

No. _____

IN THE SUPREME COURT OF THE UNITED STATES

BRANDY BAIN JENNINGS,

Petitioner,

v.

SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS,

Respondent.

APPENDIX TO PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

VOLUME II of II

CAPITAL CASE

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APPENDIX E



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Distributed by [M d d eton v. State](#), F a., October 22, 20 5

718 So.2d 144

Supreme Court of Florida.

Brandy Bain JENNINGS, Appellant,

v.

STATE of Florida, Appellee.

No. 89550.

|

Sept. 10, 1998.

Defendant was convicted in the Circuit Court, Collier County, [William L. Blackwell](#), J., of robbery and murder. Defendant appealed. The Supreme Court held that: (1) defendant was not entitled to suppression of statements even if detective's response to request for counsel was inadequate; (2) evidence supported finding of avoid arrest aggravator; (3) evidence supported finding of cold, calculated, and premeditated (CCP) aggravator; and (4) death sentences were not impermissibly disparate from co-defendant's sentences of life imprisonment.

Affirmed.

Attorneys and Law Firms

*145 [James Marion Moorman](#), Public Defender, and Robert F. Moeller, Assistant Public Defender, Tenth Judicial Circuit, Bartow, for Appellant.

[Robert A. Butterworth](#), Attorney General, and [Carol M. Dittmar](#), Assistant Attorney General, Tampa, for Appellee.

Opinion

PER CURIAM.

Brandy Bain Jennings was convicted of robbing the Cracker Barrel Restaurant in Naples, Florida, and of murdering three restaurant employees in the process. He received three separate death sentences, one for each of the murders, and was sentenced to fifteen years' imprisonment for the robbery. Jennings now appeals his convictions and sentences. We have jurisdiction. See [Art. V, § 3\(b\)\(1\), Fla. Const.](#) For the reasons expressed herein, we affirm Jennings' convictions and sentences.¹

Dorothy Siddle, Vicki Smith, and Jason Wiggins, all of whom worked at the Cracker Barrel Restaurant in Naples, were killed during an early morning robbery of the restaurant on November 15, 1995. Upon arriving on the scene, police found the bodies of all three victims lying in pools of blood on the freezer floor with their throats slashed. Victim Siddle's hands were bound behind her back with electrical tape; Smith and Wiggins both had electrical tape around their respective left wrists, but the tape appeared to have come loose from their right wrists.

Police also found bloody shoe prints leading from the freezer, through the kitchen, and into the office, blood spots in and around the kitchen sink, and an opened office safe surrounded by plastic containers and cash. Outside, leading away from the back of the restaurant, police found scattered bills and coins, shoe tracks, a Buck knife,² a Buck

*146 knife case, a pair of blood-stained gloves, and a Daisy air pistol.³

Jennings (age twenty-six) and Jason Graves (age eighteen), both of whom had previously worked at the Cracker Barrel and knew the victims, were apprehended and jailed approximately three weeks later in Las Vegas, Nevada, where Jennings ultimately made lengthy statements to Florida law enforcement personnel. In a taped interview, Jennings blamed the murders on Graves, but admitted his (Jennings') involvement in planning and, after several aborted attempts, actually perpetrating the robbery with Graves. Jennings acknowledged wearing gloves during the robbery and using his Buck knife in taping the victims' hands, but claimed that, after doing so, he must have set the Buck knife down somewhere and did not remember seeing it again. Jennings further stated that he saw the dead bodies in the freezer and that his foot slipped in some blood, but that he did not remember falling, getting blood on his clothes or hands, or washing his hands in the kitchen sink. Jennings also stated that the Daisy air pistol belonged to Graves, and directed police to a canal where he and Graves had thrown other evidence of the crime.

In an untaped interview the next day, during which he was confronted with inconsistencies in his story and the evidence against him, Jennings stated, "I think I could have been the killer. In my mind I think I could have killed them, but in my heart I don't think I could have."

At trial, the taped interview was played for the jury, and one of the officers testified regarding Jennings' untaped statements made the next day. The items ultimately recovered from the canal were also entered into evidence.⁴

The medical examiner, who performed autopsies on the victims, testified that they died from "sharp force injuries" to the neck caused by "a sharp-bladed instrument with a very strong blade," like the Buck knife found at the crime scene. A forensic serologist testified that traces of blood were found on the Buck knife, the Buck knife case, the area around the sink, and one of the gloves recovered from the crime scene, but in an amount insufficient for further analysis. An impressions expert testified that Jennings' tennis shoes recovered from the canal matched the bloody shoe prints inside the restaurant as well as some of the shoe prints from the outside tracks leading away from the restaurant.

The State also presented testimony concerning previous statements made by Jennings regarding robbery and witness elimination in general. Specifically, Angela Chainey, who had been a friend of Jennings', testified that about two years before the crimes Jennings said that if he ever needed any money he could always rob someplace or somebody. Chainey further testified that when she responded, "That's stupid. You could get caught," Jennings replied, while making a motion across his throat, "Not if you don't leave any witnesses." On cross-examination, Chainey further testified that

Jennings had “made statements similar to that several times.”

The State also presented testimony concerning previous statements made by Jennings regarding his dislike of victim Siddle. Specifically, Bob Evans, one of the managers at Cracker Barrel, testified that Jennings perceived Siddle to be holding him back at work and that, just after Jennings quit, he said about Siddle, “I hate her. I even hate the sound of her voice.” Donna Howell, who also worked at Cracker Barrel, similarly testified that she was aware of Jennings' animosity and dislike of Siddle, and that Jennings had once said about Siddle, “I can't *147 stand the bitch. I can't stand the sound of her voice.”

The jury found Jennings guilty as charged. In the penalty phase, the defense presented mitigation evidence, including general character testimony from witness Mary Hamler, who testified on direct examination that she had lived with Jennings for two and one-half years. She also testified that Jennings had gotten along well with her children during that time, and that he cried when they (Jennings and Hamler) broke up.

On cross-examination, the State elicited testimony from Hamler that there was another side to Jennings' character and that Jennings once said that if he ever committed a robbery, he would not be stupid enough to stick around, but would go north. Hamler further testified on cross-examination that Jennings was angry at Cracker Barrel in general, and Siddle in particular, for “jerking him around” and holding him back at work,

and that in this regard Jennings once said of Siddle that “one day she would get hers.”

The defense presented further character evidence from several of Jennings' friends that he was good with children, got along with everybody, and was basically a nonviolent, big-brother type who was happy-go-lucky, fun-loving, playful, laid back, and likeable. Jennings' mother testified that her son never met his father and that she raised Jennings herself. She claimed that Jennings had been a straight-A student, but quit school to take care of her when she became sick.

The jury recommended death by a vote of ten to two as to each of the murders. In its sentencing order, the trial court found three aggravators: (1) that the murders were committed during a robbery; (2) that they were committed to avoid arrest; and (3) that they were cold, calculated, and premeditated (CCP).

The trial court found only one statutory mitigator: that Jennings had no significant history of prior criminal activity (some weight). The trial court explicitly found that two urged statutory mitigators did *not* exist: that Jennings was an accomplice in a capital felony committed by another and that his participation was relatively minor; and that Jennings acted under extreme duress or under the substantial domination of another person. The trial court also found eight nonstatutory mitigators: (1) that Jennings had a deprived childhood (some weight); (2) that accomplice Graves was not sentenced to death (some weight); (3) that Jennings

cooperated with police (substantial weight); (4) that he had a good employment history (little weight); (5) that he had a loving relationship with his mother (little weight); (6) that he had positive personality traits enabling the formation of strong, caring relationships (some weight); (7) that he had the capacity to care for and be mutually loved by children (some weight); and (8) that he exhibited exemplary courtroom behavior (little weight).

After evaluating the aggravators and mitigators, the trial court sentenced Jennings to death for each murder. The trial court also sentenced Jennings to fifteen years' imprisonment for the robbery. Jennings now appeals his convictions and sentences.

Denial of Motion to Suppress

Jennings filed a pretrial motion to suppress the statements he made to Florida law enforcement personnel while in custody in Las Vegas. He urged that the statements had been obtained in violation of his constitutional rights against self-incrimination. *See* U.S. Const. amend. V; art. I, § 9, Fla. Const.

At the suppression hearing, Detective Rose of the Collier County Sheriff's Office testified that Jennings was initially advised of his *Miranda*⁵ rights and signed a waiver thereof, but that during questioning Jennings invoked his right to counsel. Detective Rose testified that he thereafter ceased questioning Jennings.

Investigator Cunningham of the State Attorney's Office testified that upon arriving in Las Vegas the next day, he did not attempt to talk to Jennings because he was advised that Jennings did not want to talk. However, Investigator Cunningham testified that the next day he and Detective Rose went to the jail to talk to Graves (*not* Jennings) and, *148 after doing so, they saw Jennings at the booking desk as they were exiting the building.

Investigator Cunningham further testified that it was Jennings who spoke first by asking Investigator Cunningham and Detective Rose if his mother had contacted them. Investigator Cunningham responded that she had not, whereupon Jennings said that he had talked to his mother, who advised Jennings to talk to the police, and that, based on that conversation, he wanted to do so. Investigator Cunningham testified that he then advised Jennings of his *Miranda* rights and held an unrecorded initial conversation with Jennings, immediately after which Jennings consented to a taped interview.

Investigator Cunningham and Detective Rose prepared to again advise Jennings of his *Miranda* rights during the taped interview, whereupon Jennings stated, "Well, if you want me to save you the trouble, I understand all my rights fully." Detective Rose nevertheless again advised Jennings of his *Miranda* rights, which Jennings orally waived, and the taped interview ensued.

Investigator Cunningham testified that the next day Jennings was again orally advised of his *Miranda* rights, and then executed a written waiver of those rights. Upon being confronted with inconsistencies in his story and the evidence against him, Jennings made the incriminating statement that he thought he could be the killer.

[1] The trial court ultimately denied Jennings' suppression motion, finding that "the contact between the Defendant and these two representatives of the State was voluntarily initiated on the part of the Defendant and that he knowing[ly], intelligently, and voluntarily waived" his *Miranda* rights. Jennings now argues, however, that any waiver of his *Miranda* rights on the day of the taped interview could not have been knowing, intelligent, and voluntary because when he invoked his right to counsel the previous day, Detective Rose simply offered to get him a Las Vegas telephone book.⁶ Jennings asserts that Detective Rose's response was inadequate.

We need not reach the question of whether Detective Rose's response to Jennings' request for counsel was inadequate as a matter of constitutional principle.⁷ In this case, the evidence is undisputed that the police ceased questioning Jennings when he invoked his *149 right to counsel, and that it was Jennings who reinitiated contact with police.

In [!\[\]\(23d9fc146e83b5c3013cfa32c784f8d5_img.jpg\) *Edwards v. Arizona*, 451 U.S. 477, 484 85, 101 S.Ct. 1880, 68 L.Ed.2d 378 \(1981\)](#), the United States Supreme Court held that

"an accused, ... having expressed his desire to deal with the police only through counsel, is not subject to further interrogation by the authorities until counsel has been made available to him, *unless the accused himself initiates further communication, exchanges, or conversations with the police.*" (Emphasis added). This Court has likewise held that

[o]nce a suspect has requested the help of a lawyer, no state agent can reinitiate interrogation on any offense throughout the period of custody unless the lawyer is present, *although the suspect is free to volunteer a statement to police on his or her own initiative at any time on any subject in the absence of counsel.*

[!\[\]\(05be7c7a8995decd503647c99211f7c2_img.jpg\) *Traylor v. State*, 596 So.2d 957, 966 \(Fla.1992\)](#) (footnote omitted) (emphasis added); see also [!\[\]\(16cd6e1a39784ecf52b4db09f4865f40_img.jpg\) *Davis v. State*, 698 So.2d 1182, 1189 \(Fla.1997\)](#), cert. denied, [*522 U.S. 1127*, 118 S.Ct. 1076, 140 L.Ed.2d 134 \(1998\)](#).

This Court applied the reasoning of *Edwards* and *Traylor* in [!\[\]\(aa53ad6fea213b8b2226d3077e30533a_img.jpg\) *Stein v. State*, 632 So.2d 1361 \(Fla.1994\)](#). The defendant in *Stein* was arrested for two murders and signed a waiver-of-rights form. See *id.* at 1363. The defendant then asked to speak to an attorney, and the questioning was terminated. See *id.* However, one of the investigators made a comment to the defendant that God would forgive

him for what he had done. *See id.* The defendant was then left alone in the interview room and several minutes later, but before the defendant had seen an attorney, the defendant initiated contact with the investigators by knocking on the door and stating, “I want to talk about part of it.” *Id.* at 1364. The police then had the defendant execute a second waiver-of-rights form, on which a notation was made that the defendant had initiated the conversation. *See* [632 So.2d at 1364](#). The defendant thereupon made incriminating statements to police. *See id.*

In rejecting arguments that the statements should have been suppressed, this Court held:

Clearly, once an accused asks for counsel, an accused may not be subjected to further interrogation until counsel has been made available to the accused, absent initiation of further communication with law enforcement officers by the accused. [Minnick v. Mississippi](#), 498 U.S. 146, 111 S.Ct. 486, 112 L.Ed.2d 489 (1990); [Edwards v. Arizona](#), 451 U.S. 477, 101 S.Ct. 1880, 68 L.Ed.2d 378 (1981). Under the circumstances of this case, however, we find that [the defendant] voluntarily initiated continued

communication with the investigators and that the motion to suppress was properly denied. At the suppression hearing, [the defendant] himself admitted that the brief conversation about God had no effect on his decision to talk to the investigators.

Id.

A determination of the issues of both the voluntariness of the confession and a knowing and intelligent waiver of *Miranda* rights requires an examination of the totality of the circumstances. *See* [Traylor](#), 596 So.2d at 964. Looking at the totality of circumstances in the present case, the trial court found not only that Jennings knowingly and intelligently waived his *Miranda* rights, but also that the “contact between the Defendant and these two representatives of the State was voluntarily initiated on the part of the Defendant.” We agree with the trial court's findings, which are unquestionably supported by the record. Jennings was advised as part of his initial *Miranda* warnings of his right to have a lawyer appointed to represent him before questioning if he could not afford one. The record is undisputed that after Jennings said he wanted a lawyer, Detective Rose ceased questioning him.

Importantly, the record further confirms that Jennings' reinitiation of conversation with Detective Rose and Investigator

Cunningham the next day was motivated *not* by any misapprehension of this right or “taint” of the telephone book scenario, but by an interceding conversation between Jennings and his mother, wherein she advised Jennings to talk to the police. During the taped interview, Jennings acknowledged that the *150 reason he decided to talk to police was because his mother advised him to do so.

[2] Moreover, upon Jennings' reinitiation of conversation with police, he was again advised of his *Miranda* rights, including his right to have a lawyer appointed to represent him before questioning if he could not afford one. Thereafter, at the beginning of the taped interview when Detective Rose and Investigator Cunningham prepared to again advise Jennings of his *Miranda* rights, Jennings stated that he could save them the trouble because he understood his rights fully. Despite this, Detective Rose again advised Jennings of his *Miranda* rights, once again including his right to have a lawyer appointed to represent him before questioning if he could not afford one.⁸ The record also indicates that, before making his subsequent untaped statement the next day, Jennings was again advised of his *Miranda* rights and executed a written waiver of same.

In short, the totality of the circumstances establishes that even if Jennings invoked his right to counsel, see [State v. Owen](#), 696 So.2d 715 (Fla.), cert. denied, 522 U.S. 1002, 118 S.Ct. 574, 139 L.Ed.2d 413 (1997), he voluntarily initiated further contact with the police. He gave the statements he now seeks to suppress after voluntarily,

knowingly, and intelligently waiving his *Miranda* rights. No violation of *Miranda* or Jennings' constitutional right against self-incrimination occurred in this case. We accordingly affirm the trial court's denial of Jennings' motion to suppress his subject statements to police.

The Avoid Arrest Aggravator

Jennings does not challenge the aggravator that the murders were committed during a robbery. However, he challenges the two remaining aggravators: that the murders were committed to avoid arrest and that they were cold, calculated, and premeditated.⁹



[3] Jennings argues that the trial court erred in finding the avoid arrest aggravator. We disagree.


In finding this aggravator, the trial court ruled:

The evidence was undisputed that this defendant and the co-defendant (whose trial preceded the trial of this case and who was convicted of the same crimes as this defendant) were former employees of the Crackerbarrel [sic] Restaurant. As such, they were well known to the three victims. Found in the defendant's truck when the defendants were arrested in Las Vegas, Nevada, were two pullover masks, similar to ski masks. These were not used in these crimes, nor were they discarded with the other items of apparel in the canal. The defendants disdained the use of masks in these crimes. The use of gloves

by the defendants shows further support for the conclusion that these murders were committed by the defendant for the purpose of avoiding or preventing a lawful arrest. Approximately two years before these crimes, this defendant, in discussing a hypothetical robbery, said, and indicated, by moving his fingers across his throat, that if he robbed someone he could not be caught because he would not leave any witnesses.

While the murder of Dorothy Siddle was undoubtedly motivated in part by defendant's dislike for her, the evidence, including *151 the murders of the other two victims, makes it manifest that the dominant motive for these murders was the elimination of witnesses in order to avoid prosecution. This aggravating circumstance was proven beyond a reasonable doubt.


[4] [5] The avoid arrest aggravator focuses on the motivation for the crimes. See  [Stein, 632 So.2d at 1366](#). As this Court stated in *Consalvo v. State*, “the evidence [supporting the avoid arrest aggravator] must prove that the sole or dominant motive for the killing was to eliminate a witness,” and “[m]ere speculation on the part of the state that witness elimination was the dominant motive behind a murder cannot support the avoid arrest aggravator.”  [697 So.2d 805, 819 \(Fla.1997\)](#), *cert. denied*, [523 U.S. 1109, 118 S.Ct. 1681, 140 L.Ed.2d 819 \(1998\)](#).


In  [Riley v. State, 366 So.2d 19 \(Fla.1978\)](#), this Court for the first time broadened the

application of the avoid arrest aggravator to encompass the murder of a witness to a crime in addition to law enforcement personnel. However, this Court cautioned that

the mere fact of a death is not enough to invoke this factor when the victim is not a law enforcement official. Proof of the requisite intent to avoid arrest and detection must be very strong in these cases.

Id. at 22; see also [Gore v. State, 706 So.2d 1328, 1334 \(Fla.1997\)](#).

In *Riley*, the defendant and an accomplice entered the business where the defendant worked for the purpose of robbing it. See  [366 So.2d at 20](#). They then threatened the defendant's three present coworkers with pistols, forced them to lie on the floor, bound and gagged them, and then shot them in the head. See *id.* In light of the fact that the victims knew the defendant and were immobilized and rendered helpless, coupled with one of the perpetrator's expressed concern for subsequent identification, this Court found that the record supported only one interpretation that the victims were killed to avoid identification. See *id.* at 22.

[6] Here, as in *Riley*, it is significant that the victims all knew and could identify their killer. While this fact alone is insufficient to prove the avoid arrest aggravator, see  [Consalvo, 697 So.2d at 819](#), there was further evidence presented that Jennings

used gloves, did not use a mask, and stated that if he ever committed a robbery, he would not leave any witnesses.

Also, the facts of the present case show that the victims had been bound. Victim Siddle's hands were bound behind her back with electrical tape when her throat was slashed. While the remaining two victims (Smith and Wiggins) had freed their hands, no evidence of their resistance (i.e., defensive [wounds](#) on Jennings, fingernail scrapings from the victims, etc.) was entered into evidence. Further, all three victims were confined to the freezer, and any immediate threat to Jennings could have been eliminated by simply closing and securing the freezer door. Instead, Jennings slashed the throats of all three victims.

As recognized by the trial court, based on the evidence in this case there was no reason to kill at least two of the victims except to eliminate them as witnesses to the first murder. See, e.g., [Willacy v. State](#), 696 So.2d 693, 696 (Fla.), cert. denied, 522 U.S. 970, 118 S.Ct. 419, 139 L.Ed.2d 321 (1997); [Thompson v. State](#), 648 So.2d 692, 695 (Fla.1994); [Correll v. State](#), 523 So.2d 562, 568 (Fla.1988). Further, the manner of killing here (consecutive throat slashings) was not of a nature that could be considered reactionary or instinctive and further supports the finding that the dominant motive for killing at least two of the victims was to avoid identification. Cf. [Robertson v. State](#), 611 So.2d 1228, 1232 (Fla.1993) (finding insufficient evidence to support avoid arrest aggravator where “[t]he facts indicate that [the appellant] shot [the

victim] instinctively and without a plan to eliminate her as a witness”). Accordingly, we find substantial competent evidence to support the trial court's finding that, beyond a reasonable doubt, the dominant motive for the murders of two of the victims was the elimination of witnesses in order to avoid prosecution.

CCP


[7] Jennings next argues that the trial court erred in finding the CCP aggravator. We again disagree.

In finding CCP, the trial court explained:


***152** In the space of approximately ten minutes, the defendants gained entry into the Cracker Barrel Restaurant, forced Dorothy Siddle to open the safe, put all three victims on the floor, taped their hands behind them, marched them into the freezer, cleaned out the safe, cut the throats of the three victims, and fled out the back door when they heard another employee buzzing the front door for entry to work. This approximate time span was established by the testimony of an employee of the security company whose computer monitors the opening of

the doors at the Cracker Barrel Restaurant and the arriving employee who buzzed the front door. The murder weapon, a large Buck folding knife, was this defendant's. While he says the co-defendant must have killed the victims, it is this defendant who told a witness two years earlier that if he committed a robbery he wouldn't be caught because he would leave no witnesses. This defendant's dislike for victim, Dorothy Siddle, was known to several witnesses who testified to his bitterness towards her. These three murders and the robbery, occurring with the rapidity described above, manifest a plan that was carried out with ruthless efficiency. Additionally, this defendant took the time to walk from the freezer where the victims were slain to the lavatory where, from blood on the lavatory, it is obvious he washed himself and the murder weapon. Traces of blood were still on the knife when it was found although not of sufficient quantity to specifically identify the traces. His




bloody footprints trace his movement and activity. The defendant admitted that he and the co-defendant had attempted to commit the robbery on several prior occasions shortly before November 15, 1996[sic], the date of these crimes, and during these aborted attempts they had actually prevailed on victim, Dorothy Siddle, to call a towing service for defendant's truck.... This aggravating circumstance was proven beyond a reasonable doubt.

This Court has recognized that, in order to prove the CCP aggravator, the State must prove beyond a reasonable doubt each of four elements: (1) the murder was the product of cool and calm reflection and not an act prompted by emotional frenzy, panic, or a fit of rage (cold); (2) the defendant had a careful plan or prearranged design to commit the murder before the fatal incident (calculated); (3) the defendant exhibited heightened premeditation (premeditated); and (4) the defendant had no pretense of moral or legal justification. See  [*Walls v. State*, 641 So.2d 381, 387 88 \(Fla.1994\)](#).


All four elements are established here. As found by the trial court, the most salient fact of these murders is the ruthless efficiency with which the murders were carried out in conjunction with the robbery. The methodic succession of events cited in the trial court's


order supports a conclusion that the murders were not committed in an “emotional frenzy, panic or a fit of rage.”  [Id. at 387.](#)

The scenario of events supports the elements of a calculated plan and heightened premeditation. We begin with witness Chainey's testimony that, approximately two years before these crimes, Jennings made general statements and gestures to the effect that if he ever needed any money, he would simply rob someplace or someone and eliminate any witnesses by slitting their throats. Moreover, Jennings admitted to several aborted robbery attempts of the Cracker Barrel in close proximity to the actual crimes that he ultimately committed there.


[8] Evidence of a plan to commit a crime other than murder (such as, in this case, robbery) is in and of itself insufficient to support CCP. *See, e.g.,*  [Castro v. State, 644 So.2d 987, 991 \(Fla.1994\).](#) However, the execution-style murders, combined with the advance procurement of the murder weapon, the previously expressed dislike for victim Siddle, and the previously expressed intent not to leave any victims if robbery were committed are all additional factors that support the elements of a calculated plan and heightened premeditation. The evidence here does not suggest a “robbery gone bad.” *Cf.*  [Rogers v. State, 511 So.2d 526, 533 \(Fla.1987\);](#)  [Hansbrough v. State, 509 So.2d 1081, 1086 \(Fla.1987\).](#)

“Cold, calculated, premeditated murder can be indicated by the circumstances showing such facts as advance procurement of

a ***153** weapon, lack of resistance or provocation, and the appearance of a killing carried out as a matter of course.”  [Bell v. State, 699 So.2d 674, 677 \(Fla.1997\), cert. denied, 522 U.S. 1123, 118 S.Ct. 1067, 140 L.Ed.2d 127 \(1998\).](#) All of these circumstances are present here.



Finally, Jennings makes no argument of moral or legal justification for the killing. Here, just as this Court found under analogous facts in  [Walls, 641 So.2d at 388,](#) there was

no evidence, much less a colorable claim, establishing a pretense of moral or legal justification.... [T]here is no construction of the facts that would support even a fragmentary claim of excuse or justification, or of a defense to homicide, because the victim here was prostrate and helpless when [the appellant] returned to kill her.

Thus, we find that substantial competent evidence supports the trial court's finding of CCP. In so finding, we reject Jennings' argument that the trial court impermissibly doubled the CCP and avoid arrest aggravators in his case. “So long as each aggravator is supported by ... distinct facts, we hold that no impermissible doubling of [these] aggravating factors [occurs].”  [Stein, 632 So.2d at 1366.](#) In the present case, although both aggravators share

certain facts, they are each also supported by facts distinct from the other and are supported by different aspects of the crime. For example, the avoid arrest aggravator is supported by the distinct fact that the victims knew Jennings and that Jennings made prior statements concerning witness elimination. The CCP aggravator is supported by distinct facts regarding the method of execution (including the ruthless efficiency), and the previously expressed animosity toward victim Siddle. We find no impermissible doubling here.

Disparate Sentence

[9] [10] Jennings' accomplice, eighteen-year-old Jason Graves, was also convicted of the murders but was sentenced to life imprisonment for each of the murders. Jennings now argues that his death sentences are impermissibly disparate from Graves' sentences of life imprisonment. While the death penalty is disproportionate where a less culpable defendant receives death and a more culpable defendant receives life, see  [Hazen v. State, 700 So.2d 1207, 1211 14 \(Fla.1997\)](#), disparate treatment of codefendants is permissible in situations where a particular defendant is more culpable. See  [Larzelere v. State, 676 So.2d 394, 406 07 \(Fla.\)](#), cert. denied, [519 U.S. 1043, 117 S.Ct. 615, 136 L.Ed.2d 539 \(1996\)](#). Although Jennings urges equal culpability with codefendant Graves in the present case, the trial court resolved this issue against Jennings in discussing Graves' disparate life sentence as a mitigating factor:

The co-defendant, Charles Jason Graves, was tried on these same charges two weeks prior to this defendant, before the undersigned judge. The state had entered an agreement in open court to waive the death penalty for Graves in exchange for his waiver of a motion for a continuance to allow more time to adequately prepare for a trial where the death penalty was contemplated. Graves was eighteen years old at the time of the crimes. While Graves admitted to possessing what could be best described as a crude, homemade knife at the crime scene (it was in evidence in both trials as were virtually all the evidentiary exhibits) the medical examiner involved in the autopsies of the victims, Dr. Borges, testified in this case that Graves' crude knife was incapable of the kinds of [wounds](#) inflicted on the victims; and further that the large Buck knife admittedly belonging to this defendant was consistent with the mortal [wounds](#) to the victims particularly the two victims

whose spines bore slashing injuries from the murder weapon.... [T]he evidence is overwhelming that this defendant wielded the knife in murdering the victims. There was only one set of bloody footprints leading from the freezer and these belonged to this defendant as evidenced by his own admissions and the testimony of a forensic expert (Mr. Grimes); the photographic comparisons and actual floor mat removed from the crime scene by investigators are inconsistent with any other possibility. As previously observed, this defendant also admitted to the killings by saying in his mind he knew he killed the victims even if his heart *154 could not accept it. This evidence was all before the jury in the guilt phase and the penalty phase. This court judicially noticed and instructed the jury during the evidentiary portion of the penalty phase that the co-defendant could only receive a life sentence for these crimes. The state's waiver of the death penalty as to Graves, whether for the stated reason of avoiding a continuance,

or because the evidence in both these cases was such that the death penalty was more problematic in the co-defendant's case, nevertheless is found by this court to be a mitigating factor.

