IN THE SUPREME COURT OF FLORIDA

Case No. SC11-1016
Lower Court Case No. 95-2284CFA

BRANDY BAIN JENNINGS,
Appellant,

v.

STATE OF FLORIDA,
Appellee.

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

INITIAL BRIEF OF APPELLANT

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PRELIMINARY STATEMENT

This proceeding involves the appeal of the circuit court's denial of Mr. Jennings's motion for post-conviction relief following an evidentiary hearing. The motion was brought pursuant to Fla. R. Crim. P. 3.851. The following symbols will be used to designate references to the record in this appeal:

"R. " -- record on direct appeal to this Court;

"T. " -- trial transcripts on direct appeal to this Court;

"PCR. " – postconviction record on appeal to this Court;

Additional citations will be self-explanatory.

REQUEST FOR ORAL ARGUMENT

Mr. Jennings has been sentenced to death. This Court has not hesitated to allow oral argument in other capital cases in a similar procedural posture. A full opportunity to air the issues through oral argument would be more than appropriate in this case, given the seriousness of the claims involved and the stakes at issue. Mr. Jennings, through counsel, accordingly urges that the Court permit oral argument.

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STATEMENT OF THE CASE AND FACTS

The Circuit Court for the Twentieth Judicial Circuit, in and for Collier County, Florida, sitting in Pinellas County, Florida, entered the judgments of conviction and sentences of death at issue in this case. Mr. Jennings and co-defendant Charles Jason Graves were tried separately and found guilty of three counts of first degree murder and one count of robbery occurring at a Cracker Barrel Restaurant in Naples, Florida.

The State pursued death for Mr. Jennings and the jury recommended a sentence of death on each count by a vote of ten (10) to two (2) (R. 784).[1] The circuit court sentenced Mr. Jennings to die in the electric chair. (R. 784-790). In affirming Mr. Jennings's convictions and sentences, this Court relied on the following findings which are relevant to this appeal:

> 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.
>
> * * *

[1] The State initially sought death for both defendants but chose not to pursue a death sentence in Mr. Graves's case and he was sentenced to life in prison. (See R. 788).

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, a Buck knife case, a pair of blood-stained gloves, and a Daisy air 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.
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> 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."

Jennings v. State, 718 So. 2d 144 (Fla. 1998) (footnotes omitted). Mr. Jennings timely petitioned the United States Supreme Court for certiorari which was denied. *Jennings v. Florida*, 119 S. Ct. 2407 (1999).

On March 12, 2000, Mr. Jennings filed a "shell" motion for postconviction relief and requested leave to amend. Mr. Jennings filed an amended motion to vacate judgments of conviction and sentence on June 22, 2000. At that time, public records issues remained outstanding and Mr. Jennings again sought leave to amend.

Mr. Jennings's filed his final amended motion to vacate on July 27, 2009. After conducting a *Huff* hearing, the Honorable Frederick Hardt granted an evidentiary hearing on several claims including Ground I(a) as to the allegations regarding trial counsel's failure to adequately impeach state witness Angela Cheney, Ground III as to whether trial counsel was ineffective at penalty phase for failing to obtain an adequate mental health evaluation, Ground IV as to whether trial counsel was ineffective for failing to investigate and prepare mitigation evidence, and Ground VI as to whether trial counsel was ineffective for failing to challenge Mr. Jennings's competency to waive his *Miranda* rights. (PCR. 2549-2562). The circuit court summarily denied Mr. Jennings's remaining claims.

Mr. Jennings presented several witnesses at the evidentiary hearing. Angela Chaney testified that she recalled testifying at Mr. Jennings's trial concerning a conversation she had with Mr. Jennings when she was in high school wherein

Mr. Jennings purportedly made inculpatory statements. Ms. Cheney testified that she was friends with Mr. Graves before she met Mr. Jennings (PCR. 2858). Chaney and Graves had grown up together. (PCR. 2865). At the time Mr. Jennings was purported to have made his inculpatory statement to Ms. Cheney, she was living with Mr. Jennings and they had a "dating relationship" which lasted about a month. (PCR. 2858). Ms. Cheney was married to Robert Cheney, Charles Graves's brother, for a period of about two years between 1994 and 1996, while Mr. Jennings and Mr. Graves were awaiting trial. (PCR. 2859). Ms. Cheney further testified that she might have been married to Mr. Graves when she testified at Mr. Jennings's trial, albeit they were separated. Ms. Cheney was related to Mr. Jennings's co-defendant and she and Mr. Jennings had had a romantic relationship that ended after one month, after which they "did not remain friends or acquaintances." (PCR. 2868).

Ms. Cheney testified that after Mr. Jennings and Mr. Graves were arrested in Las Vegas, Graves contacted her from the Las Vegas jail to request that she help him. (PCR. 2859) Ms. Cheney had told the police and State Attorney that she was concerned for Mr. Graves's mental and physical well-being. (PCR. 2859). She recalled a sworn statement at which she told the State Attorney that she had 30 to 40 telephone conversations with Mr. Graves while he was in jail awaiting his trial.

She recalled that she visited him at least one time, and that she might even have brought her daughter to the jail to see Mr. Graves. (PCR. 2862).

Ms. Cheney also recalled being present at a meeting with the lawyer that the Cheney family was trying to get to represent Mr. Graves. Ms. Cheney contacted law enforcement and met with them at a McDonald's restaurant to speak to them on Mr. Graves's behalf about their conversations in an effort to help him out. (PCR. 2865). Ms. Cheney's then-husband, who was also Mr. Jennings's co-defendant's brother, was present when Ms. Cheney spoke to the police.

Ms. Cheney testified that the purported discussion with Mr. Jennings occurred "in the apartment that I lived with him – I think it might have been Waverly," but "I don't remember the name exactly." (PCR. 2863). Ms. Cheney admitted to a history of drug abuse, and that she was "quite possibly" using drugs at the time that Mr. Jennings is alleged to have made his inculpatory statements. Ms Cheney had used drugs in high school and had been placed in a treatment program for drug addiction or substance abuse prior to testifying at Mr. Jennings's trial.

Mr. Jennings's trial counsel Thomas Osteen testified at the evidentiary hearing. At the time he represented Mr. Jennings, Mr. Osteen had represented defendants in "maybe 30 capital cases." (PCR. 2876). According to Mr. Osteen,

most of his cases went to penalty phase and most of the clients were sentenced to death, however "most got off death row one way or the other." (PCR. 2877). Mr. Osteen's co-counsel for Mr. Jennings's case, Adam Sapenoff, had no prior capital case experience. Mr. Sapenoff cross-examined one expert during the guilt phase and assisted with paperwork. (PCR. 2900). Mr. Sapenoff did not participate in the penalty phase "other than being present" (PCR. 2900) and did not conduct any penalty phase investigation or assist with discovery. (PCR. 2901).

Mr. Osteen testified that he had no recollection of deposing Ms. Cheney, but if he had, the deposition would be in his files. (PCR. 2905). He had no knowledge of any history of a boyfriend/girlfriend relationship between Ms. Cheney and Mr. Jennings. (PCR. 2904). He had no knowledge of Ms. Cheney's relationship to Mr. Graves. (PCR. 2904). Mr. Osteen testified that he would have known the substance of Ms. Cheney's trial testimony from discovery. (PCR. 2904).

In discovery Mr. Osteen received a police report and statement by Ms. Cheney wherein she states that Graves called her from the Las Vegas jail and "told her everything." (PCR. 2906). The statement also indicated that Ms. Cheney was Mr. Graves's sister-in-law. (PCR. 2906). Mr. Osteen did not cross-examine Ms. Cheney to reveal her motives and bias.

Mr. Osteen knew that Ms. Cheney would offer damaging testimony but made no effort to investigate Ms. Cheney's background. (PCR. 2910). Mr. Osteen was not aware of Ms. Cheney's drug abuse and addiction history, nor the fact that she and Mr. Jennings had previously had a relationship. (PCR. 2909). Mr. Osteen didn't think of any reason to conduct a background investigation of Ms. Cheney. (PCR. 2909).

In preparation for the penalty phase, Mr. Osteen spoke to Mr. Jennings's mother and friends who knew him. (PCR. 2878). He requested that mental health experts to assist him and the court appointed Dr. Masterson, a psychologist, and Dr. Wald, a psychiatrist. (PCR. 2878). Mr. Osteen recalls that he first wanted to find out if Mr. Jennings was legally competent. Secondly, Mr. Osteen asked Dr. Wald "to go into his personality, his background. Anything at all that would be a mitigating factor in a penalty phase." (PCR. 2879). Dr. Wald was a psychiatrist and did not do any testing, so Mr. Osteen asked that Dr. Masterson be appointed. (PCR. 2888).

Mr. Osteen felt he had a good relationship with Dr. Wald, and believed Dr. Wald knew what kind of evaluation he wanted. Dr. Wald's report indicates that he was "appointed to assist the defendant," but does not indicate whether he was to conduct a competency/sanity evaluation or an evaluation for the purposes of

mitigation. (PCR. 2883; Defense Exhibit 9). Dr. Wald was not provided with any school or medical records because Mr. Osteen made no effort to obtain them. (PCR. 2982).

Dr. Wald and Dr. Masterson evaluated Mr. Jennings and prepared reports. Dr. Wald's report indicates that he was "appointed to assist the defendant," but does not indicate whether he was to conduct a competency/sanity evaluation or an evaluation for the purposes of mitigation. (PCR. 2883; Defense Exhibit 9). When moving for Dr. Wald's appointment, Mr. Osteen requested only that an expert be appointed to determine whether Mr. Jennings "may be incompetent to proceed or may have been insane at the time of the offense." The request makes no mention of an expert to assist in any mitigation investigation or evaluation. (PCR. 2885). Subsequently, Judge Blackwell issued an order appointing Dr. Wald "to examine the defendant and then make reports to defense counsel as I may direct." (PCR. 2884).

Mr. Osteen did not consider seeking the assistance of a mitigation specialist. Mr. Osteen testified, "I think I know what you're talking about and, no, I did not hire a so-called mitigation specialist." (PCR. 2888). Instead, Mr. Osteen relied on Ed Neary, a retired New York police officer who was then Chief Investigator for the Public Defender's Office, to conduct the mitigation investigation. Mr. Osteen

was not sure if Mr. Neary travelled outside of Florida to conduct any investigation, and had no knowledge of whether Mr. Neary had any mental health training and expertise. (PCR. 2902).

Mr. Osteen's mitigation investigation included talking to Mr. Jennings's mother, Tawny Jennings, at her home or by telephone two or three different times (PCR. 2895), and speaking with some of his friends. From Tawny Jennings, Mr. Osteen learned that Mr. Jennings was raised by his mother, with whom he had a close, loving relationship. He also learned that Mr. Jennings had "not much" education and was from a low socio-economic background. Mr. Osteen believed that "If there was one thing Mr. Jennings had, he had a mother. A good one." (PCR. 2819). He learned nothing about any history of sexual abuse and incest in the Jennings family. (PCR. 2896).

From Mr. Jennings's friends, Mr. Osteen learned that Mr. Jennings had a "spotty" employment record, though he made did not obtain any of Mr. Jennings's employment records. (PCR. 2894). Mr. Osteen did not obtain any medical or school records. (PCR. 2892). He did not talk to any of Mr. Jennings's relatives except for his mother. (PCR. 2893). He did not speak to any of Mr. Jennings's friends from out of State who would have information about Mr. Jennings's childhood. (PCR. 2893).

Mr. Osteen testified that his investigator, Mr. Neary, did contact one out-of-state witness, Heather Johnson, by written correspondence. Mr. Neary requested that Ms. Johnson provide "any good word that you can give concerning our client Mr. Jennings." (PCR. 2934). Nobody spoke with Ms. Johnson (PCR. 2893).

Mr. Osteen's theory of the defense for the penalty phase was that, because Drs. Wald and Masterson would not be helpful, he would rely on Mr. Jennings's mother and friends "to make as many good statements about the defendant as they could. He had no prior record." (PCR. 2898). Mr. Osteen felt that the mother was a good witness who loved her son and elicited some sympathy from the jury. (PCR. 2921).

Mr. Osteen testified that he "probably" was familiar with the American Bar Association Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases," but he could not recall what version of the ABA Guidelines was in effect at the time of Mr. Jennings's trial. (PCR. 2889). In any event, he would "probably not" refer to ABA Guidelines in deciding what course of action to take in representing Mr. Jennings. (PCR. 2889).

Patricia Scudder, Mr. Jennings's cousin, testified at the evidentiary hearing. Ms. Scudder knew Mr. Jennings when he was a child up until age 14 when they lived in Oregon. (PCR. 2786). Between the ages of 6 and 12, Brandy and Tawny

lived at the Buccaneer Motel. (PCR. 2795). On several occasions, Brandy and Tawny lived with Mrs. Scudder for weeks at a time.

