IN THE SUPREME COURT OF FLORIDA

ARTHUR BARNHILL, III,	)	
	)	
Appellant,	)	
	)	
vs.	)	CASE NO. SC00-547
	)	
STATE OF FLORIDA,	)	
	)	
Appellee.	)	
_____	)	

APPEAL FROM THE CIRCUIT COURT
IN AND FOR SEMINOLE COUNTY
FLORIDA

INITIAL BRIEF OF APPELLANT

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SEVENTH JUDICIAL CIRCUIT

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PRELIMINARY STATEMENT

In this brief, the symbol "R" will designate pages in the record on appeal, including transcript pages as renumbered sequentially by the clerk's office. Volumes will be referenced according to the sequential numbers assigned by the clerk's office for the entire record on appeal, and not by the concurrent numbering of the court reporters.

STATEMENT OF THE CASE

The defendant was charged by indictment with the offense of first degree premeditated murder on August 6, 1995, of Earl Gallipeau, by strangulation. (Vol. 1, R 17-19) The defendant was also charged with the additional offenses of burglary of a structure while armed with a deadly weapon: a belt, towel, ligature; robbery of the victim of keys, money, a wallet, and the contents of the wallet, while similarly armed; and grand theft of the victim's automobile. (Vol. 1, R 17-19)

Prior to trial, the defense moved to declare victim impact testimony unconstitutional, to limit victim impact testimony, and to permit its presentation to the judge only. (Vol. 1, R 65-68, 74-78, 120-121) The defendant also moved to have the victim impact testimony presented via videotape to limit its emotional impact on the jury. (Vol. I, R 135-136) All of these motions were denied by the trial court. (Vol. 1, 161-164) The defense additionally sought to have the jury submit its factual findings regarding its sentencing recommendation, which motion was denied by the court. (Vol. 1, R 146-148, 161-164)

The trial court denied a defense motion to suppress the defendant's statements to police and evidence seized from him during his arrest. (Vol. 1, R 157-160; Vol. 2, 217; Vol 6, R 738) In that statement, the defendant had admitted

his involvement as an accomplice in the crimes, claiming, however, a minor role to that of the main perpetrator, Jelani Jackson. (Vol. 14, R 1968-1976; Vol. 19, R 2978-2981, 2992-3027, 3039) Because of a dispute over whether a New York misdemeanor arrest warrant had existed or not prior to the arrest and because of the court's question whether the defendant had standing to contest the entry into the apartment where he was staying, the defendant was required to testify at the suppression hearing to establish that standing. (Vol. 6, R 712-713) At that hearing, the defendant testified that he was arrested by the New York police at around 6:00 a.m. on August 8, 1995, while seated on the couch of his girlfriend's apartment, holding their eight-month old baby daughter. (Vol. 6, R 720, 722, 727) Barnhill testified that he had arrived at his girlfriend's apartment at approximately 11:00 p.m., while her parents, the lessees of the apartment, were not at home. (Vol. 6, R 721, 719) When his girlfriend's mother phoned home at approximately midnight, Barnhill testified, he spoke to her and she invited him (the father of their grandbaby) to stay with them, despite the fact that it was only a two-bedroom apartment shared by two adults, four children, and the baby (they were planning on moving into a larger apartment soon). (Vol. 6, R 719, 724) In discussing its factual findings as to standing in support of its denial of the motion to suppress, the trial court went on a tirade about the defendant's testimony, calling it "a totally unbelievable explanation"

and claiming "it about borders on perjury." (Vol. 6, R 733-734)

During jury selection, and after conversing at length with his grandmother, the defendant changed his mind and decided to enter a plea of no contest to all of the charges. (Vol. 6, R 748-777) The court accepted the plea (during which it was noted that the defendant in his statement had admitted to accompanying and assisting Jelani Jackson in the commission of these crimes) and adjudicated the defendant guilty of all the charges, including the armed robbery taking of the victim's car keys and the grand theft of the automobile. (Vol. 2, R 218, 221-222; Vol. 6, R 751-777, 791) Immediately after the plea, the defendant became extremely despondent and was ultimately found to be incompetent to stand trial for the penalty phase of the case, the original jury was discharged, and the penalty phase was continued. (Vol. 2, R 223, 224-231;Vol. 6, R 786-799)

In the interim, concerned over the court's comments about the defendant's supposed perjury made at the motion to suppress hearing and the trial judge's resultant inability to be fair and impartial, the defendant, within the ten-day time requirement, moved to disqualify the judge. (Vol. 2, R 232-235) At the original hearing on the recusal, the trial court vocally expressed doubts about the legitimacy of the motion, since the competence of the defendant, whose oath was required on the motion, had been questioned and the issue was still pending resolution. (Vol.

10, R 1279-1298) Defense counsel informed the court that, since beginning medication and treatment, the defendant's mental state had improved to the point that Barnhill understood the motion, and expressed his decision to proceed with the filing of the motion at this stage because of the strict time requirements surrounding motions to recuse. (Vol. 10, R 1283-128) The trial court found the time requirements to have been satisfied and continued the hearing on the motion to recuse, later (after finding the defendant's competence to have returned) denying the motion to disqualify without comment. (Vol. 10, R 1294-1298, 1301-1302; Vol. 11, R 1353)

The defense asked the court to grant a continuance for the penalty phase trial, indicating that their material expert medical witness, Dr. Feegel (whose testimony would rebut much of the opinion testimony of the state's medical examiner) would be unavailable to testify due to scheduled surgery. (Vol. 2, 253-254; Vol. 10, R 1317-1338) The court denied the motion, allowing the perpetuation of the expert's testimony by videotape, which videotape was later presented to the jury during penalty phase over renewed defense objection. (Vol. 2, R 255; Vol. 10, R 1338; Vol. 11, R 1353; Vol. 20, R 3198-3220)

During jury selection, the court repeatedly interrupted and admonished the defense, even where the state, on some occasions, had not interposed any

objection (at one point even threatening to preclude defense counsel from participating in the examination and to require co-counsel to assume control of the voir dire), limiting, over defense objections, the defendant's voir dire examination and refusing to allow counsel to approach the bench to discuss the limitation. (Vol. 12, R 1618, 1619-1620, 1622-1623, 1624-1630, 1631-1635, 1651-1652, 1661-1662, 1669-1672, 1674-1681) On several occasions, the court even took over the defense's voir dire examination and asked jurors simply "if they're leaning one way or the other," rather than counsel's more searching questions, or suggested to counsel that he simply ask the jurors "if anybody is prejudiced." (Vol. 12, R 1628-1630, 1632-1635, 1661-1662) Because of the interruptions and admonishments, some of which were in front of the jury, the defense requested to strike the entire panel which, it felt, had been tainted. (Vol. 12, R 1674-1680) The court denied the motion, contending that, "I think it was necessary to reign you in." (Vol. 12, R 1677, 1681) Two of the defendant's motions to recuse jurors for cause were denied. (Vol. 12, R 1687-1688) The defense exhausted all of its peremptory challenges and asked for more to exclude four additional prospective jurors, who were ultimately seated, which requests for additional peremptories were denied. (Vol. 12; R 1695, 1697-1699)

During the penalty phase hearing, the victim's son was permitted, over the

defendant's renewed objection, to give victim impact testimony. (Vol. 19, R 3059-3063)

