IN THE SUPREME COURT OF FLORIDA

JAMES BARNES,	)	
	)	
Appellant,	)	
	)	
vs.	)	CASE NO. SC08-63
	)	
STATE OF FLORIDA,	)	
	)	
Appellee.	)	
_____	)	

APPEAL FROM THE CIRCUIT COURT
IN AND FOR BREVARD COUNTY, FLORIDA

INITIAL BRIEF OF APPELLANT

JAMES S. PURDY
PUBLIC DEFENDER
SEVENTH JUDICIAL CIRCUIT

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ATTORNEY FOR APPELLANT

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OTHER AUTHORITIES CITED:

IN THE SUPREME COURT OF FLORIDA

JAMES BARNES,)
)
Appellant,)
)
vs.) CASE NO. SC08-63
)
STATE OF FLORIDA,)
)
Appellee.)
_____)

STATEMENT OF THE CASE

James Phillip Barnes, hereinafter referred to as appellant, was indicted by Grand Jury with Murder in the First Degree; Burglary of Dwelling with an Assault or Battery; two counts of Sexual Battery; and Arson of a Dwelling. (VIII 1454) Prior to appellant's first appearance, the appellant prepared a Motion for Speedy Trial and a Waiver of Representation. (I 4); (VIII 1471, 1473) At first appearance the appellant requested a ***Feretta***[1] Hearing, and executed a written Waiver of Counsel at the first appearance. (I 4;VIII 1468)

During the following court appearance, the state advised the court that they were seeking the death penalty. (I 12) The trial court designated an attorney from

[1] ***Feretta vs. California***, 422 U.S. 806 (1975)

the Public Defender's Office as standby counsel. (I 14) The appellant stated that he wished to represent himself because he wanted to make sure that the law was not conspiring against him. (I 26) The appellant stated that he did not have many rights left in this world, and the right to represent himself is one of the only rights that he still has. (I 26) The trial court found that the appellant was capable to represent himself pursuant to ***Feretta.***[2]

The appellant acknowledged that he understood his rights and wished to enter a plea. (I 29) After further inquiry by the court, the appellant pled guilty to all counts. (I 31) After the state provided a factual basis for the charges, the trial court accepted the appellant's guilty pleas to all counts and adjudicated the appellant guilty of all charges. (I 44) The appellant requested a waiver of an advisory jury. (I 45) The appellant explained that it was his strategy to avoid having a jury determine whether the murder was heinous, atrocious and cruel; and he believed that he would have more of a chance before the judge alone. (I 56)

The trial court inquired as to whether the appellant was going to present

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[2] The trial court found that the appellant was competent; that the appellant knowingly, freely and voluntarily exercised his decision to represent himself; that the appellant made a knowing and intelligent waiver of counsel; and the appellant understands the advantages and disadvantages of representing himself. (I 28) The trial court advised the appellant that if he elects to represent himself, he can not later complain about his own representation. (I 28)

evidence at his sentencing hearing. (I 56) The appellant stated that he would defend himself if challenged, but he had no evidence of mitigating circumstances. (I 57) The trial court informed the appellant that there may be an attorney appointed by the court to develop mitigating circumstances pursuant to the statute. (I 58) The trial court found that the appellant knowingly and intelligently waived his right to an advisory jury for the penalty phase. (I 60)

At the next court appearance, the trial court offered the appellant an attorney to represent him. (I 66) The appellant denied the offer to have an attorney represent him. (I 66) The trial court appointed the Office of the Public Defender as standby counsel. (I 68) Attorney Moore of the Public Defender's Office spoke to the appellant, and the appellant stated that he did not want Attorney Moore to have any role in his defense. (I 69) The state prepared an order to produce the appellant's school records. (I 72) The trial court ordered a pre-sentence investigation and a psychological examination. (I 72) The trial court advised the appellant that if the court was dissatisfied with the presentation of mitigation, there would be a ***Muhammad***[3] Hearing. (I 73)

At the subsequent hearing the trial court again informed the appellant that he

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

was at a disadvantage representing himself and offered to appoint the appellant an attorney. (I 90) The appellant understood that he was at a disadvantage and did not want an attorney appointed to represent him. (I 91) The appellant had no idea that the state would seek the death penalty when he came forward to admit his guilt. (I 119)

The trial court ordered that the appellant use the secretary from the Public Defender's Office to coordinate hearing time. (I 132) The appellant objected to the order and stated that he would not contact the Public Defender's Office to schedule hearings. (I 133)

The appellant had a hearing on his ***pro se*** Motion for Independent DNA testing. (I 153) The state requested a ***Feretta*** Hearing, and the trial court complied. (I 154) The appellant informed the trial court that he was prepared to begin his sentencing phase right away, and if the trial court further delayed the sentencing hearing he would fight by filing a series of death penalty motions. (I 171) The appellant would demonstrate to the trial court that he was not trying to commit state assisted suicide. (I 171) The trial court denied the appellant's request to obtain an unmonitored cordless telephone to contact witnesses. (I 176)

The trial court held a hearing on appellant's pre-trial motions. (II 195) The trial court held a ***Ferretta*** Hearing. (II 195) The appellant requested that the state

provide a list of the witnesses that they actually intended to call for the penalty phase. (II 271) The appellant prepared a witness questionnaire and intended to mail them to witnesses with the court's approval. (II 271) The state agreed to prepare a shorter list of possible witnesses for the penalty phase. (II 271) The appellant sought to declare the Florida Death Penalty Statute unconstitutional for various reasons: use of hearsay (II 307); faulty appellate review (II 323, III 410); improper aggravating factor 5(d) (II 342); automatic presumption for death penalty (III 415); prior felony aggravating factor is vague (III 418); under sentence of imprisonment aggravating factor can not be applied retroactively (III 423); and heinous, atrocious and cruel aggravating factor is arbitrary (III 425).

The appellant informed the trial court that he was at a disadvantage representing himself because of his lack of access to the internet. (II 323) The trial court granted the appellant's Motion to Strike Psychological Report submitted by Dr. Riebsame. (II 377) The trial court granted the appellant's Motion for Confidential Psychiatric Advisor. (II 380) The appellant informed the court that he was not going to call a psychologist as a witness. (III 386) The case proceeded to a penalty phase hearing. (III 439)

The state sought to introduce an interview with the appellant made while at prison. (III 468) The appellant objected to the introduction of the tape on the

grounds that he was not Mirandized and it was a custodial interrogation. (III 468) The trial court ruled that the appellant's statement made at prison was freely and voluntarily given, and that the Sixth Amendment did not apply in this matter because the appellant was in custody on other charges and not on this charge. (IV 626) The trial court found that the Fifth Amendment did not apply because appellant's fellow inmate, Sherman Insco, was not a police agent, but an agent of the appellant. (IV 666)

The state sought to introduce evidence of a prior violent felony committed by the appellant. (IV 656) The appellant objected to the state establishing a violent felony that occurred in 1997 for a murder that he committed in 1988. (IV 662) The trial court overruled the objection. (IV 662)

Dr. Quisar was called by the state to review the autopsy pictures of murder victim Patricia Miller and prior violent felony murder victim Linda Barnes.[4] (V 769) The appellant objected to the introduction of the autopsy pictures of Patricia Miller on the grounds that Dr. Quisar could not authenticate them. (V 769) The state responded that Dr. Quisar could render an expert opinion as to what he reviewed. (V 769) The trial court overruled the appellant's objection. (V 770) The trial court also permitted the admission of the autopsy pictures into evidence over

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[4] The murder of Patricia Miller occurred in 1988 and the prior violent felony

appellant's objection. (V 770)

Dr. Quisar also testified as to the autopsy photographs of Linda Barnes. (V 787) The appellant objected to the testimony of Dr. Quisar on the grounds that the photographs have a lack of authentication. (V 788) The appellant also objected to the testimony of Dr. Quisar on the grounds of hearsay. (V 789)

The appellant objected to the victim impact statement being entered into evidence. (V 805) The victim advocate read the victim impact statement into the record. (V 806) The state rests. (V 802)

The appellant announced that he had no mitigation evidence to offer. (R 809) Standby counsel, Attorney Moore, explained mitigation evidence preparation to the appellant. (V 810) The appellant did not want mitigation evidence presented. (V 810) It was recommended that standby counsel talk to all family members and order a full battery of neuro-psychological testing. (V 810) There would be follow-up based on the recommendations of psychologists or psychiatrists. (V 810) The appellant stated that if a doctor came to visit he would not cooperate and would quote "***Stell v. Smith***".[5] (V 811)

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murder of Linda Barnes occurred in 1997.