Tawny's home was a "disaster." (PCR. 2788). The home was messy to the extent that there were used tampons left lying around. (PCR. 2788). The bed was covered with clothes so Brandy had to sleep with Tawny on a hide-a-bed in living room. At one time, Brandy lived with his grandparents and his mother in a trailer. Another time they were living in an apartment with dog feces on floor and piles of dirty dishes. (PCR. 2790).

Mrs. Scudder testified that that Tawny had a series of "fly-by" boyfriends. One boyfriend named Frank was jealous of Mr. Jennings and ostracized him. (PCR. 2791). Frank and Tawny drank constantly and Tawny took pain pills. Mrs. Scudder explained that Mr. Jennings was named "Brandy" because Tawny was drunk on brandy when she got pregnant. (PCR. 2792).

Mrs. Scudder testified that Tawny "used" Brandy and showed him no love. (PCR. 2792). Brandy was overweight because he ate nothing but junk food. (PCR. 2792). Brandy was not allowed to play with other children because Tawny was overprotective. Mrs. Scudder recalled that Brandy was breastfed until he was 4 or 5 years old, and he would ask Tawny to breast-feed him. (PCR. 2793).

Mrs. Scudder testified that George "Sonny" Jennings, Mr. Jennings's uncle, was a child molester. (PCR. 2800). Walter J. Crume, another uncle by marriage who ran the Buccaneer Motel and often watched over Brandy when Tawny was out, also was a child molester. (PCR. 2795-2796). Tawny would leave Brandy alone with Mr. Crume despite her knowledge that Crume was a child molester. (PCR. 2800). Mrs. Scudder also recalled an occasion when three men stayed overnight with Tawny while Brandy was at home. The next morning, Mrs. Scudder walked in to find Tawny and one of the men in bed, naked, with Brandy at the foot of the bed. (PCR. 2799).

Lloyd Scudder, Patricia's husband of 35 years, testified that he is a disabled veteran who now works with children as a motivational speaker. Mr. Scudder knew Brandy when he was 5 to 14. (PCR. 2814). Mr. Scudder testified that "Sonny" molested Patricia and Walter Crume molested Mr. Scudder's son. (PCR. 2815). Mr. Scudder recalled that Tawny had a relationship with her step-nephew, Bob Gifford, who would call her to meet up. Tawny smoked marijuana, used pills and always complained of being in pain. (PCR. 2818). Mr. Scudder corroborated the fact that Tawny breastfed Brandy until he was 5 years old. (PCR. 2818).

Mr. Scudder testified that Tawny had no money and did not maintain a job. Other than relying on welfare, the only way she got money was "probably hooking" or she would get "a hold of truck drivers." (PCR. 2821). When she did have money, Tawny spent it on herself and her boyfriends.

Heather Johnson testified that she was a close friend of Mr. Jennings. When she knew Mr. Jennings, he lived with the McBride family and with his mother at the Wonderland Motel, a run-down motel in North Fort Myers. (PCR. 2831). Mr. Jennings expressed resentment and frustration with his mother yet was protective of her. Ms. Johnson described Tawny as hard and cold, and their relationship as contentious. Tawny was demanding and tough and Brandy always wanted to please his mom. (PCR. 2829). Ms. Johnson also explained how Mr. Jennings quit school to help his mom because she was always ill or disabled. (PCR. 2831). She also recalled that Ms. Jennings was tough "hard – there wasn't a lot of warmth there...She was tough. She was scary. She would intimidate me." (PCR. 2829).

Ms. Johnson described Mr. Jennings as bright, but not good at articulating what upset him. While impulsive and a little immature, Mr. Jennings was gentle natured and reserved. Ms. Johnson felt that Mr. Jennings was very protective of

her, and he made her feel safe. (PCR. 2831). He was not a leader and did not have dominant personality. (PCR. 2831-2832).

Ms. Johnson recalled getting a letter from Mr. Jennings's trial attorney asking for a character reference, but "I didn't really know what they wanted [from] me..." (PCR. 2831). Ms. Johnson responded in writing but does not recall any other contact with trial counsel. She would "absolutely" have testified for Mr. Jennings had she been asked. (PCR. 2831).

Bruce Martin testified that he has known Brandy Jennings since about 1987. Mr. Jennings lived with Mr. McBride, his father, and half-brothers when he was 16 to 17 years old. Mr. Martin lived with Mr. Jennings for approximately five years, including the period of November, 1993 (PCR. 3141). Mr. Martin identified the lease he signed on October 20, 1993, which indicates that he was living at the North Gate Club apartments at that time. (PCR. 3140). He also testified that Mr. Jennings lived with him at North Gate Club during this period. (PCR. 3140). Mr. Martin stated that Mr. Jennings was dating a girl named Mary Hamler at the time, not Angela Cheney. (PCR. 2140).

Mr. Martin recalled Mr. Jennings excessive drug and alcohol abuse around that time. They regularly went to bars and house parties. Mr. Jennings drank nearly every day, and anything he could put his hands on: beer, liquor, or wine.

Mr. Jennings used marijuana, as much as 3 to 4 joints a day, every day, in addition to his drinking. (PCR. 3143). He also used acid when he could get it, usually about once a week, and they would go to collect mushrooms about once a month. Mr. Jennings would use 8 mushrooms at a time, which is a lot. Basically, if Mr. Jennings had access to drugs, he would use them. (PCR. 3144).

Kevin McBride, Bruce Martin's half-brother, testified that he also met Mr. Jennings in the late 1980's when Mr. Jennings was about 15 years old. Mr. McBride knew Mr. Jennings's mother, who he described as "a drinker." (PCR. 3122). Mr. McBride recalled that Mr. Jennings was not happy with his mother at times. She would not keep up on bills and they did not have a place to stay. Mr. Jennings lived with McBride family for 6 months because it was a better place to stay than his mother's home. (PCR. 3122). Mr. Jennings and his mother were always between places to live, moving among different motels. Mr. McBride felt that Ms. Jennings was "unstable", "rough around the edges", and "wanted to have her own fun." (PCR. 3124).

Mr. McBride also testified to Mr. Jennings's extensive drug use. He stated that he saw Mr. Jennings on regular basis and he drank beer as often as possible, about every day. Mr. Jennings also used marijuana almost daily while drinking. He would smoke one joint after another. (PCR. 3126-2127). Mr. Jennings also used

acid whenever he could get it, and used mushrooms 2 to 3 times a year, when they were in season or he had access to them. (PCR. 3126-3127). Ms. Jennings knew about her son's drinking but did nothing to stop it. Mr. Jennings and his mother were more like friends, and they drank together. (PCR. 3130).

Thomas Hyde, M.D., Ph.D., a behavioral neurologist, testified that he evaluated Mr. Jennings on March 15, 2000 and again on April 15, 2010. Dr. Hyde conducted a behavioral neurological interview with background history, development, medical history, neurological exam of cognitive function, cranial nerve function, motor, sensory coordination and gait. (PCR. 2844). He also reviewed background materials including medical records and some school records, and interviewed Mr. Jennings's mother. Between 8 months and 2 years of age, Mr. Jennings suffered 15 to 20 febrile convulsions and was given Phenobarbital. (PCR. 2848). Mr. Jennings also suffered a number of closed head injuries. (PCR. 2849). At around 2 years of age, Mr. Jennings suffered a concussion which required overnight hospitalization. Mr. Jennings suffered other concussions as well. Dr. Hyde recommended a neuropsychological evaluation. (PCR. 2850).

Hyman Eisenstein, Ph.D., a clinical psychologist and neuropsychologist, conducted extensive neuropsychological testing of Mr. Jennings. In 2000,

Dr. Eisenstein performed a full neuropsychological evaluation, including tests of brain function, motor measures, language functioning, intelligence and memory. He also reviewed background materials including school records, employment records and previous doctors' reports, and conducted an interview. Dr. Eisenstein spent 11 hours with Mr. Jennings in the first evaluation. (PCR. 2946).

On the Wechsler Adult Intelligence Scale, 3rd Edition, Mr. Jennings achieved an IQ score of 119 (verbal) and 106 (performance). The 13-point difference between Mr. Jennings verbal and performance scores was statistically significant, one standard deviation from the mean. (PCR. 2968). Mr. Jennings's score on the Memory Scale Index was in the 91st percentile, but his test scores ranged from 14th to 97th percentile. These discrepancies indicate brain disregulation. (PCR. 2995). On the Stroop Color Word test Mr. Jennings scored in the mildly impaired range. This indicates difficulty with inhibition. In addition, the Finger Tapping test revealed mild motor overflow in the right hand. (PCR. 3025) and the Rey Complex Figure test showed Mr. Jennings has a tremor, a soft neurological sign.

Mr. Jennings reported a substantial amount of alcohol and substance abuse and a number of head injuries. Mr. Jennings had been drinking alcohol at an early age, even as toddler, and used marijuana, to the extent that Mr. Jennings sought

treatment at Charter Glades Hospital. At Charter Glades, Mr. Jennings was diagnosed as depressive alcoholic, but the condition went untreated because he could not afford it. (PCR. 3031).

Mr. Jennings medical records indicate that at age 3 or 4, he was treated after being hit in the head by a 2x4 and kicked in the head by pony. Hospital records indicate head injury with concussion, multiple treatments for high fevers, febrile seizures, and convulsions from age 6 months to 2 years. (PCR. 3032-3034). At 14 or 15 years of age, Mr. Jennings was hit by a student and required 23 stitches. At 16, he ran into brick wall, and was involved in a motorcycle accident. (PCR. 3039).

Based on his 2000 evaluation, Dr. Eisenstein opined that Mr. Jennings functions at high IQ level but had problems with academic abilities. (PCR. 2040-2042). He did not make any diagnosis at that time.

Dr. Eisenstein evaluated Mr. Jennings again in April, 2010. (PCR. 3042). In addition to the previous background materials, Dr. Eisenstein reviewed additional school records, the sworn statement of Mr. Jennings's co-defendant, and employment records. (PCR. 3043). Dr. Eisenstein and Mr. Jennings discussed the crime, the victims, Mr. Jennings's employment history, his inability to control himself, his early sexual experiences and his relationship with mother and step-fathers. (PCR. 2044). At this second evaluation, Dr. Eisenstein spent 10 hours over

2 days with Mr. Jennings, and also spoke with his mother, his friend Heather Johnson, Dr. Faye Sultan, Dr. Tom Hyde, and Dr. Masterson. (PCR. 3045).

Dr. Eisenstein performed additional neuropsychological tests. On the Wechsler Adult Intelligence Scale – Fourth Edition, Mr. Jennings's scores were largely consistent with the previous WAIS-III administration, with some notable discrepancies. His full Scale IQ of 117 was consistent with prior WAIS-III full-scale score of 114, but his individual WAIS-IV scores were statistically and clinically significant. (PCR. 2668). In addition to intelligence tests, Dr. Eisenstein performed the Projected Drawing Exercise. This test indicates that Mr. Jennings views himself as extremely depressed, helpless, with little protection and few ego boundaries.

Dr. Eisenstein opined that Mr. Jennings suffers from undiagnosed Attention Deficit Hyperactivity Disorder. As a result, he has difficulty with motivation, impulsivity, and is easily bored. Mr. Jennings seeks instant gratification and has difficulty with logical thinking, bad judgment, and trouble sleeping. Mr. Jennings was and is significantly depressed, and has self-medicated with drugs and alcohol from an early age.

Dr. Eisenstein reached two clinical diagnoses as defined by the Diagnostic and Statistical Manual of Mental Disorders: 1) Gifted Learning Disability, a

reading disorder (315.00), and 2) Intermittent Explosive Disorder (312.341), the failure to resist aggressive impulses that result in serious assaultive acts or destruction of property. Dr. Eisenstein based that opinion on Mr. Jennings's history of aggressive behavior in childhood, fights in adulthood, disproportionate responses and depression. He opined that Mr. Jennings is a recovered alcoholic through incarceration.

Dr. Eisenstein further opined that Mr. Jennings's capacity to appreciate criminality of his conduct was substantially impaired due to his learning disability, which had a tragic affect on Mr. Jennings on a personal level. Because of his learning disability, Mr. Jennings was unable to capitalize on his intelligence and reach his potential. (PCR. 2690). This set in motion Mr. Jennings's substance abuse and depression and resulted in poor impulse control and poor judgment. Mr. Jennings's frustration led to aggression and hostility.

Dr. Eisenstein testified that the evidentiary hearing that he reviewed the reports of the trial experts, Dr. Wald and Dr. Masterson. Dr. Masterson's report lacked sufficient detail to apprise even a fellow psychologist of Mr. Jennings's mental condition (PCR. 2698-2699). In addition to the not performing a complete battery of neuropsychological tests, Dr. Masterson's finding regarding the one test

he did perform was simply wrong. (PCR 2710). Dr. Eisenstein also found Dr. Masterson's methods to be non-standard. (PCR. 2708).