During the penalty phase charge conference, the defense sought to waive the statutory mitigating circumstances of "under *extreme* duress or the *substantial* domination of another" and under "*substantial* impairment," contending that it should be permitted to argue mitigation based upon less than the modifiers contained in the statute, without the jury automatically assigning them less weight when compared to the statutory mitigators. (Vol. 19, R 3091-3093) However, when the state requested that the jury be instructed on those statutory mitigators, the court denied the defendant's attempted waiver of them. (Vol. 19, R 3091-3093) Similarly, the defense requested an amended instruction on the statutory mitigating circumstance of being an accomplice, asking that the modifiers "with *relatively minor* participation" be deleted and urging that it should be allowed to argue to the jury less than that standard, which amendment the court denied. (Vol. 19, R 3087)

At the commencement of argument to the penalty phase jury, the state was permitted by the court to project a photograph of Earl Gallipeau, taken while he was alive, onto a movie screen. (Vol. 20, R 3270) When the defendant objected to the enlargement being projected and displayed during the state's closing as an

unlawful play on the sympathies of the jury which was becoming a feature of the penalty trial, the court overruled the objection, saying simply, "It's in evidence." (Vol. 20, R 3270)[1] Following the argument and penalty phase instructions to the jury, to which defense objections were renewed, the jury recommended that the defendant be sentenced to death by a vote of nine-to-three. (Vol. 20, R 3309; Vol. 21, R 3397)

At the *Spencer* hearing, the defendant addressed the court and apologized to the victim's family for his part in the crimes and to his grandmother for putting her through this ordeal. (Vol. 21, R 3411) The defense renewed its objections to the denial of its motion for a continuance and for requiring the defense to present Dr. Feegel's expert medical testimony via perpetuated videotape examination. The defense contended prejudice in that Dr. Feegel's opinions were presented to rebut those of the state's medical examiner, who, the defense claimed, surprised them at trial with opinion testimony that the victim had urinated on himself out of fear.[2]

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[1] The defendant had previously objected to introduction of the photograph as being overly prejudicial and evoking the jurors' sympathies. (Vol. 19, R 3058, 3063)

[2]The state seized upon this salient unrebutted (at trial) testimony twice during its closing argument, to the defendant's prejudice, to argue strongly in favor of the aggravator of heinous, atrocious and cruel, that the victim emptied his bladder in his shorts out of fear. (Vol. 20, R 3277, 3278; Vol. 21, R 3424-3426)

Had the defense been granted the opportunity to have Dr. Feegel to testify live *after* this damaging opinion by Dr. Gore, it could have inquired into Dr. Feegel's opposite opinion (submitted as an affidavit at the hearing) that such discoloration of the shorts "does not mean that he had to have experienced 'fright' around or at the time of loss of consciousness." (Vol. 2, R 340; Vol. 21, R 3418-3427)

The trial court imposed a sentence of death on the defendant, finding four aggravating factors: (a) a previous conviction of a felony and under sentence of imprisonment or community control; (d) while engaged in the commission of a robbery or burglary; (f) for pecuniary gain; (h) heinous, atrocious, and cruel, which the court found on the basis of the time frames surrounding the killing as recounted by the defendant in his statement to the police,[3] accompanied by extreme anxiety, fear, and foreknowledge of death, even though the court specifically found that the victim at no point ever regained consciousness and (i) cold, calculated, and premeditated, again on the basis of the erroneous time frames and also, *inter alia*, that the victim, "when confronted with his attacker surely must have been shocked and confounded by his attacker," to whom the victim had in the past "only shown

[3] Which time frames were clearly erroneous as rebutted by the state's own witnesses and evidence showing that the defendant could not have been in the house as long as his statement indicated. (*See* Vol. 13, R 1824; Vol. 15, R 2451; Vol. 19, R 2956-2959, 3024)

kindness and generosity." (Vol. 2, R 347-353)

The court rejected all of the statutory mitigating factors except the defendant's age of twenty, coupled with his emotional immaturity, which the court found to have "little weight" since Barnhill had the "ability to work and socially interact in an appropriate fashion with other members in his community." (Vol. 2, R 353-358) The court rejected mitigator (b) under the influence of extreme mental or emotional disturbance, noting that the instruction was requested by the state, and finding that the evidence did not rise to the level of "extreme." (Vol. 2, R 354) The court similarly rejected mitigating circumstance (f) substantial impairment, also requested by the state, finding it, too, did not rise to the level of "substantial." Finally, the court rejected mitigators (d) accomplice to the crime and participation relatively minor, and (e) extreme duress or substantial domination, totally rejecting the defendant's confession that he had accompanied Jelani Jackson, who was the actual perpetrator, and completely accepting Michael Jackson third inconsistent statement to the police,[4] somehow divining that the jury had likewise "rejected the defendant's contention that Jelani Jackson murdered Mr. Gallipeau," and finding

[4] During the extremely difficult cross-examination of Michael Jackson by the defense, the trial court at sidebar noted the difficulty and announced that the court judged Michael Jackson to be totally unbelievable as he exhibited all the characteristics of one who was not being truthful. (Vol. 18, R 2879)

that the confession was a "well thought out plan to implicate Jelani Jackson in place of the Defendant." (Vol. 2, R 355-357)

As to the nonstatutory mitigation, the court found as mitigation that Barnhill suffers from a learning disability; that he has frontal lobe impairment, but rejecting that it would impact greatly upon the defendant's behavior; that Barnhill had a difficult childhood, including abandonment by his mother at an early age; that the defendant pleaded guilty; that he manifested appropriate courtroom behavior and was cooperative with court officials; that Barnhill suffers from psychiatric disorders which contributed to his lack of judgment; that the defendant feels remorse for the homicide; and any other aspect of the defendant's character or background, lumping together the neglect of medical treatment by his mother which resulted in the loss of sight in one eye, that he was a poor student due to poor reading skills, and that he suffered shock in seeing his mother arrested and his father imprisoned for life. (Vol. 2, R 358-363) However, the court found that all these circumstances, although established by the defense, were entitled to only little weight. (Vol. 2, R 358-363) The court rejected the nonstatutory mitigating circumstances of his cooperation with law enforcement finding, despite testimony from the police that he was cooperative, that his confession was false and therefore not cooperative. (Vol. 2, R 359-360) The court also, as had been previously

indicated, rejected the defendant's version of minimal culpability as a minor accomplice of Jelani Jackson as a nonstatutory mitigator. (Vol. 2, R 364) In purporting to reject nonstatutory mitigation, the trial court found that the defendant was provided strong moral guidance by his paternal grandparents, was "capable of functioning as a normal human being in the day-to-day activities of our fast paced society," and that the defendant chose to violate his grandparents trust "by disobeying the rules of their house." (Vol. 2, R 363) This testimony of the grandparents, the court indicated, was "compelling and of great value" to the trial court. (Vol. 2, R 363)

The trial court ruled that "the scales of life and death tilt to the side of death," finding that the aggravating circumstances far outweigh the mitigating circumstances, and further ruling that each aggravator, standing alone, would be sufficient to outweigh the minimal mitigation. (Vol. 2, R 364-365)

The court sentenced the defendant to two life terms of imprisonment for the armed burglary and armed robbery convictions, and five years on the grand theft auto conviction, all sentences to run concurrent with each other and with the death sentence. (Vol. 2, R 365)

A notice of appeal was timely filed. (Vol. 2, R 371-372, 376-377)

