IN THE SUPREME COURT OF FLORIDA

BRANDY BAIN JENNINGS,

Appellant,

v. **Case No. SC11-1016**
Lower Tribunal No. 95-2284 CFA WLB

STATE OF FLORIDA,

Appellee.
_____/

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

ANSWER BRIEF OF APPELLEE

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STATEMENT OF THE CASE AND FACTS

Appellant Brandy Jennings was convicted of robbery and the first-degree murders of Dorothy Siddle, Vickie Smith, and Jason Wiggins, and sentenced to death (DA. V1/20-21).[1] This Court affirmed Jennings' convictions and sentences. Jennings v. State, 718 So. 2d 144 (Fla. 1998). The facts of the case were described as follows:

> Dorothy Siddle, Vicki Smith, and Jason Wiggins, all of whom worked at the Cracker Barrel Restaurant in Naples, were killed during an early morning robbery of the restaurant on November 15, 1995. Upon arriving on the scene, police found the bodies of all three victims lying in pools of blood on the freezer floor with their throats slashed. Victim Siddle's hands were bound behind her back with electrical tape; Smith and Wiggins both had electrical tape around their respective left wrists, but the tape appeared to have come loose from their right wrists.
>
> Police also found bloody shoe prints leading from the freezer, through the kitchen, and into the office, blood spots in and around the kitchen sink, and an opened office safe surrounded by plastic containers and cash. Outside, leading away from the back of the restaurant, police found scattered bills and coins, shoe tracks, a Buck knife, [FN2] a Buck knife case, a pair of blood-stained gloves, and a Daisy air pistol. [FN3]
>
> > [FN2] According to testimony at trial, a "Buck knife" is a particular brand of very sharp, sturdy knife that has an approximately four and one-half inch black plastic handle, into which folds the blade of the knife.

[1] In this brief, the record on appeal will be referenced by volume and page number; the designation "DA." is provided when citing to the record from Jennings' direct appeal, Jennings v. State, Florida Supreme Court Case No. 89,550.

[FN3] According to testimony at trial, a Daisy air pistol is like a pellet gun, but looks almost identical to a Colt .45 semi-automatic pistol.

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

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

At trial, the taped interview was played for the jury, and one of the officers testified regarding Jennings' untaped statements made the next day. The items ultimately recovered from the canal were also entered into evidence. [FN4]

[FN4] The evidence from the canal consisted of: clothes, gloves, socks, and shoes that Jennings said were worn during the crime; a homemade razor/scraper-blade knife and sheath that

> Jennings said belonged to Graves; packaging from a Daisy pellet gun and CO2 cartridges; unused CO2 cartridges and pellets; money bags (one marked “Cracker Barrel”), bank envelopes, money bands, Cracker Barrel deposit slips, and some cash and coins; personal checks, travelers’ checks, and money orders made out to Cracker Barrel; a clear plastic garbage bag; and rocks to weigh down the bundle of evidence.

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

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

The State also presented testimony concerning previous statements made by Jennings regarding his dislike of victim Siddle. Specifically, Bob Evans, one of the managers at Cracker Barrel, testified that Jennings perceived Siddle to be holding him back at work and that, just after Jennings quit, he said about Siddle, “I hate her. I even hate the sound of her voice.”

> Donna Howell, who also worked at Cracker Barrel, similarly testified that she was aware of Jennings' animosity and dislike of Siddle, and that Jennings had once said about Siddle, "I can't stand the bitch. I can't stand the sound of her voice."

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

Jennings' trial commenced on October 28, 1996, before the Honorable William J. Blackwell (DA. V7-V10). Jennings was represented by Assistant Public Defenders Tom Osteen and Adam Sapenoff. The trial was conducted in Pinellas County pursuant to an order granting a change of venue (DA. V1/133-37, 140-41). Jennings' defense acknowledged his participation in the robbery but asserted that co-defendant Graves was the one that actually killed the victims (DA. V8/229-232; V10/751-765).

At the penalty phase, the defense presented Jennings' mother, Tawny Jennings, and five good friends that testified to Jennings' positive character traits (DA. V5/699-727). Ms. Jennings testified that Jennings never knew his father, a Souix Indian (DA. V5/723). She had lost twins to crib death and Jennings was her only child (DA. V5/724). They had to move quite a bit so she could work, and lived in Oregon, Colorado, Wyoming, and Arizona (DA. V5/724-25). They moved to Ft. Myers when Jennings was fourteen (DA. V5/726). Jennings was a straight A student but had to quit school when he was seventeen because she was ill, and Jennings took care of her and paid the bills (DA.

V5/725-26). She described Jennings as very helpful and noted that they were very close; he was a good son, and she couldn't ask for any better (DA. V5/726-27).

The other mitigation witnesses were Michael Lobdell, a close friend that testified Jennings worked at a Mobil gas station, and was a happy-go-lucky person that got along with everyone and never tried to start fights (DA. V5/699-703); Angie Lobdell, a good friend for nine years that testified Jennings was fun-loving, not a troublemaker, and enjoyed working on cars, and that Jennings made her laugh and was considered to be part of the family (DA. V5/703-06); Brian McBride, a good friend for eleven to twelve years that testified Jennings was very close to his family and a very likeable guy (DA. V5/707-710); Rebecca Lloyd, a very close friend for ten years that testified Jennings was like a big brother to her, and was wonderful with her children (DA. V5/710-713); and Mary Hamler, a former girlfriend that had lived with Jennings for two and a half years and got along well with her children, taking care of them while she worked and taking them fishing (DA. V5/713-22).

After penalty phase proceedings, the jury recommended death sentences by a vote of 10-2 for each murder (DA. V4/622-24). At the Spencer hearing, Jennings' mother addressed the court and asserted her belief in Jennings' innocence of the murders (DA.

V6/957-62). She stated that Jennings had saved lives, had made straight As, and had paid the bills and taken care of her when she got breast cancer; she observed that she had not been able to afford to give him things he needed (DA. V6/957-62).

The court followed the jury's recommendations and sentenced Jennings to death on the murder convictions (DA. V5/790). The court found three aggravating circumstances: (1) that the murders were committed during a robbery, (2) that they were committed to avoid arrest, and (3) that they were cold, calculated, and premeditated (CCP) (DA. V5/784-86). The court found one statutory mitigator, that Jennings had no significant history of prior criminal activity (some weight); rejected two statutory mitigators, that (1) Jennings was an accomplice in a capital felony committed by another and (2) his participation was relatively minor and that Jennings acted under extreme duress or under the substantial domination of another person; and found eight non-statutory mitigators: (1) that Jennings had a deprived childhood (some weight), (2) that accomplice Graves was not sentenced to death (some weight), (3) that Jennings cooperated with police (substantial weight), (4) that he had a good employment history (little weight), (5) that he had a loving relationship with his mother (little weight), (6) that he had positive personality traits enabling the formation of

strong, caring relationships (some weight), (7) that he had the capacity to care for and be mutually loved by children (some weight), and (8) that he exhibited exemplary courtroom behavior (little weight) (DA. V5/786-90).

Jennings' convictions and sentences were affirmed on September 10, 1998. Jennings, 718 So. 2d at 145-147. Jennings sought certiorari review in the United States Supreme Court, asserting constitutional violations based on the State allegedly taking inconsistent positions between Jennings' trial and the trial of his codefendant. Review was denied on June 24, 1999. Jennings v. Florida, 527 U.S. 1042 (1999).

Jennings filed his Motion to Vacate on March 20, 2000 (V1/38-73), and amended it twice; his final motion was filed on or about July 29, 2009 (V12/2289-2409). An evidentiary hearing was held on five claims of ineffective assistance of trial counsel (V13/2549-71). Testimony was presented on April 28-29, 2010 (V14/2645-V15/3051), and concluded on August 11, 2010 (V16/3058-3155). Eleven witnesses were presented: trial attorney Thomas Osteen; mental health professionals Dr. Thomas Hyde, Dr. Hyman Eisenstein, and Dr. Faye Sultan; lay witnesses Angela Ostrander (f/k/a Angela Cheney),[2] Patricia Scubbard, Lloyd

[2] Cheney's name is misspelled in the trial transcript as Angela Chainey. Although she is now Angela Ostrander, she will be

Scubbard, Heather Johnson, Kevin McBride, Bruce Martin; and co-defendant Charles Jason Graves.

Tom Osteen testified that he spent thirty years as an Assistant Public Defender, and had little recall of Jennings' case (V15/2874, 2878). At the time of Jennings' trial, Osteen had represented approximately thirty capital defendants, and most were tried as death cases through penalty phase (V15/2876-77). Although most of his former clients have gotten off of death row, none of them secured relief by showing that he had provided ineffective assistance of counsel (V15/2935). In this case, he was assisted by co-counsel Adam Sapenoff (V15/2899). Although Sapenoff had little capital experience, the defense investigator, Ed Neary, was the chief investigator in the office and had assisted Osteen with a number of capital investigations (V15/2896-97). Neary's background was in law enforcement with the New York Police Department, and he had a "good feel" for mental health and family background issues that a mitigation specialist might pursue (V15/2901-02).

Typically, Osteen begins to prepare for the penalty phase at the same time he starts his trial preparation (V15/2878). He knew the State would be seeking the death penalty in this case from the beginning, and began to prepare for the penalty phase

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referred to as Cheney in this pleading, to be consistent with the name used at trial.

right away (V15/2912-14). He spoke to Jennings' mother, a friend, and other people that knew him; he also had mental health experts appointed early in the case (V15/2878). He had used both Dr. Wald and Dr. Masterson in his practice, exploring competency issues as well as any available mitigation from Jennings' personality and background (V15/2879). Dr. Wald was a psychiatrist so Dr. Masterson was used to conduct the relevant testing (V15/2878-79). He used Dr. Wald on a regular basis; Wald knew the general information Osteen would be looking for, and Osteen would have reviewed Wald's report and then spoken with Wald in more detail (V15/2881-83). Osteen recalled that he tried to have Jennings' mother meet with Dr. Wald, but she did not want to participate and he was not successful in getting her to meet with the defense expert (V15/2916).

Reports by Dr. Wald and Dr. Masterson were admitted into evidence at the hearing (V15/2883-87; V20/3760-3781). The reports reflect that the experts had reviewed school records and jail records and obtained extensive information about Jennings' background (V20/3760-64, 3772, 3775-76, 3778-79). After speaking with Dr. Wald and Dr. Masterson, Osteen concluded that they would not be helpful for the defense and decided against using them as penalty phase witnesses (V15/2898). Osteen has presented mental mitigation in other cases, but concluded that it was too

weak in this case to offer a persuasive case to the jury (V15/2920-21). After speaking with both doctors, and considering that Jennings did not have a significant prior record, Osteen decided to present good statements and positive character traits through Jennings' mother and his friends (V15/2898). Dr. Wald's report outlines Jennings' criminal history, which included mostly traffic violations, a shoplifting arrest, and a plea to attempted armed robbery; the jury never heard of any prior criminal activity, although it would have if Osteen had presented Dr. Wald as a witness (V15/2919-20). The trial court found the statutory mitigator of no significant criminal history and several nonstatutory mitigators based on Jennings having a deprived childhood, a good employment history, a loving relationship with his mother, and positive personality traits (V15/2898).