At the evidentiary hearing, Mr. Jennings also presented Faye Sultan, Ph.D., a clinical psychologist with expertise in the effects of early abuse on personality. Dr. Sultan testified that she evaluated Mr. Jennings and conducted an extensive social history investigation. Dr. Sultan reviewed Mr. Jennings's school records, employment records, a petition of independency, sex offence legal documents concerning Mr. Jennings family and Mr. Jennings's sworn statement to police. (PCR. 3072-3075).

Dr. Sultan met with Mr. Jennings seven times between 2000 and 2005, totaling approximately 18 hrs of direct clinical interview. (PCR. 3077). Mr. Jennings was cooperative, but did not elaborate on specific incidents of abuse. In addition, Dr. Sultan travelled to meet with Mr. Jennings's mother for two hours in 2005 and conducted telephonic interviews with several family members, including Alice Clark (Tawny's older sister), Sherman Jennings (Tawny's older brother), Lois Lara (Brandy's first cousin), Patricia Scudder, and friend Tasha Van Brocklin. (PCR. 3078-3081).

Dr. Sultan learned that Mr. Jennings's grew up in extreme poverty and neglect. Sexual exploitation was pervasive in his family. (PCR. 3082).

Mr. Jennings's grandfather was "overtly sexual." (PCR. 3082). George Jennings, Mr. Jennings's maternal uncle who had raped Mr. Jennings's mother, would pay a quarter to Mr. Jennings and his cousins if they sat in his lap, (PCR. 3102), and Mr. Jennings often did (PCR. 3083). Mr. Jennings was also sexually exploited at the age of 12 by a 30-year-old woman. (PCR. 3102). Walter Crume, who ran the Buccaneer Motel where Mr. Jennings and his mother lived, married into the family and molested many of the children. (PCR. 3083). Mr. Jennings grew up knowing that his mother had been violently raped by George Jennings, and believes that George might actually be his natural father. (PCR. 3107). Mr. Jennings's mother was also raped by her brother.

Dr. Sultan explained that Mr. Jennings's mother is "quite mentally ill." (PCR.29). Ms. Jennings's statements are inconsistent, and some clearly false. Her emotions are disregulated and sometimes inappropriate to subject matter. She was "all over the place" emotionally. (PCR.29). She would laugh or cry without having to do with the subject matter of the conversation, and her emotions were extreme. (PCR. 3086). Ms. Jennings wanted to talk at length about her own sexual exploitation by her brother. (PCR. 3088).

Ms. Jennings attachment to Mr. Jennings was quite abnormal, and she behaved very oddly with him. (PCR. 3086). She nursed Brandy until the age of

five or six, and her brother wondered if she was receiving sexual gratification from this. (PCR. 3086). She moved so frequently that Mr. Jennings had attended 14 different schools before the sixth grade. (PCR. 3103).

Based on her observations of Ms. Jennings and her interviews of others, Dr. Sultan believes that Ms. Jennings had very little parenting skill and was unable to provide adequate parental supervision or adequate encouragement and support. Ms. Jennings was sexually traumatized and received no treatment for it, and she was poorly parented herself. (PCR. 3098). She introduced Mr. Jennings to marijuana as a teenager, and laughed about giving him beer when he was a baby. (PCR. 3098). She could not control her own impulses. (PCR. 3098) In short, contrary to trial counsel's belief that Mr. Jennings had a good mother, Ms. Jennings was simply not an adequate parent. (PCR. 3091). Dr. Sultan explained the effect of such events and this environment has on children. (PCR. 3084). Dr. Sultan also spoke to impact on a child who knows that his mother was sexually abused by family members. (PCR. 3099).

In addition to the social history investigation, Dr. Sultan administered limited testing. The MMPI-II was not of particular significance, but indicated that Mr. Jennings was likely to be serious substance abuser, which Dr. Sultan

considered obvious. Mr. Jennings is extroverted, with a rigid personality, easily frustrated, and has difficulty controlling his anger. (PCR. 3089).

Dr. Sultan testified that Mr. Jennings meets the DSM-IV diagnostic criteria for Intermittent Explosive Disorder. (PCR. 3092). As she explained, this is a subcategory of Impulse Control Disorder, where an individual behaviorally has aggressive, violent or vulgar reactions that are out of proportion to an incident that may have occurred. (PCR. 3093).

Research indicates that this kind of impulsive aggression is related to abnormal brain mechanisms that would inhibit motor activity. (PCR. 3093). Abused children who have violence or impulsivity modeled for them tend to act out. This is consistent with Mr. Jennings's history. (PCR. 3094).

Dr. Sultan did not find that Mr. Jennings suffers from a major mental disorder or that Florida's statutory mental health mitigators would apply. However, she opined that "Mr. Jennings is quite a damaged person" who operated in the world "in a highly dysfunctional way." (PCR. 3096). Mr. Jennings suffered from excessive and prolonged substance abuse beginning in pre-adolescence, leading to behavioral and emotional deficits in young adulthood. (PCR. 3097). This, combined with exposure to sexually exploitive, neglectful and impoverished environment, predictably leads to impulse control problems, attention problems,

concentration problems, occupation and social difficulties, a propensity for criminal behavior and an inability to regulate one's own emotions. (PCR. 3098).

The circuit court issued its order denying Mr. Jennings's motion for postconviction relief on January 31, 2011. Mr. Jennings sought rehearing, which was denied. This appeal follows.

SUMMARY OF THE ARGUMENTS

ARGUMENT I

Mr. Jennings was denied effective assistance of counsel at the penalty phase of his capital trial in violation of the Sixth, Eighth, and Fourteenth Amendments. Counsel failed conduct a reasonable penalty phase investigation, failed to obtain the necessary background materials and failed to secure adequate mental health assistance. As a result of trial counsel's failings, a wealth of compelling mitigation information never reached the sentencing judge or jury. Had counsel adequately investigated and prepared, the result of Mr. Jennings's capital trial would have been different.

ARGUMENT II

Mr. Jennings's convictions and sentences are materially unreliable because trial counsel was ineffective for failing to adequately impeach the prejudicial testimony of Angela Chaney. Ms. Chaney's testimony was highly prejudicial to Mr. Jennings at guilt and penalty phase. Had counsel adequately investigated and prepared, he would have discovered a wealth of impeachment information, including Mr. Chaney's bias resulting from a prior relationship with Mr. Jennings, her marriage to the brother of Mr. Jennings's co-defendant Graves, and her efforts

to assist Graves after arrest. Reasonable investigation also would have uncovered that the events testified to by Ms. Chaney could not have occurred as she testified. Had trial counsel adequately investigated and effectively impeached Angela Chaney, the result of Mr. Jennings's trial and sentencing would have been different.

ARGUMENT III

The circuit court erred in summarily denying Mr. Jennings's meritorious postconviction claims that the prosecutor's arguments at the guilt/innocence and penalty phases presented impermissible considerations and misstated the law and facts to the jury, that trial counsel was ineffective for failing to challenge forensic evidence presented at trial, and that trial counsel was ineffective for failing to challenge the admissibility and reliability of Mr. Jennings's statements. Mr. Jennings plead specific facts which, if true, would entitle him to relief on his claims. Mr. Jennings is entitled to an evidentiary hearing and relief on his claims.

STANDARD OF REVIEW

Ineffective assistance of counsel claims present mixed questions of law and fact subject to plenary review. *Occhicone v. State,* 768 So. 2d 1037, 1045 (Fla. 2000). This Court independently reviews the trial court's legal conclusions and defers to the trial court's findings of fact.

A postconviction court's decision whether to grant an evidentiary hearing is subject to *de novo* review. *State v. Coney*, 845 So. 2d 120, 137 (Fla. 2003).

ARGUMENT I

MR. JENNINGS WAS DENIED EFFECTIVE ASSISTANCE OF COUNSEL AT THE PENALTY PHASE OF HIS CAPITAL TRIAL IN VIOLATION OF THE SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS

A. Introduction

In *Strickland v. Washington*, 466 U.S. 668 (1984), the United States Supreme Court held that counsel has "a duty to bring to bear such skill and knowledge as will render the trial a reliable adversarial testing process." *Id*. at 688 (citation omitted). Beyond the guilt-innocence stage, defense counsel must also discharge very significant constitutional responsibilities at the sentencing phase of a capital trial. The United States Supreme Court has held that in a capital case, "accurate sentencing information is an indispensable prerequisite to a reasoned determination of whether a defendant shall live or die [made] by a jury of people who may have never made a sentencing decision." *Gregg v. Georgia*, 428 U.S. 153, 190 (1976) (plurality opinion). In *Gregg* and its companion cases, the Court emphasized the importance of focusing the sentencer's attention on "the particularized characteristics of the individual defendant." *Id*. at 206. *See also Roberts v. Louisiana*, 428 U.S. 325 (1976); *Woodson v. North Carolina*, 428 U.S. 280 (1976).

Mr. Jennings "had a right – indeed a constitutionally protected right – to provide the jury with mitigating evidence that his trial counsel either failed to discover or failed to offer." *Williams v. Taylor*, 120 S. Ct. 1495, 1513 (2000). "Events that result in a person succumbing to the passions or frailties inherent in the human condition necessarily constitute valid mitigation under the Constitution and must be considered by the sentencing court." *Cheshire v. State*, 568 So. 2d 908, 912 (Fla. 1990) (*citing Lockett v. Ohio*, 438 U.S. 586 (1978)). In Mr. Jennings's capital penalty phase proceedings, substantial mitigating evidence went undiscovered and was thus not presented for the consideration of the sentencing jury or the judge.

Counsel's highest duty is the duty to investigate, prepare, and present the available mitigation. *Wiggins v. Smith*, 123 S. Ct. 2527 (2003); *see also Williams v. Taylor*, 120 S. Ct. 1495 (2000); *Rompilla v. Beard*, 125 S. Ct. 2456 (2005) (reaffirming *Wiggins* and finding that "[e]ven when a capital defendant and his family members have suggested that no mitigating evidence is available, his lawyer is bound to make reasonable efforts to obtain and review materials that counsel knows the prosecution will probably rely on as evidence of aggravation at the trial's sentencing phase."). The conclusions in *Wiggins* are based on the principle that "strategic choices made after less than complete investigation are

reasonable" only to the extent that "reasonable professional judgments support the limitations on investigation." The *Wiggins* Court clarified that "in assessing the reasonableness of an attorney's investigation, a court must consider not only the quantum of evidence already known to counsel, but also whether the known evidence would lead a reasonable attorney to investigate further." 123 S. Ct. at 2538. In other words, counsel must conduct a complete investigation to know what evidence is available before a reasonable decision can be made whether or not to present it.

Throughout the Court's analysis in *Wiggins* of what constitutes effective assistance of counsel, it turned to the American Bar Association Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases ("ABA Guidelines"). *See id*. at 2536-7. Under the ABA Guidelines, trial counsel in a capital case "should comprise efforts to discover all reasonably available mitigating evidence and evidence to rebut any aggravating evidence that may be introduced by the prosecutor. ABA Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases 11.4.1(c), p 93 (1989)." *Id*. at 2537.

Under the ABA Guidelines, there are specific requirements which should be met from the initial appointment on a case through its conclusion. Guideline

11.4.1(c) states, "the investigation for preparation of the sentencing phase should be conducted regardless of any initial assertion by the client that mitigation is not to be offered. This investigation should comprise efforts to discover all reasonably available mitigating evidence and evidence to rebut any aggravating evidence that may be introduced by the prosecutor." In order to comply with this standard, counsel is obliged to begin investigating both phases of a capital case from the beginning. *See id*. at 11.8.3(A). This includes requesting all necessary experts as soon as possible. *See* Commentary on Guideline 11.4.1(c).

A criminal defendant is entitled to expert psychiatric assistance when the State makes his or her mental state relevant to the proceeding. *Ake v. Oklahoma*, 105 S. Ct. 1087 (1985). What is required is an "adequate psychiatric evaluation of [the defendant's] state of mind." *Blake v. Kemp*, 758 F.2d 523, 529 (11th Cir. 1985). In this regard, there exists a "particularly critical interrelation between expert psychiatric assistance and minimally effective representation of counsel." *United States v. Fessel*, 531 F.2d 1278, 1279 (5th Cir. 1979).

Both the expert and trial counsel have a duty to perform an adequate background investigation. When such an investigation is not conducted, judge and jury are deprived of the facts which are necessary to make a reasoned finding and the defendant is denied due process. As established at the evidentiary hearing in

Mr. Jennings's case, information which was needed in order to render a professionally competent evaluation was not investigated by trial counsel or his retained experts.

In Mr. Jennings's capital penalty phase proceedings, substantial mitigation evidence never reached the jury or the Court. The evidence that was presented was incomplete. Counsel failed to adequately investigate and prepare for the penalty phase of the capital proceedings. Because available mitigation was not presented to the sentencer, the resulting death sentence is unreliable. In Mr. Jennings's case, "there is a reasonable probability that but for counsel's unprofessional errors, the results . . . would have been different." *Strickland*, 466 U.S. 668, 694 (1988).

