: Obviously, they have
10 something.

11 If there is information that I have given
12 to either Health or Rehabilitative Services
13 or Child Protective Services or the Courts
14 or anybody inclusive in that realm, I would
15 object under HIPPA.

16 I don't want any of my personal information
17 shown to anybody.

18 I have personal issues or had personal
19 issues and I had left home at a very young age
20 legally.

21 I don't want any of that because I gave
22 confidential information in order to obtain
23 that waiver.

24 I mean you are going to order what you
25 order but I'm going to invoke HIPPA right

1 now and say hey, I object strenuously to it.

2 THE COURT: Mr. Bardwell.

3 MR. BARDWELL: Well, Judge.

4 There is a book that big on HIPPA.

5 I don't believe that HIPPA has any
6 relevancy here unless it's medical.

7 I don't know what there is but what I'm
8 suggesting is that we agree to an in camera
9 inspection so we could determine whether HIPPA
10 applies.

11 And, of course, I have to confess that I
12 can't comprehend all of HIPPA but if I get some
13 materials you need to ask what would be --
14 I think I have some compliance materials
15 that are fairly voluminous but I will
16 try to comply with HIPPA and if there is
17 you can find a colorful plane(phonetic)
18 we can always have a hearing on it.

19 THE COURT: Let the record reflect Mr. Moore is
20 present, Mr. Barnes standby attorney, and
21 the State Attorney Miss Garrett is here.

22 I'm going to order that all the files that
23 you get that deal with medical that they be
24 inspected in camera.

25 MR. BARDWELL: Okay.

APPENDIX G

JAMES PHILLIP BARNES,
DEFENDANT, APPELLANT,

-vs-

STATE OF FLORIDA,
PLAINTIFF, APPELLEE,

) IN THE SUPREME COURT OF FLORIDA

)

)

) BREVARD COUNTY NO. 05-2006-CF-14592-AXXX-XX

)

) SUPREME COURT NO. SC08-63

)

)

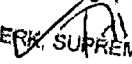
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R E C O R D O N A P P E A L
VOLUME VII OF XIII

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THOMAS D. HALL

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IN THE CIRCUIT COURT OF THE EIGHTEENTH JUDICIAL CIRCUIT

IN AND FOR BREVARD COUNTY, FLORIDA

CASE NO.: 05-2006-CF-014592-AXXX-XX

JAMES PHILLIP BARNES,

Appellant/Defendant,

vs.

STATE OF FLORIDA,

Appellee/Plaintiff.

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2008 MAR 14 P 12:26

SCOTT ELLIS

VOLUME I OF II
TRANSCRIPT OF PROCEEDINGS
SPENCER HEARING

Taken on behalf of the Plaintiff

DATE TAKEN: November 16th, 2007

TIME: 8:30 a.m. - 5:00 p.m.

PLACE: Moore Justice Center
2825 Judge Fran Jamieson Way
Viera, Florida 32940

BEFORE: Lisa Davidson, Circuit Judge

This cause came on to be heard at the time and place
aforesaid, when and where the following proceedings were
reported by:

Bobbi Lynne McCoy-Joy

Florida Professional Reporter and Notary Public
State of Florida at Large

Brevard Associated Court Services, Inc.,

14 Suntree Place, Suite 101

Melbourne, Florida 32940

ORIGINAL

22

1 very specifically, and I'm sure somebody here has
2 a copy, that it was an addendum to the PSI
3 conducted by myself, and there was a signature
4 block at the bottom.

5 I haven't -- whatever the Court wishes me to,
6 as a representative of the Department of
7 Corrections, if you wish me to attach her
8 investigative report as an addendum to my PSI,
9 that's strictly going to be up to the Court's
10 discretion.

11 THE COURT: All right, Mr. Bardwell, help me
12 out.

13 MR. BARDWELL: All right, Judge. What we
14 have -- I have to admit that until I got far
15 enough in the case I was truly not aware that this
16 situation provided for in the presentence rule,
17 Rule 3.710(b), that says "Should a defendant in
18 the capital case chose not to challenge the death
19 penalty and refuses to present mitigating
20 evidence, the Court shall refer the case to
21 Department of Corrections for preparation of a
22 presentence report. The Court shall be
23 comprehensive and should include information such
24 as previous mental health problems, including
25 hospitalizations, school records, and relevant

1 family background", et cetera.

2 Now, this was apparently a 2004 amendment in
3 response to the Muhammad decision and that was
4 found in the committee notes, and it appeared that
5 it was the Supreme Court's intention that there be
6 some document prepared by somebody, and it
7 assigned the primary responsibility to the
8 Department of Corrections to do so.

9 Now, it appeared that Ms. Sirois, who had
10 access to different resources than Ms. Lopez,
11 prepared some very appropriate materials for the
12 Court to consider. I asked that her report be
13 added as an addendum to it, not under anyone's
14 signature.

15 And in order to make it more pliable to the
16 DOC, and I don't know how they think, I asked
17 Ms. Sirois to create something that would indicate
18 that it is an addendum, and that Ms. Lopez is
19 submitting it, in the event that there was some
20 procedural bar or it didn't require it to be
21 impropriety with the DOC.

22 The report that was amended makes no
23 reference to the information, where it came from,
24 other than who prepared it. It is not deceptive
25 in that respect. It is merely a document that

1 Ms. Lopez was to review Ms. Sirois' work. It
2 would be but another source that would be
3 includeable in her report. So, I have it in two
4 forms, one -- and I don't really care which one
5 the Court considers.

6 So, I have one that's a report obviously
7 prepared by Ms. Sirois, and the other one is a
8 somewhat sanitized version, not sanitized, but one
9 in which there is no claim or authorship. It
10 doesn't say this was by the Department of
11 Corrections. It doesn't say I did this or
12 whatever. So, it doesn't attribute any of the
13 labor to Ms. Lopez. It merely is a document that
14 would appear on its face to be information that
15 came into her possession, and I'm assuming that
16 she had the opportunity to review whatever reports
17 -- we certainly made our reports available.

18 So, that's all I'm really looking for.
19 I don't care what vehicle is used. I just created
20 two vehicles, and hopefully the Court can
21 harmonize and figure out which vehicle, if any, is
22 the most appropriate one or one that would be
23 contemplated by this particular rule.

24 THE COURT: And the rule is 17 -- 3.710(b)?

25 MR. BARDWELL: Yes.

1 THE COURT: Ms. Lopez, the document that was
2 given to you by Ms. Sirois, is that something you
3 used or is it just something someone handed to you
4 and said, you know, this might be helpful? Is
5 that part of your report or would you just be
6 stapling something that someone gave to you?

7 MS. LOPEZ: In the past where we had an
8 addendum to a PSI, ma'am, what we do is we
9 actually indicate on the cover letter that we have
10 an addendum to it, and we add whatever we have an
11 addendum to add it to.

12 So, in the matter of which it was presented
13 to me -- and I have a copy of it, that was faxed
14 to me, I didn't feel comfortable with the way it
15 was worded, and I presented it to my supervisor,
16 and he indicated to me that the way it is
17 presented in here, in the format that was given to
18 me, it just said to be added to my PSI.

19 THE COURT: Well, I'm not going to require
20 you to add something that's something that either
21 A, you would not normally attach, or B, that you
22 don't feel comfortable attaching because it
23 doesn't comply with, you know, the manner of which
24 the PSI's are done or you just can't, for whatever
25 reason -- I mean, your PSI needs to be your PSI.

1 MS. LOPEZ: That's correct, and if we have
2 things that we need to add to them, whether we get
3 letters from victims or families or whatever the
4 case may be, or additional information, we receive
5 that and we just do an addendum to the PSI and
6 attach it as such. And I don't -- I mean --

7 MS. GARRETT: Just to help the Court, I think
8 Ms. Lopez's primary concern is that was sent
9 to her, the way it was drafted, it appears that
10 Ms. Lopez spoke to these people directly, which
11 she did not, and it should be clear that if it is
12 going to be attached as an addendum that there was
13 another individual, and through that individual,
14 who also spoke to these individuals, is where that
15 information came from, so that it is not
16 attributed to Ms. Lopez's direct contact.

17 THE COURT: Okay. If we do it that way, as
18 Ms. Garrett suggested, does that comport with how
19 you do PSI's?

20 MS. LOPEZ: Yes, ma'am.

21 THE COURT: So, is there anything that you
22 feel is improper or inappropriate by doing that,
23 the way Ms. Garrett suggested?

24 MS. LOPEZ: I mean, from a Department's
25 standpoint, no. But, in a legal standpoint,

1 that's beyond my area of expertise.

2 THE COURT: Is the State comfortable doing it
3 that way?

4 MS. GARRETT: Yes.

5 THE COURT: Mr. Bardwell, are you comfortable
6 with doing it that way?

7 MR. BARDWELL: My interest is only in the
8 content, period.

9 THE COURT: Okay, Mr. Moore, anything that
10 you wish to add to this? I'm going to get to
11 Mr. Barnes. I know you're standpoint, but --

12 MR. MOORE: Yes. No, what I would offer is
13 what Mr. Barnes is going to offer. So, if the
14 Court can pass over me. I don't have anything in
15 addition to what he's going to say.

16 THE COURT: All right, Mr. Barnes?

17 THE DEFENDANT: First, I would like to point
18 out that I don't qualify under this rule, um, as I
19 did challenge the death penalty in this case. I
20 argued 17 death penalty motions. So, I don't even
21 qualify under this rule.

22 The second thing is that this isn't the DOC's
23 work, and it seems to me that now this is going to
24 be entered into evidence, and I would like to
25 challenge that. This is something that came

1 across your desk and the State has agreed to put
2 in that evidence, or Court counsel, once he puts
3 it into evidence, I have the right to
4 confrontation.

5 THE COURT: Okay. Any other argument?

6 MR. BARDWELL: Yes, I will -- this will carry
7 over into several others. But, I will try to --
8 first of all, in his challenge to the death
9 penalty has been a theoretical challenge to the
10 death penalty as opposed to challenging whether or
11 not death is appropriate in this case, because the
12 balancing of aggravating and mitigating
13 circumstance.

14 Clearly, what it says in here is "should a
15 defendant in the capital case chose not to
16 challenge the death penalty and refuses to present
17 mitigating evidence." Now, in my estimation and
18 I'll certainly proper the evidence, there is
19 additional mitigating evidence that has been
20 uncovered, that Mr. Barnes has knowledge of, that
21 is mitigating by law and has been accepted as
22 mitigation.

23 So, he does in fact come under this
24 particular rule, because he has indicated there
25 are no mitigating circumstances, and there are.

1 And even if there are or not, his assessment is
2 something that the Court needs to -- after the
3 presentation of materials.

4 Now, what he has raised, interestingly
5 enough, is his confrontation clause right. Now,
6 the confrontation clause is not as broad as he
7 reads it. First of all, the State has an
8 independent interest in appropriately sentencing a
9 person to death or to life. He can't chose to --
10 he cannot chose on his own what sentence he wants
11 by inactivity.

12 Therefore, there is a separate legitimate
13 State interest in the function that I'm doing and
14 the function that is contemplated by the
15 Department of Corrections. So, he has advocated,
16 or he is advocating his opportunities to
17 appropriately participate.

18 But, the confrontation clause is very
19 fundamental. It requires that any accusatory
20 information, accusatory information against the
21 defendant, be admitted only in his particular
22 presence. And I'm not going to get into the fine
23 aspects of that.

24 But, we're not offering anything that is
25 accusatory or anything in my opinion is anything

1 but mitigating. He can't complain that it is
2 helping him, particularly when he has declined to
3 pertinently do what a person who did not want the
4 death penalty would do and engage in meaningful
5 mitigation.

6 So, therefore, the confrontation clause has
7 no application in any aspect of this particular
8 proceeding unless it becomes an accusatory fact,
9 and if it there is an accusatory fact, then he has
10 a right of confrontation. And this goes -- and
11 absent that, absent a constitutional dimension,
12 the rules of evidence is a matter for State
13 prerogative, and I would point out that this
14 particular rule of procedure contemplates hearsay
15 because the report obviously would be hearsay.

16 Now, the other aspect is that the 921, it
17 even provides for hearsay to be used in this
18 particular proceeding, provided there is a
19 meaningful opportunity to rebut it. He has
20 whatever opportunity he wants to rebut it. He is
21 a participant in most of this. He has intimate
22 knowledge, so he has that ability under the
23 statute to rebut whatever he thinks is
24 inappropriate, and he still has that opportunity.

25 So, I would point out that this rule applies

1 to him and that the confrontational clause, in
2 this context, unless it arises to an accusatory
3 information, has no confrontation in this
4 procedure.

5 THE DEFENDANT: I would like to rebut that.

6 THE COURT: Okay.

7 THE DEFENDANT: I would like to cite Theodore
8 Rogers versus State of Florida, and that would be
9 -- well, I have it as 2006 Florida (inaudible)
10 2542. I also have 31 Florida Law Weekly, 707.

11 Um, in addition, the defendant's right under
12 the confrontation clause applies to the guilt
13 phase, the penalty phase and the sentencing.
14 Mr. Bardwell does not speak for me and he didn't
15 give a cite. He just interpreted Rule 3.710 the
16 way that he interpreted it. I interpret it a
17 different way.

18 I have the right to contest anything that
19 anybody wants to enter into evidence. I have the
20 right to contest that. I never waived any right
21 to confrontation. So, I'm not doing it now and
22 the rule doesn't do it for me. And mitigation can
23 be subjective to interpretation. What he believes
24 is mitigating I can believe is aggravating.

25 THE COURT: Okay, all right --

1 MR. BARDWELL: Just if I can make one
2 observation, just for appeal. He is absolutely
3 correct. In the Rogers decision does stand for
4 the proposition that when the State offers
5 something in aggravation he has a confrontational
6 right. I don't have a problem with that.

7 But, I distinguish Rogers, in that in that
8 procedure, in Rogers, I'm just guessing that the
9 defendant was actively engaged in an adversarial
10 process of the State and that the State introduced
11 aggravating circumstances and they were violating
12 the confrontation clause because it would act in
13 an enhancement or be aggravating or accusatory in
14 nature. So, I would find that that is easily
15 distinguished.

16 THE COURT: Okay. All right, I'm going to
17 allow Ms. Lopez to attach the addendum as you
18 would do any other addendum. You don't need to
19 sign anything. You don't need to agree that it is
20 your work. It is simply what you would normally
21 do if you had additional information. And I'm
22 overruling your objection, Mr. Barnes. If you
23 would all then submit it and then we'll have it as
24 an exhibit.

25 MS. STEWART: We just need to clarify which

1 THE DEFENDANT: Your Honor, one more thing,
2 Terry Sirois was not in here, and I would like for
3 you to inform her when she comes in, if she comes
4 in.

5 THE COURT: Okay, Mr. Bardwell, if Terry is
6 going to be a witness in this case, and I don't
7 know if she is, but if she is then you need to
8 inform her of the Rule.

9 MR. BARDWELL: Yes, Judge, and if somebody
10 will let me know when and if she comes in and I'll
11 be more than happy to.

12 THE COURT: Okay.

13 DIRECT EXAMINATION

14 BY MR. BARDWELL:

15 Q. For there record, sir, could you state your
16 complete name and spell it for the court reporter.

17 A. My name is William Edward Riebsame, spelled
18 R-I-E-B-S-A-M-E.

19 Q. And what is your occupation or profession?

20 A. I'm a licensed psychologist in the State of
21 Florida.

22 Q. And what education, training or experience do
23 you have that qualifies you for that position?

24 A. I have a Bachelor's Degree from the University
25 of South Florida in Psychology and a Minor in

1 Chemistry. I have a Master's Degree from Columbia
2 University in New York City, and I have a Ph.D from
3 (inaudible) that I earned in 1987.

4 Subsequently, I completed my internship in 1987 as
5 well. I was an assistant professor of Psychology in the
6 University of Maryland, and at Sea Park. In 1989 I came
7 to Florida, past my Licensure Exam here and began to
8 practice in the Palm Bay, Melbourne area as a licensed
9 psychologist. That's where I practiced since. My
10 practice is now primarily in the area of Forensic
11 Psychology. I'm Board Certified as a Forensic
12 Psychologist in the American Board of Professional
13 Psychology. I do evaluations that are most often Court
14 appointed with regard to the mental state at the time of
15 the offense, competency evaluations.

16 I also do evaluations on behalf of the Office of
17 the State Attorney and the defense attorneys or the
18 Office of the Public Defender. I do evaluations also in
19 Family Court or Dependency Court as well in relation to
20 abuse matters and parental capacity issues.

21 Q. Have you ever been accepted as an expert in
22 the Courts of Brevard County and in the State of Florida?

23 A. Yes, sir, I began doing this work in 1990 in
24 this circuit and I've been accepted as a witness to date.

25 Q. On how many occasions?

1 A. Since 1990, I would estimate several hundred
2 times where I have testified, been accepted as a
3 witness. Many more times I've submitted reports to
4 courts and they used that information from my report as
5 well and found that to be helpful or acceptable.

6 MR. BARDWELL: Your Honor, at this time I
7 would tender Mr. Riebsame as an expert in the field
8 of Forensic Psychology.

9 THE COURT: I don't know that -- I think you
10 may have misspoken, Dr. Riebsame.

11 MR. BARDWELL: Oh, Dr. Riebsame.

12 THE COURT: State, any objection?

13 MS. GARRETT: I have no questions.

14 THE COURT: Mr. Barnes, any voir dire.

15 THE DEFENDANT: Uh, one more thing I would
16 like to point out to the Court. Yes, I do
17 object to him being qualified as an expert. And I
18 have to bring it up that I invoked the Rule of
19 Sequestration and there are still two witnesses in
20 here.

21 THE COURT: I don't know who the witnesses are
22 in this case. So if the attorneys know, are there
23 any witnesses in here?

24 MS. GARRETT: None that I'm aware of, Judge.

25 THE DEFENDANT: One would be Jay Randall Moore

1 and the other would be Sam Baxter Bardwell.

2 THE COURT: Okay, I would will overrule that
3 objection. These are attorneys that are proceeding
4 in this matter.

5 Okay, now, Mr. Bardwell, Dr. Riebsame may
6 testify as an expert in the matter.

7 MR. BARDWELL: Okay.

8 BY MR. BARDWELL:

9 Q. Doctor, have you had an opportunity to exam
10 materials related to James P. Barnes?

11 A. Yes, sir.

12 Q. How did you come about to exam materials
13 relating to James P. Barnes?

14 A. Initially in May of 2006 I was requested by
15 the Court to carry out an evaluation of Mr. Barnes and
16 the Office of the State Attorney for a significant
17 amount of material to make a review in relationship to
18 that evaluation. Subsequently, your office contacted me
19 wanting further evaluation, focusing on mitigation
20 circumstances. You sent me additional materials as well
21 that I examined as part of this evaluation.

22 Q. Can you give the Court some idea of the
23 materials that you reviewed?

24 A. I reviewed materials that included police
25 reports, witness statements, defendant's statements to

1 the police, the crime scene photographs. I also
2 reviewed medical examiner reports and fire investigation
3 reports, DNA laboratory reports and witness statements.
4 I reviewed the defendant's criminal records through the
5 Brevard County Clerk of the Courts website. I reviewed
6 police reports in Indialantic, Florida and Tulsa,
7 Oklahoma. I reviewed Mr. Barnes' DOC medical records.
8 I also reviewed the Presentence Investigation prepared
9 by the Florida Department of Corrections and the
10 material that's included with that.

11 I reviewed correspondence from the defendant, as
12 well as other inmates. I also reviewed the
13 investigative report of Terry Sirois, if that is the
14 correct pronunciation, and then I did a substantial
15 amount of research and referred to a number of
16 references relevant to Mr. Barnes' emotional and
17 behavioral problems.

18 Q. Are these materials that you described, are
19 they the type that are relied upon by experts in your
20 field in reaching an opinion?

21 A. Yes, sir.

22 Q. And can you give the Court some idea of the
23 relative volume of these reports that you received in
24 this particular case compared to like your average
25 report, average situation?

1 A. It was more than the usual amount of records
2 that I have had the opportunity to review. The Office
3 of the State Attorney provided me with -- if I told you
4 the size, it would be like maybe a box, the size that
5 you would place paper products in for coping machines.
6 So, I would guesstimate somewhere between a couple
7 thousand pages of materials inside that box.

8 Q. Okay.

9 A. Then your office supplied these materials as
10 well. So there is a couple of hundred pages of
11 materials there as well, included as part of the
12 evaluation.

13 Q. Did you find any internal consistency with all
14 these particular documents?

15 A. The consistency is evident across Mr. Barnes
16 pattern of behavior from childhood through adulthood.
17 The records are consistent from the mental health
18 evaluations included in these records, in terms of their
19 description of Mr. Barnes, description of his emotional
20 behavioral problems. The information is consistent with
21 that information that carries over into the Department
22 of Corrections records where psychology specialist from
23 that setting interviewed Mr. Barnes and provided similar
24 information that was contained in prior evaluations,
25 that included in the Presentence Investigation that are

1 also a part of the materials that were reviewed.

2 Q. And you normally have the opportunity to
3 evaluate such a vast period of time and number of
4 materials in evaluating an individual?

5 A. On a death penalty case you often tend to get
6 hopefully a significant amount of materials. In this
7 case there was I think more than the usual amount. I
8 also had information from the investigator that had
9 contacted the family members. I also had handwritten
10 documents of the defendant himself. So, I had
11 information from third-parties as well as the individual
12 involved here.

13 Q. Did you have an opportunity to actually, once
14 I required your services, to get the cooperation of the
15 defendant to participate in any psychological
16 examination or interview?

17 A. I met Mr. Barnes directly on only one
18 occasion, at the Brevard County Detention Center. Our
19 interaction was brief. He refused to cooperate and
20 assist in the evaluation, in terms of psychological
21 testing and neuropsychological testing.

22 Q. And is this an impediment in reaching a
23 reasonable conclusion, an opinion that you are going to
24 give today?

25 A. It does limit my evaluation, no doubt. If I

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1 have a more thorough particular psychological,
2 neuropsychological testing that I might have been able
3 to carry out with Mr. Barnes cooperation, that would be
4 beneficial. So, it does limit my findings. The
5 third-party information kind of balances it somewhat.
6 But, again, more information from Mr. Barnes, test
7 results from Mr. Barnes, would have been helpful.

8 Q. Can you tell us what type of testing you
9 would have done had you had the cooperation of
10 Mr. Barnes?

11 A. I would have administered a thorough battery
12 of tests that would include a measure of his
13 intelligence. I would have also done testing looking at
14 particular neuropsychological issues to see if there was
15 any kind of brain abnormality or dysfunction that might
16 be identified or hypothesized in relation to
17 Mr. Barnes. I would have asked him to complete
18 personality assessment tools, either the MMPI for myself
19 or the personality assessment inventory. At least those
20 three broad areas of acceptance, personality,
21 intelligence, and neuropsychological factors would have
22 been evaluated.

23 I had some of that information from the records.
24 There was intelligence test results from other examiners
25 in the record. There was personality acceptance result00113.

1 like the MMPI, administered on several occasions in the
2 record. So, I had that information from third
3 parties, but I would have preferred to have gotten it
4 directly from Mr. Barnes for myself.

5 Q. Can you tell us, would there be imaging,
6 medical imaging that may have assisted you had the
7 opportunity to request it?

8 A. Given his history of aggressive, impulsive
9 behavior, given the history of the abuse that has been
10 alleged, given the history of a head injury that has
11 been documented, given a history of a premature birth
12 and subsequent hospitalization at infancy, I would have
13 made a referral for a neurological evaluation to be
14 carried out. It would have been up to a neurologist to
15 decide what testing, but probably would have suggested a
16 CAT Scan, EG, MRI, possibly a PET Scan in Mr. Barnes'
17 case.

18 Q. But you did not have the benefit of those
19 possible tests; is that right?

20 A. That's correct.

21 Q. Now, nevertheless, without the opportunity to
22 do these testings, did you come up with some kind of
23 conclusion as to whether or not there was any mental or
24 emotion disturbance at the time of the offense?

25 A. Yes.

1 Q. And can you tell us what --

2 THE DEFENDANT: Objection, Your Honor, this
3 asks for supposition on his part, his personal
4 opinion. He has never evaluated me or made an
5 assessment of me.

6 THE COURT: Overruled. Go ahead.

7 BY MR. BARDWELL:

8 Q. Can you tell us what your opinion was?

9 THE DEFENDANT: Your Honor, I make my
10 objection in limine. He has already made a couple
11 of statements that I did not want as a part of the
12 record. But, I'm asking once again that you rule
13 in my favor.

14 THE COURT: Okay, I've overruled the
15 objection. Go ahead, Mr. Bardwell.

16 BY MR. BARDWELL:

17 Q. Okay, the question is, were you able to form
18 an opinion as to whether or not he was experiencing any
19 mental or emotional disturbance at the time of this
20 offense?

21 A. Yes.

22 Q. What emotional or mental disturbance do you
23 believe he was operating under?

24 A. Based upon the records that I reviewed that I
25 referenced earlier, I offered a diagnostic impression of

1 Mr. Barnes at the time of the offense, in 1988, to
2 include cocaine dependence, anti-social personality
3 disorder, and a personality disorder, NOS, that would
4 include borderline narcissistic characteristics.

5 Q. Can you give us an idea as to the degree that
6 he was under the influence of these conditions?

7 THE DEFENDANT: Objection, Your Honor, he has
8 no firsthand knowledge of me being under any
9 influence of drugs at that time.

10 THE COURT: If you'll lay a predicate.

11 BY MR. BARDWELL:

12 Q. You indicated that you reviewed materials?

13 A. Yes, sir.

14 Q. And based upon your review of the materials,
15 are these materials the type reasonably relied upon by
16 persons in your field in rendering an opinion?

17 A. Yes, sir.

18 Q. And did you formulate an opinion based upon
19 those records?

20 A. Yes.

21 Q. And you indicated what that opinion was?

22 A. Yes, sir.

23 Q. All right. So, I'm just going to ask you
24 further as to what significance or how significant were
25 these conditions at the time of the crime?

1 A. That mental disorder in Barnes' case would be
2 considered an extreme mental disturbance.

3 Q. Why don't we talk about the first disturbance,
4 which is the cocaine dependency. What is cocaine
5 dependence?

6 A. This is a reliance upon a drug like cocaine
7 that usually requires daily consumption that results an
8 individual developing tolerance to the drug. So they
9 require more of the drug in order to reach the same
10 level of intoxication. So, more and more cocaine is
11 required in order to reach a certain level of
12 intoxication. And consistent with that, the individual
13 would experience withdraw symptoms when the cocaine is
14 not available to them.

15 So, they develop and build up a tolerance to the
16 drug and experience withdraw symptoms, by definition, is
17 what we consider to be dependent, in Mr. Barnes' case,
18 this dependence on cocaine.

19 Q. And can you tell us what your second diagnosis
20 was?

21 A. Anti-social personality disorder.

22 Q. And your third diagnosis was what?

23 A. Personality disorder, NOS, which would include
24 borderline narcissistic characteristics.

25 Q. Can you tell us, basically, did he have the

1 ability to appreciate the criminality of his conduct?