STATEMENT OF THE FACTS

The wallet of the victim, Earl Gallipeau, age 84, was discovered by a neighbor on the street a few doors down from his house at approximately 6:00 p.m. on the evening of August 6, 1995. (Vol. 13, R 1824-1826, 1912) His automobile, a Ford Taurus, was seen by another neighbor leaving his residence with what appeared to be two occupants at approximately 2:30 p.m. that day. (Vol. 19, R 2956-2959) Alerted by these neighbors, a friend retrieved the wallet and entered the victim's residence, leaving it in the entranceway at approximately 7:30 p.m. (Vol. 13, R 1826-1827, 1912-1918) When she had not heard from Mr. Gallipeau by 10:00 that night, the friend became alarmed and phoned police, who discovered the deceased victim on the floor of the back bedroom of the house, with a towel and elastic belt wrapped around his neck. (Vol. 13, R 1789-1794, 1918)

When Jelani Jackson and another friend of the defendant, Arthur Barnhill, III, were arrested in New York City on August 8, 1995, driving the victim's automobile, they identified the defendant as the possessor of the vehicle. (Vol. 13, R 1932-1933; Vol. 14, R 1957; Vol. 16, R 2524-2525) The defendant was arrested on an old New York misdemeanor warrant in his girlfriend's apartment, while seated on the couch playing with their eight-month old daughter, and was held and questioned

in the murder/robbery of the victim. (Vol. 13, R 1925-1928) Two police officers involved in the case testified that Barnhill was always cooperative with them. (Vol. 13, R 1928; Vol. 14, R 1957)

Barnhill, in his taped statement to the police, immediately admitted to going to the victim's house with an accomplice for the purpose of taking a car, and to participating in the crimes against Mr. Gallipeau (who was a customer of Barnhill's grandfather's lawn service, for whom the defendant sometime worked) but indicated that he was simply an accomplice to Jelani Jackson, whose idea it was to steal the car and who actually killed the victim. (Vol. 14, R 1968-1976; Vol. 19, R 2978-2981, 2992-3027, 3039) Jelani, who was observed with recent scratches on his arm at the time of his arrest, and who was also detained and questioned for the murder and robbery, spoke on the telephone from the New York jail to his brother Michael Jackson, who was similarly being questioned by the police in Florida. (Vol. 14, R 2054-2058; Vol. 15, R 2262-2263, 2269-2270, 2299; Vol. 16, R 2468; Vol. 19, R 3051-3052) Michael gave several inconsistent stories to the police, first denying any involvement whatsoever, then stating that he had accompanied the defendant part way to the victim's house, but had left him before arriving there, and finally, after speaking to Jelani and to his parents, claiming that he, and not Jelani, had accompanied Barnhill to the victim's house, but left upon the defendant

indicating that they would have to kill the victim. (Vol. 14, R 2057-2058,; Vol. 18, R 2763-2766, 2780-2781, 2842-2843, 2861-2874; Vol. 20, R 3181-3182, 3189) Michael, in his third inconsistent statement to police, indicated that he and Barnhill had gotten a ride after church part way to the victim's house, where the defendant intended to take a car in order to drive to New York to see his family. (Vol. 18, R 2763-2766)[5] Michael's version has he and Barnhill walking the 2.64 miles from where they were dropped off to the victim's house in between ten to thirty minutes, then entering the open garage door, then entering the house through the unlocked kitchen entrance, where they saw the victim's wallet and car keys on the counter, and secretly observed Mr. Gallipeau around the corner in his living room watching television. (Vol. 18, R 2767-2771, 2894-2895) Michael recalled that Barnhill immediately indicated that they would have to kill the victim, in which act Michael said he did not want to take part and left. (Vol. 18, R 2771) Although a neighbor testified that she observed two occupants of the victim's car driving off in it, another state witness testified that she observed Michael Jackson, whom she knew vaguely from school, walking alone on a street in a direction away from the town in which the victim lived; however, she was certain that the time frame was between

[5] A church member confirmed giving the two boys a ride after they had assisted him at the church fellowship, dropping them off at 2:15 p.m. (Vol. 16, R 2420-2422)

12:30 - 1:00 p.m., and not later. (Vol. 16, R 2434, 2441; Vol. 19, R 2956-2959)

Barnhill, who was living temporarily at the Jackson house,[6] however, told police that he had accompanied Michael's brother, Jelani, to the victim's residence, with Jelani leading the way in order to steal the victim's car. (Vol. 14, R 1972-1974; Vol. 19, R 2978-2979, 3039) Barnhill also recalled them entering through the open garage into the kitchen sometime in the afternoon or evening, one time recounting that they did not arrive there until 7:00 p.m., after having walked for about two hours from Sean's house. (Vol. 14, R 1973-1974; Vol. 19, R 2978-2979, 2988-2992) But then, despite all the state's evidence of the car being seen driving away at 2:30 p.m., Barnhill being seen driving the victim's car up to the Jackson house at approximately 4:00 p.m., and the wallet being found at 6:00 p.m., Barnhill indicated that he and his accomplice stayed secretly in the kitchen for several hours while deciding what to do and that they did not leave the victim's house until around 7:00 p.m.. (Vol. 13, R 1824; Vol. 14, R 1973; Vol. 15, R 2451; Vol. 19, R 2956-2959,

[6] Arthur Barnhill had been living with his paternal grandparents until two weeks previously, when they had returned home from vacation to find other boys in the house, contrary to their house rules, and, while angry asked him to leave and had been granted permission by Mrs. Jackson to stay at their house temporarily. However, on the day in question, Mrs. Jackson had indicated to Arthur that perhaps it was time for him to move out.

2979, 3024)[7] Barnhill testified that Jelani then confronted the victim and knocked him to the ground, choking him with his hands, while he (Barnhill) kept his distance from the activity. (Vol. 14, R 1974; Vol. 19, R 2979) Barnhill only got involved in the act when Jelani requested his assistance in holding Mr. Gallipeau still, which he reluctantly did. (Vol. 14, R 1974-1975; Vol. 19, R 2979) When Barnhill decided to let go of Mr. Gallipeau, Jelani got up while the victim was still making gasping sounds (although unconscious), retrieved a towel and the victim's elastic belt and wrapped both tightly around Gallipeau's neck, killing him. (Vol. 14, R 1975; Vol. 19, R 2979-2980)

While Barnhill watched and waited, Jelani went to the garage, closed the door and started the car, returning to the kitchen to take the victim's wallet and request that Barnhill assist him in dragging the victim into the back bedroom. (Vol. 14, R 1975-1976; Vol. 19, R 2980, 3127) Blood on Barnhill's jersey was consistent with the DNA of the victim and, it was speculated, came from sores on the victim caused by recent surgery and either got on the shirt during the dragging or when the scene and the body were wiped down to erase all fingerprints. (Vol. 14, R 1976; Vol. 17, R 2635-2636; Vol. 19, R 2981)

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[7] The defense speculated that the defendant's miscalculation of the time frames was not intentional but instead was a direct result of his learning and mental disabilities. (Vol. 2, R 326)

Barnhill indicated that they left in the vehicle with him driving (because Jelani did not have a driver's license), that he dropped off Jelani, before going to Jelani's house where the plan was to pretend that he had not seen or been with Jelani. (Vol. 14, R 1977; Vol. 16, R 2451; Vol. 19, R 2982) Barnhill stated that Jelani gave him some of the money from the victim's wallet, which he used to pay off a telephone debt, and that they drove around town until late that night when they left for New York. (Vol. 14, R 1977-1978; Vol. 19, R 2983) Jelani told police that he only met up with the defendant later and testified that Barnhill gave him the money to hold and which he counted, never questioning the defendant where he got the car or the money. (Vol. 14, R 2012, 2044-2045, 2081)