This thorough analysis by the trial court indicates that not only was the issue of the codefendant's life sentence presented to the jury as a mitigating factor, but also that the trial court carefully considered relative culpability. As established in the record, Graves was only eighteen, whereas Jennings was twenty-six, at the time of the murders. The trial judge, who presided at both trials, concluded independently that Jennings was the actual killer and thus more culpable than Graves. Moreover, despite finding that Jennings was more culpable and the actual killer, the trial court did consider and instruct the jury on the fact that the codefendant received a life sentence as a result of the State's waiver of the death penalty as a mitigating factor.

Contrary to Jennings' argument, the fact that the State argued in Graves' trial that Graves was the "leader" in the robbery is not necessarily inconsistent with the argument (and the trial court's finding) that Jennings was the actual murderer. As further found by the trial court below:

The prosecution took the same position in both trials that this defendant wielded the

knife and actually killed the three victims while Graves remained outside the freezer door with the pellet pistol which closely resembled a Colt .45 semi-automatic pistol assisting in the confinement of the victims to the freezer because two of the victims were found with their hands partially freed from the electrical tape with which their hands were bound behind their backs. The evidence is consistent with the position taken by the state.

We find no abuse of discretion in the trial court's ruling on this issue. The fact that the eighteen-year-old codefendant received life does not prevent the imposition of the death penalty on Jennings, whom the trial court found to be the actual killer and to be more culpable.

Sufficiency of the Evidence/Proportionality

Though not directly raised by Jennings, we turn now to our required independent review of the sufficiency of the evidence as well as the proportionality of Jennings' death sentences as compared to other cases where we have affirmed death sentences. See [!\[\]\(74d4806277d7e73349d8e8c0897931e9_img.jpg\) *Terry*, 668 So.2d at 965; !\[\]\(5f42d2cd7ad901bc24e5d35a38c777fd_img.jpg\) *Porter v. State*, 564 So.2d 1060, 1064 \(Fla.1990\).](#)

We have independently reviewed the evidence in the present case, see [*Parker v. Dugger*, 660 So.2d 1386 \(Fla.1995\)](#), including Jennings' inculpatory statements made to law enforcement personnel, his ownership of the murder weapon, and his bloody shoe prints leading from the murder scene. The evidence also includes general testimony regarding not only Jennings' dislike of Cracker Barrel and Siddle, but also his past statements about committing a robbery and not leaving any witnesses. We conclude as a matter of law that the evidence is sufficient to support Jennings' murder convictions.

Further, based on our review of all of the aggravating and mitigating factors, including their nature and quality according to the specific facts of this case, we find that the totality of the circumstances justifies the imposition of the death sentence, see [!\[\]\(830769b31eeeaca920791081939ff8ba_img.jpg\) *Porter*, 564 So.2d at 1064](#), and that this case is proportionate to other cases where we have upheld the imposition of a death sentence. See, e.g., *Stein* (affirming death sentences where, *inter alia*, murders were cold, calculated, and premeditated and committed during armed robbery to avoid arrest, and defendant had no significant history of prior criminal activity); [!\[\]\(198f559926258ddfad814817bda0ffbc_img.jpg\) *LeCroy v. State*, 533 So.2d 750 \(Fla.1988\)](#) (affirming death sentence where, *inter alia*, murder was committed during course of armed robbery to avoid arrest, and defendant had no significant history of prior criminal activity).

***155** Based on the foregoing analysis of the issues, we affirm Jennings' convictions and sentences.





It is so ordered.



All Citations


718 So.2d 144, 23 Fla. L. Weekly S459


[HARDING](#), C.J., and [OVERTON](#), [SHAW](#),
[KOGAN](#), [WELLS](#), [ANSTEAD](#) and
[PARIENTE](#), JJ., concur.

Footnotes

- [1](#) We do not address Jennings' challenge to his robbery sentence, as it was not preserved below. See generally  [Terry v. State](#), 668 So.2d 954, 961 (Fla.1996) (citing  [Steinhorst v. State](#), 412 So.2d 332, 338 (Fla.1982)).
- [2](#) According to testimony at trial, a "Buck knife" is a particular brand of very sharp, sturdy knife that has an approximately four and one-half inch black plastic handle, into which folds the blade of the knife.
- [3](#) According to testimony at trial, a Daisy air pistol is like a pellet gun, but looks almost identical to a Colt .45 semi-automatic pistol.
- [4](#) The evidence from the canal consisted of: clothes, gloves, socks, and shoes that Jennings said were worn during the crime; a homemade razor/scrapper-blade knife and sheath that Jennings said belonged to Graves; packaging from a Daisy pellet gun and CO2 cartridges; unused CO2 cartridges and pellets; money bags (one marked "Cracker Barrel"), bank envelopes, money bands, Cracker Barrel deposit slips, and some cash and coins; personal checks, travelers' checks, and money orders made out to Cracker Barrel; a clear plastic garbage bag; and rocks to weigh down the bundle of evidence.
- [5](#)  [Miranda v. Arizona](#), 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966).
- [6](#) Specifically, Detective Rose testified as follows on cross-examination by the defense at the suppression hearing:
 - Q. What did [Jennings] tell you?
 - A. He said that he wanted a lawyer or something to that effect.
 - Q. What was your response to that?
 - A. I asked him if that's what he wanted.
 - Q. And did you go any further?
 - A. Not really.
 - Q. Any questioning?
 - A. Not from me, no.
 - Q. Specifically, did you hand him a phone book and say, "Here is a phone book. Call any lawyer in Las Vegas"?
 - A. No. I did offer him one though.
 - Q. Was that your response to providing an attorney for him?
 - A. Yes.
 - Q. Just hand him a phone book and say, "call"?
 - A. No, I asked him if he wanted to see one. I told him I could get him one.
 - Q. Did you tell him that if he wanted a lawyer, that you would see that he got one if he couldn't afford it?
 - A. That was explained to him prior, when [another detective] read the Miranda Warnings to him.
 - Q. So is your testimony that when he asked for a lawyer, you gave him a phone book, a Las Vegas phone book and said he could contact any lawyer he wanted to?
 - A. I never gave him a phone book, no.
 - Q. Okay. You said you could give him one?
 - A. Certainly.
 - Q. And that ended your conversation with him?
 - A. Pretty much, my conversation with Mr. Jennings.
- [7](#) Jennings argues that once he requested counsel, the police had an affirmative duty under  [Florida Rule of Criminal Procedure 3.111\(c\)](#) to "immediately and effectively place the defendant in communication with the (office of) public

defender of the circuit in which the arrest was made.” To the extent that Jennings did not specifically raise this procedural argument below, he is precluded from doing so now. See generally  [Terry, 668 So.2d at 961](#). Even assuming otherwise,  [rule 3.111\(c\)](#) is inapplicable to the facts of this case. By its very terms, the rule applies to booking officers' committing a defendant to custody, not to, as here, interrogating officers' questioning a defendant already in custody.

8 That Detective Rose and Investigator Cunningham failed to have Jennings execute a written waiver of his *Miranda* rights in conjunction with the taped interview is not determinative. As this Court held in  [Johnson v. State, 660 So.2d 637, 643 \(Fla.1995\)](#), noncompliance with the written waiver requirement does not require reversal unless it has resulted in prejudice or harm to the defendant such that fundamental rights are implicated. No such prejudice or harm exists in the present case.

Furthermore, Jennings' reliance on  [Thompson v. State, 595 So.2d 16 \(Fla.1992\)](#), is misplaced. In *Thompson*, this Court simply held that “the police must somehow communicate to the accused the basic idea of the right to consult a free attorney before being questioned.” *Id.* at 17. The record here is clear that Detective Rose and Investigator Cunningham repeatedly advised Jennings of his right to consult a free attorney before being questioned, both after the telephone book scenario and before he made the taped and untaped statements at issue.

9 Jennings raises two evidentiary issues related to the penalty phase: that the trial court erred in admitting masks into evidence and that the cross-examination of a character witness impermissibly exceeded the scope of direct. We reject these arguments without elaboration.

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APPENDIX F

**IN THE CIRCUIT COURT FOR THE TWENTIETH JUDICIAL CIRCUIT
IN AND FOR COLLIER COUNTY, FLORIDA**

STATE OF FLORIDA,
Plaintiff,

vs.

CASE NO: 95-2284-CFA

BRANDY JENNINGS,
Defendant.

FINAL ORDER DENYING MOTION FOR POSTCONVICTION RELIEF

THIS CAUSE comes before the Court on Defendant's "Motion to Vacate," filed on March 20, 2000, "Amended Motion To Vacate," filed June 23, 2000, and "Second Amended Motion To Vacate Judgments Of Conviction And Sentence," filed August 4, 2009. The Court notes that the State filed a response to the Second Amended Motion on August 28, 2009. An evidentiary hearing was held on April 28 and 29, 2010, and continued to August 11 and 12, 2010. Being otherwise fully advised, the Court finds as follows:

1. The facts of this case are outlined in the initial Florida Supreme Court opinion on direct appeal, Jennings v. State, 718 So.2d 144 (Fla. 1998).

Dorothy Siddle, Vicki Smith, and Jason Wiggins, all of whom worked at the Cracker Barrel restaurant in Naples, were killed during an early morning robbery of the restaurant on November 15, 1995. Upon arriving on the scene, police found the bodies of all three victims lying in pools of blood on the freezer floor with their throats slashed. Victim Siddle's hands were bound behind her back with electrical tape; Smith and Wiggins both had electrical tape around their respective left wrists, but the tape appeared to have come loose from their right wrists.

Police also found bloody shoe prints leading from the freezer, through the kitchen, and into the office, blood spots in and around the kitchen sink, and an opened office safe surrounded by plastic containers and cash. Outside, leading away from the back of the restaurant, police found scattered bills and coins, shoe tracks, a Buck knife, [FN2] a Buck knife case, a pair of blood-stained gloves, and a Daisy air pistol. [FN3]

[FN 2] According to testimony at trial, a "Buck knife" is a particular brand of very sharp, sturdy knife that has an approximately four and one-half inch black plastic handle, into which folds the blade of the knife.

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[FN 3] According to testimony at trial, a Daisy air pistol is like a pellet gun, but looks almost identical to a Colt .45 semi-automatic pistol.

Jennings (age twenty-six) and Jason Graves (age eighteen), both of whom had previously worked at the Cracker Barrel and knew the victims, were apprehended and jailed approximately three weeks later in Las Vegas, Nevada, where Jennings ultimately made lengthy statements to Florida law enforcement personnel. In a taped interview, Jennings blamed the murders on Graves, but admitted his (Jennings') involvement in planning and, after several aborted attempts, actually perpetrating the robbery with Graves. Jennings acknowledged wearing gloves during the robbery and using his Buck knife in taping the victims' hands, but claimed that, after doing so, he must have set the Buck knife down somewhere and did not remember seeing it again. Jennings further stated that he saw the dead bodies in the freezer and that his foot slipped in some blood, but that he did not remember falling, getting blood on his clothes or hands, or washing his hands in the kitchen sink. Jennings also stated that the Daisy air pistol belonged to Graves, and directed police to a canal where he and Graves had thrown other evidence of the crime.

In an untaped interview the next day, during which he was confronted with inconsistencies in his story and the evidence against him, Jennings stated, "I think I could have been the killer. In my mind I think I could have killed them, but in my heart I don't think I could have."

At trial, the taped interview was played for the jury, and one of the officers testified regarding Jennings' untaped statements made the next day. The items ultimately recovered from the canal were also entered into evidence. [FN 4]

[FN 4] The evidence from the canal consisted of: clothes, gloves, socks, and shoes that Jennings said were worn during the crime; a homemade razor/scrapper-blade knife and sheath that Jennings said belonged to Graves; packaging from a Daisy air pellet gun and CO2 cartridges; unused CO2 cartridges and pellets; money bags (one marked "Cracker Barrel"), bank envelopes, money bands, Cracker Barrel deposit slips, and some cash and coins; personal checks, traveler's checks, and money orders made out to Cracker Barrel; a clear plastic garbage bag; and rocks to weigh down the bundle of evidence.

The medical examiner, who performed autopsies on the victims, testified that they died from "sharp force injuries" to the neck caused by "a sharp-bladed instrument with a very strong blade," like the Buck knife found at the crime scene. A forensic serologist testified that traces of blood were found on the Buck knife, the Buck knife case, the area around the sink, and one of the gloves recovered from the crime scene, but in an amount insufficient for further analysis. An impressions expert testified that Jennings' tennis shoes recovered from the canal matched the bloody shoe prints inside the restaurant as well as some of the shoe prints from the outside tracks leading away from the restaurant.

The State also presented testimony concerning previous statements made by Jennings regarding robbery and witness elimination in general. Specifically, Angela Chainey (sic), who had been a friend of Jennings', testified that about two years before the crimes Jennings said that if he ever needed any money he could always rob someplace or somebody. Chainey (sic) further testified that when she responded, "That's stupid. You could get caught," Jennings replied, while making a motion across his throat, "Not if you don't leave any witnesses." On cross-examination, Chainey (sic) further testified that Jennings had "made statements similar to that several times."

The State also presented testimony concerning previous statements made by Jennings regarding his dislike of victim Siddle. Specifically, Bob Evans, one of the managers at Cracker Barrel, testified that Jennings perceived Siddle to be holding him back at work and that, just after Jennings quit, he said about Siddle, "I hate her. I even hate the sound of her voice." Donna Howell, who also worked at Cracker Barrel, similarly testified that she was aware of Jennings' animosity and dislike of Siddle, and that Jennings had once said about Siddle, "I can't stand the bitch. I can't stand the sound of her voice."

Jennings, 718 So.2d at 145-147.

2. A jury convicted defendant of three counts of first-degree murder and one count of robbery, and recommended a sentence of death by a vote of ten to two. The Court followed the recommendation, and sentenced defendant to death for each first-degree murder conviction and sentenced him to fifteen years in prison for the robbery conviction. The Court found three aggravating factors, and found that the mitigating factors did not outweigh the aggravating factors. His convictions and sentences were affirmed on direct appeal by the Florida Supreme Court. *See Jennings v. State*, 718 So.2d 144 (Fla. 1998). The United States Supreme Court denied certiorari on June 24, 1999. *See Jennings v. Florida*, 527 U.S. 1042 (1999).

3. Defendant raised twenty-five (25) claims in his motion for postconviction relief. In the order directing evidentiary hearing, this Court denied all grounds except Grounds I(a), III, IV, VI, and XX. That order is hereby incorporated by reference.

4. In this case the defendant was represented at trial by Assistant Public Defender Thomas Osteen. At the evidentiary hearing, Mr. Osteen testified as to his extensive experience in handling

capital cases. Prior to the instant case he had represented approximately 30 defendants in capital cases, the majority of which were tried as death penalty cases (April 28, 2010 Evidentiary Hearing transcript pp. 45-46). When reviewing the performance of an experienced criminal defense attorney, such as Mr. Osteen, there is a strong presumption that his conduct was reasonable. Chandler v. U.S., 218 F.3d 1305, 1316 (11th Cir. 2000).

5. **As to Ground I(a)**, defendant argues that trial counsel was ineffective for failing to impeach, or cross examine Angela Cheney regarding her past relationship with defendant and the fact that she was married to co-defendant Graves' brother. Defendant argues that counsel should have questioned Ms. Cheney on these issues in order to establish her bias against him and in favor of his co-defendant Graves. According to Strickland v. Washington, 466 U.S. 668 (1984), a claim of ineffective assistance of counsel requires that the defendant show, first, that counsel's performance was deficient and, second, that the deficient performance prejudiced the defense. Furthermore, with regard to the required showing of prejudice, the proper standard requires the defendant to show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different.

6. At the evidentiary hearing, Ms. Cheney testified that she was living with defendant at the time he made the statements regarding witness elimination, that she was in a relationship with him for only about a month in 1992 or 1993, and that she did not maintain any acquaintance with defendant after the relationship ended (April 28, 2010 evidentiary hearing transcript pp. 26-27). She stated that she was friends with Graves, and that Graves was her brother-in-law between 1994 and 1996, when she divorced his brother (April 28, 2010 evidentiary hearing transcript p. 27). Ms. Cheney maintained that she told police about defendant's statement because she wanted to do the right thing (April 28, 2010 evidentiary hearing transcript p. 33). She did not believe the statement

helped Graves, since it was part of what put him where he was (April 28, 2010 evidentiary hearing transcript p. 34). She further testified that her relationships with either defendant or Graves did not affect her testimony, and that she testified truthfully (April 28, 2010 evidentiary hearing transcript p. 37).

7. Defense counsel did not question trial counsel regarding any alleged failure to adequately cross-examine Ms. Cheney. Defendant merely established that Mr. Osteen was aware of the relationships and what Ms. Cheney would testify to based on discovery. Accordingly, defendant has failed to present any evidence that would show Mr. Osteen was in any way deficient on this issue (April 28, 2010 evidentiary hearing transcript pp. 73; 77). Further, since Ms. Cheney stated she testified truthfully at trial and that her relationship with Graves did not affect her testimony against defendant, defense counsel has failed to present any evidence that he was prejudiced by Mr. Osteen's alleged failure to impeach or cross-examine Ms. Cheney regarding her relationships with defendant or Graves. Therefore, defendant has failed to meet his burden as to either prong of Strickland, and **Ground 1(a) is DENIED.**

8. **As to Ground III**, defendant argues counsel was ineffective for failing to obtain an adequate mental health evaluation of defendant for purposes of penalty phase mitigation. Mr. Osteen testified that he moved for the appointment of two mental health experts, Dr. Wald and Dr. Masterson, with whom he had previously worked in several cases, who knew what he was looking for, and who knew what he wanted in their reports (April 28, 2010 evidentiary hearing transcript pp. 57; 82). He further testified that he always spoke with the doctors after their reports were submitted and received more details than were included in the reports (April 28, 2010 evidentiary hearing transcript p. 52). He stated that the experts were retained to determine defendant's competency and the existence of any mitigators (April 28, 2010 evidentiary hearing transcript pp. 48; 82-83). Once

he reviewed the reports, Mr. Osteen concluded that the doctors would not be helpful (April 28, 2010 evidentiary hearing transcript p. 67). He testified that this was not a strong mental health case, so he “chose to go a different route” (April 28, 2010 evidentiary hearing transcript pp. 89-90). Mr. Osteen further testified that if he had the doctors testify, the contents of their reports would have been “fair game,” and by not calling them to testify, the jury was not informed of specific details which may have harmed defendant (April 28, 2010 evidentiary hearing transcript p. 89). Counsel cannot be ineffective for making a reasonable strategic decision to forego presentation of mitigating evidence that would likely have been more harmful than helpful and could have damaged defendant’s chances with the jury. See Sexton v. State, 997 So.2d 1073 (Fla. 2008); Willacy v. State, 967 So.2d 131 (Fla. 2007), *quoting* Evans v. State, 946 So.2d 1, 13 (Fla. 2006); Stephens v. State, 975 So.2d 405 (Fla. 2007).

9. To the extent that defendant argued at the evidentiary hearing that trial counsel was ineffective for failing to retain adequate mental health experts, this claim also fails. Defendant presented extensive testimony by Dr. Eisenstein. Dr. Eisenstein testified that he evaluated defendant in 2000 and April 2010, performing a full battery of tests (April 28, 2010 evidentiary hearing transcript pp. 110-111; 211-214). Based on the 2000 evaluation, Dr. Eisenstein found defendant had an IQ of 120 and, for the most part, performed normally on all tests (April 28, 2010 evidentiary hearing transcript pp. 164; 209). He conceded that he found no significant findings and made no clinical diagnosis, but stated that some inconsistencies in defendant's scores were red flags that might indicate some neurological issue (April 28, 2010 evidentiary hearing transcript pp. 210-211). Using newer testing methods available in 2010, Dr. Eisenstein testified that defendant now displayed an IQ of 117 and his test scores were consistent with his 2000 scores (April 29, 2010 evidentiary hearing transcript pp. 19-20; 26). Contrary to his position in 2000, Dr. Eisenstein

testified that the defendant has possible ADHD, anger management issues, lacks motivation, and has low impulse control (April 29, 2010 evidentiary hearing transcript p. 40). After the 2010 evaluation, he diagnosed defendant as gifted learning disabled with a reading disorder and intermittent explosive disorder (IED) (April 29, 2010 evidentiary hearing transcript pp. 42; 47).

10. Dr. Eisenstein criticized Dr. Masterson's report, stating his opinion that Dr. Masterson did not put it all together in his report, did not list all the tests performed, and did not list all the raw data (April 29, 2010 evidentiary hearing transcript pp. 54-55; 61). Dr. Eisenstein disagreed with some of Dr. Masterson's conclusions and how Dr. Masterson listed Defendant's test results (April 29, 2010 evidentiary hearing transcript pp. 59-60; 63). However, Dr. Eisenstein conceded that this was a difference of opinion, that Dr. Masterson's report eluded to many of the same issues he had testified to, and that Dr. Masterson used the correct tests available at the time (April 29, 2010 evidentiary hearing transcript pp. 58; 123-124). He admitted that there was no authority that dictated how to write a report and that it was possible a report might be tailored to meet an attorney's needs (April 29, 2010 evidentiary hearing transcript pp. 103-105; 109-110). While Dr. Eisenstein complained that there was a whole battery of tests available that Dr. Masterson could have performed on defendant, he admitted there were no required tests (April 29, 2010 evidentiary hearing transcript pp. 66; 122).

11. In light of Mr. Osteen's testimony that he chose to retain experts who were familiar with what he wanted to see and always spoke with his experts to obtain more detail than was listed in the reports, the Court finds Dr. Eisenstein's criticism of Dr. Masterson's report to be mere semantics. Mr. Osteen testified that the report was designed to be a summary for his own use and was not written as a full report intended for neuropsychological clinical use. It appears that defense counsel did not obtain the raw data from Dr. Masterson after receiving his report. However, defense counsel

now suggests that Dr. Masterson's report was inadequate due to lack of that raw data (April 28, 2010 evidentiary hearing transcript pp. 172-175). That the defendant has now offered expert opinions different from those of the experts appointed before trial does not mean relief is warranted. Cherry v. State, 781 So.2d 1040 (Fla. 2000). Trial counsel made a reasonable tactical decision not to pursue further mental health investigation after receiving an initial diagnosis that there was no mental health mitigation, and that initial diagnosis is not rendered incompetent merely because defendant has now secured the testimony of an expert who gives a more favorable diagnosis. Asay v. State, 769 So.2d 974 (Fla. 2000). Defense counsel is entitled to rely on the evaluations conducted by qualified mental health experts, even if, in retrospect, those evaluations may not have been as complete as others may desire. Stewart v. State, 37 So.3d 243, 251-252 (Fla. 2010), *citing* State v. Sireci, 502 So.2d 1221, 1223 (Fla.1987). "[T]rial counsel's reliance on his retained experts is not proven unreasonable simply because another expert, in this case Dr. Eisenstein, questions the thoroughness of the prior evaluations." Stewart, 37 So.3d at 253-254.

12. Counsel cannot be deemed ineffective simply because he relied on what may have been less than complete pretrial psychiatric evaluations. State v. Sireci, 502 So.2d 1221, 1223 (Fla. 1987). Further, a subsequent finding of a mental deficiency does not necessarily warrant a new sentencing hearing, unless the psychiatric examinations were so grossly insufficient that they ignored clear indications of either mental retardation or organic brain damage. Id. at 1224. Dr. Eisenstein's opinion that Dr. Masterson's report was not in the clinical format he would prefer does not render Dr. Masterson's evaluation grossly insufficient for legal purposes. Dr. Eisenstein's recent diagnosis that defendant has Intermittent Explosive Disorder does not change the fact that neither he, Dr. Wald, nor Dr. Masterson, diagnosed defendant with mental retardation or organic brain damage. The reports of Dr. Wald and Dr. Masterson show they were aware of and considered

defendant's history of head injuries, drug and alcohol use, and childhood psychiatric treatment for anger issues. Defendant presented no evidence that Dr. Wald or Dr. Masterson's evaluations were grossly insufficient, nor that they ignored clear indications he suffered from mental retardation or organic brain damage. Defendant has failed to meet his burden as to either prong of Strickland. Therefore, **Ground III is DENIED.**

13. **As to Ground IV**, defendant argues trial counsel was ineffective for failing to prepare and present mitigation evidence in that counsel did not investigate or present mitigation evidence regarding his mental health, family history, a childhood marked by poverty, sexual abuse of other family members, substance and alcohol abuse and severe emotional neglect. Mr. Osteen testified that he and his investigator contacted and interviewed defendant's mother and friends (April 28, 2010 evidentiary hearing transcript pp. 63, 67). He called the mother and several friends to testify at trial because they were helpful to show defendant's character and work habits (April 28, 2010 evidentiary hearing transcript pp. 63, 67). He testified that the family and friends contacted did not provide much information about the dynamics of defendant's family and he never learned about any sexual abuse or incest in defendant's family (April 28, 2010 evidentiary hearing transcript pp. 64-65; 86; 99). Mr. Osteen further testified that the reason he did not call any of these other persons was that their testimony would not have been helpful and probably would have been harmful (April 28, 2010 evidentiary hearing transcript p. 98). Defense counsel specifically asked Mr. Osteen why he did not call defendant's friend, Heather Johnson. Mr. Osteen replied that in response to his request for character information about defendant, Ms. Johnson had responded in a letter that she thought defendant was capable of robbery, but not murder (April 28, 2010 evidentiary hearing transcript pp. 102-103). Ms. Johnson testified to the same at the hearing, further stating that she lost touch with defendant in the late 1980s and had no idea what his character was like after 1990 (April

29, 2010 evidentiary hearing transcript pp. 210-212).

14. At the evidentiary hearing, defense counsel offered the testimony of Defendant's cousin, Mrs. Scutter, and her husband, Mr. Scutter, and also Dr. Sultan, and friends Kevin McBride and Bruce Martin. Dr. Sultan testified that she interviewed members of defendant's family at length and obtained details regarding poverty, substance abuse, and sexual abuse of family members (August 11, 2010 evidentiary hearing transcript pp. 21, 23-26). She further testified that in her evaluation of defendant, she found he has an above average IQ, diagnosed him with IED, found no indication that defendant suffered from any major mental illness, and further found that defendant did not meet the standards for the statutory mental health mitigators (August 11, 2010 evidentiary hearing transcript pp. 34, 35, 39). Dr. Sultan found that defendant's background would have been mitigating. While she obtained more detail regarding that background than did Dr. Masterson or Dr. Wald, she did not uncover any new background information that had not appeared in the reports of Dr. Wald or Dr. Masterson (Defense exhibits 8 and 9).

15. Mrs. Scudder testified that she was defendant's cousin. She provided details regarding the family's poverty and possible sexual abuse, and indicated that she had not had any contact with defendant since 1990 (April 29, 2010 evidentiary hearing transcript pp. 141; 146; 148; 150-151; 159). Mr. Scudder testified that he knew defendant when he was five to fourteen years of age. He detailed poverty, sexual abuse and drug abuse in the family, and indicated he had no contact with defendant since 1983 (April 29, 2010 evidentiary hearing transcript pp. 179; 171; 174; 177; 182). The Court finds that defendant's background was sufficiently presented to the jury, and while Dr. Sultan and the Scudders provided further details, they did not provide any additional relevant mitigating information that was not elicited at trial.