2 A. Yes.

3 THE DEFENDANT: Objection, Your Honor. Your
4 Honor, he is introducing evidence that the State
5 can't even introduce at this point under
6 aggravating circumstances. There is a format here
7 that is leading him and everybody else in here to
8 believe on the record that I was cocaine
9 dependent at the time, which I was not, and two,
10 that I had some kind of abnormality going on at the
11 time. I just don't understand that, why this can
12 come in on the record. This wasn't on the record
13 before. Now, and all of a sudden, I have the
14 capability to appreciate the criminality of my
15 actions. Wait a minute. I don't have an expert to
16 dispute what he said. I've asked for an expert. I
17 was granted.

18 THE COURT: Okay, I'll overrule the
19 objection. If you wish to have an expert and would
20 like to present testimony from an expert, I will
21 certainly consider --

22 THE DEFENDANT: But this is a non statutory
23 aggravating comment. He never introduced this, and
24 yet it's being introduced.

25 THE COURT: Mr. Barnes, I don't know where

1 Mr. Bardwell is going with this. So, I need to see
2 where he where he is going so I can determine if it is a
3 mitigating circumstance. So, I'm going to give you
4 leeway to see where you are going there,
5 Mr. Bardwell.

6 BY MR. BARDWELL:

7 Q. But, nevertheless, can you tell us, despite
8 this, what impact these three conditions have on the
9 degree of which he could appreciate his actions?

10 A. Despite the extreme mental disturbance,
11 Mr. Barnes was still able to appreciate the criminality
12 or his actions.

13 Q. Did it have any impact on the degree to which
14 he was making rational and functional decisions?

15 A. Given the nature of the diagnosis and the
16 circumstances that involved the offense, altogether you
17 can assume that certainly it was carried out by an
18 individual who's judgment was impaired, that there were
19 aspects of some planfullness, also aspects of
20 impulsivity in the offense itself, that the mental
21 disturbance would effect Mr. Barnes' case, decisions
22 about the extent of harm experienced by the victim, his
23 gratification in relation to carrying out the act.

24 Q. Okay. Now, is there a body of knowledge or
25 research that gives us any insight as to why or what

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1 would cause the extreme behavior such as exhibited by
2 Mr. Barnes?

3 A. Yes, sir.

4 Q. What causes have been identified?

5 A. There are, through research that has been
6 carried out, needs to be carried out, focusing on
7 individuals like Mr. Barnes that are considered to have
8 a psychopathic personality, and the research identified
9 biological as well as genetic links associated with
10 other types of emotional and behavioral problems.

11 THE COURT: I'm sorry, Dr. Riebsame, you used
12 the word psychopathic personality. Can you define
13 for me what you mean by psychopathic personality so
14 I know what your definitions is?

15 THE WITNESS: Okay, Your Honor. There is a
16 diagnostic physical manual, four additions, that we
17 rely upon in diagnosing individuals. There is a
18 personality disorder known as the anti-social
19 personality disorder. It reflects longstanding
20 problems that are evident in adolescence that are
21 carried on through adulthood, and typically the
22 anti-social personality disorder of an individual
23 is someone who is frequently in trouble with the
24 law, considered to be a rather deceptive
25 individual, manipulative to others. They involve

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1 themselves in reckless behavior, that often times
2 can prove to be dangerous to other people, and --

3 THE DEFENDANT: Objection, Your Honor, this is
4 not fair testimony. He is supposed to be

5 presenting mitigating circumstances. I don't
6 think I have heard not one yet.

7 THE COURT: Overruled. Go ahead.

8 THE WITNESS: And Mr. Barnes meets the
9 criteria for that diagnosis. In addition, there is
10 a pattern of behavior that you see in a
11 psychopathic individual similar from what I
12 observed in a review of the records of Mr. Barnes'
13 case, where not only is there the history of
14 anti-social behavior, but there is also behavior
15 that reflects a lack of conscience, a lack of
16 empathy, in terms of experiencing the feelings of
17 others and considering those feelings of others.

18 Often times you see a predatory like behavior
19 in these individuals, and when you see the
20 definition of psychopathy or a psychopathic
21 individual you will also see anti-social
22 personality diagnosis linked with those other
23 characteristics I described, lack of conscience and
24 lack of empathy, shallow appearance of feeling, a
25 rather charming, grandiose presentation. Typically

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1 they are of above average intellect. I can -- I
2 mean --

3 THE COURT: You're using the word
4 sociopathic. Is it sociopathic or psychopathic?

5 THE WITNESS: Um, okay, historically the term
6 was sociopath. That was what we originally
7 considered individuals back in the 1950's.
8 Psychiatrist then collectively used the terms,
9 phrase, sociopath. Subsequently, he taught more
10 in terms of psychopathic individuals, same
11 definition, change in terms with the times. The
12 primary researcher in the area of psychopathic,
13 psychopathy, is Robert Hare, H-A-R-E. His
14 definition considers many of the characteristics
15 identified early in my testimony.

16 But, to answer your question, the sociopath
17 in the 1950's is what we would call the psychopath
18 in our day and age.

19 THE COURT: All right. I'm understanding --
20 you know your field. I'm learning from you what --
21 about this. But -- and I may be asking a question
22 that no one can answer. How does one become a
23 sociopathic and psychopathic? Is it genetic? Is
24 it environmental? Is it no one knows? Is it what?

25 THE WITNESS: Um, when Mr. Bardwell gave me

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1 the task of -- to answer your question, the
2 anti-social individual we see in 40 percent of the
3 prison population. He's a career criminal type
4 individual. The psychopathic are fewer and farther
5 between, and the research has increasingly
6 identified a biological predisposition for this
7 disorder coming about in an individual.

8 Sometimes you see a psychopathic individual
9 come from a very good family, no evidence of any
10 kind of environmental inborn that could steer them
11 in the direction of becoming a psychopath. It's a
12 family that has a bad seed and they can't explain
13 why their child has become this individual, and
14 early on they recognize it. The child who maybe
15 starts fires, tortures animals, constantly in
16 trouble at school, takes advantage of other kids,
17 usually a bright child, takes advantage of other
18 kids, manipulative, deceptive, charming, and the
19 family can't understand because of the environment
20 that the child has been brought up in is not
21 conducive to create this type of individual.

22 Other times you find this type of individual
23 being brought up in much more negative environment,
24 and what the research points to is the psychopath
25 who has this genetic predisposition and is also

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1 brought up in a negative environment often times
2 they prove to be the most damaging of individuals
3 in society. They have the more violent history and
4 create the most havoc.

5 So, there's certainly a biological
6 predisposition. The research that we are seeing
7 points in the direction of brain abnormality in
8 these psychopathic persons, and offers society as
9 to how come they lack empathy, how come they can't
10 feel for others, how come they have a limited
11 conscience, how come they behave impulsive and in
12 aggressive ways. Often times it may be linked to
13 some brain dysfunction or brain abnormality that we
14 are seeing more and more in the research with these
15 types of persons.

16 BY MR. BARDWELL:

17 Q. Doctor, let's talk about the genetic
18 predisposition. In your review of the social history of
19 the defendant, did you have an opportunity to note that
20 he had a fraternal twin?

21 A. Yes.

22 Q. And have studies been made of fraternal twins
23 and other identical twins and relating them to abnormal
24 behaviors, such as that exhibited by Mr. Barnes?

25 THE DEFENDANT: Your Honor, objection. They 001192

1 did not introduce this report, and this is exactly
2 what they are doing, step by step, every fricking
3 sentence, every paragraph, every topic in this
4 report, word by word. So, we didn't introduce it
5 as evidence, so it was a moot point. And here it
6 is being introduced. I object to that. This was
7 not supposed to be introduced. It was moot.

8 THE COURT: I'm overruling the objection. Go
9 ahead, Mr. Bardwell.

10 BY MR. BARDWELL:

11 Q. And you are familiar with the studies; is
12 that correct?

13 A. Yes, sir.

14 Q. What would these studies predict?

15 THE COURT: Mr. Bardwell, just one moment.

16 (Brief pause in the proceedings.)

17 THE COURT: Go ahead.

18 Q. Based upon the studies, when you describe some
19 of the studies -- would you describe some of the studies
20 to start out with?

21 A. Yes, the studies date back to 1977, starting
22 with studies of adoptions as large as 14 thousand male
23 and female adoptees. They looked at the correlation
24 between the development of criminality and adopting
25 siblings, specifically twins, and they found that the

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1 genetic connection, biological connection between these
2 twins --

3 THE DEFENDANT: Objection, Your Honor,
4 hearsay. He's just -- under direct examination --
5 maybe -- I don't know, but this is hearsay
6 testimony. He's just offering what Mr. Bardwell
7 wants him to offer as hearsay.

8 THE COURT: Overruled. Go ahead, Mr. Bardwell.
9 BY MR. BARDWELL:

10 Q. Okay.

11 A. The results of these studies indicate that
12 criminality has a strong genetic link that you see,
13 despite any kind of strong environmental influence,
14 twins following a similar pattern of criminal behavior.
15 If one twin is found to be involved in it, we often find
16 that the other twin is also involved in these types of
17 criminal behaviors or and anti-social behaviors.

18 Q. And in Mr. Barnes' case is the social history
19 as you understand it, of his sister, consistent with
20 these twin studies?

21 THE COURT: I'm sorry, maybe I missed it.
22 Mr. Barnes has a twin sister?

23 MR. BARDWELL: Yes.

24 A. Yes, based upon the information from your
25 investigator, Mr. Barnes' twin sister, Denise Woods,

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1 throughout much of her lifetime, was also involved in a
2 fair amount of anti-social activity, including drug
3 addiction and prostitution.

4 THE DEFENDANT: Objection, Your Honor, hearsay.

5 THE COURT: Overruled.

6 BY MR. BARDWELL:

7 Q. Now, is there any kind of link between a
8 distressed fetal environment and the occurrence of
9 extraordinary violent behaviors?

10 THE COURT: Mr. Bardwell, I'm sorry, would you
11 repeat the question.

12 MR. BARDWELL: Yes.

13 BY MR. BARDWELL:

14 Q. Does the research suggest that a distressed
15 fetal environment has any contributor to the type of
16 behavior that was exhibited by Mr. Barnes?

17 A. Yes, the research points in the direction of
18 brain abnormality dysfunction caused by fetal distress,
19 injury during birth, the pregnancy, has been linked to
20 these types of emotional and behavioral problems.

21 Q. And did your review of the materials suggest
22 that there was a distressed fetal environment in
23 Mr. Barnes' situation consist with this type of damage?

24 A. Yes, sir. Again, according to the records
25 from the investigator he was born prematurely and

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1 remained hospitalized was considered jaundice.
2 Apparently there's also a history during pregnancy of
3 the mother smoking and drinking heavily in terms of
4 alcohol consumption. There has also been a diagnosis of
5 Yellow Fever during childhood. These factors could be
6 hypothetically linked to some sort of fetal distress on
7 Mr. Barnes' part which could result in some sort of
8 brain abnormality or brain dysfunction.

9 Q. And can you tell us what portion of the brain
10 would be affected, would cause the kinds of behaviors
11 exhibited by Mr. Barnes?

12 A. In relation to behaviors exhibited by
13 Mr. Barnes, you often identify some sort of frontal lobe
14 dysfunction of the brain. This is the part of the brain
15 most responsible for planning ability, development of
16 frustration, tolerance. Dysfunction in this area also
17 tends to cause an increase in irritability and
18 aggressiveness and often times is linked to the
19 occurrence of impulsive behavior and socially
20 inappropriate behavior.

21 Q. Have there been any studies that relate
22 diagnostic imaging and the behavior disorders to this
23 part of the brain?

24 A. Yes.

25 THE DEFENDANT: Objection, Your Honor, once

001196

1 again, he's talking about literature.

2 THE COURT: Overruled. Go ahead.

3 BY MR. BARDWELL:

4 Q. Now, in the absence of some dysfunction or
5 injury to the brain or damage to some portion of the
6 brain, is there an explanation for what you termed
7 psychopathic behavior?

8 A. The strongest research base we have to explain
9 this type of behavior is based on a biological
10 explanation.

11 Q. And can you tell us how do we identify or what
12 indications are there that it is biological in nature?

13 A. Well, as I mentioned earlier, the research on
14 the twin studies where we have twins behaving in similar
15 ways despite any kind of changes in their environment,
16 environmental upbringing. We have autonomic arousal
17 studies where researchers have presented individuals
18 that are psychopathic with stimulating situations and
19 measured their autonomic arousal through things such as
20 a polygraph assessment, and they determined that these
21 individuals autonomic arousal is very much less than the
22 normal individuals. Their brain requires much more
23 stimulation in order to reach a level of what would be
24 considered normal stimulation.

25 Q. Can a person with a psychopathic

001107

1 characteristic be distinguished by EEG's?

2 A. The brain abnormality can be distinguished
3 with EEG's. Whether they're necessarily considered
4 psychopathic, you need more of a behavioral historical
5 data source.

6 Q. Is there any correlation between or similarity
7 between the brain waves of an adult psychopath and those
8 of normal adolescent children?

9 A. Yes.

10 Q. And how are they similar?

11 A. Again, they are similar in terms of rather
12 slow rate, suggesting a lack of maturity of the brain
13 development. So, we see very similar characteristics in
14 children and adolescents as you would see in psychopaths
15 with the self centeredness, the impulsivity, difficulty
16 delaying gratification. You see children in
17 psychopaths, you also see the same pattern of brain wave
18 occurrence that's very gradual or slowed that you don't
19 see in say a mature, normal adult.

20 Q. Do the persons exhibiting extreme violent
21 behavior, do they have any difficulty in perceiving
22 situations and coordinating information?

23 A. Yes. The research points again towards
24 difficulty in the part of a psychopathic individual in
25 terms of getting accurate meaning from language,

001198

1 particularly the emotional meaning. So it's
2 hypothesized that these individuals, because of their
3 inability or limited ability to interpret emotional
4 situations, they are often times considered to be
5 unfeeling, many times because they are not able to
6 emotionally experience events the same way a normal
7 person would.

8 Q. Can you tell us whether there is any
9 consistency in pattern in the social development of a
10 person who has anti-social or psychopathic tendencies
11 from childhood to adulthood?

12 A. There is overlap. Often times the anti-social
13 individual comes from a deprived and/or abusive
14 childhood. The psychopathic individual, not
15 necessarily. As I mentioned earlier, though, we do see
16 psychopaths that do come from deprived and/or abusive
17 childhoods as well.

18 Q. Do these characteristics, do they manifest
19 themselves -- how early do they manifest themselves in
20 the life of an individual who has psychopathic
21 tendencies.

22 A. They are usually quite obvious by elementary
23 school, becomes very evident in adolescence. Often
24 times they will be diagnosed with a conduct disorder at
25 that time, and then obviously again as an adult. So

1 they occur early on and recognized.

2 Q. Through your review of the records did it
3 reveal any inconsistency of this pattern that
4 Mr. Barnes' development?

5 A. No.

6 Q. And how consistent was it?

7 A. It was very consistent. One benefit of this
8 particular case is that I have psychological evaluations
9 that go back to his early adolescents where his parents
10 were talking to mental health counselors and describing
11 his childhood behavior, which is consistent with what I
12 described to the Court in terms of the psychopathic
13 individual as well as an adult.

14 Q. How much control does somebody have as to
15 whether or not they have these tendencies, in terms of
16 their predisposition?

17 A. There's not really control in relation to it.
18 I mean, they are considered a predisposition and it's
19 what they are inclined to become.

20 Q. Can you tell us if there is any non biological
21 circumstances that would aggravate a person with
22 predisposition, genetic or neuro biological.

23 A. Yes.

24 Q. And what type of environmental conditions
25 would aggravate the situation?

1 A. The occurrence of abuse during childhood of
2 the individual, physical, sexual, neglect, any kind of
3 mal treatment would aggravate the predisposition. The
4 involvement of any kind of substance abuse would also
5 aggravate the situation, aggravate the personality
6 disposition of the individual.

7 Q. And I think you noted that at the time of this
8 event you indicated that cocaine dependence was a
9 feature of his mental state; is that correct?

10 A. Yes.

11 Q. And how would the cocaine dependence, how
12 would it mix with a predisposition in this particular
13 case?

14 A. It might serve to heighten his arousal, given
15 the effect of cocaine. It tends to heighten the
16 individual's arousal level, psycho-physiology. If we
17 have an individual who'd arousal is typically low, I
18 mean, any type of psychopathic individuals require more
19 arousal than the rest of us in order to arouse. The use
20 of cocaine or to reach that level or arousal would be
21 desired by them.

22 Q. And based upon your review of the records, do
23 you have an opinion as to how long the drugs contributed
24 to Mr. Barnes' mental state?

25 A. Are you talking about his drug history?

001201

1 Q. Yes.

2 A. I note from the records that he began using
3 marijuana from early adolescence. The records also
4 refer to use of heroine, methamphetamine, cocaine and
5 alcohol.

6 Q. And how consistent is drug use with those
7 persons who have the predisposition that you described?

8 A. We use a term of dual diagnosis where we have
9 a diagnosis of a substance abuse as well as a mental
10 disorder, and often times the anti-social personality
11 disorder with individuals who have, like Mr. Barnes,
12 boarderline personality disorder, you very frequently
13 find substance abuse as part of there diagnosis.

14 Q. So, it's not unusual for a person to have both
15 problems?

16 A. No, sir.

17 Q. Now, let's talk about the impact of his social
18 environment. Did your review of your records reveal
19 anything that would cause you to believe that
20 Mr. Barnes' behavior were influenced by environmental
21 factors?

22 A. Yes.

23 Q. What environment factors did you identify that
24 you believe contributed to the expression of these
25 tendencies?

001202

1 A. There's information in the Department of
2 Corrections medical records, as well as several
3 psychological evaluations from Mr. Barnes' early
4 childhood that indicate he grew up in a violent
5 environment, that he also experienced periods of
6 enuresis.

7 THE COURT: Experienced what now?

8 THE WITNESS: Periods of enuresis, bed
9 wetting.

10 THE COURT: Okay.

11 A. That his parents identified early on, involves
12 other problems with stealing, aggressiveness and fire
13 setting.

14 BY MR. BARDWELL:

15 Q. And how characteristic is this of persons who
16 have that genetic or functional predisposition for
17 violence?

18 A. You often times find those characteristics in
19 areas where there is predisposed violence.

20 Q. Is that almost diagnostic of a person like
21 that?

22 A. I wouldn't use the term diagnostic. It is a
23 piece of history that you find in an individual you
24 suspect the likelihood of this occurring. It may not
25 necessarily be diagnostic. There are far more people

001203

1 that have been abused that have had normal lives
2 otherwise. But, we do see a correlation of abuse and
3 anti-social personality disorder and psychopathic
4 personality disorder. We do see that correlation
5 occurring on a significant basis.

6 Q. Can you tell us how this type of history
7 effects a person's ability to function as a normal human
8 being?

9 A. They may find themselves routinely having
10 difficulty in relationships with other people, maybe
11 drawn to rather volatile and intense relationships
12 because of their abuse in childhood where they were in a
13 situation where they couldn't control. Often times they
14 become individuals who are controlling themselves or
15 require a lot of controlling themselves. They may be
16 attracted to substance abuse as a means of diminishing
17 feelings of depression or anxiety that have been a part
18 of their history of much of their lifetime. They may
19 also be involved in self destructive behavior, prior
20 suicidal acts or self mutilating behavior. Usually its
21 reckless, risky types of behavior they find themselves
22 involved in.

23 Q. Now, the record that you reviewed involved a
24 wide period of time?

25 A. Yes, sir.

001204

1 Q. Does anything about the development of the
2 information over the period of time cause you to
3 question your opinion in any way?

4 A. No, sir.

5 Q. And how consistent is the pattern that you see
6 from these records with your opinion that you gave here
7 today?

8 A. I find the record of his history to be very
9 consistent with my diagnostic impressions information
10 that I shared with the Court today.

11 MR. BARDWELL: I have no further questions.

12 THE COURT: Okay, Ms. Garrett, Ms. Stewart.

13 CROSS EXAMINATION

14 BY MS. GARRETT:

15 Q. Good afternoon, Dr. Riebsame.

16 A. Good afternoon.

17 Q. Your diagnosis of the defendant was suffering
18 from cocaine intoxication. Other cocaine dependent what
19 exactly is your diagnosis with regards to the cocaine.

20 A. Cocaine dependent.

21 Q. At the time of the crime in 1988, that's based
22 solely on what you referred to as written statements,
23 that the defendant used drugs around that time period?

24 A. And his history of drug abuse that I have from
25 the other records, yes.

001205

1 Q. There was no evidence that you reviewed that
2 the defendant was using drugs at the time of this crime?

3 A. Yes, I'm not aware of any kind of evidence at
4 the crime scene that would suggest that he was using
5 cocaine at the moment of the event or at the time, exact
6 time of the offense.

7 Q. Can you describe for the Court what the
8 symptoms are of cocaine intoxication?

9 A. Cocaine intoxication?

10 Q. Or of this disturbance that you are
11 describing, in saying that the defendant was suffering
12 from at the time of the 1988 homicide, of the cocaine
13 dependence.

14 A. You want me to list cocaine dependence?

15 Q. The symptoms of cocaine dependence.

16 A. I'll refer specifically to the diagnostic
17 manual for a diagnosis of cocaine dependence.
18 Maladapted pattern of substance use leading to
19 clinically significant impairment or distress as
20 manifested by three or more of the following occurring
21 at any time during the same 12 month period. First
22 criteria is tolerance, defined by either of the
23 following:

24 A need for markedly increased amounts of the
25 substance to achieve intoxication or the desired

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1 effects, markedly diminished effect with conditioned use
2 of the same amount of substance.

3 Second criteria is withdraw, as manifested in
4 either the following:

5 Characteristic of withdraw syndrome for the
6 substance, or the same substance is taken to relieve or
7 avoid the withdraw symptoms.

8 Third criteria, the substance is often taken in
9 larger amounts over a longer period of time than
10 intended.

11 Fourth, there's persistent desires or unsuccessful
12 efforts to cut down or control the substance use.

13 Fifth, a great deal of time is spent in activities
14 necessary to obtain the substance or recover its effect.

15 Sixth, impairment in social, occupational or
16 recreational activities are evident and maybe even given
17 up or reduced because of the substance use.

18 Seventh, the substance use is conditioned despite
19 knowledge of having a persistent or recurrent physically
20 or psychological problem that is likely to have been
21 cautioned or exacerbated by the substance.

22 Q. And which of those symptoms did you find
23 existed in 1988, at the time of this homicide?

24 A. Based upon his history of drug use my
25 assumption, again, would be that there would be symptoms

1 of tolerance, withdraw, a great deal of time spent in
2 activities necessary to obtain the substance and social
3 and occupational and recreational activities are given
4 up because of the involvement in substance abuse. That
5 would be my suggestions that he would meet the criteria
6 that he would meet for dependence.

7 Q. And this was based upon the information that
8 was provided to you by the State Attorney's Office and
9 Mr. Bardwell?

10 A. Yes.

11 Q. Can you please point out specifically what
12 information led you to believe that the defendant was
13 suffering the symptoms of tolerance?

14 A. All I can tell you is based upon his history
15 from you psych levels and the DOC records of lengthy
16 drug use. I don't have any specific examples of reports
17 of tolerance on his part which would be something like I
18 can't tell you I used like a gram of cocaine today and I
19 needed two grams of cocaine in a month in order to
20 achieve the same amount of intoxication. I don't have
21 information for you.

22 Q. So the fact that the records suggest that drug
23 use was over an extended period of time, automatically
24 you presumed a tolerance?

25 A. That's one hypothesis that I seriously

1 considered, particularly with Mr. Barnes' history. Yes,
2 ma'am.

3 Q. You indicated that you found tolerance was a
4 symptom displayed by the defendant in 1988 at the time
5 of this homicide.

6 A. I recorded a diagnostic impression. I also
7 testified that my evaluation was limited as a result of
8 Mr. Barnes' lack of cooperation. I would suggest the
9 Court to seriously consider a likelihood of cocaine
10 dependence as a diagnostic -- these are the diagnosis in
11 his case. I cannot give you an example of tolerance per
12 se, without going through the records and assuming based
13 upon his marijuana use in adolescence, subsequent opiate
14 use, methamphetamine use, crack cocaine use, my
15 assumption is that the individual that uses those types
16 of drugs and has this type of criminal record would
17 experience symptoms similar to the diagnosis of some
18 sort of substance dependence.

19 Q. Did you also consider information regarding
20 drug use after 1988 when you were making that
21 determination?

22 A. Yes.

23 Q. What would that -- and to you, is that a valid
24 method in determining if somebody is suffering from
25 cocaine dependence in 1988 by considering things that

1 occurred afterwards?

2 A. Yes, this is a pattern of behavior when he
3 murdered his wife in late 1990. He admitted to be
4 cocaine tolerance at that time, based upon the records
5 that I reviewed. Other records prior to this murder in
6 1988 suggest that he frequently used and abused drugs as
7 well.

8 Q. And I just want you to point out specifically
9 what records you're relying on for that information.
10 You said that you have found that tolerance, withdraw,
11 time spent in activities necessary to obtain the
12 substance and foregoing social activities, and you found
13 all these existed in 1988?

14 A. Yes, ma'am.

15 Q. That collaborated your determination that the
16 defendant was cocaine dependent at the time of the
17 homicide?

18 A. I said that I hypothesized that they were
19 present based upon his history. If you go to the DOC
20 records you'll see consistently reported throughout each
21 of the psychological screenings his reported history of
22 crack cocaine addiction, marijuana use and alcohol. If
23 you go to the psychological evaluations contained in the
24 DOC Presentence investigation you'll also see frequent
25 reference to the parents' concern about substance abuse,

1 his involvement of substance abuse, in adolescence and
2 subsequently.

3 So, I'm confident that Mr. Barnes was actively
4 involved in alcohol and drug abuse throughout his
5 adolescence and adulthood. I cannot tell you whether he
6 was intoxicated on cocaine the night that he killed his
7 victim. But, I'm confident that he was dependent upon
8 cocaine, most like alcohol as well as some other
9 substances.

10 Q. What are the dates of the DOC records that you
11 relied upon?

12 A. October 10th, 1996, January 22nd, 1998,
13 February 19th, 1998, June 22, 2000, psycho evaluations
14 -- if I can find the date for you in the PSI. July
15 28th, 1971, September 13th and September 28th, 1979,
16 September 13th, 1977, test results from August, 1990,
17 October, 1996, July, 1992, January, 1998.

18 Q. What kind of test results would give you
19 information about cocaine dependence?

20 A. A PNPI result that would support of likelihood
21 of an individual involved in an alcohol and drug
22 consumption.

23 Q. Okay, go ahead, tests results from 1990 and
24 1996.

25 A. And 1992 and 1998.

1 THE COURT: These are all test results?

2 THE WITNESS: DNM PI, tests results from DOC.

3 I think those are probably the most accurate dates.

4 I would provide to you, in terms of the information

5 I relied upon to hypothesize that Mr. Barnes was

6 heavily involved in cocaine use at the time of this
7 murder.