The medical examiner, Dr. Sashi Gore, opined that the cause of death was strangulation from a ligature, wrapped so tightly as to break the hiatal bone in the neck. (Vol. 13, R 1847-1856) He also noted some contusions and a swollen ear, which he opined were caused by a fist or a blunt instrument and three to four blows, but which injuries, he also admitted, could have occurred when the victim hit the floor. (Vol. 13, R 1839, 1844, 1846, 1882) While the maximum amount of time for a death to occur from strangulation was six to seven minutes, Dr. Gore opined, with other factors involved such as heart arrhythmia and the severely blocked condition of Gallipeau's arteries, death could have occurred in the much

shorter time of one to two minutes, or even less in the case of someone as elderly as the victim here. (Vol. 13, R 1856-1860, 1885-1886) Loss of consciousness would occur even quicker and certainly within one to two minutes, or even sooner because of the victim's arterial sclerotic condition. (Vol. 13, R 1860, 1885-1886) Dr. Gore, while recognizing a treatise, *Forensic Pathology*, by Vincent DeMayo, in which it is indicated that unconsciousness could occur within ten to thirty seconds, disagreed with this leading authority (Vol. 13, R 1894), but admitted that it was possible that the victim could have been subdued and lost consciousness quickly. (Vol. 13, R 1895) Dr. Gore also speculated that because of the amount of petechiae (hemorrhaging) to the eye, the pressure to the neck was perhaps released at some point, rather than a continuous strangulation, but admitted that these petechiae would occur even with the slightest easing of pressure and even though the person would not regain consciousness. (Vol. 13, R 1895-1896, 1902-1904) Dr. Gore also opined at trial that the discoloration of the victim's shorts probably indicated a loss of control of the bladder upon the realization of the assault and fear. (Vol. 13, R 1862)

Dr. Feegel, a forensic pathologist and former medical examiner in Tampa and Atlanta, presented by the defense via videotaped examination,[8] contradicted Dr.

[8] *See* Point IV, *infra*.

Gore's opinion regarding the length of time for death or unconsciousness to occur and the significance of any petechiae, saying that less pressure was needed to strangle someone in the victim's state of health, and that unconsciousness would certainly occur in less than one minute and probably under thirty seconds during the manual strangulation. (Vol. 20, R 3205-3208, 3210) Less pressure being required for an elderly person to be strangled would necessarily translate into "less constant suffering." (Vol. 20, R 3228) Signs of petechiae do not indicate any lessening of pressure, but only indicate death through asphyxiation. (Vol. 20, R 3218-3219) Any assertion of any other significance of the petechiae, such as that by Dr. Gore, is "nonsense" in Dr. Feegel's opinion, and is not a medically solid opinion. (Vol. 20, R 3219) Any gasping sounds from the victim between the manual strangulation and the ligature, he stated with certainty, would not mean a regaining of consciousness, but instead would have been a mere reflex action. (Vol. 20, R 3209) While Dr. Feegel complimented Dr. Gore on his dissection of the victim's neck, he indicated displeasure with the lack of an examination of the carotid arteries since a lack of blood to the brain, which would have been revealed by such an examination, would have caused the loss of consciousness and death to occur quicker than simply the blocking of oxygen. (Vol. 20, R 3214-3217) Dr. Feegel, in an affidavit presented to the judge at the *Spencer* hearing, also refuted Dr. Gore's

testimony regarding the stained condition of the victim's shorts, swearing that such discoloration was not indicative of fear or loss of bladder control at or around the time of death. (Vol. 2, R 340; Vol. 21, R 3418-3426)

Evidence presented in mitigation revealed a most difficult and lonely childhood for Artie Barnhill (as his family and acquaintances know him), including abandonment, neglect, and lack of affection by his mother, being shuttled between family members to live for all of his life, while his father, Arthur Barnhill, Jr., was imprisoned for all but a brief period of young Artie's life, during which time out of prison, he would beat young Artie with an extension cord, as would his mother. (Vol. 15, R 2159-2160; Vol. 17, 2583; Vol. 18, R 2901, 2904-2907, 2914, 2932; Vol. 19, R 2951, 2953; Vol. 20, R 3157) Young Artie experienced the trauma of seeing both his mom and dad being arrested by the police several times, so much so that the arresting officer remembered it over a decade and a half later. (Vol. 20, R 3191-3193)

The lack of medical attention by his mother when Artie suffered an eye injury at age 4, which could have been cured with such attention, caused the loss of vision in his left eye and directly resulted in his reading and learning disability (he reads at, at most, a third grade level) and social problems interacting with other kids. (Vol. 14, R 2131-2133; Vol 15, R 2160-2161; Vol. 17, R 2570; Vol. 18, R 2902, 2926,

2935-2937; Vol. 20, R 3161-3162) When Artie's grandmother tried to help the youth overcome his reading problem by assisting him with his reading, the child became excited and eager, making real progress; however, Artie's mother stopped the grandmother from this activity, finding it insulting. (Vol. 18, R 2912, 2950) These eye problems and this reading level has impaired Arthur Barnhill's whole life. (Vol. 14, R 2131)

The defendant also suffered from attention deficit disorder, with a difficulty in school focusing, attending, paying attention, and completing school work. He could not read because he was not able to read; he did not perform in school because he was not able; Artie, who was held back in kindergarten for three years and then placed in a learning disabled class, was never equipped for the challenges of school so he was a failure from the get-go. (Vol. 14, R 2132-2133) Responding similarly to previous attempts of help from family members, Barnhill's mother, Nadine, also prevented assistance from other family members with his education and neglected Artie's school problems, never responding to inquiries of her from the school. (Vol. 18, R 2904, 2914, 2932; Vol. 19, R 2951) These disabilities put him at a loss from early on in his development. (Vol. 14, R 2133; Vol. 20, R 3158, 3161-3162)

Barnhill, who was placed on Prozac for depression, Haldol, an antipsychotic

medication, and Cogentin (to counter the side effects of Haldol) prior to trial, also was diagnosed as having a frontal lobe impairment. (Vol. 14, R 2127-2129; Vol. 15, R 2152) This caused an inability to moderate his thinking, with him acting first and then thinking only afterward. (Vol. 14, R 2137-2138) Coupled with his other disabilities, this would cause him to have a lack of impulse control and an inability to control his actions and to plan or think ahead, especially in a complex society and in stressful life situations. (Vol. 14, R 2137-2138; Vol. 15, R 2152-2153) A person with these psychological impairments, coupled with a stressful situation (a "very unfortunate combination," said Dr. Eisenstein, the clinical psychologist and neuropsychologist), will, ninety percent of the time, make the wrong decision; they are simply not capable of making the right decision due to flaws in judgment. (Vol. 15, R 2153; Vol. 17, R 2577)

> DR. EISENSTEIN: They do not have access to the information to input it into the computer. The frontal lobes are the hard drives of the individual. The data that's entered is going to be erroneously understood and the wrong decisions will be made. Stress only complicates a weakened brain.

(Vol. 15, R 2154) Dr. Eisenstein differentiated between a sociopathic killer who plans the crime and feels no remorse, and the defendant, who has a brain compromise (which has by mental health experts been causally connected to

serious crime) but who generally cares for and is protective of others and feels remorse:

> DR. EISENSTEIN: He [Arthur Barnhill] had problems with some serious family issues, lack of a family home. Even though there were individuals who did or do care and love Mr. Barnhill, but his growing up was extremely erratic and inconsistent and seriously feeling senses of alienation and/or rejection. But he didn't commit crimes that were involved with damaging or harming others, he was protective of others . . . . Although he did fight with his sisters . . . he took care of all the younger cousins, he loved his younger cousins and he really cared and showed a tremendous concern for them.