16. At the penalty phase, Mr. Osteen elicited testimony from a friend, Michael Lobdell, that defendant liked to go out “partying” (Penalty Phase trial transcript pp. 39-40). From defendant’s mother, Tawny Jennings, Mr. Osteen elicited testimony that defendant never knew his father, that they moved frequently to wherever Ms. Jennings could find work, and how defendant had to quit school to work due to her illness and inability to pay the bills (Penalty Phase trial transcript pp. 61-65). In addition, both of the Scudder’s last interactions with defendant were too remote to establish that trial counsel was deficient in failing to call them to provide mitigation evidence at trial. Both Mr. McBride and Mr. Martin testified that defendant drank and used various drugs excessively (August 11, 2010 evidentiary hearing transcript pp. 68-71, 84-87). Both indicated that defendant had been tolerant, patient, and not aggressive unless provoked, which contradicts the subsequent diagnosis by Dr. Sultan and Dr. Eisenstein of IED (August 11, 2010 evidentiary hearing transcript pp. 71, 88). Further, they testified that co-defendant Graves was not very bright and that defendant was “pretty intelligent” and brighter than Graves (August 11, 2010 evidentiary hearing transcript pp. 72, 77, 89). Ms. Johnson previously testified that defendant was “bright” and did not have a dominant personality (April 29, 2010 evidentiary hearing transcript pp. 205-206). This testimony contradicts defendant’s contention that Graves was the mastermind of the incident. In addition, the testimony by Mr. McBride and Mr. Martin regarding defendant’s drug use is not the kind of information that would tend to cause a jury to look favorably upon defendant.

17. As noted above, Mr. Osteen’s decision not to call Dr. Wald or Dr. Masterson as mental health experts was a trial strategy to avoid presentation of harmful evidence to the jury. See response to Ground III, *supra*. As it relates to information regarding sexual abuse or emotional neglect, Mr. Osteen could not be ineffective for failing to present evidence of which he was not aware, since he testified this information was not reported to him. In fact, in Dr. Masterson’s report,

defendant specifically denied any history of sexual abuse. Furthermore, sexual abuse of defendant's mother or other family members would not be significantly mitigating. In Dr. Wald's report, defendant also denied being intoxicated or under the influence of drugs at the time the crimes were committed. Mr. Osteen testified that he chose to rely on the positive statements by defendant's mother and friends, and the good, loving, relationship between defendant and his mother in order to attempt to elicit sympathy from the jury (April 28, 2010 evidentiary hearing transcript p. 90). Again, this was proper trial strategy to focus on positive information, rather than negative information such as poverty or extreme drug and alcohol use. The Court finds trial counsel's performance was not deficient. Even had counsel introduced all the information defendant now believes should have been introduced, defendant has not proven prejudice. There is no reasonable probability that the outcome would have been different. The Court notes that defendant has introduced evidence by Dr. Eisenstein and Dr. Sultan regarding a diagnosis of IED, yet also states counsel was ineffective for failing to introduce evidence of defendant's possible ADHD, drug and alcohol use, and childhood head injuries. However, the diagnosis of IED specifically excludes any possible effects from those conditions. Further, viewed in comparison with the heinous nature of the three murders and the aggravating circumstances, the additional information would not have changed the outcome since such mitigating evidence would not have outweighed the aggravating circumstances. Defendant has failed to meet his burden as to either prong of Strickland. Therefore, **Ground IV is DENIED.**

18. As to **Ground VI**, defendant argues counsel was ineffective for failing to establish that defendant was not competent to waive Miranda rights and for failing to object to the admission of defendant's statements. Defendant argues that he was unable to make a knowing, intelligent and voluntary waiver of his Miranda rights due to mood disorder, impulse control disorder, substance

abuse, and LSD intoxication. He further claims that his statements were obtained by the use of threats, promises and misleading information. He argues that counsel failed to present this information at the hearing on his motion to suppress and he was prejudiced as a result.

19. However, defense counsel failed to question trial counsel, Mr. Osteen, regarding this issue, nor did the defense present any evidence which would indicate Mr. Osteen was in any way deficient on this issue or that defendant was prejudiced. The only testimony elicited on this issue was that Mr. Osteen did not recall if defendant used drugs at the time he gave his confessions and he was sure he investigated that issue (April 28, 2010 evidentiary hearing transcript p. 80). To the extent that defendant argues alleged police misconduct, coercive police activity is a necessary predicate to find a confession involuntary. Colorado v. Connelly, 479 U.S. 157, 167 (1986). Defendant failed to allege any specific instances of coercive police activity. Defendant has failed to meet his burden as to either prong of Strickland. Therefore, **Ground VI is DENIED.**

20. **As to Ground XX**, defendant argued in his motion that the sentencing order did not reflect independent weighing or reasoned judgment. Defendant argued that the trial court did not give meaningful consideration to non-statutory mitigation evidence presented by the defense such as defendant's domination by his co-defendant, his good employment history, his loving relationship with his mother and his exemplary courtroom behavior. Defendant further argued that an unsigned sentencing order found in the prosecution's files indicates that the trial judge did not draft the sentencing order, but instead improperly delegated the responsibility to the prosecution. Defendant also argued that counsel was ineffective for failing to raise these issues, however, defendant failed to present any evidence on this issue at the evidentiary hearing, and accordingly, waived this claim.

21. In Burns v. State, 944 So.2d 234 (Fla. 2006), the defendant argued that he was entitled to postconviction relief because the sentencing order did not sufficiently list the nonstatutory

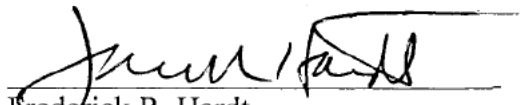
mitigating circumstances proposed by defense counsel. The Florida Supreme Court upheld the summary denial of the claim, holding that claims based upon a defect in the sentencing order are procedurally barred because they could have been raised on direct appeal. *Id.* The postconviction defendant in Walton v. State, 847 So.2d 438 (Fla. 2003), argued that the trial court improperly abdicated its sentencing responsibilities in sentencing him to death by relying upon a sentencing memorandum submitted by the state. The defendant also argued that his trial counsel was ineffective for failing to object to the trial court's adoption of the state's memorandum as its sentencing order. The Florida Supreme Court held that the claim was procedurally barred because "any claims regarding the conduct of the resentencing trial judge in the creation of his sentencing order could and should have been raised on direct appeal." *Id.* at 446. Defendant's allegations regarding the trial court's consideration or rendition of the sentencing order are therefore procedurally barred. Therefore, **Ground XX is DENIED.**

22. For the reasons stated in the previous order directing an evidentiary hearing, Grounds 1(b), 1(c), II, V, VII, VIII, IX, X, XI, XII, XIII, XIV, XV, XVI, XVII, XVIII, XIX, XXI, XXII, XXIII, XXIV, and XXV are hereby denied.

Accordingly, it is

ORDERED AND ADJUDGED that Defendant's Second Amended Motion to Vacate Judgment & Sentence pursuant to Rule 3.850 and 3.851 is DENIED. Defendant may file a notice of appeal within thirty (30) days of the date this order is rendered.

DONE AND ORDERED in Chambers at Naples, Collier County, Florida, this 31st day of January, 2011.


Frederick R. Hardt
Circuit Judge

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the above Order has been furnished to **Carol M. Dittmar**, Assistant Attorney General, 3507 E. Frontage Road, 2nd Floor, Tampa, FL 33607; **Richard Montecalvo**, Assistant State Attorney, 3301 Tamiami Trail East, Administrative Building, 6th Floor, Naples, FL 34112; **Roseanne Eckert**, Assistant Capital Collateral Regional Counsel - South, CCRC-S, 101 N.E. 3rd Avenue, Suite 400, Fort Lauderdale, FL 33301; **Anna-Liisa Nixon**, Assistant Capital Collateral Regional Counsel - South, CCRC-S, 101 N.E. 3rd Avenue, Suite 400, Fort Lauderdale, FL 33301; **Paul Kalil**, Assistant Capital Collateral Regional Counsel - South, CCRC-S, 101 N.E. 3rd Avenue, Suite 400, Fort Lauderdale, FL 33301; and **Administrative Office of the Courts (XIV)**, 1700 Monroe Street, Fort Myers, FL 33901; this 31 day of January 2011.

DWIGHT E. BROCK
Clerk of Court

By: [Signature]
Deputy Clerk

Robert J. Wald, M.D., P.A.

ADULT AND ADOLESCENT PSYCHIATRY

846 ANCHOR RODE DRIVE • NAPLES, FLORIDA 33940
TELEPHONE (813) 262-2058

June 21, 1996

CONFIDENTIAL

Thomas Osteen, Esq.
Office of the Public Defender
Collier County Courthouse
3301 Tamiami Trail, East
Naples, FL 33962-4975

Re: Brandy Bains Jennings, Case No. 95-2284-CF-A-WLB

Dear Mr. Osteen:

The above named Defendant is a 26 year old, Caucasian male seen in the attorney's conference room of the Collier County Jail on March 22, 1996 and March 30, 1996, pursuant to a Court order issued by Judge William L. Blackwell on February 1, 1996. Judge Blackwell's Order appointed this examiner as an expert to assist the Defendant. Pursuant to that order, this report is being sent to your office only and no other copies will be made without your express permission and direction.

The Defendant was seen for 2 hours on March 22, 1996 and for 1-3/4 hours on March 30, 1996, for a total interview time of 3-3/4 hours.

This examiner also had the opportunity of reviewing the activity report of investigator Ralph Cunningham dated December 21, 1995, Case Number 95-319. Also reviewed were the records of the Lee County School District pertaining to Mr. Jennings, your letter to this examiner dated March 14, 1996, and a 12 page psychological testing report prepared by Dr. Russell W. Masterson who evaluated the Defendant at the request of this examiner in April, 1996. An attempt was made to interview the Defendant's mother. She offered some resistance to being interviewed by this examiner but finally did make an appointment for June 7, 1996. She failed to appear for her meeting with this examiner and no further contact has been made.

The Defendant was questioned as to his understanding of the nature and scope of this examination and his understanding that a report to defense counsel would be rendered. He demonstrated full understanding of the above.

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The Defendant stated that he was arrested, in Las Vegas, Nevada, around mid-day, on December 8, 1995. He indicated that he was subsequently questioned about a robbery and three murders which allegedly occurred at the Cracker Barrel Restaurant in Naples, Florida on November 15, 1995.

Mr. Jennings states that when he was pulled over by police he briefly stopped and then "took off", stopping again only when he was out of Las Vegas proper. He indicates that he was taken to the Clark County correctional facility where he remained for five days. During that stay he was interviewed by Collier County investigators. He states that initially he admitted to the crimes to protect his co-Defendant, Jason Graves. He states that during the interview he was cold and frightened, and goes on to indicate he was shaking due to the cold. He then goes on to indicate that he underwent a second interview during which he told the truth to Collier County investigators. He stated that he did not see the murders, his co-Defendant was with the victims around the time of the murders, and that he (Jennings) had planned a robbery and was at the Cracker Barrel Restaurant for the purpose of robbery only. He did state, however, that he found the alleged victims in the restaurant cooler before exiting the restaurant.

After several hours of talking with Mr. Jennings and eliciting information relative to his past history, medical history, family and background, and other issues, we began to talk more in depth about the alleged activities with which he is charged. He indicated to me that he was hired at the Cracker Barrel Restaurant as a grill cook in November, 1994. He states that he worked at that job for approximately 11 months and that his work seemed to go quite well. He indicated he worked approximately 20 to 50 hours a week at \$7.45 per hour. He felt that this was not as much money as he should be making and quit his job at the Cracker Barrel in September, 1995. He said that during his tenure as a cook he was criticized several times for having a "bad mouth" and bad attitude. He admitted to some trouble accepting corporate policy and management decisions. He also states that he did not like his manager's (Dorothy) voice, but generally thought of her as a "okay" person. He admitted to, at times, giving a hard time to the waiter and waitress staff.

Mr. Jennings stated that a plan developed to rob the Cracker Barrel Restaurant after it was suggested to him by a Cracker Barrel employee who he names as Robert Campbell. He states that that plan actually was mentioned to him before he ever began working at the Cracker Barrel and it was suggested again after the Defendant quit his job there.

He indicates that he began to seriously plan a robbery at the Cracker Barrel Restaurant in October, 1995 and more seriously about actually committing the robbery on November 2, 1995 after an appearance before Judge Turner on an unrelated matter. He stated he needed to obtain "quick cash" in order to leave the State of Florida. He states that he planned to rob the Cracker Barrel Restaurant, then rob an armored truck approximately one week later and then, finally, to leave the country. The Defendant apparently had these plans fairly well formulated.

He states that he tried to plan the Cracker Barrel robbery for one person to commit the act in a ten minute period. His planning revealed that this could not be done and he subsequently enlisted an accomplice, his co-Defendant, Mr. Graves. He stated that he and his roommate planned the robbery for approximately one week prior to the commission of the robbery. He states that the robbery was attempted on two occasions before it actually took place. He goes on to indicate that he sat in front of the restaurant waiting for the manager to appear. He then, with the manager, forced his way in using a pellet gun. He describes, in marked detail, all the events before, during, and after the alleged offenses. He described the actions of he and his co-Defendant relative to the use of electrical tape to bind two of the alleged victims and then the third. He states that money was obtained and placed in a trash bag. He then indicates that his co-Defendant took the three alleged victims to the cooler and tried to take the victims' personal money. The Defendant states that he told his co-Defendant not to do so. He remembers his co-Defendant standing in specific areas of the restaurant. The Defendant states that he then went to the cooler but did not see the victims at that location. He then went to a freezer and remembers his foot slipping. He remembers seeing one of the alleged victims, Vickie Smith, in a pool of blood. He then recalls encouraging his co-Defendant to leave the restaurant quickly with him. He remembers hearing someone trying to come in the front door and recalls he and his co-Defendant leaving through the back door. He recalls the burglar alarm going off and recalls his co-Defendant falling and losing his pistol, gloves, and some money. He states that a knife was left at the scene. He then recalls the Defendant driving, with his co-Defendant to Ft. Myers to a motel where the money obtained was counted. Both then went to buy clothes in a local mall, put two tires on their truck at a tire store, then went to another motel, saw some friends, went out shooting, then went for food and drinks on several occasions. He states that he and his co-Defendant stayed in the Ft. Myers area for about a week and then traveled to Ft. Pierce where they remained three or four days. He states that they then left for Oregon where the Defendant's family is located. They drove as far as Las Vegas, Nevada, where they were arrested.

The Defendant denies having anything to do with the murders, per se. He states that he now hates his co-Defendant for indicating that he (Jennings) committed the murders but still feels that Graves is "like a little brother" to him. He states that he was originally willing to take the blame for the murders to protect Graves until his mother told him not to do so.

Mr. Jennings stated that he feels guilty about the crime, "felt just terrible" after the crime, felt scared, and did not know what to do. It is apparent that the Defendant and the co-Defendant are now accusing each other of the murders.

The Defendant indicates that he was neither intoxicated or under the influence of drugs at the time of the alleged offenses. He states that he consumed approximately two beers approximately four to five hours prior to the crime and no other intoxicating substances.

The Defendant's history was reviewed. He states that he was born in Tillamock, Oregon. He lived in Oregon into the 2nd grade of school after which the family moved to Colorado where they remained

six months prior to moving to Wyoming and then back to Oregon. He states that the moves took place as a result of his mother following her fiance from place to place. His mother and the fiance never married. In 1981 the family left Oregon and moved to Arizona until 1984. The move to North Ft. Myers then took place and the Defendant moved to Naples approximately three years ago.

The Defendant has no brothers or sisters.

The Defendant's mother is 47 years of age and suffers from bone cancer and leukemia. She also has a history of throat cancer and allergies. He says she is doing reasonably well health wise at the moment and does artwork as a career. The Defendant states he loves his mother very much, respects her opinions, and is very protective of her.

The Defendant's father died approximately one to two years ago. The Defendant had had no contact with his father, never saw him, and never saw a picture of him. His mother and father divorced before the Defendant was born.

The Defendant states that his father was alcoholic and was apparently quite violent when he came back from a tour of duty in Viet Nam.

The Defendant explained his educational history by saying that he was essentially a "straight A student" and saw himself as quite bright and intelligent. He states that he did well in school until the family moved to Florida where he began to experience boredom and disenchantment and describes the schools he attended as quite poor with bad policies. He left school in the 10th grade after he was thrown out of the house by his mother after a fight with his mother's boyfriend. He was 15 years of age at the time and apparently rather severely hurt his mother's boyfriend who was approximately 60 years of age after the boyfriend had hit his mother. He states that at the time he left school he was working two jobs and had essentially become "fed up" with school. He never finished high school or obtained his GED nor sought out other educational experiences.

The Defendant's psychiatric history was reviewed. He states that when he was 8 years of age he was sent to see a psychiatrist due to bad temper. He stated that he started to choke an 8 year old cousin after the cousin had laughed at him and he indicates that he could not tolerate being laughed at by anybody. He does not recall the name of the doctor or how many times he was seen. He states that in 1992 he went voluntarily to Charter Glade Hospital in Ft. Myers, Florida for a free evaluation. He was told that he was depressed an alcoholic and was advised to come into the hospital, which he did not do. He states that he went for an evaluation after finding himself drinking an excessive amount of alcohol after being left by a fiancée and not being able to attend to his work. He states that a girlfriend had made a statement that he was manic depressive, in her opinion.

The Defendant's medical history was taken. He apparently suffered a strep throat when he was 11 years of age, in the 5th grade. He also states that he had an ear infection with some loss of hearing

which occurred when he was 11 years old. He states that he was hospitalized for pneumonia when he was approximately 4 years old and suffered a concussion at 2 or 3 years of age when he was hit on the head by a board. He apparently remembers this quite well and was hospitalized for two to three days. In 1989 he sustained a broken collarbone secondary to a motorcycle accident. He broke a toe at 12 years of age when he kicked a rock. He suffered a broken finger in 1993 and a lacerated lip when he was 13 years of age. He was involved in several fights with minor injuries during his lifetime. He underwent no surgical procedures. He states that he suffered from carpal tunnel syndrome and broke both wrists since 1992 which he blames on arm wrestling and carpet installation. He has not suffered from any other major medical problems.

Neurological history was negative. There is no apparent history of epilepsy, meningitis, encephalitis, or severe brain or spinal cord injuries. He has never had any venereal diseases.

The Defendant reports his work history as including gas station work and work as a cook, mover's assistant, auto mechanic, construction worker, heavy equipment operator, motor rebuilder, carpet installer, and other odd jobs.

The Defendant has no military history.

He has a number of prior arrests which are primarily for driving violations. He has spent approximately three years of his life in correctional facilities. When he was 12 or 13 years of age he was arrested for shoplifting. In 1987 he was arrested for driving on a suspended license. His license had been suspended for not paying tickets in Sarasota County. In 1987 he was again arrested in Lee County for driving on a suspended license. He states that he has multiple tickets for speeding, other violations, and faulty equipment. In 1990 he was arrested for attempted armed robbery and plead no contest. He spent one year in the Collier County Jail and was placed on probation for five years. In 1992 he was arrested for driving on a suspended license and speeding. In 1992 he was arrested for violation of probation and in 1994 was arrested again for driving on a suspended license and violation of probation. In 1995 he was arrested for driving on a suspended license, a charge which is still pending. He was also arrested in 1995 for three counts of premeditated first degree murder and one count of armed robbery.

The Defendant has used alcohol and drugs in the past. He began to use beer at approximately 15 years of age and states that he became a relatively heavy drinker of beer, rum, and other alcoholic beverages. He does not, however, believe he is an alcoholic. He states that he "always had to drink more than everyone else," indicating that perhaps he had to prove himself to be "better" than everybody else. Drugs which have been used include marijuana, hashish, LSD, speed, and others. He states that he used these drugs for the same reason as noted above. He states that he discontinued the use of drugs around 1991 but is uncertain of the date. He states that he's had some minimal use on rare occasions since 1991, however. He states that he discontinued alcohol for approximately three months in 1992 and experienced no withdrawal symptoms. Over the past

two years he has been a minimal user of alcohol, drinking approximately one night per week. He has no past history of delirium tremens or drug or alcohol withdrawal.

Mr. Jennings indicated to this examiner that he was involved in drug sales and transportation of drugs in 1989 and 1990 but was never arrested for these activities.

Upon questioning Mr. Jennings talked quite a bit about himself, his past, and what seems to motivate him. He indicated that after he quit school he felt his life was shattered and really didn't care about very much at all. He describes himself as going "downhill", starting a lot of fights, not thinking much of himself, and having to work very hard to prove himself. He admits a tendency to need and look for much attention. He maintains that he has always needed to be superior and have both his mother and grandparents brag about him. He states that he always had to get A's in school and be at the top of his class. He reports, earlier in his life, involving himself with a class of people he terms "rednecks, and then druggies." He states that he then became involved with "motor heads" (people who enjoyed cars, car building, and races). He states that he always tended to associate with lower middle class people.

He describes his life as being one involving money, drugs, girls, enjoying himself, and living for the day. He indicates that he has stolen things for both money and what he describes as the "adrenalin rush." He sees himself as a showoff but quite likable and describes himself as smart, polite, short-tempered, easily aggravated, boring easily, never being able to finish things he begins, aggressive, self-centered, needing immediate gratification, and not learning from experience. He states that he has had a number of girlfriends but never really stayed with a woman very long. He states that his relationships with women have been quite good and denied any abusiveness in relationships. He described himself as often rebellious and having felt picked on by people and the law. He stated that when he was given traffic tickets he was determined not to pay them. He describes himself as "bull-headed" and hating rules. He describes himself as always driving fast in automobiles, loving speed, and frequently showing off for friends and girls. He indicates that he used to get into many fist fights, mostly to "show off."

He indicates that he has stolen money from companies and corporations approximately two dozen times, or perhaps more. He states that he has never stolen from individuals and feels that it is generally okay to steal from companies due to their insurance policies. He states that he has never stolen out of anger or revenge.

He describes himself as loving children and often becoming involved with women primarily because of their children rather than themselves. He describes his most recent girlfriend as "Mary", a 33 year old woman with whom he lived. She had three children, aged 14, 13, and 10 years. He stated that he loved the children but did not love (or even like) Mary. He describes her as a "dirty pig" and states that he "couldn't stand her." He nevertheless lived with her and dated her from November, 1993 through August, 1995.

He states that he has one child, a boy currently 9 years of age. He lives in Massachusetts with his mother and his mother's husband. The Defendant states that his child has no knowledge of him. He indicates that he may, also, have another child by another woman living elsewhere.

The Defendant was married in March, 1990 and divorced in June, 1990. He is not sure if the marriage was annulled.

He describes himself as never being able to hold on to money. He states that he spends it rather than saves it and never seems to have enough.

The Defendant indicates that any past crimes in which he has participated seemed not to affect him at all. He admits that he seeks gratification, does not feel at all remorseful about crimes he has committed, and has experienced no guilt relative to legal infractions.

He admits never learning from his experiences, as is shown by his driving record. He indicates that his tendency to speed while driving has gotten him into much trouble but he has never seemed to be able to correct these tendencies.

The Defendant denied ever experiencing moderate or severe depression and has not experienced any periods of euphoria or hypomanic symptoms. He does state that he tends to anger easily and tends to lose his temper without much provocation.

Mental status examination was conducted. The Defendant manifests a very appropriate affect and shows no evidence of significant depression or anxiety. His associations are fully intact without loosening. He appears to be an intelligent, well mannered, cooperative, polite, and articulate individual. There is no evidence of pressure of speech, flight of ideas, or psychomotor retardation. There is no evidence of auditory or visual hallucinations, delusional thought patterns, paranoid ideation, suicidal ideation or homicidal ideation. He denies any history of suicide attempts. There is no evidence of feelings of influence or ideas of reference. There is no excessive religiosity, feeling of being on a special mission, or having special powers. He is oriented to time, place and person and has very good memory for both recent and remote events. Concentration is reasonably good and judgment is fair. In certain of the questions asked to test judgment the Defendant shows significant self orientation and self centeredness. Calculation ability is good and he performed Serial 7's reasonably well. Abstracting ability is good without concreteness. Thought and speech are generally logical, coherent, and goal directed.

The records of the Medical Department of the Collier County Jail were reviewed. The Defendant, at the time of evaluation, and since his arrival at the Collier County Jail has not been on any psychoactive medications nor have there been any precautions instituted. There have apparently been no psychiatric or psychological visits to this Defendant.

A review of the Defendant's Lee County School District records was essentially non-contributory. Records of his 9th and 10th grade classes show apparent difficulties with several courses including Algebra and English. He also did poorly in World History. There was no indication of any significant health problems.

Psychological testing was conducted by Dr. Russell Masterson in April, 1996. Dr. Masterson's report is enclosed.

The history elicited by Dr. Masterson essentially parallels the history taken by this examiner.

The Defendant's I.Q. was measured as superior, both verbally and in performance. Testing to measure level of depression was essentially unrevealing with no major evidence of depression noted. Neuropsychological testing showed no handicap, evidence of learning disability, or difficulty processing information. There was no evidence of an attention deficit disorder. He showed no evidence of serious neurological difficulties. Minnesota Multiphasic Personality Inventory showed that his test results were valid and that he seemed to be handling his difficulties in an extraordinarily calm way. Some evidence of depression was seen on this test, however, and a tendency toward expressed hostility and unresolved resentments was also seen. His clinical scales were essentially within normal limits. Dr. Masterson's interpretation of these scales indicates that the Defendant would be usually an outgoing and energetic person who creates a very good first impression but has many feelings of inadequacy, frustration, and unresolved conflicts within. The profile tends to describe a person who resents the demands of society and other people and may react to stress by drinking excessively or using addictive drugs. Such individuals may have trouble with their families or the law and have difficulty with impulse control and delay of gratification. They are inclined toward the sociopathic side of character disorder with little respect for social standards and are often in conflict with society. Mr. Jennings is seen in another personality inventory administered as a person who is generally set in his ways and likes things orderly. He would also be seen as impatient with others. He was seen as being similar to individuals who have a great deal of talent and feel they should be in powerful or authority type positions. They generally would have difficulty holding these positions because of impulsiveness. Mr. Jennings was seen as having a great deal of trouble with spelling and some difficulty with reading comprehension. He saw himself as being too trusting and being "suckered" easily. Mr. Jennings reported to Dr. Masterson that he "just never was able to take full control over my life. Something always seemed to be waiting to knock me back down. I would have to say that rebelling against society has made me what I am and who I am. I had a hard time accepting some of society's ideas." He admitted having never really learned to deal with anger or the positive emotions of love and affection. He is aware that people in jail are critical of him for not having or showing emotions, but he states he really does have feelings but simply does not know how to show them and deal with them.

In the opinion of this examiner, Mr. Jennings has no major mental disorder. He is a bright, intelligent, and affable person who gives good first impressions but is extraordinarily self-centered. He does not learn from experience, seeks immediate gratification, has little respect for the needs or rights of others, and tends to gratify and satisfy himself whether or not at the expense of others. He manifests most characteristics of the sociopathic personality type. He certainly has no evidence of bipolar disorder (manic depressive disorder), psychotic thought disorder such as schizophrenia, organic brain dysfunction, or neurological disease, or any other illness which might compromise his cognitive abilities or emotional stability. From the information obtained it appears that Mr. Jennings requires a great deal of attention, respect, positive reinforcement, and glorification. Underlying this would most likely be a sense of inadequacy, inferiority, dependency, distrust of his own decision making abilities, and a dislike of himself. Projection of his inadequacies or perceived weaknesses on to society, those who make and enforce laws, employers, and work related superiors might certainly be expected to occur in such a situation and, I believe, do occur in Mr. Jennings. This individual has always to impress people and may have done reasonably well in that regard as long as he was obtaining straight A's in school. A number of factors, perhaps including drug use, tended to decrease his ability to obtain good grades and his boredom and frustration along with a need for immediate gratification may have tended further to reduce his ability to do well in school. As his intellectual achievements began to decline, he may have needed to find other ways to impress people and assert his importance or value. Frequent fights, taking control of situations, and law breaking may have been all part of this new scenario.