[5] The appellant was likely referring to ***Smith v. Estelle***, 602 Fed.2d 694 (C.A. Tex 1979). This case holds that a criminal defendant may not be compelled to speak to psychiatrist who can use his statements against him at sentencing phase of a capital trial.

The trial court observed that the appellant indicated at the very beginning he had a strategy that would become apparent, and observed that to this day the trial court did not know the appellant's strategy. (V 813) The appellant explained that his strategy was to tell the truth and "man up" to what he had done. (V 814) The appellant further explained that the court has a PSI, doctor report and school records. (V 815) The appellant stated that he is a "burned out sociopath... simple as that." (V 815) The appellant is in his early forties and it is one of those things that happen. (V 815) The appellant "cleaned the slate on this" and that has been the strategy the whole time. (V 815)

The trial court decided to appoint counsel to bring forth mitigation. (V 832) The trial court directed that a status hearing be conducted in two weeks where a special counsel will be determined and a new PSI ordered. (V 833) The appellant noted for the record that if anyone tries to contact him for any reason he would have nothing to say. (V 834)

The trial court appointed Attorney Bardwell as the court's attorney to develop mitigation for the appellant. (V 839) The appellant objected to the proceedings and Attorney Bardwell's assistance on Sixth Amendment grounds. (V 847; 869) The appellant would not answer any questions from Attorney Bardwell. (V 847)

The appellant renewed his objection to the assistance of Attorney Bardwell. (V 869) The trial court overruled the appellant's objection. (V 871) The appellant further objected to the release of any of his mental health or medical information under the HIPPA Law: "I don't want any of my personal information shown to anybody. I have personal issues or had personal issues and I left them at home at a very young age legally. I'm going to invoke HIPPA right now and say hey, I object strenuously to it." (V 878-79)

The appellant objected to Attorney Bardwell examining his prison records to develop mitigation. (VI 986) The appellant stated that from the very beginning that he was trying to put his best foot forward. (VI 986) The appellant did not want to go into his prison record and his past exposed. (VI 986)

The appellant filed a Motion to Allow Defendant Pro Se, Right to Representation During Critical Stage of Proceedings. (VI 996) The appellant argued that he had a constitutional right to represent himself and was competent to do so. (VI 996) The appellant further argued pursuant to ***Goldsmith v. State***, 930 So. 2d 1253 (Fla. 2nd DCA 2006) that he had the right to control the over-all objective of his defense and he was asserting that right. (VI 997) The appellant argued during this critical stage of his penalty phase trial that he had the right to self-representation. (VI 997) The appellant requested that the court modify their

previous ruling and allow him to represent himself during the penalty phase. (VI 997)

Attorney Bardwell argued that the appellant was not being deprived of self-representation, and was seeking a right he did not have and that was to veto the actions of appropriately appointed counsel having a legitimate constitutionally mandated objective to prevent the court from imposing a death sentence. (VI 998) The state has an independent interest in ensuring that the death penalty is used in the appropriate fashion, and only in those situations for which there is a careful weighing of all circumstances. (VI 999) The trial court granted the appellant's motion. (VI 999) The trial court had already permitted the appellant to introduce his mitigation.[6] (VI 999)

The appellant also made a motion to strike Attorney Bardwell's witness list. (VI 1001) The appellant objected to the evidence and witnesses prepared by Attorney Bardwell because they would be prejudicial and were not part the strategy that he prepared on his own behalf. (VI 1002) The trial court denied the appellant's motion without prejudice because the trial court had not heard the witnesses or seen the evidence at this point. (VI 1005)

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[6] The trial court accepted the appellant's presentation of mitigation that the appellant came forward and cooperated. The trial court would weigh that mitigation, and would use Attorney Bardwell to obtain further mitigation. (V 999)

During a status hearing, the appellant requested the ability to confer with Attorney Bardwell before the Spencer Hearing so he could discuss what matters would be brought up and what matters would not be brought up. (VI 1021) The state expressed concern that Attorney Bardwell had been appointed by the court to provide evidence to the court independent of the state and the defendant. (VI 1021) Ordering Attorney Bardwell to confer with appellant, and making any agreements with the appellant would give him a different role. (VI 1021) The trial court ordered Attorney Bardwell to confer with the appellant and stand-by counsel Moore for the purpose of informing the appellant of the mitigation evidence. (VI 1025)

The appellant and Attorney Bardwell met pursuant to the court order. (S 4-34) The two could not reach agreement on the proper presentation of mitigating evidence. (S 34)

The appellant made a motion to disqualify Attorney Bardwell. (VI 1060) The appellant introduced a letter written by Attorney Bardwell to the appellant which stated "I am not going to beg you to cooperate with my tasks since I have no strong-felt aversion to the death penalty in this case. And I have no ethical obligation to represent your best interest." (VI 1060) The trial court denied the motion on the grounds that it did not believe the motion was relevant to the

proceedings. (VI 1064)

The appellant made a ***ore tenus*** motion to disqualify the judge on the grounds that he could not get a fair hearing. (VI 1071) The trial court denied the ***ore tenus*** motion stating that the appellant needed to file an appropriate motion. (VI 1071)

The trial court conducted a Spencer Hearing. (VII 1085) The Department of Corrections prepared a PSI pursuant to Rule 3.710(b).[7] (VII 1102) At the direction of Attorney Bardwell, Investigator Sirois prepared mitigation materials to be attached to the presentence investigation as an addendum. (VII 1102) The appellant objected to this procedure on the grounds that Rule 3.710(b) does not apply because he challenged the death penalty and argued seventeen death penalty motions. (VII 1106) The appellant further objected to the addendum to the PSI on the grounds that he has a right to confront the evidence placed in it. (VII 1107)

Attorney Bardwell argued that since the appellant presented no mitigating circumstances in this case, Rule 3.710(b) applies. (VII 1107) Attorney Bardwell

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[7] Rule 3.710(b) of the Florida Rules of Criminal Procedure provides that should the defendant in a capital case choose not to challenge the death penalty and refuses to present mitigation evidence, the court shall refer the case to the Department of Corrections for preparation of pre sentence report. The report shall be comprehensive and should include information such as previous mental problems, including hospitalization, school records, and relevant family background.

further argued that the Confrontation Clause had no application because there had been no accusatory fact lodged against the appellant. (VII 1109) The appellant cited ***Rogers v. State***[8][sic] wherein the Confrontation Clause applies to the guilt phase/penalty phase and sentencing. (VII 1110) The appellant argued that he has the right to contest anything entered into evidence. (VII 1110) The court ruled that the presentence investigation and the addendum prepared by Attorney Bardwell will be considered together. (VII 1111)

The appellant made a Motion to Strike the presentence investigation submitted by the Florida Department of Corrections citing ***Crawford v. Washington,*** 541 U.S. 36 (2004). (VII 1127) The trial court overruled the appellant's motion and would review the PSI for evidence of mitigation. (VII 1131) The appellant made a Motion to Strike Dr. Riebsame's assessment report. (VII 1132) The appellant argued that the information in Dr. Riebsame's report was more prejudicial than probative and more aggravating than mitigating. (VII 1136) The appellant cited ***Smith v. Estelle***, 602 Fed.2d 694 (C.A. Tex 1979) which held that introducing medical records is forcing the appellant to incriminate himself.

