IN THE SUPREME COURT OF FLORIDA

JAMES PHILLIP BARNES,

Case No. SC08-63

Appellant,

v.

STATE OF FLORIDA,

Appellee.

____________________/

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

ANSWER BRIEF OF APPELLEE

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CHRONOLOGY

Because this case spans two decades, the State offers the following chronology to assist this Court:

October 27, 1987: Barnes released on parole;

April 20, 1988: Patricia Miller, the victim in the present case, murdered; Barnes is a suspect but is not charged;

December 11, 1997: Barnes murders his wife, Lynn Barnes;

January 9, 1998: Barnes pleads to the murder of his wife;

1998: DNA match to Barnes in Miller murder;

1998: Barnes refuses to talk about Miller murder when deputies visit him in prison;

October 10, 2005: Barnes writes to Assistant State Attorney Michael Hunt;

November 1, 2005: Barnes interviewed in jail by inmate Sherman Insco;

December 7, 2005: Barnes' second letter to ASA Hunt;

December 21, 2005: Barnes' third letter to ASA Hunt;

April 18, 2006: Barnes Indicted for Miller murder;

April 27, 2006: First appearance; Barnes waives counsel and demands speedy trial;

May 2, 2006: State announces it is seeking death penalty; Barnes asserts right to self-representation; judge conducts Faretta hearing; Barnes enters guilty plea as charged and waives advisory jury recommendation;

May 11, 2006: Trial judge orders PSI and appoints Dr. Riebsame to do a psychological evaluation;

May 25, 2006: Barnes agrees he wrote three letters to ASA Michael Hunt;

. . . [1]

January 22-26, 2007: Penalty Phase; Barnes refuses to present mitigation;

February 7, 2007: Trial judge appoints Sam Baxter Bardwell as court counsel to develop mitigation;

February 9, 2007: Barnes objects to Bardwell preparing mitigation;

. . . [2]

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[1] A series of status hearings were held during this time as follows: June 19, 2006; July 6, 2006; August 17, 2006; December 6, 2006; January 4, 2007; January 8, 2007; and January 17, 2007. On January 12, 2007, Barnes moved to have Dr. Riebsame's report stricken; the State says it does not intend to present the report; Judge ruled she would not consider Dr. Riebsame's report.

[2] The trial judge held a series of status hearings as follows:

March 15, 2007: Barnes cooperated in giving family background information to Bardwell investigator, Terry Sirois; Barnes objects to the PSI;

April 12, 2007: Trial court rules she will inspect Barnes medical records *in camera;*

April 17, 2007: PSI to be completed by May 17;

May 15, 2007: Bardwell stated potential mitigation witnesses were reluctant to testify;

May 30, 2007: Barnes requests a copy of PSI and DOC records:

June 8, 2007: Trial court informed that Barnes refused to speak to Dr.

August 16, 2007: Motion to Withdraw Plea;

September 10, 2007: Order denying Motion to Withdraw Plea;

November 16, 2007: *Spencer* hearing;

December 13, 2007: Sentencing hearing

. . . [3]

STATEMENT OF THE CASE AND FACTS

Barnes raped and murdered Patricia Miller on April 20, 1988. He then set her apartment on fire. Barnes was a suspect but was not indicted until 2006 after DNA

Riebsame;

June 15, 2007: Trial court reserved ruling on Barnes' motion to bar the use of hearsay at the penalty phase and denied Barnes motion to strike Bardwell's witness list. Bardwell will provide the State and Barnes with any witnesses' names or documents he will present at the penalty phase;

August 29, 2007: Court reserved ruling on Barnes pending motions presented;

September 26, 2007: Barnes requests copies of expert reports from Drs. Greenblum and Danziger; Barnes makes *ore tenus* motion to disqualify the judge; Barnes informed he must file a written motion within ten (10) days; Barnes moves to strike the PSI;

November 2, 2007: Motion to Disqualify Trial Judge filed;

November 16, 2007: Order denying Motion to Disqualify Trial Judge.

[3] The trial judge held several scheduling hearings before sentencing: November 28, 2007; December 10, 2007; and December 11, 2007.

technology pointed to him and he wrote letters to Assistant State Attorney Michael Hunt, confessing to Miller's murder. Barnes was indicted April 18, 2006. The five-count indictment charged Barnes with:

1. First Degree Premeditated Murder;
2. Burglary of Dwelling with an Assault or Battery;
3. Sexual Battery by Use or Threat of Deadly Weapon;
4. Sexual Battery by Use of Threat of Deadly Weapon; and
5. Arson of a Dwelling.

(V8, R1454-55).

At his first appearance on April 27, 2006, Barnes told the judge that he intended to file a demand for speedy trial and waive counsel. (V1, R5). He asked for a *Faretta*[4] hearing, which the first appearance judge said would be conducted by the assigned judge on May 2. (V1, R5). Apparently, the documents Barnes referred to were (1) Demand for Speedy trial, and (2) Defendant's Waiver of Representation of Counsel, which he mailed on April 26 from Florida State Prison and were received by the Brevard County clerk on May 1. (V8, R1471-72, R1473-74).

On May 2, 2006, Barnes was advised of the charges against him. (V1, R12-13). The prosecutor advised the State was seeking the death penalty on the first-degree

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

murder charge. (V1, R12). Barnes had a waiver of representation by counsel that he asked to file. (V1, R14; V8, R1476-78). Because Barnes had waived counsel at first appearance, the judge appointed Ms. Riewe as standby counsel for the proceedings. (V1, R14-15). Barnes said he was under the impression he would be arraigned that day, and he wanted to enter a guilty plea and waive the advisory jury "and let the Court sentence me as they so choose either to life of death." (V1, R16). The prosecutor recited the background of the case; i.e, that Barnes he had killed his wife in 1997, plead, and was sentenced to life imprisonment. In 2005, he was indicted on a second murder, for which he was before the court. (V1, R17-18).

The trial judge conducted a complete *Faretta* hearing. (V1, R19-33). Barnes had been a certified law clerk designated by the Department of Corrections since 1980. (V1, R20). He had been through a jury trial in 1985 in Oklahoma when he was charged with aggravated assault. (V1, R21). Barnes had never been treated for mental illness, but had read the Diagnostic and Statistical Manual and believed he was a borderline personality disorder according to a matrix. (V1, R22). He stated that his strategy was to represent himself because that was one of the rights he had. (V1, R26-27). When the judge asked him what his goal was, he said "Facing the death penalty, ma'am." (V1, R27). Barnes was aware this was a death penalty case which required lawyers to have certain experience. (V1, R29). He was advised by the court that "at every stage of the proceedings" he would have standby counsel to assist him in representing himself.

(V1, R32). After the *Faretta* hearing, the trial judge found Barnes "extremely competent" to knowingly and voluntarily exercise his right to waive counsel. (V1, R 34, 37).

Barnes said he was ready to enter a plea right then. (V1, R36). He wanted to plead guilty on all five counts. (V1, R37-38). The State established the factual basis. (V1, R40-42). The trial judge conducted a full plea colloquy, accepted the pleas, and adjudicated Barnes guilty. (V1, R45-51). Included in the colloquy was advisement that Barnes could receive the death penalty and that the next phase would be the penalty phase. (V1, R49-51). Barnes stated that he understood that the court could sentence him to life or death. (V1, R49).

Barnes next stated that he would like to waive the advisory jury. (V1, R52). He wanted to waive the assistance of counsel for the penalty phase, also. (V1, R53). The trial judge explained the ramifications of waiving the advisory jury. (V1, R55). Barnes said he did not intend to bring in any witnesses as far as mitigating circumstances and "the only thing I have is myself." (V1, R57). The trial court told Barnes that it must be apprised of mitigation. (V1, R57). Barnes did not want counsel appointed because it was part of his strategy and he "believe(s) I have something in mind." (V1, R58). The trial court said that it wanted to have an evidentiary hearing so it could determine whether it needed to appoint any attorney because "I need to follow the statute. The statute says I must consider any mitigating circumstances." (V1, R48). The court

granted Barnes' waiver of an advisory jury at the penalty phase. (V1, R60). She advised Barnes the evidentiary hearing regarding the penalty phase would be set for July 18-20. Standby counsel would be present. (V1, R60-61). Standby counsel Riewe said she was not "technically qualified" to be standby counsel for the penalty phase. (V1, R60-61). A hearing to determine who would be standby counsel was set for May 11, 2006.

On May 11, 2006, Barnes declined to have an attorney appointed to him. (V1, R66). The State filed a motion for a DNA sample. (V1, R66). Barnes said he would provide the sample upon request. (V1, R67). The court stated it wanted to appoint standby counsel for the hearing and re-convene in the afternoon. (V1, R67). John Moore, Office of the Public Defender, was appointed as standby counsel to assist Barnes in responding to the motion. (V1, R67). Moore said Barnes was "pretty clear" that Moore was to have "no role" in assisting Barnes in his response to the State's motion. (V1, R69). Barnes consented to the State's motion, stating that he was already in the State's database. (V1, R69-70).

On May 11, 2006, the court ordered a pre-sentence investigation ("PSI") and issued an order for school records. The court appointed Dr. Riebsame to administer a psychological evaluation. (V1, R72, 75). Barnes said he would refuse to speak to a psychologist. (V1, R72). The court said it would not force Barnes to do anything, but that it was making the "opportunity available to you." (V1, R72-73). The court further

advised Barnes that if it was not receiving information satisfactorily, she was going to have a "Mohammed" hearing to determine whether an independent attorney was needed for mitigation. (V1, R73). Barnes said he had the *Muhammad*[5] case but seemed to be missing pages. (V1, R73). The court assured him it would provide all pages of the case. (V1, R73). The judge set the next hearing and asked that Dr. Riebsame be present. (V1, R75).

On May 25, 2006, Dr. Riebsame appeared telephonically. (V1, R82). The trial court explained to Dr. Riebsame that Barnes had pled and was facing the death penalty, that it needed to examine all mitigation, and that the court was not sure Barnes would cooperate with a psychological evaluation. (V1, R83). The judge noted that this was a mitigation evaluation, not a competency evaluation because there was "no reason to believe that he is incompetent." (V1, R84). The court ordered the State to provide Dr. Riebsame with discovery documents pertaining to Barnes. (V1, R86). Barnes quoted "*Estelle v. Smith*," stating that he could not be compelled to respond to a psychiatrist because that is "part of my strategy." (V1, 86-87). Dr. Riebsame was to provide the court with a psychological evaluation prior to the scheduled penalty phase on July 18-20. (V1, R87). The trial judge once again offered Barnes the assistance of an attorney. He declined the offer. (V1, R90).

Nancy Boyatt, probation officer, also appeared telephonically. (V1, R91).

[5] *Muhammad v. State*, 782 So. 2d 343 (Fla. 2001).

Barnes refused to cooperate when Boyatt tried to interview him the previous Friday. (V1, R92). The judge asked that a report be prepared by July 18. (V1, R92). The judge ordered the State to allow the probation officer access to any records in the State's possession. (V1, R93). Cmdr. Jeter also appeared telephonically, and the judge explored Barnes' complaints about access to the law library. (V1, R95-97). Barnes indicated that any problems had been resolved. (V1, R97). The prosecutor also advised the jail commander that he had a "banker's box" of discovery to give Barnes. There were also DVD's and a videotape. (V1, R99). The jail commander made arrangements for Barnes to have the materials at the jail. (V1, R103).

Barnes acknowledged that he had written three letters in the State's possession. (V1, R105). The letters were dated October 10, 2005; December 8, 2005; and December 21, 2005. All letters were addressed to Michael Hunt at the Office of the State Attorney. (V1, R106-107).

On June 19, 2006, the penalty phase was rescheduled to the week of August 28 because Dr. Riebsame was unavailable. (V1, R113). The trial judge repeated the offer of counsel, and Barnes declined. (V1, R115-116).

The State moved to reschedule the penalty phase a second time because the victim's family wanted to attend. (V1, R142). The penalty phase was rescheduled for the week of January 22, 2007. (V1, R146).

In the meantime, Barnes' Motion for Independent DNA Testing was heard

August 17, 2006. (V1, R166). Barnes again declined appointment of counsel. (V1, R153). Barnes learned though discovery that the State conducted DNA tests in this case in 1998. Results indicated Barnes was involved. (V1, R166). Barnes wanted his own DNA expert to explain to him exactly what the results meant. (V1, R167). Barnes' strategy was that he initiated the contact with the State which led to his plea on the charges. Thus, the conviction was not instigated by the DNA results, but by him. (V1, R167). The trial court explained that it was her understanding that the State never contested the fact that Barnes contacted the State, and without that contact they would not have arrested him. (V1, R168). The prosecutor confirmed that they had a DNA result in 1998, but it was the letters to Mr. Hunt and Barnes coming forward which were the "catalyst in this prosecution." (V1, R169-70). Notwithstanding, the State was not ready to concede that "but for" Barnes' contact with the State, they could not have arrested him. (V1, R169).

Barnes said he was prepared for the sentencing phase right then and did not want a delay. (V1, R171). However, if the proceedings were delayed until January 22, he intended to file "as many motions that I can . . . I think there's a total of 22 or 25 that I can file." He acknowledged that, by giving him the *Muhammad* case, the court needed to examine mitigation. (V1, R171). Barnes said he was prepared "right now" for the penalty phase but the State was not. (V1, R171). Barnes did not believe he needed independent counsel to present mitigation. (V1, R172). Insofar as the independent

DNA testing, the State did not oppose Barnes "doing anything he believes is necessary for his presentation of mitigation." (V1, R172-173). The court granted Barnes' motion for independent DNA testing to be completed by a certified agency. (V1, R173).