It must also be remembered that Mr. Jennings, at the age of 8 years of age, apparently attempted to choke a cousin and was sent to see a psychiatrist due to his bad "temper." Some of the problems we see today may have had their origin in his very early childhood. He was moved around quite a lot, mostly to satisfy his mother's needs rather than his own, and probably never developed a significantly stable relationship with friends, peers, or any adult male. He knew nothing of his father, and mother's fiancées or boyfriends tended to appear and then, apparently, disappear. Distrust of others, particularly authority figures, in such a situation would easily occur.

It is noted that Mr. Jennings gives some lip service to feeling remorse and guilt relative to the acts with which he is charged, although he does not directly admit to those acts. This examiner's impression of Mr. Jennings' utterances relative to guilt and remorse is that such feelings were not particularly believable. At other junctures in the evaluation he made quite clear his lack of guilt or remorse for any other illegal or criminal activities including stealing from corporations, drug transportation and sales, motor vehicle violations, etc.

I believe we are dealing with a sociopathic personality in a very bright and otherwise personable young man and do not see any other evidence from psychological testing, school records, or clinical interview which would suggest any other syndrome or disorder.

Additionally, and parenthetically, this examiner is of the opinion that the Defendant is competent to proceed pursuant to the criteria set forth in 916.12(1), F.S. and, FRCrP 3.211(a). This examiner is also of the opinion that the Defendant was competent at the time of the alleged offense as per the M'Naghten standard.

Very truly yours,

A handwritten signature in cursive script, reading "Robert J. Wald", followed by a long horizontal line extending to the right.

Robert J. Wald, M.D.

RJW:ss

DR. RUSSELL MASTERSON PA
FID 592 417 608
LIC PSYCHOLOGIST # 0002435
846 ANCHOR RODE DRIVE
NAPLES, FLORIDA 33940
813 262 2056

CONFIDENTIAL

DEFENDANT: Brandy Bains Jennings **D.O.B.:** 6/30/69 **AGE:** 26

CASE NO.: 95-2284-CFAP

PSYCHOLOGIST: Dr. R. W. Masterson, Ph.D. **FLA. LIC.:** #2435

DATE: April, 1996

PURPOSE: This is a report based on a Court Order signed by Judge Blackwell, requesting psychological services for the Defendant, Brandy Bains Jennings, to be submitted to the defense counsel, Attorney Tom O'Steen. I will gather historical data, a clinical interview, a mental status, and do some psychological tests to try to outline Mr. Jennings' personality and the psychodynamics behind his behavior, as an aid in defending him from charges of murder in the first degree.

IDENTIFYING DATA: On Friday, April 12, 1996, I met with Brandy Bains Jennings at the Collier County Jail for two hours, to establish some type of a history and background for further testing. He indicated he was born June 30, 1969 in Tillamook, Oregon. He is an only child. His father was David Williams, who was in the military and is now deceased. He never did spend any time with his natural father, who apparently was not concerned about him and never associated with him. His mother is Tawny Jennings. She is alive and lives in Ft. Myers, Florida. Mr. Jennings indicated that David Williams and Tawny Jennings married in 1968 but "were divorced before he was born." He indicated he never met his natural father and thought his father was a career military person.

Brandy's earliest memories were Rockaway Beach, Oregon, and getting sick on the school bus on the way to the first grade. He indicated he and his mother moved to Grand Junction, Colorado for 6 months when he was in the first grade, and this resulted in him being retained in the first grade. Mrs. Jennings at that time thought she was going to marry a gentleman named Frank O'Neil, but they never married. Mr. Jennings indicated his mother's parents lived in Oregon but he and his mother traveled around Colorado, Wyoming, and Oregon, and for some period of time he and his mother lived with her parents, around grade 4. Unfortunately, his grandmother died of a heart attack round 1981. He indicated that his mother followed Frank O'Neil to Gillette, Wyoming, when he was in the 2nd or 3rd grade, but they were never able to set up a permanent relationship. His mother then moved back to Oregon and, finally, at the death of her mother moved to El Mirage, Arizona. He indicated his mother and he couldn't tolerate the grandfather, but he did not explain or give reasons why.

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In grade 6, Brandy remembers living with his mother and near a friend of his mother (who is a female), in Peoria and he went through the first year of high school in Peoria. He indicated that up to that time he was a straight A student, had some minor detention problems, but no behavior problems. In 1983, in the 9th grade at Peoria High, he was not playing any sports but always had lots of friends and was interested in computer programming. He indicated he became sexually active at about age 12 with a woman who introduced him to sex who was 32 years of age. He noted he was baby sitting her child and in the process of the baby sitting, she started a sexual relationship with him. He indicated his first sexual experiences were in kindergarten at age 5 or 6 with an older female cousin named Teresa, who was about 10 years of age. He denied any history of sexual abuse from adults that he could think of. He noted he was actually seduced at age 12 by the woman next door, after he baby sat her 3 or 4 year old daughter. He indicated in the first years of high school he was not sexually active and later, when he did become sexually active, it was always with older women and mostly parties or one-night stands.

In 1984, his sophomore year in high school, he and his mother moved to North Ft. Myers, Florida because there was work there. They also went because she had established a relationship with one Douglas Drake, who owned a house in North Ft. Myers and a trailer. Once, Drake put a cigar to his throat and angered him. In 1985 he was a sophomore at North Ft. Myers High School. He indicated "that it sucked and it wasn't as good as schools out West, and it had bad curriculum, and he was bored." In 1985 he had friends, but still was not involved in sports although he was of large size. He indicated his mother found a job as a bartender and they lived in Mr. Drake's house. In 1986 he got in a fight with Mr. Drake because Mr. Drake hit his mother, and because Mr. Drake stuck a cigar in his face, and he picked him up and slammed Mr. Drake on the ground in the driveway, to the point that Mr. Drake was hospitalized. Mr. Jennings indicated he was angry because Mr. Drake was drunk and attacked his mother.

He dropped out of school in 1986 as a sophomore and went to work at Kentucky Fried Chicken, and had been working at North Shore Mobil. In 1987 he went back to North Ft. Myers High for his junior year but didn't do particularly well. He indicated he knew the famous Dion Sanders at that time and Dion was picking on a pretty white girls, and Dion was a pretty miserable person so he dropped him while hitting him with a World History book. He then dropped out of school and had a motorcycle accident in November, 1987. He indicated he hit the car at around 45 or 50 mph, went flying through the air, but just had a bad bruise on his left thigh. He indicated he was not hospitalized and didn't have a head injury. He indicated he was pretty angry because he wrecked his motorcycle and it was an older guy from Punta Gorda who yelled at him, and his wife yelled at him, but he didn't retaliate. Mr. Jennings indicated he tried to be a good guy and sign to reimburse this man for the damages, but the man submitted a ridiculous bill for \$2,800.00, so he never paid him.

During 1987 and part of 1988 he thought he worked at North Shore Gas Station and spent a lot of time at the beach, which is Ft. Myers Beach, got into bar fights and was into acid, pot, and alcohol. He did mechanic work and when there was four \$100.00 bills and two tires missing from the gas

station, he was asked to quit or be fired. He noted he had nothing to do with the tires except that he mounted them, but didn't know where the four \$100.00 went, but he didn't take it. He then went to work for Raymond's Lumber as a forklift operator, then building trusses. He went back for a couple months to live in the trailer with his mother. He indicated he had no serious females at this time but had a lot of one-night stands.

In 1988 he was hired on for the summer as a rider for North American Van Lines. He took some trips up from Florida to Maine and he liked to travel, cut his drugs, and just was drinking. He then worked as a dishwasher, then a cook, at the Bayshore Buffet for a couple months because he didn't like the product manager. He then went into another round of acid, pot, alcohol, hashish oil, and speed. Later that year he worked for All American Services in lawn service for a fellow named Tim Atkinson. He wasn't happy there and quit in two months and continued to have difficulty with drugs and alcohol. He worked for Modern Air Conditioning in October, 1988 to August, 1989 and liked that job and learned a lot, but he terminated himself before he was fired. He noted he liked it when they had him out doing repair work and out on the road, but they tried to make a sheet metal worker out of him in the shop, so he quit. He indicated he didn't like the lack of freedom by being in a shop. He liked being on the road. He also felt that he was picked on because he trained a friend of his and then they hired his friend at the same salary he was making. He felt he had been victimized. He was angry at Modern Air Conditioning because they fired him just before he would have had enough time for a paid vacation, and he planned to go back to Oregon.

In 1989 he lived in the Boardwalk Apartments and became involved with Tasha Shoerner. He indicated at this time he was working at the Lani Kai in Ft. Myers Beach in security and as a bouncer. He indicated he worked through spring break and there were lots of girls and alcohol and drugs. He indicated he was supposed to marry a Lynn Jordan at this time, but both he and she were dealing and selling drugs and apparently she had a 5 year old daughter. He noted he enjoyed being kind of a father. Apparently there was a man named Jay Ellis at this time who threatened her because she owed him drug money, and Mr. Jennings indicated that he kidnapped this man in his car and was going to kill him, and did have a .25 automatic, however he was arrested for attempted armed robbery. He noted he plead no contest and got one year in the County Jail with five year's probation. He indicated he apparently was on probation at this time for numerous traffic violations, driving without a license, losing his license, etc.

He was arrested April 30, 1990 and got out January 29, 1991 and served 276 days. He indicated that in jail he wasn't a racial person, but there was a lot of black/white stuff, and he was in a lot of fights. He indicated that at this point that his natural father hated everyone, as far as he knew. I don't know whether he meant his natural father or his stepfather. He indicated that as far as he knew, his ancestors were Indians and that his father was a full-blooded Sioux and his mother was half English and half Commanche. I don't know how accurate this description would be. He noted that in jail he would never back down and had 30 or 40 fights, but never was penalized. He indicated that in jail he became a loner and tried to get along, but avoided people. After he got out on January

29, 1991 he went to work for Gulf Coast RV Sales. He indicated he found out he was a slave there, at \$5.50 an hour detailing, and they took advantage of him so he quit. In October, 1991 he worked for Hassler Carpets in North Ft. Myers as an installer. He indicated he liked this job because he was out on the road during the day and could just do his job. He worked there for almost two years, but got fired and didn't exactly explain why except he was doing some side jobs. He indicated he was tired and burned out at this time, drinking but not into drugs. At this point he got engaged to the girl he knew from two years ago, Tasha, and they lived together and she quit drugs. However, after a while he caught her with a guy and she was smoking crack again, and she hit him, and came home "with a man's pants." He indicated that at this point that he spanked her at her grandparents' house, the cops came, but he wasn't arrested.

In 1992 his life kind of fell apart and he went back into dealing drugs and drinking and acid trips. He moved back to his mother's house in East Ft. Myers and then got into mini-thins, which is a form of speed. He became involved with a man named John Stanislaw, whom he described as an alcoholic, but subcontracted for Hassler Carpets. In 1993 he moved to Golden Gate in Naples because Jack wanted him there, and John owned a house and rented a room to him. He indicated in 1993 he was off drugs pretty much, but was still heavy into alcohol like Jack. He lost his van for not paying the fines. He didn't have a girlfriend here and got pretty depressed. In 1993 he moved out to Waverly Apartments in Golden Gate. He was rooming with a Matt Kennedy, who was a mason, while he did carpets. At this point he met a girl named Angie Festa. She apparently was a 17 year old and a student at Barron Collier, doing and dealing drugs. She lived with him for two months when she was 17. He noted she was doing coke with her friends. He then added that she was his present co-Defendant's sister-in-law. At this point he got ripped off by Matt concerning the rent and in 1994 moved to Northgate and lived with Bruce Allen Martin.

At this point he met Mary Hammler, and I believe he said that she introduced him to Charles Jason Graves, who also was a Barron Collier student and later became the co-Defendant. He met Mary Hammler while shooting pool at the Sports Connection and then moved in with her and couldn't get rid of her for two years. He indicated he really liked her kids. She had three kids, a boy now 14, a boy 12, and a 10 year old. He noted he really loved the kids and, again, liked being a father but really didn't care about her. He now lived on Santa Barbara Boulevard and he and Mary both worked at The Willough in the kitchen. He then worked for Larry Lewindowski, installing carpet. He lived with Mary's aunt and uncle off Estey for a while and then he and Mary got a Laurel Ridge apartment and he, at that time, was working for The Willough but didn't last very long as a cook. He "couldn't stand a woman bosses bullshit in the kitchen, and her lies about too many smoke breaks."

He then went back to John Stanislaw laying carpet and later worked for a man named Chris, doing ceramic tile. He indicated he liked that work and picked it up fast and was making \$480.00 a week and felt pretty good. He indicated he just didn't fit in with the crew because there were two younger employees he didn't get along with. In October, 1994 he began work as a grill cook full time at night at Cracker Barrel. He quit his work with John Stanislaw because he couldn't stand his drinking on the

job. He indicated he was driving a 1987 Ford without a license and in January, 1985 was still working at Cracker Barrel. He noted he really would have liked to have gone back to Oregon, but had a five year probation to do in Florida and couldn't leave. In August, 1995 he broke up with Mary and she moved out after an argument. In September, 1995 he quit the Cracker Barrel but noted he did good work there and Bob Evans, his supervisor, "tried to keep him there and gave him a pep talk to stay with Cracker Barrel and make it a career." Charles Jason Graves moved in with him in September and he worked for Stephenson Tile for a while and made \$560.00 in a week. In October, 1995 he couldn't find a job so he went to work with the Labor Pool and was arrested on November 2, 1995. He indicated that he had five or six prior arrests for driving violations and knew Judge Turner was going to put him in the County jail for a year for driving on a suspended license. At this time he decided to leave town before November 29, 1995, when the hearing would come up and he'd have to go to jail.

At this point I terminated his interview because I didn't want to get into the details, if he wanted to talk to me about the actual crime, until we had a full hour to talk about it.

COGNITIVE TESTING: The WAIS-R was administered to Mr. Jennings at the Collier County Jail, and he did very well. His verbal I.Q. is 121. His performance I.Q. was in the 120 to 125 range, or superior verbal and performance intelligence. His subtest scores were as follows, from high to low:

1) Highest	Comprehension	15) Understanding Logic & Reasoning
1)	Similarities	15) Abstractions
1)	Block Design	15) Spatial Relations
2)	Digit Span	14) Immediate Recall of Numbers Forward & Backwards
2)	Arithmetic	14) Mathematical Reasoning
2)	Object Assembly	14) Visual-Spatial Problem Solving
3)	Vocabulary	12) Verbal Skills & Verbal Memory
3)	Picture Completion	12) Attention & Concentration
3)	Digit Symbol	12) Hand/Eye Coordination
4)	Picture Arrangement	11) Sequencing & Chronology
5) Mean/Average	Information	10) General Knowledge & Education

Brandy Jennings would seem to have excellent intellectual potential and good academic potential. It is interesting that two of his low scores were academic areas such as General Information & Knowledge and Vocabulary, while his potentials were much higher in Spatial Relations, Visual-Spatial Problem Solving, Abstractions, and Understanding & Comprehension.

DEPRESSION SCALE: The Zung Depression Scale was administered. Mr. Jennings scored a total of 44 points. This puts him below 50 which is in the normal range and not suggesting ongoing psychology involving depression at the present time. He denied any somatic symptoms with the

exception of some mild sleep difficulties. He denied palpitations, fatigue, constipation, losing weight, and anxiety. He indicated he's hopeful about the future a good part of the time. He denied being irritable. He indicated he still makes decisions quite accurately most of the time, without difficulty. He indicated he feels useful and needed a good part of the time. He did note that his life is pretty full "none or little of the time." He indicated that others would be better off if he were dead "none or little of the time." He also indicated that because of imprisonment he isn't able to enjoy the things that he used to do. However, this is either the profile of somebody controlling depression or not expressing any depression at the present time.

ADULT NEUROPSYCHOLOGICAL QUESTIONNAIRE: Mr. Jennings indicated that outside of jail he was a restless sleeper and did not sleep well at night in jail. He either sleeps a lot or not at all. He indicates that he reads a lot at night. He indicated he has not gained or lost weight in the last six months. He denied headaches past or present. He indicated he used to smoke from half a pack to three packs of cigarettes a day but is not smoking at all in prison. His alcohol and drug consumption have been enormous over the years and they've already been commented on. He denied dizzy spells. He denied any changes in gait in the last six months. He indicated that recently he's been seeing some spots in front of his eyes bilaterally, but he doesn't wear glasses and has never had them checked. He denied any tremors. He indicated he's had no difficulty with directions. He indicated he did have a head injury around age 3 or 4 when he was playing with a dog and the dog flipped a 2 X 4 out of a tree, which gave him a concussion. He also commented that he thought between age 15 and 18 he has very little memory and a confused memory, because he was so messed up on drugs and alcohol. He proudly noted that he never has done cocaine.

His speech is good. His hearing is good. His perception seems to be adequate. He indicated he's always been bad with names of people but the rest of his memory, except the years 15 to 18, is pretty good. He indicated that his mother's mother was a diabetic and he knows nothing about his father's side of the family in terms of genetics. He's not sure of any epilepsy in the family or any neurological problems. He indicated that in the last couple months in jail he's had floaters. He feels he needs to have his eyes examined as brightness hurts his eyes. He denied any hallucinations or delusions or auditory or visual hallucinations. He is right handed. He denied any anxiety at the present time and he denied depression.

He indicated that since he quit smoking in the jail his taste and smell are a lot better than they used to be. He denied any pain in any part of his body. He's never had much in the way of medical help. He denied any recent medications. He denied any tinnitus or serious illnesses, past or present.

NEUROPSYCHE TESTING: I gave him four words to remember. These words were robin, carrot, piano and green. I then told him at about ten minutes after we did some other things, I would ask him about these words. Ten minutes later I asked him to retrieve these words and he retrieved all four instantly, without any cueing. His short term recall when he is told to remember something

seems to be quite good. As will be seen, his memory for events in a short story is also excellent, as is his memory for numbers.

HALSTEAD-REITAN NEUROPSYCHE TESTS: Tests of Perception: The Trailmaking Test-Part B was completed. In this test he was asked on the sample section to connect numbers and letters in a sequence. He then was given a page full of numbers and letters and timed, to see if he could remember the directions and follow the sequence. He had an excellent score, taking 80 seconds and not making any errors. A good score is considered anything under 90. His perceptual abilities seemed to be quite accurate and acute, and there is no obvious perceptual learning handicap.

Auditory Processing of Information: In all the hours that I sat with Mr. Jennings, I never had to repeat a question nor did I have to repeat a direction. His auditory processing of information does not seem to have any deficits.

Tactile Learning Skills: The tactile finger recognition test was passed without difficulty. In this test, with his eyes closed, he's asked to identify which finger was touched after they had been numbered 5 to 1 from thumb to little finger. I did the touching randomly and rapidly, and he made no mistakes in twenty tries with either his right or left hand. His tactile learning skills seemed to be quite good.

In general, with the tests available in the prison setting, he did not have particular difficulty and there does not seem to be, in my opinion, any evidence of a learning disability, an attention deficit disorder, or any auditory, tactile or perceptual learning handicaps.

Tests of Laterality: His gross motor grip strength was 60 with his right, dominant hand, and 49 with his left, non-dominant hand. This represents about a 15% difference and is within normal limits. Regarding his fine motor skills his right, dominant hand completed an average of 61 taps at ten second intervals for four tries, while his left, non-dominant hand was equally productive with an average of 55 taps over ten seconds and four tries. There were no indications of difficulties with laterality or right or left hemisphere in contrast. In spite of the fact he's done a lot of drugs and alcohol and has had at least one blow to the head in childhood, he does not present with serious neurological difficulties as far as we can measure with outpatient tests at the jail.

MMPI RESULTS: The MMPI presented with three valid validity scales. His lie scale, F scale and K scale were all within normal limits. I would feel, based on this, that his test is an honest testing and a conscientious testing, with no attempts to deceive. His supplementary clinical tests indicated that the possibility of phobias or organic brain damage are not at relevant levels at this testing. He also projected as somebody that is not particularly stressed out and is handling prison and the charges against him in an extraordinarily calm way. Both of his stress indicators were low. His anxiety score was low. However, his depression scale was significantly high. He also had moderately high levels of repressed hostility and unresolved resentments.

His McAndrews Scale was not consistent with somebody with an addictive personality, but may reflect his present condition when he's deprived of any drugs, alcohol, or cigarettes, and he may have answered the questions more in line with his present confinement rather than the way he was five or six years ago. At this testing he's denying alcohol and drug problems.

The suicidal indicators were reviewed. Of the eight written indicators he did check one in that he noticed that it is true that he feels like a condemned person. However, he also checked that life is worthwhile and that he does not feel like harming himself or others. He feels his sins are forgivable and he doesn't wish he were dead. He also checked that he has not recently considered killing himself and he hasn't thought about it nor in his past has he had suicidal ideation or unknown past attempts. I would conclude that at this point he is quite cool, calm, collected, and while mildly depressed, is not suicidal.

Regarding his clinical scales, there isn't much to go on as most of them are within normal limits. He would seem to be mildly extroverted. At this point he has low energy levels, but there is no indication of psychotic process on paranoia, psychasthenia, or the schizophrenia scales. His two most elevated scales are scale 2, depression, and scale 4, psychopathic deviate. Of these two, only depression shows any true elevation. The psychopathic deviate just happens to be the next highest scale. The 2/4 profile describes someone who is usually outgoing and energetic, and creates a very good first impression but underneath it all has a lot of conflicts and feelings of inadequacy and frustration. The 2/4 usually resents demands of society and other people and may react to stress by drinking excessively or using addictive drugs. Sometimes they report depression and anxiety and feeling worthless, but these feelings don't seem to be sincere. The 2/4 code is usually seen in people in trouble with their families or the law, and have difficulty with impulse control and delay of gratification. They are inclined toward the sociopathic side of character disorder with little respect for social standards and often are in conflict with society.

This MMPI would suggest the personality disorder, characterological disorder, sociopathic type of personality, but there are not strong indicators like you might expect with the history and the intensity and savagery of the crime. He seems to be acknowledging the sociopathic, characterological difficulties, but only in a mild way at the present time through this MMPI.

MEYER-BRIGGS PERSONALITY INVENTORY: His Meyer-Briggs test of normal personality had 15 for extroversion and 11 for introversion. He sees himself as more extroverted than introverted but both aspects mark his personality. He sees himself as much more of a sensing person than an intuitive person. He sees himself as somebody who solves problems in an orderly, planned way, rather than by the seat of his pants. He sees himself as a cognitive, thinking person, much more than an emotional person, with a score of 19 for thinking and cognition and only 2 for feelings. His sensing score was 20 for sensing and only 3 for intuition. Finally, he sees himself as quite

judgmental and set in his ways, with a score of 24 on being judgmental and only a score of 5 on flexibility and perception.

The ESTJs are described as set in their ways and liking things in an orderly way. They are impatient with others and also with themselves in getting things done quickly and getting them done right. They don't listen patiently to others and don't do well in positions of authority in listening to other people. They often have a great deal of talent and feel they should be in powerful, authority positions, but have difficulty holding these positions because of impulsiveness. They are usually fairly neat and orderly in their personal lives. When not bothered by other difficulties in their personal lives, they're often quite dependable workers. In this particular case, alcohol and drugs seem to interfere greatly with Mr. Jennings' basically constructive personality for work, to the point that he resented authority, feeling that he knew better than the people he worked for but, at the same time, could not be responsible enough to hold on to authority for himself. It would appear he was very much in conflict between what he knew he should be because of his intellectual abilities and physical abilities, and what emotionally and with the use of drugs he was actually able to produce.

PERSONALITY ADJECTIVE CHECK LIST: I asked Mr. Jennings to review 153 descriptive adjectives and pick ten that describe himself. He had a lot of difficulty with this test because he indicated that being in jail, he has a different attitude now than he would have had a year ago, when he was a free man. I asked him to check off the items he felt were more descriptive of his life long activities with pencil, and to check off those he felt now in jail with ink and I would add the ones that overlapped in the present and in the past. He penciled in his life long traits as competitive, selfish, temperamental, sociable, adventurous, apologetic, understanding, hard working, hard headed, respectful, and helpful. He used a pen to indicate how he felt about himself at the present time and checked off careful, annoyed, touchy, lonely, orderly, anxious, suspicious, serious. Multiple answers included hard headed, competitive, and helpful.

His present set of answers seemed to reflect some calming down and gradual decrease in impulsiveness without alcohol, drugs or freedom. He feels he is more serious now but he really didn't comment on being remorseful or feeling sorry for his actions.

WECHSLER MEMORY SCALE: This was administered and the mental quotient was in the 115 to 120 range, again suggesting high, above average intelligence to superior level. This score was slightly below his WAIS-R score. On the Weschler Memory Scale he had no trouble with orientation or personal information, or mental control. He was able to subtract by 1's rapidly from 20, and add by 3's from 1 to 40. He did particularly well on short stories, remembering about 80% of each of the short story. His memory for numbers was always quite good, with 7 digits forward and 7 digits in reverse. He had some mild visual-spatial recall difficulties for designs, but still recalled 70% to 75%. He had some mild difficulties with new word associations and, in fact, on three tries was only able to remember 6 easy word associations and 2 out of the 4 difficulty associations. He never did

remember the association between inch and obey, and crush and dark. He may have been tired at this time, after several hours of testing.

INTERVIEW AND RESULTS OF QUESTIONNAIRE ON JUNE 8, 1996 IN COLLIER COUNTY

JAIL: Over a two week period I left Mr. Jennings with a list of questions I wanted him to try to respond to quietly, and bring them back to me when we met on June 8, 1996. He did this in some detail. The most striking part about his written answers were his poor spelling and, later, when I had him read some material for me his difficulty in comprehension and the amount of time it took to read just several type pages. We talked about this, and he indicated he never really learned to spell until the 5th or 6th grade. He bounced around many schools and didn't think he had a learning disability but he just never had a consistent 1st, 2nd, or 3rd grade, in terms of reading and reading comprehension, and spelling. He remains someone who tests out very well on an individual intelligence test, with superior intelligence, but does not have good reading comprehension, reads slowly, and has atrocious spelling habits.

The first question I asked him to respond to was, "List your good points, as you see it, and list your bad points, as you see it."

He responded, under good points, that he's helpful, trusting, honest, that he loves children, and he's outgoing. Under his bad points he responded, "I can be suckered easily. I am much too trusting. I don't know when to keep my mouth shut. I'm easily used by mothers who have children because I love the children and then get involved with the mothers, get rejected by the mothers and still love the children, and feel hurt and alone. Finally, he listed "I spend too much money that I don't have."

The second question was a general one asking him what happened to him for the last 26 years, why he thought it happened, and what made you what you are, good, bad, and indifferent. His verbatim response was:

"Over the past 26 years, for the first 15 years at least, I had a pretty normal childhood. Except for moving a lot and not having a steady father figure. I had a pretty good first 15 years. Then we moved to Florida and my life sort of did a 180. A lot of little things started to happen. They were not for the better. I got started into drugs, illegal drag racing, heavy drinking, and basically hanging around the wrong type of people. Instead of me running my life, it started running me. I just never was able to take full control over my life. Something always seemed to be waiting to knock me back down. I would have to say that rebelling against society has made me what I am and who I am. I had a hard time accepting some of society's ideas. If I were to blame anyone for what and who I am it would have to be me and society. I feel that if it weren't for some of the beliefs of today's society I would probably not be here today. If it wasn't the long hair, then it was because I was a drop out or I was treated by today's society and by my peers that I had no intelligence or rights to voice an opinion. Now, having a criminal record, one felony did not help matters either. If it were not for my stubbornness and what I believed to be intelligence in some matters and how I was treated I would

not have rebelled against society. So, I'd have to say that it's not just mine or society's fault that's creating who and what I am, it's a combination of both."