Osteen had a vague recollection of Jennings' background as related by Jennings and his mother (V15/2891). Mrs. Jennings thought Jennings was a good boy and did not have anything unusual to report (V15/2917). Osteen thought that Jennings had been born in Oregon and was raised primarily by his mother, with two or three different stepfathers (V15/2891-92). Jennings seemed to have a close, loving relationship with his mother; they lived at a lower socioeconomic level and Osteen recalled

that Jennings had some sort of mental health problem when he was 8 or 9 years old (V15/2892). In his conversations with Jennings and his mother, Osteen never heard about any sexual abuse in the family and he never learned of any incest, although that is the type of information that he and Investigator Neary typically looked for (V15/2895-96). He did not speak with any other family members and he did not think that he traveled to Oregon but he had corresponded in writing with other people in that area that knew Jennings (V15/2893-94). Osteen recalled that some of Jennings' "so-called friends" had negative information and would not be helpful for mitigation; he would not use anyone that thought Jennings was guilty and got what he deserved (V15/2929-31).

Osteen did not recall what information he may have obtained about Jennings' illicit drug use, but he reached the conclusion that Jennings was not addicted to drugs (V15/2897).

Osteen recalled that Jennings and state witness Angela Chaney were friends, and possibly girlfriend/boyfriend (V15/2903-04). He had been provided with Chaney's statement in discovery, which included information about her being the co-defendant's sister-in-law (V15/2904-11). He did not recall doing an independent investigation into Chaney's background (V15/2909).

Dr. Thomas Hyde, a behavioral neurologist, evaluated Jennings for postconviction purposes in March, 2000, and again shortly before the 2010 evidentiary hearing (V15/2841-46). Jennings' neurological exam was normal and Dr. Hyde did not offer any specific diagnosis but noted that two factors stood out from Jennings' background: a history of febrile convulsions in childhood, and a history of several closed head injuries (V15/2848-49). Dr. Hyde did not identify any brain damage or cognitive deficits with Jennings but noted that individuals with a history of closed head injuries may be predisposed toward some long-lasting neurological effects (V15/2849-53). He could not offer any opinion as to what impact any neurological deficits may have had on the commission of the robbery or murders (V15/2854). Dr. Hyde did not review the mental health reports prepared at the time of trial and offered no criticism of the defense trial experts (V15/2852).

Dr. Hyman Eisenstein is a clinical psychologist specializing in neuropsychology (V15/2936). Dr. Eisenstein administered the WAIS-III in 2000 and obtained a verbal IQ of 119 and a performance IQ of 106 for Jennings (V15/2947-48, 2968-69). He outlined the battery of tests he administered in 2000 and noted that Jennings performed normally on most of them; he did not reach any diagnosis based on his evaluation (V15/2947-

3027, 3042). Dr. Eisenstein conducted a new examination before the hearing in 2010, using new tests that had not been previously available (V14/2655-56). He also reviewed additional records and spoke with Jennings' mother and other witnesses (V15/3042-43, 3045). By the time of the hearing he concluded that two diagnoses were indicated: Jennings was gifted/learning disabled, a reading disorder, and also suffered from Intermittent Explosive Disorder (V14/2685-93). Dr. Eisenstein testified that both statutory mental mitigators applied in this case (V14/2716-18). The "extreme disturbance" mitigator was based on the learning disability, which caused frustration, disregulation of brain function, and poor impulse control (V14/2718). The explosive disorder added fuel to the fire and prevented Jennings from appreciating the criminality of his conduct or conforming his conduct to the requirements of law (V14/2718-19). Eisenstein thought the murders in this case were reactive in nature and "not planned" (V14/2718-19).

When Dr. Eisenstein asked Jennings about the crime, Jennings admitted that he committed the robbery, having planned it well in advance, but claimed that he did not kill the victims (V14/2722-26). Eisenstein felt that if Jennings committed the murders, he did so impulsively, as his disorder caused uncontrollable, explosive acts (V14/2723-24). Eisenstein opined

that Intermittent Explosive Disorder causes such acts because when individuals with IED are unable to resist violent urges which most people are able to resist (V14/2729-30). Although Eisenstein acknowledged that reactions from the disorder are triggered by something most people can resist, he could not identify any such trigger at the time of the murders in this case (V14/2729-30).

Dr. Eisenstein felt that Dr. Masterson's report was insufficient, in that it did not fully explore the mitigation available (V14/2748, 2751, 2754). Eisenstein was concerned that an attorney who received such a report, with no additional information, would not appreciate the extent of mitigation existing (V14/2753-54). Eisenstein agreed that Masterson had used the appropriate intelligence test and noted that there is no standard, set battery of tests which all psychologists conduct (V14/2766-68). Eisenstein had called Dr. Masterson in an attempt to obtain the raw data from Masterson's testing, but the data was no longer available as Masterson had completed his testing in 1996, fifteen years before it was requested (V15/3000).[3] Eisenstein asked Masterson why the report offered a range of possible intelligence scores rather than one score, and

[3] Counsel conceded below that he did not make a supplemental request for the raw data when he contacted Masterson in 2000 and obtained his report (V15/3003-07).

Masterson responded that was his usual practice (V14/2702). He did not ask Masterson about other concerns Eisenstein identified from the report, and did not prepare his own report (V14/2751-52, 2770).

Dr. Faye Sultan, a clinical psychologist, reviewed background materials and met with Jennings seven times between June 2000 and June 2005 (V16/3062, 3070-77). She was also able to speak with Jennings' mother and other friends, relatives, and investigators (V16/3078). She concluded that Jennings' mother's family provided an environment of extreme poverty and neglect, exposing Jennings to sex abusers and intoxicated individuals with no impulse control (V16/3082-83). In addition, Jennings and his mother moved around frequently; Jennings attended fourteen different schools by the time he was in sixth grade, and was dragged from city to city until he and his mother moved to Florida when he was about thirteen (V16/3103-04, 3118). Sultan also characterized Jennings' substance abuse as extreme (V16/3081).

Dr. Sultan noted that children that grow up in the type of environment that Jennings was raised in do not develop normally from an emotional or neuropsychological standpoint (V16/3084). They are typically impulsive and aggressive, and are often oversexualized and extreme substance abusers (V16/3084-85).

There is a lot of difficulty with memory and concentration, a distorted sense of safety, and often they commit violent crimes (V16/3084). They are damaged in their capacity to cope and their ability to adjust (V16/3085).

Having talked with Jennings' mom, Dr. Sultan concluded that Tawny Jennings is "quite mentally ill," and had an abnormal attachment to Jennings when he was young (V16/3086). She behaved oddly, nursing Jennings until he was five or six, having sex in his presence, and possessing only minimal parenting skills, leaving Jennings without adequate supervision, encouragement and support (V16/3086-87). Sultan also had information that Ms. Jennings was often intoxicated, although the only testimony from the Oregon witnesses was that Ms. Jennings was not a drinker (V14/2791; V16/3083).

Jennings denied having been sexually abused to Dr. Masterson (V20/3761). Dr. Sultan confirmed that she did not receive any direct information about Jennings being a victim of sexual abuse in the family, although she considered it evidence of sexual abuse that Jennings was sometimes paid a quarter to sit on one of the abusers' lap when he was a small child (V16/3101-02). There was no testimony that Jennings ever witnessed his mother having sex or any of the sexual abuse that may have occurred in his mother's family, but Dr. Sultan opined

that a person does not have to witness sexual abuse to be impacted by it (V16/3113). Tawny had told Jennings that Tawny had been sexually abused when Jennings was too young; he was not prepared for that type of information, and it provided significant emotional stress which contributed to his mental state (V16/3099-3100).

Dr. Sultan's personality testing did not reveal any extreme emotional distress, major mental illness, or statutory mental mitigation (V16/3089, 3096). However, Jennings was a serious substance abuser, easily frustrated, and had difficulty controlling his anger (V16/3089). She agreed that the diagnosis of Intermittent Explosive Disorder is the one that "comes closes to fitting" Jennings (V16/3092-94). It is an impulse control disorder, not otherwise specified, which means that behaviorally, a person has aggressive, violent reactions that are out of proportion to an incident that occurred (V16/3092-93). She would not suggest that the IED related to the murders or that Jennings was experiencing an IED episode at the time of the murders (V16/3111). She also acknowledged that Jennings' jail records did not reflect any behavior suggesting IED, as Jennings had few infractions, which mostly involved property issues (V16/3095).

Dr. Sultan reviewed the reports of Dr. Wald and Dr.

Masterson and found them helpful for her purposes (V16/3111-12). She was not a neuropsychologist and could not say whether the reports were professionally done, or adequate and thorough, but nothing struck her as blatantly incorrect (V16/3112). She did not have Dr. Masterson's raw data, but noted that his interpretation of the data was quite similar to her interpretation except that Jennings was a little more depressed in 1996, probably because he was on trial for his life (V16/3090).

Angela Cheney testified as a state witness at trial and testified at the evidentiary hearing as Angela Ostrander. She vaguely recalled her trial testimony, which related a conversation she'd had with Jennings when they were dating (V15/2856-57). She and Jennings dated for about a month in 1992 or 1993 (V15/2867-68). After they broke up, she did not maintain a friendship with Jennings (V15/2867-68). She met Jennings through his co-defendant, Charles Graves, a friend of hers (V15/2858). She did not recall what other witnesses may have been present and heard the conversation she had with Jennings that she discussed at trial (V15/2863). It was possible that someone was doing drugs at the time of the statement (V15/2865-66). Cheney married Graves' brother in 1994, but she was either separated or divorced from him by the time she testified at the

trial in 1996 (V15/2858-59). She told the truth to law enforcement and at trial and was not influenced by her relationship with either Jennings or Graves but only by her desire to do the right thing (V15/2864-65).

Jennings' cousin, Patricia Scudder, lives in Oregon and last saw Jennings when Jennings was about fourteen years old (V14/2785-86). She lived with Jennings and his mother a few times, helping the family when Jennings' mother had had surgery or health issues (V14/2786, 2805-06). Other than those few weeks, she did not have a lot of contact with Jennings (V14/2805-07). Mrs. Scudder testified that Jennings' home was very messy (V14/2788). Jennings and his mother had a very close and loving relationship, but Scudder thought the mother was too overprotective and exhibited inappropriate parenting (V14/2802, 2809). She described Tawny Jennings as having too many boyfriends, breastfeeding Jennings until he was about four or five, sleeping in the same bed with Jennings until he was about five or six, and fixing only basic, "quick and simple" meals or giving Jennings fast food or making him get his own cereal or sandwich (V14/2790-93, 2809). One time Mrs. Scudder walked in the apartment to find Ms. Jennings and a man lying in bed together, with Jennings right there on the floor watching television (V14/2799-2800). There was one man, Frank, that Ms.