(Vol. 15, R 2155-2156) Dr. Gutman, a clinical psychiatrist, similarly described Artie as a mentally slow, simplistic, sensitive person who would feel sorry for bad things that happen, feeling genuine remorse for his participation in this homicide. (Vol. 17, R 2572-2573, 2581) Artie Barnhill was not self-centered or self-focused; he had feelings and emotions for others, something not typical with sociopathic killers. (Vol. 15, R 2156; Vol. 18, R 2909, 2918; Vol. 20, R 3152-3153) The teenage Artie was described as someone who always cared for his younger playmates and friends at school as well as his younger relatives, identifying with the younger kids more readily than those his own age. (Vol. 20, R 3151)

At age twenty, Barnhill was extremely regressed and emotionally immature,

incapable of functioning on his own, a dependent personality who looks to others to make decisions for them. (Vol. 15, R 2163-2164; Vol. 17, R 2576, 2578) When questioned about how such a person as the defendant could be involved in this act either by himself or with another, Dr. Gutman replied,

> Well, a drowning man will grab at straws. Grabbing at a straw is an act but it is an act of desperation, it's an act of weakness, it's a bumbling type of act. . . . They look for a relationship with somebody where they don't have to make the big decisions. But if they don't find that person then they make bumbling, stupid decisions. And that, of course, is what I think about Mr. Barnhill.
>
> * * *
>
> And he is a bumbler, he's a mistake maker, he wanted a car to go to New York and he could have taken a bus. But he made a mistake and he did something that was tragic and horrendous. But we've taken into consideration the man that did it, why he did it and it was a drowning man grabbing at straws, a weak man, an outcast, somebody who had been a black sheep of his family.
>
> His mother painted his walls black . . . . One thing after the other, he was the outcast, he was the neglected one and the humiliated one.
>
> And he has a very poor self confidence and he struggled in life. So that's the picture that I see of this man. A wanton, evil predator, ice water in his veins killer? No. A killer and a murderer, yes. But a very simple, slow and bumbling, inadequate person.

(Vol. 17, R 2582-2583) He was impulsive, suffered low self-esteem and was

emotionally helpless. (Vol. 15, R 2163-2164) The psychiatrist compared Barnhill to a house built on muck with no pilings or foundation:

> Frontal lobe dependent personality, if you're talking about an upbringing without roots, without good underfinish, it's like putting a house on muck with no pilings, and it's going to sink or it's going to crash, its foundation is poor. It's going to make mistakes, it's not going to be a sturdy house.
>
> When children are taught moral lessons of life and have positive parents and are treated kindly, they have a good self confidence. If they are missing all of those things, then they have a weak self confidence and a poorly structured moral arm and very poorly structured capacity to survive in this very difficult world.
>
> It requires every bit of planning and wisdom and emotional and physical strength to survive successfully. You can live but surviving successfully – he bumbled in the Job Corp., he bumbled in interpersonal relations, he bumbled at trying to succeed in school.

(Vol. 17, R 2584) Arthur Barnhill, the other doctor also concluded, was simply "destined to fail in a complex society." (Vol. 15, R 2164)

His various relatives with whom he spent some time all testified that Artie was a shy, caring person, who would always try to help other people, but was easily led by others and was constantly being taken advantage of by them. (Vol. 18, R 2909, 2931; Vol. 19, R 3130-3131; Vol. 20, R 3134-3136, 3159, 3234-3236) As a teen, Artie sometimes would stand up for his younger schoolmates, despite

peer pressure from his older acquaintances. (Vol. 20, R 3151) However, it was noticed that around the guys, Arthur Barnhill would put on a facade, trying to act tough in order to gain their approval. (Vol. 20, R 3152) Shy, the defendant would often try to buy his friends, giving them money and buying them things they wanted. (Vol. 20, R 3160) Jelani Jackson especially took advantage of the defendant. (Vol. 20, R 3246)

Throughout his short life, Artie always felt the lack of love from his mother, leading to chronic depression and sadness, and would often question relatives as to the reason for her lack of affection and attention. (Vol. 17, R 2572; Vol. 18, R 2906-2907, 2910, 2918-2919, 2938; Vol. 19, R 3136) His mother, Nadine, first expressed her dissatisfaction with Artie even before he was born, attempting suicide while she was five months pregnant with Artie. (Vol. 18, R 2901) Nadine also abandoned Artie to family members when he was seven years old, simply leaving him behind with an aunt and uncle following a family wedding and never calling or writing the child. (Vol. 18, R 2905-2910) She even went to the extreme measure of painting the boy's room a dismal black, while painting her daughters' room a bright, cheery white. (Vol. 18, R 2908, 2919)

All the family agreed that Nadine "did Artie wrong" and failed him, yet the child never stopped loving his mom and hopelessly, desperately craved her love in

return. (Vol. 18, R 2918-2919, 2921, 2925; Vol. 21, R 3161) No matter what, though, Artie never did receive his mother's love, even now when he needed it most. (Vol. 18, R 2919-2921)

SUMMARY OF ARGUMENT

Point I. The trial court erred in denying the motion to disqualify itself. The motion, swearing that the defendant feared that he would not receive a fair penalty phase trial and fair sentencing determination where the court had previously expressed the opinion that the defendant was lying, bordering on perjury, was legally sufficient. The trial court had to recuse itself.

Point II. The court erred in denying two strikes for cause of potential jurors who had indicated strong convictions about the imposition of the death penalty. The court's attempted rehabilitation by asking leading general questions as to whether they could be fair was totally insufficient to establish their impartiality.

Point III. The court improperly limited the defendant's voir dire examination of jurors, repeatedly interrupting his jury questioning, even in the absence of state objections, and improperly chastised him. This prevented the defense from exploring highly relevant areas of inquiry with probing questions, thereby precluding him from determining jury bias and being able to properly exercise his for cause and peremptory challenges. Further, the repeated interruptions and admonitions from the court tainted the jury pool against the defense, precluding a fair trial by jury.

Point IV. The trial court abused its discretion in denying the defendant's motion for a continuance. Defense counsel's expert witness was unavailable to testify at the scheduled commencement of the penalty phase trial due to medically necessary surgery. The trial court's solution, over the defense objections, of permitting the defense to perpetuate the doctor's testimony via videotape was totally inadequate since the doctor was to rebut the state's medical examiner on material issues related to aggravating circumstances. This was impossible to do, since the medical examiner had not yet testified. When the medical examiner testified to new opinions not previously disclosed, the defendant had no way to rebut those opinions without his live witness. The defendant suffered irreparable harm since the jury did not get to hear what the rebuttal evidence from the defense expert would have been.

Point V. The trial court committed fundamental error in adjudicating and sentencing the defendant on both robbery of the victim's car keys and grand theft of the automobile, where the taking was in one continuous act. Even where the defendant has entered a no contest plea to both charges, where the plea was not negotiated and the state did not give up any rights, the issue can be raised for the first time on appeal.

Point VI. The trial court erred in refusing to allow the defendant to waive

statutory mitigating circumstances, in the face of the state's request to read those factors to the jury. Since mitigating factors are for the defendant's benefit, the state has no corresponding right to request those circumstances be presented to the jury. The defense was legitimately concerned that, with two sets of mental mitigating instructions presented to the jury, one with the statutory modifiers of "extreme" and "substantial" and one set without, that the jury, if not finding the modifiers present, would believe that the nonstatutory mental mitigators were entitled to much less weight.