Dale Gilmore, Wuesthoff laboratories, was trying to determine whether there was enough DNA from the swab sample left on the slide to be retested. (V1, R181). In the meantime, Barnes had filed a series of death penalty motions. (V1, R183).

Barnes' motions were heard January 4, 2007. Before the hearing, the trial judge swore the defendant and conducted a second *Faretta* hearing. (V2, R195-200). Barnes was allowed to continue to represent himself with Mr. Moore as standby counsel. (V2, R200).

With permission of the court, the State was allowed to call the witnesses who were standing by for the various hearings. (V2, R202). Dale Gilmore, DNA supervisor at Wuesthoff laboratories, had conducted DNA testing in Barnes' case. (V2, R205). He had evaluated the evidence and said there were two smears that could possibly be tested for DNA. (V2, R206, 208). Gilmore believed it was possible DNA from spermatozoa could be obtained from the smears. (V2, R206). The court asked for the names of certified labs, and it was decided to use Orchid Cellmark. (V2, R216, 219).

Detective Dennis Nichols, Melbourne Police Department, testified to the requests in Barnes' motion for mitigating evidence. (V2, R220). Nichols said he was not aware of any taped interviews not previously provided to Barnes. (V2. R224).

Four books containing information related to the murder had been provided to the State and to Barnes. (V2, R224-225). Nichols was not aware of any surveillance tapes. (V2, R225). Nichols had provided all photographs to the State and defendant. (V2, R225-26). Property belonging to the victim had previously been returned to next of kin. (V2, R227). Updated witness information had been provided to the State and Barnes. (V2, R228). There was no record of how many man-hours had been logged regarding this case. Barnes requested various taped police interviews of potential penalty phase witnesses be transcribed. (V2, R246, 249). He claimed he had only received a few copies of taped interviews. (V2, R253).

The State agreed to send Barnes copies of all taped interviews in the possession of the Melbourne Police Department. (V2, R254). In addition, the State said that the Palm Bay Police Department did not have any surveillance tapes of Barnes. (V2, R259). The State agreed that: newspaper articles would not be used as evidence; Robert Bernard would not be called as a witness; evidence had been returned to the victim's family; updated addresses of witnesses would be provided to Barnes; names of law enforcement personnel that visited Barnes would be provided; copies of questions used to interview Barnes after his arrest would be provided; and any discovery that might be considered mitigation would be provided. (V2, R279-280). The court also heard various motions regarding the death penalty. (V2, R281-351).

One of Barnes' motions was to strike the PSI because *Crawford v. Washington,* 541 U.S. 36 (2004), precluded hearsay testimony at the penalty phase. (V2, R290). The trial judge stated that she could not rule on the entire PSI until she saw it. Certain portions could be testimonial; however, the judge could not "say blanketly the PSI is testimonial." (V2, R295). The judge reserved ruling on the issue and advised Barnes that if he had specific objections to the PSI, "we will go line by line and issue by issue and I will rule, but I can't make any ruling before me before reading the PSI." (V2, R296). Barnes believed the information in the PSI was not true and did not want the judge to review the document at all. (V2, R297).

Barnes had also argued his motion to declare Section 921.141(1) unconstitutional and bar hearsay evidence at the penalty phase. (V2, R307-316). Among the arguments was that hearsay violated *Crawford v. Washington.* (V2, R314). The motion was denied. (V2, R317). However, the judge noted that Barnes was free to object to any specific hearsay testimony he believed was testimonial. (V2, R317).

On January 8, 2007, the trial judge declared Barnes indigent for costs. Barnes continued to assert his right to self-representation. (V2, R356). The parties discussed the cost for Cellmark to conduct the DNA testing. (V2, R357). Barnes wanted the DNA report to go directly to him, and the trial judge ruled that it would. If Barnes intended to use the report, he would have to provide a copy to the State. (V2, R362). Barnes requested an expert that could explain a DNA report. (V2, R359-60).

On January 12, 2007, Barnes presented a motion to strike Dr. Riebsame's psychological assessment. (V2, R373). Barnes refused to be interviewed when Dr. Riebsame came to the jail. (V2, R373). The prosecutor advised the court that the State had no intention of introducing Dr. Riebsame's report or testimony at the penalty proceeding. (V2, R374). The court struck Dr. Riebsame's assessment. (V2, R377). Barnes then asked to confer with either Dr. David Greenblum or Dr. Howard Bernstein as a confidential advisor. (V2, R378).[6]

On January 17, 2007, Barnes said he would not call a mental health expert on his behalf at the penalty phase. (V3, R386). Standby counsel Mr. Moore stated that DNA results would be available the following week. (V3, R387).

The penalty phase hearing took place January 22-26, 2007. At the beginning of the proceedings, the court conducted another *Faretta* hearing and allowed Barnes to continue to represent himself with Mr. Moore as standby counsel. (V3, R398-404). Barnes presented several motions, and the parties discussed the applicable aggravating circumstances. (V3, R410-428).

The State called four witnesses: Sgt. Nichols and Lt. Goodyear, Melbourne Police Department; Detective Castrillo, Brevard County Sheriff's Office; John Cizmadia, State Attorney investigator; Dr. Sajie Qaisar, Medical Examiner; and Dale

[6] Barnes later retracted this request. (V5, R851).

Gilmore, Wuesthoff Laboratory.

Sgt. Nichols investigated the rape and murder of Patricia Miller, which occurred on April 20, 1988. (V3, R440, 453). Miller, a nurse, was found "nude, bound with her hands behind her back and burnt, lying on the bed." (V3, R446). Firefighting personnel had been at the crime scene before Nichols arrived. (V3, R445). The victim's hands were bound with shoelaces, a fact that was not made public. (V3, R452-53). The DVD video, State Exhibit 4, showed the victim's stethoscope hanging on the back of her bedroom door, and basket-making materials located nearby. (V3, R447, 452). The DVD video was not disclosed to the media. (V3, R453). When later questioned by law enforcement, Barnes described seeing these undisclosed key pieces of evidence. (V3, R453).

Barnes was a suspect within the first week following the murder. He said he was not involved and had never been in Miller's apartment. He might have seen her on the beachside the month prior to her murder. (V3, R454). However, Barnes denied knowing Miller. (V3, R455).

Miller's murder went unsolved for many years. (V3, R458). Barnes objected to any hearsay testimony regarding DNA results, quoting "*Crawford*." (V3, R458-59). The State argued that the 1988 DNA results were not testimonial. (V3, R459). The trial judge requested a proffer, which the State provided. (V3, R460). Barnes stated that he was aware he had already pled to the charges, but that he was going to object to

"anything that's hearsay from now on." (V3, R460). The prosecutor stated that the lab technician who conducted the DNA testing, Dale Gilmore, would be brought in to testify. (V3, R461). Barnes withdrew his objection to the DNA. (V3, R462).

Det. Nichols testified that, due to technological advances in DNA testing, a sample was re-submitted to Wuesthoff Laboratories in 1998. (V3, R463).[7] When Wuesthoff tested the DNA from Miller's murder, it was determined "there had been a match as far as a contributor to the DNA, that being Mr. Barnes." (V3, R463). Sgt. Nichols and Sgt. Goodyear then traveled to where Barnes was incarcerated and attempted to interview him. (V3, R463). Barnes refused to speak with them. (V3, R464). The detectives did not tell Barnes what evidence they had. (V464).

Assistant State Attorney Michael Hunt prosecuted Barnes in 1997 when he killed his wife, Linda Barnes. (V3, R472). On October 10, 2005, Barnes wrote a letter to Hunt and stated the following:

> My Muslim brother Sherman Insco (Mustafa) has convinced me that I should confess an unresolved matter. This matter happened in 1988.
>
> I struggled with this and told him that Ramadan is a Holy month and it is a time of purification. That I will answer questions that he poses.
>
> I will agree to a video recorded interview with only Sherman Insco in the room after I am satisfied in my heart that his well being and safety is assured.

---

[7] Barnes had provided a blood sample in 1988. (V3, R462).

> Any attempts to pull me from an interview will end as previous attempts have. Visit terminated.
>
> The law enforcement personell (sic) who coordinate this interview may give him a questioaire (sic) and pull him from the room at any time and then send him back in.
>
> This agreement I've made with Sherman Insco ends on the last day of Ramadan1436. My silence is assured after Ramadan ends.
>
> I believe you should feel very appreciative towards Sherman Insco as he will save Brevard County and the State of Florida the cost of a trial.
>
> These are my terms to resolve this matter.
>
> James P. Barnes
>
> Post Script. I will also resolve other matters with you should you be interested, also through Sherman Insco.

(V3, 503-504; V13, R2098-2099; State Exh. 9).

On November 1, 2005, Barnes was interviewed at Columbia Correctional facility by inmate Sherman Insco. (V3, R 526). Hunt did not provide questions to Insco to be asked of Barnes. Barnes had instructed that law enforcement could send questions into the interview room, and that could be seen on the video. (V3, R516). Barnes established the ground rules for the interview. (V3, R517). Insco was not "coached" on how to conduct an interview. (V3, 517). He formed his question from having talked to Barnes so much. (V3, R518). The only police officer in the interview

room was the man who conducted the videotaping. (V3, R519).[8] The video was published to the court. (V4, R560-602; State Exhibit 15). Dets. Nichols and Lawson observed from another room. (V3, R468, 520).

There were no deals made with Inmate Insco. (V3, R505). Insco was not an agent for the State at any time. (V3, R506, 515). He was Barnes' agent and coordinated on Barnes' behalf. (V3, R506, 514). Hunt never solicited assistance from Insco. Barnes chose Insco to interview him. Hunt did not meet with Insco before the interview. (V3, R526). Hunt never promised Insco anything. Neither did Hunt provide information or directions for the interview. (V3, R526).

Insco was transferred to another DOC facility for safety reasons after he interviewed Barnes. (V3, R514- 515). Hunt had requested the transfer. (V3, R509-510). Insco did not receive any benefit from this transfer because he was not transferred where he requested. (V3, R514, 525). Insco sent Hunt a Rule 3.850 motion asking for help and asked about a reward. (V3, R522, 523). Hunt wrote Insco and told him there would be no deals. (V3, R531).

Sgt. Nichols was one of the officers who observed the interview between Insco and Barnes. (V3, R533-534). He did not solicit Insco to get any information from Barnes. (V3, R535). Barnes had previously agreed in writing that Dets. Nichols and

[8] Det. Emil Castrillo videotaped Barnes' discussion with Insco. (V3, R551). Castrillo was wearing identification which indicated he was law enforcement. (V4, R602).

Lawson could give Insco additional questions to ask Barnes. (V3, R539, 549). Barnes had refused to speak directly with Nichols. (V3, R541). There were no deals made with inmate Insco, and he did not benefit from assisting law enforcement. (V3, R525, 549). Det. Lawson never spoke to Insco outside Nichols' presence. (V3, R538). Det. Lawson did not tell Insco what to ask or tell him what information they were looking for. (V3, R539). At one point, Nichols wrote out some questions per Barnes' instructions in his letter. (V3, R539).

The videotape was published to the trial court and transcribed in the record.[9] (V4, R560-602). Barnes began with the statement:

> All right. (Inaudible) Mike, I've known you for a little more than four months and I've trusted you. I've talked to you about a matter that happened in Melbourne in 1988 and with your simple, righteous (Inaudible) gave a whole approach (Inaudible.). There are no questions you can ever ask of me that I will not answer in this holy month of Ramadan (Inaudible) beg for his forgiveness that he might purify our souls.

(V4, R561). Barnes then proceeded to describe the murder on Patricia Miller in April 1988 as follows:

- He entered the north window of a condominium at River Oaks;
- He was naked when he entered;
- He got a knife out of the kitchen;

[9] Barnes moved orally to suppress the interview. (V3, R463). After the video was played, the trial judge heard argument and denied the motion. (V4, R626-28).

- He caught the lady in her bathroom, took her in the bedroom, and raped her;

- He got some shoestrings off tennis shoes;

- He tied the lady up with her hands behind her back;

- He raped her again and tied a sheet up;

- He tried to strangle the lady, but “it didn’t happen;”

- He ended up beating her to death in the back of the head with a hammer;

- He went through her condo and took a bank card and wallet;

- He put all the items he touched inside a sack;

- He went outside and got a lighter and cigarette;

- He came back in through the front door and set the bed on fire;

- He got dressed and left;

- He realized he left the screen in the back yard, so he stopped and picked it up.

(V4, R560-62). Barnes remembered details of the victim’s condominium:

- The victim had a lot of jewelry in the bathroom;

- He did not take the jewelry because he didn’t want to get caught;

- There was a stethoscope on the bedroom door;

- The victim had basket weaving, “straw-type stuff” on her kitchen table;

- When he tried to strangle the victim, he removed a white terry cloth belt from a robe;

-

- When he first entered, the victim was watching TV and eating;

- There was a ten-speed bicycle in the bedroom;

- There was a pair of binoculars on the TV;

- The bedroom curtain was very large and didn't fit;

- There was a court paper about a divorce on the dishwasher;

- Hanging in the dining room was a palm frond-type "deal" made from the same material as that on the kitchen table;

- The terry cloth robe from which he took the belt was hanging on a hanger in the master bathroom hallway.

(V4, R563-65, 585).

Barnes went into the victim's condo with the intent of killing her. (V4, R584). Barnes was able to describe the exact position in which he left the victim. (V4, R566). When Barnes hit the victim in the head with the hammer it "definitely penetrated, contracted, broke the skull." He described the victim as being in "death throws," i.e.:

> That's when the whole body just goes through spasms, couldn't catch your breath or whatever and was dying.