Jennings was with “off and on” for about three years; Mrs. Scudder did not think it was a loving relationship, and Frank never seemed to care for Jennings but seemed to be jealous of him and didn’t want much to do with him (V14/2791-92, 2807). In addition, there were two child molesters in the family (V14/2794-95). Mrs. Scudder had lost contact with Tawny Jennings about 1990 and did not hear about Jennings’ arrest and trial for the murders until about 1998 (V14/2801, 2803).

Patricia’s husband, Lloyd Scudder, also testified (V14/2813). Mr. Scudder knew Jennings when Jennings was about five or six, until the time he was about thirteen or fourteen (V14/2814). He reiterated that there was a history of child molestation in the family, and that Tawny was a “bad” mother; she smoked marijuana while Jennings was a child, went to the doctor a lot and took pain pills that she also offered to others, and breastfed Jennings until he was about five years old (V14/2815, 2818). According to Scudder, Ms. Jennings did not have the maternal, caring feelings for her son that she should have, did not take care of her house or cook meals, did not have a job or money, did not pay any attention to Jennings and made him stay places he didn’t want to be (V14/2820-21). Mr. Scudder took Jennings fishing and was the only one that paid him any attention (V14/2819). The last contact he had with Jennings was

in 1983 or 1984, when Jennings called to wish him a happy Father's Day (V14/2819, 2826).

Heather Johnson, Kevin McBride, and Bruce Martin were all friends of Jennings that lived in Florida. Heather Johnson was a good friend in the late 1980s (V14/2831-L, 2831-V). She and Jennings never dated, but hung out together and had the same friends, including Brian McBride, a defense penalty phase witness, and Kevin McBride, a witness at the evidentiary hearing (V14/2831-M). Johnson recalled that Jennings talked about his mother some; she did not remember details, but Jennings was not happy, there was often conflict, frustration and resentment (V14/2831-M-2831-N). Johnson had met Ms. Jennings and described her as hard, tough, and a little cold (V14/2831-Q). Jennings and his mother had a contentious relationship; there was a closeness and a desire to please, but Ms. Jennings was demanding and intimidating (V14/2831-R). Johnson recalled that Jennings quit school so he could take care of his mother, who was always sick or disabled (V14/2831-S).

Johnson described Jennings as a typical seventeen-year-old, impulsive and a little immature, but good natured and reserved (V14/2831-Q). He was emotional and bright but not always articulate, and got frustrated with his inability to express himself (V14/2831-P). It was not in his nature to act out

violently (V14/2831-O-2831-P). She only saw him violent once, when a friend of hers was being a jerk and Jennings told the guy to stop but he didn't, so Jennings put him on the ground (V14/2831-P). Jennings did not intend to hurt the guy but was just being protective of her (V14/2831-P). Johnson had seen Jennings smoke marijuana and knew he used other drugs such as acid, although people did not do the hard stuff around her because they knew she didn't like it (V14/2831-R).

Johnson received a letter from Jennings' attorney before trial, looking for a character reference, to which she responded (V14/2831-N-2831-0). She was living out of state at the time but would have returned to Florida to testify, if asked (V14/2831-S). If she had testified, she would have said what was in her letter, which was admitted into evidence at the hearing (V14/2831-N, 2831-V; V20/3784-85). In the letter, she characterized the robbery as an understandable act, in the sense that Jennings was just getting his anger out (V14/2831-V; V20/3784). She noted that she would not make a sterling character witness, but indicated that Jennings was bright and not a threat to anyone (V14/2831-V; V20/3784). She last saw Jennings in the late 1980s and could not say what kind of life he had been living after that (V14/2831-V, 2831-W).

Kevin McBride lived in the same Ft. Myers neighborhood as

Jennings and knew him when McBride was about eighteen or nineteen and Jennings was fifteen (V16/3119). He testified that Jennings' mother seemed to be a very nice lady who worked as a bartender and was friendly to Jennings' friends (V16/3121). Jennings' relationship with his mom was generally good but there were times Jennings was not happy with their situation (V16/3122). They seemed more like friends than mother and son (V16/3130). He saw Jennings and his mother drinking together two or three times, but he didn't see Ms. Jennings that much and she wasn't always drinking when he did (V16/3133). Ms. Jennings had problems paying the bills and they would get the electricity cut off or have to move; she was unstable and rough around the edges (V16/3122-23). At one point, Jennings moved in with the McBrides for a few months, just to have a better place to stay (V16/3122-23). Jennings was never a problem when he lived with them (V16/3124).

Jennings and McBride worked for the same company at one point and would see each other socially fairly regularly when they lived in Ft. Myers (V16/3124-25). They would go to bars when they were of age, and drank beer possibly every day (V16/3125). Jennings seemed to consume about the same as everyone else (V16/3125). They also used acid once in a while, and did mushrooms about once a month when they were in season,

maybe two or three times a year, or less (V16/3126-28 69-71). Jennings' mom was aware of his drug and alcohol use (V16/3128).

McBride described Jennings as tolerant, very patient of others, and intelligent (V16/3128, 3134). Jennings was not aggressive unless provoked, and McBride recalled seeing Jennings get angry if someone was lying, stealing, or trying to manipulate Jennings or someone he cared about (V16/3128-29). However, he never saw Jennings get into a fight (V16/3129). McBride also knew the co-defendant, Graves, but did not hang around Graves often; Graves lived in Naples and was young, cocky, not very bright and always eager to prove himself (V16/3129).

McBride did not remember talking to an attorney before the trial but it was possible that he had (V16/3131). He did not testify at trial, but his brother did (V16/3133). Had he testified, he would have said that the charges seemed out of character for Jennings, and didn't seem like something Jennings would do (V16/3132).

Bruce Martin is a half-brother to trial witness Brian McBride and evidentiary hearing witness Kevin McBride (V16/3136-37). He met Jennings around 1987 and recalled that Jennings lived with them briefly when Jennings was about sixteen or seventeen and having problems with his mother (V16/3136). They

also lived together for several years in Ft. Myers and in Naples (V16/3137). They shared an apartment in Naples in 1993, and Jennings had a girlfriend at that time, Mary Hamler (V16/3138-41). They would go out together a few times a week, shooting pool, going to house parties, and drinking; Jennings would drink anything he could get his hands on (V16/3141-42). Jennings drank every day and could drink anyone else under the table (V16/3142). Jennings also smoked pot every day, took about two hits of acid about once a week, probably used cocaine, and went "shrooming" about once a month (V16/3143-44). Martin was also doing the drugs with Jennings (V16/3148).

Martin described Jennings as having a temper, but not quick to get angry (V16/3145). Jennings would tell you to back off if you needed to back off, like if someone was messing with his friends or his mother (V16/3145). He did not see Jennings get angry often, but it happened a couple of times, like when Jennings picked up a guy named Benny and threw him on the floor (V16/3145). Martin also knew co-defendant Graves, and described him as crazy and not right in the head (V16/3146).

Although Jennings told Dr. Wald that his drug use stopped about 1991, Martin testified that Jennings continued to use drugs even after they lived in the apartment in 1993 (V16/3147; V20/3776). The drug consumption may have slowed down after 1991,

but it didn't stop (V16/3147). Martin did not remember meeting with the McBrides and a defense investigator in September, 1996 (V16/3146).

Charles Jason Graves was Jennings' co-defendant (V14/2831). Graves and Jennings were friends since Graves was about thirteen or fourteen years old (V14/2831-C). Jennings was like a big brother to him (V14/2831-D). Graves did not have an independent recollection of seeing Jennings doing drugs, but he thought they had used drugs together, since Graves had used drugs with a lot of people (V14/2831-C). He has not had contact with Jennings since being convicted, although he wrote Jennings a letter, which was admitted into evidence, indicating that he wanted to apologize to Jennings (V14/2831-D-2831-F). Graves testified that he was not related to Angela Cheney, and they were never involved in a sexual relationship, although they grew up together (V14/2831-I-2831-J). He recalled contacting her when he was arrested in Las Vegas, when he was trying to contact a lot of people, looking for help (V14/2831-J).

Following the hearing, written closing arguments were filed by the parties (V16/3160-3246). Jennings' motion was denied on January 31, 2011 (V17/3247-3260). The court concluded that Jennings had not demonstrated any deficient performance by counsel, or any prejudice, as to each of the claims of

ineffective assistance (V17/3251, 3255, 3258, 3259). This appeal follows.

SUMMARY OF THE ARGUMENT

The trial court properly denied Jennings' claim that his trial attorney provided ineffective assistance of counsel by failing to investigate and present mitigating evidence. Following an evidentiary hearing, the court found that counsel's investigation was reasonable, that counsel made a strategic decision against the presentation of testimony from his retained mental health experts, and that counsel adequately presented the evidence of Jennings' background. The court also determined that, even if the postconviction witnesses had been presented at the penalty phase, there would be no reasonable probability of a different result. The court's factual findings are fully supported by the record of the evidentiary hearing and the legal conclusions are supported by the case law cited in the order denying relief.

The trial court also properly denied the claim of ineffective assistance of counsel based on counsel's assertedly insufficient cross examination of state witness Angela Cheney. The court again found that Jennings had failed to demonstrate deficiency or prejudice. The court observed that trial counsel was not questioned about the cross examination, and that Cheney indicated that she testified truthfully.

Jennings' challenge to the summary denial of three

postconviction claims is similarly without merit. He does not even address the trial court's ruling that his claim of prosecutorial misconduct was procedurally barred, as it clearly is. His claim as to ineffective assistance of counsel for failing to challenge the forensic evidence was legally insufficient since Jennings did not allege any specific testimony which could have been presented had the defense offered its own forensic expert. Similarly, his claim of ineffective assistance of counsel for failing to challenge the admissibility of his post-arrest statements was legally insufficient since Jennings did not identify any police misconduct which would compel suppression of the statements. He did not assert that the statements would have been suppressed had counsel performed differently, or any reasonable probability of a different outcome had the statements been suppressed. As all three claims were procedurally barred and insufficiently pled, they were properly summarily denied.

ARGUMENT

ISSUE I

WHETHER THE TRIAL COURT ERRED IN DENYING JENNINGS' CLAIM OF INEFFECTIVE ASSISTANCE OF COUNSEL AT THE PENALTY PHASE.