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[8] ***Rodgers v. State***, 948 So.2d 655 (Fla. 2006)

(VII 1137)

The appellant objected to Dr. Riebsame issuing an opinion as to whether or not the appellant suffered from mental or emotional disturbance at the time of the offense. (VII 1182) The appellant objected to the testimony of Dr. Riebsame because testimony did not establish mitigating circumstances. (VII 1189) The appellant further objected to the testimony of Dr. Riebsame because he was reading from a report that was excluded from evidence. (VII 1193) At the conclusion of the Spencer Hearing, the appellant stated he was not preparing a memorandum of law concerning the death penalty. (VIII 1285)

The trial court issued a Sentencing Order and found that there were six aggravating factors,[9] and the trial court assigned each aggravating factor great weight. (VIII 1384-1408) The trial court found there was statutory mitigation. (VIII 1415) The trial court found that the appellant was under the influence of an extreme mental disturbance, but that the appellant was not substantially impaired

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[9] Capital Felony was Committed by a Person Under Sentence of Imprisonment; Defendant was Previously Convicted of Another Capital Felony or a Felony Involving Violence; Capital Felony was Committed While the Defendant was Engaged in the Commission of a Sexual Battery and a Burglary; The Capital Felony was Committed for the Purpose of Avoiding or Preventing Lawful Arrest; The Capital Felony was Heinous, Atrocious or Cruel; The Capital Felony was committed in a Cold, Calculated and Premeditated Manner.

to the extent that he did not have the capacity to appreciate the criminality of his conduct or to conform his conduct to the requirements of law. (VIII 1415) The trial court assigned no weight to this mitigator. (VIII 1415) The trial court found some non-statutory mitigation, but gave it little weight. (VIII 1416-23) The trial court found that each of the six statutory aggravating factors standing alone outweigh all of the mitigating circumstances combined. (VIII 1425) The trial court sentenced the appellant to death as to Count I; Count II-IV the appellant was sentenced to life imprisonment to run consecutively to one another; and on Count V the appellant was sentenced to thirty (30) years to run consecutive to all other counts. (VIII 1428) The Office of the Public Defender was appointed. (XII 2088) This appeal follows.

STATEMENT OF THE FACTS

Melbourne Police Detective Dennis Nichols investigated the homicide of Patricia Miller. (III 440) On April 20, 1988, Nichols was called to respond to a condominium complex where there had been a fire. (III 441) In the master bedroom lying on the bed was the burnt body of a nude female with her hands bound behind her back. (III 446) Appellant was interviewed as a suspect in 1988, and provided a blood sample. (III 462) Detective Nichols could not develop any leads because of the limitations of DNA processing. (III 462) Ten years later the crime scene evidence was processed again, and there was a DNA match to the appellant. (III 462) Detective Nichols then visited the appellant in prison, and the appellant refused to speak to Nichols. (III 464) The investigative work to solve this murder stalled over the following years.

In October of 2005 the appellant sent a letter to state attorney Hunt stating that he will confess to an unresolved matter to a fellow inmate named Sherman Insco. (III 503) The appellant's offer to confess was open until Ramadan[10] ends.

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[10] Ramadan is a Muslim religious observance and is a time to fast for the sake of God, and to offer even more prayer than usual. Also involved in Ramadan are asking forgiveness for the sins of the past, asking for guidance in the future, and asking for help with refraining from every day evils and trying to purify oneself through self-restraint and good deeds.

(III 503)

Melbourne Police Detective Dennis Nichols was present during the interview of the appellant on November 1, 2005. (III 534) The appellant stated that in April of 1988 he entered the north window of a condominium in the River Oaks Condominiums in Melbourne, Florida. (IV 561) The appellant got a knife out of the kitchen and caught a woman in her bathroom. (IV 561) The appellant took her into the bedroom and raped her. (IV 561) The appellant got some shoestrings off of tennis shoes and went back in the bedroom and tied her up with her hands behind her back. (IV 561) The appellant raped her again. (IV 561) The appellant attempted to strangle the woman to death but was unsuccessful. (IV 562) The appellant then beat her to death with a hammer by striking the back of her head four or five times. (IV 562, 566) The appellant took the victim's bank card and wallet. (IV 562) The appellant put all the items he thought he touched inside a sack and went outside. (IV 562) The appellant got a lighter and cigarette and came back into the front door and set the bed on fire. (III 562) The appellant then got dressed quickly and left. (IV 562)

The appellant then gave details of the victim's condominium. (IV 563) The appellant did not want to take any property because he did not want to get caught

with the property. (IV 563) According to the appellant, the victim did not put up any kind of resistance when he put her on the bed. (IV 569) The appellant refused to answer questions about what happened immediately before the murder and anything that happened immediately after the murder. (IV 569) The appellant had a previous encounter with the victim where he had been humiliated at the pool, but the appellant refused to give details to that encounter. (IV 572) The appellant refused to answer the question as to what time he decided to kill the victim. (IV 572) The appellant also refused to answer why he decided to kill her. (IV 572) The appellant started the victim's bed on fire because he had started a couple of fires before. (IV 574) The appellant's intent when he entered the victim's condominium was to kill her. (IV 584) The appellant did not have an intent to rape her rather his intent was to kill her. (IV 584) The appellant had spoken to the victim before and had spent a lot of time in the condominium upstairs with some friends. (IV 590)

After making the taped confession in prison, the appellant wrote a letter to the state confessing to the crime. (IV 634) The appellant stated that the intent for entering the victim's condominium was rape, which explained why he entered the condominium unclothed. (IV 635) The appellant murdered the victim so there would be no witness or complaint against him. (IV 635) The appellant claimed that

he was not looking to go to death row. (IV 636) The appellant claimed that he would be willing to give an open plea at a plea hearing for a guarantee of a fair sentencing hearing and dismissal of any charges against his father. (IV 636)

The appellant wrote another letter to State Attorney Hunt. (IV 636) The appellant claimed that he was willing to plea guilty and to resolve the case in exchange for not prosecuting Brian Barnes for accessory after the fact. (IV 637) The appellant again detailed the rape and murder of Patricia Miller. (IV 637-647)

Evidence of Prior Violent Felony

During the appellant's relationship with his wife Lynn he went back to drug use. (V 712) The appellant's wife was very supportive. (V 712) On December 1, 1997 the appellant stole some things out of the house, and the appellant's wife got an injunction against him. (V 712) The appellant went into Twin River's detox on December 5, 1997. (V 712) The appellant met his wife at a Friendly's Restaurant on December 8th and promised he would not do it again. (V 712) The appellant's wife let him back in the house, and he went to work on December 9th and December 10th. (V 712)

The appellant's wife found crack cocaine in the house. (V 712) The appellant's wife became very upset, and locked the bedroom door and told the appellant to get out of the house. (V 712) The appellant refused to leave and

wanted to talk. (V 712) The appellant's wife stated that she no longer trusted him because he broke his promises. (V 712) The appellant's wife then opened the bedroom door and "started on him." (V 713) The appellant grabbed both of her hands and told her that she had to listen him. (V 713) The appellant's wife started to kick and knee him, the appellant stepped out of the way got behind her and grabbed her around the neck and then went to the floor hard. (V 713) The appellant broke his wife's neck when she hit the floor. (V 714) After the two hit the floor the appellant continued to hold onto her around the neck so she would not be able to fight back. (V 720) The appellant then rolled his wife over and she was cut on the nose and her tongue was sticking out and she was blue. (V 721) The appellant then left the house and took jewelry and took cash with him. (V 726) The appellant then drove off to Interstate 95 to get some drugs. (V 726) After the appellant ran out of drugs he thought about dying – he just wanted to die. (V 745) The cause of death of Linda Barnes was manual strangulation. (V 794)