In order to assess the reasonableness of trial counsel's representation, it is necessary to consider the paucity of mitigation presented at Mr. Jennings's penalty phase. This Court characterized the mitigation presentation as follows:

> In the penalty phase, the defense presented mitigation evidence, including general character testimony from witness Mary Hamler, who testified on direct examination that she had lived with Jennings for two and one-half years. She also testified that Jennings had gotten along well with her children during that time, and that he cried when they (Jennings and Hamler) broke up.
>
> On cross-examination, the State elicited testimony from Hamler that there was another side to Jennings' character and that Jennings once said that if he ever committed a robbery, he would not be stupid enough to stick around,

> but would go north. Hamler further testified on cross-examination that Jennings was angry at Cracker Barrel in general, and Siddle in particular, for "jerking him around" and holding him back at work, and that in this regard Jennings once said of Siddle that "one day she would get hers."
>
> The defense presented further character evidence from several of Jennings' friends that he was good with children, got along with everybody, and was basically a nonviolent, big-brother type who was happy-go-lucky, fun-loving, playful, laid back, and likeable. Jennings' mother testified that her son never met his father and that she raised Jennings herself. She claimed that Jennings had been a straight-A student, but quit school to take care of her when she became sick.

State v. Jennings, 718 So. 2d 144 (1998).

The transcript of the mitigation phase of Mr. Jennings trial is only 38 pages, much of which is legal argument. Trial counsel presented no expert witnesses; he presented only very limited testimony by Mr. Jennings's mother and a few friends. As this Court recognized, on cross-examination these witnesses were more aggravating than mitigating. As set forth below, this Court, like the sentencing judge and jury, did not have the benefit of the wealth of mitigating evidence that was available had trial counsel fully investigated.

B. Deficient Performance

Mr. Jennings demonstrated at the evidentiary hearing that trial counsel's performance was constitutionally deficient. Counsel's mitigation investigation was

minimal, consisting of little more than interviews with some of Mr. Jennings's friends and few phone conversations with his mother. Trial counsel failed to obtain any medical or school records and failed to provide any such information to his experts. The experts that were appointed did not conduct thorough mitigation evaluations because they did not have the necessary records and background information and the trial experts made minimal efforts to speak with any of Mr. Jennings's family, including his mother.

Trial counsel Thomas Osteen testified at the evidentiary hearing that he represented Mr. Jennings from his first appearance to trial. At the time he represented Mr. Jennings, Mr. Osteen had represented capital defendants in approximately 30 cases, most of which went to penalty phase. Most of the clients were sentenced to death but "got off death row one way or the other." (PCR. 2853). Co-counsel Adam Sapenoff had no prior capital case experience. Mr. Sapenoff cross-examined one expert during the guilt phase and assisted with paperwork. Mr. Sapenoff was present during the penalty phase but did not participate or assist with penalty phase investigation or preparation.

Mr. Osteen's theory of the defense for the penalty phase was that, his appointed mental health experts would not be helpful, he would rely on Mr. Jennings's mother and friends "to make as many good statements about the

defendant as they could. He had no prior record." Mr. Osteen felt that the mother was a good witness who loved her son and elicited some sympathy from the jury. Based on his limited investigation, Mr. Osteen believed "If there was one thing Mr. Jennings had, he had a mother. A good one." (PCR. 2918).

Mr. Osteen testified that he "probably" was familiar with the American Bar Association Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases," but he could not recall what version of the ABA Guidelines was in effect at the time of Mr. Jennings's trial. (PCR. 2889). In any event, he would "probably not" refer to ABA Guidelines in deciding what course of action to take in representing Mr. Jennings. (PCR. 2889). For example, when asked whether he considered seeking the assistance of a mitigation specialist, Mr. Osteen testified, "I think I know what you're talking about and, no, I did not hire a so-called mitigation specialist." (PCR. 2888).

Instead, Mr. Osteen relied on Ed Neary, a retired New York police officer who was then Chief Investigator for the Public Defender's Office. Mr. Osteen's understanding of a "mitigation specialist" was "one that goes out to find a witness to get mitigating testimony." (PCR. 2889). According to Mr. Osteen, a mitigation specialist's expertise would entail "mental health and family background. Psychological problems, abuse. You name it. That sort of thing. A person's

personality." (PCR. 2901). While Mr. Neary did not have any experience in these areas, Mr. Osteen felt that Mr. Neary "had a good feel for it," but, "as far as training, probably not." (PCR. 2901). Mr. Osteen was not sure if Mr. Neary travelled outside of Florida to conduct any investigation, and had no knowledge of whether Mr. Neary had any mental health training and expertise.

Mr. Osteen requested that Dr. Wald be appointed to determine whether Mr. Jennings "may be incompetent to proceed or may have been insane at the time of the offense." The trial court appointed Dr. Wald "to examine the defendant and then make reports to defense counsel as I may direct" (PCR. 2884) however, there was no mention of Dr. Wald assisting in any mitigation investigation or evaluation. (PCR. 2885).

Mr. Osteen subsequently wrote to Dr. Wald:

> What is your insight on this type of personality disorder? I need to know all of the testing and files I can get that might show any forces beyond his control, childhood incidents or whatever that might help induce his mind set. If you feel you can benefit from any sources whatsoever, let's do it.

(PCR. 2914). This simplistic question about "personality disorder" demonstrates Mr. Osteen's lack of knowledge of the psychological issues relevant to mitigation in a capital penalty phase proceeding. There was no mention of Florida's statutory mental health mitigators, or whether they might apply to Mr. Jennings. Moreover,

while Mr. Osteen recognized that Dr. Wald might benefit from additional sources of information, he failed to provided his experts with any school or medical records. Indeed, Mr. Osteen made no effort to obtain any such records. (PCR. 2892).

Dr. Wald and Dr. Masterson evaluated Mr. Jennings and prepared reports.[2] Dr. Wald's report indicates that he was "appointed to assist the defendant," but does not indicate whether he was to conduct a competency/sanity evaluation or an evaluation for the purposes of mitigation. (PCR. 2883; Defense Exhibit 9). Dr. Masterson's report indicates that the purpose of his evaluation was to "try to outline Mr. Jennings' personality and the psychodynamics behind his behavior, as an aid in defending him from charges of murder in the first degree." Like Dr. Wald's report, Dr. Masterson's report makes no reference to, or findings regarding, statutory or non-statutory mitigation.

In addition, Dr. Masterson's report was insufficient in other ways. Dr. Eisenstein testified that the evidentiary hearing that Dr. Masterson's report

[2] Collateral counsel wrote to Dr. Masterson in 2000 to request that he provide his records. All counsel received was a copy of his own request with a copy of the report Dr. Masterson prepared. Prior to the evidentiary hearing, Dr. Eisenstein contacted Dr. Masterson to request his raw data and records. As Dr. Eisenstein testified, Dr. Masterson was defensive and not comfortable with evaluation. (PCR. 2894). Dr. Masterson stated that the report "is what it" is and reflects what he had to say.

lacked sufficient detail to apprise even a fellow psychologist of Mr. Jennings's mental condition, not to mention an attorney with limited training, experience or understanding of mental health issues. To the extent that Dr. Masterson's report does included the necessary findings, the report demonstrates that Dr. Masterson's evaluation was woefully inadequate.

Dr. Masterson indicated that he administered "Halstead-Reitan Neuropsyche [*sic*] Tests," however this is very misleading. (PCR. 2897). In fact, Dr. Masterson administered only one of an entire battery of tests that make up the Halstead-Reitan Battery. In addition to the not performing the complete battery, Dr. Masterson's finding regarding the one test he did perform was simply wrong. While Dr. Masterson found Mr. Jennings score of 80 to be "an excellent score," this is by no means the case. (PCR. 2897)

Dr. Masterson also failed to report the results of his testing accurately or completely. While his report indicates a full-scale IQ score, Dr. Masterson did not report verbal and performance scores accurately. Dr. Masterson qualified his test results by indicating that the testing he performed was limited to what is "available in the prison setting," but he does not indicate what those limitations were, and there is no indication that he made any effort to have the jail accommodate him in his evaluation, as would be the standard practice.

In addition to incomplete testing and reporting, Dr. Masterson's methods are non-standard. Dr. Masterson's report indicates that he administered a "Questionnaire" wherein he asked several questions that are not widely used, and are not normed, standardized or accepted neuropsychological measures in any way. (PCR. 2895). Furthermore, the Myers-Briggs Personality Type Indicator (incorrectly referenced in Dr. Masterson's report as "Myer-Briggs Personality Inventory") is not typically a test used in a forensic or neuropsychological setting. Rather, it is a personality assessment used in vocational settings to assist with job placement. (PCR. 2895). Dr. Masterson's report was misleading and incomplete. Dr. Masterson drew the wrong conclusions from an incomplete evaluation.

Given the inaccuracies and inadequacies of Dr. Wald and Dr. Masterson's evaluations and reports, it is not surprising that Mr. Osteen felt that they would not be helpful at the penalty phase. However, much of the deficiencies in the experts' evaluations can be attributed to counsel's own deficient performance. Counsel made no effort to obtain Mr. Jennings's school, employment, medical or any other records, or provide them to the experts. Counsel failed ensure that his experts had the opportunity to speak with Mr. Jennings's mother, friends or family, either in person or by telephone. As a result, the experts had not information about Mr. Jennings's background than Mr. Jennings's himself. As a result of the combined

failings of trial counsel and his experts, Mr. Jennings's sentencing judge and jury were not able to "make a sensible and educated determination about the mental condition of the defendant at the time of the offense." *Ake*, 105 S. Ct. at 1095.

Mr. Osteen's mitigation investigation was limited to talking to Mr. Jennings's mother at her home or by telephone "two or three different times" (PCR. 2895), and speaking with some of his friends. From Mr. Jennings's mother, Mr. Osteen learned that Mr. Jennings and his mother had a close, loving relationship. He also learned that Mr. Jennings had "not much" education and was from a low socio-economic background. From Mr. Jennings's friends, Mr. Osteen learned that Mr. Jennings had a "spotty" employment record, though he made no effort to obtain Mr. Jennings's employment records. (PCR. 2894). Nor did Mr. Osteen make an effort to obtain any medical or school records. (PCR. 2892). He made no effort to talk to any of Mr. Jennings's relatives except for his mother. (PCR. 2893). Nor did he speak to any of Mr. Jennings's friends from out of State who would have information about Mr. Jennings's childhood. (PCR. 2893). Trial counsel learned nothing about any history of sexual abuse and incest in the Jennings family because

> it never came up as an issue that I wanted – I thought was, you know, something I looked into. But that is one of the normal things that my investigator would do and I would do would be to ask questions about that.

(PCR. 2896).

There is no indication that trial counsel's investigator uncovered any information about Mr. Jennings childhood or family history. Mr. Neary contacted only one out-of-state witness, Heather Johnson, by written correspondence, requesting "any good word that you can give concerning our client Mr. Jennings." (PCR. 2934). There was no explanation of what "any good word" could be, nor did the letter ask any specific questions about Mr. Jennings's history (See Exhibit 12). Nobody spoke with Ms. Johnson (PCR. 2894), however she did respond with a letter that contained helpful information. However, rather than present the witness's helpful testimony before the jury, Mr. Osteen merely entered her letter at the *Spencer* hearing. (PCR. 2899).

Trial counsel's performance at the penalty phase was clearly deficient. Counsel and his investigator spoke only to Mr. Jennings's mother, Tawny, who was available locally, and made no effort to seek out other relatives who had knowledge of Mr. Jennings's upbringing. The Supreme Court recognized in *Wiggins* "in assessing the reasonableness of an attorney's investigation, a court must consider not only the quantum of evidence already known to counsel, but also whether the known evidence would lead a reasonable attorney to investigate further." 123 S. Ct. at 2538. Rather than conduct the required investigation, trial

counsel here chose to rely solely on Tawny Jennings's representations regarding her relationship with her son and his background. Had he fully investigated, trial counsel would have learned that much of what Ms. Jennings said about her son was not accurate. Moreover, trial counsel would have discovered a wealth of compelling mitigating information.

The friends that trial counsel interviewed and presented at the penalty phase knew nothing of Mr. Jennings background or history prior to him moving to Fort Myers as a teenager. Much of what they had to say on cross-examination was more damaging to Mr. Jennings than mitigating. Heather Johnson, the one out-of-state witness they contacted, was never interviewed. When Ms. Johnson responded to trial counsel's written request for information, trial counsel did not follow up by speaking with her, despite the fact that she had a wealth of information that would have been helpful to Mr. Jennings's mitigation case.