Jennings initially submits that his trial counsel rendered ineffective assistance of counsel in the penalty phase of Jennings' 1996 capital trial. The trial court conducted an evidentiary hearing on this claim and concluded that Jennings failed to demonstrate either deficient performance or prejudice. Therefore, a proper review of the issue accords deference to any factual findings made below, with legal rulings to be considered *de novo*. Stephens v. State, 748 So. 2d 1028, 1033 (Fla. 1999). As will be seen, this claim was properly denied below, and this Court must affirm the ruling to deny relief.

The legal standards to be applied to Jennings' claim are well established. The seminal case of Strickland v. Washington, 466 U.S. 668 (1984), governs the analysis of a constitutional challenge to the adequacy of legal representation. In Strickland, the United States Supreme Court established a two-part test for reviewing claims of ineffective assistance of counsel, which requires a defendant to show that (1) counsel's performance was deficient and fell below the standard for reasonably competent counsel and (2) the deficiency affected the

outcome of the proceedings. The first prong of this test requires a defendant to establish that counsel's acts or omissions fell outside the wide range of professionally competent assistance, in that counsel's errors were "so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." Strickland, 466 U.S. at 687, 690. Only a clear, substantial deficiency will meet this test. See Johnson v. State, 921 So. 2d 490, 499 (Fla. 2005). The second prong requires a showing that the "errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable," and thus there is a reasonable probability that, but for counsel's errors, the result of the proceedings would have been different. Strickland, 466 U.S. at 687, 695. The deficiency must have affected the proceedings to such an extent that confidence in the outcome is undermined. Johnson, 921 So. 2d at 500.

Proper analysis of this claim requires a court to eliminate the distorting effects of hindsight and evaluate the performance from counsel's perspective at the time, and to indulge a strong presumption that counsel rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment. Strickland, 466 U.S. at 689; Chandler v. United States, 218 F.3d 1305, 1313-19 (11th Cir. 2000), cert.

denied, 531 U.S. 1204 (2001); Johnson, 921 So. 2d 499-500; Asay v. State, 769 So. 2d 974, 984 (Fla. 2000). Judicial scrutiny of attorney performance must be highly deferential. "It is all too tempting for a defendant to second-guess counsel's assistance after conviction or adverse sentence, and it is all too easy for a court, examining counsel's defense after it has proved unsuccessful, to conclude that a particular act or omission of counsel was unreasonable." Strickland, 466 U.S. at 689. The defendant bears the heavy burden of proving that counsel's representation was unreasonable under prevailing professional standards and was not a matter of sound trial strategy, and that prejudice resulted. Strickland, 466 U.S. at 689; Chandler, 218 F.2d at 1313; Johnson, 921 So. 2d at 500; Asay, 769 So. 2d at 984.

Courts have repeatedly recognized that the proper analysis considers the actions taken by defense counsel at the time of trial as if "standing in the shoes" of the attorney. See Mincey v. Head, 206 F.3d 1106, 1144-45 (11th Cir. 2000) (counsel's decision against seeking funds for an independent mental health expert "was reasonable when considered from the perspective of a hypothetical lawyer standing in counsel's shoes at the time"); Callahan v. Campbell, 427 F.3d 897, 934-35 (11th Cir. 2005) ("When we place ourselves in Knight's shoes at the time of the

trial, it was reasonable for him not to investigate the possibility Callahan was abused as a child").

Jennings relies on the ABA guidelines in determining the relevant standards for reasonable attorney performance, but courts caution against using these standards to grade an attorney's performance. See Bobby v. Van Hook, 130 S. Ct. 13, 17, n.1 (2009) ("The narrow grounds for our opinion should not be regarded as accepting the legitimacy of a less categorical use of the Guidelines to evaluate post-2003 representation. For that to be proper, the Guidelines must reflect '[p]revailing norms of practice,' Strickland, 466 U.S. at 688, 104 S. Ct. 2052, and 'standard practice,' Wiggins v. Smith, 539 U.S. 510, 524, 123 S. Ct. 2527, 156 L.Ed.2d 471 (2003), and must not be so detailed that they would 'interfere with the constitutionally protected independence of counsel and restrict the wide latitude counsel must have in making tactical decisions,' Strickland, supra, at 689, 104 S. Ct. 2052. We express no views on whether the 2003 Guidelines meet these criteria"); Harvey v. Warden, Union Correctional Institution, 629 F.3d 1228, 1258-59 (11th Cir. 2011) (ABA guidelines provide "an inappropriate metric for judging Watson's performance"); Mendoza v. State, 36 Fla. L. Weekly S427 (Fla. July 8, 2011) ("The ABA Guidelines are not a set of rules constitutionally mandated under the Sixth Amendment

and that govern the Court's Strickland analysis. Rather, the ABA Guidelines provide guidance, and have evolved over time as has this Court's own jurisprudence").

In this case, Jennings was represented by Assistant Public Defenders Thomas Osteen and Adam Sapenoff (V15/2899). While Mr. Sapenoff did not have extensive experience with capital cases, Mr. Osteen had represented approximately thirty capital defendants (V15/2876-77). When reviewing the performance of such a seasoned trial attorney, the strong presumption of correctness ascribed to his actions is even stronger. Chandler, 218 F.3d at 1316. In addition, this Court has repeatedly recognized that "the reasonableness of counsel's actions may be determined or substantially influenced by the defendant's own statements or actions." Henry v. State, 937 So. 2d 563, 573 (Fla. 2006), quoting Stewart v. State, 801 So. 2d 59 (Fla. 2001), and Cherry v. State, 781 So. 2d 1040, 1050 (Fla. 2000).

In this case, Jennings alleges that counsel conducted an inadequate investigation, speaking only to Jennings' mother, Tawny, and a few friends; and that counsel failed to obtain the necessary records and provide the relevant background information to the defense mental health experts, resulting in inadequate mental health assistance. The trial court rejected these allegations, specifically finding that counsel's

performance was not deficient, and that no potential prejudice had been demonstrated (V17/3258).

The court found that Jennings' background was sufficiently presented to the jury, and that although the evidentiary hearing witnesses provided further details, "they did not provide any additional relevant mitigating information that was not elicited at trial" (V17/3256). The court observed that counsel made a strategic decision not to present the mental health experts; that counsel could not be ineffective for failing to learn about sexual abuse or emotional neglect which Jennings had not disclosed and in fact denied; and that it was a reasonable trial tactic to focus on positive information rather than negative information such as extreme drug use (V17/3256-58). The court also found that the postconviction criticisms of the trial mental health experts amounted to a matter of semantics, and that Jennings failed to show that the trial experts' evaluations were grossly insufficient or ignored clear indications that he suffered from retardation or brain damage (V17/3253-55). These findings are fully supported by the record and must be affirmed.

In addition, the lower court found that, even if counsel had presented the testimony offered in postconviction, there is no reasonable probability that the outcome would be different (V17/3258). The court noted the inconsistencies in the expert

testimony presented at the hearing and concluded that, given the heinous nature of the three murders and the other aggravating factors, the additional information would not have changed the outcome as the mitigation would not have outweighed the aggravating circumstances (V17/3258). Once again, this ruling is supported by the record, and must be affirmed.

A. Deficient Performance

Jennings claims that his attorneys failed to conduct an adequate investigation into mitigation. Jennings asserts that counsel's investigation was "minimal," talking to Jennings' mother a few times and speaking with some of his friends (Initial Brief, pp. 35-36). He faults counsel for failing to secure medical, school and employment records and for failing to hire a mitigation specialist. However, a review of the record confirms the adequacy of counsel's performance and refutes Jennings' allegations of deficiency.

Osteen was an experienced capital litigator, and very familiar with the ideas and general framework of presenting a case in mitigation; he had attended continuing education courses on the subject and was exposed to a lot of training with regard to capital issues (V15/2889). In this case, he began preparing for the penalty phase right from the beginning (V15/2878, 2912-14). He had the assistance of Ed Neary, chief investigator at

the public defender's office, who had worked many capital cases with Osteen (V15/2896-97).

The defense secured the appointment of Dr. Robert Wald as a confidential defense mental health expert early into the case. Dr. Wald was appointed on March 4, 1996, pursuant to Osteen's motion filed on February 1, 1996 (V15/2878-80; DA. V1/75-76). Thereafter, the court was notified that Dr. Wald had requested assistance from Dr. Russell Masterson, and Dr. Masterson was also appointed to assist the defense (V15/2886; DA. V1/88, 91). These experts reviewed school and jail records, administered psychological and neurological testing, interviewed Jennings, and conducted a mental status examination (V20/3760-3781). The record also reflects that Osteen attempted to assist the experts by arranging a meeting with Jennings' mother, Tawny Jennings, but that Tawny was not cooperative about meeting with Dr. Masterson as requested (V15/2916; V20/3772). Finally, the record reflects that Osteen did not simply rely on the reports provided but he consulted with both Drs. Wald and Masterson individually before making a determination as to whether to present either expert as a penalty phase witness (V15/2883; DA. V4/524-25, 635).

In order to bolster his case, Jennings repeatedly makes arguments that are directly refuted by the record. For example,

Jennings suggests that Dr. Wald may have only been appointed to assist the defense with competency concerns (Initial Brief, pp. 9, 38, 39), yet Osteen testified unequivocally that Wald and Masterson both evaluated Jennings for mitigation purposes as well (V15/2879). Similarly, Jennings is highly critical of counsel for making "no effort" to obtain background records (Initial Brief, pp. 9, 10, 36, 39, 41, 42), yet the mental health reports indicate that the defense experts reviewed school, jail, and medical records (V20/3772, 3778-79). Moreover, Jennings has not identified any pertinent information that was unknown to counsel due to any purported failure to obtain records and he has not disputed the accuracy of the extensive background information as relayed in the expert reports.

The testimony from the evidentiary hearing was undisputed and established that Osteen made a reasonable strategic decision against presenting any testimony relating to mental mitigation from Dr. Wald or Dr. Masterson (V15/2898, 2919-21). At the evidentiary hearing, counsel explained that he has used mental health evidence in other cases to a great extent (V20/2921). However, in this case, the mental health mitigation was simply not strong enough to present to the jury (V20/2920-21). Osteen reached this conclusion based on his experience and having been involved in a number of cases with much more compelling mental

mitigation (V15/2920-21). In addition, counsel was reasonably concerned about the fact that the expert reports, which detailed extensive criminal activity by Jennings, would become available to the State and rebut the statutory mitigating factor of no significant criminal history which counsel intended to argue should apply (V15/2919-20). Jennings was evaluated by competent mental health professionals, and a strategic decision was made that the mental mitigation available was not sufficient to present. Rather, after investigation, the defense adopted a theme of portraying Jennings in a positive light, with evidence of his redeeming characteristics in an attempt to demonstrate to the jury that Jennings' life was worth sparing (V15/2898, 2021).