Dr. Sajie Quisar, the Brevard County Medical Examiner, reviewed the autopsy report of Patricia Miller. (V 764) The autopsy report of Patricia Miller was performed by Dr. Wickham a former Brevard County Medical Examiner. (V 764) Dr. Quisar also reviewed the letter describing the murder written by the appellant James Barnes. (V 765)

The victim Patricia Miller had a lesion on the anal area consistent with anal sexual assault. (V 771) The autopsy report photographs show the hemorrhage and fracture of two structures. (V 776) One is the cricoid cartilage of the larynx and one is fracture of the hyoid bone. (V 776) It took substantial amount of force to fracture the hyoid bone of a person in their forties. (V 776) A person will lose consciousness in 10 to 20 seconds when they are strangled. (V 779) The victim also suffered multiple blows to the head with lacerations on the skull and multiple contusions to the brain substance. (V 780) The cause of death of Patricia Miller was multiple cranial cerebral injuries. (V 784) The burns on the victim's body were post mortem. (V 784)

Dale Gilmore is the forensic DNA supervisor for Wuestoff Reference Lavatories. (V 795) Gilmore tested two sets of slides that were vaginal smears obtained from the victim Patricia Miller. (V 797) There was spermatozoa present on both of the slides. (V 797) Gilmore compared the DNA extracted from the spermatozoa with standards of Ernest Helms, Issac Helms and the appellant. (V 798) Gilmore was able to exclude Ernest Helms and Issac Helms as being the source of the spermatozoa. (V 798) Gilmore could not exclude James Barnes. (V 798) In this particular case the probability of a random match for the DNA type was 2 in 28.7 million in the African American population, 1 in 3.8 million in the

Caucasian population and 1 in 82.4 million in Hispanic population which represents how common these DNA types are and those populations. (V 799)

The state introduced a certified copy of appellant's conviction for aggravated battery dated January 19, 1982 in Broward County, Florida. (V 800) The state also introduced a certified copy of the conviction of first degree murder, forgery, uttering a forgery, grand theft, dealing in stolen property which occurred on January 9, 1998. (V 801) The state further submitted into evidence the certificate of parole dated October 27, 1987. (V 801) The state submitted a victim impact statement. (V 802)

Attorney Bardwell called Dr. Riebsame as an expert in forensic psychology. (VII 1176) Dr. Riebsame reviewed police reports witness statements appellant's statements to the police and the crime scene photographs. (VII 1178) Dr. Riebsame also reviewed medical examiner reports, DNA laboratory reports and witness statements. (VII 1178) Riebsame reviewed appellant's criminal records and police reports from Florida and Oklahoma, and also reviewed appellant's DOC medical records. (VII 1178) Dr. Riebsame also reviewed the investigative report prepared by Terry Sirois. (VII 1178) These materials and records were more than Dr. Riebsame usually had the opportunity to review in a case like this. (VII 1179) Dr. Riebsame also met with the appellant. (VII 1179) The appellant refused to

cooperate and assist in the evaluation, and refused psychological testing and neuro psychological testing. (VII 1180) The refusal of the appellant did limit Dr. Riebsame's evaluation, and the appellant's cooperation would have been helpful. (VII 1180)

At the time of the offense, the appellant had cocaine dependence and an anti-social personality disorder, NOS, which would include borderline narcissistic characteristics. (VII 1184) The mental disorder in the appellant's case would be considered a extreme mental disturbance. (VII 1185) Despite the extreme mental disturbance, the appellant was still able to appreciate the criminality of his actions. (VII 1187)

The appellant has a psychopathic personality. (VII 1189) A psychopathic individual has a history of anti-social behavior, or behavior that reflects a lack of conscious, a lack of empathy, and in terms of feelings of others and considering those feelings of others. (VII 1189) The psychopathic personality has a biological predisposition, and the research suggests a brain abnormality in psychopathic persons. (VII 1192) Psychopathic persons lack empathy, cannot feel for others, have a limited conscious, and behave in impulsive and aggressive ways. (VII 1192)

The appellant was born prematurely and remained hospitalized and considered jaundice. (VII 1196) There was also history during pregnancy of the

mother smoking and abusing alcohol. (VII 1196) The appellant was diagnosed with yellow fever during childhood. (VII 1196) These factors could be linked to some sort of fetal distress on the appellant's part which could result in some sort of brain abnormality or brain dysfunction. (VII 1196) The behaviors exhibited by the appellant often result from some sort of frontal lobe dysfunction of the brain. (VII 1196) This is the part of the brain most responsible for the planning ability, development of frustration, and tolerance. (VII 1196) The appellant grew up in a violent environment and experienced periods of bed wetting. (VII 1203) The appellant also had problems with stealing, aggressiveness and setting fires. (VII 1203) At the time of the murder, the appellant had the ability to appreciate the criminality of his conduct. (VII 1228) The appellant also had the ability to conform his conduct to the requirements of the law. (VII 1228)

SUMMARY OF ARGUMENT

POINT I: The trial court violated appellant's Sixth Amendment right to representation when it appointed counsel to develop penalty phase evidence over appellant's objection. Barnes had a constitutional right to represent himself, and he was clearly competent to do so. To permit counsel to take a position contrary to his wishes through the vehicle of appointing"***Muhammad*** Counsel" would violate the dictates of ***Faretta v. California***. In a criminal trial all competent defendants have a right to control their own destinies.

POINT II: The trial court erred in permitting hearsay evidence to be considered over the appellant's objection. The appellant made a Motion to Strike the presentence investigation submitted by the Florida Department of Corrections and Attorney Bardwell citing ***Crawford v. Washington,*** 541 U.S. 36 (2004). The appellant believed that the hearsay information in the report was more prejudicial than mitigating.

POINT I

THE TRIAL COURT VIOLATED APPELLANT'S SIXTH AMENDMENT RIGHT TO REPRESENTATION WHEN IT APPOINTED COUNSEL TO DEVELOP PENALTY PHASE EVIDENCE OVER APPELLANT'S OBJECTION.

From the very beginning, the appellant demanded his constitutional right to represent himself. The appellant requested a ***Feretta***[11] Hearing, and executed a written waiver of counsel at his first appearance. After the state advised the trial court that they were seeking the death penalty, the trial court designated an attorney from the Public Defender's Office as standby counsel. The appellant reiterated that he wished to represent himself because he wanted to make sure that the law was not conspiring against him. The appellant also stated that he did not have many rights left in this world, and the right to represent himself was one of the rights that he had remaining.

The trial court found that the appellant was competent; and that the appellant knowingly, freely and voluntarily exercised his decision to represent himself; that the appellant has made a knowing and intelligent waiver of counsel; and that the

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[11] ***Feretta vs. California***, 422 U.S. 806 (1975)

appellant understands the advantage and disadvantages of representing himself. The trial court advised the appellant that if he elects to represent himself, he can not later complain about his own representation. The appellant acknowledged that he understood his rights and wished to enter a plea. After further inquiry by the court, the appellant plead guilty to all counts. After the state provided a factual basis for the charges, the trial court accepted the appellant's guilty pleas to all counts and adjudicated appellant guilty to all charges. The appellant requested a waiver of an advisory jury. The appellant explained that it was his strategy to avoid having a jury determine whether the murder was heinous, atrocious and cruel, and that he would have more of a chance before the judge alone.

The trial court inquired whether the appellant was going to present evidence at his sentencing hearing. The appellant stated that he would defend himself if challenged, but he had no evidence of mitigating circumstances. The trial court found that the appellant knowingly and intelligently waived his right to an advisory jury for the penalty phase.