Point VII. The trial court erred in making its findings of fact in support of the death sentence where the findings were insufficient, where the court failed to consider appropriate mitigating factors, where the court erroneously found inappropriate aggravating circumstances, and where a comparison to other capital cases reveals that the only appropriate sentence in the instant case is a life sentence.

ARGUMENT

POINT I.

THE TRIAL COURT ERRED IN DENYING THE MOTION FOR DISQUALIFICATION WHERE THE COURT, IN A MOTION HEARING, DECLARED THAT THE DEFENDANT'S TESTIMONY AT THAT HEARING AMOUNTED TO PERJURY, THEREBY CREATING THE WELL FOUNDED FEAR IN THE DEFENDANT'S MIND THAT HE WOULD NOT RECEIVE A FAIR AND IMPARTIAL PENALTY PHASE TRIAL AND SENTENCING IN VIOLATION OF THE DEFENDANT'S RIGHTS UNDER THE FIFTH, SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION, AND ARTICLE I, SECTIONS 9, 16, AND 17 OF THE FLORIDA CONSTITUTION.

As recounted in the Statement of Facts, the trial court, at the conclusion of the motion to suppress hearing, went on a tirade about the truthfulness of the defendant, Arthur Barnhill, who had testified at the hearing as to his temporary residence in New York City, calling it "a totally unbelievable explanation" and claiming "it about borders on perjury." (Vol. 6, R 733-734) The defendant timely filed a sworn motion to disqualify the judge, claiming and swearing under oath that, due to the comments made by the trial court with regard to his veracity, he had a well-founded fear that he could not receive a fair and impartial penalty phase trial and sentencing. (Vol. 2, R 232-235) The court ultimately denied the motion,

without comment, which motion was renewed at the start of the trial, and likewise denied. (Vol. 10, R 1294-1298, 1301-1302; Vol. 11, R 1353) The failure of the court to recuse itself, where it had, in open court, announced its views of the defendant's veracity, denied the defendant a fair and impartial trial and due process of law and subjected him to imposition of a cruel or unusual punishment in violation of the Florida and United States constitutions. As this issue is strictly a question of law, ***MacKenzie v. Super Kids Bargain Store, Inc.***, 565 So.2d 1332, 1335 (Fla. 1990), this Court should review the issue *de novo*.

Rule 2.160, Florida Rules of Judicial Administration, governs the procedure to be followed in deciding motions to disqualify or recuse the trial judge. It provides, in part:

> (b) Parties. Any party, including the state, may move to disqualify the trial judge assigned to the case on grounds provided by rule, by statute, or by the Code of Judicial Conduct.
>
> (c) Motion. A motion to disqualify shall be in writing and specifically allege the facts and reasons relied on to show the grounds for disqualification and shall be sworn to by the party by signing the motion under oath or by a separate affidavit. The attorney for the party shall also separately certify that the motion and the client's statements are made in good faith.
>
> (d) Grounds. A motion to disqualify shall show:

> (1) that the party fears that he or she will not receive a fair trial or hearing because of specifically described prejudice or bias of the judge . . . .
>
> * * *
>
> (f) Determination--Initial Motion. The judge against whom an initial motion to disqualify under subdivision (d)(1) is directed shall determine only the legal sufficiency of the motion and shall not pass on the truth of the facts alleged. If the motion is legally sufficient, the judge shall immediately enter an order granting disqualification and proceed no further in the action.

The requirements set forth in the rule were established "to ensure public confidence in the integrity of the judicial system as well as to prevent the disqualification process from being abused for the purposes of judge-shopping, delay, or some other reason not related to providing for the fairness and impartiality of the proceeding." ***Livingston v. State***, 441 So.2d 1083, 1086 (Fla. 1983); ***Rogers v. State*** , 630 So.2d 513 (Fla. 1993).

In ***State ex rel. Davis v. Parks***, 194 So. 613, 615 (Fla. 1939), this Court noted the commitment this rule provides to the appearance of impartiality and the due process guarantee of a fair trial:

> This Court is committed to the doctrine that every litigant is entitled to nothing less than the cold neutrality of an impartial judge. It is the duty of Courts to scrupulously guard this right and to refrain

> from attempting to exercise jurisdiction in any matter where his qualification to do so is seriously brought in question. The exercise of any other policy tends to discredit the judiciary and shadow the administration of justice.
>
> It is not enough for a judge to assert that he is free from prejudice. His mien and the reflex from his court room speak louder than he can declaim on this point. If he fails through these avenues to reflect justice and square dealing, his usefulness is destroyed. The attitude of the judge and the atmosphere of the court room should indeed be such that no matter what charge is lodged against a litigant or what cause he is called on to litigate, he can approach the bar with every assurance that he is in a forum where the judicial ermine is everything that it typifies, purity and justice. The guaranty of a fair and impartial trial can mean nothing less than this.

A party seeking to disqualify a judge need only show a well grounded fear that he or she will not receive a fair trial at the hands of the judge. ***Livingston v. State***, *supra* at 1086. The inquiry focuses on the reasonableness of the defendant's belief that he or she will not receive a fair hearing, "whether the facts alleged would place a reasonably prudent person in fear of not receiving a fair and impartial trial." ***Id***. at 1087; ***Rogers v. State***, *supra* at 515. "It is not a question of how the judge feels; it is a question of what feeling resides in the affiant's mind, and the basis for such feeling." ***Crosby v. State***, 97 So.2d 181, 183 (Fla. 1957). In applying the test, the function of the trial court is limited to a determination of the

legal sufficiency of the affidavit, without reference to its truth and veracity. If the allegations are sufficient, the judge must retire from the case. ***Id***., *quoting* ***Dickenson v. Parks***, 140 So. 459 (Fla. 1932).

In the instant case, the motion and affidavit for disqualification state:

> 1. Defendant has a well grounded fear that this court will not be fair and impartial during the penalty phase of this trial, at which the State will be seeking the Death Penalty, and the Court will ultimately be making a decision whether to impose the Death Penalty on the Defendant.
> 2. The actions indicating bias on the part of the trial judge which give the defendant a well-grounded fear include the following: On October 14, 1998, Defendant entered a plea as charged to the indictment charging him with first degree murder, armed burglary, robbery with a deadly weapon and grand theft auto. Prior to entering his plea, defendant was present when the trial court heard a Motion to Suppress Statements and other Evidence. Defendant testified at the hearing as to the limited issue of whether defendant had standing, i.e.: a privacy interest in the residence where he was arrested by New York City Police authorities, so that the defendant could contest the legality of his arrest and any evidence gained therefrom.
> 3. At the conclusion of the defendant's testimony, which was uncontroverted by any other testimony in the record at the suppression hearing, the trial court made certain comments on the record. The trial court stated that the defendant's testimony was wholly unbelievable and bordered on or was very close to perjury. This finding was clearly made based upon the substantive testimony of the defendant. The Court made no findings on the record as to the demeanor of

> the defendant. Defendant would argue that the prosecutor brought out no inconsistencies in the defendant's testimony on cross-examination. Defendant would point out herein that his testimony had been limited to the issue of whether he was living at the residence where he was arrested, and the arrangements he had made to live there. Defendant answered the questions posed to him by his counsel and counsel for the State. Defendant would argue that the trial court went well beyond any role the court might have to consider the credibility of witnesses, especially when there was no other testimony put forward which contradicted the testimony of the defendant.
>
> 4. Defendant has a well-founded fear that the trial court will not give him a fair hearing at penalty phase, in that the court has so strongly stated a distrust of the defendant's credibility should he decide to take the witness stand again. Defendant would be chilled in the exercise of his decision whether to testify at the penalty phase hearing or in a Spencer hearing, due to the court's commentary on the record at the suppression hearing.