The law is well settled that when such strategic decisions are made counsel cannot be deemed to have been ineffective. There are many cases which recognize the reasonableness of a decision to forgo mental mitigation in favor of a strategy to humanize the defendant. See Darling v. State, 966 So. 2d 366, 377-78 (Fla. 2007) (noting attorneys are entitled to rely on trial experts); Burns v. State, 944 So. 2d 234, 243-44 (Fla. 2006); Hannon v. State, 941 So. 2d 1109, 1130 (Fla. 2006); Looney v. State, 941 So. 2d 1017, 1029 (Fla. 2006); Henry v. State, 862 So. 2d 679, 686 (Fla. 2003); Shere v. State, 742 So. 2d 215, 223-24 (Fla. 1999); Rutherford v. State, 727 So. 2d 216,

223 (Fla. 1998); Haliburton v. Singletary, 691 So. 2d 466, 471 (Fla. 1997); Bryan v. Dugger, 641 So. 2d 61, 64 (Fla. 1994). Counsel in this case investigated potential mitigation through known, reliable mental experts, and made a strategic decision to forgo the weak mental mitigation in favor of the presentation of positive personality traits. Such an informed, reasonable decision refutes any allegation of deficient performance with regard to the failure to present Dr. Wald and/or Dr. Masterson as mitigation witnesses.

Jennings claims that the decision against using mental mitigation was flawed because the evaluations conducted were allegedly insufficient. This Court has recognized that due process may be implicated by inadequate mental health assistance at trial when it is shown in postconviction that "a prior mental health expert's examination was so 'grossly insufficient' that the expert 'ignore[d] clear indications of either mental retardation or organic brain damage.'" Stewart v. State, 37 So. 3d 243, 255 (Fla. 2010); Raleigh v. State, 932 So. 2d 1054, 1060 (Fla. 2006); State v. Sireci, 502 So. 2d 1221, 1224 (Fla. 1987). In this case, as the court below found (V17/3254-55), Jennings failed to demonstrate that Drs. Wald and Masterson ignored clear indications of mental retardation or organic brain damage; Jennings does not even assert that he has met this standard.

Instead, he critiques the reports prepared and provided to trial counsel as insufficient. Of course, as counsel testified, Osteen did not rely exclusively on the reports but spoke to both Wald and Masterson for further information before deciding against presenting mental mitigation from these experts (V15/2883). Moreover, such post-hoc criticisms are insufficient to demonstrate any basis for relief. See Stewart, 37 So. 3d at 257 ("Stewart has not identified clear signs of brain damage that his penalty-phase mental health experts overlooked. ... An expert's evaluation 'is not rendered less than competent ... simply because [the] appellant has been able to provide testimony to conflict with that presented' by the expert," citing Jones v. State, 732 So. 2d 313, 320 (Fla. 1999)).

In this case, while Dr. Eisenstein testified that Dr. Masterson's report was inadequate and he disagreed with Masterson's characterization of one of Jennings' test scores, there was no testimony that Wald or Masterson had missed or ignored clear indications of retardation or brain damage or that their examinations were grossly insufficient. The court below deemed Eisenstein's concerns to be a matter of semantics (V17/3253). On this record, there was no basis for the lower court to find that Osteen's investigation into possible mental mitigation, and his resultant decision against presenting any

mental health expert in the penalty phase, was anything less than reasonable.

Osteen's investigation of non-statutory mitigation through family members and friends was similarly reasonable. Unfortunately but not surprisingly, Osteen had only vague recall of the investigation conducted fifteen years earlier (V15/2874, 2891). He relied primarily on Jennings and his mother to assist with the development of family background and character mitigation, and was assisted by his co-counsel and the public defender's chief investigator in locating and interviewing potential witnesses (V15/2878, 2891, 2893, 2894-97, 2900-02). Once he had ruled out the existence of substantial or compelling mental mitigation, counsel focused on finding people with good, positive things to say about Jennings (V15/2898, 2921).

To the extent Jennings now claims counsel was deficient for failing to obtain additional records or hire a mitigation specialist, he has offered nothing to support any suggestion that these actions were taken by all reasonable counsel in 1995. Jennings has not identified any critical records which should have been discovered or could potentially affect the case. The mental health experts consulted prior to trial reviewed school and jail records, and since Osteen had worked with these experts over the years in a number of capital cases, he would have been

familiar with their methods and could see in their reports that they had secured some of this material (V15/2878, 2881-82; V20/3772, 3778-79). Osteen testified at the hearing that mitigation experts were not prevalent in 1995, and although he may have used one "from time to time," he did not think then and does not feel now that it was necessary to hire one in this case (V15/2922-23). Jennings offered no evidence to suggest that Ed Neary, the public defender investigator that had worked with Osteen on nearly all of the numerous capital cases Osteen had handled, had any less experience or did any less thorough a job investigating Jennings' background than a mitigation specialist might have done (V15/2896-97, 2901-02).

Thus, the record establishes that counsel explored mental health mitigation and used the services of the chief investigator at the public defender's office to help develop family and background mitigation. Counsel also prepared and argued mitigation based on Graves' participation in the offense and an assertion of disparate sentencing. Counsel identified and submitted both statutory and nonstatutory mitigation, including Jennings' lack of significant criminal history and his exemplary courtroom behavior, both of which were weighed in mitigation at sentencing. On these facts, it is evident that the penalty phase investigation extended far beyond Osteen's discussions with

Tawny Jennings and some of Jennings' friends.

In addition, Jennings has failed to demonstrate that counsel should have discovered the family history mitigation offered at postconviction through Patricia and Lloyd Scudder. Osteen testified that although he did not particularly recall doing so in this case, his standard practice is to ask about a family history of sexual abuse or incest, and presumably he did so here (V15/2896). However, he never heard of any such history in this case; nothing was ever brought to his attention relating to this type of mitigation (V15/2895-96). Importantly, neither Jennings nor his mother testified at the evidentiary hearing to rebut Osteen's testimony on this point; there is no evidence which suggests that Jennings, Tawny, or anyone else ever provided counsel with any information which needed to be developed further on this point. Counsel cannot be deemed to have performed deficiently for failing to investigate avenues which were unknown because the defendant, as the person with knowledge of the information, has not shared the relevant facts with counsel. Anderson v. State, 18 So. 3d 501, 509-510 (Fla. 2009); Stewart v. State, 801 So. 2d 59, 67 (Fla. 2001) ("by failing to communicate to defense counsel (or the defense psychiatrist) regarding any instances of childhood abuse, Stewart may not now complain that trial counsel's failure to

pursue such mitigation was unreasonable"). Osteen testified that he would have inquired as to family background and, absent some showing that he did not ask for this information or was given information which he should have pursued further, nothing more is constitutionally compelled.

With regard to counsel's failure to present Heather Johnson, Kevin McBride, and Bruce Martin, Jennings has not shown any deficient performance; counsel was clearly aware of the mitigation available through these witnesses and chose to present similar testimony through other witnesses. Osteen interviewed a number of Jennings' peers as potential character witnesses, and recalled that some of them were not helpful and would not make good defense witnesses (V15/2921-22, 2929-31). For example, he would not use witnesses that would testify that Jennings was guilty and got what he deserved (V15/2929-31). Like the strategy involved in deciding to forgo expert testimony of Jennings' mental functioning, counsel's tactical decision as to which lay witnesses to present to the jury and the scope of the subject matter addressed are not subject to being second-guessed in assessing a claim of ineffective assistance of counsel. At the postconviction hearing, the only "new" information from these witnesses involved Jennings' extensive history of substance abuse, which is not universally considered mitigating

and which, in this case, did not relate to the commission of the offense and was inconsistent with counsel's theme of presenting only positive traits. See Happ v. State, 922 So. 2d 182, 193 (Fla. 2005) (failure to offer evidence of history of substance abuse not deficient where counsel testified a Lake County jury would not see it as mitigating, particularly where it was not related to the offense); Cummings-El v. State, 863 So. 2d 246, 267 (Fla. 2003) (no deficient performance where presentation of family background and history of substance abuse would permit jury to hear defendant's criminal record, not otherwise presented).

An honest review of the record in this case shows that counsel prepared for the penalty phase of trial from an early date; that counsel's investigation was not unduly limited by time, money, or other resources; that counsel thoroughly explored the mental mitigation available and chose not to present expert testimony on the issue; that counsel forcefully argued against the application of the aggravating factors sought by the State; that counsel and his investigator developed the names of potential background and character witnesses, interviewed witnesses, and presented those witnesses that counsel deemed helpful to the defense; and that counsel developed other nonstatutory mitigation based on the facts of

the case, including the fact that the co-defendant was receiving a sentence less than death and Jennings behaved well at trial. As a result of counsel's actions, the trial judge found and weighed one statutory mitigating factor (no significant criminal history) and eight nonstatutory mitigators: Jennings' deprived childhood, Graves' life sentence, Jennings' cooperation with the police, Jennings' good employment history, Jennings' loving relationship with his mother, Jennings' positive personality traits including the ability to form loving, caring relationships, Jennings' capacity to care for, love, and be loved by children, and Jennings' exemplary behavior (DA. V5/784-790). Jennings has not specifically identified acts or omissions by counsel which demonstrate an unreasonable performance, he simply disagrees with the way his attorney handled the penalty phase and offers a few witnesses that were not presented. As counsel's investigation and presentation of mitigation was entirely reasonable, Jennings' claim of ineffective assistance of counsel must be denied.

B. Prejudice

Even if Jennings had offered some evidence to support a finding of deficient performance, he could not prevail in this case as he cannot establish any prejudice. The relevant assessment considers whether the additional mitigation evidence

makes it "reasonably probable, given the nature of the mitigation offered, that this altered picture would have led to the imposition of a life sentence, outweighing the multiple substantial aggravators." Asay v. State, 769 So. 2d 974, 988 (Fla. 2000). This case involves a senseless triple murder, and Jennings' death sentences are supported by multiple, substantial aggravating factors: committed during a robbery; committed to avoid arrest; and committed in a cold, calculated and premeditated manner. These factors overwhelmed the mitigation presented at trial, and they continue to easily outweigh the mitigation even when the new postconviction testimony is added.

Any possible deficiency with regard to the investigation and presentation of non-statutory mitigation related to Jennings' family background could not have made a difference in this case. The family background evidence offered by Patricia and Lloyd Scudder at the postconviction hearing was not compelling. While Jennings tries to convince this Court that he offered substantial mitigation based on Jennings' having been raised in an environment replete with abuse, neglect, incest, and exposure to sexual predation, his argument is not persuasive on the record presented.