The third question is "What would you do differently if you could as a child, an adolescent, and adult?"

He answered "As a child there is nothing that I would change except for maybe having a father. When it comes to my adolescent years, there's two things. One, not moving to Florida, and two, staying in school no matter what. My adult years I would change to where I was more stable considering work. The future I would just like another chance at taking control of my life.

The fourth question was "What advice would you give to a 15 year old at North Ft. Myers High today who is physically fit with an I.Q. of 115 to 125 and superior intelligence?"

He answered "I would tell that 15 year old to stay in school, join the service as a career. While in the service, further his or her education to the fullest. Retire after 20 years with a good pension and finish the rest of your life doing what you enjoy doing the most."

In summary, Mr. Jennings and I talked for a while longer and he indicated that he didn't think he'd ever been crazy. I went over his MMPI with him, pointing out that there wasn't any evidence of psychotic process. He agreed with some of the interpretations of the Meyer-Briggs and the MMPI. He indicated that he really didn't have any roots. He didn't have a father. His schooling was sub-par and even though he was intelligent he never learned to learn. His spelling and his reading comprehension show this today. He indicated that he was kept back when he knew he was smart. He guessed that he fell behind in terms of getting along with people and in social skills and people treated him as dumb, when he knew he was smart. This built up a certain degree of anger over the years and, especially, when he moved to North Ft. Myers. There, his stepfather was abusive to his mother and to himself. He also indicated that he learned around this time to hold pain in and not express it because his mother had cancer, and still has cancer today. He indicated that his mother had all sorts of allergies, always had a lot of pain, and he didn't want to cause her any more pain so he held everything in regarding himself, and he focused on his mother's pain. There wasn't a male figure to teach him much of anything concerning maleness, or values, or self-discipline. The peer group in school that was most attractive were the burn-outs and the druggies, and yet he felt more intelligent than they were but couldn't prove it to them, so he drifted into this group. He felt rejected in school. He felt that he was smart but he was always treated as a dumbbell. Drugs, then, took control in adolescence, particularly alcohol and acid. He indicated that at some level he's always longed for a family and this is why he loves children and has allowed women that had children to negatively influence his life.

He concluded that he's never really learned to deal with anger or the positive emotions of love and affection in being able to give or receive both of these emotions. He noted that "I just have never

shared my feelings about my own pain with anybody." He noted that his mother today is 48, has T. cell leukemia, cancer, and her boyfriend tries to keep her from visiting him, which makes him angry. He suggested that perhaps she could talk to Dr. Wald, preferably late in the afternoon on a Monday, Wednesday or Thursday, then come to see him at the jail around 6:00 P.M. He noted that she did not have a ride down and depends on her boyfriend, and she would have to convince the boyfriend to bring her down to see Dr. Wald and himself on the same day, or he would never do it. He then added, somewhat bitterly, that he pays the gas money anyway.

He finally noted that the last time he showed his emotions was when his grandmother died and he was told that he wasn't supposed to show emotions at that time, so he stuffed them down. He indicated this is why people in the jail are critical of him concerning not having feelings, but he really does have feelings but just doesn't know, at this stage of his life, how to show the feelings and the appropriate time to show feelings so that it is not weakness or someone doesn't take advantage of him like some of the women in his life have taken advantage of him in the past, because he cared for his children and was generous toward them with his funds.

He remained cooperative, docile, with no surface signs of the terrible conflicts and difficulties that appear to lurk within.

Dr. R. W. Masterson (sb)

Dr. R. W. Masterson, Ph.D.

RWM:ss

Dictated BUT NOT PROOFREAD.

IN THE CIRCUIT COURT OF THE SIXTH JUDICIAL CIRCUIT IN
AND FOR PINELLAS COUNTY, FLORIDA CRIMINAL ACTION

STATE OF FLORIDA,

Plaintiff,

ORIGINAL

vs.

CASE NO.: 95-2284-CFA-WLB

BRANDY BAIN JENNINGS,

FILE IN COURT FILE DATE 11/21/96

Defendant.

W. Blackwell
WILLIAM L. BLACKWELL, CIRCUIT JUDGE

TRANSCRIPT OF PROCEEDINGS

J EASTERLY
Filed In Computer

Before the Honorable William L. Blackwell, Judge
of said Court, at the proceedings in the above-styled
cause on November 1, 1996, commencing at 9:00 a.m. at
the Pinellas County Courthouse, Clearwater, Florida.

APPEARANCES:

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MCMILLER REPORTING SERVICE, INC.

1 A. I met him through friends, through Brian.
2 And he used to work at a Mobil station. I met him
3 there.

4 Q. He was working at a station?

5 A. Yes, Mobil station.

6 Q. You've know him for about six years?

7 A. Yes.

8 Q. What has your relationship with him been
9 during these seven years?

10 A. Pretty close friends. The last year or so
11 we've more or less talked on the phone, but we're
12 pretty close. We always talk and he's come over to the
13 house a couple of times. I've been to Naples and to
14 his house in East Fort Myers.

15 Q. You've visited his home and he's visited
16 your home?

17 A. Yeah.

18 Q. All right. Do you feel as though you've
19 learned quite a bit about Brandy?

20 A. Yes.

21 Q. Could you describe to the jury your
22 understanding of Brandy, as far as him being in a crowd
23 and how you-all got along and how he got along with
24 other people?

25 A. We always got along. He seemed like he got

1 along with everybody. We've went out partying and
2 stuff and he's always known everybody and we've always
3 had a good time and everything. He's always
4 happy-go-lucky.

5 Q. He's a rather big person, isn't he?

6 A. Yes.

7 Q. Could you tell the jury whether or not when
8 you were with him that he was -- whether he was a
9 domineering person or what type of personality was he?

10 A. He never tried causing any fights or
11 anything like that. And he was kind of like a brother,
12 you know, a bigger brother.

13 Q. Okay. Did you enjoy being with him?

14 A. Oh, yeah, all the time.

15 Q. All right. Thank you, Mr. Lobdell. Just
16 hold on.

17 MR. OSTEN: Nothing further.

18 CROSS-EXAMINATION

19 BY MR. BROCK:

20 Q. Mr. Lobdell, I believe the day after the
21 Cracker Barrel robbery and murders, the Defendant came
22 to your house; is that correct?

23 A. Yes, he did.

24 Q. Did the Defendant act any different that day
25 that he came to your house than he had when you had

1 testified as follows:

2 DIRECT EXAMINATION

3 BY MR. OSTEEN:

4 Q. All right. Would you identify yourself for
5 the jury, please?

6 A. My name is Tawny Jennings. I'm Brandy's
7 mother.

8 Q. All right. Ms. Jennings, can you tell the
9 jury where Brandy was born?

10 A. He was born in Oregon.

11 Q. Twenty-six years ago?

12 A. Twenty-seven.

13 Q. Would you tell the jury who his father was?

14 A. His father was David Williams. He was a
15 Sioux Indian. I met him in California.

16 Q. Okay. Did Brandy ever know his father?

17 A. No. He did not. We got a divorce when I
18 was three months pregnant with Brandy.

19 Q. So has Brandy ever even seen a picture of
20 him?

21 A. No.

22 Q. Never met him?

23 A. No.

24 Q. Now, do you have any other children?

25 A. Any -- what is it?

1 Q. Any other children?

2 A. I had a set of twins before Brandy was born
3 and I lost them to crib death.

4 Q. But there are no other children. He's your
5 only child?

6 A. He's my only child.

7 Q. And he's always been your only child?

8 A. Yes.

9 Q. How long did you live in Oregon?

10 A. From the time Brandy was born from '69 to
11 '78.

12 Q. And then where did you go?

13 A. We went to Colorado.

14 Q. All right. And how long did you live in
15 Colorado?

16 A. We lived there about a year and a half, give
17 or take, until the job ran out.

18 Q. What kind of work were you doing?

19 A. I was working on a dude ranch.

20 Q. And where did you go from Colorado?

21 A. We went back to Oregon.

22 Q. And how long did you stay there this time?

23 A. Six months, until I got a job in Gillette,
24 Wyoming.

25 Q. During all this time were you the, more or

1 less, sole supporter of Brandy?

2 A. Yes, I was.

3 Q. And from Oregon, you went back to where?

4 A. To Wyoming.

5 Q. How long did you stay in Wyoming?

6 A. About a year, until I couldn't take the
7 tornadoes anymore.

8 Q. Did Brandy have an opportunity to go to
9 school?

10 A. Yes, sir. He was a straight A student.

11 Q. Where did you go from Wyoming?

12 A. Back to Oregon.

13 Q. How long did you stay there that time?

14 A. It was about a year and then we went to
15 Arizona because my mother passed away.

16 Q. And she lived in Arizona?

17 A. No. She lived in Oregon.

18 Q. Now, during this period of time, had you
19 ever remarried?

20 A. No, sir.

21 Q. Have you ever remarried?

22 A. No, sir.

23 Q. So you've been a single mom all these years?

24 A. Yes.

25 Q. How old was Brandy when you moved to

1 Fort Myers?

2 A. I believe he was 14.

3 Q. I know -- I take it from time to time you
4 did have someone living with you, a male companion, I
5 don't know?

6 A. Yes.

7 Q. Maybe more than one?

8 A. Yes.

9 Q. Brandy, did he graduate from high school?

10 A. No. He did not.

11 Q. Okay. Did he quit school?

12 A. He quit school to take care of me, because I
13 was ill and was unable to afford the bills and stuff,
14 so he quit school to take care of me and pay the bills,
15 which he did.

16 Q. How old was he at that time?

17 A. Seventeen.

18 Q. Would you tell the jury your relationship
19 between you and Brandy?

20 A. We're very close. He's my best friend and
21 I'm his. We keep nothing from each other, nothing. He
22 even told me the first time he made love to a girl. I
23 mean, that's how close we are. When times were bad, I
24 would tell him. When I'd have a problem, I would tell
25 him and we're still best friends.

1 Q. Ms. Jennings, would you describe him as a
2 helpful son? Was he helpful to you?

3 A. Yes, I would.

4 Q. Now, you-all lived in Fort Myers since you
5 moved there in --

6 A. '84.

7 Q. '84?

8 A. Uh-huh (affirmative response).

9 Q. And you still live there?

10 A. Yes.

11 Q. Do you work at this time?

12 A. No, sir.

13 Q. Do you have an illness?

14 A. Yes.

15 Q. Would you say that Brandy has been a good
16 son?

17 A. I couldn't ask for any better.

18 MR. OSTEN: Thank you, Ms. Jennings.

19 MR. LEE: No questions, Your Honor.

20 THE COURT: All right. Your next witness.

21 MR. OSTEN: We have no other witnesses,
22 Your Honor. We would rest.

23 THE COURT: All right. Approach the bench.

24 (Thereupon, the following bench conference
25 began in the presence of the jury.)

IN THE CIRCUIT COURT OF THE TWENTIETH JUDICIAL CIRCUIT IN
AND FOR COLLIER COUNTY, FLORIDA

ORIGINAL

STATE OF FLORIDA,

Plaintiff,

vs.

CASE NO. 95-2284-CFA

BRANDY BAIN JENNINGS,

Defendant.

HEARING BEFORE: The Honorable Frederick R. Hardt

DATE: April 28, 2010

TIME: 9:00 a.m. to 5:00 p.m.

LOCATION: Collier County Courthouse
Naples, Florida

REPORTER: Angela S. Hartsock, CSR

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COLLIER COUNTY, FLORIDA
2010 MAY 17 PM 1:30
CLERK OF COURTS
BY *M. Martinez*
Filed in Courtroom

1 him. I stayed with him, I think, for about a month. I am
2 not sure about the time.

3 Q. Where was this that you were staying with him?

4 A. In his apartment. I don't remember what they are
5 called now. On Green Boulevard. I think it was Green.

6 Q. Do you recall giving a statement to the police --
7 a sworn statement to the police and the state attorney in
8 1996?

9 A. Yeah. Well, I -- yes.

10 MR. KALIL: May I approach, Your Honor?

11 BY MR. KALIL:

12 Q. I am showing you a document entitled "Sworn
13 Statement."

14 Do you recognize this document? Have you seen
15 this before?

16 A. No, sir.

17 Q. Do you recall giving this statement on
18 January 24, 1996?

19 A. I know that I gave a statement.

20 Q. Do you recall testifying as to where you and
21 Mr. Jennings lived at the time?

22 A. I probably did.

23 Q. Did you have a dating relationship with
24 Mr. Jennings?

25 A. Yes, sir.

1 Q. And for approximately how long?

2 A. I don't remember. Maybe about a month. That was
3 a long time ago. I don't really remember. Maybe about a
4 month.

5 Q. Did you at any time have a relationship with
6 Charles Jason Graves?

7 A. No. We were friends in high school. That's how
8 I met Brandy.

9 Q. Were you related in any way to Charles Jason
10 Graves?

11 A. He became my brother-in-law in 1994. At the end
12 of '94, and then I divorced his brother in '96 maybe.

13 Q. So we are clear, who was his brother? What was
14 his name?

15 A. My husband at the time. Jason was -- Charles
16 Jason was my brother-in-law only for about two years.

17 Q. What was your husband's name?

18 A. Robert Cheney.

19 Q. How was Robert Cheney related to Charles Graves?

20 A. They are brothers.

21 Q. Were you married to Robert Cheney at the time you
22 testified in Brandy Jennings's trial?

23 A. I don't remember if we were divorced. We were
24 either in the process of divorce, or we were already
25 divorced. I don't recall where I was, but we were

1 Q. Would your trial testimony be a better reflection
2 of your recollection than today?

3 A. Yes, sir.

4 Q. Now, when you had these conversations with
5 Mr. Graves at the jail, did he indicate to you that he
6 wanted you to repeat those conversations to law
7 enforcement or that he wanted them to remain private?

8 A. I don't really remember. I do remember when I
9 contacted -- I do remember contacting -- I think it was
10 Mr. Ganich. I'm not sure, and I met with him at the
11 McDonald's. I am trying to remember.

12 Q. Let me direct you to your sworn statement.

13 A. I wanted to make sure that, what he said to me
14 was -- that I told the police that because I was raised
15 that, you know, to do the right thing, and I thought
16 regardless of whether he wanted it done or not, I wanted
17 to make sure to do the right thing and report what he told
18 me.

19 Q. And it was for his benefit?

20 A. For him and my own. It cleared my conscience as
21 well.

22 Q. Let me direct you to your statement on page 53.
23 Will you look and see if that refresh your recollection as
24 to Mr. Graves' wishes regarding you contacting law
25 enforcement?

1 A. Yeah, that probably sounds about right.

2 Q. So you wanted to discuss with law enforcement
3 what Mr. Graves' told you because you were concerned for
4 his safety?

5 A. That could be. I knew that it was the right
6 thing to do, and, you know, that he was safe. He was just
7 a kid at the time. We grew up together.

8 Q. If I can direct you to page 54 at the top. See
9 if that refresh your recollection as to Mr. Graves' wishes
10 to -- for you to discuss this with law enforcement.

11 A. Uh-huh.

12 Q. Is it fair to say that you were concerned for
13 Mr. Graves' safety?

14 A. Yeah.

15 Q. Is it also fair to say that you wished to help
16 Mr. Graves out by talking to law enforcement on his
17 behalf?

18 A. I don't think that my statements helped him. I
19 mean, as far as -- it put him in the situation that he was
20 in.

21 Q. At the time that this recorded statement was
22 made, was anybody in the home using drugs?

23 A. In my home?

24 Q. Where you were at the time when Mr. Jennings
25 purportedly made this statement that you testify to, was

1 Mr. Jennings?

2 A. I was in high school. I was actually trying to
3 remember if it was -- I think it was in my 11th grade
4 year, so that would have been '93. Maybe '92. Somewhere
5 in there.

6 Q. Did you maintain a friendship or an acquaintance
7 with Mr. Jennings after you broke up?

8 A. No, sir.

9 Q. Did your relationship with Mr. Jennings and
10 Mr. Graves have any influence on your testimony when you
11 gave it either to Detective Ganich or when you testified
12 at the trial?

13 A. No, sir.

14 Q. You indicated on direct that you just felt you
15 were brought up to do the right thing; is that correct?

16 A. Yes.

17 Q. When you testified at the trial, did you testify
18 truthfully?

19 A. Yes, sir.

20 MR. MONTECALVO: A moment, Your Honor.

21 The State has no further questions.

22 JUDGE HARDT: Any redirect, Mr. Kalil?

23 MR. KALIL: Yes, Your Honor.

24 REDIRECT EXAMINATION

25 BY MR. KALIL:

1 Q. Let's talk about Dr. Wald and Dr. Masterson.
2 What was the purpose of you involving them? What was it
3 that you were hoping to achieve?

4 A. Well, to begin with, I wanted to make sure that
5 he was competent -- legally competent. Secondly, I had
6 asked Dr. Wald to go into his personality, his background.
7 Anything at all that would be a mitigating factor in a
8 penalty phase. Anything that would be helpful to me, and
9 in that regard -- he was a psychiatrist. He didn't do
10 that sort of testing, and that's where Dr. Masterson would
11 have come in.

12 Q. So Dr. Wald was a psychiatrist. When you
13 requested that Dr. Wald be appointed -- when you requested
14 that the judge appoint a mental health expert to assist
15 you, what was your request based upon? On what grounds
16 did you request an expert be appointed?

17 A. He was charged with a death penalty case.

18 Q. Fair enough. And specifically what did you tell
19 the Court at the time that you needed assistance with with
20 Dr. Wald?

21 A. A mental health evaluation.

22 Q. And was that specifically for a mental health
23 evaluation for the purpose of developing mitigation, or
24 was that for competency and sanity?

25 A. Both.

1 reading that.

2 Q. Does that look familiar to you? You recognize
3 that report?

4 A. Uh-huh.

5 Q. Does this report indicate what Dr. Wald was
6 appointed to assist you with in the case?

7 A. Probably.

8 Q. In your experience with Dr. Wald, did he write
9 pretty complete reports? You were satisfied with the
10 completeness of his reports?

11 A. Yes, I would always talk to him afterwards and go
12 into more detail. I didn't rely just on his report. I
13 always spoke with him.

14 Q. Let me refer you to the first paragraph. And
15 does it indicate specifically what he was appointed to do?

16 A. Yes.

17 Q. And can you tell us what that is.

18 A. He was appointed as an expert to assist the
19 defendant.

20 Q. Does that indicate how he was to assist the
21 defendant, whether it was a competency or sanity
22 evaluation or whether it's an evaluation for the purposes
23 of mitigation?

24 A. I don't believe it does. It says, "Appointed to
25 assist the defendant."

1 A. I was satisfied. I didn't ask for any other
2 psychiatrists.

3 Q. Do you have any recollection whether or not
4 either Dr. Wald or Dr. Masterson formed any opinion with
5 regard to mental health mitigation or statutory mental
6 health mitigators?

7 A. If so it would be in that report.

8 Q. Did you at any time seek the assistance of a
9 mitigation expert?

10 A. No, I did not other than what I could glean from
11 Dr. Wald and Dr. Masterson.

12 Q. Are Dr. Wald and Dr. Masterson individuals that
13 you would consider to be a mitigation expert or a
14 mitigation specialist?

15 A. I don't know exactly what you call an expert in
16 that field, but they assisted me through the years, and
17 they knew what I was looking for and would help me in that
18 regard. But I think I know what you are talking about,
19 and, no, I did not hire a so-called mitigation specialist.

20 Q. Are you familiar with the America Bar Association
21 guidelines for the appointment and performance of counsel
22 in death penalty cases?

23 A. Probably.

24 Q. Probably? Is that more likely yes, or a more
25 likely no?

1 written correspondence, if I recall.

2 Q. And this is with friends?

3 A. Yes.

4 Q. The witnesses that you spoke to locally, were
5 those witnesses helpful to you in developing your
6 mitigation case?

7 A. As I recall only -- well, they were helpful. I
8 believe I did call two or three of them at the hearing.
9 They were helpful as far as giving character references
10 for me. Work habit and that sort of thing.

11 Q. I didn't hear you.

12 A. Work habits.

13 Q. What was your understanding of his employment
14 history?

15 A. Spotty.

16 Q. And can you elaborate on the term "spotty."

17 A. Well, I don't think he had a full-time profession
18 or career. He worked different jobs at different times.

19 Q. Do you have any recollection if you obtained any
20 employment records?

21 A. No, I didn't. I'm sure I didn't.

22 Q. Did you obtain any tax records or Social Security
23 records that reflected Mr. Jennings' employment history?

24 A. No.

25 Q. Do you recall how many times you spoke with

1 Mrs. Jennings -- with Mr. Jennings mother?

2 A. No, I do not.

3 Q. Do you recall where or the circumstances under
4 which you spoke to her?

5 A. I know I went to her home and spoke with her. I
6 may have spoken with her on the phone. I recall speaking
7 with her two or three different times.

8 Q. And when you went to her home, can you describe
9 for the Court what her home was like.

10 A. Well, I don't really recall what it was like. It
11 was not a mansion on the hill, that's for sure. But it
12 left no impression one way or the other.

13 Q. And ultimately you chose to call Mrs. Jennings as
14 a witness?

15 A. I did.

16 Q. What was your impression of Mrs. Jennings as a
17 person? Was she a function -- a well-functioning person,
18 or did she appear to have difficulties to you?

19 A. I don't recall having any difficulties
20 communicating with her discussing her son.

21 Q. In your conversations with any of the friends or
22 Mrs. Jennings, were you aware of any sexual abuse that
23 occurred in Mr. Jennings' family?

24 A. Never heard of that. Don't believe it was ever
25 brought to my attention. I don't recall.

1 Q. Did you ever learn of any incest that occurred in
2 the family?

3 A. No, I did not.

4 Q. Do you know of any history of Mr. Jennings'
5 mother being a victim of sexual assault or molestation?

6 A. The mother?

7 Q. The mother.

8 A. No.

9 Q. Did you ask any of those questions of
10 Tawny Jennings as to potential history of sexual abuse or
11 incest in the Jennings family?

12 A. Well, I don't specifically recall because it
13 never came up as an issue that I wanted -- thought I was,
14 you know, something I looked into. But that is one of the
15 normal things that my investigator would do and I would do
16 would be to ask questions about that.

17 Q. Who was your investigator in this case?

18 A. His name was Ed Neary.

19 Q. And do you recall what his role was and what his
20 duties were?

21 A. He assisted me in just about all of my capital
22 cases and a lot of other cases.

23 Q. And specific to this case, do you recall what
24 actually duties he performed?

25 A. Yeah, he went around and talked to witnesses and

1 Q. Did you ever seek to have -- did you ever seek an
2 expert opinion based on his history of drug and alcohol
3 abuse as to whether or not he was addicted to any
4 substance?

5 A. I would think, but that would have been Dr. Wald
6 or Dr. Masterson's report. They would have made an
7 inquiry into that.

8 Q. Are you aware if Mr. Jennings ever sought
9 treatment for substance abuse disorder?

10 A. I seem to recall at one time he did. I can't be
11 sure.

12 Q. Now, ultimately you chose not to call Dr. Wald or
13 Dr. Masterson as witnesses at the penalty phase.

14 A. Uh-huh.

15 Q. What was your theory of the defense for the
16 purposes of the penalty phase?

17 A. Well, after talking with Dr. Wald and
18 Dr. Masterson, obviously, I came to the conclusion that
19 they would not be helpful to a great extent, and so I
20 decided to rely on his mother and his friends to come
21 forward and make as many good statements as they could
22 about the defendant. He had no prior record.

23 Q. When you say his prior record, what are you
24 referring to?

25 A. Well, you know, criminal record.

1 A. Well, I know they were friends.

2 Q. Do you have any knowledge as to whether or not
3 Ms. Cheney was related in any way to Mr. Jennings'
4 co-defend Mr. Graves?

5 A. No.

6 Q. Did you have an opportunity at any time to depose
7 Ms. Cheney prior to her testimony?

8 A. I am sure I had an opportunity. Whether I did or
9 not, I don't recall.

10 Q. If you had deposed her, is it fair to say it
11 would be represented either by copy of the deposition
12 transcript in your file or in the record on appeal or the
13 State's file?

14 A. It would, yes.

15 Q. Is there any particular reason why you didn't --
16 why you would chose not to depose Ms. Cheney?

17 A. She was a witness for the State. I don't know if
18 I deposed her or not, but I do know what her testimony
19 would have been now that I've read it.

20 Q. You knew prior to her testifying what her
21 testimony would be?

22 A. Uh-huh.

23 Q. And do you know how you knew that?

24 A. Probably from discovery.

25 Q. Okay. Do you recall what you received in

1 JUDGE HARDT: It will be received.

2 MR. KALIL: Thank you.

3 BY MR. KALIL:

4 Q. Now, you also received a transcript of the
5 statement that Ms. Cheney provided to law enforcement in
6 discovery. Was that your testimony?

7 A. I am sure I did, yes.

8 Q. Were you present when this statement was given?
9 Do you have any recollection of being present when --
10 sorry. I have it here. Defendant's Exhibit 11 mark for
11 identification.

12 A. No, I don't.

13 Q. Do you recall receiving it in discovery? I might
14 have asked that already.

15 A. I don't recall. If I did, it would be in my
16 file.

17 Q. If it's in your file, it's fair to assume it was
18 received.

19 Turning your attention to the second page of the
20 statement. Does the statement indicate that Ms. Cheney
21 and Mr. Graves are related?

22 A. Sister-in-law, yes.

23 Q. Does the statement reflect any concern for the
24 well-being of Mr. Graves on the part of Ms. Cheney?

25 A. Uh-huh, yes. I think she was concerned whether

1 A. I can't point to it, no.

2 Q. So to the best of your recollection?

3 A. Somehow I knew about it, but I am sure it had to
4 be in some report or statement that she had given.

5 Q. Do you have any recollection, whether or not
6 Ms. Cheney had assisted Mr. Graves in obtaining counsel to
7 assist him?

8 A. No, I have no knowledge of that.

9 Q. Okay. And if that is reflected in her statement
10 that was provided to you in discovery, is that something
11 you would have had knowledge of at the time?

12 A. Sure. Uh-huh.

13 MR. KALIL: May I have a moment, Your Honor?

14 JUDGE HARDT: Yes.

15 BY MR. KALIL:

16 Q. Mr. Osteen, were you aware of any substance abuse
17 issues or drug use by Mr. Jennings at or about the time
18 that he gave his confession or statement to the police in
19 Las Vegas?

20 A. I don't recollect it, no.

21 Q. Did you conduct any investigation into that
22 issue, to your knowledge?

23 A. I'm sure I did.

24 MR. KALIL: Nothing further on direct.

25 JUDGE HARDT: All right. Cross-examination.

1 Q. Was that a confidential evaluation for your eyes
2 only?

3 A. It was.

4 Q. Now that you've had a chance to look at your
5 file, was there any other correspondence that you had with
6 Dr. Wald other than the simple motion and order signed by
7 Judge Blackwell in March of 1996?

8 A. Okay. Every time the Court would appoint
9 Dr. Wald or some expert, I would usually put in writing --
10 send them a letter in writing outlining what I am looking
11 for them to look at and to make their report based on, and
12 I did that with Dr. Wald.

13 MR. KALIL: Your Honor, it appears that the
14 witness is using something to refresh his
15 recollection. I am not aware of what it is. May I
16 inquire or inspect it?

17 MR. MONTECALVO: I have no objection, Your Honor.
18 Your Honor, for the record, this is a file that we
19 actually received from CCRC this morning.