8 Q. So, does your hypothesis that the defendant
9 was heavily involved in cocaine use at the time of the
10 homicide then cause you to simply suppose that he was
11 tolerant and suffering from tolerance and withdraw and
12 spending time in activity to obtain this substance stand
13 and giving up social activities?

14 A. Yes.

15 Q. You're just supposing it?

16 A. No, it's based upon my clinical
17 experience working with addicts. That's what they do.

18 Q. But, is there any specific information that
19 you have about Mr. Barnes that causes you to believe
20 that he had these symptoms at the time of the homicide?

21 A. That he is tolerating and withdrawing from
22 cocaine?

23 Q. Yes.

24 A. As I answered earlier, I cannot give you a
25 specific example of that.

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1 Q. How about the other two things that you
2 indicated that you found in Mr. Barnes' case? You said
3 you found that he was spending time in activities
4 necessary to obtain the substance and giving up social
5 activities.

6 A. Again, I cannot give you specific examples of
7 that. I'm assuming that those events were occurring, a
8 very high likelihood, given his history of alcohol and
9 drug use.

10 Q. I guess I'm trying to understand what causes
11 you to make those assumptions, just the fact that you
12 believe he's cocaine dependent based upon his history of
13 long term drug use?

14 A. You answered my question. Yes, this is an
15 individual that has been using drugs since early
16 adolescence, consistently, reports it to most of the
17 health evaluators that he speaks to, announces his
18 involvement. His criminal record reflects a great deal
19 in participation in typically what we know to be drug
20 related crimes. I think making an assumption that he
21 may become tolerant to alcohol and cocaine, some of the
22 drugs and then be dependent upon is a very simple
23 logical step to take.

24 Q. Well, isn't it certainly possible that he
25 became dependent on it sometime after 1998, if he was

1 dependent on it at all?

2 A. I would agree with you that the defendant was,
3 in 1988, certainly through the homicide in 1997.

4 Q. When did the cocaine dependence begin?

5 A. I don't know.

6 Q. But, you know that it was there in 1988?

7 A. I offered that diagnostic impression to the
8 court. If it is inaccurate, it's because my evaluation
9 was limited as a result of lack of information directly
10 from Mr. Barnes.

11 Q. So, you're referring to it as a diagnostic
12 impression?

13 A. Correct.

14 Q. So, it is not an actual diagnostic impression?

15 A. Without the information of Mr. Barnes, it's
16 limited, yes.

17 Q. But, you're willing to say within a reasonable
18 degree of psychological certainty?

19 A. That diagnostic impression is strongly
20 reported by the history and the information that I
21 reviewed; yes.

22 Q. That Mr. Barnes was, at the time of the 1988
23 homicide, suffering from an extreme mental disturbance,
24 specifically what we are talking about right now,
25 cocaine dependence?

1 A. That's not the extreme mental disturbance.

2 Q. That is not one of the three extreme mental
3 disturbances you indicated that you found?

4 A. I didn't find three extreme mental
5 disturbances. I found an extreme mental disturbance.
6 He also had to be someone dependent upon cocaine.

7 Q. You're finding an extreme mental disturbance
8 based upon all three of these diagnostic impressions
9 that you made -- I guess they are diagnostic
10 impressions. The are not actual diagnostic --

11 THE COURT: I'm confused.

12 MS. GARRETT: As I am, Judge.

13 THE COURT: That's okay. What is the extreme
14 mental disturbance that you're identifying?

15 THE WITNESS: It includes certainly the
16 anti-social personality disorder with the
17 borderline narcissistic characteristics, and
18 cocaine dependence. As far as that, I certainly
19 wouldn't highlight -- but what we picked up here is
20 there is a lot of cocaine dependence and the
21 extreme mental disturbance.

22 THE COURT: So, when you say anti-social,
23 borderline narcissistic characteristics, is that
24 all one or is it two different things?

25 THE WITNESS: The anti-social personality

1 disorder, that included borderline narcissistic
2 personality characteristics. That is an individual
3 with an extreme mental disturbance. If you include
4 cocaine dependence or some other type of substance
5 abuse along with that diagnostic impression or type
6 of individual who is psychopathic in nature, I
7 certainly think they are worsen.

8 BY MS. GARRETT:

9 Q. So, cocaine dependence itself is not an
10 extreme mental disturbance that you found in this case?

11 A. I wouldn't consider it statutory in a death
12 penalty case; no, ma'am.

13 Q. And again, you have no information that the
14 defendant was then under the influence of drugs or
15 intoxicants or any kind at the time of the homicide?

16 A. That's correct. I have not seen a urine
17 analysis or blood analysis or any kind of evidence that
18 would suggest drug paraphernalia at the scene of the
19 crime that would support that.

20 Q. In fact, it's your opinion that the murder
21 itself does not support a diagnosis of crack cocaine
22 dependence; isn't that true?

23 A. In my deposition we discussed that; yes. It's
24 not simply the crime of a crack addict; no, ma'am.

25 Q. There were three evaluations that you said you

1 looked at that actually occurred before the murder. One
2 was from July 28th, 1971. One was from September 28th
3 of 1979, and one was from September 13th of 1977.

4 A. They're included in the PSI; yes.

5 Q. Let's start with the July 28th, 1971.

6 Specifically, what about that -- what type of evaluation
7 was that?

8 A. This is an evaluation carried out at the
9 Brevard Mental Health Center, now is Circles of Care.

10 Q. Okay, and was there testing involved in that
11 evaluation?

12 A. It doesn't appear to be; no, ma'am.

13 Q. And what specifically in their evaluation
14 collaborates your diagnostic impression of cocaine
15 dependence at the time of the 1988 murder?

16 A. Cocaine dependence?

17 Q. Yes.

18 A. There's no mention of cocaine in this
19 evaluation, only strong evidence for the anti-social and
20 psychopathic development on the part of Mr. Barnes.

21 Q. Were you able to verify any of the information
22 that was in this evaluation?

23 A. No.

24 Q. Let's go to the September 13th, 1977
25 evaluation. Could you describe for the Court who did

1 that evaluation and what type of evaluation it was?

2 A. This is a -- appears to be a court ordered
3 evaluation, psychological evaluation, court ordered by
4 Judge Anthony Hoseman (phonetic), carried out by Linda
5 Sawyer, who is a juvenile court psychologist, September,
6 1977.

7 Q. And what specifically about that evaluation
8 collaborated your diagnostic impression of cocaine
9 dependence at the time of the 1988 homicide?

10 A. Again, strong evidence of the development of
11 the anti-social and psychopathic characteristics, as
12 well as reference to his use of marijuana and drug
13 dealing.

14 Q. And let's go to the 19 -- again, were you
15 able to verify any of the information in this evaluation?

16 A. No, ma'am, I assumed the PSI was accurate.

17 Q. And the other one was from September 28th, of
18 1979. What kind of evaluation was that?

19 A. Alcohol and substance abuse.

20 Q. And who performed that evaluation?

21 A. I don't know.

22 Q. What type of evaluation is it?

23 A. It says alcohol and substance abuse.

24 Q. What are you looking at? Where is that
25 information from?

1 A. Page 22 of the PSI.

2 THE COURT: Ms. Garrett, we are going to take
3 a recess. We've been going for an hour and 15
4 minutes. We'll come back at a quarter 'til 3:00.
5 (Brief recess was taken. Proceedings then
6 continued, as follows:)

7 THE COURT: Okay, Ms. Garrett, if you'll
8 proceed. I've got Mr. Moore present, Mr. Barnes
9 present, Ms. Stewart, Ms. Garrett and Mr. Bardwell.

10 MS. GARRETT: Judge, Ms. Lopez is outside of
11 the courtroom. She asked me to ask the Court --
12 she has a pressing matter that she has to attend
13 to. She has to leave by 4:30. She was not
14 subpoenaed to be here and was not planning to be
15 here the whole day.

16 THE COURT: The thing is I don't know what
17 anyone is going to do in this case. It's
18 unfolding in front of me. So, I don't know if
19 Mr. Barnes is going to challenge anything with the
20 PSI. I mean, if you all want to stop with
21 Dr. Riebsame for a moment and deal with the PSI, or
22 we can deal with Ms. Lopez and find out if anybody
23 has any ideas about calling her. I just don't want
24 to let her go and then find out that someone wants
25 to talk to her or cross examine her.

1 MR. BARDWELL: Judge, I have no intention of
2 calling her. If you want to poll any other party
3 that may be something --

4 THE COURT: All right. Ms. Garrett, do you
5 have any intention of calling Ms. Lopez?

6 MS. GARRETT: No.

7 THE COURT: Mr. Barnes?

8 THE DEFENDANT: The problem I have is my train
9 of thought right now is with Dr. Riebsame and his
10 cross examination. I don't even know if we are
11 going to have a chance to get to Ms. Lopez or not.

12 THE COURT: Oh, yes, we will. We're going to
13 finish. So, my question is, are you going to call
14 Ms. Lopez? If you are, then I'm going to have
15 Dr. Riebsame step off the stand and we're going to
16 deal with Ms. Lopez now. So, that's my question.

17 THE DEFENDANT: Well, some of the testimony
18 that -- Your Honor, the testimony he's giving is
19 directly attributable to the PSI, and until he's
20 finished I'm not sure whether or not I'm even going
21 to cross examine him. I'm going to follow the
22 State. So right now there is a possibility that
23 I'm going to call Ms. Lopez.

24 THE COURT: Okay, so you think you're going to
25 call Ms. Lopez?

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1 THE DEFENDANT: It's possible.

2 THE COURT: All right, then let's try to get
3 this moving further along.

4 BY MS. GARRETT:

5 Q. Okay, I think we were on what you termed was
6 a third psychological evaluation, and I believe you
7 indicated it was September 28th, 1979. Was that an
8 actual psychological evaluation?

9 A. I don't know. I don't remember referring to
10 it as a psychological evaluation. I think you asked me
11 what type of mental health evaluations I was relying
12 upon, and I gave you those dates.

13 Q. Is what occurred on September 28th of 1979
14 actually a mental health evaluation of any type?

15 A. It looks like it was a Presentence
16 Investigation, from reading this paragraph.

17 Q. And there were some comments in there by Fred
18 Geiger, who prepare the Presentence Investigation on
19 September 28th, 1979. Is that what you're referring to?

20 A. Yes.

21 Q. And there were some comments by the defendant
22 that he had used pot since age 13?

23 A. Yes.

24 Q. And that in January, 1991, he became addicted
25 to crack cocaine?

1 A. Yes.

2 Q. And did you rely on that information to
3 determine that the defendant was cocaine dependent in
4 1988 at the time of the murder of Patricia Miller?

5 A. As well as his letter to your office.

6 Q. Apparently over the break you found some other
7 information?

8 A. Well, since you got more specific with your
9 questioning I knew there was evidence in here. So, I
10 returned to the letter that Mr. Barnes also had wrote to
11 your office where he referred to his purchase of cocaine
12 and his intention to shoot cocaine the night of the
13 murder.

14 Q. Now, what letter is that. Does it give a date
15 on the letter?

16 A. Looks like the date is 12/19/05. This is the
17 letter where Mr. Barnes details the offense.

18 Q. Can you point out specifically what portion of
19 that letter you're referring to?

20 A. On the last paragraph, about 10 lines from the
21 bottom.

22 Q. On the last page of the letter?

23 A. I assume so. I don't have the letter in front
24 of me. I just have the letter transcribed onto the PSI.

25 Q. And when -- you're referring to his comments.

1 "I had bought cocaine from Tom Controne (phonetic)
2 earlier that evening. I was ready to shoot some."

3 A. Yes.

4 Q. And as far as time period, what is this
5 referring to? Is that before or after the homicide?

6 A. This appears to be after. Well, he bought it
7 earlier that evening. So, I guess he had bought the
8 cocaine prior to the homicide. Whether he used some
9 just then or during the homicide, but from this
10 reference it appeared that he is ready to inject it soon
11 afterwards.

12 Q. After the homicide?

13 A. Yes.

14 Q. So, is there any information that you have
15 that the defendant was under the influence of cocaine or
16 other intoxicants at the time of the homicide?

17 A. No, unless he shot up cocaine prior to the
18 homicide. But, I don't have any exact evidence of
19 that. I just have evidence of his cocaine dependence.
20 So, I would assume he used cocaine sometime within a 24
21 hour period beforehand.

22 Q. And that again is just speculation on your
23 part?

24 A. No, when you have an IV --

25 Q. Do you have information that the defendant

1 used cocaine within 24 hours of the crime?

2 A. I have a statement by an individual who is an
3 IV drug user that he's about to use cocaine again, via
4 injection. I've not encountered an IV drug user in my
5 practice that didn't use it on a daily basis.

6 Q. So, it's speculation on your part that he used
7 cocaine within 24 hours prior to the crime? You have no
8 actual information --

9 A. Again, I don't have a drug analysis, or a
10 blood analysis. I know that IV drug users who use
11 cocaine, heroine or methamphetamines as often or as
12 frequently as much as possible. We have evidence here
13 that he was about to use it right after the crime. It
14 is not speculation that he used it 24 hours beforehand.
15 It is a clinical conclusions.

16 Q. So, you are willing to say within a reasonable
17 degree of psychological certainty that based on the fact
18 that the defendant in the letter indicated that he had
19 purchased cocaine and was going to use it after the
20 crime that he had also used cocaine within 24 hours
21 prior to the crime?

22 A. I'm willing to testify to the Court that the
23 probability is much, much more likely than not that he
24 did.

25 Q. But, you're relying solely on that statement?

1 A. His acknowledgment that he is an IV drug user
2 and purchased cocaine prior to killing this woman and
3 about to use it afterwards; yes.

4 Q. So, is it your opinion that he was under the
5 influence of any intoxicants, including cocaine at the
6 time of the homicide?

7 A. I don't know.

8 Q. So, the answer is no?

9 A. The answer is I don't know.

10 Q. Is it your opinion that he was under the
11 influence of any intoxicants at the time of the homicide?

12 A. I don't know.

13 Q. You don't know what your opinion is?

14 A. I don't know the answer to your question.

15 Q. The answer is it your opinion or is it not
16 your opinion?

17 A. I don't have an opinion as to whether he was
18 intoxicated at the time of the crime. I don't know the
19 answer to your question.

20 Q. But, your opinion that the defendant was
21 cocaine dependent was based on this 1971 psychological
22 evaluation that didn't mention intoxicants or drugs at
23 all, the 1977 evaluation that talks about pot use, and
24 the 1979 PSI, where the defendant says he does not drink
25 alcohol at all, and remarks in the PSI that was provided

1 to the Court and is dated November 16th, 2007, the
2 final copy was provided today, indicating that he used
3 pot since age 13 and in January of 1991 became addicted
4 to crack cocaine, as well as evaluations that occurred
5 in 1996, '98, '99, 2000, and test results from MMPI,
6 test results from 1990 to 1996, you're using all of that
7 to determine that in 1988, at the time of this homicide
8 the defendant was cocaine dependent?

9 A. Well, you left out where he admitted that he
10 was preparing to shoot up cocaine after killing her.

11 Q. And that?

12 A. And that, yes, I'm relying on Mr. Barnes'
13 statement, that he was about to inject cocaine after
14 carrying out this homicide.

15 Q. So, it is just the fact that he indicated to
16 you that he was going to inject some cocaine after the
17 homicide that led you to believe that he was cocaine
18 dependent at the time of the crime?

19 A. No, all of what you just referred to.

20 Q. Most of which occurred afterwards?

21 A. No, we have an individual that began drug use
22 at age 13, proceeded to become involved in the use of
23 speed, heroine, then crack cocaine, IV cocaine.

24 Q. When did he become involved in these other
25 items?

1 A. I don't know the exact date. It just had
2 reference in the psyche evaluation and the PSI.

3 Q. The PSI refers to him using marijuana at age
4 13?

5 A. Marijuana, 13, heroine and speed, soon there
6 after. He is addicted to crack cocaine in '91,
7 following his dad's Baker Act, because of crack cocaine
8 use in 1988, he's admitting that he's shooting up
9 cocaine after killing the victim.

10 Q. And the defendant admitted to becoming
11 addicted to crack cocaine in 1991; isn't that true?

12 A. I don't believe he has admitted to it or not.
13 His parents forced the issue ex-party in 1991. So, I
14 don't know if it is an admission or not.

15 Q. But, that's something in the PSI that you said
16 you relied on?

17 A. Yes.

18 Q. What are the symptoms of someone who is under
19 the influence of crack cocaine? What are some of the
20 symptoms?

21 A. A person may be quite agitated. They often
22 times are irritable, excitable. They're making
23 decisions in kind of often a half hazard way without
24 considering the consequences of their actions.
25 Sometimes their actions are often aggressive, erratic,

1 not goal oriented. Their judgment appears to be
2 impaired or simply focused on the drug intoxicating
3 effects, and then soon thereafter acquiring more of the
4 drugs for the same intoxicating effect.

5 Q. And would this also be the symptoms of
6 somebody who was an IV cocaine user?

7 A. Soon after the cocaine was ingested; yes.

8 Q. And it is your opinion that the murder itself,
9 the 1988 murder, was actually well planned; wasn't it?

10 A. From the records I reviewed; yes.

11 Q. And then, at the time of the 1988 murder, the
12 defendant has the ability to appreciate the criminality
13 of his conduct?

14 A. Yes.

15 Q. And he had the ability to conform his conduct
16 to the requirements of the law?

17 A. Yes, if he had chosen to do so; yes.

18 Q. In fact, you indicated that with regard to the
19 rape and the homicide in 1988 there is no doubt -- you
20 had no doubt about his ability to control the
21 circumstances?

22 A. Yes, there are several examples of him making
23 efforts to control the circumstances around this woman's
24 death.

25 Q. And that behavior is actually contrary to the

1 behavior that would be exhibited of somebody that was
2 intoxicated or on drugs at the time of the crime?

3 A. To some extent, yes. It depends upon the
4 amount of the intoxication or the particular drug. But,
5 we don't see the erratic agitated disoriented type of
6 behavior in this crime that you might see in some
7 individual who is on crack cocaine at that moment.

8 MS. GARRETT: One moment, Judge.

9 BY MS. GARRETT:

10 Q. So, just to clear this up, you're indicating
11 now that the cocaine dependence is not a diagnosis that
12 you're making of an extreme mental disturbance?

13 A. Extreme mental disturbance is not a
14 diagnosis. A diagnosis is cocaine dependence taking
15 separately is not necessarily extreme mental disturbance
16 in a death penalty in my opinion in terms as a death
17 penalty statutory mitigator.

18 Q. I worded that bad. You're indicating that you
19 are not making a diagnosis of cocaine dependence; is
20 that correct?

21 A. No, my diagnostic impression is of cocaine
22 dependence in this chase, as well as the other
23 diagnostic information that I shared with the Court that
24 supports the extreme mental disturbance as a mitigator.

25 Q. Your treating diagnosis and diagnostic

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1 impression as meaning the same thing or do they mean
2 different things to you?

3 A. Because my evaluation is limited in this case
4 they mean different things to me.

5 Q. What is the difference between a diagnostic
6 and a diagnosis impression?

7 A. My impression here has to do with much
8 information gathered through third-parties. A diagnosis
9 usually involves more direct observation of the
10 individual, information from them, as well as direct
11 observation of behaviors that would reflect the mental
12 disorder. I have enough historical information that
13 confirmed mental disorder, narcissistic and borderline
14 characteristics that you see in psychopathic
15 individuals. I don't have direct observation of
16 Mr. Barnes in terms of his cocaine intoxication or
17 cocaine dependence. All I have is some of the
18 information that we talked about earlier.

19 Q. Is diagnostic impression a term that is
20 accepted in your field?

21 A. Yes.

22 Q. And does a diagnostic impression carry with it
23 the same weight that a diagnosis would?

24 A. No, the diagnosis would carry more weight.
25 Again, like I mentioned earlier, usually there are

1 direct observational aspects of data, psycho
2 physiological data that would support the diagnoses.
3 The diagnostic impression has much more to do with
4 third-party information that you get from other sources
5 that are not as supportive as you would like to reach a
6 full diagnoses.

7 Q. So, it can only be -- you can only give as
8 much weight at it as you might give weight to the
9 sources that you rely upon?

10 A. Certainly. If a third-party sources are
11 faulty, if certain data in Mr. Barnes' case is
12 inaccurate then that further limits my evaluation
13 findings.

14 Q. And I think you've indicated that cocaine
15 dependence in and of itself, that your diagnostic
16 impression of cocaine dependence, and we have gone over
17 what we based that on, that that in and of itself is not
18 an extreme mental or emotional disturbance for purposes
19 of mitigation?

20 A. In my opinion, that's correct.

21 Q. Your next diagnosis or diagnostic impression
22 was anti-social personality disorder. Is that again an
23 impression?

24 A. No, there is a significant amount of issues
25 that support that again. If the history is accurate

1 then a personality diagnostic information that is right
2 here about the personality disorder and the borderline
3 narcissistic characteristics have to do with a
4 psychopathic individual in Mr. Barnes then we can be
5 confident in its accuracy.

6 Q. So, are you calling that -- are you giving
7 your opinion as a diagnosis or as a diagnostic
8 impression, that Mr. Barnes suffered from anti-social
9 personality disorder at the time of the 1988 homicide?

10 A. To me it's a diagnosis. The historical
11 information that we rely upon, is behavioral in nature
12 for this particular diagnosis.

13 Q. But, there was no testing or anything that you
14 did with regards to making this assessment?

15 A. Not that I did. The testing done beforehand
16 strongly supported the diagnoses.

17 Q. And did you attempt to verify any of the
18 information that you relied upon in making this
19 diagnosis?

20 A. No.

21 Q. And you did not rely on family history for
22 this diagnosis; is that accurate?

23 A. No, that is accurate. I did not rely solely
24 upon family history. No, I didn't. That wasn't
25 necessary.

1 requires attention, considers himself to be entitled.
2 He's exploitive of other people. He lacks empathy. At
3 times he can be rather arrogant.

4 Q. Now, you're reading from a book.

5 A. I'm reading the diagnostic characteristics
6 that match the diagnoses that I mentioned earlier in my
7 testimony.

8 Q. Which diagnostic characteristics were you
9 reading, anti-social personality or the other ones you
10 referred to?

11 A. I was reading the anti-social personality
12 disorder criteria as well as the criteria which is the
13 borderline and the narcissistic individual.

14 Q. And were you reading symptoms in general or
15 were you reading from what you specifically found in the
16 symptoms of Mr. Barnes at the time of the 1988 homicide?

17 A. I was reading criteria that reflects his
18 history that I think were also present at the time of
19 the 1988 homicide.

20 Q. What specifically did you rely upon to come up
21 with the diagnosis of anti-social personality disorder,
22 if the family history didn't play a big role? It was
23 more of a behavioral diagnosis? What did you rely upon
24 for that?

25 A. Um, the police reports, the witness

1 statements, defendant's statements, his criminal record,
2 the prior police reports, the DOC medical records, his
3 correspondence, information from Mr. Bardwell's
4 investigator.

5 Q. Did you rely upon information that was
6 obtained after the 1988 homicide?

7 A. Yes, there was information after 1988.

8 Q. What information did you rely upon that was
9 obtained after the 1988 homicide?

10 A. I don't know off the top of my head. I'm
11 going on the PSI. The information in the PSI dates way
12 back. All the DOC medical records, a lot of them are
13 after the 1988 homicide. They make reference to before
14 the 1988 time period. There are correspondence that
15 Mr. Barnes admitted preparing to shoot up the cocaine
16 right after the homicide. That's after 1988. The
17 letter is written in 2005. So, there is information
18 that is dated after 1988, but it's referring back to
19 prior to 1988.

20 Q. Did you use information that occurred after
21 1988 in coming up with the diagnosis of anti-social
22 personality disorder?

23 A. Yes. I mean, a good example was his criminal
24 records. If you look at the criminal record past 1988,
25 it continues, the multiple arrests and convictions,

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1 suggesting anti-social behavior on his part, that would
2 be reflective of the anti-social personality disorder
3 diagnosis.

4 Q. You indicated to the Court that 40 percent of
5 the prison population suffers from this disorder?

6 A. Yes, that is the estimated frequency and the
7 research, about 40 percent of the criminal population,
8 the male population, meet the criteria for the diagnosis
9 of an anti-social personality disorder.

10 Q. And in your opinion did this disorder affect
11 the defendant's ability to appreciate the criminality of
12 his actions in 1988 when he was committing the homicide?

13 A. No.

14 Q. Did it effect his capacity to conform his
15 conduct to the law?

16 A. No.

17 Q. Okay, I think your third diagnostic impression
18 was personality disorder not otherwise specified.

19 A. Yes, ma'am.

20 Q. And is that a diagnosis or a diagnostic
21 impression?

22 A. That's a diagnosis.

23 Q. And did you do any direct testing or
24 evaluating yourself?

25 A. No.

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1 Q. What did you use to determine this personality
2 disorder existed in 1988, at the time of the homicide?

3 A. All the information that I testified to
4 earlier.

5 Q. Did you use family history?

6 A. Yes.

7 Q. And did you verify any of the family history?

8 A. No.

9 Q. Where did you get the family history from?

10 A. From the information in the PSI, the
11 information from the DOC records, and through the
12 investigator of Mr. Bardwell's office.

13 Q. And again, what are the symptoms of this
14 specific personality disorder, not otherwise specified,
15 and I think you had something about borderline
16 narcissistic as well?

17 A. Do you want me to repeat this?

18 Q. First of all, tell me what your entire -- what
19 the entire diagnosis is, personality disorder not
20 otherwise specified, and I think you had a more
21 explanation of that. You called it borderline and
22 narcissistic.

23 A. It includes borderline and narcissistic
24 characteristics. Earlier you had asked me about the
25 extreme mental disturbance criteria for statutory

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1 mitigator. At that time I described from the diagnostic
2 manual, the criteria that I was referring to for the
3 Court. That includes my testimony about the anti-social
4 personality disorder and the characteristics of the
5 borderline narcissistic individual. That was also part
6 of my diagnosis.

7 Q. But, I'm trying to separate them out. So,
8 what are the characteristics of somebody suffering from
9 personality disorder not otherwise specified and
10 borderline narcissistic characteristics?

11 A. I understand that you're trying to separate
12 them out, but that's not how the individual operates.
13 There is a complex of all different cases. You have an
14 anti-social individual and you also have an individual
15 who has a pattern of very unstable and intense
16 inner-personal relationship. He is impulsive in a
17 number of areas like substance abuse, sexual activity,
18 reckless type of activity. You often see an emotionally
19 instability. They may be very irritable, anxious, then
20 calm and collective.

21 They may be inappropriate and tend to manipulate
22 and often will result in aggressiveness, there's a
23 grandiose quality of the person. They believe
24 themselves to be somewhat special and require attention,
25 admiration, maybe feel entitled. Often times they are

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1 exploitive of other people. They lack empathy.
2 Sometimes they behave in rather arrogant ways. I'm
3 describing a psychopathic person for you.