(V4, R587).

Barnes used a kitchen towel to make sure he didn't leave any footprints. (V4, R593). He wiped off everything he touched. (V4, R593). After he left the condo, Barnes drove to Indialantic and disposed of the bag with the items he touched in the condo. (V4, R564). He tried to use the victim's ATM card, but it didn't work. (V4,

R577). He drove back by the condo on U.S. 1 “a couple times” and could smell the smoke and see the flashing lights. (V4, R591).

Barnes wrote to Hunt and arranged the interview because:

> And I figured that I might as well resolve this matter and I chose you to resolve this matter with. (Inaudible) and there’s a right way and wrong way to do anything. You know the right way.
> . . .
>
> There’s no questions you could ask me about me personally that I wouldn’t answer for you, but I’m not going to answer questions from anybody else.

(V4, R570). Barnes also had another “very big” matter he wanted to resolve through Insco. (V4, R571, 599). Barnes wanted to clear up the murder because during the holy month of Ramadan every good deed is multiplied. (V4, R599).

Subsequent to the November 2005 interview, Barnes wrote a letter to Hunt dated December 7, 2005:[10]

> I would like to write a confession to the River Oaks Condominium murder that happened April of 1988. Sean Norris, Robert Bernard Put forth there own stories. Sherman Insco went with his own agenda so I kept a lot of details from him. His motives were ignoble and believe me he would not do well under examination. He is very petulant and very easily made violently hostile.
>
> Only I know how the window to the bedroom was really opened. I saved that information. Also my intent when I went in was rape. That is the reason I was unclothed when I entered. I murdered her so there would be no witness or complaint against me. Plus she had a real bad disposition during both sexual Assaults.

[10] The letter is duplicated exactly as written.

My father, Bryant B. Barnes, was aware that I did not return home until well after 3:00 a.m. the next morning. I had no idea he would alibi me. And once he was involved, he just kept going. I did meet Tom Cantron at the condo. It was Tom who was in the white truck Only it was his parked next to hers. Lisa Moore had no idea who he was. She did give a good description And I was surprised Det. Nichols never put that together. Tom was thier to question me about Beth. This was earlier that evening. And also sell me some cocaine. Lisa & Sonya left with Stevie just as he was parking. They never saw me as I was at the pool area.

Contrary to popular opinion, I'm not looking to go to death row. As you can tell from the video, I would like fresh air and sunshine and being healthy. I plan on living another 40 + years.

I'm sorry about Dad and not Tom. I'd be more than willing to give an open plea at a plea hearing for guarantee for a fair sentencing hearing and dismissal of any or all charges my Dad has or will be held for.

(V4, R634-36; V13, R2116-2118, State Exhibit 13).

On December 21, 2005, Barnes wrote to Hunt, stating:

State Attorney M. Hunt,

As I see this, there is no punishment for what I've done. I'm already doing life without any sub. I tried to help mass Mustafa Sherman get himself squared away and maybe some relief.

I've got nothing to hide since I came forward with this. I doubt the death penalty is acceptable and obviously Dennis Nichols would love to keep his dishonorable actions in 1988 (D.N.A.) out of publication and public record.

I would be willing to plead and give an open disposition to resolve the case in exchange for you not prosecuting Bryant P. Barnes for accessory after the fact. Enclosed is proof of my good faith. Sherman N. Insco plans on killing his sister once he is released from prison.

(V4, R636-37, V13, R2121; State Exhibit 14).

Enclosed with that letter was a very detailed and graphic statement from Barnes confessing to the rape and murder of Patricia Miller. (V4, R636-647; State Exhibit 14). The letter is attached hereto for the convenience of the Court. (Attachment "A").

Lt. Jeffrey Goodyear, Brevard County Sheriff's Office, interviewed Barnes in 1997 after he murdered his wife, Linda Barnes. Goodyear had responded to the scene on December 12, 1997. (V4, R651). The victim was found in a closet. The photos were admitted into evidence. (V4, R652; State Exh. 16). Barnes objected to testimony regarding conversations the officer had with him. The basis of the objection was *Crawford v. Washington,* 541 U.S. 36 (2004). (V4, R653). Barnes also objected to testimony that he was taken into custody after the murder of his wife due to a violation of an injunction for domestic violence. (V4, R656). An audiotape of the interview was published for the court. (V4, R667-707; V5, R711-760, State Exh. 17). The tapes were 2 hour, 45 minutes long. (V4, R663). Barnes admitted he killed his wife after she found cocaine in the house. (V5, R712). He admitted he broke her neck because "I just wanted her to calm down." (V5, R714). Barnes strangled Linda until she urinated. (V5, R752). When he realized she was dead, Barnes dragged her down the hallway. (V724). He took jewelry and cash and went to get drugs. (V5, R726). He went back to the house to make sure Linda was dead. (V5, R728). Then he went to pawn the jewelry to get more drugs. (V5, R728-29). He went back to the house, got a check out

of Linda's purse, then went to Nations Bank where he forged and cashed a $500.00 check on Linda's account. (V5, R735-37). He picked up a girl named Crystal and rented a room at the Days Inn. (V5, R741-42). They smoked some crack, then he went back to Linda's house. (V5, 745).

Dr. Sajie Qaisar, medical examiner, reviewed the autopsy report and photographs of Patricia Miller, as well as the letter written by Barnes detailing the rape and murder. (V5, R 763-765; State Exhs. 11, 14).[11] The details in Barnes' letter were consistent with the way Patricia Miller died. (V5, R773). Miller was raped, strangled, and suffered multiple blows to her head, consistent with a hammer. (V5, R779, 781). Miller died as a result of multiple cranial cerebral injuries. (V5, R781).

Dr. Qaisar also reviewed the autopsy report[12] and photographs of Linda Barnes. (V5, R785). Linda Barnes died as a result of manual strangulation. (V5, R788, 794).

In 1997, Dale Gilmore, DNA supervisor at Wuesthoff Laboratories, conducted DNA testing on vaginal smears extracted from Patricia Miller's body in 1988. (V5, R795, 797). Gilmore compared the DNA to blood standards from various suspects. (V5, R798). Gilmore was able to exclude the other suspects, but James Barnes could not be excluded as a donor. (V5, R798).

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[11] State Exhibits 11 and 14 are the same letter.

[12] Barnes also objected to the autopsy reports. The basis of the objection was *Crawford v. Washington.*

The State presented certified copies of Barnes' prior violent felony convictions for aggravated battery in 1982 (V5, R800; State Exh. 37), and first-degree murder of Linda Barnes in 1998. (V5, R801; State Exh. 38). The State also admitted a certificate of parole dated October 27, 1987, and a revocation of parole dated September 28, 1988. (V5, R801; State Exhs. 39 and 40).

The victim advocate for Miller's family read a statement to the court. (V5, R806-808).

When the State's presentation was finished, the following occurred:

> THE COURT: Mr. Barnes, you have had an opportunity over the lunch hour about how you're going to proceed. Are you ready to tell the Court how you are going to proceed at this point?
>
> MR. BARNES: Yes, Your Honor. I have no evidence to offer.
>
> THE COURT: Mr. Barnes, if there's mitigating evidence that you wish to present to this Court, this is the time to do it. And if you wish me to appoint Mr. Moore to represent you in presenting the mitigating evidence, then I will do that.
>
> MR. BARNES: No, I do not wish to appoint Mr. Moore to represent me. The State has and you have also requested school records, PSI, doctor reports, all those things. I believe that there is no evidence that I can offer the Court that is mitigating.
>
> THE COURT: Mr. Moore, have you consulted with Mr. Barnes on the mitigating evidence that he could present?
>
> MR. MOORE (standby counsel): Yes, Your Honor. And he's been consistent from the beginning that he doesn't want any presented. So yes, I have at length. I told him what I would do if I was his lawyer, what I'd do for him, what I'd do for any client. And it would be a lot more than

> has been done in this case. But I've been limited in my role and authority as standby counsel, been prevented from doing any of that because I am standby counsel. I have told him exactly what I would do. He says he doesn't want it done.

(V5, R808-809). Upon further inquiry from the court, Moore outlined the mitigation he would have presented. He would have spoken to Barnes' family, "anybody who's had contact with him his whole life," collected all relevant school and medical records, and would have a full battery of psychological, neuropsychological testing and a neurological work up. He would follow up on any recommended testing such as an MRI or PET scan or QEEG. (V5, R810-812). "We don't leave any stones left unturned." (V5, R812). Barnes said he would refuse any testing. (V5, R811).

The court indicated it did not understand Barnes' strategy:

> THE COURT: Mr. Barnes, you indicated at the very beginning you have a strategy and it will become apparent. I don't to this day know what your strategy is.
>
> MR. BARNES: The apparency is simple. The State claims they've had DNA evidence since 1998. I didn't know that until I came back and the State proffered their discovery to me. I decided to come forward without any assistance.
>
> I mean, there was some things – there was mechanics to this. It was ugly. I didn't know that people would take advantage of a situation like the way that they did. But I've come forward, I've told the exact truth, everything that happened, every detail so that there would never be a question as to what happened in Melbourne and basically man up to what I had done.
>
> That was the strategy the whole time. I didn't want anybody that was culpable, like an attorney, to have any type of responsibility in what my

actions were or what the final disposition would be, whether it would be life or death.

I understood the severity of the situation when I came forward. I knew what the sequences could be. I faced it. There were a few times that I've doubted myself because of some of the behaviors people have had towards me. I'm trying to put final resolution to this case for the victim's family. But I believe that has been a perfect strategy.

Mr. Moore did let the Court know, you know, he grew into sitting right next to me. As you know from the very beginning, I didn't want any conversation with the man. But he's a good man. I mean, don't get me wrong. He's not a bad person. And he's helped me quite considerably, against my wishes. I don't know to say that other than it just grew.

But, you know, I would be better off if that was what was taken into consideration. That I came forward, that the State has already admitted that I facilitated resolution of this case. It's been horrendous, it's been tough. It's been tough for me to sit here and to face all this. But I've done it. And now it's time for judgment.

You've got a PSI, doctor report, school records. I'm a burned out sociopath. Simple as that. I'm in my early 40s. It's one of those things that happened. I clean the slate on this. That has been the strategy the whole time.

Now I'm prepared to let you take sovereignty and issue judgment in this case and sentence me as appropriate, whatever it is, because it's the law. And if you sentence me to life, that's appropriate. If you sentence me to death, that's appropriate.

Now it comes down to you weigh it. The aggravating circumstances against me are tremendous. I think without appellate review there's five of them that are going to stick and they all carry great weight.

I've been in prison for almost ten years I have no family. I have no friends. I have no relatives. I don't have a job history. The only thing I have is a prison record. And it would be better for me today if that's what I stood on instead of having a whole bunch of doctors come give me

> a battery of tests that I'm going to refuse to cooperate.
>
> As far as him saying he would talk to my teachers and everything, I'm in my 40s. I mean, they're gone. As far as baseball, I left home when I was 14 and the record reflects that. I've been on my own for a long time. And now I'm trying to just face up to what I did.
>
> And that's where I stand. I'm prepared to be sentenced at any time you're prepared to sentence me.

(V5, R813, 815-816).

The trial judge informed Barnes of the requirement under *Muhammad,* that it consider mitigating circumstances or have them explored. (V5, R816). The trial judge explained it was required to follow the statute and court-appoint an attorney to develop mitigation. (V5, R817). Judge Davidson offered Barnes the opportunity to talk with Mr. Moore to decide whether Barnes would let Mr. Moore be the mitigation attorney. Otherwise, she would appoint an attorney. (V5, R817). To this, Barnes responded:

> It's not like I sat here and tried to commit state-aided suicide. I preserved everything on the record. If there had been a mistake, let the appellate court of Florida deal with it anyway. The Florida Supreme Court is going to have to review it if you sentence me to death anyway.

(V5, R819). The trial court stated that in order to comply with *Muhammad*, it should appoint special counsel to present mitigation. (V5, R820). Barnes said he was going to "repulse" anyone that came near him. (V5, R820). The judge then recessed "to do the necessary research so that I can satisfy myself as to what my legal duty is." (V5, R821). After the recess, the court explained to Barnes that the *Muhammad* counsel is

"not your attorney but a court attorney." (V5, R823). The court reiterated that it needed to "know at least there was an investigation and an effort to determine any mitigation that would be relevant for my consideration." (V5, R823). Mr. Moore advised the judge that he would have an ethical conflict in being appointed as the court attorney because Barnes "doesn't want any mitigation presented." (V5, R829).

The trial judge ultimately determined that special counsel would be appointed to conduct an independent investigation. (V5, R830). Barnes stated:

> For the record then, my strategy from the beginning is to come forth and facilitate final resolution of this case. And I feel it would be prejudicial at this time to take that strategy away from me. I understand you're going by a new statute. You offered Hakeem Mohammed to me the first time I was in this courtroom.
>
> But I had a strategy from the very beginning. And that was present this on my own, take full responsibility and put no culpability on anybody else. There are no secrets. There was no lies told here. Everybody knows the details.
>
> For you to appoint special counsel for the Court is beyond my purview. I have nothing to do with that and I understand that. This is for the courts. And you're saying it purifies the process. Abut the process was purified and that was my strategy. Now you have taken that away from me.
>
> So for the record, I felt that if there was any mitigating evidence that would have been offered, it would mine [sic] to take full responsibility and facilitate final resolution of this case because I benefitted in no way in doing this. There is nothing I benefitted from financially or emotionally or psychologically or – there was no benefit in this. So that's where I leave it with the Court, just for the record.

(V5, R831-32). The judge assured Barnes that his coming forward and taking

responsibility for the murder would be considered. (V5, R832).