20 MR. KALIL: Fair enough.

21 BY MR. MONTECALVO:

22 Q. I will ask you to indicate to the Court some of
23 what it was you asked of Mr. Wald to look for or some of
24 your concerns that you had with Mr. Jennings at the time.

25 A. Well, I said that "I really need to know all that

1 I can that will help explain what, if anything,
2 (inaudible) about Jennings," and I wanted to know if there
3 had been any forensic studies. "What is your insight on
4 this type of personality disorder? I need to know all the
5 testing and files I can get that might show any forces
6 beyond his control, childhood incidents or whatever that
7 might help induced this mind set. If you feel he can
8 benefit from any sources whatsoever, let's do it. This is
9 going to be a death penalty case for sure, and I don't
10 intend to be (inaudible) seeking all possible mitigating
11 factors."

12 Q. And what is the date of that letter to Dr. Wald?

13 A. March 14, 1996.

14 Q. So this would have been three months
15 approximately after the State indicted Mr. Jennings?

16 A. That's correct.

17 Q. So you knew this was going to be a death penalty
18 case that early on; is that correct?

19 A. Uh-huh. I did from the very get go. There was
20 no doubt about it.

21 Q. Now, did you have an indication based on your
22 conversations with Mr. Jennings and with his family
23 members whether or not, for example, you would seek an
24 insanity defense?

25 A. No.

1 you seeking from Ms. Jennings at that early stage to give
2 to Dr. Wald?

3 A. Well, we needed to know -- Dr. Wald certainly
4 kind of needed to know the defendant's background from
5 childhood on up. Any problems he might have. Mental
6 health issues. That sort of thing.

7 Q. Now, later on, you did have the opportunity to
8 meet with Tawny Jennings; is that correct?

9 A. Yes, I did.

10 Q. And, in fact, she testified at the penalty phase?

11 A. She did.

12 Q. Did she indicate some of those problems or some
13 of those issues with Mr. Jennings' childhood in her
14 conversations with you?

15 A. Best I recollect she -- her report was nothing
16 too unusual. He had problems, I think, with one or more
17 of her husbands. Basically she thought he was a good boy.

18 Q. And she indicated she had a tight relationship
19 with Mr. Jennings, the defendant?

20 A. She did, uh-huh.

21 Q. In fact, one of the non-statutory mitigators was
22 the close loving relationship with his mother; is that
23 correct?

24 A. That's correct.

25 Q. And that was presented to the jury?

1 Q. You did make that argument?

2 A. I believe I did. I am sure I did.

3 Q. If Dr. Wald had testified at the penalty phase,
4 certainly you would agree that his report would become
5 fair game?

6 A. It would.

7 Q. Did the jury find out, to the best of your
8 knowledge, about these criminal priors?

9 A. No, the jury did not.

10 Q. Was that part of your strategy in order to
11 request that statutory mitigator?

12 A. Yes, it was.

13 Q. On direct you indicated that calling Dr. Wald
14 and/or Dr. Masterson would not be helpful to your case.
15 Can you elaborate on that a little more.

16 A. Well, based on their report, there was not enough
17 that they could testify to that would be helpful, and I
18 really didn't want to get into the situation of the state
19 attorney bringing in their experts, you know, to try to
20 hammer down what Dr. Wald would have to say.

21 Q. You felt that in terms of mental health
22 mitigation, this was not a strong case for you to present
23 to the penalty phase jury?

24 A. It was not strong enough.

25 Q. And again, is that based on your experience and

1 having other cases where the mental health evidence was
2 far stronger?

3 A. Uh-huh. I have used mental health in other cases
4 to a great extent. In this case, I just didn't find it
5 there. Not sufficient enough to use it, and I chose to go
6 a different route.

7 Q. And again, for the Court, can you describe that
8 different route.

9 A. Well, the different route was I would present
10 evidence, you know. The trial was, to be honest with you,
11 it didn't take a brain surgeon to figure out what the
12 verdict would be in the case -- the likely verdict -- and
13 I decided that I would call his mother who was a good
14 witness. She loved her son, and I think she elicited some
15 sympathy in the jury, and I called some friends who could
16 give a good word for him, and his lack of any real deep
17 trouble with the law in the past. Things like that is
18 what I decided to go with, and I would argue that.

19 Q. And you said that you called friends as well.
20 Did Investigator Neary -- how did you come into contact
21 with these friends? How did you learn of these people?

22 A. From the defendant and his mother and just
23 talking to one, and it would lead to another.

24 Q. And how did you utilize Investigator Neary in
25 collecting this information so you could present it to the

1 Q. Is there any reason why you wouldn't --

2 A. Remember?

3 Q. No, why you wouldn't have called that witness
4 that you can recall?

5 A. Sir, if you had asked me 12 years ago, I probably
6 could have told you. Today I can't.

7 Q. If you had sought to admit your correspondence as
8 evidence in this hearing for mitigation purposes, would
9 there be any specific strategic reason for not calling
10 that witness and having them testify to the jury instead?

11 A. It would have been that the testimony would not
12 have been helpful. It might have been harmful.

13 Q. But you would seek to admit the letter in the
14 dispensary hearing?

15 A. If it was helpful, yes.

16 Q. Was it your understanding that every first-degree
17 murder charge in the 19th Circuit would be a death penalty
18 case?

19 JUDGE HARDT: I think we are in the 20th Circuit.

20 BY MR. KALIL:

21 Q. I apologize. In this circuit would be a death
22 penalty?

23 A. Every one, no, not every one but a good measure
24 of them.

25 Q. And specifically with regard to Mr. Jennings'

1 mother, you testified on cross-examination that you
2 believe that she was a good witness. What about her
3 testimony do you feel was particularly good?

4 A. Well, it had to have been about her relationship
5 with her son.

6 Q. And do you have any recollection of what that is?

7 A. Well, I don't recall her saying anything harmful
8 about him. She loved her son. That's for sure.

9 Q. Did you seek any collateral information from
10 other sources within Mr. Jennings' family about the family
11 dynamics or the relationship that Mr. Jennings had with
12 his mother?

13 A. Other than his friends we talked to and about
14 what they knew about his life, that was about it.

15 Q. You also testified on cross that some of the
16 witnesses did not have good things to say about
17 Mr. Jennings. Is that accurate?

18 A. It seems like I recall a couple of them that were
19 negative.

20 Q. Were these friends of Mr. Jennings' or family?

21 A. So-called friends, yes.

22 Q. And were they not helpful to you? Would they not
23 respond to your questions, or did they provide damaging
24 information or information you felt was damaging?

25 A. It would not have been anyone I would have called

1 MR. KALIL: If I can just have a moment, Your
2 Honor.

3 BY MR. KALIL:

4 Q. You referred to a correspondence with an
5 individual in Oregon. Do you remember the individual's
6 name?

7 A. No, I do not.

8 Q. Okay. I am showing you what has been marked for
9 identification as Exhibit 12. Do you recognize that
10 correspondence?

11 A. Uh-huh.

12 Q. Can you tell the Court what that is.

13 A. That's a letter from a person in Washington
14 State, I guess.

15 Q. Is it signed by anyone?

16 A. Yeah, it's signed by Heather Johnson.

17 Q. Okay. Do you have a recollection of the
18 substance of the letter?

19 A. Uh-huh, yeah.

20 Q. And what is your understanding of what
21 Ms. Johnson had to offer at the time?

22 A. Well, she thought he was capable of robbery, but
23 not murder.

24 Q. Okay.

25 A. She didn't think that was the type of person she

1 knew.

2 Q. Is there any indication as to whether or not she
3 would be willing to testify if she were called?

4 A. She may have. I don't know if she would testify
5 or not.

6 Q. Who is that letter addressed to?

7 A. It's to my investigator.

8 Q. Mr. Neary?

9 A. Uh-huh.

10 Q. And do you have any recollection of how Mr. Neary
11 contacted Ms. Johnson?

12 A. No. I don't know whether it was by telephone or
13 what. No, I don't.

14 Q. If I can just turn your attention to the first
15 paragraph. Does it indicate there how she came to be
16 involved?

17 A. Correspondence, yes.

18 Q. And what was the correspondence requesting?

19 A. "Any good word that you can give concerning our
20 client Mr. Jennings."

21 Q. Do you have any knowledge as to what Mr. Neary
22 was requesting in the correspondence that he had sent her?

23 A. Well, I'm sure we were looking for some character
24 witness.

25 Q. So other than requesting a good word, you don't

1 Q. And how did that first occur?

2 A. Mr. Hennis and Ms. Day from the Capital
3 Collateral Regional Counsel office contacted me back in
4 2000, and they asked if I would conduct a
5 neuropsychological evaluation on Mr. Jennings, and I
6 proceeding to conduct a comprehensive neuropsychological
7 evaluation of Mr. Jennings back in June of 2000.

8 Q. Now, Ms. Day and Mr. Hennis, who are they?

9 A. They both are attorneys at the Capital Collateral
10 Regional office. The south office.

11 Q. Now, your evaluation in 2000, what did that
12 evaluation entail?

13 A. A typical neuropsychological examination looks at
14 various different brain function, and my battery, which I
15 have been using for the last 25 years, is an acceptable
16 battery of various different neuropsychological tests and
17 instruments that looks at a variety of different areas of
18 function in the brain. It's divided into several
19 different areas, and usually testing is going to have
20 multiple different measures that are going to assess each
21 one of the particular areas. This specific domain. So
22 the areas typical are going to be motor measures, motor
23 area, sensory perceptual, language functioning, the IQ,
24 which has always consisted of the Wechsler Adult
25 Intelligence Scale. There are various different versions

1 of that. We are up to the IV version. At the time it was
2 the III version. There was also the Wechsler Adult
3 Intelligence Scale revised edition that was given to
4 Mr. Brandy, so there has actually been three IQ
5 standardized Wechsler tests. I gave him an achievement
6 test, which is the Wide Range Achievement Test III Edition
7 to measure his academic performance and his abilities. I
8 also gave him the memory test consisting of the Wechsler
9 Memory Scale III Edition back in 2000. I also gave him
10 the Halstead-Reitan neuropsychological battery, and that
11 consists of a variety executive measures. That looks at
12 both higher cortical function. So that looks at different
13 areas of brain functioning. So I gave him in 2000 the
14 tactical performance test. I gave him the category test.
15 I gave him trail making tests. All the different tests
16 within the executive function Halstead-Reitan. I also
17 gave him the Wisconsin Card Sort test, which is another
18 acceptable measure to assess frontal lobe activity. I
19 also gave him a malingering test. The test of memory
20 malingering. The TOMM, also another accepted measure for
21 memory malingering. Actually, malingering to be more
22 specific even though it is a memory test, but it more a
23 malingering test. Something that as a neuropsychologist
24 we certainly want to look at and see whether or not our
25 tests are valid and whether or not our tests are

1 IQ score of 120.

2 Now, the Visual Immediate, which consisted of the
3 faces and the family pictures, yielded an index of 91.
4 Immediate Memory, which consisted of Logical Memory 1, the
5 Faces 1, the Paired Associates 1, and Family Pictures 1,
6 yielded an index of 106. Auditory delayed --

7 Q. Excuse me, Doctor. If I can just briefly go
8 back. When we discussed the auditory immediate score of
9 120, does that then correlate with a percentage ranking of
10 that score --

11 A. Yes, it does.

12 Q. -- against the population?

13 A. Yes.

14 Q. And what would that be?

15 A. An index score of 120 equalled a percentile of
16 91. So 91 percent of the population -- he's at the 91st
17 percentile of the general population.

18 Q. Okay. Let me ask you, then, about the Visual
19 Immediate in which you got an index score of 91. What
20 percentile would that put him in?

21 A. On that he would have equalled a percentile of
22 27. So he was at the 27th percentile of the general
23 population.

24 Q. And then we were discussing immediate memory,
25 and, I think, you said 106 was his index score. What

1 A. That's correct.

2 Q. Showing you what has been marked for
3 identification Defendant's 14. Do you recognize that
4 document?

5 A. Yes.

6 Q. And what is that document?

7 JUDGE HARDT: Have you shown this to counsel?

8 MR. KALIL: Oh, I apologize, Your Honor.

9 JUDGE HARDT: Is this something he wrote?

10 MR. KALIL: No, this is my correspondence with
11 Dr. Masterson in an effort to get the records that
12 Dr. Eisenstein would be relying upon. I anticipate
13 that the State would have concern with regard to
14 hearsay. I would say that for the purposes of a
15 penalty phase, such hearsay would be admissible as
16 demonstrating that counsel had made an effort to
17 obtain the necessary background materials.

18 JUDGE HARDT: Did you get a response to this
19 letter?

20 MR. KALIL: Yes, sir.

21 JUDGE HARDT: And the response said what?

22 MR. KALIL: The response said nothing. It was an
23 envelope with a copy of that letter with his date
24 stamp on it and a copy of his report, which has been
25 admitted into evidence. There was no letter, no data.

1 JUDGE HARDT: So he just sent his report?

2 MR. KALIL: That's correct.

3 JUDGE HARDT: Did you make further inquiry after
4 this? Did you say, "Doctor, I need more information.
5 I need the raw data"? Did you ask him for that?

6 MR. KALIL: I believe that the letter
7 specifically requests --

8 JUDGE HARDT: But he responded by sending you his
9 report.

10 MR. KALIL: That's correct.

11 JUDGE HARDT: So maybe he thought that's all you
12 wanted. Did you follow-up and say, "Dr. Masterson,
13 thank you for your report, but what I really need is
14 the raw data"? Did you ask for that?

15 MR. KALIL: Not to my recollection, no.

16 JUDGE HARDT: Why not?

17 MR. KALIL: At the risk of becoming a witness,
18 Your Honor.

19 JUDGE HARDT: Well, you are a witness right now.
20 I am taking your representations as an officer of the
21 court. You raised the issue, so now I want to
22 follow-up because this could be an important issue.

23 MR. KALIL: I believe it is.

24 JUDGE HARDT: After that you didn't follow-up
25 with Dr. Masterson to say, "Doc, I really need this

1 raw data"?

2 MR. KALIL: Your Honor, if you like I can --

3 JUDGE HARDT: If the answer is yes, that's fine.
4 Just tell me.

5 MR. KALIL: There are other circumstances as
6 well. I wrote to Dr. Masterson and Dr. Wald who both
7 shared the same address at the time. Their responses
8 were identical.

9 JUDGE HARDT: Okay. But my question is, after
10 that did you follow-up with either one and say I need
11 the raw data?

12 MR. KALIL: Not to my knowledge.

13 JUDGE HARDT: So that was the end of it in 2000?

14 MR. KALIL: To my recollection.

15 JUDGE HARDT: Where does that leave us? That
16 leaves us without the raw data could have been
17 obtained by you or by court order. Did you ask the
18 Court for a court order?

19 MR. KALIL: No. At the time this request was
20 made, I believe that the 3852 was in effect which made
21 any public records demands -- had to be done through a
22 3852 proceeding. These were not public records. I
23 believe I showed diligence in requesting that the
24 records be provided by letter, and, again, I don't
25 recall if there was any subsequent conversation.

1 JUDGE HARDT: But if they responded, and they
2 didn't send you what you wanted, then it would be on
3 you to follow-up with them or get a court order as to
4 specifically what you wanted, and you didn't do that.

5 MR. KALIL: Not to my knowledge. The record may
6 reflect otherwise, and I will look into that, but at
7 this time, no.

8 JUDGE HARDT: Doesn't that present a problem as
9 far as the good doctor here giving us his opinion
10 because he doesn't have the raw data from 1996?

11 MR. KALIL: Yes, it does. And that specifically
12 is what Dr. Masterson --

13 JUDGE HARDT: If you are going to criticize what
14 Dr. Masterson did, don't you need to have that raw
15 data from 1996?

16 MR. KALIL: Well, I would start by saying that
17 his report that he submitted to trial counsel was
18 insufficient. It should have included all that raw
19 data in it.

20 JUDGE HARDT: Did it have all the raw data?

21 MR. KALIL: Dr. Eisenstein, as the professional,
22 would be the one to testify to that, but, I believe,
23 that the report in a death penalty case should provide
24 a lot more data than Dr. Masterson's report provides.

25 JUDGE HARDT: Now we are talking about the

1 loss of consciousness. I don't know if he is aware that
2 there was or there wasn't. Certainly it was a major
3 accident, and what injuries -- additional injuries he
4 sustained, I don't know, but it is certainly typical of a
5 closed head injury with that type of speed and the
6 involvement with the -- typically with the coup and
7 contrecoup that is so typically seen in motorcycle
8 accidents and closed head injuries, so it certainly falls
9 into that category.

10 Q. All right. Now, as a result of the evaluation
11 that you performed in 2000, did you arrive at any
12 diagnosis of a mental disorder?

13 A. The 2000 evaluation is certainly indicative of
14 several things. First of all, it's indicative of an
15 individual that is clearly functioning at a high level in
16 many areas. His overall IQ and index scores are high.
17 There are discrepancies, and there are some deviations,
18 and there is some indication of some impairment. Perhaps
19 atypical in terms of when you look at an individual in
20 neuropsychological findings in such a nature that one
21 needs to look at almost a closer level to appreciate the
22 nuances. Objective neuropsychological finding does
23 indicate that there were some -- certainly some problems
24 in academic abilities, and they are more pronounced by the
25 fact that there was a discrepancies. It's hard to totally

1 appreciate the fact that when an individual has lots of
2 deficits, then one can speak about perhaps grave behavior
3 impairment. But when one has relative few deficits in the
4 overall picture, one would say that they should -- it
5 should perhaps wash out or everything else should be
6 equal, or the individual can compensate. The problem over
7 here is that there is some deficits that were noted, and
8 the neuropsychological findings coupled with some of the
9 history and some of the academic problems, is a sign of
10 some major problems. And again, discrepancies between the
11 IQ scores, between the academic achievement scores are
12 some red flags. And the fact that there was academic
13 failure, the fact that there is all these head injuries,
14 the fact that there is a history also of neurological
15 problems is indicative of the fact that there is some
16 brain disregulation. At this point, I guess, looking back
17 at 2000 -- at 2000 when I did my evaluation, I conducted
18 lots of psychological tests, but I didn't delve into the
19 totality of the picture. I knew there was some problems,
20 and I sort of left it in 2000, and I put the case away.
21 Kept my records, and, obviously, when I was asked to look
22 at Mr. Jennings again in this most recent time, those 2000
23 records came relevant again.

24 So in 2000, basically, I saw that there was some
25 discrepancy, some problems, but I didn't delve into it,

1 and I sort of just put some issues on hand without really
2 coming to any type of conclusions.

3 Q. Which then naturally brings us to the most recent
4 evaluation you performed.

5 Can you tell us when and how that occurred.

6 JUDGE HARDT: So as of 2000, you did not reach
7 any clinical psychological diagnosis; is that correct?

8 THE WITNESS: Right.

9 JUDGE HARDT: Correct? No diagnosis?

10 THE WITNESS: That's correct.

11 JUDGE HARDT: Thank you. Go ahead.

12 BY MR. KALIL:

13 Q. Thank you. So the most recent evaluation
14 occurred when and where?

15 A. The most recent evaluation occurred earlier this
16 month. I evaluated Mr. Jennings on two occasions. I saw
17 him on April 13th and April 20th of 2010 at Union
18 Correctional Institution in Raiford, Florida.

19 Q. Were you provided any additional background
20 materials that you hadn't been provided before?

21 A. Yes.

22 Q. And, I believe, you testified to the medical
23 records.

24 A. I received, in addition to the medical records, I
25 also received some additional school records besides what

1 was provided in the original packet. There was some
2 additional records, not the complete school records, but
3 there was some additional records. I also received the
4 sworn statement of Mr. Jennings and also Mr. Jason Graves,
5 so I reviewed those. I received the work records from the
6 Cracker Barrel Restaurant. Those were work evaluations.

7 JUDGE HARDT: Of the defendant?

8 THE WITNESS: Of the defendant, correct. I
9 believe that's it.

10 BY MR. KALIL:

11 Q. All right. When you conducted your evaluation of
12 Mr. Jennings at the prison, did you conduct another
13 neuropsychological interview?

14 A. Yes, I did.

15 Q. Can you briefly summarize what your findings were
16 as a result of that interview?

17 A. Again, the interview included information about
18 his background. It included the review of his alcohol
19 usage. It included his school records. I wanted to
20 develop a developmental picture of where he went to school
21 and where he was raised and what was happening to him. I
22 also talk about his incarceration and any DR's that he had
23 obtained.

24 JUDGE HARDT: You are referring to disciplinary
25 actions?

1 THE WITNESS: Right. I talked to him about the
2 crime, his attitudes. His feelings about the victims.
3 I talked to him about his employment history. The
4 various different places that he was employed, and he
5 told me not only the places where he was employed, the
6 type of work that he was doing. He stated that he
7 also filed income tax for the duration of ten years
8 with the exception of one year and all the different
9 type of work that he had done. He also talked about
10 several different incidents about problems that he had
11 with anger management. The inability to control
12 himself and how that manifested itself. Talked about
13 some of his earlier sexual experiences. Tried to get
14 a more extensive sense of the totality of what his
15 life consisted of, and he talked also about his
16 relationship with his mother and some of the different
17 step-fathers that were involved in his life.

18 BY MR. KALIL:

19 Q. Now, was Mr. Jennings cooperative with you in
20 that interview?

21 A. Yes.

22 Q. How much time did you spend over the two visits?

23 A. Ten hours. Five hours each day.

24 Q. In addition to the interview that you performed,
25 did you perform any additional testing?

1 A. Yes, I did. I conducted another battery of
2 neuropsychological tests in 2010. Similar to the 2000,
3 some of the tests that I performed now were the updated
4 version. The most recent version since it was ten years
5 since the first evaluation. So similar tests but the more
6 recent or updated versions of the various different tests.

7 Q. Okay. And we will discuss the tests in more
8 detail. Let me ask you, were you -- did you have the
9 benefit of any collateral sources of information in terms
10 of interviews with any additional persons?

11 A. Yes. I spoke to his mother on two occasions, and
12 I also spoke to a Ms. Heather Johnson, a friend of
13 Mr. Jennings'.

14 Q. And did you consult with any other experts that
15 were involved in the case?

16 A. Yes, I also spoke to Dr. Faye Sultan, a
17 psychologist, and I spoke to Dr. Tom Hyde, a behavior
18 neurologist.

19 Q. Now, as a result of the --

20 A. And I also spoke with Dr. Masterson.

21 Q. And we covered that.

22 A. That's correct.

23 Q. Thank you. As a result of your interview with
24 Mr. Jennings' mother, what were you able to ascertain?

25 A. Well, she reported on the fact that he had the

IN THE CIRCUIT COURT OF THE TWENTIETH JUDICIAL CIRCUIT IN
AND FOR COLLIER COUNTY, FLORIDA

STATE OF FLORIDA,

Plaintiff,

vs.

CASE NO. 95-2284-CFA

BRANDY BAIN JENNINGS,

Defendant.

ORIGINAL

HEARING BEFORE: The Honorable Frederick R. Hardt

DATE: April 29, 2010

TIME: 9:00 a.m. to 5:00 p.m.

LOCATION: Collier County Courthouse
Naples, Florida

REPORTER: Angela S. Hartsock, CSR

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1 Q. And can you explain to us how the IQ score is
2 formulated and what the ultimate result is?

3 A. The IQ score, again, sums up all the scale scores
4 and converts the scale scores to an index IQ score. Where
5 again, the mean is 100, and the standard deviation is 15.

6 On the WAIS-IV, Mr. Jennings' obtained a full
7 scale IQ score of 117, and that compares to the full scale
8 IQ score of 114 on the WAIS-III. Only a three point
9 difference. That's not significantly different.

10 Q. Now, is there a standard error of measurement on
11 these tests?

12 JUDGE HARDT: I thought it was 119 on the first
13 IQ test?

14 THE WITNESS: The verbal was 119. The
15 performance was 106. The Full Scale was 114. Let me
16 just double check.

17 JUDGE HARDT: Okay. Maybe my notes are wrong.
18 So the new IQ score that you just gave us, that's the
19 combined?

20 THE WITNESS: Right. The new IQ score does not
21 have the verbal and performance, just the full scale
22 IQ score, and that score comes out to be 117.

23 JUDGE HARDT: So he went up three points?

24 THE WITNESS: Correct.

25 JUDGE HARDT: Okay.

1 THE WITNESS: And Mr. Kalil asked me the
2 confidence interval. That's the 95th percentile.
3 Meaning the band of error -- if one would give this
4 test a hundred times, one would expect that there
5 should be deviation, and that band of error in the
6 95th percentile goes between 113 and 121.

7 BY MR. KALIL:

8 Q. So is it fair to say that this WAIS-IV result
9 is -- even though there is a discrepancy between the
10 WAIS-III and WAIS-IV, it is a reliable result. It is not
11 statistically inconsistent with the prior result?

12 A. That's correct.

13 Q. Now, in what ways was Mr. Jennings' WAIS-IV
14 testing results significantly or clinically significantly
15 different from his WAIS-III results?

16 A. The index scores, which are now used instead of
17 the verbal and performance IQ scores, so verbal and IQ
18 scores are no longer included.

19 JUDGE HARDT: But they are still part of the
20 overall test? In other words, they are merged into
21 more of a broader test? Would that be a way of
22 looking at it? Because you are still asking those
23 questions.

24 THE WITNESS: That's correct.

25 JUDGE HARDT: So you are combining them into one

1 still the average IQ, and if everything would be average,
2 everything would be fine. If everything -- high average
3 that would be fine. If everything was superior, that's
4 fine. But when you have these discrepancies, then one has
5 to look at what areas are impaired, what areas are again
6 relatively dysfunctional, and how that affects the
7 person's cognitive ability and how that affects them in
8 their overall dysfunction.

9 Q. Okay. In terms of the overall impression that
10 you gleaned from the WAIS-IV and the WAIS-III, are
11 Mr. Jennings' scores overall relatively consistent between
12 those two tests?

13 A. There is consistency when one adds it all up. In
14 other words, the composite scores are basically
15 consistent. There are discrepancies when one looks at
16 some of the individual scores.

17 Q. Okay. And can you explain a reason for that.

18 A. Part of that is some of the test constructions
19 have changed. As I mentioned earlier, the cutoffs on the
20 WAIS-IV are much more strict than they were on the
21 WAIS-III. I think part of it is perhaps a variation over
22 time. You know.

23 Q. It is a combination of perhaps learning
24 variations among the individual, the circumstances that
25 change over time. Okay.

1 point of view as a neuropsychologist?

2 A. Yes, I did.

3 Q. Can you summarize for the Court what those are.

4 A. Looking back at his schooling, I think that there
5 were issues of hyperactivity. Never really formally
6 diagnosed as perhaps Attention Deficit Disorder,
7 Hyperactivity.

8 There was an incident that I mentioned that he
9 tried to choke his cousin Rex for laughing at him. His
10 pediatrician placed him on some type of diet to deal with
11 anger management. There was questions, perhaps
12 medications as well. His diet consisted basically of fast
13 food, and, I think, that perhaps there were issues at that
14 time that were never really dealt with. He is highly
15 distractible. He has difficulty with motivation. He
16 doesn't feel like doing anything. There are issues with
17 impulsivity, and he has low frustration tolerance. Little
18 things upset him and can tick him off fairly easily. He
19 is easily bored, and he needs constant stimulation, and he
20 needs instant gratification. He has difficulty
21 articulating his thoughts, his needs, and his desires. He
22 has great difficulty logically thinking things out. At
23 times he uses bad judgment, and he says stupid things. He
24 has racing thoughts. He has trouble sleeping. He can
25 stay up for days at a time until he finally crashes. He

1 mentioned in the DSM.