Trial counsel's failings cannot be attributed to any reasonable strategic decision. "[S]trategic choices made after less than complete investigation are reasonable" only to the extent that "reasonable professional judgments support the limitations on investigation." 123 S. Ct. at 2538. Here, the information Mr. Osteen discovered would have lead a reasonable attorney to investigate further. Having failed to conduct the required investigation into Mr. Jennings's background and

history, trial counsel was not in a position to make a reasoned strategic decision to forgo mental health mitigation and rely on Mr. Jennings's mother to establish mitigation. One cannot make a strategic decision not to investigate. Trial counsel's failure to fully investigate the circumstances of Mr. Jennings's background and develop a mitigation case was deficient performance.

C. Prejudice

Strickland's prejudice standard requires showing "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceedings would have been different. A defendant is not required to show that counsel's deficient performance "[m]ore likely than not altered the outcome of the case." *Strickland*, 466 U.S. at 693. The Supreme Court specifically rejected that standard in favor of showing a reasonable probability. See *Kyles v. Whitley*, 115 S. Ct. 1555 (1995) (discussing identity between *Strickland* prejudice standard and *Brady* materiality standard). "The question is not whether the defendant would more likely than not have received a different verdict with the evidence, but whether in its absence he received a fair trial, understood as a trial resulting in a verdict worthy of confidence." *Id*. As demonstrated herein, Mr. Jennings was prejudiced by trial counsels' numerous failings.

Several family members with compelling mitigation were available to testify at Mr. Jennings's penalty phase. However, trial counsel failed to speak with any of them. In addition, these witness's information regarding Mr. Jennings's upbringing in deplorable conditions of poverty, deprivation, depravity and squalor would have been invaluable to mental health experts preparing a mitigation defense.

Patricia Scudder, Mr. Jennings's cousin, testified at the evidentiary hearing that she last saw Mr. Jennings when he was 14 years old in Oregon. (PCR. 2786). Between the ages of 6 and 12, Mr. Jennings and his mother lived at the Buccaneer Motel. (PCR. 2795). On several occasions, they would live with Mrs. Scudder for weeks at a time.

Mrs. Scudder had occasion to visit the Jennings's home, and testified to the shocking conditions in which Mr. Jennings grew up. She recalls that the home was a "disaster"; very messy to the extent that there were used tampons left lying around the home. (PCR. 2888). The bed was covered with clothes, so Mr. Jennings had to sleep with his mother on hide-a-bed in living room. At one time, Mr. Jennings lived with his grandparents and his mother in a trailer. Another time they were living in an apartment where there was dog feces on floor and piles of dirty dishes. (PCR. 2790).

Ms. Jennings personal life was as chaotic as her home. Mrs. Scudder testified that she recalled 5 or 6 of her "fly-by" boyfriends. One named Frank was jealous of Mr. Jennings and not take him to do anything. (PCR. 2791). Frank was constantly drinking and Ms. Jennings took pain pills. Mrs. Scudder explained that Mr. Jennings was named "Brandy" because his mother was drunk on Brandy when she got pregnant with him. (PCR. 2794)

Mrs. Scudder told of how Ms. Jennings used Brandy and showed him no love. Brandy was overweight because he ate nothing but junk food all the time. (PCR. 2794). He was not allowed to play with other children because Ms. Jennings was overprotective. Tawny and Brandy slept in same bed, even at age 5-6, on a regular basis. Mrs. Scudder felt that this "was not right." (PCR. 2795). Mrs. Scudder recalled that Brandy was breastfed until he was 4 or 5 years old, and would request that his mother breast-feed him. (PCR. 2795).

Mrs. Scudder also told of how Mr. Jennings was exposed to unsavory characters and inappropriate sexual behavior. George "Sonny" Jennings, Mr. Jennings's uncle, was a child molester. (PCR. 2796). Walter J. Crume, another uncle by marriage who ran Buccaneer Motel and often watched over Brandy when Tawny was out, also was a child molester. (PCR. 2795-2796). Ms. Jennings left

Brandy with Mr. Crume despite her knowledge that he was a child molester. (PCR. 2800).

On one occasion, three men stayed overnight with Ms. Jennings while Brandy was at home. The next morning, Mrs. Scudder walked in to find Tawny and one of men in bed, naked, while Brandy was at the foot of the bed watching television. (PCR. 2799).

Lloyd Scudder, Patricia's husband of 35 years, testified that he knew Brandy from the ages of about 5 to 14. (PCR. 2814). Mr. Scudder is a disabled veteran who now works with children as a motivational speaker. He testified that George "Sonny" Jennings molested his wife Patricia Scudder, and that Walter Crume molested his son. (PCR. 2815). Ms. Jennings also had a relationship with her step-nephew, Bob Gifford, who would call her to meet up. Ms. Jennings smoked marijuana and used pills and always complained of something hurting. (PCR. 2818). Mr. Scudder corroborated the fact that Ms. Jennings breastfed Brandy until he was 5 years old. (PCR. 2818).

Mr. Scudder observed Ms. Jennings as a bad mother who did not care about Brandy like she should have. Ms. Jennings had no money and did not maintain a job. Other than relying on welfare, the only way she got money was "probably

hooking" or she would get "a hold of truck drivers." (PCR. 2821). When she did have money, Ms. Jennings spent it on herself and her boyfriends.

Mr. Scudder testified that he last saw Mr. Jennings when was about 13 years old, but Mr. Jennings did call him to wish him a happy Veteran's Day. "He said that I was his veteran." (PCR. 2819). And although Mr. Scudder was not Mr. Jennings's father, he also called to wish him a happy Father's Day and "I cried. It still gets me today. I cried." (PCR. 2820).

Heather Johnson's evidentiary hearing testimony was similarly compelling. Ms. Johnson was a close friend of Mr. Jennings, having met him when he was a teenager living with the McBride family. When she knew Mr. Jennings, he also lived with his mother at the Wonderland Motel, a run-down motel in North Fort Myers. (PCR. 2831).

Ms. Johnson described Mr. Jennings's complicated and conflicted relationship with his mother. Mr. Jennings expressed resentment and frustration with his mother yet was protective of her. Ms. Johnson described Ms. Jennings as hard and cold, and their relationship as contentious. Ms. Jennings was demanding and tough, but there was closeness and Mr. Jennings always wanted to please his mom. (PCR. 2829). Ms. Johnson also explained how Mr. Jennings quit school to

help his mom because she was always ill or disabled. (PCR. 2832). She also recalled that Ms. Jennings was tough:

> She was just a hard – there wasn't a lot of warmth there. It was, like, a hard outer shell. She was tough. She was scary. She would intimidate me."

(PCR. 2829).

Ms. Johnson also explained how Mr. Jennings was bright, but not good at articulating what upset him. While impulsive and a little immature, Mr. Jennings was gentle natured and reserved. Ms. Johnson felt that Mr. Jennings was very protective of her, and he made her feel safe. (PCR. 2831). He was not a leader and did not have dominant personality. (PCR. 2831-2832).

Ms. Johnson recalled that she got letter from Mr. Jennings's trial attorney asking for a character reference, but "I didn't really know what they wanted [from] me. I just got a letter asking for a statement. I didn't know whether I was being helpful at all or not." (PCR. 2831). Ms. Johnson responded in writing (Defense Exhibit 12) but does not recall any other contact with trial counsel. She would "absolutely" have testified for Mr. Jennings had she been asked. (PCR. 2835).

Bruce Martin testified that he has known Brandy Jennings since about 1987. Mr. Jennings lived with Mr. McBride, his father, and half-brothers when he was 16 to 17 years old. Mr. Martin recalled Mr. Jennings excessive drug and alcohol abuse

around that time. They regularly went to bars and house parties. Mr. Jennings drank nearly every day, and anything he could put his hands on: beer, liquor, or wine. Mr. Jennings could drink an 18-pack of beer by himself and down a fifth of liquor. This was regular behavior for him. Mr. Jennings used marijuana, as much as 3 to 4 joints a day, every day, in addition to his drinking. He also used acid when he could get it, usually about once a week, and they would go to collect mushrooms about once a month. Mr. Jennings would use 8 mushrooms at a time, which is a lot. Basically, if Mr. Jennings had access to drugs, he would use them.

Kevin McBride, Bruce Martin's half-brother, also met Mr. Jennings in the late 1980's when Mr. Jennings was about 15 years old. Mr. McBride knew Mr. Jennings's mother, who he described as "a drinker." Mr. McBride recalled that Mr. Jennings was not happy with his mother at times for not keeping up on bills and not having place to stay. Mr. Jennings lived with McBride family for 6 months because it was a better place to stay than his mother's home.

Mr. McBride also testified to Mr. Jennings's extensive drug use. He stated that he saw Mr. Jennings on regular basis and he drank beer as often as possible, about every day. Mr. Jennings also used marijuana almost daily while drinking. He would smoke one joint after another. Mr. Jennings also used acid whenever he

could get it, and used mushrooms 2 to 3 times a year, when they were in season or he had access to them.

Mr. McBride recalled that Ms. Jennings knew about her son's drinking but did nothing to stop it. In fact, Mr. Jennings and his mother were more like friends, and they drank together. Mr. Jennings and his mother were always between places to live, moving among different motels. Mr. McBride felt that Ms. Jennings was "unstable", "rough around the edges", and "wanted to have her own fun."

Mr. McBride had been contacted by trial counsel but was never called to testify. He would have been willing to do so, had he been asked.

In addition to the volume of lay testimony that was never presented to Mr. Jennings's jury, there was an abundance evidence that Mr. Jennings suffers from mental disorders that the sentencing jury and judge should have been aware of. At the evidentiary hearing, Mr. Jennings presented several expert witnesses to establish that such mitigating information was available, had trial counsel adequately sought it.

Thomas Hyde, M.D., Ph.D., a behavioral neurologist, evaluated Mr. Jennings on March 15, 2000 for 2 hours. Dr. Hyde conducted a behavioral neurological interview with background history, development, medical history, neurological exam of cognitive function, cranial nerve function, motor, sensory

coordination and gait. April 15, 2010, Dr. Hyde reexamined Mr. Jennings. He also reviewed background materials including medical records and some school records, and interviewed Mr. Jennings's mother.

Dr. Hyde found two factors from Mr. Jennings's childhood to be significant neurologically. Firstly, between 8 months and 2 years of age, Mr. Jennings suffered 15 to 20 febrile convulsions and was given Phenobarbital. This usually would indicate abnormal brain function and increased likelihood to have neuropsychiatric problems later. Secondly, Mr. Jennings suffered a number of closed head injuries. At around 2 years of age, Mr. Jennings suffered a concussion which required overnight hospitalization. Mr. Jennings suffered other concussions as well.

Dr. Hyde did not reach a diagnosis and indicated that Mr. Jennings's neurological examination was normal, but with subtle neurological findings. Based on these neurological findings, Dr. Hyde recommended a neuropsychological evaluation.

At the evidentiary hearing, Mr. Jennings presented Hyman Eisenstein, Ph.D., a clinical psychologist and neuropsychologist, who spent a total of 23 hours evaluating Mr. Jennings and conducting extensive neuropsychological testing in 2000 and 2010.

After performing a full neuropsychological evaluation in 2000, including tests of brain function, motor measures, language functioning, intelligence and memory, Dr. Eisenstein found a significant variance between Mr. Jennings's verbal and performance functioning. Dr. Eisenstein's testing revealed that on the Wechsler Adult Intelligence Scale, 3rd Edition, Mr. Jennings achieved a verbal IQ score of 119 and yet on his performance score he achieved a 106. Dr. Eisenstein explained that this discrepancy in verbal and performance IQ scores was consistent with Mr. Jennings's score on the Memory Scale Index, and that both test results were indicative of brain disregulation. Further testing by Dr. Eisenstein demonstrated that Mr. Jennings also suffered from difficulties in regulating inhibitions as well as mild motor and neurological impairments.[3]

Dr. Eisenstein testified that in 2000 he reviewed background materials including school records, employment records and previous doctors' reports, and conducted a clinical interview. From his clinical interview with Mr. Jennings, Dr. Eisenstein discovered a significant history of alcohol and substance abuse beginning when Mr. Jennings was just a toddler. He further found that Mr. Jennings was a chronic drug abuser to the extent that he sought drug treatment at a

[3] On the Stroop Color Word test Mr. Jennings scored in the mildly impaired range. This indicates difficulty with inhibition. The Finger Tapping test revealed mild motor overflow in the right hand. (PCR. 3025) and the Rey Complex Figure test showed Mr. Jennings has a tremor, a soft neurological sign.

medical center, Charter Glades, as a young adult. At Charter Glades Mr. Jennings was diagnosed as depressive alcoholic, however, due to financial constraints Mr. Jennings was unable to seek further treatment.

Dr. Eisenstein also found that Mr. Jennings had a history of numerous head injuries. Mr. Jennings medical records, which were never obtained by trial counsel, indicate that at age 3 or 4, he was treated after being hit in the head by a 2x4 and kicked in the head by pony. Hospital records indicate head injury with concussion, multiple treatments for high fevers, febrile seizures, and convulsions from age 6 months to 2 years. At 14 or 15 years of age, Mr. Jennings was hit by a student and required 23 stitches. At 16, he ran into brick wall, and was involved in a motorcycle accident.