The trial judge ordered a PSI. (V5, R833). Barnes asked why there was a second PSI when one had just been completed in December. The trial court explained that the prior PSI relied heavily on previous PSI's and it wanted a more comprehensive PSI. (V5, R833). Barnes told the judge he would not cooperate with anyone who tried to speak with him. (V5, R834).

Two weeks later, February 9, 2007, the court held a hearing with Barnes, Moore, and court counsel, Sam Baxter Bardwell. (V5, 836-837). The trial judge advised Bardwell:

> Mr. Bardwell, you had been appointed pursuant to the Mohamed case to represent not the defendant; you're not his attorney. You are the Court's attorney.

(V5, R839). The trial judge summarized the case: that Barnes pled, they conducted a "*Spencer*" hearing because Barnes "waived the penalty phase in terms of a jury, and we went right to a *Spencer* hearing." (V5, R840).[13] Because "when it came time to present mitigators," Barnes told the judge "there are no mitigators," and he felt the

[13] Prior to this statement, the parties called the January 23-26 hearing the "penalty phase" or the *Spencer* hearing interchangeably. Notwithstanding the statement that Barnes waived a penalty phase, the January 23-26 hearing was an evidentiary hearing indistinguishable from a penalty phase and the trial judge subsequently held a second evidentiary hearing, the *Spencer* hearing, on November 16, 2007. (V7). The two evidentiary hearings satisfied the statutory process in death penalty cases and that mandated by this Court in *Spencer,* 615 So. 2d 688 (Fla. 1993).

"best mitigator is that I came forward," the trial judge appointed Bardwell to prepare the presentation of mitigating evidence. (V5, R840, 842). Barnes objected based on his "Sixth Amendment Right." (V5, R846-847). Barnes was "vigorously opposed to the appointment of any counsel to this date." (V5, R847). Mr. Moore stated for the record that Barnes had previously asked for Drs. Greenblum and Bernstein to be appointed, but had subsequently changed his mind and did not want to be evaluated. However, the doctors did need to be paid for the work they had done. (V5, R851).

At the March 15, 2007, status hearing, Bardwell said Barnes was very cooperative with Bardwell's investigator and they were able to identify family members and obtain social background. (V5, R857). Bardwell wanted to inquire whether Barnes would allow diagnostic imaging. (V5, R858).[14] Bardwell requested the court order a deadline for the date when the PSI was to be completed. (V5, R858). Carla Lopez, parole and probation, said the PSI would be completed within 30 days. (V5, R861). Barnes then stated that:

> Also, for the record, I'd like to – under the Sixth Amendment of the US Constitution, I have a right to assistance of counsel. I believe that now at this point the law has conspired against me. I do not –
>
> THE COURT: Who?
>
> THE DEFENDANT: The law. You've done that again, and I understand what you're doing, but what came along with this doesn't apply to me. I do not have attorneys. I'm pro se. My mitigation was offered, you didn't

[14] Barnes subsequently refused diagnostic testing. (V5, R882).

> accept it. I believe I put the best strategy forward that I could have.
>
> And a PSI doesn't do anything but bring up criminal record. So, I mean, this is just redundant and it's ridiculous because it's not going to help, but I understand you're the Court, you're going to do what you're going to do, and request a criminal, you know, record to show mitigating circumstances, hey, who am I to, you know, judge whose, you know, actions. But for the record, it seems awfully strange, but under US Constitution Amendment Six, I protest this.

(V5, R868). Barnes then said that he understood that Bardwell is not his attorney and he was not going to cooperate with him. (V5, R869). Barnes did not want his family dragged into the case because "I am estranged." (V5, R870). Barnes just wanted to finish the proceedings and go back to prison. (V5, R870).

At the April 12, 2007, status hearing Barnes said he did not want his personal information shown to anyone based upon HIPAA laws. (V5, R878). The clerk's office had records of a dependency case involving Barnes. Barnes said that he "had personal issues and I had left home at a very young age legally." However, he did not want that information made public because he "gave confidential information in order to obtain that waiver." (V5, R878). The court held that any medical or psychological records would be inspected *in camera*. (V5, R879-880). Barnes had a fraternal twin, and Bardwell was trying to determine the circumstances of birth. Bardwell had reason to believe Barnes was underweight and a product of a distressful fetal environment. (V5, R881). In the meantime, Barnes told Moore where his father lived, and Moore went to Palm Coast to speak with him. The information was passed to Bardwell. (V5, R884).

Barnes wanted a copy of everything received and generated by Bardwell. (V5, R885-886). The court told Bardwell to provide Barnes with an unredacted copy of what he generated. (V5, R887). Barnes then stated on the record that his twin sister has:

> [m]any, many, many, many, many problems. I think she has been arrested in Brevard County some sixty (phonetic) times which is one of the reasons she is not here is because she has two outstanding warrants.

(V5, R889). Barnes wanted Terry Sirois, Bardwell's mitigation investigator, to come to the jail and meet with him and listen to the witness statements in 1988 which were recorded on "about fifty cassette tapes." (V5, R893). Barnes wanted to sit in the passing booth while Sirois listened to the tapes. (V5, R895).

On April 17, 2007, Bardwell requested additional hours for investigator Sirois due to Barnes' request she listen to tapes with him at the jail. (V6, R902).

At the May 15, 2007, status hearing the court said it read Barnes' dependency file *in camera.* The file contained no medical information on Barnes that would violate HIPAA laws. (V6, R916). The file was about a child that Barnes allegedly fathered. It was subsequently discovered it was not his child. (V6, R918). Mr. Bardwell said potential mitigation witnesses were "extremely reluctant to appear in person." (V6, R920). Bardwell said he would use his investigator Terri Sirois to convey the evidence from family members who were reluctant to come to Florida, and possibly Dr. Riebsame on mental health mitigation. (V6, R921-922).

At the May 30, 2007, status hearing Barnes requested a copy of his PSI and

DOC records. (V6, R963). He complained about Dr. Riebsame's "third party" assessment of him and reviewing any further records because Dr. Riebsame's report had been stricken. (V6, R967-968).

On June 8, 2007, Mr. Bardwell informed the court that Dr. Riebsame was not going to talk to Barnes, but Bardwell did want the doctor to render an opinion based on materials reviewed. (V6, R976-977). After a discussion regarding whether Dr. Riebsame's opinion might not be mitigating, the trial judge ordered that Bardwell was not required to disclose Dr. Riebsame's report unless and until he decided to call the doctor as a witness. (V6, R984). Dr. Riebsame was removed from the witness list. (V6, R984).

Barnes said he made it "perfectly clear back in January that there was no mitigating evidence. (V6, R983). He did want anyone to "extenuate" the death of Patricia Miller. (V6, R986).

On June 15, 2007, Barnes filed three motions:

(1) Motion to Allow Defendant, *pro se*, Right to Self Representation During Critical State of Proceedings;

(2) Motion to Bar Court Counsel from Using Hearsay during Penalty Phase; and

(3) Motion to Strike Court Counsel's Witness List.

(V10, R1841-42, 1843-45, 1846-66). The motions were heard the same day. Barnes argued that his Sixth Amendment right to represent himself outweighed the procedural

ruling of *Muhammad*. (V6, R996).[15] The court reserved ruling on Barnes' motion to prevent the use of hearsay because nothing had yet been presented. (V6, R1001). Barnes moved to strike the witness list based on the Sixth Amendment right to represent himself. (V6, R1002). Further, Bardwell's witness list included family members who would not testify, but their testimony would be presented as hearsay. Also, Dr. Riebsame's report had been previously stricken. (V6, R1003). The motion to strike the witness list was denied. (V6, R1005). The trial judge advised Barnes to object at the time any evidence was presented. (V6, R1005). Bardwell stated that Dr. Riebsame had been provisionally stricken from the witness list until there was a decision on whether he would testify. (V6, R1005). Barnes requested a complete copy of Bardwell's file. (V6, R1006). The judge instructed Mr. Bardwell to provide to Barnes whatever he intended to use at the *Spencer* hearing. (V6, R1008).

On August 16, 2007, the court conducted a hearing on setting the *Spencer* hearing. (V6, R1011-34). Mr. Bardwell stated that the presentation of mitigation could be extremely brief; however, if Barnes persisted in his confrontation clause argument, then all the witnesses would need to be brought to the hearing so Barnes could cross-examine them. (V6, R1015). Barnes stated:

What I need to understand is this.

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[15] The motion cites to *Rodgers v. State*, 948 So. 2d 655 (Fla. 2006), and *Crawford v. Washington.* (V10, R1842).

> I know this is meant to produce mitigating evidence.
>
> But I believe a family member that is on the witness list is adamant that they don't want to be slandered.
>
> So what I say is this: I don't want to sign a waiver but I agree to what he is saying.
>
> This is going to resolve. But I won't sign a waiver saying that I am not going to call in a *Crawford* if I think it is appropriate.
>
> There are some statements that are made that aren't true.
>
> I won't allow anybody as far as the defense goes to interject a lie in these proceedings.

(V6, R1019-20). Barnes asked to be able to meet with Mr. Bardwell so they could "discuss what issues would be brought up and won't be brought up." (V6, R1021). Mr. Bardwell objected to the process but said he would confer with him if a court reporter was present and the transcript was sealed. (V6, R1025). Notwithstanding, the trial judge reaffirmed that Bardwell was independent counsel and if he felt something was mitigation that Barnes disagreed with, Bardwell was still captain of his ship. (V6, R1032-33).

Barnes, Bardwell, and Moore then met in a separate room with a court reporter. (SR 1-35). [16] Bardwell placed on the record what he intended to do for the *Spencer* hearing. (SR4-7). During the discussion, Barnes advised that he filed Terry Sirois' un-

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[16] Cites to the supplemental record are "SR."

redacted report with the judge as an attachment to the motion to strike the witness list. (SR15; V10, R1853-60).

Barnes filed several motions after the meeting with Bardwell:

(1) Motion to Withdraw Plea;

(2) Motion for Court to Recognize Defendant, pro se, Considers Court Counsel and Adversary in the Above Styled Cause; and

(3) Motion to have Court Order Dr. David Greenblum and Prepare Written Assessment and Evaluation of Defendant James P. Barnes from Interview Conducted January 2007.

(V10, R1872-73, 1874-76, 1877-78).

The court addressed the motions on August 29, 2007. The court stated it would not rule on Barnes' pending motions until it ruled on his motion to withdraw his plea, and it needed the transcript of the plea hearing. (V6, R1037-38). The trial court denied the motion to withdraw the plea on September 10, 2007. (V11, R1886-1945).

At the September 26, 2007, hearing, Barnes requested all discovery material that Mr. Bardwell had obtained. Bardwell assured Barnes and the court that all material, with the exception of Dr. Riebsame's recent report and work product, had been provided to Barnes. (V6, R1049-50, 1054). Barnes requested that Mr. Bardwell be ruled as an adversary. (V6, R1051). The trial judge explained Mr. Bardwell's role as court-appointed attorney. (V6, R1054-55). The court informed Barnes that it was not appropriate for the court to rule on the motion to declare Bardwell an adversary or

designate anyone's role during the proceedings. (V6, R1058). Ultimately, that motion was denied as not relevant to the proceedings. (V6, R1064). Next, Barnes requested copies of Dr.Greenblum's and Dr. Danziger's reports which were prepared in January 2007 when Barnes had two confidential psychological evaluations. (V6, R1064). Barnes wanted copies of the evaluations and the notes. (V6, R1067). Standby counsel Mr. Moore said he would call both Dr. Greenblum and Dr. Danziger to get copies of the reports for Barnes. (V6, R1068). Barnes said he wanted to disqualify the judge but he needed help drafting the motion. The judge asked him to file a written motion. (V6, R1071).[17]

Last, Mr. Bardwell offered mitigation investigator Terry Sirois' report as an addendum to the PSI. (V6, R1072-76). The judge asked that Ms. Lopez, the probation officer preparing the PSI, be present before there was a ruling on whether to attach Sirois' report to the PSI (V6, R1078). Barnes stated he was going to move to strike the PSI, and he was "challenging all of the information in it." (V6, R1079-80).

On October 25, 2007, Barnes filed:

(1) Motion to Strike Pre-Sentence Investigation Submitted by the Florida Department of Corrections;

(2) Motion to Strike Dr. Riebsame's Assessment of Defendant and Report of "Sentence of Death or Life Imprisonment for Capital Crimes;

[17] The motion to disqualify the judge was filed November 2, 2007. (V11, R1959-61).

(3) Motion to have Court Order Dr. Greenblum to Prepare Written Assessment and Evaluation.

(V11, R1950-52, 1953-56, 1957-58). He also filed a written motion to disqualify the judge. (V11, R1959-61). The motion was denied. (V11, R1967).

The *Spencer* hearing was held November 16, 2007. Ms. Lopez, Probation and Parole, had prepared an updated PSI in May 2007. (V7, R1099). Terry Sirois, Bardwell's mitigation investigator, asked Ms. Lopez to attach her investigative report as an addendum to the updated PSI. (V7, R1100). Barnes objected to Sirois' investigative report being included as an addendum to the PSI based on his right to confrontation. (V7, R1106). Mr. Bardwell argued that the confrontation clause did not apply to mitigating evidence because it was not "accusatory." (V7, R1109). Further, hearsay is allowed in the penalty phase, and Barnes was a participant in the events described in Sirois' report and could rebut the information. (V7, R1109). Barnes cited to the *Rodgers* case, arguing that he has the "right to contest anything that anybody wants to enter into evidence." (V7, R1110). Moreover, Barnes argued: "mitigation can be subjective to interpretation. What he believes is mitigating I can believe is aggravating." (V7, R1110). The trial judge allowed the Sirois report to be attached to the May 2007 PSI as an addendum. (V7, R 1111).