Patricia Scudder described Jennings' mother, Tawny, as an overprotective mother hampered by her own physical and emotional

needs. Although Jennings relies on her testimony to suggest that he was raised in filth and with many unmet needs, this is not a fair characterization of the evidence. Scudder did describe the conditions where Tawny lived with a young Brandy Jennings as cluttered and even unsanitary at times, but this description must be considered in the context in which it was offered. Patricia testified that she only observed the conditions of the home a few times, including two occasions when she had agreed to come and stay with Tawny because Tawny had had surgery and needed assistance caring for herself, Brandy, and their home (V14/2786, 2788, 2805). Patricia agreed that Tawny was being responsible in seeking this assistance and did not suggest there were similar problems with the condition of the home when Tawny was not recovering from surgery; in fact, she did not see Tawny and Jennings very much except for those times she stayed with them (V14/2805-07).

Even after exhaustive postconviction investigation, there is much about Jennings' childhood that is simply unknown as his family members are not good historians. While the Scudders provided snapshot-type memories of Jennings' early childhood, they only had limited contacts with Jennings and Tawny, seeing them sporadically over a period of years when Jennings was about five or six until he was a young teenager. Moreover, the

inconsistencies between Patricia's and Lloyd's testimonies suggest that either their memories and recall were very poor, or that they were influenced by their desire to help Jennings. For example, Lloyd testified that the times that Patricia had stayed with Tawny and Jennings were before they were married and even before he knew Patricia (V14/2825), and Patricia testified that the last time she stayed with them, Jennings was twelve or thirteen years old (V14/2806), suggesting that Floyd only knew Jennings for a year or so before Jennings left Oregon; however Lloyd testified that he knew Jennings from the time Jennings was five or six years old until he moved away (V14/2814). Lloyd in particular was very critical of Tawny, and appeared to base much of his testimony and many of his personal conclusions about Tawny based on information from other people.

No one testified directly to any significant abuse or neglect suffered by Jennings as a child. While some witnesses may have disagreed with Tawny's parenting style, for example thinking it "wrong" that Tawny breastfed Jennings beyond infancy and criticizing her for not allowing Jennings to go out and play with other children more often, no one testified that Tawny was abusive. The most common complaint was that Tawny was too loving, too overprotective, and too much of a friend when she should have been a parent; the worst thing she is accused of

doing is exposing or possibly introducing Jennings to alcohol and drugs at an early age. Compared to the backgrounds of most death row inmates, Tawny's poor judgment is decidedly tame and mild. And despite great speculation and attempts to show that Jennings had been sexually abused by either George "Uncle Sonny" or Walter Crume, there was no direct evidence of any such abuse. Apparently Jennings recalls being paid a quarter to sit on Sonny's lap but he has certainly never testified to any abuse or established that such testimony was available for Osteen to present at the penalty phase.

Of course, the trial judge found Jennings' deprived childhood to be a mitigating factor, and allocated it "some" weight, citing Tawny's testimony about Jennings having been abandoned by and never knowing his father and having an unstable home life due to his mother's moving around frequently and becoming involved with different male companions (DA. V5/787). The value of the new mitigation on this point is properly reduced by the fact that Jennings was 26 at the time of the murders. Douglas v. State, 878 So. 2d 1246, 1260 (Fla. 2004) (affirming the assignment of little weight to mitigation of abusive childhood based on it being remote in time where defendant was 25 at the time of the capital murder). Jennings has made no showing that the weight of this factor would be

increased by the new testimony from the Scudders, but even if such is presumed the factor still falls far short of overcoming the strong aggravating factors applicable in this case.

The postconviction testimony by Heather Johnson, Kevin McBride and Bruce Martin is even less compelling. The evidence they offered is similar to that which was presented to the jury at penalty phase through the testimony of Michael Lobdell, Angie Lobdell, Brian McBride, Rebecca Lloyd and Mary Hamler (DA. V5/699-722). Again the trial judge already found and weighed Jennings' positive personality traits, his employment history, and his ability to love and care for children (DA. V5/789). The additional information about Jennings' substantial illegal drug use may provide another nonstatutory factor, but it comes at a significant cost, as it would reduce if not eliminate the statutory factor of no significant criminal history. The evidentiary underpinnings of Jennings' death sentences are not affected to any discernible degree by the information provided by these witnesses, and there can be no reasonable probability of a different outcome even if they had been offered as mitigation witnesses at trial.

Similarly, the mental mitigation offered by Dr. Hyde, Dr. Eisenstein and Dr. Sultan does not establish any prejudice flowing from counsel's decision to forgo expert testimony on

Jennings' mental functioning. It must be noted initially that there has been no showing that, had counsel decided to present evidence on Jennings' mental functioning, the testimony presented in postconviction would have been what was presented to the jury. Rather than offer the experts that actually examined Jennings prior to trial and consulted with defense counsel, Jennings has presented the opinions of new experts without any basis to believe that this same information would have been offered had counsel chosen to offer mental mitigation. The postconviction experts were not consistent in their opinions and they relied on testing and information which was not available to the trial experts.

The trial record demonstrates that additional investigation into mental mitigation through the appointment of new experts would not have been an option for trial counsel. Indeed, the record reflects that Collier County balked at the expense counsel incurred in seeking the appointment of a second expert, although the funds were ultimately awarded to permit Dr. Masterson's participation with the defense team (see, e.g., DA. V2/319-320, letter from Dr. Masterson to an assistant county attorney justifying expense of additional evaluation). Although the postconviction experts testified that they were available and could have testified in 1995, there certainly has been no

showing that counsel could have secured even more funding for this expense, particularly to hire two out-of-state experts. The postconviction experts had the advantage of time and resources to conduct more extensive testing and evaluations than the trial experts. Because Jennings did not present any evidence as to what information could and would have been presented to the jury through Dr. Wald and Dr. Masterson, he did not offer any relevant material as potential prejudice even if Mr. Osteen's decision against presenting this testimony could be deemed unreasonable. Because there has been no showing that the opinions of Dr. Hyde, Dr. Eisenstein and Dr. Sultan would be what counsel could and would have presented, their collective testimony was irrelevant and clearly insufficient to support any finding of prejudice.

Even if the postconviction testimony is accepted as a sample of the mental mitigation available at the time of trial, this evidence was not compelling but was fairly routine and insignificant in its ability to reduce Jennings' moral culpability for the deaths of Dorothy Siddle, Jason Wiggins and Vickie Smith.

The experts agreed that Jennings is intelligent and does not suffer from any major mental illness (V15/3040; V16/3089, 3096). Dr. Hyde did not offer any diagnosis or identify any

particular neurological or cognitive deficits; Jennings' performance on his testing was normal (V15/2849-51). Although he identified several indicators of possible neurological abnormalities, he could not offer any connection between the potential problems and the commission of the crimes at Cracker Barrel (V15/2854). He was not asked to form any opinion as to the applicability of any statutory or nonstatutory mitigation (V15/2855).

Dr. Eisenstein offered two diagnoses: (1) Gifted Learning Disabled, a reading disorder and (2) Intermittent Explosive Disorder [IED] (V14/2685-86, 2691). Dr. Eisenstein also testified that, in his opinion, both statutory mental mitigating factors apply in this case; Jennings was operating under an extreme mental or emotional disturbance and Jennings' ability to conform his conduct to the requirements of law was substantially impaired (V14/2715-17). Eisenstein felt that these factors were supported by the fact that Jennings' learning disability was never addressed and in combination with his chaotic home life it drove Jennings to self-medicate with alcohol and drugs, which in turn led to disregulation of brain function and poor impulse control (V14/2717-18). Eisenstein felt Jennings' problems were "extreme" because something that could have been dealt with, the learning disability, was not; and the IED then added fuel to the

fire (V14/2718). Notably, Eisenstein testified that, in his opinion, the murders in this case were not premeditated but were reactive and impulsive in nature (V14/2718-19).

Dr. Sultan corroborated Eisenstein's diagnosis of IED (V16/3092). However, she would not suggest that the Cracker Barrel murders were related to the IED or that Jennings experienced an explosive episode at the time of the crime (V16/3111). She testified that Jennings does not meet the criteria for application of either of the statutory mental mitigating factors (V16/3096).

Dr. Eisenstein's finding Jennings to have a learning disability due to a reading disorder provides no basis for reducing Jennings' moral culpability for the murders. This diagnosis was noted, although Eisenstein acknowledged that Jennings is now a prolific reader and Eisenstein credited an improvement in some of Jennings' test scores to the fact that Jennings has stimulated his brain over the last ten years by engaging in a significant amount of reading (V14/2677-79). Moreover this academic deficiency does not seem to have had much influence on the commission of the Cracker Barrel crimes; no reading was necessary in order to kill Dorothy Siddle, Jason Wiggins, and Vickie Smith.

The IED diagnosis is similarly weak with only minimal

mitigating value. A finding of IED is suspect in light of the wealth of lay witness testimony that Jennings was not generally considered to be violent or aggressive by his close peers and associates (V14/2831-O-2831-P; V16/3128-29, 3145; DA. V5/702, 705). The IED diagnosis requires a finding that Jennings has experienced discrete episodes where he has been unable to resist engaging in aggressive behavior. Dr. Eisenstein identified the Cracker Barrel murders as one episode, and noted another possible episode from an incident where Jennings, at eight years of age, had attempted to choke a cousin. Eisenstein also noted that school records reflect Jennings had engaged in fights with other students. No other attempt to identify any past explosive episodes was made.

To the contrary, lay testimony suggested that Jennings was in control of his behavior even during difficult times. For example, Heather Johnson testified that she and Jennings were “best” friends for many years, yet the only time she ever saw him violent was when her boyfriend was being annoying, and Jennings repeatedly asked the boyfriend to stop the behavior, to no avail. The testimony that Jennings can apparently control his explosive temper when he wants to reduces the mitigating value of any testimony related to Intermittent Explosive Disorder. At any rate, to whatever extent Jennings may or may not have IED,

it is apparent from the facts of this case that it did not cause or contribute to his actions at the Cracker Barrel.

Dr. Eisenstein was the only expert to opine that any IED played a part in the murders. Eisenstein's conclusion that the murders occurred during an explosive episode is refuted by the facts of the case, which reflect not only that the murders were premeditated, but that the heightened premeditation required for application of the CCP aggravating factor existed. See Jennings, 718 So. 2d at 151-53 (affirming application of CCP). Eisenstein's assessment that the murders were reactive and impulsive is not even supported by Jennings' own account of the crime.