4 Q. Okay. Now, psychopath is a description. It
5 is not a diagnosis; is that correct?

6 A. Correct.

7 Q. Which of these did you find in the defendant,
8 the symptoms that you've just read, are these all what
9 you found in the defendant's behavior?

10 A. I think many of the characteristics would
11 identify Mr. Barnes.

12 Q. Which ones --

13 A. The ones that I said, I believe in my opinion
14 describes Mr. Barnes.

15 Q. Okay. And the fact that you found these to
16 exist at the time of the 1988 homicide, that is how you
17 come to the opinion that this personality disorder not
18 otherwise specified existed at the time of the crime; is
19 that correct?

20 A. It's my opinion that it exist at the time of
21 the crime and before the crime and today.

22 Q. But, that wasn't the question. My question
23 was by finding that these symptoms existed in 1988 at
24 the time of the crime, that's how you come to the
25 conclusion that the defendant was suffering from this

1 personality disorder at the time of the crime, or is it
2 not?

3 A. I'm not sure I understand your question. But,
4 at the time of the 1988 homicide it's my opinion that
5 Mr. Barnes met the criteria for a diagnosis of
6 anti-personality disorder, personality disorder, NOS,
7 borderline narcissistic characteristics, and he was
8 dependent on cocaine.

9 Q. And do you base that on the fact that there
10 were symptoms that go along with these diagnoses, the
11 symptoms that lead you to believe that the defendant was
12 suffering from personality disorder at the time of the
13 homicide?

14 A. Yes.

15 Q. Specifically what symptoms did you find
16 existed in 1988, at the time of the homicide, that led
17 you to this conclusion?

18 A. Just what I said.

19 Q. Okay, the list that you just gave me, all of
20 those?

21 A. Yes, ma'am.

22 Q. Let's start with unstable and intensive
23 relationships, what did you base that on?

24 A. Um, let's begin with the Presentence
25 Investigation. Um, I'm not sure which one this is.

1 There are so many. But, this one I think was from 1991.
2 He refers to -- the father refers to a personality
3 conflict with his oldest sister, Beth, where he breaks
4 her nose by punching her. I think that is a tense and
5 volatile relationship.

6 Um, he had been diagnosed as a sociopath by the
7 mental health department as well during that time
8 period. He has been known to assault everyone in his
9 family.

10 Q. Is this the father's statement in the 1991 PSI?

11 A. I don't know who's statements they are. Brian
12 Barnes.

13 Q. Including the -- you've indicated that the
14 defendant had been diagnosed as a sociopath. Is that
15 from the PSI, the father's statement in the PSI?
16 Where did you get that information.

17 A. There's a paragraph that says, according to
18 Brian Barnes, the father, states that Mr. Barnes has
19 assaulted all the family members. Couple paragraphs
20 down there's simply a statement he attended mental
21 department for psychological counseling and was
22 diagnosed as a sociopath. I don't know who that
23 statement was attributed to. It's just in the PSI.

24 Q. Okay.

25 A. I'm looking for more examples of intense

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1 volatile relationships as a child, adolescence, uh, I'm
2 looking for the reference to the sexual abuse. And then
3 in the psyevaluation from 1977 shoots his brother with
4 a BB gun. Stealing from his brothers and sisters. He
5 begins living in a home of a suspected homosexual. This
6 is when he was an adolescence, often truant from school.
7 I suspect that relationship was also quite dysfunctional.

8 Q. What relationship was that?

9 A. The relationship with Mr. Vitally (phonetic)
10 he has referencing here. Onward into the record there's
11 reference to the father hitting Mr. Barnes with his fist
12 in elementary school; another reference to him being
13 stabbed in the stomach by a sibling. I was looking for
14 it earlier. There was a relationship out in Tulsa,
15 Oklahoma with an adult female that involved domestic
16 violence and drug use between them but I couldn't find
17 the reference during the break. Another example of a
18 volatile relationship.

19 Q. Okay, let's move onto impulsivity.

20 A. At age two he broke into a mail truck and took
21 an envelope with a check in it. He also took his
22 father's blank check book a tried to cash it at an
23 earlier age, many examples of threatening to do away
24 with himself, exposing himself sexually.

25 Q. Those are indicators of impulsivity?

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1 A. If a child came into my office and a parent
2 reported those behaviors to me I would be concerned
3 about their ability to control their behavior and
4 consider it to be impulsive; yes.

5 Q. How do you describe -- describe for the Court
6 what --

7 THE DEFENDANT: Objection, Your Honor. What
8 is he reading from? What is it that he has that I
9 don't have? Is this the PSI?

10 THE WITNESS: Do I answer the question?

11 THE COURT: I'm sorry, if there is an
12 objection, the objection is that the defendant
13 doesn't know what you're reading from. So what are
14 you reading from?

15 THE WITNESS: I'm reading from the PSI that was
16 prepared, I think May of 2007.

17 THE DEFENDANT: And you're saying it said in
18 there that I exposed myself?

19 THE COURT: Wait, wait, wait.

20 THE DEFENDANT: I'm objecting. I don't have
21 this information.

22 THE COURT: You don't have that PSI?

23 THE DEFENDANT: I just read this PSI and I got
24 to say, I don't know where he got this -- is that
25 the PSI you're reading from directly that you're

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1 reading from?

2 THE WITNESS: It's included in the PSI.

3 THE DEFENDANT: What page?

4 THE WITNESS: Page 16.

5 THE DEFENDANT: I would see where he is
6 reading from I would like to know where he got that
7 page.

8 THE COURT: I'll overrule the objection. I
9 will allow you to cross examine the doctor. Go
10 ahead, Ms. Garrett.

11 BY MS. GARRETT:

12 Q. Any information that led you to believe that
13 the defendant was suffering from impulsivity at the
14 1988, at the time of the homicide?

15 A. Again, the information contained in the psych
16 evaluations, the one dated 1971, the one dated 1977, uh,
17 I think the criminal record would suggest the
18 possibility of somebody who is unable to control their
19 behavior at times, frequent arrests for aggravated
20 assault, battery, suggest a rather impulsive
21 aggressiveness.

22 Q. How are you defining impulsivity?

23 A. Poorly controlled behavior, carried out at a
24 moment's notice.

25 Q. Is there any sign of impulsivity in the

1 actions that you know about with regard to the murder of
2 Patricia Miller in 1988?

3 A. As I testified to earlier in my deposition,
4 there are moments during the '88 offense, particularly
5 with regard to the torturous sex acts that might suggest
6 some impulsivity where Mr. Barnes is simply making
7 decisions at the moment to gratify himself. They're not
8 so planned fully as the entire offense itself.

9 Q. The murder, the homicide, the killing of
10 Patricia Miller was planned; do you agree with that?

11 A. Given what Mr. Barnes had admitted to; yes.

12 Q. Given the information that you have been
13 provided?

14 A. Yes.

15 Q. And the sexual battery of Patricia Miller were
16 planned?

17 A. Yes, he planned to sexually batter her; yes.

18 Q. And the disposal of evidence was carried out
19 as well in a controlled manner?

20 A. Yes.

21 Q. As well as the disposal of Patricia Miller's
22 body?

23 A. Correct.

24 Q. How do you reconcile that with impulsivity?

25 A. A person can be planfull and also impulsive.

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1 He plans out the offense and in the midst of the offense
2 he makes impulsive decisions about his treatment of the
3 victim.

4 Q. And is that what you found in this case?

5 A. From my review of the evidence at times he
6 appears to be making some certainly harmful choices in
7 terms of the victim, impulsive decisions on his part
8 most likely then to gratify him at the moment.

9 Q. What behavior during the homicide, the sexual
10 battery and homicide of Patricia Miller do you consider
11 to be impulsive behavior?

12 A. His different sex acts that he momentarily
13 chooses to carry out on the victim, the anal sex act,
14 some of the other things he carried out appear to be
15 somewhat impulsive in at least the choosing at the
16 time. They are meant to be gratifying to him I'm sure
17 at the moment. He is not planning them at the moment.
18 He's planned the offense, but he's making impulsive
19 decisions from moment to moment as he rapes and kills
20 this woman.

21 Q. How do you know that he's not planning those
22 specific acts? What information do you have
23 that supports that?

24 A. I don't know if he actually planned them
25 purposely. It doesn't appear to be so from his

1 writings. It appears to be most likely that he was
2 fantasizing about them no doubt, but I don't have a
3 sense that he went through what you might see in an
4 obsessive controlling individual who has to carry out
5 each act one right after the other without any kind of
6 deviation. I don't see that occurring.

7 Q. He made the decision to commit the act before
8 he committed it, didn't he?

9 A. Yes.

10 Q. You don't consider that to be planning?

11 A. Which acts are we talking about?

12 Q. The sexual acts that were committed on
13 Patricia Miller. There was a decision to do each act
14 before it was done.

15 A. Yes, it was a choice. Sometimes the choices
16 are planfull. Sometimes they are impulsive.

17 Q. How are you able to determine which are
18 planned and which are impulsive?

19 A. I'm simply reviewing some of the information
20 that appears from his telling of the crime that at
21 different points in time he made decisions that's
22 momentary sexually were most likely to be sexually
23 gratifying to him. Other points in time he's making
24 decision that are very planfull, appears to be motivated
25 to assist him in getting away from the events, not

1 getting caught.

2 Q. So, although it's your testimony that he has
3 planned the sexual battery and he planned the homicide
4 and he's carried them out in a controlled manner, you
5 are indicating to this Court that he has displayed
6 impulsivity in the order of the sexual act or the sexual
7 acts that were done that makes it consistent with a
8 personality disorder diagnosis?

9 A. No.

10 Q. Then what are you telling this Court with
11 regard to impulsivity as it concerns this crime?

12 A. That during the course of the crime the Court
13 might consider the likelihood that Mr. Barnes made
14 impulsive choices to maybe satisfy himself, that
15 focussed on his own sexual interest.

16 Q. I don't think anybody disagrees that he made
17 choices that focussed on his own sexual interest. How
18 is that indicative of the personality disorder that you
19 describe, not otherwise specified?

20 A. A personality is who the person is. You're
21 asking for one piece of behavior to reflect somebody's
22 personality. That is not how a personality works. A
23 personality is characteristics. We have these
24 characteristics in Mr. Barnes' case, the characteristics
25 of lack of concern for other people's feelings, self

1 centerdness, manipulative, impulsiveness, lack of
2 concern of the consequences for his actions, involved in
3 reckless types of behaviors, aggressiveness. This is
4 all in Mr. Barnes. We don't see all of it at once.

5 You're asking questions as if we see this one piece
6 of behavior, that that's someone's personality. That's
7 not how you diagnose a personality disorder. So, if a
8 person is impulsive it doesn't make them have a
9 personality disorder. When we see these characteristics
10 all together, early childhood to adulthood, that
11 constitutes a personality disorder. We see examples of
12 impulsivity in childhood. We see them in adolescence
13 and we see them in adulthood. It was occurring around
14 the time of 1988.

15 Q. Are there any of these symptoms that you see
16 in the crime itself?

17 A. Yes.

18 Q. Which ones?

19 A. Unable to conform to social normalities,
20 conform behavior to the law, deceitful, manipulative,
21 impulsivity, recklessness, disregard for the safety of
22 others, intense inner personally relationship, emotional
23 instability, inappropriate anger and violent actions,
24 feelings of self importance and grandiosity, feelings of
25 entitlement, inner personal exploitation, lack of

1 empathy for others. I see all those characteristics
2 present at the time of the victim's death.

3 Q. Intense inner personal relationship?

4 A. An intense inner personal relationship, yes.

5 Q. What relationship are you referring to?

6 A. His sexual assault of the victim.

7 Q. That created a relationship? Are you talking
8 about a relationship with the victim?

9 A. In his mind he suspected there was a
10 relationship; yes. You've read the letter, I assume?

11 Q. Yes, the letter is in evidence. The Court has
12 it. You indicated that psychopath is the descriptive
13 term, not a diagnosis?

14 A. Correct.

15 Q. So, you wouldn't refer to that as an extreme
16 emotional disturbance?

17 A. Yes, I am referring to it as an extreme mental
18 disturbance. Psychopathy, the psychopathic individual
19 is an individual with an extreme mental disturbance.
20 The terminology we use to describe that person often
21 includes the anti-social as well as the borderline
22 narcissistic criteria.

23 Q. So, the defendant was suffering from
24 psychopathy at the time of the 1988 homicide?

25 A. Suffering is your word.

1 Q. What word would you use?

2 A. Met the criteria for that type of
3 personality.

4 Q. But it's not a diagnosis?

5 A. It's a descriptive term that often includes
6 the anti-social as well as the narcissistic and
7 borderline personality characteristics that are
8 diagnostic labels that we rely upon in our profession.

9 Q. Is it your opinion that the defendant was
10 suffering from any type of frontal lobe damage at the
11 time of the homicide in 1988?

12 A. I don't know.

13 Q. Does that mean you have not been asked to
14 render that opinion?

15 A. You just asked me to render the opinion.

16 Q. Do you have any evidence of -- do you have any
17 evidence that the defendant was suffering from a frontal
18 lobe injury at the time of the 1988 homicide?

19 A. No, I have no neuropsychological testing. I
20 have references to medical records that might suggest
21 the possibility of that type of damage or frontal lobe
22 abnormality, but I have no direct evidence of it, in
23 terms of any neurological testing and neuropsychological
24 testing.

25 Q. Did you say you have medical records? What

1 information do you have that you are relying on?

2 A. Information from Mr. Bardwell's investigator
3 who provided historical data regarding Mr. Barnes' birth.

4 Q. And in what form was that, interviews with
5 family members?

6 A. Yes.

7 Q. Anything else you relied upon?

8 A. There is a DOC health appraisal that offers
9 some information, refers to the occurrence of childhood
10 diseases in his case, as well as a head injury,
11 dizziness. But, I didn't refer to it. So, I didn't
12 weight this very heavily in my opinion.

13 Q. When was the head injury alleged to have
14 occurred?

15 A. According to this, it occurred in '91, which
16 would be after the 1988 homicide.

17 Q. Other than that DOC health appraisal, did you
18 have any medical records?

19 A. No, my understanding was they were not able to
20 obtain the medical records because of their age. I
21 think it was in Maryland.

22 Q. So, you based it primarily on this history
23 provided by family members communicated to Terry Sirois?

24 A. Based --

25 Q. Your determination that the defendant could

1 possibly have a frontal lobe injury, that he had
2 symptoms consistent with a frontal head injury?

3 A. That's not my testimony.

4 Q. What is your testimony with regards to the
5 frontal lobe injury? Do you have a opinion that the
6 defendant has a frontal lobe injury?

7 A. Excuse me?

8 Q. Are you of the opinion that the defendant, at
9 the time of the 1988 homicide, was suffering from
10 frontal lobe damage?

11 A. I don't know.

12 Q. So, you render that opinion because you don't
13 know?

14 A. That's correct.

15 Q. Well, we talked quite a bit about fetal
16 distress and him being borne prematurely and his mother
17 drinking and smoking. How does that weigh in your
18 opinion with regards to the defendant's mental or
19 emotional disturbances?

20 A. (No response.)

21 Q. Does that add anything at all to your opinion
22 with regard to the defendant suffering from extreme
23 mental and emotional disturbance at the time of the
24 crime?

25 A. I'm going to try to connect this for you.

1 Mr. Bardwell provided me some historical information
2 that might suggest the occurrence of this brain
3 abnormality. We know that this sort of brain
4 abnormality is often times seen in psychopathic
5 individuals. He asked me to do research in relation to
6 that particular issue.

7 Q. So, your testimony was primarily research of
8 other experts in the area?

9 A. Based upon what Mr. Bardwell requested of me.

10 Q. But, you are not testifying at all that the
11 defendant had had a frontal lobe injury at the time of
12 the 1988 crime?

13 A. I don't know. I don't have such data to offer
14 that kind of opinion.

15 Q. So, your testimony is solely that -- that
16 research would indicate that premature infants could be
17 suffering from frontal lobe injury?

18 A. Yes, that's possible.

19 Q. And premature infants also do not suffer from
20 frontal lobe injuries?

21 A. Yes, that's correct.

22 Q. And does your research indicate that
23 individuals who's mother drinks or smokes during
24 pregnancy suffer from frontal lobe injury?

25 A. It's possible.

1 Q. And also individuals who's mother drinks and
2 smokes during pregnancy do not suffer from frontal lobe
3 injury?

4 A. Correct, you're describing risk factors. The
5 probability is greater that it will, but sometimes they
6 do not.

7 Q. What does Yellow Fever have to do with it?

8 A. This diagnosis in early childhood has been
9 linked to the occurrence of some sort of brain
10 dysfunction or abnormality.

11 Q. Does everyone who has Yellow Fever then suffer
12 from a brain dysfunction or abnormality afterwards?

13 A. No.

14 Q. Then you have no evidence or indication that
15 the defendant was suffering from a brain abnormality
16 based on his Yellow Fever?

17 A. I don't know.

18 Q. Or the premature birth?

19 A. I don't know.

20 Q. Or his mother allegedly drinking or smoking
21 during pregnancy?

22 A. I don't know.

23 Q. Okay. One of the symptoms of frontal lobe
24 damage and injury is behavior, isn't it?

25 A. Yes.

1 Q. And again, there's no impulsive behavior with
2 regard to the planning of the murder of Patricia Miller,
3 the sexual battery, the murder and the disposal of the
4 evidence and the body. It was a well thought out and
5 planned crime?

6 A. Yes.

7 Q. And that would contradict an individual having
8 a frontal lobe injury; wouldn't it?

9 A. Not necessarily. It's based on the extent of
10 the injury. Some folks might say it supports it.

11 Q. How would it support a frontal lobe injury?

12 A. The dysregulation of a person's ability to
13 control behavior and to act appropriately. The violence
14 of the crime, including the sexual assault, that type of
15 extremely inappropriate behavior or inappropriate action
16 by any individual, may actually support the idea that
17 there is a brain abnormality in this case.

18 Q. But, you indicated that the defendant was able
19 to control his behavior. He was able to conform his
20 behavior to compliance with the law and he was able to
21 appreciate his criminal nature.

22 A. Yes.

23 Q. Isn't that contrary to him being unable to
24 control his behavior based on the frontal lobe injury?

25 A. Well, you asked a hypothetical question, just

1 suggesting it to you that some folks would consider the
2 possibility that the nature of the crime itself would
3 suggest a brain abnormality, which might include
4 planfullness and other aspects of rational or logical
5 behavior. But, the nature of the crime itself that you
6 see in this situation would be hypothetically considered
7 as evidence of brain abnormality itself.

8 Q. What folks would say that planfullness
9 supports a diagnosis of frontal lobe injury?

10 A. It doesn't.

11 Q. Okay, or that it is a symptom of frontal lobe
12 injury?

13 A. It doesn't.

14 Q. You just said some folks would say that
15 planfullness would support --

16 A. No, I said some folks would suggest that the
17 nature of the crime itself, those were my words, the
18 decision to sexually assault a woman across time in
19 numerous ways and then to kill her in a violent fashion,
20 that might be considered some evidence of a brain
21 abnormality itself.

22 Q. Just the fact that the crime occurred?

23 A. The nature of this particular crime.

24 Q. What specifically about this crime, a rape and
25 a homicide?

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1 A. The nature of the rape and the nature of the
2 homicide.

3 Q. Which you agree was well planned?

4 A. Yes.

5 Q. You suggested to the Court that there is a
6 twin study that would indicate that criminal behavior is
7 genetic in nature?

8 A. Yes.

9 Q. And in that study these were twins that were
10 separated at birth or early age?

11 A. They were adopted; yes.

12 Q. And you related this to the defendant, in that
13 the defendant also has a twin who has been involved in
14 criminal behavior, as well?

15 A. Yes.

16 Q. But, this twin was raised by the same parent?

17 A. Correct.

18 Q. So, it is different in the twin study, in that
19 they were not separated at birth?

20 A. That's correct.

21 Q. And the criminal behavior of the twin, does
22 it involve a homicide?

23 A. Not to my knowledge.

24 Q. Does it involve violent crimes of any sort?

25 A. I don't know.

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1 Q. Do you know what the criminal behavior of the
2 twin is?

3 A. All I know is that it involved prostitution
4 and drug addiction.

5 Q. And prostitution is certainly a different type
6 of criminal behavior than sexual battery and homicide;
7 would you agree with that?

8 A. Yes.

9 MS. GARRETT: I have no further questions.

10 THE COURT: Mr. Barnes?

11 CROSS EXAMINATION

12 BY THE DEFENDANT:

13 Q. Yes, I have a couple of questions. First I
14 want to ask is you submitted a report to Mr. Bardwell.
15 Isn't it true that everything I talked to you about was
16 in that report?

17 A. Everything that you talked to me about was in
18 this report?

19 Q. Yes, is it true or not true?

20 A. That's true.

21 Q. Was the information that you received in that
22 evaluation, was it accurate?

23 A. To my knowledge.

24 Q. You don't know whether it was or was not?

25 A. I did not verify it.

1 Q. How do you determine if you have accurate
2 information?

3 A. I do rely upon the competence of other
4 professionals that may have carried out testing that I
5 review or collected information that I review. I rely
6 upon them to do it competently.

7 Q. Do you have a standard when checking
8 information?

9 A. Yes.

10 Q. Can you tell me what that standard is?

11 A. I try to collect information that is accurate,
12 as best as possible, in terms of administering tests in
13 a standardized fashion, carrying out testing that is
14 appropriate in the situation. If I interview someone
15 I'm making sure I ask questions about all aspects of the
16 history. That is how I would answer your question.

17 Q. Do you believe that I have a maladapted
18 personality disorder?

19 A. Yes.

20 Q. Can you explain that?

21 A. I think your history since childhood through
22 adolescence into adulthood includes many, many examples
23 of a pattern of maladapted behavior that is a reflection
24 of your personality.

25 Q. Can you explain exactly what a maladapted

1 personality is?

2 A. An individual's personality that does not in a
3 normal or reasonable fashion adapt to the circumstances
4 around them. They act emotionally in a way that is not
5 appropriate in the situation or not adaptive to the
6 situation. They may react in a behavior in ways that is
7 not appropriate in the situation. Their interpretation
8 of relationships is not appropriate or adaptive or
9 functional. There will be a pattern of maladaptiveness
10 seen in the school setting or work setting. In your
11 case the maladaptiveness has included involvement in
12 substance abuse as well. That has proven to be
13 maladaptive.

14 Q. You described psychopathy or anti-social
15 personality disorder.

16 A. Yes, sir.

17 Q. Are you describing a character trait or a
18 mental and physical trait?

19 A. That's a controversy in my file. Some
20 individuals would consider it a mental illness. Others
21 are more likely to describe it a characteristics of
22 one's personality, not necessarily a mental illness that
23 someone suffers from. When I correct the assistant
24 state attorney earlier, she used the words suffers. I
25 wouldn't characterize it as an illness that someone

1 suffers from. I would would characterize it more as
2 these are behavioral patterns that has to do with a
3 person's emotional inner personal lives.

4 Q. You talked a lot about literature?

5 A. Yes, sir.

6 Q. I'm curious as to how exactly who -- I'm going
7 to say the words mastered, whether Freudian or Young,
8 which side of the road do you chose to -- I mean, I
9 don't want to go (inaudible) or anything like that. I
10 would just like to know that in your field of study, as
11 a normal psychologist, who basically is the person that
12 you would like to emulate that literature?

13 A. In forensic psychology might be an individual
14 by the name of Ried Meloy, M-E-L-O-Y.

15 Q. And explain to me why?

16 A. He's a psychologist like myself. His
17 specialty is in the area of forensic psychology like
18 myself. He's particularly knowledgable in terms of
19 explaining an individual's involvement in some sort of
20 criminal behavior, not just by relying upon cognitive
21 explanation or emotional explanation or biological
22 explanation, but he's well versed in the research of
23 psychology that has to do with biological, sociological,
24 as well as the emotional and cognitive types of research
25 data, and he brings it together and offers that

1 integrated type of explanation to course attorneys in a
2 relation to a variety of forensic matters.

3 He's written a number of texts that are very well
4 respected because of that ability to bring information
5 together from a variety of areas to try to explain
6 criminal behavior.

7 Q. Do you believe that he focuses on organic
8 brain abnormalities or something (inaudible)?

9 A. Both. He tries to explain an individual's
10 behavior through not just organic but also other types
11 of combined influences.

12 Q. You gave a couple of hypotheses, and I'm
13 confused on a couple of issues. One would be I asked
14 you during the deposition if you had verified any of the
15 information and you had said you had not, that you are
16 taking information that was given to you and came up
17 with your opinion based upon that, and I asked the
18 question specifically is there anything that you
19 reviewed or viewed that you would think would change
20 your opinion?

21 So, this is the question. You've said that I'm
22 very manipulative on very many occasions during this
23 cross examination. Do you believe that I have
24 manipulated any of the evidence that has come in in this
25 case, any of the information that you've reviewed?

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1 A. I don't believe that you manipulated any of
2 the evidence that I reviewed. I'm not aware of you
3 having manipulated any of the evidence that I reviewed.

4 Q. If you had been made aware or was aware that I
5 had, would that change your opinions concerning any of
6 the personality disorders that you have described?

7 A. I don't know if it would or not. I would have
8 to know the nature of the information that you
9 manipulated. On the one hand, that you had possibly
10 manipulated information coming before the Court would
11 support my deceptiveness of you in terms of
12 deceptiveness in a manipulative type of behavior.
13 Whether it would change my opinion about it in some
14 other way, I would have to know the nature of the
15 information that you manipulated.

16 Q. What information that you reviewed to base
17 your opinion on if you realize was manipulated or
18 deceptively given to you would make you change your
19 opinion?

20 A. I don't know what information would cause me
21 to change my opinion. But, to answer your question, if
22 I learned that there was information that was inaccurate
23 or manipulated I would certainly reconsider my opinion
24 upon learning about that inaccurate or manipulated
25 information. I just don't know if it would change my

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1 opinion. But, I would reconsider my opinion.

2 Q. What information did I submit that you
3 reviewed that would make you call me deceptive?

4 A. There's acts of deceptiveness on your part
5 when you describe the crime. I'm not aware of any other
6 information that you submitted.

7 Q. Is there any information that you have
8 reviewed, that if it was taken out, say my
9 correspondence, would change your opinion about me?

10 A. If we take your letter away from the evidence,
11 I would be more than likely offering the same diagnostic
12 impression of you. I'm not sure I could testify to the
13 Court with regard to an extreme mental disturbance
14 mitigator that is apparent in the writing of that letter
15 because it details the crime, and I'm particularly
16 interested in your mental state at the time of the crime.

17 Q. Did you focus on that letter when you made
18 your opinions?

19 A. No. I gave it weight, but I did not focus on
20 it. I focussed more on the behavioral history.

21 Q. I heard you answer a lot of questions that the
22 State had asked you, and repeatedly you went back to the
23 manipulative and impulsiveness and deceptiveness and the
24 emotional distress and the dependence on cocaine. Did
25 you get all that information from that letter?

1 A. No.

2 Q. Where else did that information come from?

3 A. As I mentioned earlier, there's information in
4 a number of the psychological evaluations and PSI's that
5 referred to your history of substance abuse, your
6 history of impulsive and aggressive behaviors are also
7 included in these psych evals and PSI's.