Barnes had filed several motions, and the trial judge addressed each one. Barnes wanted Dr. Greenblum to prepare a written assessment to rebut Dr. Riebsame. (V7,

R1118-19; V11, R1957-58). Neither had Barnes received a report from Dr. Danziger. (V7, R1120). Mr. Moore, stand-by counsel for Barnes, advised the court that he had spoken to Dr. Greenblum's secretary, who said the doctor had not located his notes and had not done a report. (V7, R1120-21). Mr. Moore had also spoken informally with Dr. Greenblum, who told him "that if I were Mr. Barnes attorney I would not want that report." (V7, R1121). Barnes asked for a court order for Dr. Greenblum to give him "that which he was paid to do" before the *Spencer* hearing proceeded further. (V7, R1124). Barnes wanted a report so he could decide whether he wanted to introduce it. (V7, R1124).[18] The trial judge took the motion under advisement in order to determine whether there were funds available to pay Dr. Greenblum to prepare a report. (V7, R1125).

Barnes' next motion was to strike the PSI, citing *Crawford v. Washington,* 541 U.S. 36 (2004). (V7, R1126; V11, R1950-52). Barnes challenged "every single sentence" in the document. (V7, R1127). The trial court held that it would consider the PSI insofar as it "will help the Court in mitigation." (V7, R1131). The judge stated that she would not consider evidence that was not appropriate. (V7, R1131).

Barnes also moved to strike Dr. Riebsame's assessment and evaluation. (V7,

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[18] The State pointed out that Dr. Greenblum and Dr. Danziger had interviewed Barnes in January 2007, but Barnes stated at the penalty phase he did not want to introduce any mental health evidence. (V7, R1122).

R1132; V11, R1953-56). Barnes told the judge: "I'm invoking my Sixth Amendment right to represent myself because I believe this is truly aggravating." (V7, R1134). Barnes denied that the MMPI test from DOC was his. (V7, R1134). Even if it were his, he used to refuse the MMPI and would "Christmas tree" everything they gave him. (V7, R1135). Further, any brain injury from a car accident would have been in 1990 or 1991, after Miller's murder. (V7, R1136). Mr. Bardwell explained that he had provided a copy of Dr. Riebsame's report to the State as part of discovery; however, the report would not be admitted into evidence because Dr. Riebsame was going to testify. (V7, R1138). The judge denied Barnes' motion to strike the report because the motion was irrelevant. (V7, R1143).

Barnes requested all materials generated by Terry Sirois, the private investigator hired by court-counsel Mr. Bardwell. (V7, R1146). Barnes felt that Sirois did not provide all relevant information, such as the fact he had a "relationship" with the victim and that there was a second person with him when she was murdered. (V7, R1148). Further, Barnes wanted the E-mails from his father to Sirois. He wanted to present all this information in mitigation. (V7, R1148). Ms. Sirois testified that she gave Barnes copies everything that was not work product. (V7, R1153). Barnes never allowed Sirois to take notes when she interviewed him. (V7, R1156). She had scribbled some notes that were used to prepare her report. (V7, R1156). All witnesses interviewed by Sirois were in her report. (V7, R1159). The judge ordered Sirois to

submit her entire file on Barnes so the court could review it *in camera.* (V7, R1164). Mr. Bardwell noted that there were letters from Barnes in the file which, if he were Barnes' attorney, he would not want the judge to see. (V7, R1166). Barnes was given the opportunity to review his letters. (V7, R1167).

Mr. Bardwell called one witness for the *Spencer* hearing: Dr. Riebsame, forensic psychologist. (V7, R1174). Dr. Riebsame reviewed a vast amount of material, including police reports, medical records, Barnes' statements to police, crime scene photographs, investigative reports, witness statements, DNA reports the PSI, and Sirois' report. (V7, R1177-78). Dr. Riebsame also reviewed Barnes' and other inmates' letters. (V7, R1178). All documents were the type relied upon by psychologists in reaching an opinion. (V7, R1178). All tolled, Dr. Riebsame reviewed "a couple thousand pages" of materials. (V7, R1189).

The documents reviewed by Dr. Riebsame showed a consistent pattern of behavior from childhood through adulthood. Barnes refused to speak with Dr. Riebsame or cooperate in the evaluation. (V7, R1180). Dr. Riebsame prefers to have thorough psychological testing because, without testing, it limits his findings. (V7, R1181). There was some information in the records; i.e., IQ testing, and personality acceptance tests like the MMPI, which were administered on several occasions. (V7, R1181-82). The records revealed Barnes has a history of "aggressive, impulsive behavior," a history of abuse, a head injury, and premature birth and hospitalization.

(V7, R1182). Notwithstanding the absence of testing, Dr. Riebsame was able to form conclusions. (V7, R1183). In Dr. Riebsame's opinion, Barnes was experiencing an extreme emotional disturbance at the time of Miller's murder. (V7, R1183, 1185). In 1988, Barnes suffered from cocaine dependence, anti-social personality disorder, and a personality disorder, NOS, with borderline narcissistic characteristics. (V7, R1184). Despite the extreme emotional disturbance, in Dr. Riebsame's opinion Barnes was able to appreciate the criminality of his actions. (V7, R1187).

According to the records, Barnes' twin sister also exhibited anti-social personality traits. (V7, R1194). Research showed that a distressed fetal environment contributes to emotional and behavior problems. (V7, R1195). Barnes was born prematurely and remained hospitalized. (V7, R1196). His mother smoked and drank alcohol during pregnancy. Barnes had yellow fever during childhood. (V7, R1196). Frontal lobe dysfunction could account for behaviors exhibited by Barnes. The frontal lobe controls planning, aggressiveness, and impulsivity. (V7, R1196).

The strongest research regarding brain damage indicates biological causes. (V7, R1197). The fact that Barnes' twin exhibited anti-social behavior was consistent with the studies. (V7, R1197). The environment can also have an impact. Often, an anti-social individual would come from a deprived or abusive environment. (V7, R1199). Substance abuse can aggravate the personality disposition. (V7, R1201). Conduct disorder would usually manifest by elementary school. (V7, R1199). Barnes'

adolescence was documented by mental health counselors. (V7, R1200). He began using marijuana in early adolescence, then graduated to heroin, methamphetamine and cocaine. (V7, R1202). Barnes grew up in a violent environment and experienced periods of enuresis. (V7, R1203).

The prosecutor cross-examined Dr. Riebsame, challenging his diagnostic impression regarding cocaine dependence and conclusions regarding extreme emotional disturbance and personality disorders. (V7, R1205-59).

Barnes also cross-examined Dr. Riebsame. (V7, R1259-70). In his testimony, Dr. Riebsame stated that he did not verify the information on which he based his diagnosis. (V7, R1259). He relied on the competence of other professionals who conducted testing. (V7, R1260). Dr. Riebsame had no reason to believe Barnes manipulated any of the evidence which he reviewed. (V7, R1264). Barnes' letter describing the crime was instrumental in Dr. Riebsame's diagnosis of extreme emotional disturbance. If that letter were not true, Dr. Riebsame was "not sure I could testify to the Court with regard to an extreme mental disturbance mitigator that is apparent in the writing of that letter …" (V7, R1265). Information regarding cocaine dependency came from "a number of the psychological evaluations and PSI's." Barnes' letter also refers to cocaine use in 1988. (V7, R1266). If Barnes told Dr. Riebsame that he "made up 90 percent of what happened" because he was mad at the State Attorney, that would change Dr. Riebsame's opinion regarding cocaine

dependence. (V7, R1268). However, it would not change his opinion regarding the personality disorder because of the evidence from the crime scene. (V7, R1268). Dr. Riebsame had no knowledge of whether Barnes had a prior relationship with the victim. (V7, R1268). Dr. Riebsame would find it troubling that Barnes could rape and kill someone he knew. When Barnes asked Dr. Riebsame whether it would change his opinion if he knew the sexual contact was consensual, Dr. Riebsame answered: “She’s brutalized. She’s tied face down. It doesn’t appear to be consensual sex.” (V7, R1269).

Dr. Riebsame was aware Barnes murdered his wife. This indicated a volatile relationship and brain dysfunction. (V7, R1270-71). Dr. Riebsame reviewed psychological evaluations that dated back 20 to 30 years. He had documented medical records and years of criminal history. The amount of information available increased his confidence in his opinion. (V7, R1275). There were three computer-scored MMPI tests and one hand-scored MMPI. They all provided consistent information. (V7, R1276). Barnes had previously been diagnosed as having anti-social tendencies and as having an anti-social personality disorder. (V7, R1277). In 1971, Barnes was diagnosed as “unsocial aggressive reaction of childhood,” which today would be called conduct disorder. (V7, R1278).

At the conclusion of the *Spencer* hearing, Barnes said he would call no witnesses, not “Ms. Lopez or Ms. Sirois or anything.” (V8, R1285). He also informed the court he would not submit a sentencing memorandum on his own behalf. (V8,

R1285). Neither did Barnes want to call Dr. Greenblum because "using Dr. David Greenblum would not help me at all." (V8, R1287-88). He abandoned his request to have the materials from Terry Sirois. (V8, R1289). The judge offered to appoint Mr. Moore to present any further mitigation Barnes desired, and offered to continue the *Spencer* hearing in order to accomplish that. (V8, R1289-90). Barnes refused the offer. (V8, R1290). The court ordered Mr. Bardwell to prepare a sentencing memorandum and list any and all mitigators the court should consider. (V8, R1290). The State would then have an opportunity to respond to Bardwell's memo, then Bardwell could reply to the State's response. (V8, R1291). Barnes reiterated that he felt he "put my best foot forward when I came forward to resolve this case." Therefore, he had no intention of challenging anything the State presented. (V7, R1293).

At the November 28, 2007, status hearing, the judge offered Barnes another opportunity to submit a sentencing memorandum, but he said: "No, that defeats everything that I have done." (V8, R1301).

The judge held another status hearing on December 10, 2007, to ensure Barnes had received the sentencing memorandums from the State and Bardwell. Barnes confirmed he received the memos, but:

> I'm not going to respond to Mr. Bardwell. I don't give it any validity anyway. So – to me, it's just a piece of paper with a bunch of words on it.

(V8, R1312-1313).

On December 13, 2007, the sentencing hearing was held. The court found the following aggravators:

1. Under sentence of imprisonment - great weight;

2. Prior violent felony - great weight;

3. During a sexual battery and a burglary - great weight;

4. Avoid arrest - great weight;

5. Heinous, atrocious, and cruel - great weight; and

6. Cold, calculated, and premeditated - great weight.

(V8, R1383-1408, 1425; V11, R2031-45).

The court found the following statutory mitigator:

1. Extreme mental or emotional disturbance - slight weight.

The court found the following non-statutory mitigators:

1. The defendant came forward and revealed his involvement in the unsolved crime-little weight;

2. The defendant took responsibility for his acts - little weight;

3. The defendant has experienced prolonged drug use - little weight;

4. The defendant did not have the benefit of a loving relationship with his mother - little weight;

5. The defendant did not have the benefit of a loving relationship with his father - little weight;

6. The defendant was sexually abused as a child - slight weight;

7. The defendant has taken steps to improve himself - little weight;

8. The defendant is a functional and capable person and has demonstrated by his actions and participation in this case that he has sufficient intelligence and capabilities to contribute to society - little weight.

(V8, R1416-23, V11, R2047-54). The court additionally held that "each of the six aggravating factors standing alone outweigh all of the mitigating circumstances combined." (V11, 2055).

No notice of appeal was filed. This Court received the certified Judgment and Sentence on January 14, 2008. (V12, R2076). This Court treated the judgment as a notice of appeal and ordered the record on appeal. (V12, R2077-79). The trial judge was ordered to hold a status conference to complete the record on appeal. (V12, R1278). The trial judge held a hearing on March 26, 2008. (V12, R1434). Barnes refused to come out of his cell for the hearing. (V8, R1437). Prison staff asked Barnes to sign a waiver form, but he refused to sign. (V12, R2082). Mr. Moore, Office of the Public Defender, had been noticed for the status hearing, but indicated that Barnes did not want to file an appeal. (V8, R1441). However, Mr. Moore indicated that if the Court appointed him to perfect the appeal, he would follow the court's order and "he can file his grievance, I suppose, against Mr. Russo and myself for acting against his wishes." (V8, R1441). Mr. Moore also told the judge:

> He didn't want a penalty phase. He didn't want an appeal. He didn't want any representation by my office of any other lawyer in this matter.

(V12, R1442).

Over Mr. Moore's objection, the trial judge appointed the Public Defender. (V12, R1450). Mr. Moore filed a Statement of Judicial Acts to be Reviewed and Directions to the Clerk. (V12, R2085, 2086).

SUMMARY OF ARGUMENTS

Claim I: The trial court did not abuse its discretion by following this Court's procedures outlined in *Muhammad* and appointing special counsel to investigate and present available mitigation. The trial court did not abuse its discretion by following this Court's procedures outlined in Rule 3.710(b) and ordering a presentence investigation report after Barnes refused to present mitigation. Error, if any, was harmless. If the mitigation presented by special counsel and anything gleaned from the PSI were stricken, Barnes would still have a death sentence.

Claim II: This issue is waived. Barnes' relies on grounds and arguments on appeal that were not raised at the trial level. *Crawford* was not violated in the sentencing proceedings. Barnes' right to confrontation was not implicated, because mitigation information is not information used *against* a defendant or to prosecute him. Error, if any, was harmless. Even if the PSI should have been stricken, the trial judge did not rely on hearsay evidence in sentencing. Further, if there was any mitigation derived from the PSI and it was stricken, Barnes would still have a death sentence.