Dr. Eisenstein's opinion that Jennings' mental functioning at the time of the murders was so impaired as to rise to the level of both statutory mental mitigating factors was not credible. Despite trial testimony that Jennings had previously indicated that, if he committed a robbery, he "would leave no witnesses," and despite evidence of personal animosity between Jennings and Dorothy Siddle and despite the fact that Jennings and Graves used gloves but did not wear the masks available, Dr. Eisenstein testified that he accepted Jennings' representation that he had planned to leave Siddle and the other victims alive when he robbed the restaurant. Eisenstein testified that,

notwithstanding Jennings' claim that he had not killed the victims, Eisenstein believed that Jennings killed because "something" happened which caused Jennings to overreact with a homicidal rage during an intermittent explosive episode. The inability to reconcile Eisenstein's conclusions with the facts and the lack of acceptance by the other experts are common factors cited by courts in finding Eisenstein's expert opinions to be incredible. See Gonzalez v. State, 990 So. 2d 1017, 1022-1023, 1030 (Fla. 2008) (trial court rejected Eisenstein's opinion that both mental mitigating factors applied; "the extreme mental or emotional disturbance mitigator was rejected due to the lack of credibility of Dr. Eisenstein's own testimony ... The trial court also found that the facts in the record did not support Dr. Eisenstein's opinion"); Stewart, 37 So. 3d at 250-51 (trial court found only "possible" brain damage where Eisenstein's finding of actual damage was rejected by other experts); Jones v. State, 966 So. 2d 319, 327 (Fla. 2007) ("Dr. Eisenstein's testimony that in this phrase the word "present" actually refers to past, or childhood, adaptive functioning would impose an Alice-in-Wonderland definition of the word "present"); Connor v. State, 803 So. 2d 598, 611-12 (Fla. 2001) (affirming trial court's rejection of statutory mental mitigation despite testimony from Dr. Eisenstein that it

existed); Walker v. State, 707 So. 2d 300, 318 (Fla. 1997) (affirming trial court's rejection of statutory mitigation testified to by Eisenstein).

Even if this testimony were credible, it would not mitigate the murders to such an extent that a life sentence would have been recommended and imposed. It is readily apparent that the presentation of mental mitigation would have come at great cost to the defense. The statutory mitigating factor of no significant criminal history would not have been available had Dr. Wald or Dr. Masterson testified, as they would have been cross-examined on Jennings' extensive criminal past. As the pretrial reports indicate, Jennings not only admitted a history of substance abuse, but also indicated that he sold drugs as well, he stole money from corporations "dozens" of times, he was involved in illegal street racing, and had committed violent assaults.

The record in this case supports the lower court's conclusion that there is no reasonable probability of a different result had the penalty phase been conducted in the manner that Jennings now suggests it should have been. The death penalty is routinely recommended and imposed in comparable cases where the mitigation is even more persuasive than this case. See Hernandez v. State, 4 So. 3d 642, 654-55 (Fla. 2009); Lebron v.

State, 982 So. 2d 649 (Fla. 2008); White v. State, 817 So. 2d 799, 801-03 (Fla. 2002); Asay, 769 So. 2d at 987-88. When the mitigation from Jennings' trial is combined with the new mitigation offered at postconviction, it still does not begin to counter the strong aggravating factors that apply. Compare Breedlove v. State, 692 So. 2d 874, 878 (Fla. 1997) (mitigation of childhood beatings and alcohol abuse still overwhelmed by aggravating factors of prior felony conviction, during burglary, and heinous, atrocious or cruel); Haliburton v. State, 691 So. 2d 466, 471 (Fla. 1997) (no prejudice where counsel did not present mitigation of defendant's abusive childhood, history of substance abuse, and brain damage); Asay, 769 So. 2d at 988 (failure to present abusive childhood and history of substance abuse not prejudicial where testimony would have led to cross-examination revealing defendant's violent past). Jennings committed an egregious triple murder, and the circumstances of his life history and brain functioning as portrayed even in postconviction do not substantially mitigate his culpability for these offenses.

In conclusion, Jennings has failed to establish that he was denied the effective assistance of counsel with regard to the investigation and presentation of mitigation at the penalty phase of his capital trial. He has not demonstrated either

deficient performance or potential prejudice. Accordingly, this claim must be denied.

ISSUE II

WHETHER THE TRIAL COURT ERRED IN DENYING JENNINGS' CLAIM OF INEFFECTIVE ASSISTANCE OF COUNSEL FOR FAILING TO ADEQUATELY CROSS EXAMINE STATE WITNESS ANGELA CHENEY.

Jennings next asserts that trial counsel rendered ineffective assistance with regard to the cross examination of State witness Angela Cheney. This claim was also subjected to an evidentiary hearing, so factual findings are reviewed with deference and legal rulings are considered *de novo*. Stephens, 748 So. 2d at 1033.

Jennings' motion asserted that Osteen should have asked Cheney about her prior relationship with Jennings and about the fact that she was married to the brother of Jennings' co-defendant, Jason Graves (V1/108-09; V12/2297). Following the evidentiary hearing, Jennings expanded his argument to allege that counsel also should have established that the statement "could not have taken place" as testified to and that Jennings and Cheney may have been using illegal drugs around the time the statement was made (V16/3162, 3164-65).[4] No ineffective assistance has been demonstrated under either theory.

[4] Pursuant to Florida Rule of Criminal Procedure 3.851(f)(4) any amendment to Jennings' claim had to have been filed prior to the evidentiary hearing, so the new allegations that counsel should have established that the statement could not have been made as described and that illegal drugs may have been consumed at the time of the statement are not properly before the Court and should not be considered.

Angela Cheney testified at trial that she was friends with Jennings and Graves (DA. V10/699). She recalled a conversation prior to the Cracker Barrel murders with Jennings and some friends about money, where Jennings had indicated that, if he ever needed money, he could always commit a robbery; when Cheney responded that was "stupid" because Jennings could get caught, he said, "Not if you don't leave any witnesses," and made a slashing motion across his throat (DA. V10/700). On cross-examination, counsel brought out the fact that this discussion took place two years before the Cracker Barrel robbery, and that Cheney did not reveal the statement to law enforcement until after the robbery (DA. V10/702).

The testimony presented at the evidentiary hearing did not support any conclusion that Mr. Osteen provided ineffective assistance of counsel with regard to Cheney's cross-examination. Osteen testified that he was a very experienced capital litigator at the time of Jennings' trial (V15/2876-77). He did not recall whether he had deposed Cheney but he was aware of the substance of her testimony about Jennings' statement and knew they had been friends or maybe girlfriend/boyfriend at the time (V15/2903-04, 2910-11). He did not conduct a background investigation of Cheney because he did not have any reason to do so (V15/2909-10).

Cheney testified at the evidentiary hearing that at the time of the conversation with Jennings, she had been staying with Jennings for about a month, although she was not sure about the time; she also said that she had a "dating relationship" with Jennings, again for maybe a month but she didn't really remember as it was a long time ago (V15/2856-58). She stated that she had been friends with co-defendant Jason Graves; they had grown up together and that's how she came to meet Jennings (V15/2858, 2865). She had been married to Graves' brother, Robert Cheney, from 1994 until maybe 1996; she did not recall if they were divorced or just in the process of divorcing at the time of trial (V15/2858). She testified that she had been truthful at trial and that her relationship with Jennings and Graves did not influence the sworn statement she gave to law enforcement or her trial testimony (V15/2868).

The court below summarized the testimony from Ms. Cheney and from trial counsel Osteen and concluded that Jennings failed to demonstrate either deficient performance or prejudice with regard to Osteen's cross-examination of Cheney at trial (V17/3250-51). The court noted that Osteen was not asked any questions about his asserted failure to adequately cross-examine Cheney, establishing only that counsel was aware of who Cheney was and what she would testify to at trial (V17/3251). The court

found that, since Cheney indicated that she testified truthfully at trial and was not influenced by her relationships with Jennings and Graves, there was no evidence of any possible prejudice (V17/3251). No error can be discerned in this ruling.

Notably, some of the facts cited in support of Jennings' argument are not fully supported by the record. For example, Jennings asserts that Cheney "helped" Graves when Graves contacted her from jail in Las Vegas (Initial Brief, p. 65), but Cheney testified she did not think her talking to law enforcement helped Graves, it was just the right thing to do and a way to ease her own conscience (V15/2864-65). Jennings also claims that trial counsel "had no knowledge of any history of a boyfriend/girlfriend relationship" between Cheney and Jennings (Initial Brief, p. 68), but when Osteen was asked about his understanding of the relationship, he responded, "I want to say boyfriend and girlfriend, but, no, I can't say for sure" (V15/2903-04). Of course, just because Osteen was uncertain about the exact relationship at the evidentiary hearing in 2010 does not establish that he was uncertain about it at the time of trial in 1996, but he clearly was not surprised at the suggestion that Cheney and Jennings had briefly dated at one point.

There was no testimony at the hearing offered to support

any conclusion that Osteen's cross-examination at trial was unreasonable or constitutionally deficient. Certainly there was no direct evidence that all reasonable attorneys would have conducted the cross-examination differently. Osteen did not testify, even in hindsight, that he had failed to conduct a reasonable cross-examination, and he did not suggest he would do anything differently if given another opportunity. Cheney did not reveal any hostility or negative feelings that could have been used to suggest bias either for or against Jennings or for or against Graves. Jennings has never denied making the statement and gesture attributed to him and there is nothing to suggest that he advised Osteen that Cheney's testimony was only a result of bad feelings due to their prior relationship. Although Jennings faults counsel for failing to inform the jury of Cheney's "close familial and friendly relationship" with Graves (Initial Brief, p. 64), he did not establish any close familial relationship since Cheney testified she was either divorced or seeking a divorce from Graves' brother at the time of trial, and the jury did in fact hear that Cheney was friends with Graves (V15/2858-59; DA. V10/699).

Moreover, Jennings has failed to offer any reasonable basis for a finding of prejudice. Had counsel elicited the information provided in postconviction about Cheney's relationships with

Jennings, Graves, and Robert Cheney, there is no reasonable probability that Jennings would not have been convicted of these murders. Cheney was not a critical witness; she did not have any direct information about the Cracker Barrel robbery or murders. None of the additional information developed in postconviction diminishes Cheney's credibility. Moreover, even if Cheney had never testified at trial, the evidence of Jennings' culpability in the murders was overwhelming. On these facts, any purported deficiently in Cheney's cross-examination could not have affected the outcome at trial. The aggravating factors supporting Jennings' death sentences are not founded on this testimony and would have applied even if Cheney's statements had never been admitted, so no prejudice as to sentence has been offered either.

To the extent Jennings now asserts that counsel should have established that the statement "could not have been made" and/or that Cheney and Jennings may have been using illegal substances at the time of the statement, his allegations are procedurally barred since they were not offered in his initial motion. See Florida Rule of Criminal Procedure 3.851(f)(4) (any amendment to motion must be made prior to evidentiary hearing). In this case, Jennings' failure to fully plead this issue precluded the parties from developing the relevant information at the

evidentiary hearing. For example, although Jennings asserts that counsel should have explored the drug use with Cheney, trial counsel may very well have not wanted the jury to hear that Jennings had previously been involved with drugs. It is a common defense practice and trial strategy to avoid having the jury hear that the defendant has committed crimes in addition to the charges being tried at trial, and in all likelihood Osteen would have strategically avoided exploring the drug issue; but because this was not alleged as a basis for ineffectiveness, the State did not ask Osteen about this. Therefore, this Court should reject any reliance on the new allegations as to this issue as untimely and procedurally barred.