The appellant was unwaivering in his desire to represent himself throughout all future proceedings. The trial court continued to offer the appellant an attorney to represent him, and conducted several ***Feretta*** Hearings. The trial court ordered a pre-sentence investigation and a psychological examination. The trial court

advised the appellant that if his presentation of mitigation was inadequate, there would be a ***Muhammad***[12] Hearing. The appellant informed the trial court that he was prepared to begin his sentencing phase right away, and if the trial court further delayed his sentencing hearing he would fight by filing a series of death penalty motions. The appellant claimed that he was not trying to commit state assisted suicide.

After the state rested, the appellant announced that he had no mitigation evidence to offer. The trial court reminded the appellant that at the very beginning he had a mitigation strategy that would become apparent, and the trial court did not know the appellant's strategy. The appellant explained that his mitigation strategy was to tell the truth and "man up" to what he had done. The appellant further explained that the trial court has a PSI, doctor report and school records. The appellant explained that he "cleaned the slate" on this and that has been the strategy the whole time. The trial court decided to appoint counsel to bring forth mitigation over the appellant's objection. This was error.

A. ***Faretta v. California***

The right to counsel was recognized in ***Gideon v. Wainwright***, 372 U.S. 335 (1963) which established a Fourteenth Amendment right to counsel in state

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

court proceedings. ***Faretta v. California***, 422 U.S. 806 (1975) establishes a Sixth Amendment right to self-representation. In ***Faretta***, the Supreme Court of the United States stated the question as whether a state court may "hale a person into its criminal courts and there force a lawyer upon him, even when he insists that he wants to conduct his own defense." 422 U.S. at 807. The Court concluded that it could not. In reaching this conclusion, the Court cited the structure of the Sixth Amendment, which provides:

> In all criminal prosecutions, the accused shall enjoy the right . . . to be informed of the nature and cause of the accusation; to be confronted with the witness against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

U.S. Const. amend. VI. ***Faretta*** observed that these rights are guaranteed in state proceedings by the Fourteenth Amendment. ***Faretta,*** 422 U.S. at 818.

Although the Sixth Amendment makes no explicit reference to a right to proceed ***pro se***, ***Faretta*** found this right implicit because the right to defend is given to the accused, and counsel is to assist, not conduct, the defense. ***Id.*** at 818-20. The appellant, therefore, has a federal constitutional right to be the "master" of his own defense. ***Id.*** at 820. The ***Faretta*** majority conceded that most criminal defendants would be better defended by counsel. ***Id.*** at 834. But to force unwanted counsel on a defendant "violates the logic" of the Sixth Amendment. ***Id.*** at 820.

Faretta also held that an accused must "knowingly and intelligently" forego his right to counsel and that the defendant need not possess the skill and experience of a lawyer in order to represent himself. ***Id.*** at 835 The Court observed that Faretta was "literate, competent, and understanding, and the he was voluntarily exercising his informed free will." **Id.** The trial judge informed Faretta that he would be required to follow the rules a lawyer would be required to follow. The Supreme Court concluded that:

> We need make no assessment of how well or poorly Faretta had mastered the intricacies of the hearsay rule and the California code provisions that govern challenges of potential jurors on voir dire. For his technical legal knowledge, as such, was not relevant to assessment of his knowing exercise of the right to defend himself.

Id. at 836 (footnote omitted). Chief Justice Burger dissented in ***Faretta***, joined by Justices Blackmun and Rehnquist. In his view, public confidence in the criminal justice system requires a capable defense, and the right of the accused did not warrant converting it into an "instrument of self destruction." Id. at 839-40. Justice Blackmun filed a separate dissent, expressing a concern that self-representation could transform a trial into a "vehicle for personal or political self-gratification." Id. at 849.

B. ***Godinez v. Moran***

The two cases that set forth the Constitution's "mental competence"

standard, ***Dusky* v.*United States***, 362 U. S. 402 (1960) *(per curiam)*, and ***Drope* v. *Missouri***, 420 U. S. 162 (1975), specify that the Constitution does not permit trial of an individual who lacks "mental competency." ***Dusky*** defines the competency standard as including both (1) "whether" the defendant has "a rational as well as factual understanding of the proceedings against him" and (2) whether the defendant "has sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding." 362 U. S., at 402 ***Drope*** repeats that standard, stating that it "has long been accepted that a person whose mental condition is such that he lacks the capacity to understand the nature and object of the proceedings against him, to consult with counsel, and to assist in preparing his defense may not be subjected to a trial." 420 U. S., at 171 Neither case considered the relationship between the mental competence standard to the right of self-representation.

In ***Godinez v. Moran***, 509 U.S. 389 (1993), the Supreme Court of the United States reaffirmed the ***Dusky*** standard and held that the standard of competence to waive the right to counsel is the same as the standard of competence to stand trial. Moran was charged with three murders and found competent to stand trial. ***Godinez***, 509 U.S. at 391. He informed the court that he wished to plead guilty and discharge his counsel. ***Id. at 392***. After advising Moran of his rights and warning

him of the disadvantages of proceeding ***pro se***, the trial court accepted his waiver of counsel and guilty pleas, concluding that Moran had "knowingly and intelligently" waived counsel and had entered his pleas "freely and voluntarily." ***Id. at 392-93.***

Moran was sentenced to death for each of the three murders, and two of these were affirmed on appeal. ***Id.*** at 393. Two years later, Moran filed a petition for post-conviction relief alleging that he had been "mentally incompetent to represent himself." ***Id.*** at 393 After the state courts denied relief, Moran sought federal habeas corpus. The Ninth Circuit reversed the district court's denial of habeas, concluding that competence to waive the right to assistance of counsel requires a higher level of mental function than is required to stand trial. ***Id.*** at 394.

The Supreme Court granted certiorari to address Moran's contention that a pro se defense requires "greater powers of comprehension, judgment, and reason than would be necessary to stand trial with the aid of an attorney" and therefore the standard of competence to waive counsel should be higher. ***Id***. at 399. The Supreme Court rejected this claim, holding that "the competence that is required of a defendant seeking to waive his right to counsel is the competence to waive the right, not the competence to represent himself." ***Id.*** The Supreme Court reiterated its observation in ***Faretta*** that "technical legal knowledge" has no relevance to

the determination of whether a defendant is competent to waive his right to counsel and concluded that the standard of competence for waiving that right is not higher than that required to stand trial. ***Id***. at 400.

C. **The Trial Court's Denial of Barnes' Objection To Mitigation Counsel.**

_____***Faretta*** established that before permitting a ***pro se*** defense the trial court must inform the defendant of the "dangers and disadvantages of self-representation." 422 U.S. at 835. The appellant properly asserted his Sixth Amendment right to proceed ***pro se.*** The trial judge conducted a hearing according to the requirements of ***Faretta***, and ***Goode v. State***, 365 So.2d 381 (Fla.1978), to determine appellant's fitness for self-representation. The evidence at this hearing showed that Barnes had studied legal matters in prison and that he understood courtroom procedure. The judge determined that Barnes met the criteria that enabled him to exercise his right of self-representation, but ordered an assistant public defender to be in the courtroom as emergency backup counsel.