(Vol. 2, R 232-234)[9]

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[9] A reading of the trial transcripts strongly suggests a lingering animosity towards the defense case on the part of the trial court. *See, e.g.*, during voir dire examination: court interrupts and cuts off defense voir dire, even without an objection (Vol. 12, R 1622, 1623, 1624, 1631, 1669-1670, 1674); court refuses to allow defense opportunity to approach bench to argue ruling (Vol. 12, R 1623); court accuses defense of trying to mislead jury (Vol. 12, R 1625, 1632, 1652, 1674); court threatens to remove defense attorney from case and replace with co-counsel (Vol. 12, R 1625, 1652); court takes over voir dire from defense (Vol. 12, R 1628-1630, 1632-1634); court announces to defense that it was necessary to reign counsel in, further limiting voir dire (Vol. 12, R 1677-1681); *see further*, Point II, *infra*. During penalty phase trial: court accuses defense of misleading the

The appellant recognizes that mere adverse rulings to the party in the past does not constitute a legally sufficient ground for a motion to disqualify. ***Barwick v. State***, 660 So.2d 685, 692 (Fla. 1995); ***Tafero v. State***, 403 So.2d 355, 361 (Fla. 1981). However, as recounted in the motion and affidavit, the trial court here specifically commented that it believed the defendant to be lying, despite the lack of any contradictory evidence to the defendant's testimony.

A statement by a trial judge that he or she feels a party has lied in the case is generally regarded as indicating a bias against the party. ***Campbell Soup Co. v. Roberts***, 676 So.2d 435, 436 (Fla. 2nd DCA 1995); ***Deauville Realty Co. v. Tobin***, 120 So.2d 198 (Fla. 3rd DCA 1960). *See also* ***Morales v. Four Star Poultry and***

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jury or the court (Vol. 13, R 1753-1759, 1869-1870; Vol. 14, R 2067; Vol. 17, R 2597-2599); court admonishes the defense for making objections (in order to

[9(cont.)] preserve issues) during the state's opening, claiming purely tactical motives to disrupt, and claims defense counsel "dangerously close" to contempt (Vol. 13, 1753-1759, 1761-1762); court refuses to allow defense to approach the bench to argue ruling, at one point, in front of the jury, ordering defense, "I made my ruling, sit down." (Vol. 13, R 1762, 1858; Vol. 16, R 2429, 2436, 2515); court is facetious in front of jury, when defense requests opportunity to see photos on which state is questioning witness, saying, "*Do me a favor*, why don't you show those to the defense." (Vol. 13, R 1915); court chastises defense, twice in front of the jury, "Don't do it again," and "Stop, don't argue with me." (Vol. 13, R 1869; Vol. 16, R 2476, 2514); and court cuts off defense questioning without any objections from the state. (Vol. 16, R 2476, 2480, 2513, 2514; Vol. 17, R 2597-2599) The appellant suggests that these instances show that the trial court had departed from his role as a neutral arbiter in this case to the appellant's detriment.

Provision Co., Inc., 523 So.2d 1183, 1185 n. 3 (Fla. 3rd DCA 1988), wherein it was noted that the original trial judge in the cause was forced to recuse himself due to his expressed belief that Morales was "patently untruthful." This Court has granted a petition for writ of prohibition because the trial court, having been presented an affidavit from a party, commented, "If [the party] were here I wouldn't believe him anyway." ***Brown v. St. George Island, Ltd.***, 561 So.2d 253 (Fla. 1990). A district court similarly found a judicial comment about a party's believability ("as thin as a balloon") to be the basis for the granting of a writ of prohibition to have the trial court recuse itself. ***Owens-Corning Fiberglas Corporation v. Parsons***, 644 So.2d 340 (Fla. 1st DCA 1994). Likewise, a judge's comments about the credibility of the corporate party sufficiently warranted the party's concerns about the fairness of the upcoming trial, justifying removal of the judge. ***Campbell Soup Co. v. Roberts***, *supra*.

Finally, in ***Crosby v. State***, *supra*, this Court ruled, a statement of the trial judge that he thought the defendant Crosby was "a liar from the word 'go'," together with other expressions concerning the defendant's veracity, was sufficient to require the trial judge to recuse himself from hearing the defendant's request to withdraw his guilty plea. "The affidavit suggesting the disqualification of the trial judge in the case before us shows plainly that he should have recused himself and

not participated further in the case," this Court concluded. ***Crosby v. State***, *supra* at 183-184.

The remarks about the defendant's veracity in the instant case cannot be dismissed as merely announcing an adverse judicial ruling, which would be insufficient to warrant disqualification. They are much more. In ***Brown v. St. George Island***, *supra*, this Court specifically rejected such an argument from the respondent, finding, rather, that a statement by the court that it feels a party has lied in a case indicates bias against the party, supporting recusal:

> Respondents have presented two general arguments in rebuttal to the claims for relief made in the petition. First, they seek to characterize the judge's remarks as either those announcing an adverse judicial ruling or as reflecting the mental impressions and opinions formed during the course of the proceedings. These are not sufficient grounds for disqualification. [citations omitted.] We reject these arguments and find the trial judge's remarks more analogous to those described in ***Deauville Realty Co. v. Tobin***, 120 So.2d 198 (Fla. 3d DCA 1960), *cert. denied*, 127 So.2d 678 (Fla.1961), where it was held that a statement by the judge that he feels a party has lied in a case generally indicates a bias against the party. As in ***Hayslip v. Douglas***, 400 So.2d 553 (Fla. 4th DCA 1981), we find that the motion and accompanying affidavit support a conclusion that the movant has a well-founded fear he will not receive a fair trial at the hands of the judge. *See also* ***LeBruno Aluminum Co. v. Lane***, 436 So.2d 1039 (Fla. 1st DCA 1983), *review dismissed*, 450 So.2d 487 (Fla.1984); ***Irwin***

> ***v. Marko***, 417 So.2d 1108 (Fla. 4th DCA 1982).
>
> Thus, we hold that the motions should have been granted and that Judge Rudd is disqualified further to act in these proceedings.

Brown v. St. George Island, Ltd., *supra* at 257.

Thus, here, too, the motion to disqualify was legally sufficient to show that Arthur Barnhill had a well-grounded fear that he would not receive a fair penalty phase trial and life or death determination at the hands of this trial judge. ***Crosby v. State***, *supra*; ***State ex re. Brown v. Dewell***, 179 So. 695, 697 (Fla. 1938). Reversal is mandated for a new penalty phase trial before a different impartial judge.

POINT II.

THE TRIAL COURT ERRED IN REFUSING TO STRIKE TWO JURORS FOR CAUSE, WHO, WHILE INDICATING THEY COULD FOLLOW THE LAW, NONETHELESS EXPRESSED DEEP-ROOTED PERSONAL BELIEFS IN FAVOR OF THE DEATH PENALTY, GIVING RISE TO DOUBTS ABOUT THEIR IMPARTIALITY IN VIOLATION OF THE FIFTH, SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION, AND ARTICLE I, SECTIONS 9, 16, 17, AND 22 OF THE FLORIDA CONSTITUTION.