In the 2010 evaluation, Dr. Eisenstein reviewed additional school records, the sworn statement of Mr. Jennings's co-defendant, and employment records. Dr. Eisenstein and Mr. Jennings discussed the crime, the victims, Mr. Jennings's employment history, his inability to control himself, his early sexual experiences and his relationship with mother and step-fathers. In addition to his interviews with Mr. Jennings, Dr. Eisenstein spoke with his mother, his friend Heather Johnson, Dr. Faye Sultan, Dr. Tom Hyde, and Dr. Masterson, and conducted additional neuropsychological tests, including the Wechsler Adult Intelligence

Scale – Fourth Edition. Dr. Eisenstein testified that the results from the additional tests were somewhat consistent with his findings from 2000 with the exception of some additional discrepancies in his individual WAIS-IV scores in Verbal Comprehension (102), Perceptual Reasoning (125), Working Memory (131), and Processing Speed (102). Mr. Jennings's Processing Speed score of 102 puts him in 55th percentile of population. His nearly 30-point spread is nearly 2 standard deviations, which is statistically and clinically significant. (PCR. 2668). Dr. Eisenstein also testified to his findings that Mr. Jennings that Mr. Jennings felt extremely depressed, helpless, with little protection and few ego boundaries.

At the evidentiary hearing Dr. Eisenstein found that Mr. Jennings suffers from undiagnosed Attention Deficit Hyperactivity Disorder which manifests in his difficulty with motivation, impulsivity, and boredom. Dr. Eisenstein testified that Mr. Jennings seeks instant gratification and has difficulty with logical thinking, bad judgment, and trouble sleeping. Mr. Jennings was and is significantly depressed, and has self-medicated with drugs and alcohol from an early age.

Dr. Eisenstein found that Mr. Jennings met the DSM – IV clinical criteria for Gifted Learning Disability, and Intermittent Explosive Disorder, further defined as the failure to resist aggressive impulses that result in serious assaultive acts or destruction of property. Dr. Eisenstein based that opinion on Mr. Jennings's history

of aggressive behavior in childhood, fights in adulthood, disproportionate responses and depression. He opined that Mr. Jennings is a recovered alcoholic through incarceration.

According to Dr. Eisenstein, Mr. Jennings's capacity to appreciate criminality of his conduct was substantially impaired due to his learning disability, and because of this disability, Mr. Jennings was unable to capitalize on his intelligence and realized his potential. This set in motion Mr. Jennings's substance abuse and depression and resulted in poor impulse control and poor judgment. Mr. Jennings's frustration led to aggression and hostility.

At the evidentiary hearing, Mr. Jennings also presented clinical psychologist Faye Sultan, Ph.D., an expert in the effects of early childhood abuse on personality. Dr. Sultan evaluated Mr. Jennings and conducted an extensive social history investigation. Dr. Sultan also reviewed Mr. Jennings's school records, employment records, a petition of independency, sex offence legal documents concerning Mr. Jennings family and Mr. Jennings's sworn statement to police.

Dr. Sultan met with Mr. Jennings seven times between 2000 and 2005, totaling approximately 18 hrs of direct clinical interview. Mr. Jennings was cooperative, but did not elaborate on specific incidents of abuse. In addition,

Dr. Sultan travelled to meet with Mr. Jennings's mother for two hours in 2005 and conducted telephonic interviews with several family members, including Alice Clark (Tawny's older sister), Sherman Jennings (Tawny's older brother), Lois Lara (Brandy's first cousin), Patricia Scudder, and friend Tasha Van Brocklin.

As a result of her extensive investigation, Dr. Sultan learned that Mr. Jennings's grew up in extreme poverty and neglect. Sexual exploitation was pervasive in his family. While Mr. Jennings's grandfather was "overtly sexual," George Jennings, Mr. Jennings's maternal uncle, a known rapist among his family, would entice Mr. Jennings and his cousins with money to sit on his lap, which Mr. Jennings often did. Mr. Jennings was also sexually exploited at the age of 12 by a 30-year-old woman. Walter Crume, who ran the Buccaneer Motel where Mr. Jennings and his mother lived, married into the family and molested many of the children. Mr. Jennings grew up knowing that his mother had been violently raped by George Jennings, and believes that George might actually be his natural father. (PCR.50). Mr. Jennings's mother was also raped by her brother.

Dr. Sultan explained that Tawny, far from being the good mother as trial counsel believed, is actually quite mentally ill and unfit as a parent. Dr. Sultan explained that Ms. Jennings's statements are inconsistent, and some clearly false. Her emotions are disregulated and sometimes inappropriate to subject matter. She

was “all over the place” emotionally. (PCR.29). She would laugh or cry without having to do with the subject matter of the conversation, and her emotions were extreme. (PCR.29). While the purpose of Dr. Sultan’s interviews with Ms. Jennings was to talk about her son, Ms. Jennings talked at length about her own sexual exploitation by her brother. (PCR.31).

Ms. Jennings attachment to Mr. Jennings was quite abnormal, and she behaved very oddly with him. (PCR.29). She nursed Brandy until the age of five or six, and her brother wondered if she was receiving sexual gratification from this. (PCR.29). Mr. Jennings’s childhood was chaotic due to the frequency with which Ms. Jennings moved. Brandy had attended 14 different schools before the sixth grade.

Based on her observations of Ms. Jennings and her interviews of others, Dr. Sultan believes that Ms. Jennings had very little parenting skill and was unable to provide adequate parental supervision or adequate encouragement and support. Ms. Jennings was sexually traumatized and received no treatment for it, and she was poorly parented herself. (PCR.41). She introduced Mr. Jennings to marijuana as a teenager, and laughed about giving him beer when he was a baby. (PCR.41). She could not control her own impulses. (PCR.41) In short, contrary to trial

counsel's belief that Mr. Jennings had a good mother, Ms. Jennings was simply not an adequate parent. (PCR.41).

Dr. Sultan explained the effect of such events and this environment has on children:

> What we know about the brains of children who grow up in that kind of chaos and exploitation is that they don't develop normally neurologically . . . and they don't develop normally emotionally. Those children are quite impulsive, sometimes aggressive, over sexualized themselves, often substance abusers to the extreme. Have a great deal of difficulty with memory and concentration. Have a very distorted view of their safety in the world. Those children frequently wind up in situations where the commit violent crimes. There is a good deal of damage done to the coping capacity and adjustment in the world for children who have been exposed to circumstances like Brandy Jennings . . ."

(PCR.27).

Dr. Sultan also spoke to the devastating impact on a child who knows that his mother was sexually abused by family members:

> There's a body of literature that has to do with witnessing sexual violence and being told of sexual violence at an inappropriate age . . . We know that even the telling of such stories produce[s] significant emotional distress in children because they're simply not prepared – in a brain development sense, for the kind of information.

(PCR.42).

In addition to the social history investigation, Dr. Sultan administered limited testing. The MMPI-II was not of particular significance, but indicated that Mr. Jennings was likely to be serious substance abuser, which Dr. Sultan considered obvious. Mr. Jennings is extroverted, with a rigid personality, easily frustrated, and has difficulty controlling his anger. (PCR.32).

As a result of the work she performed in this case, Dr. Sultan testified that Mr. Jennings meets the DSM-IV diagnostic criteria for Intermittent Explosive Disorder. As she explained, this is a subcategory of Impulse Control Disorder, where an individual behaviorally has aggressive, violent or vulgar reactions that are out of proportion to an incident that may have occurred.

Research indicates that this kind of impulsive aggression is related to abnormal brain mechanisms that would inhibit motor activity. (PCR.36). Abused children who have violence or impulsivity modeled for them tend to act out. This is consistent with Mr. Jennings's history. (PCR.37).

Dr. Sultan did not find that Mr. Jennings suffers from a major mental disorder or that Florida's statutory mental health mitigators would apply. However, she found substantial non-statutory mitigation that could have been presented to Mr. Jennings's jury. According to Dr. Sultan, "Mr. Jennings is quite a damaged person" and operated in the world "in a highly dysfunctional way." (PCR.39).

Mr. Jennings suffered from excessive and prolonged substance abuse beginning in pre-adolescence, leading to behavioral and emotional deficits in young adulthood. (PCR.40). This, combined with exposure to sexually exploitive, neglectful and impoverished environment, predictably leads to impulse control problems, attention problems, concentration problems, occupation and social difficulties, a propensity for criminal behavior and an inability to regulate one's own emotions.

Mr. Jennings demonstrated at the evidentiary hearing that a wealth of mitigating information was available had trial counsel conducted a reasonable investigation. Witnesses were available to provide compelling mitigation testimony if Mr. Jennings's deplorable upbringing and to assist mental health experts in understanding and explaining Mr. Jennings's mental health conditions. This Court must consider the evidence that was presented at trial and conduct a cumulative analysis, taking into consideration the scant mitigation presented at Mr. Jennings's trial, and then assessing the impact that the evidence uncovered during collateral proceedings could have had on the jurors. *Sears v. Upton*, 130 S.Ct. 3259 (2010); *Porter v. McCollum*, 130 S.Ct. 447, 454 (2009). While the jury knew something of the history of Mr. Jennings's psychological and emotional problems, there was no explanation offered for these difficulties. Had trial counsel properly investigated and presented the available evidence, the sentencing judge and jury would have

had a greater appreciation for these aspects of his conduct and character. There is, at the very least, a reasonable probability that the result of the penalty phase would have been different. *Strickland*, 466 U.S. 668, 694 (1988).

ARGUMENT II

MR. JENNINGS'S CONVICTIONS AND SENTENCES ARE MATERIALLY UNRELIABLE BECAUSE TRIAL COUNSEL WAS INEFFECTIVE FOR FAILING TO ADEQUATELY IMPEACH THE PREJUDICIAL TESTIMONY OF ANGELA CHANEY

In *Strickland v. Washington*, 466 U.S. 668 (1984), the United States Supreme Court held that counsel has "a duty to bring to bear such skill and knowledge as will render the trial a reliable adversarial testing process." *Id*. at 688 (citation omitted). In order to establish that trial counsel was ineffective, Mr. Jennings must establish both deficient performance and prejudice. Deficient performance is performance that is objectively unreasonable. Id. To establish prejudice, Mr. Jennings need show that "there is a reasonable probability that but for counsel's unprofessional errors, the results . . . would have been different." *Strickland*, 466 U.S. 668, 694 (1988) . Mr. Jennings has established both.

Angela Cheney testified at Mr. Jennings's trial that at some time prior to the robbery and murders at the Cracker Barrel, while at Mr. Jennings's apartment, she and Mr. Jennings had a discussion about money. Cheney testified that Mr. Jennings

said if he ever needed money, he could always rob someplace or somebody. According to Cheney, Mr. Jennings said he would not get caught, "not if you don't leave any witnesses." (R. 700). In her trial testimony, Ms. Cheney demonstrated that Mr. Jennings "made a motion across his throat." (R. 700). On cross-examination, Ms. Cheney further testified that the discussion occurred in November of 1993. (R. 701). Trial counsel failed to impeach this highly prejudicial testimony by inquiring in to the respective relationships between Ms. Cheney and both Mr. Jennings and his co-defendant, Charles Jason Graves, and the fact that this purported conversation could not have taken place as Ms. Cheney remembers it.

Angela Cheney (now Angela Ostrander) testified at the evidentiary hearing that she recalled testifying at Mr. Jennings's trial concerning conversation with Mr. Jennings when she was in high school. Unbeknown to Mr. Jennings's jury or the sentencing court, Ms. Cheney had a close familial and friendly relationship with Charles Jason Graves, Mr. Jennings's co-defendant. In fact, Ms. Cheney was friends with Mr. Graves before she met Mr. Jennings. She and Mr. Graves had grown up together.

At the time Mr. Jennings was purported to have made his inculpatory statement to Ms. Cheney, she was living with Mr. Jennings and they had a "dating

relationship" which lasted about a month. (PCR. 2858). Moreover, Ms. Cheney was married to Robert Cheney, Charles Graves's brother, for a period of about two years between 1994 and 1996, while Mr. Jennings and Mr. Graves were awaiting trial. (PCR. 2859). Ms. Cheney testified at the evidentiary hearing that she might have been married to Mr. Graves when she testified at Mr. Jennings's trial, albeit they were separated. The judge and jury that sentenced Mr. Jennings to death never knew that Ms. Cheney was, in fact, related to Mr. Jennings's co-defendant, or that she and Mr. Jennings had had a romantic relationship that ended after one month, and after which they "did not remain friends or acquaintances." (PCR 2868).

Nor was the jury or court aware that, after Mr. Jennings and Mr. Graves were arrested in Las Vegas, Graves contacted Ms. Cheney from the Las Vegas jail to request that she help him. And she did help him. Ms. Cheney testified at the evidentiary hearing that she had told the police and State Attorney that she was concerned for Mr. Graves's mental and physical well-being. (PCR. 2859). She recalled a sworn statement at which she told the State Attorney that she had 30 to 40 telephone conversations with Mr. Graves while he was in jail awaiting his trial. She recalled that she visited him at least one time, and that she might even have brought her daughter to the jail to see Graves. (PCR. 2862).