Barnes presented a Motion to Suppress, Motions challenging the Constitutionality of the Florida Death Penalty Scheme, and made several timely objections to the state's presentation of evidence during the penalty phase. Barnes case for mitigation was that he came forward and told the truth detailing his

participation in an unsolved murder in 1988 while serving a life sentence for a murder committed in 1998. Barnes, in his role as ***pro se*** counsel, believed that this was overwhelming mitigation, and was surprised that the state was seeking the death penalty in this matter under these circumstances. The trial court acknowledged that the appellant presented his case of mitigation, but was not satisfied with it. Nor was the trial court satisfied with the appellant's argument that his presentation of mitigation along with a pre-sentence investigation report will be adequate to proceed to sentencing. Over the appellant's strident objection, the trial court appointed Attorney Sam Bardwell pursuant to ***Muhammad v. State*** to make a further presentation of mitigation evidence against appellant's wishes. The trial court likely relied upon the language in ***Muhammad*** which states:

> [W]e expect and encourage trial courts to consider mitigating evidence, even when the defendant refuses 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." (Citation Omitted) 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 circumstances." (Citation Omitted)

Id at 364. To this end, this Court requires that a comprehensive PSI be prepared in every case where the defendant is not challenging the imposition of the death penalty and refuses to present mitigation evidence. If the PSI and 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, use standby counsel to develop mitigation or appoint special counsel to develop mitigation. In a footnote, this Court explained that any counsel appointed in these circumstances would be acting solely as an officer of the court.

The appellant filed a Motion to Allow Defendant Pro Se, Right to Representation During Critical Stage of Proceedings. The appellant argued that he had a constitutional right to represent himself and was competent to do so. The appellant further argued pursuant to ***Goldsmith v. State***, 930 So. 2d 1253 (Fla. 2nd DCA 2006) that he had the right to control the over-all objective of his defense and he was asserting that right. The appellant argued during this critical stage of his penalty phase proceeding that he had the right to self-representation. The appellant requested that the court modify their previous ruling and allow him to represent himself during the penalty phase.

Attorney Bardwell argued that the appellant was not being deprived of self-representation, and was seeking a right he did not have and that was to veto the actions of appropriately appointed counsel having a legitimate constitutionally mandated objective to prevent the court from imposing a death sentence. ***The trial court granted the appellant's motion***. The trial court had permitted the appellant

to introduce his mitigation that he came forward and cooperated, however, the trial court was going to permit Attorney Bardwell to develop further mitigation. This "***hybrid Muhammed***" ruling is contrary to this Court's ruling in ***Hamblen v. State,*** 527 So. 2d 800 (Fla. 1988), and the United States Supreme Court's rulings in ***Feretta*** and ***McKaskle v. Wiggins***, 465 U.S. 168 (1984).

The appellant continued to exercise his legal right to self-representation. The appellant made a motion to strike Attorney Bardwell's witness list. The appellant objected to the evidence and witnesses prepared by Attorney Bardwell because it would be prejudicial and was not a part of his strategy that he has prepared on his own behalf. The trial court denied the appellant's motion without prejudice because she had not heard the witnesses or the evidence.

The appellant requested the ability to confer with Attorney Bardwell before the Spencer Hearing so he could discuss what issues would be brought up and would not be brought up. The state expressed concern that Attorney Bardwell had been appointed by the court to provide evidence to the court independent of the state and the defendant, and making any agreements with the appellant would have him taking a different role. The trial court ordered Attorney Bardwell to confer with the appellant and stand-by counsel Moore for the purpose of informing appellant of the mitigation evidence.

The appellant and Attorney Bardwell met pursuant to a court order. The appellant informed Attorney Bardwell that materials in his draft report were detailing his character defects, and not any illness or sickness. (S 19) The appellant wanted to act in a manner that was ethically and morally upright, and did not want to cast dispersions on others for his actions. (S 20) Attorney Bardwell could not ultimately come to an agreement on the presentation of mitigation evidence.

D. Florida Rule of Criminal Procedure 3.710(b)

The appellant submits that the state has an independent interest in ensuring that the death penalty is used in the appropriate fashion, and only in those situations for which there is a careful weighing of all aggravating and mitigating circumstances. This Court, concerned with defendants that would not challenge the death penalty, promulgated a Rule of Criminal Procedure to obtain mitigating information to be considered by the sentencing trial judge through the use of a comprehensive presentence investigation. Rule 3.710(b) of the Florida Rules of Criminal Procedure was enacted in those cases "should a defendant in a capital case choose not to challenge the death penalty and refuse to present mitigation evidence." In the Amendment to the Florida Rules of Criminal Procedure, this Court explained:

> 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.

Amendment to the Florida Rules of Criminal Procedure, 886 So.2d 197 (Fla. 2004) The Department of Corrections is to consider many aspects of a defendant's life history in creating this "comprehensive PSI."[13]

The appellant argued that Rule 3.710(b) should not have applied to this case because the appellant challenged the death penalty, and presented what he believed to be the mitigating circumstances in this case. Should this Court find that Rule 3.710(b) applies, the documentation gathered by the Department of Corrections

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[13] The Department of Corrections is to consider (1) The offender's prior record of arrests and convictions; (2) The offender's educational background; (3) The offender's employment background, including any military record, present employment status, and occupational capabilities; (4) The offender's financial status, including total monthly income and estimated total debts; (5) The social history of the offender, including his or her family relationships, marital status, interests, and activities; (6) The residence history; (7) An explanation of the offender's criminal record, if any, including his or her version and explanation of any previous offenses.

was adequate for the trial court to fulfill its function of creating a sentencing order where the aggravating and mitigating factors of the case were considered before rendering a sentence.

The trial court erred when it appointed Attorney Bardwell, and included Investigator Solis, to develop additional mitigation evidence over the objection of the appellant. The appointment of ***Muhammad*** counsel is improper when the trial court has appointed the appellant to represent himself; the representation is meeting the standard established in ***Godinez***, and there was no statement on the record by the trial court that there was something presented that was mitigating and it required further investigation by a special counsel. This Court's decision in ***Muhammad*** did not give a trial court a blank check to go on a mitigation fishing expedition over the objection of counsel.

E. *Hamden, Faretta* and *McKaskle* as Binding Precedent

This Court has addressed issue where a capital defendant desires that nothing be presented to mitigate his sentence and held that a competent defendant in a capital case can refuse to contest the imposition of a death sentence and waive the presentation of evidence in mitigation. In ***Hamblen v. State***, 527 So.2d 800 (Fla. 1988) the defendant waived counsel and pled guilty to first-degree murder. He also waived a jury sentencing recommendation; presented no evidence in

mitigation and challenged none of the aggravating evidence. On appeal, the question was whether the trial court erred in allowing Hamblen to represent himself at the penalty phase. The appellate counsel argued that the court should have appointed special counsel to present and argue mitigation. This Court rejected his argument:

> We find no error in the trial judge's handling of this case. Hamblen had a constitutional right to represent himself, and he was clearly competent to do so. To permit counsel to take a position contrary to his wishes through the vehicle of guardian ad litem would violate the dictates of ***Faretta v. California***, 422 U.S. 806, 95 S.Ct. 2525, 45 L.Ed.2d 562 (1975)]. In the field of criminal law, there is no doubt that `death is different,' but, in the final analysis, all competent defendants have a right to control their own destinies.

Id. at 804. This Court also found that the judge in ***Hamblen*** had protected society's interest in insuring that the death sentence was not improperly imposed since he carefully analyzed the propriety of the aggravating circumstances and the

possible statutory and nonstatutory mitigating evidence. ***Id.*** This Court concluded:

> We hold that there was no error in not appointing counsel against Hamblen's wishes to seek out and to present mitigating evidence and to argue against the death sentence. The trial judge adequately fulfilled that function on his own, thereby protecting society's interests in seeing that the death penalty was not imposed improperly.

Id.

Later, in ***Anderson v. State***, 574 So.2d 87 (Fla. 1991), the defendant directed his lawyer not to present any evidence at the penalty phase of his trial. Anderson's counsel informed the trial court of the possible mitigation evidence. On appeal, counsel argued that Anderson's orders to his lawyer denied him his Sixth Amendment right to the effective assistance of counsel. He also argued the court had not determined if Anderson had freely and voluntarily waived his constitutional right to present mitigating evidence. This Court rejected both arguments, finding that Anderson's comments on the record were sufficient to waive mitigating evidence and because he had counsel, no ***Faretta*** inquiry was

required. ***Id.*** at 95.