8 It's referenced also in some of the DOC records, in
9 terms of the family history that includes abuse. Also
10 in the DOC records has reference to your alcohol and
11 drug dependence. The criminal records that I referred
12 to also include a lot of data that that supports the
13 anti-social aspects of your personality.

14 Q. Did the cocaine use come up in any of the
15 information you had before that crime, in 1988?

16 A. Well, your letter refers to it. The other
17 references are subsequent. I mean, they are talking
18 about cocaine, alcohol, drug use, like methamphetamine,
19 speed, heroin, throughout your adolescence and early
20 adulthood. You referenced to the cocaine in the
21 letter. I guess two to three years later your parents
22 are putting in you substance abuse treatment for cocaine
23 addiction.

24 Q. You talked about cocaine dependence.

25 A. Yes.

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1 Q. During the episode as the extreme emotional
2 distress. Anywhere in the police reports, anywhere
3 in the PSI's, anywhere it Terry Sirois' investigative
4 report did you find that I had used cocaine prior to
5 that night in 1988?

6 A. As we sit here, the only place I recollect it
7 being reported is in your letter.

8 Q. The State had asked you how you verify cocaine
9 dependence before then. Also, you've referenced that I
10 used heroine and methamphetamine. Could you reference
11 the heroine and the methamphetamine before 1988?

12 A. It's in the PSI. When you used those drugs,
13 it is not referenced in that information.

14 Q. I know it's going to sound redundant, but I
15 need to ask you one more time. We talked about
16 cocaine, emotional distress, cocaine dependence. We
17 talked about planfullness, and I heard all the questions
18 that were asked. There's a letter that was written and
19 submitted, and everybody keeps referring to this, and
20 this is the base where a psych eval or some sort of
21 disorder, the deviant behavior that I had presented came
22 from. Hypothetically, if I were to tell you that I
23 wrote that letter and made up 90 percent of what
24 happened because I was pissed off at the State Attorney,
25 would you change your opinion?

1 A. My opinion would be changed. I wouldn't be as
2 certain about the cocaine dependence. I would continue
3 to be certain about the personality disorder diagnoses.
4 Based upon the evidence from the crime scene, the
5 violence that was carried out in relationship to the
6 victim, my opinion would be changed in relationship to
7 that. So, my opinion would be changed, to answer your
8 question; yes.

9 Q. Do you believe that I had any prior
10 relationship with the victim, prior to that night in
11 1988?

12 A. I don't know.

13 Q. I'm asking your opinion. You've given it a
14 lot today, so I'm going to ask it.

15 A. I don't know. I don't have an opinion. I
16 answer honestly. I don't know if you had a relationship
17 with the victims beforehand.

18 Q. Do you believe that would change your opinion
19 if you knew that I had a previous relationship with this
20 woman?

21 A. Yes, it would change my opinion.

22 Q. Do you find anywhere in the police reports, in
23 the PSI or in Ms. Sirois' investigative report, which
24 she submitted, saying that I had had a previous
25 relationship with this witness?

1 A. I don't remember any reference to you having a
2 personal relationship with the victim beforehand.

3 Q. But, if you did know today that I did have, it
4 would have changed your opinion in which way?

5 A. At this date it would -- I would find it more
6 troubling that you could sexually assault and kill
7 someone that you know the way you did so in this matter.

8 Q. The sexual assault was written into that
9 letter, was it not?

10 A. My recollection of the evidence is that there
11 is, from the crime scene and examination of the body,
12 evidence of a sexual assault.

13 Q. Would your opinion change if you were informed
14 that there was not a sexual assault, that the sex was
15 consensual before the murder?

16 A. I guess it would change. It just doesn't fit
17 the circumstances that I reviewed in relation to the
18 event.

19 Q. Once again, you're referring to the letter
20 that you read; correct?

21 A. No, I'm referring to the police report, how
22 the victim was found. She's brutalized. She's tied
23 face down. It doesn't appear to be consensual sex.

24 THE DEFENDANT: I don't have anything further.

25 THE COURT: Mr. Bardwell?

1 REDIRECT EXAMINATION

2 BY MR. BARDWELL:

3 Q. Doctor, you indicated that 40 percent of the
4 criminal population has what problem?

5 A. Anti-social personality disorder.

6 Q. Does that imply that all those persons would
7 be considered psychopath?

8 A. No, very few of them would qualify to be
9 characterized as a psychopathic individual.

10 Q. Okay, so all persons with an anti-social
11 personality disorder are not psychopaths?

12 A. Correct.

13 Q. But, do all psychopath persons have an
14 anti-social personality disorder?

15 A. That's more likely the case; yes.

16 Q. Now, let's talk about the unstable
17 relationship. Did your research indicate that this man
18 murdered a wife?

19 A. Yes, sir.

20 Q. Now, is that any indication in your mind of a
21 an unstable relationship?

22 A. Yes.

23 Q. Is it profound, minimal? How would you
24 characterize the degree of instability of a relationship
25 that ended in a homicide?

1 A. Very intense, very volatile, very unstable.

2 Q. Now, let's see, in the absence of diagnostic
3 testing, and we're talking about objective diagnostic
4 testing, you can't express a certain opinion about any
5 brain malfunction or dysfunction that he may or may not
6 have, Mr. Barnes?

7 A. That's correct.

8 Q. But, can you express a likelihood of a
9 dysfunction or injury of him having that and this type
10 of behavior. Is there any correlation in the studies
11 that have been done in dysfunction or injury in that area
12 and this type of intense violent behavior?

13 A. Yes, that's what I testified to earlier. The
14 correlation is there. We continue to see in the
15 research between some sort of brain dysfunction or brain
16 injury contributing to psychopathic behavior.

17 Q. How strong is this correlation?

18 A. It is significantly significant. And in
19 saying that you need to be careful about how you
20 interpret the statistics. More often than not we are
21 not necessarily identifying a certain type of phenomena
22 that is there, but it's 99 to a hundred percent
23 likelihood, a probability that it is there.

24 Q. Let's talk about this personality disorder.
25 How persistent is a personality disorder?

1 A. It's an enduring pattern throughout the
2 individual's lifetime, evidenced in typically
3 adolescence through adulthood. It is persistent.

4 Q. Can a person who has a personality disorder in
5 adolescence and as an older adult, is there any
6 likelihood that between the intervening period of time
7 they also have a mental disorder?

8 A. It is continuous. So, the pattern is
9 persistent, enduring and across time.

10 Q. Is it subject to any kind of change that
11 you're aware of?

12 A. Certain personality disorders respond to long
13 term psycho therapy efforts. We're talking about many
14 years of treatment. Sometimes use of medications, but
15 by and large you would see some change that allows a
16 person to adapt to their living situation. You can
17 still see the characteristics, but just not as extreme
18 or severe.

19 Q. But, in the absence of that type of
20 intervention what is the likelihood that a person who
21 is, let's say a psychopath at age 14, is not going to
22 have that characteristic later in life?

23 A. You see the likelihood is it is going to
24 continue. It's going to be enduring. We do see in the
25 research into the 40's that the psychopathic

1 individuals become less problematic to society, for
2 whatever reason. We don't know for certain. But,
3 through adolescence and the twenties and thirties,
4 psychopathic individual evidence continuance
5 characteristics.

6 Q. Is there a huge distribution of psychopath
7 according to gender?

8 A. Yes.

9 Q. And skewed in who's favor?

10 A. We see more men identified as psychopathic
11 individuals than women.

12 Q. Is there any correlation between the social
13 problems caused by male psychopaths and their decline in
14 testosterone?

15 A. Yes, that is the age related research that we
16 are talking about earlier. As they get older you see
17 less aggressiveness, less impulsiveness, less change in
18 their mood. They appear to be less psychopathic.

19 Q. Let's focus on this twin study. Now, the
20 purpose of studying twins is what? Why would you want
21 to study twins as opposed to unrelated persons?

22 A. So you can rule out environmental influences
23 and control the genetic predisposition of the
24 individuals.

25 Q. And the reason that researchers are excited

1 about studying separated twins is what?

2 A. Because they still have control of the genetic
3 predisposition, the genetic factors, and they can follow
4 those, and no matter what the environmental influence
5 might be, depending upon one twin or the other, they can
6 see how the genetic predisposition, how that's weighted
7 in terms of effecting the personality or developmental
8 behavior.

9 Q. So, the fact that this gentleman may have been
10 raised in the same household as his fraternal twin,
11 would that have any impact on your opinion as to proof
12 of the possibility of a genetic propensity?

13 A. No, it does not subtract the genetic
14 propensity or the predisposition. The genetic factory
15 may be present. Now, you can include in the knowledge of
16 Mr. Barnes' environmental situation, his upbringing.

17 Q. Okay, that is fine. Now, let's talk about the
18 variability of your opinion based upon the accuracy or
19 inaccuracy of any component of what you studied. Can
20 you focus on that?

21 A. Yes.

22 Q. Okay, just focus on that.

23 A. Yes, sir.

24 Q. Now, how sensitive is your opinion to any one
25 source or one study or one evaluation, how sensitive is

1 it to any change or any notion that that report or
2 evaluation could contain any inaccurate information?

3 A. It could cause me to reconsider the
4 information. And when I began my testimony I described
5 all the information that I reviewed, which was a
6 significant amount in this case. I don't foresee within
7 this information, in and of itself, altering my opinion
8 in a manner that would that I think change the general
9 testimony for the record.

10 Q. Okay. Can you tell us whether or not the
11 broad period of time and the amount of information
12 that's available to you, how did you -- what impact did
13 that have in your confidence in your overall opinions?

14 A. It increases my confidence.

15 Q. Why would it increase your confidence?

16 A. Well, I have information, for example,
17 psychological evaluations that date back 20, 30 years in
18 Mr. Barnes' case. I have documented records, medical
19 records, PSI's, that over years and years of information
20 that --

21 Q. But, do you have any opinion as to the
22 likelihood or the ability of any one person to
23 manipulate that substantial information?

24 A. I don't have an opinion. I wouldn't expect
25 that to be the case, if some person would manipulate all

1 this information.

2 Q. Let's focus on the MMPI.

3 A. Yes, sir.

4 Q. Do you see any evidence that somebody
5 manipulated the results of those MMPI's?

6 A. No, the three MMPI's are computer scored. So,
7 unless the individual purposely imputed inaccurate data,
8 and in Mr. Barnes' case, each time -- the computer
9 program that scored each one of these is the same one.

10 The third -- the fourth is a hand scored MMPI. I
11 can't tell you whether that was manipulated or not. It
12 offers similar information than the other MMPI's, so I
13 don't think is it necessarily manipulation by the score.

14 Q. Well, could they, based upon your knowledge of
15 the MMPI's, how likely would it be that an administered
16 of those tests on those particular days purposely
17 manipulated their entries and responses? Do you have
18 any opinion as to the likelihood of undetected
19 manipulation under those circumstances?

20 A. I think that would be unlikely.

21 Q. So, do you see any evidence, based upon your
22 experience, of any manipulation that pervaded the
23 information that you have?

24 A. No, I don't see any pattern of manipulation by
25 anyone. Again, I see the consistency across the

1 different reports and test data. I don't see any
2 pattern of manipulation on efforts to mislead by
3 Mr. Barnes.

4 MR. BARDWELL: I don't have any further
5 questions.

6 THE COURT: Ms. Garrett?

7 RECROSS EXAMINATION

8 BY MS. GARRETT:

9 Q. Doctor, has any mental health provider, other
10 than yourself, diagnosed the defendant with anti-social
11 personality disorder?

12 A. (Reviews documents.) Yes.

13 Q. And who did that diagnosis, and when was it?

14 A. Let's see, just from my review of the data
15 that I have in front of me -- there's a lot more, but
16 this is a psychological screening report from the
17 Department of Corrections. I don't see a date on it.
18 Diagnosis is anti-social tendencies/manipulative.

19 Q. Would that be the same as anti-social
20 personality disorder?

21 A. No, close to. It's hard to know what this
22 person means by it. But, likely they mean similar to
23 what I referred to in terms of anti-social individuals.
24 Another DOC mental health note, dated 2005, diagnosed it
25 as anti-social personality. They used that word,

1 anti-social personality in this one.

2 If you go to the PSI and you find the psych eval
3 that was carried out in 1971, they offer a diagnosis of
4 unsocial aggressive reaction of childhood. Back in 1971
5 that was the conduct disorder of today, which is the
6 precursor and the necessary criteria for anti-social
7 personality disorder.

8 Q. Did anybody other than yourself diagnose the
9 defendant with personality disorder not otherwise
10 specified, borderline slash narcissistic?

11 A. I'm not aware of anyone else offering that
12 diagnosis in these record.

13 MS. GARRETT:

14 MS. GARRETT: No further questions.

15 THE COURT: Mr. Barnes?

16 RE CROSS EXAMINATION

17 BY THE DEFENDANT:

18 Q. You've read the letter. You've seen all these
19 police reports taken, the information that you have at
20 face value. You've never done a psychological
21 evaluation on me and you've never done any neurological
22 testing on me. Do you believe I'm death principled?

23 A. Excuse me?

24 Q. Do you believe I'm death principled?

25 A. I don't know what that means?

1 Q. Do you believe I'm seeking the death penalty?

2 A. That you're seeking the death penalty?

3 Q. Yes.

4 A. I don't know.

5 Q. I want to know what your opinion is?

6 A. I don't know.

7 Q. Do you believe it's possible?

8 A. Do I believe it's possible?

9 Q. That I'm seeking the death penalty?

10 A. Yes, I have evaluated defendants who have
11 sought the death penalty.

12 Q. Do you call that death principled?

13 A. No.

14 Q. If you felt that I was seeking the death
15 penalty, seeking State aided suicide, would you be aware
16 of that by now?

17 A. Not necessarily; no, sir.

18 Q. And why wouldn't you after all the information
19 that you have assimilated?

20 A. No one has suggested to me that you're seeking
21 the death penalty.

22 Q. They show I.Q. testing ranging from 101 to
23 121. Can you tell me how that is possible?

24 A. Yes, we talked about this briefly in the
25 deposition. It depends upon the intelligence test that

1 was being used at the time to measure your abilities and
2 how it was administered.

3 Q. You've claimed from the very beginning your
4 contact with me in this Court that I'm a very deceptive
5 narcissistic, anti-social, psychopath and all those
6 things. What would lead you to believe that any test
7 that I was given by the Department of Corrections I
8 would have truthfully answered any of the questions?

9 A. Well, with the intelligence testing, I would
10 expect that you would do your best on in order to
11 appear intelligent, to convince others that you have
12 above average intellectual abilities, which I believe
13 that you do.

14 So, I don't think you would attempt the
15 intelligence testing to appear stupid and you would do
16 your best to try to impress somebody, and may actually
17 enjoy the intelligence testing challenge and make a good
18 effort at it.

19 The MMPI testing, it's alleged you answered all the
20 items honestly. Um, that may not necessarily be the
21 case. One of the MMPI's suggests that you are quite
22 distressed, you might be exaggerating your psychological
23 problems on that particular MMPI. Another MMPI where
24 the lie scale is somewhat elevated suggesting that you
25 might be trying to portray yourself as you're better off

1 or more virtuous than you actually are. So, you may not
2 answered honestly throughout all of the items in the
3 MMPI's.

4 Q. From what you've read concerning all the
5 testings that you previewed, and the letter that I have
6 written to the State Attorneys and concerning this
7 crime, do you believe that I have been truthful?

8 A. No.

9 THE DEFENDANT: No further questions.

10 THE COURT: Mr. Bardwell?

11 MR. BARDWELL: No questions, Your Honor?

12 THE COURT: Ms. Garrett?

13 MS. GARRETT: Nothing further.

14 THE COURT: Okay, Dr. Riebsame, you're excused.

15 THE WITNESS: Thank you, Your Honor.

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18 (Proceedings continued in Volume II.)

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APPENDIX H

STATE OF FLORIDA
DEPARTMENT OF CORRECTIONS

PRE-SENTENCE INVESTIGATION

CIRCUIT COURT Brevard COUNTY

NAME: James Phillip Barnes

OFFICER Nancy L. Boyett

COURT DATA

COUNT	CRIME	OFFENSE STATUTE #(S)	DEGREE OF CRIME	MINIMUM MANDATORY	CASE OR UC#	ADJ. OR ADJ. W/H
I	Murder 1 st Degree: Premeditated Design	782.04 (1) (A)	Capital		05-2006-CF-14592- AXXX-XX	
II	Burglary of a Dwelling- Armed	810.02 (2)(B)	PBL		05-2006-CF-14592- AXXX-XX	
III	Sexual Battery by use of Great Force	794.011	Life		05-2006-CF-14592- AXXX-XX	
IV	Sexual Battery by use of Great Force	794.011	Life		05-2006-CF-14592- AXXX-XX	
V	Arson of a Dwelling	806.01	1 st		05-2006-CF-14592	

Detainers/Charges Pending: None noted

Sentencing Status: First Offender ☐ Habitual Offender ☐ Youthful Offender ☐
Active Probation: Juvenile ☐ Adult ☐ Active Post-Prison Release: ☐

Judge Lisa Davidson Prosecutor Susan Garrett
Defense Attorney Self representation, Co Counsel-Randy Moore Retained ☐ Appointed ☒

Plea: Guilty ☒ Nolo Contendere ☐ Jury Trial ☐ Judge Trial ☐ Other ☐

Date of Arrest 4-16-06 Arresting Agency Melbourne Police Department
Days in Custody as of _____ Present Custody Status: Incarceration
Date PSI Requested 5-11-06 Scheduled Sentencing Date 1-22-07 Actual Sentencing Date _____

DESCRIPTION

True Name James Phillip Barnes Alias/Nickname James P. Barnes, James Barnes
Date of Birth 3-07-62 Race/Sex W/M DC# 071551 FDLE # 01482628
Social Security # 261-85-6567; 201-85-6507; 261-85-6564; 261-85-5567 FBI # 829912V5 Military Veteran: Yes ☐ No ☒
Driver License # B65245562087 Alien Registration # _____ Gang Affiliation _____
Present Address Brevard County Jail 860 Camp Road Cocoa, Florida 32926 Phone # _____
Birthplace Baltimore, Maryland Citizenship USA Legal Residence _____
Height 5'10" Weight 190lbs. Eyes Brown Hair Brown Complexion med
Scars/Marks/Tattoos unknown
Next of Kin: Name Bryant Barnes Relationship Father Phone # 904-377-2203
Address _____

CO-DEFENDANT

Co-Defendant's Name:

None

DC #:Disposition:

PRESENT OFFENSE

LEGAL STATUS

Offense(s) as Charged: Count I: Murder 1st degree-Premeditated Design
Count II: Burglary of a Dwelling- Armed
Counts III, IV: Sexual Battery by use of Great Force
Count V: Arson of a Dwelling

Offense(s) Pled To: Count I: Murder 1st degree-Premeditated Design
Count II: Burglary of a Dwelling- Armed
Counts III, IV: Sexual Battery by use of Great Force
Count V: Arson of a Dwelling

Plea Agreement: On 5-2-06 the subject pled open to the court

Number of Counts Waived:

Plea Agreed Upon: Guilty ☐ Nolo Contendere ☐ Other:

Sentence Agreed Upon: _____

Additional Terms of Agreement: _____

Circumstances: On the evening of April 20, 1988 at approximately 11:12p.m. Firefighters discovered the charred remains of Patricia Miller, in the southeast bedroom of Apt #101, 1480 Roosevelt Ave. Melbourne, Florida after extinguishing a fire.

The nude body of the victim was discovered on the bed, face down, with her hands bound behind her back. The fire had destroyed a substantial portion of the bed, completely burning away the mattress with the exception of that portion directly under the victim's body. The victim was positioned diagonally on the bed with her head pointing in a southeasterly direction and her legs trailing towards the northwest. The right leg of the victim was resting on the right bedrail.

Visual examination of the victim revealed that her hands were bound with white shoe laces. The victim was still had on her watch and rings. There were visible signs of trauma to the left rear portion of the victim's head. The victim sustained varying degrees of burns all over her body.

Processing of the scene was conducted by Evidence Technicians from the Melbourne Police Department along with assistance from the Brevard county Sheriff's Department. There were no signs of forced entry to

the dwelling other than those made by the firefighter, which were the front door and the northeast set of sliding glass doors. The southeast set of sliding glass doors (entering the bedroom) were found closed, but were unlocked and had the curtains pulled shut.

The interior of the dwelling showed no signs of someone having rummaged through the contents, with the exception of the kitchen area where the victim purse and its contents were discovered on the counter. The contents of the purse were spread out on the counter and the only item that was determined to be missing was the victim's wallet and its contents.

Defendant's Statement: In a letter address to Michael Hunt, State Attorney's Office the defendant gave a detailed description of the night of 4-19-88 that lead to the murder of Patricia Miller.

"It was about 7:30pm in the 3rd week of April 1988. Patricia Miller of Rivera Oaks Condominium unit 1 or A. I had parked at the end of Roosevelt Ave in Melbourne underneath a lightpole on Riverview drive. I walked through the entrance by the pool. I knew Sonya Waldo and Lisa Moore, my associate's _____. I went to the northside, the condo. I saw her through a window. She was watching t.v. running back and forth to the kitchen. I was there to kill her. She was wearing a green button down silk night shirt. They barely covered her white panties. She was very fit, ____, tan, very healthy. I found an open window. I removed the screen first. I moved a 10 speed bike out of the way with my hand. I got undressed and rolled everything in a black gym pants. I entered the northwest bedroom. There was a single bed. It was dark. No lights. I cracked the bedroom door. I crept back into the kitchen. She was eating a dinner and now watching st.elsewhere. I crept back into the bedroom. She got up and I watched her turn off the t.v. I heard dishes clink in the dishwasher. I waited another minute. I sneaked out of the bedroom. I didn't see her. I walked past the kitchen table that had palm fronds for some ____ of her home improvement. She had been making something. A fan to go with ____ are on the wall. The kitchen light was on. So where the living room light. I walked to the kitchen and snuck a white handle butter knife out of the dishwasher, and went into the master bedroom. I didn't see her so I went into the bathroom. I was naked with a knife when she turned around. She jumped startled and said "Get out of here." I grabbed her arm and acted like I'd stab her. She said "please don't hurt me. I'll do anything you want." I walked her to the bed and sat her on it. I unbuttoned her shirt and played with her titties while taking it off. I tugged her underwear and told her to lift her ass and pulled them off. I looked at her in the eyes and rubbed her pussy and stuck two fingers inside. I told her to get on her knees. She did and asked "what are you going to do to me?" I told her to shut up. I got on my knees behind her and let her feel my cock rub between her ass. She whimpered as I put it at her anal opening. I said "you do everything I ask, I won't hurt you. I tapped knife on her hip. I put the head of my cock in her pussy and plunged. I started pumping her, I looked at the mirror above the dresser and watched myself. I leaned forward and reached around and grabbed _____ pinched her nipple. I was holding the knife in my right hand. She tightened her pussy on my cock. I knew she did it so I would finish. I was rocking her. I held back as long as I could. I shot sperm in her. She begged me please don't come in me. I just grabbed her hips and finished in her. I told her to tighten again to force me out. She did. When I got off the bed I pulled her feet towards me so she was lying on her stomach. I got up and shut the patio door curtain. I took shoestrings out of her tennis shoes and used one to tie her hands behind her back. I looked her room over good and searched for a gun. I asked her if she had one, she said no. I found a hammer and a camping knife in a leather sheath in a milk crate next tot her bed. There was a stethoscope scope on her door handle. I asked it she was a Dr. She said no, she was a nurse. I found a drawer full of jewelry in the bathroom and left it, I knew I was going to kill her and didn't want to get caught with it. I took a terry cloth belt out of its robe to gag her with. It was hanging on the towel closet. I was going to gag her with it. I went back in the bedroom and got behind her. I rubbed her ass and spread her cheeks apart. I stuck two fingers of my right hand up her pussy and my thumb up her ass and pumped in and out. She said "stop that" I pulled them out and grabbed panty hose off her dresser, wadded them up and stuffed them in her mouth. Before I could use the belt she spit the hose out. I said "why did you do that", she said "think about it." I said "if you make a sound I'll kill you" "okay, okay.