2 Brandy Jennings is really what we refer to as
3 gifted LD. Someone who is gifted and has learning
4 disabilities presents as an anomaly in terms of someone
5 that is perhaps a little different than the ordinary
6 common individual. His scores were basically very high
7 with the exception of some scores that were, as I
8 mentioned, relatively two standard deviations below
9 especially on processing speed and difficulty that's been
10 mentioned with communication, expressing himself, and
11 articulation.

12 Now, the reason that this is significant is
13 because -- he had difficulty reading, which was already in
14 the first grade. He got a U, unsatisfactory, in the first
15 grade, and that continued, and, I believe, that looking
16 back at why he failed 10th grade was because he had this
17 discrepancy in terms of his academic skills. Although he
18 was bright and gifted, but he was learning disabled in the
19 areas of reading and communication skills and written
20 expression, which is a reading disorder, which is a
21 diagnosis in the DSM, and with your permission --

22 JUDGE HARDT: Which one is it?

23 THE WITNESS: It's called reading disorder.

24 JUDGE HARDT: Which one is it?

25 THE WITNESS: 315.00. I am just going to read

1 any other opinions with regard to diagnoses?

2 A. Yes. So that's just the background for what went
3 wrong in part. The other diagnosis is intermittent
4 explosive disorder, which is 312.34.

5 JUDGE HARDT: .34?

6 THE WITNESS: 312.341; correct. In the DSM-IV.
7 The criteria for the diagnosis is several discreet
8 episodes of failure to resist aggressive impulses that
9 result in serious assaultive acts or destruction of
10 property. That's criteria A. I do believe he meets
11 the criteria not only --

12 JUDGE HARDT: That's based upon the crimes
13 involved?

14 THE WITNESS: Correct. The current crimes, and
15 some of his past behavior.

16 JUDGE HARDT: And prior history?

17 THE WITNESS: Correct.

18 JUDGE HARDT: Okay.

19 MS. DITTMAR: Your Honor, I apologize for
20 interrupting, but I was wondering if we could take a
21 comfort break for a few minutes?

22 JUDGE HARDT: Sure. 15 minutes.

23 (A short break was held.)

24 JUDGE HARDT: Go ahead.

25 MR. KALIL: Thank you, Your Honor.

1 bipolar disorder.

2 Again, these are all elements that may have been
3 present but not to the extent that it would warrant a
4 diagnosis. A diagnosis that could fully explain or the
5 best -- we look for the most parsimonious explanation for
6 the behavior that fits the diagnosis.

7 Q. Did you reach any other conclusions with regard
8 to a diagnosis?

9 A. No.

10 Q. Now, Doctor, let me turn your attention to
11 Dr. Masterson's report that we referred to.

12 Would you say that Dr. Masterson's conclusions
13 were consistent with yours?

14 A. Correct. Within Dr. Masterson's report, I think
15 there are elements that I've spoken about. He spoke about
16 them. He did not put it all together in his own report,
17 although, if one would look at his own report and
18 findings, I think he alludes to some of the issues that
19 I've talked about. There are some other slight variations
20 in terms of conclusions that may not be totally accurate,
21 and it was also just a little difficult to figure out
22 exactly, because his reporting was not fully detailed, so
23 it was very difficult to figure out what he was talking
24 about, and I'm sure that if I had difficulty, I'm sure
25 that a person who is not familiar with the IQ testing

1 would have even greater difficulty. He just did not -- he
2 listed things, but he didn't list, and he didn't report on
3 numbers. He didn't report on full scale IQ score.
4 Subtests were very difficult to figure out, but, anyway,
5 other than that, there is certainly significant
6 information in his report.

7 Q. Okay. Now, you took a history, and that covers
8 several -- four or five pages of the report, and then he
9 discusses the cognitive testing that he performed. He
10 performed the WAIS-R.

11 Now, I believe, you testified previously that the
12 WAIS-R was the version of the WAIS that was available
13 prior to the WAIS-III that you performed?

14 A. Correct.

15 Q. Okay. Now, I think, you always mentioned that he
16 didn't list any of his raw or index scores, but does his
17 report reach an ultimate conclusion with regard to his
18 overall IQ or his index scores?

19 A. He reports on the verbal IQ. He reports the
20 performance IQ with a range. I'm not sure why that's the
21 case.

22 JUDGE HARDT: This report is in evidence, and the
23 Court has read it, just so you know. Right? This is
24 an exhibit?

25 MR. KALIL: Yes.

1 Q. Let me move on to page 7 of his report where he
2 mentions the Halstead-Reitan neuropsych tests.

3 JUDGE HARDT: By the way, did you ask
4 Dr. Masterson about that range issue?

5 THE WITNESS: I asked him, yes.

6 JUDGE HARDT: What did he say?

7 THE WITNESS: He said that was the practice.

8 JUDGE HARDT: Okay. Difference of opinion?

9 THE WITNESS: Correct. His opinion was --

10 JUDGE HARDT: Difference of opinion as to how you
11 report --

12 THE WITNESS: I've conducted this test, you know,
13 over 25 years a thousand times. I have reviewed
14 report documents. Like I said, this is a hybrid. In
15 other words, you can report both; that's fine. I am
16 not sure why this was reported like this.

17 JUDGE HARDT: But he said that was the way he did
18 it.

19 THE WITNESS: He also didn't remember a whole
20 lot. But, yeah, I specifically asked him. My
21 question was, "I can't figure out exactly from your
22 report what you have to say."

23 JUDGE HARDT: Okay.

24 BY MR. KALIL:

25 Q. Let me ask you, in the manual for the WAIS, does

1 it recommend or a procedure for reporting such a score?

2 A. A score of -- a range of scores?

3 Q. Yes. Or for giving a specific number and then
4 explaining the range.

5 A. Always one gives the number. I mean, there
6 are -- I do have to say there are reports that people
7 didn't want to talk about numbers. They felt that the
8 numbers somehow were something they wanted to avoid in the
9 report. Bottom line is either you report the numbers or
10 you don't report the numbers, but this is somewhere in
11 between.

12 Q. Let me ask you about the Halstead-Reitan
13 neuropsych test.

14 Does Dr. Masterson perform the complete
15 Halstead-Reitan battery of tests?

16 A. No.

17 Q. And the subtests that he performed, the test of
18 perception, the Trail Making test, Part B. Is that one of
19 the tests that you performed as well?

20 A. Correct.

21 Q. Okay. Dr. Masterson reports that Mr. Jennings'
22 had an excellent score taking 80 seconds and not making
23 any errors. A good score is considered anything under 90.
24 Would you agree with that?

25 A. No. That's not completely accurate.

1 Q. Can you say in what way that's not accurate?

2 A. Reitan used a criteria of 40 seconds and
3 90 seconds as cutoffs. Anything that was over 90 was
4 considered to be in the brain damage range. Anything
5 under 90 was considered to be not in the brain damage
6 range. So let's say we were going to use criteria set up
7 by Reitan himself. So 80 seconds is very close to
8 90 seconds. It's not, like, it is an excellent score.
9 That's far from an excellent score. An excellent score
10 might have been something more in half the amount of time.
11 A good score is considered anything under 90. That's not
12 true. According to the criteria set up by Reitan,
13 anything under 90 does not meet the criteria of brain
14 damage.

15 Now, as neuropsychology developed over the years,
16 psychologists, and there are many people that started to
17 do normative data, that started to use a range of test
18 scores, so it wouldn't be an absolute cutoff score.
19 Reitan's idea was it was either brain damage or it wasn't
20 brain damage. And over time psychologists and
21 neuropsychologists started to use a continuum of scores,
22 and in the continuum of scores, they would talk about a
23 score and talk about a mean and a standard deviation, and
24 again, one standard would be mild; two would be moderate;
25 three would be severe so on and so forth. That would give

1 a little more understanding to what the test score really
2 represents in the real functioning world. So when you
3 take a look at data -- so the mean, or his age at the
4 time, which was 30, the mean would have been 58.7 with a
5 standard deviation of 15.9. So he is certainly mildly
6 impaired. He is one standard deviation between the mean
7 score of 80. As a matter of fact, it is really one and a
8 half standard deviations between the mean. So it is
9 between mild and moderate, and it is below the 20th
10 percentile of the general population. He does not report
11 A, so I can't tell you what the score is on that because
12 there is also indexes to compare A to B. But the bottom
13 line is, no one is going to say this is a good score, and
14 no one would say it's an excellent score. That's just not
15 true.

16 Q. And my next question was, is there any indication
17 that he performed the Trail Making, Part A in his report?

18 A. He doesn't report on that. I don't know. I
19 don't know exactly what he did. He doesn't report on it,
20 and we don't have his raw data.

21 Q. Let me ask you about some of the personality
22 testing that Dr. Masterson reports. The Myers-Briggs
23 Personality Inventory. Can you tell the Court what that
24 test is.

25 JUDGE HARDT: We talked about that yesterday,

1 THE WITNESS: No. The conversation was somewhat
2 brief. He did return the call. It was late at night,
3 but he had very little recollection.

4 JUDGE HARDT: All right.

5 BY MR. KALIL:

6 Q. What was Dr. Masterson's recollection about his
7 involvement with Mr. Jennings?

8 A. He was -- he felt that -- he felt scared with his
9 examination of him, and he was -- sounded like he was
10 somewhat defensive and not comfortable in terms of the
11 evaluation, but he said, "It is what it is, and my report
12 reflects whatever I had to say, and I really have no
13 further knowledge, and I have no records," and that was
14 about it.

15 Q. Okay. Again, on the Wechsler Memory Scale, he
16 indicates a score of 115 to 120. Is that the appropriate
17 way to report the Wechsler Memory Scale score?

18 A. No. Again, there is an absolute score rather
19 than a range.

20 Q. This score was slightly below his WAIS-R score.
21 Do you know what his WAIS-R score is from the report? The
22 over all IQ score.

23 A. No.

24 Q. Okay. Let me ask you about the interview and the
25 questionnaire that he performed on June 8. From what you

1 in Dr. Masterson's report that you felt would have been
2 necessary to form an opinion regarding Mr. Jennings?

3 A. Okay. Besides what has already been mentioned,
4 the fact that scores were not reported, which makes it
5 really difficult to understand what exactly he did, but
6 just as far as the Halstead-Reitan neuropsychological
7 test. It is very misleading. He gave one -- at least he
8 reports one test. Trails A and Trails B is a start.
9 Well, he didn't report A, but if the only test that he
10 gave was Trails B, and the score of 80, which I've
11 indicated by no means is an excellent score, those
12 conclusions are wrong.

13 First of all, you know, the title says
14 Halstead-Reitan Neuropsychological Test, and he gives one
15 test. There is a whole battery of tests that could have
16 been done, and he did not perform those, so it's a little
17 misleading when he just gave one test, which is a test
18 that takes basically two minutes to give, and then you
19 have a whole title which somewhat is misleading saying
20 that he is doing tests of -- a neuropsychological test.

21 Q. Let me clarify that with you. You referred to
22 page 7 of his report. Under that Halstead-Reitan
23 Neuropsych Test, he does list -- he says, "Tests of
24 perception," and he mentions Trail Making, and then he
25 lists auditory processing information. Is that a test?

1 -- there is a reason why the clinician would prefer not to
2 put in the data, I can perhaps under that as well. Maybe
3 this was very sensitive information, and it could be used
4 perhaps in the wrong way. All right. There may be a
5 rational explanation to that as well, but there is no
6 rational explanation for putting in some of the data and
7 not putting in other parts of the data. In other words,
8 this is a hybrid.

9 Q. So just having the conclusions without having the
10 specific subtests you think is a failure as to the report?

11 A. Well, I am saying when you read the report, and
12 you try to figure out what exactly happened, you see some
13 of the data is in, and some of the data is not in.

14 Q. I'm sorry. Were you finished?

15 A. No. I am saying that there is no explanation
16 that I can understand as to what exactly, you know, what
17 he was referring to.

18 Q. Okay. So there is no standard convention,
19 though, when you are asked to do an evaluation you write a
20 report, and you include A, B, C in the report?

21 A. I think it's a standard practice that if you do a
22 test, you report what the test results are. I think that
23 is the standard practice. I am saying if you are not
24 going to report on the data, that's, you know, the
25 individual is hired in order to do certain tests. The

1 tests are going to be reported in the body of the report.
2 That's a standard practice.

3 Q. Does the sufficiency of the report have anything
4 to do with why the report was generated and what the
5 report is going to be used for?

6 A. I'm -- I don't understand your question.

7 Q. Well, in certain situations will you be guided in
8 writing your report by -- if you are working with an
9 attorney what the attorney tells you they are interested
10 in and what they want to see in the report and what they
11 really don't care about in the report?

12 A. It's possible, but you have to adhere to your own
13 standards as well.

14 Q. Your personal standards?

15 A. No, no, not my personal standards.

16 Q. Your professional standards? I didn't meant that
17 like --

18 A. Okay. I'm sorry.

19 Q. I mean your professional standards.

20 A. Right. Correct.

21 JUDGE HARDT: The question was, is there a guide
22 or protocol that you psychologists are supposed to
23 follow in writing the report. And I don't think we
24 got an answer to that question. You said what your
25 practice is and what the practice of others is, but

1 this question is, is there actually someplace you
2 would go to see this is what should be in or not be in
3 the report. That's the question.

4 What's the answer to that question?

5 THE WITNESS: That's a good question.

6 JUDGE HARDT: What's the answer?

7 THE WITNESS: I'm not sure. I can't tell you
8 offhand. In other words, there should be a guideline.
9 There should be a protocol.

10 JUDGE HARDT: So --

11 THE WITNESS: I'm not sure. I do this as a
12 standard practice. I certainly -- I would have to go
13 back and look and see what the guidelines are, but I
14 assume that it would be that if you do a test, that
15 you would include the test in that report.

16 JUDGE HARDT: As you sit here now today, you
17 don't know that there are any such guidelines?

18 THE WITNESS: I assume there are.

19 JUDGE HARDT: Assumptions --

20 THE WITNESS: Right. 100 percent I can't say.

21 JUDGE HARDT: That answers that question. Thank
22 you.

23 BY MS. DITTMAR:

24 Q. I think you mentioned that in your opinion this
25 report was in and of itself insufficient to -- was not

1 A. He was defensive in terms of the conversation.
2 When I was asking him questions about the examination and
3 the protocol and the raw data and things of that sort.

4 Q. And so when you are talking about the report
5 being insufficient, you are talking about for your
6 purposes to determine the sufficiency of his examination.
7 You are not talking about for the attorney's purposes in
8 determining whether or not to present mitigating evidence?

9 A. You know, I think it's up to the attorney and the
10 Court to decide, but as far as -- you are asking me as far
11 as are there gross deficiencies in this report, and the
12 answer is yes.

13 JUDGE HARDT: Let me ask this: As a whole --
14 taking the report as a whole, would it be your opinion
15 that it is grossly insufficient for the purposes for
16 which the report was intended?

17 THE WITNESS: Well, you know, after I know what I
18 know now, so I could put this together like a piece of
19 a puzzle, and then I can add to the whole picture, but
20 if I just had this report, no, it certainly is
21 insufficient. In other words, after I examined him on
22 two occasions, so then I can use his data and try to
23 figure out exactly what he did to add it into the
24 picture. But if I would just have this report, and I
25 would be trying to figure out if there is significant

1 mitigation or not, it's a good starter. There are
2 certainly things in this report that are of value, but
3 there needs to be more, and it doesn't address the
4 issues in totality.

5 BY MS. DITTMAR:

6 Q. So are you aware that Mr. Jennings' attorney, Mr.
7 Tom Osteen went and met with Dr. Masterson for some
8 lengthy period of time after he had this report so they
9 could discuss it, and if he had questions, they could
10 perhaps answer the questions and talk more about what may
11 or may not have been in the report?

12 A. How am I supposed to be aware of that?

13 Q. I don't know. Maybe the attorney you're working
14 with may have mentioned the situation and how the report
15 fit into the scheme of the defense preparation for trial?

16 A. I have no knowledge.

17 Q. So you are not suggesting that there were poor
18 decisions made because of this report by the defense
19 attorney?

20 A. I have no idea.

21 Q. Now, you talked about the June 8th, the questions
22 at the end of the report that Dr. Masterson said look at
23 these questions and got these answers, and I think you
24 testified that these are not standardized, they haven't
25 been accepted, validated, normed, peer reviewed questions.

1 give the same tests?

2 A. Well, the basic battery with the proviso that I
3 give the updated version of the various different tests.
4 That's correct.

5 Q. So is that a standard thing that all
6 psychologists when they evaluate someone have to do a set
7 number of the same exact battery --

8 A. No.

9 Q. -- when you say it's a standard, or is that
10 something that each professional decides for themselves
11 what they feel comfortable -- the tests they feel
12 comfortable working with?

13 A. No. There is several different approaches to how
14 one can conduct an evaluation. The Halstead-Reitan
15 including the IQ and various different other measures that
16 I -- in the standard practice utilize is one way of an
17 accepted manner. There are other different manners of
18 accepted manners of one conducting the evaluation.
19 Absolutely.

20 Q. And how many tests are included in your battery
21 that you generally did?

22 A. I spent a lot of hours talking about all the
23 number of tests.

24 Q. Yeah, I don't want to hear the name and what they
25 mean. I was just looking for the number of tests because

1 I was trying to keep up with them.

2 A. Within -- I think I broke it up that within the
3 different modalities there are several tests within each
4 one of the modalities. There is a motor component. There
5 are several tests there. There is a sensory perceptual.
6 There are several tests there.

7 Q. But do you give 25 tests, or do you give ten
8 tests? If it's the same test, the same battery but there
9 is not a set number of what the tests are?

10 A. Yeah. The tests are all the same. I can tell
11 you the names of tests. Some of the tests have subtests,
12 so you can subdivide it. I am not sure exactly, you know,
13 what you are asking at this point..

14 Q. You don't know how many tests are in your
15 battery?

16 A. Again, there is the overall -- there is the name
17 of the test. They are subdivided into subtests. You
18 know, probably if you subdivide each one of the tests to
19 subtests, we are probably talking about 50 tests.

20 Q. And you noted that in Dr. Masterson's report that
21 he had given the revised WAIS-R.

22 A. He said he gave the Wechsler Adult Intelligent
23 Scale Revised; correct.

24 Q. What would have been the appropriate test for him
25 to have given in 1996?

1 A. I'm not sure what you are asking.

2 Q. Would that have been the correct -- would that
3 have been the test you would have used in 1996?

4 A. Yes.

5 Q. You talked a little about your experience in
6 capitol cases and your prior testimony, how many death row
7 defendants in Florida have you evaluated?

8 A. Approximately 25, 30.

9 Q. And how many times were you -- and I am not -- I
10 am talking already convicted and on death row. I know you
11 have also testified in penalty phase, and you mentioned
12 even, I guess, before conviction for competency or sanity,
13 but I am talking about -- so your 25 is basically -- they
14 are already post-conviction cases?

15 A. Correct.

16 Q. In any of those cases did you find any of the
17 defendants' had normal functioning brains?

18 A. Yes.

19 Q. Who was that?

20 A. I would have to look back but there --

21 Q. Well, how many out of the 25 would you estimate
22 were perfectly normal functioning individuals?

23 A. A minority, but there have been cases.

24 Q. Less than five?

25 A. Probably.

1 Mr. Kalil, call your next witness.

2 MR. KALIL: Your Honor, if I may, I do intend to
3 call Charles Jason Graves, and I have several other
4 witnesses waiting outside, so if we need to put
5 anything in motion to get Mr. Grogoza here.

6 JUDGE HARDT: We are not getting anything in
7 motion to get Mr. Grogoza here.

8 MR. KALIL: Okay.

9 JUDGE HARDT: We will get him loaded up, and in
10 the meantime we will call another witness.

11 MR. KALIL: Very good. The next witness is
12 Patricia Scudder.

13 JUDGE HARDT: All right.

14 THE CLERK: You do solemnly swear or affirm that
15 the testimony you are about to give shall be the
16 truth, the whole trust, and nothing but the truth?

17 MS. SCUDDER: I do.

18 DIRECT EXAMINATION

19 BY MR. KALIL:

20 Q. Good afternoon, ma'am. Can you state your name
21 and spell your last name.

22 A. Patricia Scudder, S-c-u-d-d-e-r.

23 Q. Are you related in any way to Brandy Bain
24 Jennings?

25 A. Yes, he is my cousin.

1 Q. Well, tell me about when you stayed with them the
2 second time. You said you were staying in an apartment.

3 A. Yes.

4 Q. Tell me about that apartment. What was that
5 apartment like?

6 A. Okay. That apartment -- Sassy had had puppies,
7 or they had gotten another puppy, and there was dog feces
8 all over the floor. There was also papers all over the
9 floor, and I had to clean that up.

10 Q. Were there other -- any other indications that
11 the house wasn't kept properly? Was the home clean?

12 A. No. Dirty dishes all over the place. You
13 couldn't find anyplace to even set a dish.

14 Q. Now, did you ever become acquainted with any of
15 Tawny's, and I will refer to Ms. Jennings as Tawny, if the
16 Court allows.

17 Did you ever come to know any of Tawny's
18 boyfriends?

19 A. I knew of one that -- I knew him by name but the
20 others were just fly-byes.

21 Q. Okay. And how many, as you say fly-byes, do you
22 think there were?

23 A. I don't know. Probably about five or six.

24 Q. Now, the one that you know by name, is that
25 Frank?

1 A. Yes. His mother told me that she named him
2 Brandy because she was drunk on brandy when she got
3 pregnant with him.

4 Q. Would you describe Frank and Tawny's relationship
5 as a loving boyfriend/girlfriend relationship?

6 A. No, not really. I always thought that Tawny was
7 using him.

8 Q. And what made you think that?

9 A. Just by the way she acted towards him. I didn't
10 see any love or caring going on between the two.

11 Q. Let me ask you about Brandy and your impressions
12 of Brandy when he was a child and a youngster. Was Brandy
13 overweight?

14 A. Yes, he was.

15 Q. And in your experience and from your knowledge,
16 what kind of food did Tawny prepare for Brandy?

17 A. Well, it wasn't really meals. It was just one
18 basic dish that she would put out in front of him. Like,
19 either hamburger, gravy, and toast or something that was
20 quick and simple.

21 Q. Did he eat a lot of junk food?

22 A. Yes.

23 Q. And when I say eating a lot of junk food, can you
24 give the Court an idea of how much -- how often he would
25 have a meal as opposed to eating junk food or snack food?

1 Q. Let me ask you who is George Jennings?

2 A. There are two of them.

3 Q. Okay.

4 A. The first George Jennings is my grandfather.

5 Q. Okay.

6 A. The second one is my uncle Sonny.

7 Q. So he goes by Sonny?

8 A. Yes.

9 Q. Was Sonny ever in the picture when you were with
10 Mr. Jennings as a child or with Tawny? Was he ever
11 around?

12 A. No.

13 Q. Why is that?

14 A. Because Tawny wouldn't allow him to come around
15 her.

16 Q. Okay. Where is Sonny today, to your knowledge?

17 A. He is dead.

18 Q. Did he have any criminal background that you are
19 aware of?

20 A. Yes, he was a child molester for years.

21 Q. Were there any -- to your knowledge, were there
22 any other child molesters in Mr. Jennings' closer family?

23 A. Yes.

24 Q. Can you tell us who those were?

25 A. My ex-brother-in-law was a child molester, and he

1 was the manager of the hotel -- or the motel where Brandy
2 and his mom was living.

3 Q. What was his name?

4 A. Jack --- or Walter J. Croom.

5 Q. And we will come back to him. Were there any
6 other, that you know of, were there any other relatives
7 that were --

8 A. Child molesters?

9 Q. -- that were child molesters, to your knowledge?

10 A. No, just those two.

11 Q. All right. Let me ask you about Mr. Croom. To
12 your knowledge, was he ever convicted of a crime involving
13 a sex offense?

14 A. After my niece had turned him in for molesting
15 her, he got a divorce from my sister, and he remarried,
16 and he had four daughters, and he molested every one of
17 them, and he got sent to prison for five years.

18 Q. Now, I think you mentioned he was the manager of
19 the Buccaneer Motel.

20 A. Yes.

21 Q. Was he the manager of the Buccaneer Motel when
22 Tawny and Brandy were living there?

23 A. Yes.

24 Q. Were you aware of any -- of whether or not
25 Ms. Jennings paid rent to live at the motel?

1 Q. Good afternoon, Mrs. Scudder. You indicated that
2 you did not know that Brandy had been accused or convicted
3 of murder until 1998; is that correct?

4 A. That's right.

5 Q. Is there a reason for that?

6 A. No. The last time I seen his mom he was still in
7 Florida, but his mom had come out to Oregon in 1990, and
8 she spent two weeks with us, and she left, said that she
9 was going to go to New Jersey and get a nanny job, and the
10 next thing we know we were getting a letter from her
11 saying that she ended up becoming a cook at a scout camp
12 or something.

13 Q. So it is safe to say that you kind of grew apart
14 from 1990 onward?

15 A. Yeah. I even tried to get in contact with her
16 and couldn't.

17 Q. Do you know whether or not your name had been
18 given to Mr. Jennings' attorney for him to contact you?

19 A. No. I am not aware of anything like that.

20 Q. Tawny wouldn't have contacted you in 1996 and
21 said, "Hey, listen, Patricia, Brandy is in a whole heap of
22 trouble"? She never did that?

23 A. No. We did not know anything about this until
24 the investigators came out to our house in 1998.

25 Q. Investigators from where? From what agency; do

1 with Mr. Jennings and with Mr. Jennings' mother and
2 family, did you ever know of any instances where there was
3 any incest in Mr. Jennings' family? .

4 A. Yes, I do. His Uncle Sonny molested my wife, and
5 there is another person by the name of Walter that
6 molested my son.

7 Q. Okay. And did Sonny or Walter ever -- were
8 they -- was Mr. Jennings ever exposed to their presence?

9 A. Oh, yeah. Walter, they were neighbors. Mom used
10 to rent off them. They used to live at the Buccaneer
11 Motel in Rockaway, and Sonny was Tawny's brother.
12 Brandy's mom's brother, yes.

13 Q. Did you ever have any knowledge about Tawny
14 having any sort of a sexual relationship with any of --
15 with a step nephew?

16 A. I was told by him, which he told me that he comes
17 down from Pendleton and stuff to see Tawny while he is
18 down in --

19 MR. MONTECALVO: Objection, Judge. I am going to
20 object to hearsay. I don't even know who "he" is.

21 JUDGE HARDT: Sustained.

22 BY MR. KALIL:

23 Q. Okay. What was the name of the step nephew?

24 A. I can't think of his name right now.

25 Q. Was it Bob?

1 do drugs while Mr. Jennings was a child?

2 A. Yes, she did. In fact, I smoked marijuana with
3 her. I got my card now, but I used to smoke marijuana
4 with her, and also she used to have pills all the time
5 because she always said that she was sick, and she carried
6 around a lot of pain pills and stuff with her.

7 Q. When she said she was sick, was she always sick
8 when she complained about it, or was it sometimes not
9 true?

10 A. Well, she always had something the matter with
11 her which wasn't even nothing the matter with her at the
12 time. She complained about her hands, her legs, her ears,
13 even her hair hurting, and I couldn't see anything the
14 matter with her at all, but she would go back to the
15 doctor so she could get pills.

16 Q. And what did she do with the pills?

17 A. She give them out to people. She even offered
18 them to me, sir.

19 Q. To who?

20 A. Me.

21 Q. Do you have any knowledge about whether or not
22 Ms. Jennings breastfed Brandy when she was a child?

23 A. The only recollection I have of that is that I
24 was told by his grandmother that he used to breastfeed
25 clean up until he was about five years old. When I met

1 well, and she wasn't cooking meals. Nothing.

2 Q. Did the family have a lot of money, or were they
3 relatively a poor family? I am talking about Mr. Jennings
4 when he was a child and Tawny.