Claim III: Although not raised by Barnes, this Court automatically reviews the evidence and proportionality of the death sentence. There is sufficient evidence and the death sentence is proportional.

<u>CLAIM I</u>

THE TRIAL COURT DID NOT ABUSE ITS DISCRETION BY FOLLOWING THE COURT'S PROCEDURES OUTLINED IN *MUHAMMAD* AND RULE 3.710(b); ERROR, IF ANY, WAS HARMLESS.

Barnes argues that the trial court violated his Sixth Amendment right to self-representation by appointing counsel to present mitigating circumstances after Barnes waived the advisory jury and refused to present mitigation. He also argues that Rule 3.710(b) does not apply to this case because he did present mitigation. Rule 3.710(b), *Fla.R.Crim.P.* (Initial Brief at 39). Barnes argues in the alternative that if Rule 3.710(b) does apply, the documentation gathered by the Department of Corrections suffices to fulfill the trial court's responsibility to gather mitigating evidence. (Initial Brief at 39).[19]

I. The trial court did not abuse its discretion by appointing *Muhammad* counsel. When Barnes stated he would present no mitigation, the trial judge scrupulously followed this Court's procedure outlined in *Muhammad v. State*, 782 So. 2d 343 (Fla. 2001). In *Muhammad*, this Court outlined the procedure to be followed when a defendant refuses to present mitigation:

> It is clear from our previous cases that we expect and encourage trial courts to consider mitigating evidence, even when the defendant refuses

[19] The State notes that in Claim II, Barnes argues that Rule 3.710(b) violates the Confrontation Clause and *Crawford v. Washington.*

to present mitigating evidence. We have repeatedly emphasized the duty of the trial court to consider all mitigating evidence "contained anywhere in the record, to the extent it is believable and uncontroverted." *Farr v. State*, 621 So. 2d 1368, 1369 (Fla. 1993) *("Farr I"); see, e.g., Hauser v. State*, 701 So. 2d 329, 330-31 (Fla. 1997); *Robinson v. State*, 684 So. 2d 175, 176, 179 (Fla. 1996). This requirement "applies with no less force when a defendant argues in favor of the death penalty, and even if the defendant asks the court not to consider mitigating evidence." *Farr I*, 621 So. 2d at 1369.

In the past, we have encouraged trial courts to order the preparation of a PSI to determine the existence of mitigating circumstances "in at least those cases in which the defendant essentially is not challenging the imposition of the death penalty." *Farr v. State*, 656 So. 2d 448, 450 (Fla. 1995) ("Farr II"); *see Allen v. State*, 662 So. 2d 323, 330 (Fla. 1995). Having continued to struggle with how to ensure reliability, fairness, and uniformity in the imposition of the death penalty in these rare cases where the defendant waives mitigation, we have now concluded that the better policy will be to require the preparation of a PSI in every case where the defendant is not challenging the imposition of the death penalty and refuses to present mitigation evidence. n10 To be meaningful, the PSI should be comprehensive and should include information such as previous mental health problems (including hospitalizations), school records, and relevant family background. In addition, the trial court could require the State to place in the record all evidence in its possession of a mitigating nature such as school records, military records, and medical records. n11 Further, if the PSI and the accompanying records alert the trial court to the probability of significant mitigation, the trial court has the discretion to call persons with mitigating evidence as its own witnesses.

. . . .

If the trial court prefers that counsel present mitigation rather than calling its own witnesses, the trial court possesses the discretion to appoint counsel to present the mitigation as was done in *Klokoc v. State*, 589 So. 2d 219 (Fla. 1991) n14 or to utilize standby counsel for this limited purpose. n15

n10 A majority of this Court has concurred that a presentence

investigation report should be ordered in all capital cases just as it is a mandatory requirement in all other criminal cases. *See Nelson v. State*, 748 So. 2d 237, 246 (Fla. 1999) (Pariente, J., concurring specially).

n11 This is consistent with the prosecutors' existing obligations. Florida Rule of Professional Conduct 4-3.8(c) provides that prosecutors shall "make timely disclosure to the defense of all evidence or information known to the prosecutor that tends to negate the guilt of the accused or mitigates the offense, and, in connection with sentencing, disclose to the defense and to the tribunal all unprivileged mitigating information known to the prosecutor."

n14 During the trial in *Klokoc*, the defendant refused to allow his counsel to present mitigating evidence. 589 So. 2d at 220. The trial court denied counsel's motion to withdraw "but, in view of Klokoc's lack of cooperation with his counsel, the court appointed special counsel to represent the public interest in bringing forth mitigating factors to be considered by the court in the sentencing proceedings." *Klokoc,* 589 So. 2d at 220. As a result of the mitigation presented by special counsel, this Court reduced Klokoc's sentence of death to life.

n15 Any counsel performing this function would be acting solely as an officer of the court. Assuming that the defendant had knowingly and intelligent waived the presentation of mitigating evidence, the defendant would be barred from subsequently claiming that counsel's performance was ineffective in the presentation of mitigating evidence. *See Koon v. Dugger*, 619 So. 2d 246, 249-50 (Fla. 1993).

In all capital cases, this Court is constitutionally required "to engage in a thoughtful, deliberate proportionality review to consider the totality of circumstances in a case, and to compare it with other capital cases." *Porter v. State*, 564 So. 2d 1060, 1064 (Fla. 1990); *see, e.g., Urbin v. State*, 714 So. 2d 411, 416 (Fla. 1998); *Tillman v. State*, 591 So. 2d 167, 169 (Fla. 1991). This case provides a perfect example of why the defendant's failure to present mitigating evidence makes it difficult, if not

> impossible, for this Court to adequately compare the aggravating and mitigating circumstances in this case to those present in other death penalty cases.

Muhammad, 782 So. 2d at 364-65 (Fla. 2001).

Barnes argues that his Sixth Amendment right to self-representation outweighs any constitutional requirement to an individualized consideration before a death sentence is imposed. The requirement of an individualized sentencing is well-established. *Stringer v. Black*, 503 U.S. 222, 231 (U.S. 1992) (To determine the appropriate sentence, the sentencer must engage in a "broad inquiry into all relevant mitigating evidence to allow an individualized determination.") *Buchanan v. Angelone*, 522 U.S. 269, 276 (1998). *California v. Brown*, 479 U.S. 538, 545 (1987); ("[E]vidence about the defendant's background and character is relevant because of the belief, long held by this society, that defendants who commit criminal acts that are attributable to a disadvantaged background, or to emotional and mental problems, may be less culpable than defendants who have no such excuse."); *Lockett v. Ohio*, 438 U.S. 586, 605 (U.S. 1978).

To pass constitutional muster, the United States Supreme Court has held that there must be a broad inquiry into all relevant mitigating evidence to allow an individualized determination. *Tuilaepa v. California,* 512 U.S. 967, 971-973 (1994); *Romano v. Oklahoma*, 512 U.S. 1, 6-7 (1994); *McCleskey v. Kemp*, 481 U.S. 279, 304-306 (1987). The sentencer may not be precluded from considering, and may not refuse

to consider, any constitutionally relevant mitigating evidence. *Penry v. Lynaugh*, 492 U.S. 302, 317-318 (1989); *Eddings v. Oklahoma*, 455 U.S. 104, 113-114 (1982); *Lockett v. Ohio*, 438 U.S. 586, 604 (1978). The importance of individualized sentencing and review of all mitigation was summarized in *Woodson v. North Carolina*, 428 U.S. 280, 304-305 (U.S. 1976):

> This conclusion rests squarely on the predicate that the penalty of death is qualitatively different from a sentence of imprisonment, however long. Death, in its finality, differs more from life imprisonment than a 100-year prison term differs from one of only a year or two. Because of that qualitative difference, there is a corresponding difference in the need for reliability in the determination that death is the appropriate punishment in a specific case.

Barnes asks this Court to disregard the tenets of the United States Supreme Court, discard this Court's precedent in *Muhammad*, and allow him to be sentenced to death without consideration of mitigation. The question is whether the trial court abused its discretion by following this Court's mandate, and the answer is "no." *See Fitzpatrick v. State*, 900 So. 2d 495, 523-24 (Fla. 2005) (trial court correctly followed this Court's dictate that "mitigating evidence must be considered and weighed" if a defendant refuses to present mitigation); *Grim v. State*, 841 So. 2d 455, 462 (Fla. 2003); *Ocha v. State*, 826 So. 2d 956, 962 (Fla. 2002) (trial judge has duty to independently examine the record for any evidence of mitigation, whether presented by the defendant or not). As stated in *Ocha*, "Discretion is abused only when the judicial action is arbitrary, fanciful, or unreasonable . . ." Following this Court's established

case law is hardly arbitrary.

Justice Pariente addressed the juxtaposition of the right to counsel and the requirement of an individualized sentencing in her concurrence in *Muhammad:*

> Although the defendant may have a right to plead guilty, the defendant has no corresponding "right" after conviction to have the death penalty imposed based on a waiver of the right to present mitigation. *See* § 921.141(1), Fla. Stat. (2000) (providing for a penalty phase proceeding in those cases where the defendant pleaded guilty to first-degree murder). Rather, pursuant to Florida's statutory scheme, whether or not the death penalty should be imposed must be determined by an independent review of the aggravating circumstances and mitigating factors to ensure that the death penalty is fairly, reliably and uniformly imposed. In all capital cases, this Court is constitutionally required "to engage in a thoughtful, deliberate proportionality review to consider the totality of circumstances in a case, and to compare it with other capital cases." *Porter v. State*, 564 So. 2d 1060, 1064 (Fla. 1990); *see, e.g., Urbin v. State*, 714 So. 2d 411, 416 (Fla. 1998); *Tillman v. State*, 591 So. 2d 167, 169 (Fla. 1991). We cannot permit this constitutional obligation to be thwarted by the defendant's own actions or inactions.
>
> Moreover, it is not necessarily those most deserving of the death penalty (*e. g*., the most aggravated and least mitigated) who seek its imposition and refuse to present mitigation. Rather, in some cases, those seeking the death penalty, while competent, may suffer from serious underlying mental illnesses. The case of *Klokoc* is a salient example of this fact. As we noted in *Klokoc*:
>
> > While this record reflects that this murder occurred when Klokoc was not in a heightened rage, it is unrefuted in this record that he was under extreme emotional distress. The record also establishes that he suffers from bipolar affective disorder, manic type with paranoid features, and that his family has a history of suicide, emotional disturbance, and alcoholism. Further, he had no record of prior criminal activity.
>
> *Klokoc*, 589 So. 2d at 222 (emphasis supplied). In *Klokoc*, although the

defendant refused to put on mitigation, the Court unanimously reduced the death sentence to life based on specially appointed counsel's presentation of mitigating evidence, including evidence of mental illness.

Klokoc is also an example of the importance of a uniform procedure for evaluating mitigating evidence before imposition of the death penalty in these rare cases and the benefits of appointing special counsel. In *Klokoc*, the trial court denied counsel's motion to withdraw "but, in view of Klokoc's lack of cooperation with his counsel, the court appointed special counsel to represent the public interest in bringing forth mitigating factors to be considered by the court in the sentencing proceeding." 589 So. 2d at 220. As a result of the procedure of appointing special counsel in *Klokoc* to present mitigating evidence during the penalty phase, we unanimously reversed Klokoc's death sentence on the grounds that the mitigating evidence in the record rendered the death sentence disproportionate. Essentially, this reversal was over the defendant's own objection. *See id*. at 222.

In *Klokoc*, we impliedly recognized that a procedure for appointing special counsel does not conflict with the defendant's right to self-representation as set forth in *Faretta v. California*, 422 U.S. 806, 45 L. Ed. 2d 562, 95 S. Ct. 2525 (1975). Similarly, the United States Supreme Court recently explained that "the government's interest in ensuring the integrity and efficiency of the trial at times outweighs the defendant's interest in acting as his own lawyer." *Martinez v. Court of Appeal of California,* 528 U.S. 152, 120 S. Ct. 684, 691, 145 L. Ed. 2d 597 (2000). The Court concluded that the right to self-representation does not extend to an appeal because [t]he status of the accused defendant, who retains a presumption of innocence throughout the trial process, changes dramatically when the jury returns a guilty verdict.

. . . [T]he autonomy interests that survive a felony conviction are less compelling than those motivating the decision in *Faretta*. Yet the overriding state interest in the fair and efficient administration of justice remains as strong as at the trial level. Thus, the States are clearly within their discretion to conclude that the government's interests outweigh an invasion of the appellant's interest in self-representation.

Id. 120 S. Ct. at 691-92 (emphasis supplied).

> As with an appeal, during the penalty phase of a capital trial, the defendant has already been convicted. At this point, the State has an overriding interest in the integrity of the process by which the death penalty is imposed. As the United States Supreme Court has emphasized, the difference between the imposition of the death penalty and any other penalty gives rise to "a corresponding difference in the need for reliability in the determination that death is the appropriate punishment in a specific case." *Woodson v. North Carolina*, 428 U.S. 280, 305, 49 L. Ed. 2d 944, 96 S. Ct. 2978 (1976) (plurality opinion). We have already recognized this interest when we have required the trial court to consider any evidence of mitigation in the record, even if the defendant asks the court not to consider mitigating evidence. *See Robinson v. State*, 684 So. 2d 175, 179 (Fla. 1996); *Farr v. State*, 621 So. 2d 1368, 1369 (Fla. 1993) ("*Farr I*").