Please don't hurt me." I went in the bathroom and washed my dick off in the sink then went through her purse. I took a 2.00 bill and a bank card. I asked for the pin #. She said 1021 it was her husband birthdate. I said, "Kiss me like a lover and finger me. She layed on her side and did it with her eyes open. I fingered her I told her to 69 me and if she tried to hurt me I'll stab you to death" I showed her the knife again. I layed on my side and put my head between her legs. She opened them and I kissed and licked her. I got hard as she took to in her mouth and sucked me. I started humming and going nuts locking and sucking her more. I grabbed her ass with my left hand and squeezed her ass as she orgasm. She said "you son of a bitch!" I got off bed and hit her with my fist hard on the side of her head. I looked at her _____ and said, "Roll over on your stomach"! I used the other shoestring to tie her feet together. I walked through the condo and into the kitchen. I noticed some civil court papers on the counter above the dishwasher. They were concerning a divorce. I walked back the living room and notice the binoculars on the t.v. I went back into the bedroom and asked her the pin # again and she said 1021. I looked her over and got hard again. I straddled her waist with my knees. I spread her ass cheek and looked at her starfish. I place the head of my dick on it and pushed. I entered and pushed all the way in. She groaned and I pumped her and watched _____ go in and out. I layed on her back and went at it. I told her to get on her knees and pulled out. She got on her knees. I pulled her waist back so I could stand up behind her and enter her ass again. She moved forward little bit as I entered so I grabbed a fist full of hair and pulled back violently. She said, "Oh God, don't do this to me." I said "I told you to shut up, now push back on me"! She did. She said " I gotta go. I gotta go Please the bathroom"! I pulled out and said." Hurry up, come on" I pulled her off the bed and she hopped to the toilet with me hold her arm. As she was going I washed my dick off. It had fecal on it. I flushed for her, wipe her and washed her pussy and ass with a wash rag and sink water. I hopped her back to the bed and laid her on her back and pushed her leggs up. I forced three fingers in her pussy. I put her in the back and entered her ass again and fucked her till I came again. I got off her, rolled her over on her stomach and grabbed the white terry cloth belt. I sat on her ass, wrapped the belt around her neck and with all my strength tried to choke her to death. She defecated by times, so I got off her. I didn't know if she was dead so I picked up the hammer and stood behind her left shoulder and hit her as hard as I could on the back of her head. I broke her skull open and blood splattered everywhere. She was going uh flath, uh flath, uh flath, rocking on her stomach. I hit her again broke her skull more. A bigger hole opened and blood was _____ and wrist. The wall on the south wall was splattered. I know _____ she was dead but I didn't want the cops to know I used a hammer so I _____ the opening where I could she her brain matter and aimed there to crack the skull the wood handle to leave the skull jagged. My heart was pounding, I thought I'd pass out from exhilaration. I tasted blood and smelled it. I hit her one more time. I went to the bathroom sink to wash the blood off my right forearm and hand, shoulder, face and hair. I picked the hammer out of the sink, set it back down and dried my self off. I grabbed a canvas zippered bag from the closet with the toolbox in it and wrapped the hammer in the towel and put it in a zip bag. I put her shirt, panties, panty hose. Maybe her shoes and wallet it I couldn't think straight anymore. My blood pressure was off the charts. I ran to the front door. I went outside and got my clothes and stuff and set them on the kitchen floor. I went into the north bedroom where I entered and locked the window and figured I'd better get a towel and wipe it down. I did. I went back into the bathroom and wash. The scene was brutal. Blood splattered everywhere. The smell was ripe with fecal matter and blood. Man it was a mess. I thought I better wipe down the kitchen floor it was tiled and I didn't want to leave fingerprints. I wiped down the bathroom first to dry it. I didn't want anyone to think I used it or leave D.N.A. I grabbed the camper's knife and went to the kitchen. I put it in the bag. I dressed sc _____ a towel around on the kitchen floor, wiped the dishwasher and put the white handle butter knife in the dishwasher and turned it on. I took my lighter out of my pocket, went to the bedroom and lit the comforter, a small flames. Gave me plenty of time to get away. I shut the door to a crack. Instead of closing it so the fire would not steal all the oxygen and go out. I walked to the front door, picked up the bag, opened the door a crack, locked the door knob, looked outside and shut the door on my way out.. I walked around the back of the building and saw a man wearing glasses up stairs sitting down. I went around the pool, walked out through the entrance to my car at the end of Roosevelt Ave. and riverview drive. I threw the bag on the floor board, got in started the car and was going up Roosevelt Ave to U.S. 1 when I realized I left the screen in the yard. I backed up to the

entrance, opened the car door and ran flat out to the screen and then ran flat out the car. I threw it in the back seat and drove to U.S.1. I turned right, went to I-92 and turned right and went over the Melbourne causeway. As soon as I got into Indialantic I turned left into the strip mall right past south Patrick Drive. I pulled up to a trash receptacle and burned the bag in it. I drove to A1A and headed north to Indian Harbor Beach. I turned in to a Residential area it was trash night and stopped next to a house, got the screen out bent it up and stuck it between the trash cans I drove back to the causeway and crossed over to the park There is a section for a car park. It's less then 1 mile from the condo that sits on the river facing south west. I could see flashing lights and white smoke faintly. I got in my car and drove to U.S1 and past Roosevelt Ave and saw it in greater detail. I could smell the smoke. I had bought cocaine from Tom Cantron earlier that eve. I was ready to shoot some. I drove back to Indian harbor Beach and went to Chuck Vitale's home. He let me in and we smoked a joint. I told him I was going to McDonald's and to pick up some Budweiser for him. I came back and after eating kept going to the bathroom in his bedroom to shoot up. I left around 2:30am. I drove by Roosevelt again. It looked quiet, then I saw a few cops cars parked and driving. The police were all over the area. I figured I go to dad's house and try to sneak in. I forgot to mention that I went McDonald. I tried the bank card 2 times at the bank across from the Holiday Inn in Indialantic to no avail. She lied to me. I figured as much over our first meeting wasn't very pleasant. There is more but I believe I'll wait to talk about it.

James P. Barnes 12-19-05

VICTIM IMPACT

EXTENT OF VICTIM INJURY OR LOSS (summary): Patricia Carmel Miller died as a result of Blunt Craniocerebral Trauma.

VICTIM'S STATEMENT: See Attached ☐

A letter was sent on 5-30-6 to Paula Murphy, sister, and no response has been received.

[Refer to Assessment/Recommendation Section for further restitution information.]

CRIMINAL HISTORY (JUVENILE/ADULT HISTORY)

(Include *circumstances* for any prior felony or misdemeanor, which are similar to the present offense(s), below the applicable offense).

Juvenile:

<u>Date</u>	<u>Place</u>	<u>Offense</u>	<u>Disposition/Date</u>
9-29-77	Brevard County, Florida	Ct I Battery CTII Possession of Marijuana 77-1814-CJ-A-21	Adj. of Delinquency withheld, placed on HRS probation

In this case the defendant shot his father with a BB gun.

1-9-78	Brevard County, Florida	Violation of Probation 77-1814-CJ-A-21	Adj delinquent, continued on probation

3-1-78	Brevard County, Florida	Ct I Aggravated Assault Ct II Possession of a Firearm by a Minor Ct III Discharging a Firearm in the County 78-177-CJ-A-21	Adj. Delinquent, continued on probation

Note: Specifics on this case were not available

12-18-78	Brevard County, Florida	Violation of Probation (suspended from school two times for fighting and missing class)	No evidence

12-18-78	Brevard County, Florida	Ct I Auto Theft Ct II No Valid Driver's License 78-3255-CJ-A-21	Adj delinquent committed to HRS

The defendant temporarily used his sister's automobile without authority and without a valid operator's license.

12-18-78	Brevard County, Florida	Ct I Armed Robbery Ct II Grand Theft Ct III Aggravated Battery Ct IV Aggravated Assault 78-3289-CJ-A-21	Adj delinquent, committed to HRS 4-13-79 released form Okeechobee School for Boys 7-25-79 discharged from aftercare

The defendant was carrying a pistol during an alleged drug "rip off" in which he had supposedly two bales of "pot" to sell for \$5,000.00. He hit the victim on the head with the pistol and stole the money.

Adult:

<u>Date</u>	<u>Place</u>	<u>Offense</u>	<u>Disposition/Date</u>
8-13-79	Satellite Beach PD, Florida	Ct I Burglary of an Occupied Dwelling Ct II Grand Theft 79-1308-CF-A	12-3-79 adj. guilty both counts, 6 months to 5 years under the Youthful Offender Act 2 days credit for time served 7-21-81 Paroled
12-2-79	Brevard County, Florida	Ct I Burglary Ct II Petit Theft 79-1966-CF-A Ct I Grand Theft 79-1965-CF-A	12-21-79 No information
4-3-80	Melbourne, Florida	Ct I Burglary of a Structure Ct II Grand Theft 80-248-CF-A	7-14-80 adj. guilty both counts 10 years probation, consecutive to case #79-1308-CF-A

On 11-21-79 the subject broke into the residence of William Tosko and stole a gold pocket watch, a box of missed coins, \$18.00, two gold chains, and one charm.

9-26-81	Indialantic PD, Florida	Ct I & II Aggravated Battery 81-1994-CF-A	1-19-82 Ct I adj guilty, 5 years probation consecutive to case # 81-2030-CF-A and any other sentence now serving Ct I nolle prossed.

Circumstances: The defendant stabbed two men in a confrontation at a bar.

9-27-81	Brevard County, Florida	Aggravated Battery (4 counts) 81-1993-CF-A	11-30-81 all counts nolle prossed

10-1-81	Indialantic PD, Florida	Ct I Burglary Ct II Petit Theft 81-2030-CF-A	1-19-82 Ct I adj guilty 5 years DOC consecutive to any other sentence 8-28-84 Paroled

10-21-81	Brevard County, Florida	Ct I Battery 81-3963-MM-A	12-4-81 nolle prossed

1986	Brevard County, Florida	Violation of Parole Ref Burglary 81-2030-CF-A	1-15-87 Parole revoked 10-27-87 Parole Re-Instated

6-29-87	Tulsa, OK	Ct I Escape from Imprisonment while awaiting trial Ct II Assault and Battery CRF85-3412	7-20-87 Ct I Adjudicated Guilty Two (2) years credit for time served in Florida State Prison Ct II Dismissed

Circumstances: While investigating a complaint of Assault and Battery Detective Parke received information that the subject was an escapee from the Tulsa County Jail, escaping on 8-27-85. The subject was serving time for several misdemeanor offenses and a governor's warrant from Florida. A warrant was issued and subject was arrested for Escape from Imprisonment while awaiting Trial.

4-10-88	Brevard County, Florida	Ct I Unsafe Vehicle 86612PV Ct II Obscured or Defaced Tag 86613PV	10-20-89 Ct I Fined \$47.00 Ct II fined \$47.00

5-27-88	Brevard County, Florida	Violation of Parole Ref Burglary 81- 2030-CF-A	9-28-88 Parole revoked 4-11-89 Released to Probation

5-27-88	Brevard County, Florida	Ct I Aggravated Battery 88-3044-CF-A	7-15-88 State filed no information
7-3-89	Brevard County, Florida	Battery 89-11763-MM	3-10-03 Dismissed
8-28-89	Brevard County, Florida	Ct I Violation of Probation Ref 80-248-CF-A Ct II Violation of Probation Ref 81-1994-CF-A	9-14-89 Dismissed
9-18-89	Brevard County, Florida	Battery 88-5155-MM-A	4-2-90 Nolle Prosequi
10-13-89	Brevard County, Florida	Battery 89-16488-MM	6-18-90 Nolle Prosequi
1-1-90	Brevard County, Florida	Battery 91-277-MM	6-28-91 Acquitted
1-29-90	Brevard County, Florida	Ct I Violation of Probation Ref 80-248-CF-A Ct II Violation of Probation Ref 81-1994-CF-A	7-20-90 Ct I adj guilty 2 years DOC 175 days credit for time served Ct II dismissed
4-9-90	Brevard County, Florida	Battery 89-16488-MM-A	6-18-90 Nolle Prosequi
12-28-90	Brevard County, Florida	Ct I Failure to Signal Ct II Failure to Maintain Proof of Insurance 91-79751-TR	1-28-91 Ct I fined \$67.00 Ct II fined \$47.00
1-1-93	Brevard County, Florida	Ct I Unsafe Vehicle Ct II Failure to Maintain Proof 91-70889-TR	2-8-91 Ct I and II fined \$47.00

3-9-91	Brevard County, Florida	Ct I & II Offenses Against Intellectual Property Ct III Petit Theft 92-3548-CF-A	11-13-91 No information
3-11-91	Brevard County, Florida	Driving While License Suspended, or Revoked 91-18316-CT-A	4-20-91 six (6) months probation
3-12-91	Brevard County, Florida	Ct I Battery Ct II Failure to Appear 91-4119-MM-A	4-10-91 Ct I adj withheld 29 days county jail, 29 days credit for time served Ct II dismissed
4-7-91	Brevard County, Florida	Resisting Arrest Without Violence 91-5695-MM-A	4-8-91 adj guilty 2 days county jail, 2 days credit for time served
4-16-91	Melbourne Police Dept. Florida	Possession of Firearm by a Convicted Felon 91-7088-CF-A	10-23-91 Adj guilty One (1) year community control 4-14-92 Community Control revoked sentenced to 21/2 years prison

On 4-16-91 the defendant having been previously convicted of felonies in the State of Florida, had in his custody one Boito Twenty Gauge Double Barrel shotgun which he sold to American Trading Post and Pawn for \$30.00.

5-5-91	Brevard County, Florida	Ct I Battery Ct II Failure to Appear 91-277-MM-A	6-28-91 Ct I Acquitted 5-6-91 Ct II Dismissed
7-15-91	Brevard County Florida	Driving While License Suspended/Revoked 91-18316CT-A	7-16-91 58 days county jail
10-23-91	Melbourne Police Depart, Florida	Ct I Dealing in Stolen Property 91-18858-CF-A	2-19-92 Order of Dismissing due to the death of the witness
10-25-91	Melbourne Police Department, Florida	Ct I Cheating Gross Fraud Ct II Grand Theft Ct III Petit Theft 91-18859	1-27-92 No Information

4-17-92	Melbourne Police Department, Florida	Ct I Battery Ct II False Imprisonment 92-2914-MM	3-16-92 No Action
4-17-92	Melbourne Police Department, Florida	Tampering with a Witness 92-7138-CF-A	6-17-92 No information
2-13-92	Brevard County, Florida	Ct I Grand Theft Ct II-V Stolen Property Buying Receiving Ct VI Grand Theft Buying and Receiving Stolen Property 92-3548-CF-A	Ct I-V No Action Ct VI 6-28-92 Six (6) years DOC as a Habitual Felony Offender

Between the 13th and 20th of February, 1992 the defendant knowingly obtained the property of assorted stereo equipment and tools valued in excess of \$300.00 belonging to Arthur Henderson with the intent to permanently deprive of any benefit there from. The defendant then trafficked this property that he knew to be stolen by selling it to S&S Pawn Shop of four separate dates between the 15th and 19th of February 1992.

2-26-92	Melbourne Police Department	Ct I Forgery Ct II & III Uttering a Forged Instrument Ct IV Petit Theft 92-3543-CF-A	4-14-92 Ct I, II & III Dropped Ct IV 6-18-92 Guilty 2 days county jail
2-26-92	Melbourne Police Department	Grand Theft 92-3546	4-17-92 No information
7-25-96	Brevard County, Florida	Battery Domestic Violence (2 counts) 96-17255-MM-A	9-4-96 Adj guilty One (1) years county jail suspended placed on One (1) year probation

On 7-25-96 at 10:00pm Deputy Van Ore responded to 3419 Willowood St. in reference to a domestic violence battery complaint. Upon arrival the Deputy made contact with Linda Diane Verz-Barnes who provided the following information. The victim advised that she had been battered twice by the defendant since 7-20-96. She stated that on 7-20-96 or 7-21-96 during the afternoon hours she had an argument with the defendant over the drinking of alcohol. She stated that during the argument the suspect punched her twice in the face while standing in the kitchen area. The victim stated as a result of the punched her head was forced into the wall which resulted in a distinct bump on her forehead which was still visible at this time the deputy made contact with her. The victim also stated that the defendant twisted her arms during the argument. The second time the victim and defendant were having an argument over the defendant's drug usage in the kitchen. The defendant punched her right elbow and then grabbed her by the arms and placed her on a bar stool forcing her to sit on her hands.

12-12-97	Brevard County, Florida	Ct I Violation of Injunction for Protection Ct II Battery Domestic Violence 97-30586MM-A	1-12-98 No information
12-14-97	Brevard County, Florida	Ct I Murder 1 st Degree Premeditated Ct II Uttering a Forged Instrument Ct III Trafficking in Stolen Property Ct IV Grand Theft Ct V Forgery 97-30638-CF-A	1-9-98 Ct I Life Ct II Five (5) years DOC Ct III Fifteen (15) years DOC Ct IV Five (5) years DOC Ct V Five (5) years DOC

On 12/12/06 Deputy Frank Teste, Brevard County Sheriff Department, responded to 3419 Wildwood Drive West Melbourne, Florida, to check on the well being of the victim, Mrs Barnes. Mrs Tanner stated that she was a co-worker of the victim and had not seen or heard from the victim for approximately two days. Mrs. Tanner also stated that the victim and her husband were having marital problems and that Mr. Barnes had a history of being violent toward the victim.

Upon arrival Deputy Teste observed a blue caprice station wagon in the driveway. There was also a small bucket of soap and a garden hose in the driveway. The garage door was open. Deputy Teste observed that the shades to all the windows were closed. Deputy Teste went to the front door and could not hear any sounds coming from the residence. The deputy rang the door bell and after several moments he still did not get a response from the residence. The deputy had communication center call inside the residence and made contact with the defendant, who stated that he had just woke up and would come to the door. The defendant peered out of the front window and then disappeared. Deputy Teste had communication center again call inside the residence and for him to step outside. Again the defendant peered out the window but did not come outside.

After attempting to make contact with Mr. or Mrs. Barnes, Sgt Leatherow arrived and called into the residence and contact the defendant. After several attempts to have the defendant step outside he told Sgt Leatherow that the victim was not in the residence and he was her brother. Sgt. Leatherow then convinced the defendant to stand in front of the window and at that time Sgt Leatherow identified him as the defendant from contact made from prior calls. Sgt Leatherow then got the defendant to admit who he was. While Sgt. Leatherow was talking to the defendant Deputy Teste made contact with warrants division and was notified that the victim had an injunction for protection against the defendant and he was ordered to stay out of the residence. During the conversation with the defendant, he stated that the victim was at the Titusville courthouse, the Viera C courthouse and State Attorney Office. As the locations were given to Deputy Teste he had communication center call those locations and they responded that the victim was not at any of the location. The defendant stated that she was. The defendant continued to refuse to step outside of the residence. The defendant stated at one time that he was afraid that because of the injunction he was going to be arrested.

At approximately 1:05pm the defendant cracked the door open in the garage leading to the house. Deputies Heyn and Young were next to the door and attempted to arrest the defendant for the violation of the Injunction. The defendant retreated inside of the residence and began resisting arrest with deputies. Deputy Teste and Butler secured the rest of the residence. At the southeast front bedroom inside the rooms closet Cpl. Bulter discovered the victim lying on the floor of the closet. Deputy Teste observed that the victim was lying on her left side facing the wall of the closet. The victim was cold to the touch and lividity was present. She had dried blood on her face and had no signs of life.

The victim was strangled. The defendant admitted to removing his wife's jewelry from the dresser valued at over \$300.00 and pawning the jewelry. The defendants obtain the victim's check book and forged the victim's signature on a personal check and made it payable to the defendant in the amount of \$500.00. The defendant went to the victim's bank and withdrew the money.

2-27-00	Brevard County, Florida	Dealing in Stolen Property 98-20241	6-8-00 Adj guilty Fifteen (15) years DOC

On 12-5-97 the defendant pawned a Sharp VCR, and Sharpe radio with speakers, which were stolen, to Dealer Pawn

4-20-06

Melbourne Police
Department

Ct I Murder 1st
Degree Premeditated
Ct II Burglary of a
Dwelling was
Armed
Ct III & IV Sexual
Battery by use Great
Force
Ct V Arson of a
Dwelling
06-14592-CF-A

Instant Offense

SOCIOECONOMIC STATUS

EDUCATION

Verified By: Bryant Barnes, Father

Highest Grade Completed: 9th, Satellite High School

Special Training/Vocational Skills: In the Pre-sentence Investigation date 8-28-91 by Ralph Comp, the defendant claims to be a certified welder, a certified telephone repairman/installer and a graphic pressman

Current Education/Training: None noted

EMPLOYMENT

Verified By: Bryant Barnes, Father

Occupation: Unemployed, the subject has been incarcerated since 1-15-98
Current or Most Recent Employer, Address, and Phone #:

Wage/Salary:

Length of Current or Most Recent Employment:
Name of Immediate Supervisor:

Number of Jobs in Past Two Years: 0

Months Unemployed Past Two Years: 24

FINANCIAL STATUS

Verified By:

Primary Means of Subsistence at Time of Arrest:

Employment ☐ Welfare/Social Assistance ☐ Family, Relatives, Friends ☐
or Personal Assets ☐ Other _____

Total Monthly Income:

Estimated Total Monthly Expenses:
(Itemize any court-ordered payments)

Estimated Total Debts:

SUPPLEMENTAL INFORMATION

Currently Required by Statute

- ☒ Family History
- ☒ Marital History
- ☒ Military History
- ☒ Physical and Mental Health
- ☒ Residential History

Optional

- ☒ Alcohol/Substance Abuse
- ☐ Comments of Others
- ☒ Educational History
- ☒ Employment History
- ☐ Other (Specify:)

FAMILY HISTORY

Verified By: Bryant Barnes, Father

<u>Name</u>	<u>Age</u>	<u>Relationship</u>	<u>Address</u>	<u>Occupation</u>
Bryant Barnes		Father	Flagler, County, Florida	
Ann Barnes		Mother	Malabar, Florida Brevard County	Unknown
Beth Catron		Sister	Malabar, Florida Brevard County	Unknown
Jeannice Deggendorf (twin sister)		Sister	Georgia	Unknown
Michael		Brother	Deceased	Unknown
Roberta Barnes		Sister	Texas	Unknown

Remarks: According to the Pre-Sentence Investigation date 9-28-79 Fred Dyke, the subject was born to the union of Bryant Barnes and Ann Barnes on 3-7-62. The subject is the 3rd oldest of 5 children. The defendant's parent separated in September 1977 and divorced in March of 79. The defendant had been a resident of Brevard County since 1969. The defendant was permitted to leave the parental home at age 15 to reside with Charles Vitale (who at the time was 32 years old.) The defendant did move back to live with his father and two (2) sisters.

According the Bryant Barnes, father, the subject did not get along with his mother or sisters. He has assaulted all of them. He only stayed at home when he needed a safe house. All of his friends were older. The subject has a keen sense of right and wrong and is very smart. He stated that he always want to fool dad. Mr. Barnes stated that the defendant made is his own childhood and life. He stated that the subject was never home and that he went over sees for 14 years.

According the Pre-Sentence Investigation date 8-28-91 by Ralph Comp the subject's father is retired from Harris Corporation his mother is a nurse. He stated that he speaks to his father fairly often but hasn't talked to his mother since March of 1991.

In the Pre-Sentence Investigation the subject's father stated that the defendant had a personal sister Beth. One time he broke her nose by punching her. The subject was blamed for many the parents would believe them rather than the subject and indicated the defendant was the so was easy for the defendant to bring out the worst in his parents. He attended Mental Dept. for Counseling and he was diagnosed as a Sociopath. The subject had gone through phases when he also had a passive side. His father believes subject is now motivated to work and seems to get al

associates on the job. Stated defendant did not get love at home and turned to associate who weren't the best type. The defendant got involved with older people who would use him to commit house burglaries. Stated whenever he heard of the defendant committing any illegal activities he immediately took the defendant to the police department or notified the police authorities. The father doesn't know what punishment is suitable for the defendant but feels that rehabilitation has begun as a result of his being employed and his enthusiasm about the job.

According to the prison intake on 6-14-05 the subject's mother and sisters Jeannice, and Roberta are deceased. On 12-13-06 Bryant Barnes stated that his mother and sisters are alive. He did state that his brother, Michael was deceased. It appears on 6-14-05 the defendant removed his father, Bryant Barnes from his visiting list. Mr. Barnes stated that he has stopped going to see the defendant and that is why he thinks he is off the visiting list.

In speaking with the defendant's father, he told this officer that he is trying to keep his two lives separated.

MARITAL HISTORY

Verified By: Clerk's Office

Status: Single ☐ Married ☐ Divorced ☒ Separated ☐ Widowed ☐
Number of Marriages: 1

Spouse /significant other: Linda Diane Verzi Barnes Deceased
(name) (age) (address)

Current Martial Relationship: Good ☐ Fair ☐ Poor ☒

Present Marriage: The defendant is currently incarcerated for the death of his wife, Linda Barnes

Children: Unknown
Name Age Location Means of Support

MILITARY HISTORY

Verified By:

According to the Pre-Sentence Investigation date 8-28-91 by Ralph Comp the subject never served in the Armed Forces.

None ☒ Presently Active/Reserve Status ☐ Discharged Veteran ☐

Service Number: _____ VA Claim Number: _____

Disabilities:

Remarks:

PHYSICAL AND MENTAL HEALTH

Verified By:

Health Status: Good ☐ Satisfactory ☐ Fair ☐ Poor ☐ Disabled ☐

Remarks: According the Pre-Sentence Investigation dated 9-28-79 by Fred Dykes a psychological evaluation was performed on the subject on 9-13-77, indicating that although he was not emotionally disturbed, he is an angry, dissatisfied, tense and overly emotional individual. Subject believes he was alienated by his family and perceives himself as a scape goat for family problems. He sees his mother as hostile and rejecting of him and his father as a man who overreacts with physical abuse. The defendant feels inadequate, insecure and powerless to re-establish trust and closeness with his parents. He deals with frustration by leaving home or becoming angry and aggressive. Admits having a bad temper which results in arguments and aggression that he is overly impulsive. He projects blame on others and seeks sympathy by complaining of mistreatment. He is rebellious and resentful of authoritative control. His outlook was negative and pessimistic and he felt no one sees his side of any situation.

RESIDENTIAL HISTORY

Verified By: Department of Corrections

Residence: Home ☐ Trailer ☐ Apartment ☐ Room ☐ Other: _____
Owns ☐ Rents ☐ No Cost ☐ Amount per month: \$ _____

Lives with:

Remarks: The defendant is currently incarceration at Florida State Prison. When the subject was not incarcerated he lived in the Brevard County area

Alcohol/Substance Abuse

Verified By: Bryant Barnes, father

Remarks: In the Pre-Sentence date on 9-28-79 by Fred Dyke the defendant stated he does not drink alcohol at all. He stated that he has used pot since age 13 and in January of 1991 became addicted to crack cocaine, using as much as he could get. In a previous PSI he also admitted to using speed and heroin in the past. The defendant stated the was placed in Circles of Care "ex parte" by his father in February of 1991 he remained there for ten (10) days and was accepted at His Place in Stuart, Florida where he stayed for one week before getting kicked out for using drugs. He stated that he was an inpatient at Circles of Care for one week in March of 1991.

Education History: The defendant withdrew form Satellite High School in November, 1978 when he was sentenced to Okeechobee School for Boys. Subject obtained his GED on 3-27-79 while at Okeechobee. He appeared to be a good student through 9th grad but did very poorly in his 10th year at Satellite High School. One of his major problems appeared to be lack of attendance. According to the Pre-Sentence Investigation by Ralph Comp dated 8-28-91 in 1978 he was suspended two time for fighting and failing to attend classes.

Employment History:

In the Pre-sentence Investigation date on 9-28-79 by Fred Dykes in 1979 the subject was employed by Mr. Andy Pavlakos, at the Woodfield Condominiums in Melbourne, Florida as a laborer earning \$3.25 per hour. No prior employment record of any significance.

In the Pre-sentence Investigation date on 6-30-80 by Vivian Scott the subject was unemployed. Prior to the arrest he was employed with Melbourne Car Wash for one week. His duties were drying cars and vacuuming the carpet. In 1979 he was employed by Andrew Homes of Indian Harbor Beach as a carpenter. His salary was \$130 per week; he was fired because he did not get along with his boss. In 1978 he was employed by Dragon Lady's Den in Indian Harbor Beach as a dishwasher for \$15 per night. Also in '78 he was employed by Cosmic Construction of Patrick AFB where he earned a reported \$160 per week as a construction worker.

In the Pre-Sentence Investigation dated 8/28/91 by Ralph Comp the defendant stated that he worked off and on over the past 11 years for The Alarm Barn in Palm Bay, Florida in telemarketing sales. He stated the he left in March of

1991 because his father, now owns the business, left the company and he was laid off due to the loss of business. Mr. Bryant Barnes stated that he never employed the defendant and he would have never let him go to peoples homes

COURT OFFICIALS' STATEMENTS

State Attorney: None ☐ Attached ☐
Susan Garrett, Reserves comments until time of sentencing.

Defense Attorney: None ☒ Attached ☐
James Barnes, refused to talk with this officer

Law Enforcement: None ☒ Attached ☐

DEFENDANT'S PLAN

Verified By: _____

Residence: The defendant has been sentenced to Life for Murder 1st Degree

Employment: _____

Other Recommendation: _____

ASSESSMENT & RECOMMENDATION

Recommended Disposition:

Before the Court stands James Phillip Barnes who is standing before the court on charges of Murder 1st Degree Premeditated Designed, Burglary of a Dwelling was Armed, Two (2) counts of Sexual Battery by use of great force and Arson. The incident involved the defendant sexually assaulting and brutally killing the victim in this case with a hammer. He then covered the evidence by burning the body.