5 A. They didn't have much money at all. I think they
6 lived on welfare.

7 Q. Did she ever work or maintain a job that you are
8 aware of?

9 A. No, she didn't work.

10 Q. Besides welfare did she come into money any other
11 way?

12 A. Probably hooking.

13 Q. But by your personal knowledge?

14 A. Her telling me -- because she said she was
15 getting ahold of truck drivers and stuff like that.
16 That's through the knowledge of Tawny.

17 Q. Did she ever come into any big sums of money in
18 any way that you are aware of?

19 A. No, not that I know of.

20 Q. If she did come into a big sum of money, how
21 would she spend it?

22 A. Probably on herself or her boyfriends.

23 MR. KALIL: Nothing further, Your Honor. Thank
24 you.

25 CROSS-EXAMINATION

1 Q. Well, if she was a terrible mother, as you have
2 testified, why didn't you do more?

3 A. Why don't I do more?

4 Q. Yes.

5 A. On the count that I was raised in a family by
6 myself. I'm disabled and stuff like that, and where they
7 lived and where I lived -- I lived up in the hills; they
8 lived down there, so it was quite a bit -- it was a way to
9 go.

10 Q. And you didn't see them much; right?

11 A. Did I see them much?

12 Q. Yeah.

13 A. I seen them at least once a week.

14 Q. Are you married to Patricia?

15 A. Yeah.

16 Q. You know, she testified that she didn't see much
17 of them.

18 A. Well, I drove at that time. She didn't.

19 Q. So you would go down and see them on your own?

20 A. I would -- I would see them when she would go
21 over and visit her sister at the apartments at Rockaway.
22 On account of her and Tawny wasn't getting along. I would
23 go over and visit Tawny and Brandy while she was there. I
24 was driving.

25 Q. So you had more opportunity to see Tawny and

1 that your wife was staying with Tawny to help her get
2 through her medical issues?

3 A. Only by what she told me and what my
4 father-in-law said and all them, yeah, but I wasn't
5 married to her at the time that she lived up there with
6 Tawny.

7 Q. Now, first you testified on direct that the
8 defendant called you 20 years ago to wish you a happy
9 Father's Day and then a happy Veteran's Day, but then you
10 testified that it was 1983, '84.

11 A. I can't remember the exact date. I know it was
12 20 years or more ago when he was, like, about 13 or
13 14 years old. I don't know how old he is now, to tell you
14 the truth.

15 Q. But that was it. After 1983, 1984 no contact
16 with Brandy?

17 A. That's correct. I didn't hear anything from him
18 at all. I never got nothing until I got notified by the
19 investigator, by the attorney.

20 Q. And when was that?

21 A. One time was, like, about two years ago and then
22 just a couple weeks ago.

23 Q. So you had no other prior contact with any member
24 of this attorney's office until two years ago?

25 A. I can't remember exactly. Two or three years

1 A. It wasn't in his nature. He wasn't a violent
2 person. I've only seen him be violent once, and that was
3 a brief response to my future husband just being extremely
4 annoying, and he wasn't intending to hurt him at all. He
5 was trying to get him to stop. Kept telling him, "Stop,
6 Stop." And he wouldn't stop, so he finally just put him
7 down on the ground and hit his head, but that's the only
8 time I ever saw anything like that.

9 Q. Did Mr. Jennings -- was he protective of you?

10 A. Yeah.

11 Q. And what would make you say that?

12 A. He was just always protective of me. He would
13 make sure -- I knew that nothing would happen to me if I
14 was with him. He was always very protective. He always
15 made me feel safe.

16 Q. How would you describe Mr. Jennings emotionally?
17 Was he an emotional person?

18 A. Yeah. I mean, he is bright. He is not always
19 good at knowing how to articulate, so he would get
20 frustrated. I think he would get frustrated more with
21 himself than with anyone else because he just wouldn't
22 know how to articulate what was upsetting him or how he
23 was angry about something.

24 Q. So he wasn't able to express himself?

25 A. Yeah, he wasn't always good at expressing

1 himself.

2 Q. Was he impulsive at all?

3 A. Yeah, he was impulsive. He was a typical 17-year
4 old. A little immature, but he was always gentle natured,
5 more reserved, stood back. He wasn't really a leader. He
6 didn't have a dominant personality.

7 Q. And you said he tended to set back from other
8 people. Was he interactive with other people?

9 A. He would interact, but he was more like me. He
10 was more 'quite and would tend to just kind of stand back
11 in the corner in the shadows and not be the center of
12 attention, and he and I would take off around crowds.

13 Q. I'm sorry.

14 A. We would often take off from the crowd. When
15 there was a party or something, he and I would just take
16 off on his motorcycle just to go away.

17 Q. Now, did you know Brandy Jennings' mother?

18 A. Yeah, not real well, but I was familiar with her.

19 Q. Had you met her personally?

20 A. Uh-huh.

21 Q. Had you spent any time with her?

22 A. Yeah, she liked me.

23 Q. What were your impressions of her?

24 A. She was tough. She was hard. She was just a
25 little colder. I think she and Brandy had kind of a

1 Q. Any reason why you didn't go inside?

2 A. I don't recall. I don't think I knew Tawny at
3 that time.

4 MR. KALIL: Nothing further on direct, Your
5 Honor.

6 JUDGE HARDT: All right.

7 MR. MONTECALVO: May I approach the witness, Your
8 Honor? I want to take a look at the letter.

9 JUDGE HARDT: Yes. It's Exhibit 14. Sorry.
10 Exhibit 12.

11 CROSS-EXAMINATION

12 BY MR. MONTECALVO:

13 Q. Good afternoon, Ms. Johnson.

14 A. Hello.

15 Q. You testified on direct that if you had been
16 asked, you would have gladly testified on behalf of
17 Mr. Jennings at the penalty phase; is that correct?

18 A. Correct.

19 Q. So you would have testified that you thought the
20 robbery in the Cracker Barrel was an understandable act,
21 correct, as you indicated in your letter?

22 A. Yeah. Understandable in the respect of I can see
23 Brandy using that as a way to just get his anger out.
24 Just robbery.

25 Q. But certainly not the murder?

1 A. No.

2 Q. When did you lose contact with Brandy?

3 A. Late 80s. It was after I got involved with
4 someone, and Brandy wound up getting married.

5 Q. And you indicated in your letter that you didn't
6 believe you would have been a sterling character
7 reference; is that correct?

8 A. Probably.

9 Q. But you would have testified you knew him to be a
10 bright individual; correct?

11 A. Uh-huh. Correct.

12 Q. And never believed him to be a threat to anyone?

13 A. Correct.

14 Q. You had moved to Silverdale, Washington at some
15 point?

16 A. Correct.

17 Q. When was that?

18 A. '94, I believe.

19 Q. You would have testified that, as you did today,
20 that he was very protective of you --

21 A. Uh-huh.

22 Q. -- if asked?

23 A. Correct.

24 Q. You would have testified that having known him at
25 age 17 or 18, as you've indicated, that he was a typical

1 17-year old?

2 A. Typical 17-year old boy.

3 Q. So impulsive at times?

4 A. Impulsive.

5 Q. But also reserved and of a gentle nature?

6 A. Uh-huh.

7 Q. You would have also testified that Tawny liked
8 you --

9 A. Uh-huh.

10 Q. -- despite her hard exterior perhaps?

11 A. Uh-huh. All the parents liked me.

12 Q. But you really after 1990 have no idea what kind
13 of a life he was living after that?

14 A. Correct. The last time I saw him was 1990.

15 MR. MONTECALVO: May I have a moment, Your Honor?

16 JUDGE HARDT: Yes.

17 MR. MONTECALVO: No other questions, Your Honor.

18 JUDGE HARDT: Redirect.

19 MR. KALIL: If I can just have a moment, Your
20 Honor.

21 MR. KALIL: Nothing further, Your Honor.

22 JUDGE HARDT: Thank you, Ms. Johnson. You may be
23 excused.

24 Folks, it is almost 5:00 o'clock. The hearing
25 will be continued to August 11, 2010, at 9 o'clock.

IN THE CIRCUIT COURT OF THE TWENTIETH JUDICIAL CIRCUIT
IN AND FOR COLLIER COUNTY, FLORIDA, CRIMINAL DIVISION

STATE OF FLORIDA,

ORIGINAL

Plaintiff,

vs.

CASE NO. ~~9~~5-2284-CFA

BRANDY JENNINGS,

Defendant.

HEARING BEFORE: The Honorable Frederick Hardt
DATE: August 11, 2010
TIME: 9:00 a.m. to 11:45 a.m.
LOCATION: Collier County Courthouse
Naples, Florida
TAKEN BY: Counsel for Defendant
REPORTER: Theresa Schiff, RPR/CRR/CSR (WI)

BY _____ D.C.

CLERK OF COURTS

2010 SEP -3 AM 10:33

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COLLIER COUNTY, FLORIDA

1 asked of him. He would not elaborate generally on
2 specific incidents of abuse.

3 BY MR. KALIL:

4 Q Okay. Is that response something that would be
5 typical in your experience of somebody who was an abuse
6 survivor?

7 A Quite.

8 Q In addition to meeting with Mr. Jennings, did
9 you conduct any interviews of any collateral witnesses
10 or individuals?

11 A I did. I met with Brandy Jennings' mother,
12 Tawny Jennings, for about two hours on May 26th of 2005.
13 I have had informal interviews and discussions with the
14 investigators who've been working on Mr. Jennings' case
15 during the last ten years. There have been several of
16 them. I spoke on the telephone with Dr. Hyman
17 Eisenstein a couple of months ago about his
18 neuropsychological findings. And I conducted some
19 telephone interviews quite recently with some family
20 members and people close to Mr. Jennings when he was a
21 young person.

22 Q Did you have any information about
23 Mr. Jennings' father?

24 A Conflicting information about his father. He's
25 named in the school records and described as a man by

1 Q We can talk about them, but generally speaking
2 did you find that the collateral sources of information
3 were better, perhaps more consistent with one another
4 than Mr. Jennings' version of his history?

5 A Certainly.

6 Q Let me ask you about the people that you spoke
7 to most recently, one of them I believe -- well, if you
8 can tell the Court whom they were if you haven't
9 already.

10 A I don't think I have. I spoke with Ms. Alice
11 Clark who was an older sister to Tawny Jennings; in
12 fact, she was part of the sibling group that was removed
13 from the family home in 1939. Ms. Clark is 87 at this
14 point. She's 87 years old.

15 I spoke with Sherman Jennings who is also an
16 older brother to Tawny Jennings but was in the lower
17 half of the sibling group. He was not in the group that
18 was removed from the home. I spoke with Lois Lara, who
19 is the daughter of one of the oldest children in that
20 sibling group, so she is a first cousin to Brandy
21 Jennings.

22 I spoke with Patricia Scudder, who was also a
23 daughter of one of the oldest siblings. In fact -- no
24 he was the second, I think. John Harris, Senior, is his
25 father. He was one of the two children in the Jennings'

1 household who is, I think, a half sibling. Was born out
2 of wedlock, I think, to Tawny Jennings' mother before
3 Mr. and Mrs. Jennings got married. I spoke with her.

4 And I spoke briefly with Tasha Van Brocklin.
5 She was a contemporary of Brandy Jennings and someone
6 who knew a good bit about his substance abuse history.

7 Q All right. Let me ask you first about Tasha
8 Van Brocklin. What was she able to relate to you
9 regarding Mr. Jennings' substance abuse history?

10 A She was witness to and participant with
11 Mr. Jennings in a great deal of substance abuse when
12 they were together. They smoked a great deal of
13 marijuana. They were drunk quite a lot. And she and he
14 ingested LSD together. She described his LSD ingestion
15 as extreme, as well as his alcohol usage. She described
16 Mr. Jennings as needing to drink, seemed to her, more
17 than anybody else in the room.

18 Q Now, in talking to the additional witnesses
19 that you spoke to that were family members, were you
20 able to reach any opinion as to Mr. Jennings' familiar
21 history that were significant to you as a psychologist?

22 A I think one thing that was particularly
23 noteworthy was the consistency of the stories told by
24 the relatives. Taken as a group these relatives
25 describe a family environment for the generation of

1 Brandy Jennings' mother, Tawny, of extreme poverty and
2 neglect. As I've said earlier, many of the older
3 siblings were removed permanently from the home and
4 placed in foster homes or adopted. The youngest
5 children were adopted out. The boys at that time were
6 quite young, eight or ten years old, but already showing
7 very serious delinquent behaviors and they were put in
8 what's called a boys' home. I don't know what was a
9 boys' home in 1939, but that's what it was called at
10 that time.

11 In this family the father never worked, so
12 we're talking about Brandy Jennings' maternal
13 grandfather. He was overtly sexual with the siblings,
14 with the girls. Some of the people that I talked with
15 witnessed sexuality, sexual gestures between this
16 grandfather of Brandy Jennings and his daughters.

17 One of the older sons, who's name was also
18 George Jennings, was a molester of Tawny Jennings, some
19 of Tawny Jennings' cousins. Sexual abuse using children
20 for the purposes of sexual exploitation, sometimes in a
21 coercive way but rather often in a very, very violent
22 way was pervasive throughout the family. So I actually
23 put these people through a lot of psychological stress
24 by asking them to recall for me their own sexual abuse
25 histories, as a way of helping me understand the

1 environment in which Brandy Jennings grew up.

2 There was -- the man I referred to earlier,
3 Walter Crume, who also was involved in the family. In
4 fact, he winds up marrying the sister of one of the
5 women that I spoke with, Patricia Scudder. And
6 Mr. Crume, too, babysat for Brandy Jennings, as did the
7 grandfather. So Brandy Jennings was exposed to these
8 people all the time, and molested many, many of the
9 children in the extended families -- neighbors, children
10 in the house, even infant children he was witnessed
11 massaging the genitals of infant children as well.

12 The maternal uncle, George Jennings, was also
13 around the family a lot. This is one of the rapists of
14 Tawny Jennings. And he was around Brandy Jennings a
15 good bit. These people witnessed Brandy Jennings
16 sitting in his lap often.

17 Q Now, with regard to the grandparents of
18 Mr. Jennings and Mr. Jennings' mother, how did those
19 experiences have any effect on Mr. Jennings?

20 A Well, taken together in an atmosphere where
21 Brandy Jennings grew up, where his mother was frequently
22 intoxicated -- sometimes on prescription medication,
23 sometimes on alcohol, sometimes both -- given the level
24 of disregulation in the family, the sexualization of
25 children, the impulse control that is simply not there.

1 testing at that time?

2 A I did not. I reviewed school records in
3 Dr. Masterson's report, again. And Mr. Jennings
4 clearly, by the way he functions and what I observed in
5 interviewing him, has an above average intelligence.

6 Q You're not a neuropsychological or you don't
7 have an expertise in neuropsychology?

8 A I do not.

9 Q And just briefly, about the witnesses that you
10 spoke to in person, were these people also cooperative
11 and forthcoming with you when you spoke to them?

12 A Let me separate out cooperative from
13 forthcoming.

14 Q Okay.

15 A They were all on the surface cooperative.
16 Sherman Jennings was not forthcoming in his manner. He
17 was willing in the sense that he was cooperative with me
18 asking him questions, but he was pretty clearly
19 emotionally disturbed by the content of what we were
20 talking about, so he was pretty reticent.

21 THE COURT: Can you help me with something; who
22 is Sherman Jennings? I forgot. I'm not sure that
23 was put in the record before.

24 BY MR. KALIL:

25 Q There were two Sherman Jennings and, Doctor,

1 maybe you can tell the familiar relationship of the
2 Sherman Jennings you were referring to.

3 A Yes. The Sherman Jennings I spoke with was an
4 older brother to Tawny Jennings. He was one of the
5 younger children in this large, large family that was
6 the grandparents' generation.

7 THE COURT: The defendant's uncle?

8 THE WITNESS: Yes, it would be the defendant's
9 maternal uncle.

10 THE COURT: All right. You say there's another
11 Sherman Jennings?

12 MR. KALIL: There was another Sherman Jennings
13 in other testimony, but this is a different Sherman
14 Jennings that was testified to before.

15 THE COURT: Thank you.

16 BY MR. KALIL:

17 Q All right. Now, as a result, the end product
18 of the work that you performed on the case, did you
19 reach any opinion as to whether or not Mr. Jennings can
20 be diagnosed under any diagnostic criteria of the
21 DSM-IV?

22 A I think the diagnostic category that he would
23 fit into, according to our latest diagnostic manual,
24 would be intermittent explosive disorder, which in the
25 new category system is a subcategory of impulse control

1 Q Is it your opinion that Mr. Jennings suffers
2 from any major mental illness?

3 A No.

4 Q You've testified in Florida in death penalty
5 cases before, I think you've stated. You're familiar
6 with the Florida Mental Health mitigating factors under
7 the Florida Statutes?

8 A Yes.

9 Q Did you reach any opinion as to whether or not
10 Mr. Jennings met any of the statutory mental health
11 mitigating factors in your opinion?

12 A I did not reach such an opinion. Basically it
13 was my opinion that he did not meet the standards for
14 those statutory mitigators.

15 Q Do you have an opinion as to whether or not any
16 of these other factors that we've discussed today are
17 mitigating?

18 A I think they're all quite mitigating to the
19 extent that mitigation means things that occurred in the
20 history of the person or the circumstances of the person
21 or the psychological state of the person that would have
22 influenced his behavior at the time of the offense. I
23 think Brandy Jennings is quite a damaged person. And I
24 think that he operates in the world or has operated at
25 that time in the world in a highly dysfunctional way.

1 get into bars and things of that nature -- we didn't go
2 to bars a whole lot together. I was hanging out with
3 some other guys that -- my roommates at the time and
4 Brandy had, you know, of course, his own friends as
5 well, you know, so now and again we might go to a bar.
6 Might find each other at a bar or go to a bar together.

7 Q Before you were old enough to get into bars,
8 did you go out together?

9 A Well, yeah, just hanging out, driving around
10 and stuff.

11 Q Was Mr. Jennings a drinker?

12 A Yes.

13 Q What did he drink?

14 A Beer.

15 Q How often would he drink beer?

16 A I imagine as often as possible, just like most
17 of us did.

18 Q Was it every day?

19 A It very well could have been, yeah.

20 Q How much would he drink whenever he would have
21 a beer?

22 A I don't know. Never really kept up with it.
23 About as much as anybody else would, you know. As long
24 as there was beer around, you know, you always had one
25 in your hand.

1 Q So he would generally always have a beer in his
2 hand?

3 A Not 90 percent of the time, no, but usually in
4 the evenings.

5 Q So in the evenings he would have a beer in his
6 hand?

7 A Sure.

8 Q Did Mr. Jennings use drugs?

9 A Yes.

10 Q Which drugs did he use?

11 A Marijuana.

12 Q Did he use any other drugs?

13 A To my knowledge, I think we've done acid, and
14 other than that, I think that was -- maybe mushrooms or
15 something like that.

16 Q You said that he used marijuana. How often
17 would you use marijuana?

18 A Often.

19 Q Often as in daily?

20 A Yeah -- well, pretty much, yeah.

21 Q Would he use marijuana when he was drinking?

22 A Yes.

23 Q Was that normal for him to do?

24 A Um-hmm.

25 THE COURT: Yes?

1 THE WITNESS: Yes.

2 BY MS. HURWOOD:

3 Q And how much would he use?

4 A Oh, I couldn't tell you. He smoked a joint,
5 and then that's pretty much it, you know, until hours
6 later I guess.

7 Q Okay. Would he smoke another one later then?

8 A Well, yeah.

9 Q And you also mentioned that he would use acid?

10 A Yes.

11 Q How often would he use acid?

12 A Oh, it wasn't that often, just every now and
13 again. Sometimes it would just come around the area,
14 you know, and you got it then, and then afterwards, it
15 was pretty much done until it would come around the area
16 again, you know.

17 Q So is it fair to say that if he had access to
18 acid, he would use it?

19 A Yes.

20 Q And you also mentioned that he would use
21 mushrooms?

22 A Yes.

23 Q How much -- well, how often would he use
24 mushrooms?

25 A I'd say during the season, which is probably in

1 the spring time, maybe once a month. I would probably
2 say even a total of maybe two or three times a year, if
3 that.

4 Q You said the mushrooms are seasonal?

5 A Yes.

6 Q So would it be fair to say if he had access to
7 mushrooms, then he would use those?

8 A Yes.

9 Q And to your knowledge, did his mom know about
10 his drug use?

11 A To my knowledge, she did, yes.

12 Q Did she also know about his drinking?

13 A Yes.

14 Q Would you describe Brandy as aggressive?

15 A Not unless provoked.

16 Q Was he tolerant of people?

17 A Yes. He's very patient.

18 Q Did you ever see him get angry?

19 A Yes, of course.

20 Q Was he quick to get angry?

21 A It depended on the circumstances. If it was
22 something that was senseless, yes, he was impatient
23 about that, yes.

24 Q Can you describe what made him angry, what
25 sorts of things made him angry?

1 A Someone lying, someone stealing, somebody
2 trying to manipulate him or somebody that he cared
3 about.

4 Q Did you ever see him get into fights?

5 A Me personally, no.

6 Q Did you ever meet Jason Graves?

7 A Yes.

8 Q How would you describe him?

9 A Young, cocky, not, in my opinion, very bright,
10 but always eager to prove himself.

11 Q Did you ever hang out with him?

12 A Not regularly, no.

13 Q Why not?

14 A Well, for one, they lived in Naples and I lived
15 in Fort Myers, so when I did see them, it was on a brief
16 visit situation when I was visiting Brandy or if he came
17 to visit me and Jason happened to be with him. So it
18 wasn't very often at all that I would hang out with him.

19 Q One moment.

20 (Short pause in proceedings.)

21 BY MS. HURWOOD:

22 Q I want to go back for just a moment and we were
23 talking about Mr. Jennings' mother, and you were saying
24 that she liked to go out and have her own fun was your
25 testimony. And would you say that they were more like

1 Q Was he over the age of 21 when you saw that?

2 A No, not always.

3 Q Were you over the age of 21?

4 A No.

5 Q You indicated that you considered Jason Graves
6 to be young, cocky and not very bright?

7 A Exactly.

8 Q Would you describe Brandy Jennings in the same
9 way?

10 A Actually, I would describe Brandy as young,
11 cocky -- he's pretty intelligent, but he can be -- not
12 very bright side sometimes as well.

13 Q You would consider him brighter than Jason
14 though?

15 A Definitely.

16 MR. MONTECALVO: A moment, Your Honor.

17 (Short pause in proceedings.)

18 MR. MONTECALVO: Nothing further, Your Honor.

19 THE COURT: All right. Redirect.

20 MS. HURWOOD: One moment, Your Honor. Nothing
21 further, Your Honor.

22 THE COURT: Mr. McBride, thank you very much.
23 You may be excused.

24 (Witness stepped down.)

25 THE COURT: Please call your next witness.

1 A Give or -- yes. Yes.

2 Q And that would have been Fort Myers and in
3 Naples?

4 A Um-hmm.

5 THE COURT: Yes?

6 THE WITNESS: Yes.

7 BY MS. HURWOOD:

8 Q Did you spend time together while you were
9 living together other than being just roommates?

10 A Going out and stuff like that, yes.

11 Q How often did you go out together?

12 A Probably about three times a week.

13 Q And what would you do when you went out
14 together?

15 A I would go to pool -- shoot pool and stuff like
16 that. Play games and stuff.

17 Q Would you go to bars?

18 A Yes.

19 Q Would you go to house parties?

20 A Yes.

21 Q Was Mr. Jennings a drinker?

22 A Yes.

23 Q What did he drink?

24 A He was -- just about anything that you could
25 put in his hands.

1 Q So he would drink beer?

2 A Yes. Liquor. Everything, yes. Wine.

3 Q Any liquor?

4 A Yes.

5 Q How often would he drink?

6 A I'd say probably about just about every day.

7 Q How much would he drink whenever he drank?

8 A If we had the money, he would drink just about
9 everybody under the table.

10 Q When you say "under the table," could you
11 describe that?

12 A Let's say he'd probably drink about an 18-pack
13 by himself.

14 THE COURT: Sorry, sir, what?

15 THE WITNESS: 18-pack by himself.

16 BY MS. HURWOOD:

17 Q An 18-pack of beer?

18 A Yes.

19 Q And what about liquor?

20 A He'd drink about -- I've seen him down a fifth
21 before.

22 Q A fifth?

23 A A fifth of liquor.

24 Q And was this normal behavior?

25 A Not normal, no.

1 Q It was regular behavior?

2 A He would drink it by himself quite a few times,
3 yes.

4 Q Did Mr. Jennings also use drugs?

5 A Yes.

6 Q What drugs did he use?

7 A He did acid and we had -- and I don't know if
8 he did coke with me before, but we've probably done some
9 of that too.

10 Q How often would he smoke marijuana?

11 A Every day.

12 THE COURT: I'm sorry, sir?

13 THE WITNESS: Every day.

14 BY MS. HURWOOD:

15 Q Would this go along with his drinking alcohol?

16 A Yes.

17 Q How much pot -- how much marijuana would he
18 smoke?

19 A About three or four joints.

20 Q In one day?

21 A Yes.

22 Q And you also said that he used acid?

23 A Yes.

24 Q How often would he use acid?

25 A As much as we could get it. That's probably

1 about -- probably about once a week.

2 Q And how much would he use at a time?

3 A He took two hits.

4 Q Is two hits a lot?

5 A Oh, yes.

6 Q Would he also use mushrooms?

7 A Yes, we went shrooming a couple of times.

8 Q What does "shrooming" mean?

9 A Picking the mushrooms out of the field and
10 eating them.

11 Q From a field, like a pasture?

12 A Yes.

13 Q Okay.

14 A Cow patties. Cow crap. You had to go in a
15 field and pick it up.

16 Q How often would he use mushrooms?

17 A I haven't made a trip -- probably about once a
18 month.

19 Q And how much of the mushrooms would he use?

20 A I seen him eat about probably about eight.

21 Q Is that a lot?

22 A If you get them strong, yes.

23 Q Okay. So is it fair to say that if he had
24 access to these drugs, he would use them?

25 A Yes.

1 Q And was this behavior when you lived together
2 in Fort Myers and in Naples?

3 A Yes.

4 Q Did you ever see Mr. Jennings get angry?

5 A Yes.

6 Q Was he quick to get angry?

7 A No, not really.

8 Q Did he have a temper?

9 A Yes.

10 Q What sort of temper did he have?

11 A He'd definitely tell you to back off when you
12 need to back off.

13 Q What sort of things would make him angry to say
14 that?

15 A Somebody messing with one of his friends or
16 something like that or talking about his mother. Just
17 general, you know, just talking about his friends and
18 his mother.

19 Q Did you see him get angry often?

20 A Not really, not often, but I have seen him
21 couple of times get angry.

22 Q Can you describe an incident where he got
23 angry?

24 A Picked a guy up named Benny and tossed him on
25 the floor.

1 Q And why did he do this?

2 A I'm not clear about that.

3 Q Did you ever meet Jason Graves?

4 A Yes.

5 Q Can you describe him?

6 A Crazy.

7 Q I'm sorry, what?

8 A Crazy.

9 Q Is there any other way you would describe him?

10 A Not right in the head.

11 MS. HURWOOD: One moment, Your Honor.

12 THE COURT: All right.

13 MS. HURWOOD: Nothing further, Your Honor.

14 THE COURT: Okay. Mr. Montecalov.

15 CROSS-EXAMINATION

16 BY MR. MONTECALVO:

17 Q Mr. Martin, these incidents of extensive drug
18 use that you've testified to on behalf of Mr. Jennings,
19 when was this occurring?

20 A When was this occurring?

21 Q Yeah.

22 A When we were living in the Boardwalk Apartments
23 and the apartments in Naples.

24 Q So that would have been North Gate after
25 October of 1993?