Ms. Cheney also recalled being present at a meeting with the lawyer that the Cheney family was trying to get to represent Mr. Graves. Ms. Cheney contacted law enforcement and met with them at a McDonald's restaurant to speak to them on Mr. Graves's behalf about their conversations in an effort to help him out. (PCR. 2865). Ms. Cheney's then-husband, who was also Mr. Jennings's co-defendant's brother, was present when Ms. Cheney spoke to the police. Mr. Jennings's sentencing judge and jury should have known that the witness who made such prejudicial testimony about him was related to Mr. Jennings's co-defendant, and had sought to help his codefendant by speaking to law enforcement to "help him out" and assisting him in getting legal representation.

Trial counsel also failed to realize, or present to the jury, the fact that this purported conversation could not have taken place as Ms. Cheney remembered it. Ms. Cheney testified that the purported discussion with Mr. Jennings occurred "in the apartment that I lived with him – I think it might have been Waverly," but "I don't remember the name exactly." (PCR. 2863). However, in November of 1993, Mr. Jennings was living with Bruce Martin at North Gate Club apartments, not Waverly.

Bruce Martin testified at the evidentiary hearing that he and Mr. Jennings had lived with Mr. Jennings for approximately five years, including the period of

November, 1993 (PCR. 3141), when the conversation with Ms. Cheney is purported to have taken place. Mr. Martin identified the lease he signed on October 20, 1993, which indicates that he was living at the North Gate Club apartments at that time. (PCR. 3140). He also testified that Mr. Jennings lived with him at North Gate Club during this period. (PCR. 3140). Furthermore, Mr. Martin stated that Mr. Jennings was dating a girl named Mary Hamler at the time, not Angela Cheney.

Nor did the jury or court know that Ms. Cheney had a history of drug abuse, and they were "quite possibly" using drugs at the time that Mr. Jennings is alleged to have made these inculpatory statements. In fact, Ms. Cheney testified at the evidentiary hearing that she used drugs in high school, and that she had been placed in a treatment program for drug addiction or substance abuse when she was in high school, prior to testifying at Mr. Jennings's trial.

The jury was not aware of any of this impeaching information because trial counsel failed to adequately cross-examine Angela Cheney. Trial counsel's failings cannot be attributed to any reasonable strategic decision. Rather, as is evident from trial counsel's evidentiary hearing testimony, he had no knowledge of this information because he failed to adequately investigate.

The circuit court denied this claim in part because "Defense counsel did not question trial counsel regarding any alleged failure to adequately cross-examine Ms. Cheney. Defendant merely established that Mr. Osteen was aware of the relationships and what Ms. Cheney would testify to based on discovery." (PCR. 3251). This is incorrect.

At the evidentiary hearing, trial counsel testified that he had no recollection of deposing Ms. Cheney, but if he had, the deposition would be in his files. (PCR. 2905). Mr. Osteen testified that he had no knowledge of any history of a boyfriend/girlfriend relationship between Ms. Cheney and Mr. Jennings. (PCR. 2904). Furthermore, he had no knowledge of Ms. Cheney's relationship to Mr. Graves. (PCR. 2904).

Moreover, the discovery Mr. Osteen received included a police report and statement by Ms. Cheney wherein she states that Graves called her from the Las Vegas jail and "told her everything." (PCR. 2906). The statement also indicated that she is Mr. Graves's sister-in-law. (PCR. 2906) (Police Report admitted as Defense Exhibit 11). Despite having this valuable impeachment information, Mr. Osteen did not cross-examine Ms. Cheney to reveal her motives and bias.

The lower court does not address the fact that Mr. Osteen made no effort to investigate Ms. Cheney's background, even though he knew that she would offer

damaging testimony. Mr. Osteen was not aware of Ms. Cheney's drug abuse and addiction history, nor the fact that she and Mr. Jennings had previously had a relationship. (PCR. 2909). Despite his insistence that he knew the substance of her highly prejudicial testimony, Mr. Osteen "didn't think of any reason" to conduct a background investigation of Ms. Cheney. (PCR. 2909). Failure to conduct any investigation of this important State witness was deficient performance.

The prejudice from trial counsel's failings is evident. Had Mr. Osteen adequately investigated, prepared and cross-examined Ms. Cheney, the jury would have realized that her recollection of the purported events was inaccurate due to her own drug use and history. Indeed, the jury would have known that the events could not have occurred where and when Ms. Cheney stated. Further, the jury would have been aware that Ms. Cheney was a highly biased witness who had motive to help Mr. Jennings's co-defendant, to the detriment of Mr. Jennings. In fact, she became involved in the case in an effort to help Mr. Graves, and out of concern for Graves's well-being, to the extent that she and her husband, who is Mr. Graves's brother, sought legal assistance for Mr. Graves.

Trial counsel's failure to adequately impeach Ms. Cheney went not only to guilt but also to penalty. The State relied on Ms. Cheney's testimony to argue that Mr. Jennings should be convicted and sentenced to death. In his sentencing order,

the trial court specifically referred to Ms. Cheney's testimony as evidence of two aggravating factors: avoiding arrest and CCP. (R. 785). This Court also relied on Cheney's un-challenged testimony when affirming the conviction and sentence *Jennings v. State*, 718 So. 2d at 146.

Trial counsel failed to adequately investigate, prepare and cross-examine Angela Cheney. As a result, counsel was not acting as counsel within the meaning of the Sixth Amendment. Through no strategy or tactic, trial counsel failed to vigorously defend Mr. Jennings. As a result, Ms. Cheney's highly prejudicial testimony went wholly unchallenged. Had trial counsel fulfilled his duties reasonably, there is a reasonable likelihood that the result Mr. Jennings's trial and sentence would have been different.

ARGUMENT III

THE CIRCUIT COURT ERRED IN SUMMARILY DENYING SEVERAL MERITORIOUS CLAIMS IN VIOLATION OF THE FIFTH, SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS

Mr. Jennings sought an evidentiary hearing pursuant to Florida Rule of Criminal Procdure P. 3.851 for all claims requiring a factual determination. Pursuant to rule 3.851(f)(5)(A)(i), an evidentiary hearing must be held whenever the movant makes a facially sufficient claim that requires a factual determination. *See also Amendments to Fla. R. Crim. P. 3.851*, 772 So. 2d 488, 491 n.2

(Fla. 2000) (endorsing the proposition that "an evidentiary hearing is mandated on initial motions which assert . . . legally cognizable claims which allege an ultimate factual basis"). *See also, Allen v. Butterworth*, 756 So. 2d 52, 66-67 (2000); *Gonzales v. State*, 990 So. 2d 1017, 1024 (Fla. 2008). To the extent there is any question as to whether the movant has made a facially sufficient claim requiring a factual determination, the Court will presume that an evidentiary hearing is required. *Booker v. State*, 969 So. 2d 186, 195 (Fla. 2007).

"Postconviction claims may be summarily denied when they are legally insufficient, should have been brought on direct appeal, or are positively refuted by the record." *Connor v. State*, 979 So. 2d 852 (Fla. 2007). Factual allegations as to the merits of a constitutional claim as well as to issues of diligence must be accepted as true, and an evidentiary hearing is warranted if the claims involve "disputed issues of fact." *Maharaj v. State*, 684 So. 2d 726, 728 (Fla. 1996). A court's decision whether to grant an evidentiary hearing is subject to *de novo* review. *State v. Coney*, 845 So. 2d 120, 137 (Fla. 2003).

As set forth below, Mr. Jennings's rule 3.851 motion pled facts regarding the merits of his claim which must be accepted as true. *Lightbourne v. State*, 549 So. 2d 1364, 1365 (Fla. 1989). When these facts are accepted as true, it is clear that

the record does not positively refute Mr. Jennings's claims and that an evidentiary hearing was required.

A. Prosecutor's Arguments At The Guilt/Innocence And Penalty Phases Presented Impermissible Considerations And Misstated The Law And Facts To The Jury

Mr. Jennings alleged that he was denied a fair trial and a fair, reliable and individualized capital sentencing determination in violation of the Fifth, Sixth, Eighth, and Fourteenth Amendments, because the prosecutor's arguments at the guilt/innocence and penalty phases presented impermissible considerations to the jury, misstated the law and facts, and were inflammatory and improper. He further alleged that defense counsel's failure to raise proper objections was deficient performance, which denied Mr. Jennings effective assistance of counsel. The circuit court denied this claim without an evidentiary hearing, finding that Mr. Jennings had failed to claim prejudice. This was error.

Prosecutorial misconduct in closing argument constitutes grounds for reversing a conviction. *Berber v. United States*, 295 U.S. 78, 85-88 (1934). The prosecutor, while an advocate, is also a public servant "whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done." *Id*., at 88. Prosecutorial misconduct is particularly dangerous because of its harmful influence on the jury. It is the responsibility of the trial court to ensure that

final argument is kept within proper and accepted bounds. *United States v. Young*, 470 U.S. 1, 6-11 (1985). The court must be aware that "the prosecutorial mantle of authority can intensify the effect on the jury of any misconduct." *Brooks v. Kemp*, 762 F.2d 1383, 1399 (11th Cir. *en banc* 1985).

The prosecution in Mr. Jennings's case engaged in acts of misconduct by making improper comments during the guilt phase. A prosecutor may not use epithets or derogatory remarks directed toward the defendant as they impermissibly appeal to the passions and prejudices of the jury. *See, Green v. State*, 427 So. 2d 1036, 1038 (Fla. 3d DCA 1983) ("It is improper in the prosecution of persons charged with a crime for the representative of the State to apply offensive epithets to defendants or their witnesses, and to engage in vituperative characterizations of them.") *See also, Duque v. State*, 498 So. 2d 1334, 1337 (Fla. 2d DCA 1986); *Dukes v. State*, 356 So. 2d 873 (Fla. 4th DCA 1978).

The prosecutor's improper arguments extended into the penalty phase of Mr. Jennings's capital trial. The prosecutor mischaracterized the nature of mitigation, as an "an attempt to escape accountability" (R. 813), argued impermissible aggravating circumstances including that Mr. Jennings had "spent his ill gotten gains at Flints, a **topless dance club"** (R. 914)(emphasis added), and stated that the co-defendant Graves had already received a life sentence (R.934).

The implication that the co-defendant had escaped the electric chair and that this somehow redoubled the jury's obligation to impose a death sentence on Mr. Jennings, as well as the misleading call to them that they had a legal duty to impose death constitute misconduct which cannot be harmless. Trial counsel was ineffective for failing to object to this mischaracterization of the law, and Mr. Jennings was prejudiced as a result.

In addition, the State presented inconsistent and irreconcilable arguments at Mr. Jennings's and co-defendant's Graves's trials, violating Mr. Jennings's constitutional right to a fair trial and due process under the Sixth, Eighth, and Fourteenth Amendments. In *Bradshaw v. Stumpf*, 125 S. Ct. 2398 (2005), the United State Supreme Court recognized, for the first time, that a prosecutor's use of inconsistent and irreconcilable theories to secure a death sentence against separately tried co-defendants can violate due process. In *Stumpf*, the Supreme Court reviewed the voluntariness of Stumpf's guilty plea to the charge of aggravated murder for the shooting death of the victim and whether his conviction and death sentence could stand in light of his allegation that his due process rights were violated. *Id*. at 2402-2403. Stumpf's position was that the prosecutor's decision to take a contrary position regarding the identity of the sole triggerman in the trial of the co-defendant violated the fundamental right of due process.

The Sixth Circuit found that the conviction obtained through the use of inconsistent theories violated the notion of fundamental fairness: "[b]ecause inconsistent theories render convictions unreliable, they constitute a violation of due process rights of any defendant in whose trial they are used. *Stumpf v. Mitchell*, 367 F.3d at 613. The Sixth Circuit granted relief, and expressed concern with the State's disingenuous behavior that extended well into Stump's postconviction proceedings and granted relief on Stumpf's federal habeas petition. *Id*. at 616.

The U.S. Supreme Court ultimately rejected Stumpf's collateral attack of his convictions. *Bradshaw v. Stumpf*, at 2407. The U.S. Supreme Court did, however, break new ground by recognizing that the flip-flopping by the State in order to secure the death sentence against Stumpf may have violated due process even though the change in theories occurred after his conviction and sentence. *Id*. at 2407-2408. The Supreme Court made this distinction because of the possibility that Stumpf's role in the offense may have been a material fact that resulted in his death sentence. *Id*. at 2408. The case was remanded to the Sixth Circuit for consideration of the impact of the prosecutor's actions on the sentence imposed, as distinguished from the conviction itself. *Id*.