The defendant's prior record goes back to when he was a juvenile and has continued until he was finally incarcerated for life. The defendant was on Parole when the offense was committed and arrested thirty-eight (38) days later for violation of Parole. The defendant and family have been uncooperative with this investigation. In previous investigations the defendant has been label a dangerous violent offender. According to the letter by the defendant he intentionally went to the condo to kill the victim. The defendant was brutal in the method of death. The defendant gave the victim hope that he would not hurt her but knew the final outcome. The defendant has been diagnosed as being a sociopath. The defendant has shown the he is not amenable to any type of leniency or possible release.

Therefore, it is recommended that he be sentence in accordance with the Florida Sentencing Guidelines or Florida Criminal Punishment Code.

Restitution: NO ☐ YES ☐ (Specify amount, name, address, phone #, and how payable)

<u>Name</u>	<u>Address</u>	<u>Phone #</u>	<u>Amount</u> \$	<u>Case or UC #</u>
Payable to:			\$	
Payable to:			\$	
Payable to:			\$	
Payable to:			\$	
TOTAL			\$	

Environment to Which Offender Might Return or Be Sent: _____

Resources Available to Assist this Particular Offender: _____

Alternative Recommended Dispositions (If Any):

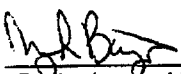
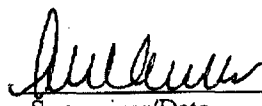
Should the court elect to depart from the recommended Sentencing Guideline or Criminal Punishment Code sentence and accept the negotiated plea, the following recommendation is made:

Should the court elect to depart from the recommended Sentencing Guideline or Criminal Punishment Code sentence, the following alternative disposition is provided for the court's consideration:

Date Dictated: 12-12-06 Typed 12-12-06

I hereby certify that the above is true and correct to the best of my knowledge and belief, and verified where reasonably possible.

DEPARTMENT OF CORRECTIONS

By:  12-13-06 Approved by: 
Probation and Parole Officer/Date Supervisor/Date

The Pre-Sentence Investigation is not a public record and is available only to those persons as specified in Rule 3.712 of the Florida Rules of Criminal Procedure. Following sentencing, portions of the report shall constitute the basic classification and evaluation document of the Department of Correction as specified in 921.231 Florida Statutes.

Disposition:

APPENDIX I

11/30

IN THE CIRCUIT COURT OF THE
EIGHTEENTH JUDICIAL CIRCUIT
IN AND FOR BREVARD COUNTY,
FLORIDA

CASE NO.: 05-2006-CF-014592-AXXX-XX

STATE OF FLORIDA,

Plaintiff,

v.

JAMES PHILLIP BARNES,

Defendant.

FILED IN OPEN COURT
Date: 12-13-07 Time 3:00 pm
CLERK,
CIRCUIT AND COUNTY COURT
By [Signature] D.C.

JUDGMENT AND SENTENCE

The Defendant, James Phillip Barnes, born March 7, 1962, is before the Court for sentencing.

The Defendant represented himself pro se throughout this case. The Court appointed the Office of the Public Defender as standby counsel and either Assistant Public Defender Phyllis Riewe or Assistant Public Defender Randy Moore were present at all court proceedings. Pursuant to Faretta v. California, 422 U.S. 806 (1975) and rule 3.111(d)(3), Florida Rules of Criminal Procedure, the Defendant unequivocally requested to represent himself and knowingly and voluntarily waived his right to counsel. At every stage of the proceedings, the Court renewed the offer of assistance of counsel to the Defendant, to which the Defendant knowingly, voluntarily, and unequivocally waived. Fla. R. Crim. P. 3.111(d)(5).



On May 2, 2006, the Defendant plead guilty to the charged crimes of first degree premeditated murder (Count I), burglary of a dwelling with an assault or battery (Count II), two counts of sexual battery by use or threat of a deadly weapon on a person older than twelve years of age (Counts III and IV), and arson of a dwelling (Count V). Prior to entering his plea, the Court advised the Defendant that the State was seeking the death penalty on the first degree premeditated murder count. The Defendant entered an "open plea" and had no agreement with the State.

On May 2, 2006, the Defendant waived his right to a jury recommendation and requested that the Court proceed to sentencing without the benefit of the jury's recommendation as to the imposition of life or death on Count I - First Degree Premeditated Murder. The Court finds that the Defendant knowingly, freely, and voluntarily chose to forego a jury for the penalty phase. The Defendant explained to the Court that he was making a strategic decision to have a judge alone determine his sentence.

The Defendant represented himself pro se at the sentencing hearing and specifically chose not to present mitigating evidence or argument at the penalty phase, other than that already placed on the record. The Court conducted an extensive colloquy with the Defendant to determine whether the Defendant knowingly and intelligently made this decision. The Court finds that the Defendant knowingly, freely, and voluntarily chose not to present mitigating evidence at the penalty phase. The Court observed the demeanor of the Defendant and his responses to the Court's questions. The Court finds that the

Defendant understood the Court's questions, and the Court finds that the Defendant's answers were responsive and forthright. The Court finds the Defendant was competent to make this decision. See Ocha v. State, 826 So. 2d 956, 961 (Fla. 2002).

On January 22-26, 2007, the State presented its evidence as to sentencing the Defendant on Count I, first degree premeditated murder.

On May 11, 2006, this Court ordered that a comprehensive pre-sentence investigation (PSI) be conducted, and on February 7, 2007, this Court appointed Sam Baxter Bardwell¹ as court counsel to present mitigating evidence to the Court, pursuant to Muhammad v. State, 782 So. 2d 343, 364 (Fla. 2001) and Klokoc v. State, 589 So. 2d 219, 220 (Fla. 1991), since the Defendant refused to present any mitigating evidence on his behalf other than that evidence already placed on the record. The Defendant objected to the Court's consideration of the PSI report; however, the Supreme Court of Florida in Muhammad v. State, 782 So. 2d 343, 363 (Fla. 2001) recommended a PSI in every case such as this one, where the Defendant refuses to present mitigation evidence. On November 16, 2007, the Court held a hearing at which Mr. Bardwell, court counsel, presented alleged mitigating evidence to the Court.

This Trial Court is now charged with the responsibility of applying a reasoned judgment as to the appropriate sentence, in light of the totality of circumstances in this case. This Court recognizes that the imposition of death is to be reserved for the most aggravated and least mitigated of first-degree

¹ Attorney Sam Bardwell is one of two attorneys on the Eighteenth Judicial Circuit's registry for court-appointed counsel in capital cases in Brevard County.

murders. Patton v. State, 878 So. 2d 368, 381 (Fla. 2004); Urbain v. State, 714 So. 2d 411, 416 (Fla. 1998); Crook v. State, 908 So. 2d 350, 357 (Fla. 2005).

In this regard, the Court has considered all evidence and testimony presented, the official Court file, argument of counsel, and the applicable elements of aggravation and mitigation set forth in section 921.141(5) and (6), Florida Statutes (1987), as well as the non-statutory mitigating circumstances. See Ford v. State, 802 So. 2d 1121 (Fla. 2001), cert. denied, 535 U.S. 1103 (2002). The Court has also considered sentencing memorandums submitted by both the State and appointed court counsel, Mr. Bardwell. The Defendant refused to submit a sentencing memorandum, despite being offered the opportunity to do so on several occasions by the Court.² Being fully advised in the premises, this Court makes the following findings of fact and conclusions of law:

I. FACTS

On April 20, 1988, the Defendant entered through a bedroom window of Ms. Patricia "Patsy" Miller's condominium unit number 101 located at the River Oaks Condominiums, 1480 Roosevelt Avenue in Melbourne, Brevard County, Florida. The Defendant did not know Ms. Miller; he was a stranger to her. The Defendant entered Ms. Miller's condominium unit with the intent to rape and kill her. The Defendant repeatedly raped Ms. Miller, placing his penis in both her vagina and anus. The Defendant ultimately murdered Ms. Miller by manually strangling her with the belt from her bath robe, then hitting her about the head

² The Court extended the last offer on Monday, December 10, 2007, after the Defendant had the opportunity to read the State's memorandum.

with a hammer that he had found in her apartment. In order to conceal his identity and crime, the Defendant set a fire to Ms. Miller's bed upon which the nude, bound, and beaten body of Ms. Miller laid.

Shortly after 11:00 P.M. on April 20, 1988, firefighters responded to a fire alarm at the River Oaks Condominiums and found the charred remains of the homeowner, Ms. Miller. At 11:45 P.M., Sergeant Dennis Nichols of the Melbourne Police Department arrived at Ms. Miller's apartment after being dispatched there. Sergeant Nichols observed Ms. Miller's nude body face down on the bed in her master bedroom, with her hands bound behind her back tied with shoe laces. There were visible signs of trauma to Ms. Miller's head and varying degrees of burns over all of her body. Law enforcement officers did not observe any apparent signs of forced entry, although firefighters had already entered the apartment through the front door as well as the rear sliding glass doors. Ms. Miller's purse had been emptied and the contents left on the kitchen counter. Her wallet and its contents were taken and never recovered.

The Medical Examiner determined that the cause of Ms. Miller's death was blunt force trauma to the head. There were also signs of strangulation in the form of soft tissue bleeding around the thyroid muscle, cartilage, and bone and contusions in the base of the tongue. The shape of the multiple skull fractures was consistent with the use of a hammer. The Medical Examiner determined that Ms. Miller's body was set ablaze after she died from blows to her head. Sperm was recovered from Ms. Miller's vagina and was preserved for possible DNA testing.

Within one week of the murder, the police department considered the Defendant as a suspect. Sergeant Nichols initially spoke with the Defendant in 1988 about Patricia Miller's murder. At that time, the Defendant denied any involvement with the murder and told Sergeant Nichols that he had never been inside Ms. Miller's apartment. The Defendant denied knowing Ms. Miller, although he indicated he may have seen her once in Satellite Beach, Florida. The Defendant agreed to give a sample of his blood for possible DNA comparison.

In 1988, only restriction fragment length polymorphism (RFLP) DNA testing was available, which required a large amount of DNA and the DNA had to interact with a high molecular weight. As a result, there were no DNA leads because the scientific technology was not that advanced at that time.

In 1998, the Defendant was serving a life sentence for the 1997 first degree strangulation murder of his wife, Linda Barnes, in Case Number 05-1997-CF-030638-XXXX-XX. With advanced DNA testing in 1998, specifically the polymerase chain reaction (PCR), spermatozoa removed from Ms. Miller's vagina was re-submitted for DNA testing and it matched the Defendant. Dale Gilmore, a forensic DNA supervisor for Wuesthoff Reference Laboratories, testified that the probability of a random match was 1 in 3.8 million in the Caucasian population; 1 in 28.7 million in the African-American population; and 1 in 82.4 million in the Hispanic population. Sergeant Nichols and Agent Goodyear then traveled to the prison to speak with the Defendant regarding the death of Ms. Miller, but the Defendant refused to speak to the officers.

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In 2005, the Defendant who remained incarcerated for life for murdering his wife wrote three letters to Assistant State Attorney Michael Hunt. Mr. Hunt represented the State at the Defendant's plea and sentencing proceeding in the case concerning the death of the Defendant's wife, Linda Barnes. The Defendant's letters to Mr. Hunt are dated October 10, 2005³, December 7, 2005⁴, and December 21, 2005⁵. In the October 10, 2005 letter, the Defendant requested an interview at the correctional facility with Sherman Insco, a fellow prison inmate, facilitating the interview. The Defendant specifically instructed Insco to ask the questions, while law enforcement officers were present and observed the entire interview.

On November 1, 2005, pursuant to the Defendant's request, the Defendant's interview with Insco occurred, which was videotaped by Detective Emil Castrillo of the Melbourne Police Department. In that videotaped interview, the Defendant stated that before entering Ms. Miller's condominium, he intended to murder her. The Defendant stated he entered the condominium unit through a bedroom window. The Defendant removed his clothing before entering and left them outside the window. The Defendant stated that he entered naked because he did not want to bring in any material that would link him to the crime that he was about to commit. Once inside, the Defendant armed himself with a knife from the kitchen. The Defendant stated that he confronted Ms. Miller in the bathroom first, and then took her at knife-point to the bedroom where he first sexually battered her. The Defendant then bound her hands behind her back

³ State's Exhibit 9.

⁴ State's Exhibit 10.

⁵ State's Exhibit 11.

with some shoelaces that he had removed from some tennis shoes, tied her feet together, and next sexually battered her again. The Defendant stated that he tried to strangle her to death with a belt from her terry cloth robe he found, but was not successful, so he then beat her to death with a hammer that he found inside her bedroom. The Defendant stated that he took a bankcard and a bill from her wallet. The Defendant collected everything he touched as well as the clothing Ms. Miller was wearing and placed them in a bag. The Defendant set Ms. Miller's bed afire to eliminate evidence and he got dressed. The Defendant took the items that he had bagged as well as a window screen that he had removed, and then left. He returned to his vehicle which had been parked in a nearby remote area. The Defendant threw away the items in the trash at another site. The Defendant stated that he was in Ms. Miller's apartment for approximately forty-five minutes to one hour.

During the interview, the Defendant described with accuracy Ms. Miller's physical appearance, the interior of the apartment, specific objects he saw in the apartment, including a bicycle, basket weaving supplies, divorce paperwork, a stethoscope, and over-sized curtains. The Defendant also correctly described the positioning of Ms. Miller's bed and her body. His descriptions of the homicide, the sexual batteries, and the arson were consistent with the evidence.

II. AGGRAVATING CIRCUMSTANCES

The State argued six statutory aggravators. The Court finds that all six aggravators were proven beyond a reasonable doubt, and the Court gives each of them great weight, specifically:

1. The Capital Felony was Committed by a Person under Sentence of Imprisonment

Section 921.141(5)(a), Florida Statutes (1987), provides that if the capital felony was committed by a person previously convicted of a felony and under sentence of imprisonment, then this qualifies as an aggravating factor for purposes of imposing the death penalty. At the time of the murder of Patricia Miller, courts had interpreted this aggravator to include persons on parole. Jackson v. State, 530 So. 2d 269, 273 (Fla. 1988), cert. denied, 488 U.S. 1050 (1989).

The State proved this aggravating circumstance beyond a reasonable doubt through documentation as well as the Defendant's admissions. During the sentencing hearing, the State introduced into evidence certified copies of documents from the Florida Parole and Probation Commission. The "Certificate of Parole" indicates that the Defendant was granted parole on August 28, 1984, and thereafter released on parole with conditions on October 27, 1987. (See State's Exhibit #39). The "Revocation of Parole" document indicates that the Defendant's parole was revoked on September 28, 1988. (See State's Exhibit #40). The murder of Patricia Miller occurred on April 20, 1988, clearly after the Defendant was placed on parole and before the Defendant's parole was revoked.

The Defendant also admitted in his statement to Sherman Insko that he was on parole at the time he murdered Patricia Miller.

The Court finds this aggravating circumstance has been proven beyond a reasonable doubt. The Court gives this aggravator great weight.

2. The Defendant was Previously Convicted of Another Capital Felony or a Felony Involving the Use or Threat of Violence to Person

Section 921.141(5)(b), Florida Statutes, provides that an aggravating circumstance is that "[t]he defendant was previously convicted of another capital felony or of a felony involving the use or threat of violence to the person." This aggravating circumstance has been proven to exist beyond a reasonable doubt as the Defendant had been previously convicted of a capital felony. The State also introduced into evidence a certified copy of the Defendant's conviction for the first-degree pre-meditated murder of his wife, Linda Barnes, on January 9, 1998, in Case Number 05-1997-CF-030638-AXXX-XX. (State's Exhibit Number 38). In addition, the Court heard the testimony of Agent Todd Goodyear of the Brevard County Sheriff's Office regarding the facts of that homicide. The Defendant murdered Linda Barnes on December 11, 1997, in Ms. Barnes' home. The cause of her death was strangulation. The Court also heard the audio-taped statement that the Defendant gave to law enforcement when questioned regarding the murder of Linda Barnes shortly after it occurred, wherein the Defendant confessed to killing Linda Barnes by manual strangulation. The Defendant was indicted for this murder, plead guilty to the charge, and was sentenced to life in prison.

Although the homicide of Linda Barnes occurred after the homicide before this Court, this aggravating circumstance may be proven by a conviction that occurs any time prior to the sentencing on the case before the Court. Lecroy v. State, 533 So. 2d 750, 755 (Fla. 1988), cert. denied, 492 U.S. 925 (1989); Correll v. State, 523 So. 2d 562, 568 (Fla. 1986), cert. denied, 488 U.S. 871 (1988);

Francis v. State, 808 So. 2d 110, 136 (Fla. 2001), cert. denied, 537 U.S. 1090 (2002).

The Court gives this aggravator great weight.

3. The Capital Felony was Committed while the Defendant was Engaged in the Commission of a Sexual Battery and a Burglary

Section 921.141(5)(d), Florida Statutes, provides that an aggravating circumstance is "[t]he capital felony was committed while the defendant was engaged, or was an accomplice, in the commission of, or an attempt to commit, or flight after committing or attempt to commit, any robbery, sexual battery, arson, burglary, kidnapping, or aircraft piracy or the unlawful throwing, placing, or discharging of a destructive device or bomb." While committing the capital felony in this case, the Defendant engaged in a burglary and a sexual battery. This aggravating circumstance has been proven beyond all reasonable doubt.

§ 921.141((5)(d), Fla. Stat. (1987).

The Defendant pleaded guilty on May 2, 2006, to first-degree premeditated murder, burglary of a dwelling with an assault or battery, and sexual battery by use or threat of a deadly weapon. During the plea colloquy, the Defendant made the following statement to this Court:

On April 20, 1988, I broke into Patricia Miller's condominium on Roosevelt Avenue in Melbourne, Florida. I raped her twice. I tried to strangle her to death. I hit her in the head with a hammer and killed her and I set her bed on fire.

(5/2/2006 Plea Transcript, pgs. 35-36). When asked by the Court if he knew Ms. Miller, the Defendant replied, "No, I didn't." (5/2/2006 Plea Transcript, p. 36, lines 5-7).

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In addition to the statements made in Court during the Defendant's guilty plea, the Defendant made other statements admitting to the contemporaneous perpetration of burglary and sexual batteries. In the videotaped statement that the Defendant provided to Inmate Sherman Insko, the Defendant described how he disrobed, and then stealthily entered Patricia Miller's home through a rear window, arming himself with a kitchen knife once inside. He stated that he did not know at that time the victim's name. He stated that he used a knife to control her. He said that he sexually battered her, bound her arms and legs, and then sexually battered her again. He thereafter killed her. The Defendant rifled through her purse and took her bank card, as well as items that he believed he had touched.

In the letter dated December 21, 2005, sent to Assistant State Attorney Michael Hunt, the Defendant provided a detailed account of the burglary and sexual batteries. The letter, which the Defendant stipulated in open court that he had handwritten and sent to Mr. Hunt, stated in grotesque detail how the Defendant removed his clothing, climbed into Patricia Miller's home through an open back window, armed himself with a knife, and attacked Ms. Miller. He indicated that she told him to leave and he did not. The Defendant described the vaginal and anal sexual batteries perpetrated upon Ms. Miller, as well as other crimes.

The State also presented other evidence of the sexual batteries. Medical Examiner Dr. Qaisar testified that Ms. Miller's body showed bruising around her anus, consistent with forced penetration. There was also semen found in Ms.

Miller's vaginal cavity during the original autopsy, and in 1998, the DNA extracted from that semen sample matched the Defendant. This evidence, along with the surrounding circumstances of the victim being murdered, her body left nude and bound on the bed and set ablaze evinces the intent and consciousness of wrongdoing on part of the perpetrator.

The Court assigns great weight to this aggravator.

4. The Capital Felony was Committed for the Purpose of Avoiding or Preventing Lawful Arrest

In order to establish the avoid arrest aggravator for a murder that does not involve a law enforcement officer, the intent to avoid arrest must be very strong. Farina v. State, 801 So. 2d 44, 54 (Fla. 2001), cert. denied, 536 U.S. 910 (2002); Rodriguez v. State, 753 So. 2d 29, 47-48 (Fla.), cert. denied, 531 U.S. 859 (2000); Consalvo v. State, 697 So. 2d 805, 819 (Fla. 1996), cert. denied, 523 U.S. 1109 (1998). The evidence must prove that witness elimination was the sole or dominate motive for the killing. Id. Mere speculation on the part of the State that witness elimination was the dominant motive is insufficient. Farina, 801 So. 2d at 84; Consalvo, 697 So. 2d at 819. However, the State may prove this aggravator with circumstantial evidence without direct evidence of the defendant's thought process. Id. This aggravating circumstance may be established by a defendant's admission that he killed the victim because he or she could identify him. Derrick v. State, 641 So. 2d 378, 380 (Fla. 1994), cert. denied, 513 U.S. 1130 (1995); Trease v. State, 768 So. 2d 1050, 1055-56 (Fla. 2000).

The Defendant committed the murder of Patricia Miller solely or dominantly in order to eliminate her so that she could not identify him as the perpetrator. In the Defendant's letter to Assistant State Attorney Michael Hunt, dated December 7, 2005, the Defendant wrote, "I murdered her [Patricia Miller] so [there] would be no witness or complaint against me." Furthermore, in the videotaped statement that the Defendant made to Sherman Insco, the Defendant stated that he knew that he was going to kill Patricia Miller when he entered her residence naked. It is clear from the Defendant's statements that his only motive for killing Patricia Miller was to avoid arrest. The Defendant never suggested at any other time that he had any other motive for murdering Ms. Miller. This is direct evidence of the Defendant's thought process which proves the Defendant's sole motive for murdering Patricia Miller was to eliminate her as a witness.

While the Defendant's statement is enough to establish this aggravator, the crime scene evidence also showed that the Defendant murdered Ms. Miller for the purpose of avoiding or preventing his lawful arrest. Ms. Miller was bound and helpless at the time the Defendant murdered her. The injuries to her head inflicted by an object like a hammer and the fractures to her hyoid bone consistent with strangulation clearly show that the Defendant intended to kill her. The amount of force used to inflict these wounds was substantial. The nature of these wounds, in addition to the facts that the Defendant made great effort to avoid detection by carefully removing all items from the home that he believed he had touched, by wiping down other areas of the home to eliminate fingerprints, and by setting Ms. Miller's body on fire, support the conclusion beyond all

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reasonable doubt that the Defendant's dominant motive for Ms. Miller's murder was to eliminate her as a witness to his crimes. See Willacy v. State, 696 So. 2d 693, 696 (Fla.), cert. denied, 522 U.S. 970 (1997); Swafford v. State, 533 So. 2d 270 (Fla. 1988).

This aggravator was proven beyond a reasonable doubt. § 921.141(5)(e), Fla. Stat. (1987). The Court assigns it great weight.

5. Heinous, Atrocious, or Cruel

The heinous, atrocious, or cruel aggravator applies "only in tortuous murders – those that evince extreme and outrageous depravity as exemplified either by the desire to inflict a high degree of pain or utter indifference to or enjoyment of the suffering of another." Simmons v. State, 934 So. 2d 1100, 1122 (Fla. 2006), cert. denied, 127 S.Ct. 1334, 167 L.Ed.2d 80 (2007). The Supreme Court of Florida has defined the heinous, atrocious, or cruel aggravator as follows:

Heinous means extremely wicked or shockingly evil. Atrocious means outrageously wicked and vile. Cruel means that designed to inflict a high degree of pain with utter indifference to, or even enjoyment of the suffering of others. The kind of crime intended to be included as heinous, atrocious, or cruel is one accompanied by additional acts that show that the crime was conscienceless or pitiless and was unnecessarily torturous to the victim.

Hall v. State, 614 So. 2d 473, 478 (Fla.), cert. denied, 510 U.S. 834 (1993). This aggravator applies to murders "that evince extreme and outrageous depravity as exemplified either by the desire to inflict a high degree of pain or utter indifference to or enjoyment of the suffering of another." Card v. State, 803 So.

2d 613, 624 (Fla. 2001) (quoting Brown v. State, 721 So. 2d 274, 277 (Fla. 1998)). This aggravator focuses on the means and manner in which the death was inflicted and the immediate circumstances surrounding the death rather than the state of mind or intent of the defendant. Id.; see also Rimmer v. State, 825 So. 2d 304, 328 (Fla.), cert. denied, 537 U.S. 1034 (2002). Phrased differently, "the focus should be upon the victim's perceptions of the circumstances as opposed to those of the perpetrator." Schoenwetter v. State, 931 So. 2d 857, 874 (Fla.), cert. denied, 127 S.Ct. 587, 166 L.Ed.2d 437 (2006). The uncontested evidence presented to the Court during the sentencing hearing established this circumstance beyond a reasonable doubt.

The Defendant stated that he was in Ms. Miller's apartment for approximately forty-five minutes to an hour. During this time, he threatened her with a knife to obtain her submission. Upon first confronting Ms. Miller, the Defendant had a knife and told her that he was going to rape her, no doubt causing immediate terror in her mind. She asked the Defendant not to hurt her. He then sexually battered Ms. Miller multiple times, including, as described by the Defendant, digital penetration of her vagina and anus, penile penetration of her vagina, anus, and mouth, and oral contact with her vagina.

The medical evidence corroborates sexual batteries by the Defendant as well. His sperm is found in the victim's vaginal cavity and her anus was bruised at or near her time of death in a manner consistent with forced anal penetration. Dr. Qaisar testified that the anal sexual assault occurred when Ms. Miller was alive and would have been very painful to her. The Defendant bound Ms. Miller's

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hands and legs prior to her death, rendering her immobile and helpless. Dr. Qaisar testified that the blanching, hemorrhage, and abrasions on Ms. Miller's wrists indicated that the ligatures were on her wrists while she was alive.

During the extensive sexual batteries of Ms. Miller, she asked the Defendant not to hurt her. She asked the Defendant not to ejaculate inside of her, and she begged him not to penetrate her anally, all of which the Defendant did regardless. Throughout the sexual batteries, the Defendant threatened Ms. Miller with the knife, advising her at one point that he would stab her to death if she hurt him. The acts perpetrated on Ms. Miller would have taken a considerable amount of time, and is consistent with the Defendant's approximation of forty-five to sixty minutes.

The Defendant then attempted to strangle Ms. Miller, but failed to kill her by this means. The Defendant stated that he tried to strangle her for about forty-five seconds. Ms. Miller was conscious at the time the Defendant began to strangle her. The Medical Examiner, Dr. Qaisar testified that Ms. Miller's cricoid cartilage of the larynx and hyoid bone were fractured, consistent with strangulation. Dr. Qaisar testified that a large amount of force was needed to inflict those fractures, especially in persons in their forties, like Ms. Miller. Dr. Qaisar opined that Ms. Miller would have experienced great pain for ten to twenty seconds before she lost consciousness.

The Defendant thereafter bludgeoned Ms. Miller to death. Multiple blows were inflicted. Dr. Qaisar described the injuries to Ms. Miller's head as follows:

She has multiple blows to the head with the large and multiple complex lacerations on the skull and fracture of bones with inward

movement of the bone, and also laceration and multiple contusions to the brain substance and also pulpification of the brain substance.