In ***Pettit v. State***, 591 So.2d 618 (Fla. 1992), this Court adhered to the rule announced in ***Hamblen*** that a competent defendant could waive the presentation of mitigating evidence. This Court affirmed the trial court's decision to allow the defendant to waive the presentation of mitigating evidence and the subsequent sentence of death. However, this Court reiterated the responsibility of the trial judge to analyze the possible statutory and nonstatutory mitigating factors. The trial judge satisfied the requirement in ***Pettit*** when he heard the testimony of the two neurologists who had examined Pettit. ***Pettit***, at 620.

Hamblen, ***Pettit*** and ***Anderson*** hold that a capital defendant has control over his destiny at the trial phase -- waive counsel, plead guilty, and waive the presentation of all mitigating evidence. Without expressly overturning the above authority, in ***Klokoc v. State***, 589 So.2d 219 (Fla. 1991) this court upheld the appointment of special counsel to "represent the public interest in bringing forth mitigating factors to be considered by the court in the sentencing proceeding."[14]

After ***Klokoc*** this Court has affirmed its decision in ***Hamblen***, that defendants have the right to control the extent of mitigating evidence available to

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[14] ***Hamden*** is distinguishable from ***Klokoc***: Hamden was representing himself and was found to be “clearly competent to do so”; Klokoc was not representing himself, and gave the trial court concern over his lack of cooperation.

the sentencer. ***Lockhart v. State***, 655 So.2d 69 (Fla. 1995); ***Henry v. State***, 613 So.2d 429, 433 (Fla. 1992); ***Clark v. State***, 613 So.2d 412, 413 (Fla. 1992). Moreover, this Court has since held that a trial court need not appoint independent counsel for this purpose where a defendant wants to limit the mitigating evidence. ***See***, ***e.g.***, ***Lockhart v. State***, 655 So.2d 69, 74 (Fla. 1995). Nevertheless, this Court has acknowledged:

> ...that this is a troubling area of the law. On a case-by-case basis, we have attempted to achieve a solution that both honors the defendant's right of self-determination and the constitutional requirement that death be imposed reliably and proportionally.

Farr v. State, 656 So.2d 448 (Fla. 1995).

The appellant's right of self-determination was violated by the appointment of Attorney Bardwell. In ***Faretta v. California,*** the United States Supreme Court recognized a defendant's Sixth Amendment right to conduct his own defense. The Court also held that a trial court may appoint "standby counsel" to assist the ***pro se*** defendants in their defense. In ***McKaskle v. Wiggins***, 465 U.S. 168 (1984) the same Court decided the role of a court-appointed standby counsel who is present at trial over the defendant's objection.

In ***McKaskle*** the Court held that:

> First, the ***pro se*** defendant is entitled to preserve actual

> control over the case he chooses to present to the jury. This is the core of the ***Faretta*** right. If standby counsel's participation over the defendant's objection effectively allows counsel to make or substantially interfere with any significant tactical decisions, or to control the questioning of witnesses, or to speak ***instead*** of the defendant on any matter of importance, the ***Faretta*** right is eroded.

McKaskle at 178. However, the pro se defendant's ***Faretta*** right is not violated where standby counsel assists the ***pro se*** defendant in overcoming routine procedural or evidentiary obstacles to the completion of some specific task, such as introducing evidence or objecting to testimony, that the defendant has clearly shown he wishes to complete. Also, standby counsel could also help to ensure the defendant's compliance with basic rules of courtroom protocol and procedure. In neither case is there any significant interference with the defendant's actual control over the presentation of his defense.

F. Conclusion

The trial court erred in the appointment of Attorney Bardwell over the appellant's objection. The appellant has a constitutional right to represent himself in the penalty phase of his trial. The trial court has a constitutional requirement that death be imposed reliably and proportionally which includes the review of mitigation evidence. The trial court had the tools to perform this constitutional responsibility without the appointment of Attorney Bardwell. The trial court had a

PSI, doctor report, school records and the appellant's argument for mitigation upon which to proceed to sentencing. ***See Hamblen*** Moreover, the ***pro se*** appellant should not be forced to argue his trial strategy with a court-appointed counsel that would write "I am not going to beg you to cooperate with my tasks since I have no strong-felt aversion to the death penalty in this case. And I have no ethical obligation to represent your best interest."

The error in this case requires a new penalty phase trial. The right of self-representation is fundamental, and not subject to harmless error analysis. "Since the right of self-representation is a right that when exercised usually increases the likelihood of a trial outcome unfavorable to the defendant, its denial is not amenable to "harmless error" analysis." ***McKaskle*** footnote 8. Wherefore, the judgement and sentence against the appellant should be reversed, and a new penalty phase ordered without the appointment of ***Muhammad*** counsel.

POINT II

THE TRIAL COURT ERRED IN PERMITTING HEARSAY EVIDENCE TO BE CONSIDERED OVER THE APPELLANT'S OBJECTION.

The appellant made a Motion to Strike the presentence investigation submitted by the Florida Department of Corrections and Attorney Bardwell citing ***Crawford v. Washington,*** 541 U.S. 36 (2004). The appellant believed that the information was more prejudicial than mitigating. The following statements are in these documents: Barnes had always been a pyromaniac since an early age, and set fire to other people's homes. (X 1849); Barnes is a con-artist and sociopath. (X 1849); Barnes physically assaulted his mother and threatened to kill his mother. (X 1849); Barnes sexually assaulted his two sisters. (X 1849); Barnes killed the family cats (X 1849); Barnes beat-up other children at boy scouts, little league and church. (X 1849); Barnes could not be rehabilitated. (V 1849) Barnes stole things from family members. (X 1850) Barnes' ability to lie is noteworthy as well as his lack of remorse. (X 1866) Barnes' score of 36 on the Hare PCL-R classifies him as a psychopath. (X 1866)

The Supreme Court held in ***Crawford v. Washington*** that the use of an out of court statement violated the Confrontation Clause because, where testimonial statements are at issue, the only indicium of reliability sufficient to satisfy

constitutional demands is confrontation. This Court in ***Rodgers v. State***, 948 So.2d 655 (Fla. 2006) construed the decision in ***Crawford*** as follows:

> Whether the admission of the witnesses' testimony was ***Crawford*** error depends on whether Caldwell's statement and deposition are "testimonial." Although in ***Crawford*** the Supreme Court declined to define "testimonial," it did say that "[w]hatever else the term covers, it applies at a minimum to prior testimony at a preliminary hearing, before a grand jury, or at a former trial; and to police interrogations." 541 U.S. at 68, 124 S.Ct. 1354. Subsequently, however, in ***Davis v. Washington***, 547 U.S. 813, 126 S.Ct. 2266, 165 L.Ed.2d 224 (2006), the Court addressed how to determine "which police interrogations produce testimony" and held as follows: Statements are nontestimonial when made in the course of police interrogation under circumstances objectively indicating that the primary purpose of the interrogation is to enable police assistance to meet an ongoing emergency. They are testimonial when the circumstances objectively indicate that there is no such ongoing emergency, and that the primary purpose of the interrogation is to establish or prove past events potentially relevant to later criminal prosecution. **Id.** at 2273-74; ***see also id.*** at 2276 (stating that the result of the latter type of interrogation, "whether reduced to a writing signed by the declarant or embedded in the memory (and perhaps the notes) of the interrogating officer, is testimonial"). Under this test, Caldwell's statements to the police officer were testimonial because they were made in the course of an investigation.

Rodgers at 659.