Muhammad v. State, 782 So. 2d at 371 (J. Pariente concurring).

Although the majority in *Muhammad* did not directly address the tension between the defendant's right to self-representation and the overriding requirement of an individualized sentencing, there is no reason these two rights cannot co-exist. In the present case, the trial judge honored Barnes' request to represent himself throughout the proceedings. However, that right is a shield, not a sword. Barnes believes a defendant has a Sixth Amendment right not to present mitigation.

In *Hamblen*, this Court held that the trial judge did not abuse its discretion by allowing the defendant to waive mitigation. Subsequently, in *Muhammad,* this Court held that the trial judge should appoint special counsel to present mitigation. *Muhammad* post-dates *Hamblen*, and the trial judge did not err in following this Court's most recent precedent.

II. The trial court did not abuse its discretion by ordering a pre-sentence investigation pursuant to Rule 3.710(b). In this section, Barnes argues that Rule 3.710(b) does not apply to this case because he did present mitigation. Rule 3.710(b), *Fla.R.Crim.P*. (Initial Brief at 39). Barnes argues in the alternative that if Rule 3.710(b) does apply, the documentation gathered by the Department of Corrections suffices to fulfill the trial court's responsibility to gather mitigating evidence. (Initial Brief at 39).

Rule 3.710(b) provides:

> **Capital Defendant Who Refuses To Present Mitigation Evidence**. Should a defendant in a capital case choose not to challenge the death penalty and refuse to present mitigation evidence, the court shall refer the case to the Department of Corrections for the preparation of a presentence report. The report shall be comprehensive and should include information such as previous mental health problems (including hospitalizations), school records, and relevant family background.

Section 3.710(b) was adopted by this Court in *Amendments to the Fla. Rules of Criminal Procedure,* 886 So. 2d 197, 199 (Fla. 2004):

> The new subdivision is based on the Court's decision in *Muhammad v. State*, 782 So. 2d 343 (Fla. 2001) (holding when a defendant in a death penalty action refuses to present mitigating evidence, a comprehensive presentence investigation report (PSI) must be placed in the record). According to the Rules Committee, although the new subdivision provides that the PSI "should include information such as previous mental health problems (including hospitalizations), school records, and relevant family background," this is not intended to be a conclusive list of items that should be in the report. It is simply offered as a list of examples. Finally, in order to provide additional guidance to the Florida Department of Corrections, the following committee note, which we have

modified slightly for clarity, has been added to the rule:

> The amendment adds subdivision (b). Section 948.015, Florida Statutes, is by its own terms inapplicable to those cases described in this new subdivision. Nonetheless, subdivision (b) requires a report that is "comprehensive." Accordingly, the report should include, if reasonably available, in addition to those matters specifically listed in *Muhammad v. State*, 782 So. 2d 343, 363 (Fla. 2000), a description of the status of all of the charges in the indictment as well as any other pending offenses; the defendant's medical history; and those matters listed in section 948.015(3)-(8) and (13),[20] Florida Statutes. The Department of Corrections should not recommend a sentence.

The trial court did not abuse its discretion by following this Court's adopted rules of procedure. After the State's presentation of evidence, Barnes said he would not present mitigation. This triggered the trial court ordering a PSI. Barnes later argued that he did present mitigation: that he came forward and pled. Relying on information that is implicit in the proceedings, i.e., that a defendant pled, is not a comprehensive

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[20] Sections 948.015(3)-(8) and (13) provide:

(3) The offender's prior record of arrests and convictions.
(4) The offender's educational background.
(5) The offender's employment background, including any military record, present employment status, and occupational capabilities.
(6) The offender's financial status, including total monthly income and estimated total debts.
(7) The social history of the offender, including his or her family relationships, marital status, interests, and activities.
(8) The residence history of the offender.
(13) An explanation of the offender's criminal record, if any, including his or her version and explanation of any previous offenses.

review of available mitigation.

This case presents the untenable difficulties facing trial judges confronted with a situation in which either way they rule, it will be an issue on appeal. If the trial court had not followed this Court's rules, Barnes would be complaining that it abused its discretion by failing to follow *Muhammad*. *See Ocha*, 826 So. 2d at 962. The trial judge in this case scrupulously honored Barnes' right to self-representation while complying with the mandates of this Court. There was no abuse of discretion.

III. Error, if any, was harmless. In his conclusion, Barnes asks this Court to order a new penalty phase. (Initial Brief at 54). Barnes has not attacked the validity of any aggravating circumstance. If this Court ruled in Barnes' favor on either Claim I or Claim II herein, the remedy would be to strike the mitigating circumstances found by the trial court pursuant to either the presentation of Mr. Bardwell and/or the pre-sentence investigation. Apparently, the only mitigating circumstance Barnes wishes this Court to consider is that he confessed to the murder 17 years later, even though in 1988 he had his father contrive an alibi, that he pled to the murder, even though the State had a DNA match and a confession. The trial judge did consider the fact that Barnes came forward and took responsibility for his acts. (V11, R2050-51). The judge gave each of those non-statutory mitigators little weight. As to the fact Barnes came forward, the trial judge held that "The defendant did not come forward to admit his involvement until there was already DNA evidence linking him to the crimes." (V11,

R2050). The trial judge also found that "each of the six aggravating factors standing alone outweigh all of the mitigating circumstances combined." (V11, R2055).

Therefore, even if this Court found technical error with the proceedings, there would be no reasonable probability of a different outcome because there would be the same aggravating circumstances and *less* mitigation. *See State v. DiGuilio*, 491 So. 2d 1129, 1139 (Fla. 1986). A harmless error analysis is particularly appropriate in this case because there was no advisory jury and the trial judge clearly defined the weight given the aggravating circumstances and stated that any one aggravator outweighs all mitigation.

CLAIM II

BARNES RELIES ON GROUNDS AND ARGUMENTS ON APPEAL THAT WERE NOT RAISED AT THE TRIAL LEVEL; THE TRIAL JUDGE DID NOT RELY ON HEARSAY EVIDENCE; BARNES' RIGHT TO CONFRONTATION WAS NOT VIOLATED AND *CRAWFORD* IS NOT IMPLICATED IN THIS CASE. ERROR, IF ANY, WAS HARMLESS.

Barnes argues that the trial judge abused its discretion by denying his "Motion to Strike the presentence investigation submitted by the Florida Department of Corrections and Attorney Bardwell[21] citing *Crawford v. Washington*." (Initial Brief at

[21] The reference to Attorney Bardwell may be to the mitigation investigator's report that was attached as an addendum to the PSI; however, the statement in the Initial Brief is not specific enough for the State to determine conclusively whether this is the allegation.

46).[22]

I. The issue raised on appeal is based on different grounds and arguments from those raised in the trial court. Barnes claims the trial court abused its discretion for failing to grant Barnes' motion to strike the presentence investigation ("PSI"). There is no record cite to the alleged motion. On January 4, 2007, Barnes filed a Motion to Strike Pre-Sentence Investigation submitted by the Florida Department of Corrections, citing *Crawford*. (V10, R1740-42). On October 25, 2007, Barnes re-filed the same motion. (V11, R1950-52). Thus, there were two motions to strike filed, but the grounds and arguments Barnes advances in the appellate brief relate not to these motions but to others. Unless the appellant presents to this court the specific claim raised below, the claim is not reviewable. *See Lynch v. State*, 33 Fla. L. Weekly S880 (Fla. Nov. 6, 2008); *Steinhorst v. State*, 412 So. 2d 332, 338 (Fla. 1982) ("[F]or an argument to be cognizable on appeal, it must be the specific contention asserted as legal ground for the objection, exception, or motion below.").

On appeal, Barnes argues that the following objectionable information was contained in the PSI and improperly considered by the trial judge:

> (1) Barnes had always been a pyromaniac since an early age, and set fire to other people's homes. (X 1849);

[22] This claim contradicts the argument in Claim I that the procedures in Rule 3.710(b) requiring PSI's in capital cases were adequate to present mitigation and that the trial court erred in appointing court counsel to present mitigation.

> (2) Barnes is a con-artist and sociopath. (X 1849);
> (3) Barnes physically assaulted his mother and threatened to kill his mother. (X 1849);
> (4) Barnes sexually assaulted his two sisters. (X 1849);
> (5) Barnes killed the family cats. (X 1849);
> (6) Barnes Beat-up other children at boy scouts, little league and church . (X 1849);
> (7) Barnes could not be rehabilitated. (X 1849);
> (8) Barnes stole things from family members. (X 1850);
> (9) Barnes' ability to lie is noteworthy as well as his lack of remorse. (X 1866); and
> (10) Barnes' score of 36 on the Hare PCL-R classifies him as a psychopath. (X 1866).

(Initial Brief at 46). These cites are *not* cites to information contained in the PSI,[23] but to facts in attachments to motions Barnes himself filed with the trial court. The first eight (8) facts were derived from the Melbourne Beach Police Department report which Barnes attached to his Motion to Strike Court Counsel's Witness List. (V10, R1849-50). The second two (2) facts were derived from Dr. Riebsame's report which Barnes attached to his Motion to Strike Dr. Riebsame's Assessment of Defendant. (V10, R1861-66).

II. A PSI does not violate the confrontation clause. This Court has previously held that a PSI does not violate the confrontation clause:

> The consideration of the confession or statement of a co-defendant is quite different from the consideration of a presentence report. If the

[23] The State supplemented with the PSI which is sealed in the Supplemental Record as a confidential document. The date of the PSI in the supplemental record is November 16, 2007.

> defendant disputes the truth of a presentence report, he has the right to secure confrontation and cross-examination if he wishes to do so. *See Eutsey v. State*, 383 So. 2d 219 (Fla. 1980). On the other hand, a defendant cannot require a co-defendant to waive his constitutional right to remain silent and force him to testify during the sentencing procedure.

Engle, 438 So. 2d at 814.

III. *Crawford* does not apply to sentencing hearings. The State acknowledges *Rodgers v. State*, 948 So. 2d 655, 666 (Fla. 2006); however, the State respectfully suggests the conclusion in *Rodgers* that *Crawford* applies to sentencing should be rejected. Florida's death penalty statute, like the death penalty statutes in many other states and the Federal Death Penalty Act, allows hearsay testimony at the penalty phase. *See*, § 921.141(1), Fla. Stat. (1985) (providing: "[a]ny such evidence which the court deems to have probative value may be received, regardless of its admissibility under the exclusionary rules of evidence, provided the defendant is accorded a fair opportunity to rebut any hearsay statements."). This is consistent with well-settled constitutional law. In *Williams v. New York*, 337 U.S. 241 (1949), the United States Supreme Court held that the consideration of information supplied by witnesses at sentencing who were not subject to cross examination did not violate the Due Process Clause. *Id*. The principle announced in *Williams* has been reiterated in subsequent capital cases reviewed by the Supreme Court. *See, Gregg v. Georgia,* 428 U.S. 153, 203-204 (1976) (explaining that strict evidentiary rules at trial should not preclude admissibility of relevant information at capital sentencing phase); *Jurek v. Texas*, 428

U.S. 262, 276 (1976) (same); *United States v. Owens,* 484 U.S. 554 (1988); *United States v. Grayson,* 438 U.S. 41, 45-50 (1978); *United States v. Tucker*, 404 U.S. 443, 446-47 (1972).

Crawford addressed the use of *testimonial* statements only at *trial* - not at sentencing. *Crawford* does not apply to *non-testimonial* statements and federal courts, the guardians of constitutional law, declined to extend *Crawford* to sentencing. Virtually every federal appellate court has recently addressed the issue and has reaffirmed the longstanding principle that the Confrontation Clause does not apply to sentencing. *See United States v. Underwood*, 194 Fed. Appx. 215 (5th Cir. 2006) (reaffirming its prior holding that the Confrontation Clause does not apply to sentencing, and noting that therefore Crawford does not apply to sentencing either); *United States v. Bustamante*, 454 F.3d 1200, 1202 (10th Cir. 2006) (same); *United States v. Statts*, 189 Fed. Appx. 237 (4th Cir. 2006) (ruling "[t]here is no Confrontation Clause right at sentencing and nothing in *Crawford* indicates that it is applicable to sentencing proceedings); *United States v. Littlesun*, 444 F.3d 1196, 1199-1200 (9th Cir. 2006) (same), *cert. denied*, 127 S. Ct. 248 (2006); *United States v. Katzopoulos*, 437 F.3d 569, 576 (6th Cir. 2006) (same); *United States v. Cantellano*, 430 F.3d 1142, 1146 (11th Cir. 2005) (same), *cert. denied*, 126 S. Ct. 1604 (2006); *United States v. Cabbagestalk*, 184 Fed. Appx. 191, 195-196 (3rd Cir. 2006); *United States v. Luciano*, 414 F.3d 174, 179 (1st Cir. 2005); *United States v. Chau*, 426 F.3d 1318, 1323 (11th

Cir. 2005); *United States v. Roche*, 415 F.3d 614, 618 (7th Cir. 2005), *cert. denied*, 126 S. Ct. 671, 163 L. Ed. 2d 541 (2005) (explaining that the "relevant provision at sentencing is the due process clause, not the confrontation clause" because witnesses at sentencing are not accusers); *United States v. Stone*, 432 F.3d 651, 654 (6th Cir. 2005) ("Because *Crawford* was concerned only with testimonial evidence introduced at trial, *Crawford* does not change our long-settled rule that the confrontation clause does not apply in sentencing proceedings"); *United States v. Fleck*, 413 F.3d 883, 894 (8th Cir. 2005) (reaffirming prior holding that the Confrontation Clause does not apply at sentencing); *United States v. Martinez*, 413 F.3d 239, 243-44 (2d Cir. 2005) (reaffirming its prior holding that the Confrontation Clause does not apply to sentencing and noting that therefore Crawford does not apply to sentencing either), *cert. denied*, 126 S. Ct. 1086 (2006).