Ms. Miller's skull was broken, which was caused by a severe degree of force. Dr. Qaiser explained that the injuries to Ms. Miller's head were consistent with the use of a hammer and he opined that she was alive when she was bludgeoned. The cause of her death was the blunt force trauma inflicted with the hammer. Ms. Miller was alive at the time of the bludgeoning, but it is unclear if she was conscious.

The sexual batteries of Patricia Miller were perpetrated in a manner that was wicked, vile, and shockingly evil and unnecessarily tortuous to the victim. The Defendant was naked when he initially attacked her, and he engaged her in conversation immediately, advising her that he was going to rape her. This undoubtedly created a great deal of emotional stress and fear in the mind of Ms. Miller. The Defendant thereafter sexually battered Ms. Miller extensively, threatening her with a knife. He bound her so that she was helpless to resist, causing further terror. He thereafter sexually battered her again, telling her that he would stab her to death if she did not cooperate. He strangled her with the belt of her own robe in an initial unsuccessful attempt to take her life. She knew he was going to kill her for the duration of her conscious state, and she was unable to resist due to being bound and overpowered by the Defendant. Patricia Miller suffered, over a period of time, a terrifying ordeal culminating in a horrifying death at the Defendant's hands.

The Supreme Court of Florida has held on numerous occasions that strangulation perpetrated upon a conscious victim involves foreknowledge of

death, extreme anxiety and fear, and that this method of killing is one to which the fact of heinousness is applicable. Huggins v. State, 889 So. 2d 743, 770 (Fla 2004), cert. denied, 545 U.S. 1107 (2005); Overton v. State, 801 So. 2d 877, 901 (Fla. 2001), cert. denied, 535 U.S. 1062 (2002); Sochor v. State, 580 So. 2d 595, 603 (Fla. 1991) (quoting Tompkins v. State, 502 So. 2d 415, 421 (Fla. 1986)), *vacated on other grounds*, 504 U.S. 527 (1992); Ocha v. State, 826 So. 2d 956, 963 (Fla. 2002); James v. State, 695 So. 2d 1229, 1235 (Fla.), cert. denied, 522 U.S. 1000 (1997); Castro v. State, 644 So. 2d 987, n. 3 (Fla. 1994); Bowles v. State, 804 So. 2d 1173, 1178 (Fla. 2001), cert. denied, 536 U.S. 930 (2002). The Supreme Court of Florida has further noted that "[o]ur case law establishes ... that strangulation creates a prima facie case for [HAC]." Overton v. State, 801 So. 2d 877, 901 (Fla. 2001), cert. denied, 535 U.S. 1062 (2002) (citing Orme v. State, 677 So. 2d 258, 263 (Fla. 1996); Hitchcock v. State, 578 So. 2d 685, 692 (Fla. 1990) ("[S]trangulations are nearly per se heinous.")).

Since it is the impact on the victim and the victim's state of mind that courts look to in determining the existence of this factor, the fear and emotional strain leading up to even a quick death may be considered. Sexual battery perpetrated on a victim prior to death has also supported findings of the especially heinous, atrocious, or cruel aggravator. See Banks v. State, 700 So. 2d 363, 366-67 (Fla. 1997), cert. denied, 523 U.S. 1026 (1998); Swafford v. State, 533 So. 2d 270, 279 (Fla. 1988); Preston v. State, 607 So. 2d 404, 409-10 (Fla. 1992), cert. denied, 507 U.S. 999 (1993).

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The Florida Supreme Court held that this aggravating circumstance applies to murders "that evince extreme and outrageous depravity as exemplified either by a desire to inflict a high degree of pain or utter indifference to or enjoyment of the suffering of another." Cheshire v. State, 568 So. 2d 908, 912 (Fla. 1990). The crime must be both conscienceless or pitiless and unnecessarily tortuous to the victim. Richardson v. State, 604 So. 2d 1107, 1109 (Fla. 1992). The Defendant's actions in this case evince clearly the Defendant's lack of conscience or pity, as well as his complete and utter indifference to the suffering of Patricia Miller.

This aggravator can be applied to murders committed during the course of a felony and it is not impermissible to find that both of these aggravating circumstances exist. The aggravating circumstance of especially heinous, atrocious, or cruel focuses on the impact to the victim while the aggravating circumstance of committing the murder during the course of a felony focuses on whether it was committed during an enumerated felony and therefore, it is not impermissible doubling to find both aggravators exist in certain factual scenarios such as this one. Banks v. State, 700 So. 2d 363 (Fla. 1997), cert. denied, 523 U.S. 1026 (1998).

This Court finds that the facts and circumstances surrounding and leading up to the eventual death of Patricia Miller prove beyond a reasonable doubt that the murder of Patricia Miller was especially heinous, atrocious, or cruel, and the Court gives this aggravator great weight. § 921.141(5)(h), Fla. Stat. (1987).

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6. Cold, Calculated, and Premeditated

The terms "cold," "calculated," and "premeditated," have been specifically defined by the courts. "Cold" means "calm, cool reflection, not an act prompted by emotional frenzy, panic, or fit of rage." Richardson v. State, 604 So. 2d 1107, 1109 (Fla. 1992). "Calculated" means the defendant had a "careful plan or prearranged design to commit the murder." Rogers v. State, 511 So. 2d 526, 533 (Fla. 1997), cert. denied, 484 U.S. 1020 (1988). "Premeditated" means a "heightened premeditation," which has been further defined as more than that required to provide first degree murder, and as "deliberate ruthlessness." Jackson v. State, 648 So. 2d 85 (Fla. 1994); Walls v. State, 641 So. 2d 381, 388 (Fla. 1994), cert. denied, 513 U.S. 1130 (1995). "Pretense of moral justification" refers to any claim that, although "insufficient to reduce the charge to a lesser degree of murder, nevertheless rebuts the cold and calculating nature of the homicide." Banda v. State, 536 So. 2d 221, 225 (Fla. 1988), cert. denied, 489 U.S. 1087 (1989).

The Court finds that Patricia Miller's murder was committed in a cold, calculated, and premeditated manner without any pretense of moral or legal justification. The uncontradicted evidence presented at the sentencing hearing supports the finding of this aggravating circumstance.

In the videotaped statement that the Defendant made in November 2005, while he was imprisoned, the Defendant states that he planned to sexually batter and kill Patricia Miller before entering her home. In his letter to Assistant State

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Attorney Michael Hunt dated December 21, 2005, the Defendant writes that he went there to kill his victim.

In the Defendant's detailed recounting of the murder, he stated unequivocally that he went there to murder Ms. Miller and that it was not an afterthought. The Defendant maintained control and worked calmly and coolly towards his goal throughout the entire time that he was in the victim's home, which was approximately forty-five to sixty minutes. The murder was carried out in a brutal and ruthless manner. The Defendant failed at his first attempt to take her life by strangulation. He then obtained an item from Ms. Miller's home, a hammer, and proceeded to strike her in the back of the head four to five times. The Defendant continued to strike Ms. Miller after he knew she was dead, not because he was in a frenzy or fit of rage, but with a plan to confuse law enforcement and prevent matching of the wound to any specific type of weapon. Even after the murder, the Defendant maintained his calm as he proceeded to clean the crime scene and destroy evidence that he was there. No inference can be made from any of the evidence before this Court that the Defendant was acting under a pretense of moral or legal justification, particularly in light of the Defendant's own recounting, in which he stated that the victim submitted to him and that she did not fight him.

It is legally permissible for this Court to find this circumstance along with the aggravating circumstance of especially heinous, atrocious, or cruel, as this aggravator looks at the Defendant's state of mind, while the especially heinous, atrocious, or cruel aggravator considers the Defendant's acts in carrying out the

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murder. Jackson v. State, 530 So. 2d 269 (Fla. 1988). The Court may also find this aggravator to exist along with the aggravating circumstance of the murder being committed for the purpose of avoiding or preventing a lawful arrest or effecting and escape from custody, as long as there are distinct facts to support each circumstance. In Rodriguez v. State, 753 So. 2d 29 (Fla.), cert. denied, 531 U.S. 859 (2000), the Court held that avoiding arrest goes to the motive of the crime, rather than the manner in which it was done. In the case at bar, the evidence shows that although the Defendant's dominant motivation for killing Patricia Miller was witness elimination, the Defendant planned the rape and murder of Ms. Miller carefully, from the selection of Ms. Miller as a victim (a woman living alone in the condominium complex), to planning the timing (when neighbors would not likely be home), to the stealthy entry into the home, lying in wait for the victim in her home, then proceeding to carry out his plan of rape and murder and evidence destruction in a goal-oriented manner.

The State has proven beyond a reasonable doubt that the homicide was committed in a cold, calculated, and premeditated manner without any pretense of moral or legal justification. The Court gives this aggravator great weight.

III. MITIGATING CIRCUMSTANCES

Although the Defendant freely and voluntarily waived the presentation of mitigating evidence other than that already placed on the record, this Court must consider and weigh any mitigating evidence in determining the appropriate sentence. Accordingly, this Court has considered and weighed any and all

mitigation presented during the course of the penalty phase, the Pre-Sentence Investigation Report, and the sentencing hearing.

In Ford v. State, 802 So. 2d 1121, 1134-1135 (Fla. 2001), cert. denied, 535 U.S. 1103 (2002), the Court described the procedure that a trial court should follow in considering mitigating circumstances:

When a court is confronted with a factor that is proposed as a mitigating circumstance, the court first must determine whether the factor is mitigating in nature. A factor is mitigating in nature if it falls within a statutory category or otherwise meets the definition of a mitigating circumstance. The court next must determine whether the factor is mitigating under the facts in the case at hand. If a proposed factor falls within a statutory category, it necessarily is mitigating in any case in which it is present. If a factor does not fall within a statutory category but nevertheless meets the definition of mitigating circumstance, it must be shown to be mitigating in each case, not merely present. If a proposed factor is mitigating under the facts in the case at hand, it must be accorded some weight; the amount of weight is within the trial court's discretion.

A. STATUTORY MITIGATING CIRCUMSTANCES

There are two possible statutory mitigating circumstances present in this case. The Court will address each one in detail separately. In considering alleged mitigating evidence the Court must decide if "the facts alleged in mitigation are supported by the evidence," if those established facts are "capable of mitigating the defendant's punishment, i.e., may be considered as extenuating or reducing the degree of moral culpability for the crime committed," and if "they are of sufficient weight to counterbalance the aggravating factors." Rogers v. State, 511 So. 2d 526, 534 (Fla.), cert. denied, 484 U.S. 1020 (1988). The

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decision as to whether a mitigating circumstance has been established is within the Trial Court's discretion.

1. The Defendant was under the Influence of Extreme Mental or Emotional Disturbance

Dr. William Riebsame, an expert in forensic psychology, reviewed over 2,000 pages of materials in performing his evaluation of the Defendant. The Defendant declined to cooperate, therefore, the evaluation was based solely on records. These records included a PSI with psychological evaluations dating back to 1971, police reports regarding the murder, the Defendant's statements to law enforcement, letters written by the Defendant, the Defendant's records from the Department of Corrections, Brevard County Jail records, and the Defendant's school records. Dr. Riebsame indicated that he was confident in his opinions, because of the wealth of information he received on the Defendant from over the years. The doctor indicated that there was a statistical likelihood that the Defendant suffers from a frontal lobe injury, as there is a correlation between brain injury and psychopathic behavior. However, the doctor could not definitely state the Defendant had such an injury because the Defendant refused medical testing to confirm this diagnostic impression.

Dr. Riebsame testified that the Defendant was a psychopath, and that his personality disorders were persistent and consistent throughout his life. He opined that the Defendant had cocaine dependency, an antisocial personality disorder and a personality disorder not otherwise specified, with borderline and narcissistic characteristics. Dr. Riebsame's opinion was based partially upon his

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knowledge of the Defendant's past medical history and upon considering that he was born prematurely to a mother who smoked and drank alcohol during her pregnancy. Dr. Riebsame noted that studies conducted on biological twins have supported a genetic component to these mental disorders, and further noted that the Defendant's twin sister has also exhibited anti-social personality disorder behaviors. The doctor testified that the Defendant exhibited symptoms of an antisocial personality disorder from a young child, continuing through adolescence and into adulthood. The criteria for the diagnosis of psychopathy was found in the Defendant's history of antisocial behavior, his lack of conscience and empathy, his aggressiveness, his violence and quick temper, and his predatory behavior, among others. The doctor testified that a violent social environment in childhood can aggravate personality disorders, and the records establish that the Defendant grew up in a violent home without love or support from his family. The PSI history also reveals that mental health issues were also found in the Defendant's relatives. Michael, the Defendant's brother, committed suicide. His maternal grandmother was institutionalized for mental illness at an early age and never released. His younger sister, Beth Catron, attempted suicide as a teenager, and she was also a self-mutilator. The Defendant's twin sister, Jeannice Deggendorf, had drug issues also.

Dr. Riebsame testified that the Defendant is an individual with an extreme mental disorder. The Court accepts the testimony of Dr. Riebsame, and finds that this mitigator has been established by a preponderance of the evidence. The Court assigns slight weight to this mitigator. See Perez v. State, 919 So. 2d

347, 374-75 (Fla. 2005) (upholding trial court's decision to assign slight weight to the mental disturbance mitigating circumstance because there was no showing that Perez was unable to conform his behavior to the requirements of the law), cert. denied, 126 S.Ct. 2359 (2005).

2. The Capacity of the Defendant to Appreciate the Criminality of his Conduct or to Conform his Conduct to the Requirements of the Law was Substantially Impaired

The Court finds that this mitigator was not established. The evidence presented clearly establishes the controlled, planned nature of this crime from start to finish. Although the Court finds by a preponderance of the evidence, the Defendant was under the influence of an extreme mental disturbance, the Court finds that the Defendant was not substantially impaired to the extent that he did not have the capacity to appreciate the criminality of his conduct or to conform his conduct to the requirements of law. The Court assigns no weight to this mitigator.

B. NON-STATUTORY MITIGATING CIRCUMSTANCES

A defendant is allowed great latitude in presenting evidence which he feels constitutes non-statutory mitigating circumstances. When addressing mitigating circumstances, the trial judge must expressly evaluate in its written order each mitigating circumstance 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 mitigation nature. Rogers v. State, 511 So. 2d 526 (Fla. 1987), cert. denied, 484 U.S. 1020 (1988); Campbell v. State, 577 So. 2d 932 (Fla. 1991). The resolution of factual conflicts is solely the responsibility and duty

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of the trial judge. Gunsby v. State, 574 So. 2d 1085, 1090 (Fla.) cert. denied, 502 U.S. 843 (1991). The Court notes that the "catch-all" non-statutory mitigator was not a part of the sentencing phase when this crime was committed. However, consideration of these factors is required by Hitchcock v. Dugger, 481 U.S. 393 (1986). The following non-statutory mitigating circumstances were considered by the Court in this case:

1. The Defendant came forward and revealed his involvement in the unsolved crime. In 1988, the Defendant was interviewed by law enforcement and he denied any knowledge or involvement in Ms. Miller's murder. In 1998, DNA evidence linked the Defendant to Ms. Miller's sexual battery and murder. For reasons not made clear, law enforcement did not act on this new information. In 2005, the Defendant initiated, indirectly and directly, contact with law enforcement and did voluntarily provide a videotaped confession to the murder as well as several written admissions. These acts by the Defendant prompted the 2006 indictment by the grand jury in this case.

This mitigator was established by the greater weight of the evidence. Although the Defendant did ultimately step forward and admit his involvement in these crimes, this non-statutory mitigator is given little weight by the Court. The Defendant did not come forward to admit his involvement until there was already DNA evidence linking him to the crimes.

2. The Defendant took responsibility for his acts. The Defendant "has accepted moral responsibility, offered no excuses or defenses, entered a plea and appears ready to accept appropriate punishment, including death." This

mitigator was established by the greater weight of the evidence. Although the Defendant has taken responsibility for his actions, this non-statutory mitigator is given little weight by the Court.

3. The Defendant has expressed remorse for his actions. There is no evidence in the record of this case to support a finding of this mitigating circumstance. In fact, the Defendant has indicated in court and in his taped statement to Sherman Insco that his acceptance of responsibility for the sexual batteries and the killing of Patricia Miller has to do with the Defendant's religious beliefs rather than an sincere sense of guilt or actual remorse. This mitigator was not established by the greater weight of the evidence.

4. The Defendant was under the influence of a mental or emotional disturbance. Court counsel asserts that if the Defendant's mental or emotional disorders are not "extreme" enough to qualify as a statutory mitigator, they are of sufficient significance to be considered a non-statutory mitigator. The Court has already found this factor established as a statutory mitigator and assigned it slight weight.

5. The Defendant has experienced prolonged drug abuse. Dr. Riebsame testified that based on the records he reviewed the Defendant has been a lifelong drug abuser of various drugs. There was no evidence that the Defendant was under the influence of any drugs at the time of Ms. Miller's murder. Most of the "prolonged drug abuse" occurred after the 1988 murder of Ms. Miller. This mitigator was established by the greater weight of the evidence. This Court assigns it little weight.

6. **The Defendant did not have the benefit of a loving relationship with his mother.** The record suggests that the Defendant's mother used him as a scapegoat, and blamed the Defendant for problems/conflicts with his other siblings, even when he was not the one at fault. This mitigator was established by the greater weight of the evidence, and the Court assigns it little weight.

7. **The Defendant did not have the benefit of a loving relationship with his father.** The records establish that the Defendant was beaten by his father, with a belt and fists. His sister indicated that the father would have a "blanket party," for the Defendant, wherein the father would envelop the Defendant in a blanket then beat him through the blanket. The father would then hand the belt to the siblings and have them take turns hitting the Defendant. If the father deemed that insufficient force was being applied by the siblings, he would take the belt back and hit all the harder. Various documents indicate that the father admitted physically punishing his son. The records reveal that the Defendant had a very unhappy childhood with constant strife and dissension. This mitigator was established by the greater weight of the evidence, and the Court assigns it little weight.

8. **The Defendant was sexually abused as a child.** The records indicate that the Defendant reported that he was sexually molested by a man who lived next door when he was young and in retaliation, the Defendant set the man's house on fire." At age fifteen, the Defendant moved in with Chuck Vitale, who was a "suspected homosexual" who took in runaway boys. The Defendant's mother reported that the Defendant received money from Vitale; more money

than could be explained by the Defendant performing odd jobs. His father was unhappy with the Defendant's and Vitale's relationship, and his sister stated she was convinced that Vitale was paying the Defendant for sexual acts. This mitigator was established by the greater weight of the evidence, and the Court assigns it slight weight.

9. **Due to aging, the Defendant is a diminishing threat.** Dr. Riebsame testified that research has shown that by the time psychopaths reach their forties, they become less problematic to society, possibly due to a decline in testosterone. The doctor testified that as they get older, psychopaths can show less aggressiveness, less impulsiveness, less change in mood, and appear to be less psychopathic. The Defendant's history actually suggests otherwise, in that the Defendant committed the murder of Ms. Miller in 1988, when he was twenty-six years of age. Nine years later, at the age of thirty-five, the Defendant murdered his wife, Linda Barnes. Although nine years had passed, the Defendant remained a danger and a threat to society and killed again. The Court finds this mitigating circumstance has not been proven by the greater weight of the evidence.

10. **The Defendant has taken steps to improve himself.** According to the PSI, the Defendant completed ninth grade. Since then, the Defendant has earned a high school diploma, some college credits, and serves as a "certified legal assistant." The Court finds this mitigating circumstance has been proven by the greater weight of the evidence. This non-statutory mitigator is given little weight by the Court.

11. The Defendant is a functional and capable person and has demonstrated by his actions and participation in this case that he has sufficient intelligence and capabilities to contribute to society. The Court finds this mitigating circumstance has been proven by the greater weight of the evidence. This non-statutory mitigator is given little weight by the Court.

IV. CONCLUSION

The Court finds that the State of Florida has established beyond and to the exclusion of every reasonable doubt, the existence of six statutory aggravating factors: (1) the capital felony was committed by a person previously convicted of a felony and under sentence of imprisonment; (2) the Defendant was previously convicted of another capital felony or a felony involving the use or threat of violence to a person; (3) the capital felony was committed during the commission of multiple sexual batteries and a burglary; (4) the capital felony was committed for the purpose of avoiding or preventing lawful arrest; (5) the murder was heinous, atrocious, and cruel; and (6) the capital felony was a homicide and was committed in a cold, calculated, and premeditated manner without any pretense of moral or legal justification.

The Court considered the mitigators as detailed above. All of the mitigators combined are insufficient in weight to counter balance the six aggravating factors which have been proven beyond a reasonable doubt and for which this Court assigned great weight. The alternative sentence available to this Court on Count I is life imprisonment without the possibility of parole until the Defendant has served twenty-five years of his sentence. This is not adequate

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punishment for this crime, particularly in light of the fact that the Defendant is already serving a life sentence for another murder. The Court further finds that each of the six aggravating factors standing alone outweigh all of the mitigating circumstances combined. This case involves a cold, deliberate murder committed in a heinous, atrocious, and cruel manner. The senseless, brutal, and tortuous killing of Patricia Miller in her home calls for nothing less than a death sentence. Under this specific set of circumstances, the Court finds the sentence of death to be appropriate.

V. SENTENCE

JAMES PHILLIP BARNES, having been given the opportunity to be heard and show legal cause why judgment and sentence should not now be imposed and to offer matters in mitigation, and no legal cause having been shown to preclude imposition of sentence, you are hereby:

ADJUDGED guilty of the crime of First Degree Murder for the unlawful killing of Patricia "Patsy" Miller, perpetrated by you from a premeditated design or intent to effect the death of Patricia "Patsy" Miller. It is therefore

ORDERED:

1. That the sentence of this Court is that you shall be **PUT TO DEATH** in the manner and means provided by law. **MAY GOD HAVE MERCY ON YOUR SOUL.**

2. You are hereby adjudged guilty of Count II – Burglary of a Dwelling with an Assault or Battery, a first degree felony punishable by imprisonment for a term of years not exceeding life. As a result of this crime, you are committed to

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the custody of the Sheriff of Brevard County, Florida, to be delivered to him to the custody of the Department of Corrections of Corrections to be confined for life. This sentence shall be served consecutively to the sentence imposed on Count I.

3. You are hereby adjudged guilty of Count III – Sexual Battery by Use or Threat of a Deadly Weapon, a life felony. As a result of this crime, you are committed to the custody of the Sheriff of Brevard County, Florida, to be delivered to him to the custody of the Department of Corrections of Corrections to be confined for life. This sentence shall be served consecutively to the sentence imposed on Count II.

4. You are hereby adjudged guilty of Count IV – Sexual Battery by Use or Threat of a Deadly Weapon, a life felony. As a result of this crime, you are committed to the custody of the Sheriff of Brevard County, Florida, to be delivered to him to the custody of the Department of Corrections of Corrections to be confined for life. This sentence shall be served consecutively to the sentence imposed on Count III.

5. You are hereby adjudged guilty of Count V – Arson of a Dwelling, a felony of the first degree. As a result of this crime, you are committed to the custody of the Sheriff of Brevard County, Florida, to be delivered to him to the custody of the Department of Corrections of Corrections to be confined for thirty (30) years imprisonment. This sentence shall be served consecutively to the sentence imposed on Count IV.

6. The composite term of all sentences imposed for the Counts specified in this order shall run concurrently with any active sentence being served.

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7. YOU HAVE AN AUTOMATIC APPEAL TO THE SUPREME COURT OF FLORIDA FROM THIS JUDGMENT OF GUILT AND THE SENTENCE THIS COURT HAS IMPOSED. § 921.141(4), Fla. Stat. (1987). You are entitled to the assistance of an attorney in preparing and filing your appeal. Upon a showing that you are entitled to an attorney at the expense of the State one will be appointed for you.

DIRECTIONS TO THE CLERK OF THE COURT, SHERIFF, AND COURT REPORTER

8. The Clerk of the Court shall file and record this judgment and sentence and shall prepare six certified copies of this record of conviction and sentence of death and the Sheriff of Brevard County shall send one copy of this record to the Governor of the State of Florida. § 922.052, Fla. Stat. The Defendant is hereby remanded to the custody of the Sheriff of Brevard County, Florida, who is directed to deliver the Defendant and the second certified copy of this conviction and sentence to the custody of the Department of Corrections to await issuance by the Governor of a warrant commanding the execution of this sentence of death. § 922.111, Fla. Stat.

9. The Clerk of the Court shall forthwith furnish the third certified copy of this judgment to the court reporter, who is directed as expeditiously as possible to transcribe the notes of all proceedings in this case and to certify the corrections of the notes and of the transcript, duly certified, and to file two copies of such with the Clerk of this Court.

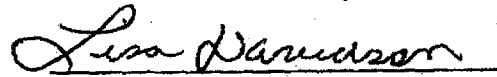
10. The Clerk of this Court shall forthwith furnish the fourth certified copy of this judgment to the Defendant's counsel on appeal (the Office of the Public

Defender) and the fifth certified copy of this judgment to the Attorney General of the State of Florida, and the sixth certified copy to the Defendant.

11. This judgment of conviction and sentence of death being subject to automatic review pursuant to section 921.141(4), Florida Statutes, the Clerk of Court is hereby directed to prepare a complete record on appeal of all parts of the original record, papers and exhibits, proceedings and evidence and two copies thereof, and after certification by the sentencing court, the Clerk shall transmit the entire original certified record to the Clerk of the Supreme Court of Florida for automatic review and serve one copy thereof upon the Attorney General of the State of Florida, one copy to the Defendant, and one copy thereof upon the Office of the Public Defender for appeal.

12. The Defendant having been adjudged insolvent for purposes of appeal, the State of Florida shall pay the costs of such transcripts and copies and the filing fee on appeal.

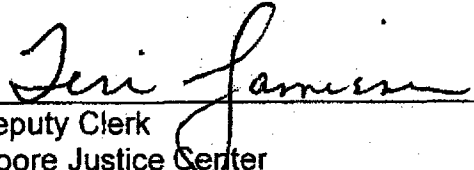
DONE AND ORDERED at the Moore Justice Center, Viera, Brevard County, Florida, this 13 day of December 2007.


LISA DAVIDSON
CIRCUIT COURT JUDGE

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CERTIFICATE OF SERVICE

I do hereby certify that copies of this Order have been provided by ~~U.S. Mail~~ to Sue Garrett, Esq., and Susan Stewart, Esq., Assistant State Attorneys, Office of the State Attorney, 2725 Judge Fran Jamieson Way, Building D, Viera, Florida 32940; James Barnes, pro se, d.o.b. 3/7/1962, Brevard County Detention Center, 860 Camp Road, Cocoa, Florida 32927; and J. Randall Moore, Assistant Public Defender, Standby Counsel for the Defendant, 2725 Judge Fran Jamieson Way, Building E, Second Floor, Viera, Florida 32940; Sam Baxter Bardwell, Esq., Court-Appointed Counsel, 503 South Palm Avenue, Titusville, Florida 32796 by hand-delivery on December 13, 2007.


Deputy Clerk
Moore Justice Center
2825 Judge Fran Jamieson Way
Viera, Florida 32940

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