In addition, Jennings' additional allegations are without merit. The postconviction testimony that Jennings was living with Bruce Martin in November of 1993 and that Jennings was dating Mary Hamler during this time does not suggest that Jennings never made these statements. Cheney testified at trial that the statement had been made at Jennings' apartment with other people around, including Chris Graves and a guy named Bruce (DA. V10/701). At the postconviction hearing, Cheney testified that she could not remember the name of the apartment, but Jennings had two other roommates there (V15/2863, 2869). She recalled that others had been around at the time of the

statement, including possibly one of Jennings' roommates (V15/2863). Although Bruce Martin testified vaguely that Jennings' girlfriend was Mary Hamler "at this time," the lease at the apartments was presumably for a year starting in late October, so all of the trial and postconviction testimony is consistent: Jennings and Bruce were living together in an apartment at the time that Cheney places the statement, which Jennings made in the presence of other people including "Bruce" according to the trial testimony and "one of his roommates" according to the postconviction testimony. Mary Hamler testified at sentencing that she and Jennings lived together for about two and a half years (DA. V5/714). Since Jennings and Cheney were only together briefly around the time of the statement, he could have dated Hamler after that time and been with her a substantial portion of the time that he lived with Bruce Martin at the same Naples apartment where the statement was made in Cheney's presence. Martin had difficulty recalling Mary's name and certainly she dated Jennings a significantly longer period of time than Cheney; it is no surprise that he would identify Mary as the girlfriend Jennings had at this point in his life. Nor is the fact that Cheney thought it might have been the Waverly Apartments when the lease with Martin was for the North Gate Club Apartments; Cheney admitted that she did not recall

the name of the complex, and although she described the apartment and offered to explain how to get there, the defense did not question Martin on these details to determine whether it could have been the same apartment complex. Of course the State was unaware that the location was an issue, since this had not been pled, and therefore did not explore the uncertainty about the location which Jennings now attempts to introduce.

As to the claim that counsel should have questioned Cheney about her prior drug use, there was no showing that either she or Jennings were on drugs at the time Jennings' statement was made; Cheney was asked whether "anybody" in the home at that time was using drugs, and she responded "quite possibly" (V15/2865-66). The reasoning for even asking Cheney this line of questioning is not clear; if counsel was intending to suggest that Cheney's memory or Jennings' statement had been affected by drug use, he did not present any testimony which supports this theory. If the idea was to impeach Cheney as a witness by showing that she had a history of illegal drug use, that is not a permissible line of impeachment. Absent some showing of how this information could have been used in cross-examination, it is irrelevant and counsel cannot be deemed deficient for failing to ask for inadmissible or irrelevant information. Even if the questions could have been asked and answered, again no possible

prejudice has been demonstrated.

On these facts, Jennings' current claim that trial counsel failed to investigate Cheney's statement or prepare for her cross-examination is without merit. The information which Jennings claims should have been discovered and presented to the jury was known by Jennings himself, and he has never indicated that he provided this information to counsel or gave counsel any reason to believe that Cheney's testimony was subject to impeachment on any of these bases. The cross-examination of a trial witness is a matter well within the scope of an attorney's strategy, and Jennings has failed to overcome the strong presumption that Osteen performed reasonably in this regard. Jennings failed to demonstrate any deficient performance or potential prejudice premised on trial counsel's failure to ask additional questions in the cross-examination of Angela Cheney. His claim of ineffective assistance of counsel on this basis was properly denied, a ruling which must be affirmed on appeal.

ISSUE III

WHETHER THE TRIAL COURT ERRED IN SUMMARILY DENYING JENNINGS' OTHER POSTCONVICTION CLAIMS.

Jennings' final issue disputes the summary denial of several other postconviction claims. This Court reviews the propriety of such rulings *de novo*. Henyard v. State, 992 So. 2d 120, 125 (Fla. 2008) (postconviction motion denied solely on the pleadings presents a legal issue, reviewed *de novo*). Such a review confirms that the trial court correctly rejected these claims without an evidentiary hearing.

In order to obtain an evidentiary hearing on a postconviction claim of ineffective assistance of counsel, a defendant must specifically allege both deficient performance and prejudice. Ponticelli v. State, 941 So. 2d 1073, 1104 (Fla. 2006); Nelson v. State, 875 So. 2d 579, 583 (Fla. 2004). Claims that are based upon speculation or contain only conclusory allegations are insufficient and should be summarily denied. Maharaj v. State, 778 So. 2d 944, 951 (Fla. 2000); Ragsdale v. State, 720 So. 2d 203, 207 (Fla. 1998). See also Doorbal v. State, 983 So. 2d 464, 485 (Fla. 2008) ("Counsel for Doorbal appears to operate under the incorrect assumption that conclusory, nonspecific allegations are sufficient to obtain an evidentiary hearing on claims of ineffective assistance of counsel, and specific facts and arguments need not be disclosed

or presented until the evidentiary hearing. We strongly reiterate to those who represent capital defendants in postconviction proceedings that claims of ineffective assistance of counsel must comply with the pleading requirements enunciated by this Court"). As will be seen, the claims challenged in this issue were procedurally barred and/or insufficiently pled, and summary denial was proper and must be affirmed.

A. Prosecutorial Argument

The first ruling challenged under this issue denied an evidentiary hearing on Jennings' claim of improper prosecutorial argument. This issue was framed as a claim of prosecutorial misconduct, and despite Jennings' allegation that defense counsel's failure to raise any proper objection to the prosecutor's statements was deficient performance, he offers no facts to support any claim of ineffective assistance of counsel. He does not assert that any objection would have been sustained and he does not allege any prejudice.

Jennings offers three bases for finding that the prosecutor's comments denied him a fair trial and violated his constitutional rights. First, he asserts that the prosecutor engaged in misconduct "by making improper comments during the guilt phase" (Appellant's Initial Brief, p. 73). He does not identify the ostensibly improper comments or provide any record

citation in support of his allegation. This failure renders his claim legally insufficient.

Next, he claims that three comments in the penalty phase closing argument were improper, citing the prosecutor's reference to the nature of his mitigation as "an attempt to escape accountability," (DA. V11/914); the prosecutor's reference to Jennings having spent the proceeds of the crime at "a topless dance club," (DA. V11/914); and the prosecutor's revelation that co-defendant Graves had received a life sentence (DA. V11/934). Taking the last complaint first, it was the defense that submitted Graves' life sentence as a mitigating factor (DA. V11/910-11), so the prosecutor can hardly be faulted for noting the undisputed fact that Graves had been sentenced to life. As to the comment about Jennings spending the Cracker Barrel money at a topless dance club, the remark was supported by the testimony of Danielle Martel, who testified at trial that Jennings and Graves came in to Flirts, a topless dance club, spending approximately $1000 over two nights shortly after the murders (DA. V9/503-04, 506). Finally, any impropriety in the isolated suggestion that Jennings' mitigation evidence was an attempt to avoid accountability could not possibly have vitiated the fairness of Jennings' trial. Jennings has not cited a single case in support of his claim that the prosecutor's penalty phase

closing argument was improper in any respect.

The bulk of Jennings' argument on this subclaim is devoted to his assertion that the prosecutor took inconsistent positions between Jennings' trial and the trial of his co-defendant. This claim is procedurally barred, having been litigated previously, and is also refuted by the record factually, as the trial court specifically found that "[t]he prosecution took the same position in both trials" (DA. V5/788), a finding approved by this Court on direct appeal. Jennings, 718 So. 2d at 154. With this background, the court below could not have granted an evidentiary hearing, and this subclaim was properly summarily denied.

B. Ineffective Assistance of Counsel - Forensic Evidence

The second ruling challenged under this issue denied Jennings' claim of ineffective assistance of trial counsel for failing to adequately challenge the forensic evidence. The postconviction motion filed below asserted that trial counsel should have presented a defense expert to refute the forensic evidence offered by the State, but never identified any specific testimony that could be offered by such an expert. Similarly, although Jennings asserts that counsel should have requested a hearing under Frye v. United States, 293 F. 1013 (D.C. Cir. 1923), conducted additional cross-examination, or otherwise

challenged the forensic testimony, there is no allegation as to what these purportedly required acts would accomplish. Accordingly, Jennings' claim was legally insufficient and properly summarily denied. Bryant v. State, 901 So. 2d 810, 821-22 (Fla. 2005) (claim of ineffective assistance premised on counsel's failure to call witnesses must be supported by specific allegations as to what testimony could have been elicited and how the failure to call the witnesses prejudiced the case); Nelson, 875 So. 2d at 582-83 (noting necessity of pleading "what a witness's testimony would have been and the witness's ability to testify at trial" on such claims).

C. Ineffective Assistance of Counsel - Admission of Jennings' Post-Arrest Statements

The third ruling challenged under this issue denied Jennings' claim that trial counsel was ineffective for failing to challenge the admissibility of Jennings' statements. Once again a review of the record confirms that this claim was legally insufficient. Jennings recognizes that the court below denied this claim because he did not identify any police misconduct to support an argument for suppression and because he did not assert that the statements would have been suppressed had counsel investigated the issue, but he still fails to provide those necessary allegations. He makes no argument that

such allegations were not necessary and again fails to cite a single case to support his claim of error, either as to the substantive issue or the summary denial.

Notably, Jennings was granted a hearing on his claim that trial counsel had been ineffective for failing to establish that Jennings was not competent to waive his constitutional rights (V13/1554-55). He presented no evidence and offered no argument in support of that subclaim. He has never identified any particular witnesses or evidence which could have been presented had he received an evidentiary hearing on any of the three subclaims presented in this issue.

As these three postconviction claims were procedurally barred and/or legally insufficient, summary denial was compelled. No error has been demonstrated with regard to the lower court’s ruling on these claims, and this Court must affirm.

CONCLUSION

WHEREFORE, the State respectfully requests that this Honorable Court affirm the Order entered below denying postconviction relief.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Regular Mail to Paul Kalil, Assistant CCRC-South, Office of the Capital Collateral Regional Counsel - South, 101 N.E. 3rd Avenue, Suite 400, Fort Lauderdale, Florida, 33301, this 30th day of March, 2012.

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CERTIFICATE OF FONT COMPLIANCE

I HEREBY CERTIFY that the size and style of type used in this brief is 12-point Courier New, in compliance with Fla. R. App. P. 9.210(a)(2).

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