The State acknowledges *Rodgers* and that this Court has also found, with limitations, that the Sixth Amendment right of confrontation applies to sentencing proceedings. *See e.g. Way v. State*, 760 So. 2d 903, 917 (Fla. 2000); *Rodriguez v. State*, 753 So. 2d 29, 43 (Fla. 2000); *Engle v. State*, 438 So. 2d 803, 813-14 (Fla. 1983).

In *Way*, the trial judge limited the defendant's cross-examination of a police officer, and this Court held there was no abuse of discretion. The confrontation clause was mentioned in passing, but then this Court treated the evidentiary ruling as within

the trial's court's discretion. *Way* relied on *Engle* in stating "[T]he confrontation clause applies to sentencing proceedings." *Way*, 760 So. 2d at 917. In *Engle*, this Court stated that due process applies to all three phases of a capital case and that the right to confrontation is a fundamental right. *Engle*, 438 So. 2d at 813-814. This court observed that: "The right to confrontation protected by cross-examination is a right that has been applied to the sentencing process." *Engle*, 438 So. 2d at 814. This Court then relied on *Bruton v. U.S.*, 391 U.S. 123 (1968), in holding the co-defendant's statement was inadmissible. Again, this finding was limited. In fact, this Court dealt with the present situation and held that:

> The consideration of the confession or statement of a co-defendant is quite different from the consideration of a presentence report. If the defendant disputes the truth of a presentence report, he has the right to secure confrontation and cross-examination if he wishes to do so. *See Eutsey v. State*, 383 So. 2d 219 (Fla. 1980). On the other hand, a defendant cannot require a co-defendant to waive his constitutional right to remain silent and force him to testify during the sentencing procedure.

Engle, 438 So. 2d at 814. *Rodriguez* also cited *Engle*; however, the ruling was limited to the circumstances in which a police officer testified about the testimony of a jailhouse informant. The fault in that testimony was that a police officer's testimony lends credibility to the statement of an informant. This Court specifically distinguished hearsay which can be admitted in the penalty phase:

> We distinguish this case from those cases in which the police officer gave hearsay testimony concerning a defendant's prior violent felonies. *See Hudson v. State,* 708 So. 2d 256, 261 (Fla. 1998); *Clark v. State,* 613 So.

> 2d 412, 415 (Fla. 1992). Details of prior felony convictions involving the use or threat of violence to the victim are admissible in the penalty phase of a capital trial, provided the defendant has a fair opportunity to rebut any hearsay testimony. *See Rhodes v. State*, 547 So. 2d 1201, 1204 (Fla. 1989; *Tompkins v. State*, 502 So. 2d 415, 419 (Fla. 1986).

Rodriguez, 753 So. 2d at 44.

In the present case, Barnes asks this Court to apply the right of confrontation indiscriminately. He claims that any information in a PSI cannot be considered in the penalty phase, nor can *any* hearsay. This Court already stated in *Engle* that information in a PSI does not implicate the confrontation clause because the defendant can call witnesses to rebut the information. Barnes' allegations reveal the lengths to which a defendant may try to extend the safeguards of *Crawford*. Rather than protecting a defendant as a shield, Barnes now attempts to use *Crawford* as a sword to alleviate the defendant from producing witnesses. The State submits that this Court should follow federal law on this constitutional issue and hold that *Crawford* does not apply to sentencing proceedings. The State also respectfully requests this Honorable Court recede from *Rodgers,* and notes that Rodgers specifically waived any contention that preclusion of hearsay was absolute.[24]

IV. The trial court did not abuse its discretion by failing to strike the PSI

[24] "In his brief, Rodgers also contended that some of Dr. Prichard's testimony for the State during the penalty phase also violated *Crawford*, but at oral argument he waived this contention." *Rodgers*, 948 So. 2d at 663, n. 3.

which is required by 3.710(b). Although no further discussion of this issue is warranted and Barnes does not raise the constitutionality of Rule 3.710(b), because Barnes argues that information contained in a PSI violated *Crawford,* the State submits that requesting a PSI pursuant to Rule 3.710(b) does not violate *Crawford.* Rule 3.710(b) was adopted to ensure reliable sentencing in capital cases. Development of mitigation assists both the trial court in sentencing and this Court in proportionality review. *Crawford* also seeks to protect the rights of the defendant by excluding testimonial hearsay to be used in criminal *prosecution*. *Davis v. Washington,* 547 U.S. 813 (2006). The purpose of Rule 3.710(b) is to ensure that all available mitigation is presented so that a defendant is sentenced fairly, not to prosecute the defendant. Even if the trial judge had considered mitigating evidence gleaned from the PSI, this evidence could hardly violate *Crawford* since it is used to help the defendant, not used against him. *See e.g., Klokoc v. State*, 589 So. 2d 219 (Fla. 1991). As stated in *Crawford*, the text of the Confrontation Clause applies to " 'witnesses' *against* the accused." *Crawford*, 541 U.S. at 51. (Emphasis added.)

V. Error, if any, was harmless. Violations of the Confrontation Clause are subject to harmless error analysis. *Delaware v. Van Arsdall*, 475 U.S. 673 (1986).

A. The trial judge did not rely on any hearsay from the PSI in sentencing Barnes. Even if the trial court abused its discretion in failing to grant the motion to strike the PSI, and even if any of the information listed above were contained in the

PSI, that information was not the basis for the sentence. Therefore, any error was harmless.

None of the information cited above by Barnes was mentioned in the sentencing order, except that (1) Barnes was a psychopath (V11, R2047), and (2) Barnes failed to prove that he expressed remorse. (V11, R2051). There was direct evidence of both these facts, and the sentencing order acknowledges reliance on that direct evidence.

As to Barnes being a psychopath, the trial judge discussed this in relation to the statutory mitigator of extreme emotional disturbance mitigator (which the court found based on the testimony of Dr. Riebsame and not on the PSI):

> Dr. Riebsame testified that the Defendant was a psychopath and that his personality disorders were persistent and consistent throughout his life.

(V11, R2047). Thus, this finding was based on direct testimony and not hearsay. As to the lack of remorse, the trial judge discussed this in relation to the non-statutory mitigator that Barnes "expressed remorse for his actions" and found:

> There is no evidence in the record of this case to support a finding of this mitigating circumstance. In fact, the Defendant has indicated in court and in his taped statement to Sherman Insco that his acceptance of responsibility for the sexual batteries and the killing of Patricia Miller has to do with the Defendant's religious beliefs rather than a sincere sense of guilt of actual remorse. This mitigator was not established by the greater weight of the evidence.

(V11, R2051). Again, this finding was based on admissions by Barnes and lack of evidence: not on the PSI.

Barnes' cites to no finding in the sentencing order which was based on the PSI. Barnes recognizes this fact on page 52 of his Initial Brief in which he states that "A showing of the sentencing judge's reliance of this prejudicial hearsay should not be dispositive of the appellant's claim." In other words, a judge could have some hidden agenda and actually rely on "inaccurate information" and simply not "disclose" that devious plan. (Initial Brief at 52-53). It is well settled in Florida law that when a judge sits as a trier of fact, he is presumed to have ignored any inadmissible evidence to which he might have been exposed unless he expressly relies on that evidence. *See Guzman v. State*, 868 So. 2d 498, 510-11 (Fla. 2003); *State v. Arroyo*, 422 So. 2d 50, 51 (Fla. 3d DCA 1982).

The trial judge made clear findings of fact which are supported by competent substantial evidence. Barnes seems to imply that because the trial court cited *Perez v. State*, 919 So. 2d 347 (Fla. 2005), it minimized the weight given the extreme-emotional mitigator because of information in the PSI that Barnes has anti-social personality disorder. The trial court clearly explained the basis for its findings in the testimony of Dr. Riebsame, the facts of this crime, Barnes' admissions. This argument has no merit. *See Guzman, supra.*

B. Striking mitigation derived from the PSI would not change the outcome. Even if the trial judge abused her discretion by failing to strike the PSI, and even if an alleged Confrontation Clause right arguably extended to the penalty phase proceeding,

(which the State strongly disputes) and even if the trial judge considered information in the PSI which was testimonial (which the State again strongly disputes), any alleged error was harmless.

Any consideration of information in the PSI was for the purpose of establishing mitigation. If, as Barnes requests, any mitigation gleaned from the PSI was removed from the sentencing order, it would not change the outcome. Barnes has not attacked the validity of any aggravating circumstance. Apparently, the only mitigating circumstance Barnes wishes this Court to consider is that he confessed to the murder 17 years later, even though in 1988 he had his father contrive an alibi; and that he pled to the murder, even though the State had a DNA match and a confession. The trial judge did consider the fact that Barnes came forward and took responsibility for his acts. (V11, R2050-51). The judge gave each of those non-statutory mitigators little weight. As to the fact Barnes came forward, the trial judge held that "The defendant did not come forward to admit his involvement until there was already DNA evidence linking him to the crimes." (V11, R2050). The trial judge also found that "each of the six aggravating factors standing alone outweigh all of the mitigating circumstances combined." (V11, R2055).

Therefore, even if this Court found technical error with the proceedings, there would be no reasonable probability of a different outcome because there would be the same aggravating circumstances and *less* mitigation. *See State v. DiGuilio*, 491 So. 2d

1129, 1139 (Fla. 1986). A harmless error analysis is particularly appropriate in this case because there was no advisory jury and the trial judge clearly defined the weight given the aggravating circumstances and stated that any one aggravator outweighs all mitigation.

CLAIM III

THERE IS SUFFICIENT EVIDENCE AND THE DEATH SENTENCE IS PROPORTIONAL

Although not raised in the initial brief, this Court conducts an independent review of the sufficiency of the evidence and proportionality of the death sentence. - *See Buzia v. State*, 926 So. 2d 1203, 1217 (Fla. 2006); *Hoskins v. State*, 965 So. 2d 1, 22 (Fla. 2007).

I. There is sufficient evidence of guilt on all charges. Barnes pled to all charges. The forensic evidence and medical examiner testimony is consistent with Barnes' letters to the prosecutor and the November 1, 2006, interview.

II. Barnes' sentence of death is proportional to other death sentenced defendants. The court found the following aggravators:

1. Under sentence of imprisonment - great weight;
2. Prior violent felony - great weight;
3. During a sexual battery and a burglary - great weight;
4. Avoid arrest - great weight;

5. Heinous, atrocious, and cruel - great weight; and

6. Cold, calculated, and premeditated - great weight.

(V8, R1383-1408, 1425; V11, R2031-45).

The court found one statutory mitigator: Extreme mental or emotional disturbance, and gave it slight weight.

The court found the following non-statutory mitigators:

> 1. The defendant came forward and revealed his involvement in the unsolved crime-little weight;
>
> 2. The defendant took responsibility for his acts - little weight;
>
> 3. The defendant has experienced prolonged drug use - little weight;
>
> 4. The defendant did not have the benefit of a loving relationship with his mother - little weight;
>
> 5. The defendant did not have the benefit of a loving relationship with his father - little weight;
>
> 6. The defendant was sexually abused as a child - slight weight;
>
> 7. The defendant has taken steps to improve himself - little weight;
>
> 8. The defendant is a functional and capable person and has demonstrated by his actions and participation in this case that he has sufficient intelligence and capabilities to contribute to society - little weight.

(V8, R1416-23, V11, R2047-54). The court additionally held that "each of the six aggravating factors standing alone outweigh all of the mitigating circumstances combined." (V11, 2055).

Because the death penalty is reserved for only the most aggravated and the least mitigated of first-degree murders, the Court undertakes "a comprehensive analysis in order to determine whether the crime falls within the category of both the most aggravated and the least mitigated of murders, thereby assuring uniformity in the application of the sentence." *Rodgers v. State*, 948 So. 2d 655, 669 (Fla. 2006) (*quoting Anderson v. State*, 841 So. 2d 390, 407-08 (Fla. 2003)). In the absence of demonstrated legal error, the Court "accept[s] the trial court's findings on the aggravating and mitigating circumstances and consider[s] the totality of the circumstances of the case in comparing it to other capital cases." *Id.* at 670.

The present case is proportional to other capital cases. Heinous/atrocious and cold/calculated/premeditated are two of the weightiest aggravators. *Morton v. State*, 789 So. 2d 324, 331 (Fla. 2001). When, as in this case, the prior-violent-felony aggravator is a murder, the death penalty has been upheld. *See Bevel v. State,* 983 So. 2d 505 (Fla. 2008); *Rodgers v. State,* 948 So. 2d 655 (Fla. 2006); *Ferrell v. State,* 680 So. 2d 390 (Fla. 1996). The death penalty has been upheld in cases in which the victim was sexually battered, then strangled or beaten to death. *Hoskins v. State*, 965 So. 2d 1 (Fla. 2007); *Simmons v. State*, 934 So. 2d 1100 (Fla. 2006); *Boyd v. State*, 910 So. 2d 167 (Fla. 2005); *Wright v. State*, 473 So. 2d 1277, 1282 (Fla. 1985).

CONCLUSION

Based on the foregoing arguments and authorities, Appellee respectfully requests this Honorable Court affirm the convictions and sentences.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the above has been furnished by U.S. Mail to: **George D.E. Burden,** Assistant Public Defender, 444 Seabreeze Blvd., Suite 210, Daytona Beach, Florida 32118 on this __ day of January, 2009.

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Of Counsel

CERTIFICATE OF COMPLIANCE

This brief is typed in Times New Roman 14 point.

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