The majority in ***Rodgers*** states that there can be ***Crawford*** error in sentencing proceedings. However, there is some that argue that ***Crawford*** error or the right to confrontation does not apply in sentencing hearings. See ***Rodgers***

(Justice Cantero concurring opinion); The Supreme Court in ***Williams v. New York***, 337 U.S. 241 (1949) held that due process and the right to confrontation does not apply to sentencing:

> Under the practice of individualizing punishments, investigation techniques have been given an important role. Probation workers making reports of their investigations have not been trained to prosecute but to aid offenders. Their reports have been given a high value by conscientious judges who want to sentence persons on the best available information rather than on guesswork and inadequate information. To deprive sentencing judges of this kind of information would undermine modern penological procedural policies that have been cautiously adopted throughout the nation after careful consideration and experimentation. We must recognize that most of the information now relied upon by judges to guide them in the intelligent imposition of sentences would be unavailable if information were restricted to that given in open court by witnesses subject to cross-examination. And the modern probation report draws on information concerning every aspect of a defendant's life. The type and extent of this information make totally impractical if not impossible open court testimony with cross-examination. Such a procedure could endlessly delay criminal administration in a retrial of collateral issues.

Williams v. New York at 249, 250. In determining an appropriate punishment, all the circumstances of the particular crime and the background of the individual offender must be considered. This individualized sentencing process requires possession of the fullest information possible concerning the defendant's life and characteristics, and that information is not limited to what is admissible at trial.

United States v. Tucker, 404 U.S. 443 (1972) Accordingly, the reliance upon hearsay in assessing punishment is not per se improper:

> Once the guilt of the accused has been properly established, the sentencing judge, in determining the kind and extent of punishment to be imposed, is not restricted to evidence derived from the examination and cross-examination of witnesses in open court but may, consistently with the Due Process Clause of the Fourteenth Amendment, consider responsible unsworn or "out-of-court" information relative to the circumstances of the crime and to the convicted person's life and characteristics.

Williams v. Oklahoma, 358 U.S. 576 (1959); ***Williams v. New York***, ***supra.*** However, the Supreme Court has never suggested that consideration of hearsay is always proper. In ***Williams v. New York***, the narrow issue was whether reliance on hearsay in determining an appropriate sentence was ever permissible and the Court specifically noted that the accuracy of the hearsay information relied on by the sentencing judge in that case "were not challenged by appellant or his counsel, nor was the judge asked to disregard any of them or to afford the appellant a chance to refute or discredit any of them by cross-examination or otherwise." ***Williams*** at 337.

Although not specifically overruling ***Williams***, the Supreme Court in ***Gardner v. Florida***, 430 U.S. 349 (1977) observed that when ***Williams*** was decided there was no significant constitutional difference between the death

penalty and lesser punishments. Evolving law now has recognized that death is different. The Court in ***Gardner*** found that the sentencing process and trial must satisfy the requirements of Due Process:

> Second, it is now clear that the sentencing process, as well as the trial itself, must satisfy the requirements of the Due Process Clause. Even though the defendant has no substantive right to a particular sentence within the range authorized by statute, the sentencing is a critical stage of the criminal proceeding at which he is entitled to the effective assistance of counsel. (Citation Omitted) The defendant has a legitimate interest in the character of the procedure which leads to the imposition of sentence even if he may have no right to object to a particular result of the sentencing process. (Citation Omitted)

Gardner at 358.

It is necessary, therefore, to determine what, if any, safeguards exist on the consideration of hearsay information in the sentencing process. In ***Townsend v. Burke***, 334 U.S. 736 (1948), the Supreme Court held that it violated due process to sentence a defendant "on the basis of assumptions concerning his criminal record which were materially untrue." ***Townsend*** at 741. The Supreme Court noted that the defendant, being unrepresented by counsel, had no opportunity to correct the false foundation upon which his sentence was premised. Similarly, in ***United States v. Tucker***, 404 U.S. 443 (1972), the Supreme Court set aside a sentence because it was based, at least in part, upon prior convictions which were

subsequently held constitutionally invalid because they were obtained while defendant was not represented by counsel. ***Tucker*** and ***Townsend*** have been read broadly to preclude reliance upon "improper or inaccurate information" in making the sentencing determination. Implicit in the Court's holding in ***Tucker*** is the principle that despite the broad discretion left to the trial judge in assessing background information for sentencing purposes, a defendant retains the right not to be sentenced on the basis of invalid premises.

The Townsend-Tucker principle, however, is to some extent inconsistent with the principle of ***Williams v. New York*** and its progeny. The former reflects the Court's belief that a defendant should not be sentenced on invalid premises. The latter, i. e., that consideration of hearsay information regarding the defendant's life and characteristics is generally permissible, reflects the Court's concern that the trial judge exercise his individualized sentencing discretion in an informed manner. While both principles are premised on a concern that the sentencing process be objective and fair to the individual defendant, the policies underlying ***Williams*** cannot be inflexibly advanced without undermining the policies underlying ***Townsend*** and ***Tucker***, since hearsay allegations, by their very nature, are prone to error or inaccuracy. Hence, the courts have found it necessary to strike a balance between the two principles in order to give adequate recognition to both.

In striking this balance, the courts have held that a defendant is entitled to some protection against the danger of reliance on erroneous hearsay allegations in the assessment of punishment. Specifically, where the sentencing judge relies upon prejudicial hearsay information, the accuracy of which is contested, fundamental fairness requires that a defendant be given at least some opportunity to rebut that information. The application of this principle to the case at bar is inadequate. Imagine Barnes being given the opportunity to testify that he did not sexually assault my sisters; he did not beat-up my mother. This does not blunt the prejudice of these damning assertions made by others.

Moreover, the state likely would contend that there is only error where the sentencing judge has explicitly relied on prejudicial hearsay information regarding the offender's background. A showing of the sentencing judge's reliance of this prejudicial hearsay should not be dispositive of the appellant's claim. The vindication of a defendant's right to not be sentenced on the basis of improper factors or erroneous information, a right recognized by the Court in ***Townsend*** and ***Tucker,*** should not depend upon the fortuity of the sentencing judge disclosing the factors relied upon in the imposition of sentence. The fairness of the sentencing process is undermined by the reliance upon inaccurate information, not by the sentencing judge stating that he relied upon material which proves to be inaccurate.

In the Sentencing Order the trial court found that the appellant was under the influence of extreme mental or emotional disturbance. The Court accepted the assertion that the appellant suffered from an extreme mental disorder. Nonetheless, the trial court gave this item little weight. The trial court did not explain this conclusion, but did cite ***Perez v. State***, 919 So.2d 347 (Fla. 2005) The trial court was influenced by the prejudicial hearsay with the finding that the appellant exhibited symptoms of anti-social personalty disorder, being a psychopath, and having a lack of conscience and empathy. These findings all being derived from prejudicial hearsay properly objected to by the appellant.

The appellant should receive a new sentencing hearing. ***See*** Point I This Court should order that the damaging hearsay evidence concerning past acts of the appellant was permitted in violation of ***Crawford*** , and such evidence should be excluded and not considered in resentencing.

CONCLUSION

Based upon the foregoing cases, authorities, policies, and arguments, as well as those cited in the Initial Brief, Appellant respectfully requests this Honorable Court to order a new penalty phase hearing.

Respectfully submitted,

JAMES S. PURDY
PUBLIC DEFENDER
SEVENTH JUDICIAL CIRCUIT

_____
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been hand- delivered to the Honorable Bill McCollum, Attorney General, 444 Seabreeze Boulevard, Fifth Floor, Daytona Beach, Florida 32118, via his basket at the Fifth District Court of Appeal and mailed to Mr. James Barnes, DC#071551 Florida State Prison, 7819 NW 228th St., Raiford, FL 32026, this 9th day of September, 2008.

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GEORGE D.E. BURDEN
ASSISTANT PUBLIC DEFENDER

CERTIFICATE OF FONT

I hereby certify that the size and style of type used in this brief is point proportionally spaced Times New Roman, 14 pt.

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GEORGE D.E. BURDEN
ASSISTANT PUBLIC DEFENDER