Bradshaw v. Stumpf, therefore, did not hold that there was a violation of due process in Stumpf's particular case. This case is important because this is the first time that the U.S. Supreme Court has even recognized that this kind of foul play could render a conviction unreliable. *Bradshaw v. Stumpf*, at 2409 (Thomas, J., concurring).

While the U.S. Supreme Court has not previously held that the use of inconsistent theories constitutes a *per se* due process violation, prosecutorial games have never been condoned. "It is as much [a prosecutor's] duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one." *Berber v. United States*, 295 U.S. 78, 88 (1935); *see also Giglio v. United States*, 405 U.S. 150 (1972); *Green v. Georgia*, 442 U.S. 95 (1979); *Miller v. Pate*, 386 U.S. 1 (1967).

The disingenuous use of inconsistent theories infected the Mr. Jennings's entire penalty phase proceeding directly resulting in his death sentences. Mr. Jennings's case is similar to Mr. Stumpf's, with the exception that the prosecutor's behavior in this case was even more egregious. In Stumpf's case, the prosecutor argued that the co-defendant Wesley was the actual shooter based on newly discovered evidence, and after Stumpf had already been convicted and sentenced. The serious foul play came about during Stumpf's postconviction

proceedings when the same prosecuting attorney attempted to maintain the conviction and sentence. The prosecutor vouched for the credibility of the jailhouse informant in Wesley's trial but later argued that he was not credible and that all along there was evidence to support the theory was Stumpf was the triggerman.

In the instant case, the State argued at Graves trial that Graves "was the leader from beginning to end." Then, after Graves was sentenced to life, the State argued at Jennings's trial that Jennings was the dominant actor in the robbery and murders:

> So when we look at the two roles that these two men played, consider a few of these as we're looking at this. First, remember that Jason Graves is 18. [Jennings] is 26. Look at the roles between the two men. The defendant talked in his taped statement about how he tried to sort of keep him under his wing and take care of Jason. The defendant was the one who was in control of the plan. He laid out the various plans. It was his idea from the very beginning. It was his alibi that was attempted to bew established. It was his truck that was used. It was his bloody knife, his bloody shoe prints, his bloody sheath. It was his masks in his truck.

(R. 936-7).

The State successfully argued at Graves's trial that Mr. Graves could not be under the control and substantial domination of Mr. Jennings, and that Graves was clearly the leader in the robbery. Detective Cunningham testified that Graves

called Mr. Jennings "gutless" and "ball-less" because he could not grab Ms. Siddle. (R. 965). In closing arguments at Graves's trial, the prosecutor argued:

> The defendant [Graves] in his statement to the police wants the police to believe that he was afraid of Mr. Jennings and that he was simply following what Mr. Jennings did and yet, when you listened carefully to what he said, it's very clear that he [Graves] was the leader. He was the leader in this robbery. He was the leader from beginning to end. He had the Gun. He was the one that got the drop on Dorothy Siddle, not Jennings, the defendant [Graves]. And I'm only talking about what he tells us in his taped statement. He's the one that forced his way inside. He instructed her to disarm the alarm. Not Mr. Jennings. He is the one that tells her to call out Jason Wiggins, to call him out. He is the one that orders Dorothy to open the safe. He's the one that goes in the office and tells her to open the safe, because he's concerned there might be another buzzer in there.
>
> And meanwhile, the other man [Jennings], his assistant I would submit is doing the medial work. He's doing the taping while the leader is getting out the money and getting the safe open. The leader had the gun and the control through this situation. And after getting the keys, he is the one who puts the key in the backdoor, which turns off the alarm, so they can make their escape. And according to his own words, it was him and not Brandy Jennings that got the key and put it in the door.

(Record on Appeal, *State v. Graves*, Case No. 95-2284CFA, Vol. VI, p. 1070-2).

The State further argued at closing that it was Graves who lost the murder

weapon, had gloves with blood on them, and that Graves dropped both at the crime scene, not Mr. Jennings (R. 1074-1075).

The trial court relied heavily on the State's contention that Mr. Jennings was the principal actor when sentencing him to death. It is clear that Mr. Jennings's sentencing judge and jury relied on the State's arguments that Mr. Jennings was more culpable than Mr. Graves, despite the fact that the State argued the exact opposite at Mr. Graves's trial. The state's arguing of a diametrically opposed theories at Graves's and Jennings's trials violated Mr. Jennings's rights to due process and equal protection.

Contrary to the lower court's conclusion, Mr. Jennings plead specific fact that, if true, would entitle him to relief. The denial of this claim without an evidentiary hearing was error.

B. Counsel Was Ineffective For Failing To Challenge Forensic Evidence Presented At Trial

Mr. Jennings alleged that the "scientific" evidence used to convict Mr. Jennings was the result of methods with questionable and untested underlying scientific principles, in violation of Mr. Jennings's rights under the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution, and that trial counsel's failure to challenge the reliability of the forensic science used to

convict and sentence Mr. Jennings to death constituted ineffective assistance of counsel. The lower court's summary denial of this claim was error.

Mr. Jennings plead specific facts which, if true, would entitle him to relief. Counsel failed to investigate the crime scene and forensic evidence presented by the State. The State presented testimony from several expert witnesses regarding crime scene investigation, footprint and shoe/track identification, fingerprint identification, blood spatter characteristics, serology, and medical examination. Trial counsel called not one expert to testify on Mr. Jennings's behalf. Had counsel presented his own forensic witnesses to rebut the State's confusing and misleading evidence, Mr. Jennings would not have been convicted and sentenced to death.

Dr. Borges testified that he saw a buck knife at the scene and then purchased "a dental knife with almost all the same characteristics" at Wal-Mart or K-Mart against which he compared the victims' wounds. (R. 393). The alleged murder weapon at the scene was not used in the autopsies, but trial counsel failed to object to this testimony. Furthermore, no *Frye* hearing was held to challenge the use of a different knife. Despite this, with regard to Dorothy Siddle, Dr. Borges was allowed to testify that the knife "*fit* into the holes in the bone" and was "*consistent with*" the wounds" or "one *identical* to it" (R. 394) (emphasis added).

David Grimes was hired by the State Attorney's Office to conduct pattern analysis of the alleged shoeprints found at the scene. Mr. Grimes labeled himself a "document examiner" (R. 661). Furthermore, Mr. Grimes testified that "professional organizations do not certify the impression work" (R. 664). Trial counsel made no objection and conducted no voir dire. (R. 665). Once qualified as an expert, Mr. Grimes went so far as to testify that one of the impressions from the soil outside the Cracker Barrel "*matched*" the Reebok shoe because he could not "*eliminate the shoe*" through an enlarged photo (R. 683). Mr. Grimes manipulated the photos of the alleged bloodstains in the kitchen of the restaurant by adjusting the colors and alternating sizes. Only then was he able to reach this conclusion. Again, trial counsel failed to challenge the methods used by Mr. Grimes in reaching his conclusions and no *Frye* hearing was held to determine if his tests were an acceptable practice.

Officer Browning testified that he found blood transfers in the kitchen of the restaurant that "looked like shoe tracks" (T. 275). He then opined that the "tracks go this way" toward the sink (R. 276). Officer Browning testified to the direction of the alleged tracks as going from the freezer to the office (R. 277). He was at the scene to take photographs and collect evidence, not to reconstruct the crime scene. His credentials went unchallenged by trial counsel.

The State also offered the testimony of John Horth, another police officer who responded to the crime scene. Officer Horth testified that he searched the restaurant and photographed the area. He testified at length to his observations of the crime scene, and the State introduced into evidence the photographs that he took. Defense counsel made no effort to cross-examine this witness regarding his observations, techniques, experience, or the containment of the crime scene.

As alleged in Mr. Jennings's postconviction motion, had counsel properly investigated the crime scene evidence, he would have been able to present his own expert testimony to rebut the State's case against Mr. Jennings. Had counsel consulted with an independent crime scene expert and a medical examiner, he could have challenged the State's case against Mr. Jennings. These facts, if true, would entitle Mr. Jennings to relief. The lower court's denial of an evidentiary hearing on this claim was error.

C. Trial Counsel Was Ineffective For Failing To Challenge The Admissibility And Reliability Of Mr. Jennings's Statements

Mr. Jennings alleged that trial counsel failed to investigate the circumstances surrounding Mr. Jennings's confession, and as a result was ineffective in his motion to suppress the confession and his subsequent cross examination of these key State witnesses. The lower court denied this claim because Mr. Jennings "does not allege any misconduct on the part of law enforcement, nor does he assert that

his statements would have been suppressed had counsel conducted further investigation." (PCR. 3248). The circuit court's denial of this claim was error.

Mr. Jennings in fact alleged that trial counsel failed to investigate Mr. Jennings's background and mental health, and failed to secure competent mental health assistance to determine Mr. Jennings's competence to proceed and sanity at the time of the incident. He also alleged that had trial counsel investigated Mr. Jennings's mental health background, he would have discovered that Mr. Jennings suffered from, *inter alia,* a major mood disorder and a chronic and acute substance abuse disorder and LSD intoxication, which prevented him form making a knowing, intelligent and voluntary waiver of his right to remain silent.

Mr. Jennings further alleged that trial counsel failed to investigate the circumstances surrounding the confession itself. Mr. Jennings's confession was obtained by officers Rose and Crenshaw of the Collier County Sheriff's Office, and Investigator Cunningham of the State Attorney's Office in Collier County, who interrogated Mr. Jennings after his arrest in Las Vegas, Nevada. The first taped recorded statement of Mr. Jennings was tape recorded and played to the jury. Cunningham originally testified that no off-tape discussions occurred. (R.449). However, he later testified as to the contents of a second interrogation which he claimed was not subject to tape recording. This alleged second interview was not

recorded verbatim in Cunningham's written report, and over counsel's objection, the contents of the alleged statement were allowed into the record. (R.715).

> MR. OSTEEN: Okay, Judge, we're getting into statements made by my client. I keep going through Cunningham's report, I don't see those statements in there. And I thing I'm entitled to have the contents of those statements or statements made furnished to me prior to those statements coming in. Now, the Rule requires that. I didn't see it in there. Are you reading from this report? Or just asking questions?
>
> MR. LEE: No sir. I'm asking questions. He has provided a report with the substance of what transpired. You certainly have the right in cross examination to ask him about it and compare his report to that. **But you've had his report, you've had the opportunity to depose him about all the statements. In your deposition you never asked him about these statements.** And that is why this may be somewhat hazy to you. But there is nothing improper here. There has been no discovery violation. This is something that you're free to go into in cross examination.

(R. 717) (emphasis added).

> THE COURT: All right. Are either of you prepared to argue any law about whether in taking his deposition-- did you depose him?
>
> MR. OSTEEN: **Did I depose Mr. Cunningham -- no**.
>
> THE COURT: Did Mr. Sapenoff or somebody from your office?
>
> MR. OSTEEN: **Mr. Sapenoff may have sat in, yeah.**

(R.717) (emphasis added).[4]

The record thus reflects that not only did counsel fail to prepare for and conduct effective depositions of a key witness for the State, but he was totally unaware as to whether or not his second chair attorney had attended, and if so, to the extent of the second chair's participation in the discovery. Even opposing counsel indicated that Osteen's performance was deficient.

Trial counsel's omissions regarding the content of any alleged unrecorded statements made by Mr. Jennings are compounded by comparison of Cunningham's report and testimony with the reports of Officers Crenshaw and Rose. Had trial counsel properly investigated both the internal discrepancies within the several versions of events and the discrepancies between them, he would have been able to effectively challenge the existence and admissibility of Mr. Jennings's alleged second confession, as well as its alleged content. The fact that he did not do so allowed the State to "cherry pick" the aspects of Mr. Jennings's alleged off-tape statements to misleading and inflammatory effect. Counsel's failure to investigate and prepare led to a failure to effectively cross examine and impeach key state witnesses, and deprived Mr. Jennings of an adversarial testing and of the effective

[4] Indeed Sapenoff attended the deposition conducted by counsel for Mr. Jennings' codefendant Graves, but Sapenoff did not actively participate at all in the questioning of Cunningham.

assistance of counsel. Mr. Jennings plead facts which, if true, would entitle him to relief. The circuit court's denial of relief on this claim was error.

CONCLUSION AND RELIEF SOUGHT

Based upon the foregoing and the record, Mr. Jennings respectfully urges this Court to reverse the lower court, grant a new trial and/or penalty phase proceeding, and grant such other relief as the Court deems just and proper.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing brief has been furnished by United States Mail, first-class postage prepaid to Carol Dittmar, Assistant Attorney General, Office of the Attorney General, 3507 East Frontage Road, Suite 200, Tampa, Florida 33607, this 28th day of December, 2011.

_____
PAUL KALIL
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CERTIFICATE OF FONT

I HEREBY CERTIFY that the foregoing Initial Brief has been reproduced in 14 Times New Roman type, pursuant to Rule 9.100 (l), Florida Rules of Appellate Procedure.

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