The defense attempted to strike two jurors for cause after they had expressed deep-rooted personal beliefs in favor of the death penalty which would give concerns over their impartiality to decide the issue of life of death for a killer. The trial court refused to strike the jurors, the defense exercised peremptory challenges on them, ran out of peremptory challenges, and requested four more, revealing additional jurors which the defense found unacceptable and wished to peremptorily excuse. The court denied those additional challenges. The abuse of discretion or manifest error test governs appellate review of a trial court decision regarding the competency of a juror in a criminal case. ***Mendoza v. State***, 700 So.2d 670 (Fla. 1997); ***Franqui v. State***, 699 So.2d 1312 (Fla. 1997). Here, the denial of the cause challenges and the refusal to grant additional peremptories was

error and reversal is required.

Two jurors expressed very strong views in favor of the death penalty. Juror Cotto expressed quite plainly that if someone kills, they should be executed. He also complained about the length of time murderers stayed on death row before their sentences were carried out. (Vol. 12, R 1582, 1641) Similarly, Juror Robinson indicated beyond question that she believed in the death penalty and has her own opinions on when it should be imposed. (Vol. 12, R 1587) Ms. Robinson also indicated that prisoners remain on death row for too long prior to their executions. (Vol. 12, R 1638-1639) Additionally, she said that she tends to favor a death sentence, but she was not so "head strong" that she would not listen to the evidence and consider life. (Vol. 12, R 1624) However, she also stated unequivocally that, in general, she would be inclined to favor, and give greater weight to, aggravating circumstances over mitigating ones. (Vol. 12, R 1624)[10] Both jurors were "rehabilitated" by the trial court taking over the inquiry from the defense and asking the simple leading question of whether they could follow the law, to which both replied they could. (Vol. 12, R 1582, 1588)

A declaration by a juror simply that he or she can follow the law, especially

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[10] Defense counsel's further attempts to explore the feelings of these jurors with more probing questions was curtailed by the court and counsel was not permitted to question them further in this regard. *See* Point III, *infra*.

in response to leading questions, is not determinative if other statements give rise to doubt the juror's impartiality. ***Hill v. State***, 477 So.2d 553 (Fla. 1985); ***Tenon v. State***, 545 So.2d 382 (Fla. 1st DCA 1989)(juror's affirmative answer that he can follow the law does not cure his statement that he has misgivings about crack cocaine); ***Price v. State***, 538 So.2d 486 (Fla. 3d DCA 1989)(where juror's responses show possible prejudices, "rehabilitation" via leading questions by judge or prosecutor inadequate).

Additionally, the United States Supreme Court has similarly held that such perfunctory, leading rehabilitation questions and answers that the juror could follow the law, are inadequate. ***Morgan v. Illinois***, 504 U.S. 719, 112 S.Ct. 2222, 2232-2233 (1992). There, the Court found:

> As to general questions of fairness and impartiality, such jurors could in all truth and candor respond affirmatively, personally confident that such dogmatic views are fair and impartial, while leaving the specific concern unprobed. . . . Any juror who would impose death regardless of the facts and circumstances of conviction cannot follow the dictates of law. [citation omitted]. . . . The risk that such jurors may have been empaneled in this case and 'infected petitioner's capital sentencing [is] unacceptable in light of the ease with which that risk could have been minimized.' [citation omitted].

Morgan v. Illinois, 112 S.Ct. at 2232-2233.

The prospective jurors here were, under these cases, not adequately rehabilitated simply by their promise to "follow the law." There has been "manifest error" committed by the trial court in denying the challenges for cause and requests for additional peremptories. The appellant's death sentence cannot stand; a new penalty trial is required.

POINT III.

THE TRIAL COURT ERRED IN LIMITING THE DEFENDANT'S RELEVANT VOIR DIRE EXAMINATION AND IN REPEATEDLY INTERRUPTING JUROR QUESTIONING AND CHASTISING HIM IN VIOLATION OF THE DEFENDANT'S RIGHTS UNDER THE FIFTH, SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION, AND ARTICLE I, SECTIONS 9, 16, 17, AND 22 OF THE FLORIDA CONSTITUTION.

Rule 3.300(b), Florida Rules of Criminal Procedure, provides for a reasonable voir dire examination of prospective jurors by counsel. Because the purpose of voir dire is to obtain a fair and impartial jury, restrictions or limits on questions can result in the loss of this fundamental right. ***Helton v. State***, 719 So.2d 928 (Fla. 3rd DCA 1998); ***Williams v. State***, 424 So.2d 148 (Fla. 5th DCA 1982). Although a trial judge has considerable discretion in determining the extent of counsel's examination of the jury venire, unreasonable limitation and restrictions on juror examination can be considered an abuse of discretion. ***Morgan v. Illinois***, 504 U.S. 719, 112 S.Ct. 2222, 2230 (1992); ***Lavado v. State***, 492 So.2d 1322 (Fla. 1986); ***Helton v. State***, 719 So.2d 928, 929 (Fla. 3rd DCA 1998); ***Ferrer v. State***, 718 So.2d 822, 825 (Fla. 4th DCA 1998). The trial court clearly abused its discretion here by improperly and repeatedly restricting and cutting off the

defendant's examination of jurors into relevant prejudices, by repeatedly chastising and threatening to replace defense counsel for his voir dire examination, and by improperly taking over defense counsel's voir dire examination.

During the defendant's voir dire examination of potential jurors, the trial court repeatedly interrupted defense counsel, despite the lack of a state objection, chastised the defense in front of the jury for what it deemed improper questions (at one point castigating the defense, "Stop it right now. Counsel, approach the bench"), and limited the scope and method of questioning, interjecting itself into the examination process by taking over for the defense and asking what it thought was the entire scope of voir dire in asking mere general bias questions:

court interrupts and cuts off defense voir dire, even without an objection (Vol. 12, R 1622, 1623, 1624, 1631, 1669-1670, 1674)

court refuses to allow defense opportunity to approach bench to argue ruling (Vol. 12, R 1623);

court accuses defense of trying to mislead jury (Vol. 12, R 1625, 1632, 1652, 1674);

court threatens to remove defense attorney from case and replace with co-counsel (Vol. 12, R 1625, 1652);

court takes over voir dire from defense (Vol. 12, R 1628-1630, 1632-1634);

and

court announces to defense that it was necessary to reign counsel in, further limiting voir dire. (Vol. 12, R 1677-1681)

Defense counsel, feeling that the court's interruptions and rebukes had infected the jury selection process and tainted the jury, asked that the entire panel be stricken, which the court denied, blaming the defense for reconditioning the jurors not to listen, and accusing the defense of merely trying to set the case up for reversal. (Vol. 12, R 1674-1681) This restriction and interference with the defendant's voir dire examination resulted in the denial of the right to a fair trial by an impartial jury, due process of law, the right to counsel, and the prohibition of cruel or unusual punishment in violation of the Florida and federal constitutions.

A meaningful voir dire is critical to effectuating an accused's constitutionally guaranteed right to a fair and impartial jury. ***Lavado v. State***, 469 So.2d 917, 919 (Fla. 3rd DCA 1985 (Pearson, J. dissenting), *quashed* 492 So.2d 1322 (Fla. 1986)(adopting Judge Pearson's dissent as the majority opinion of the Supreme Court).

> What is a meaningful voir dire which will satisfy the constitutional imperative of a fair and impartial jury depends on the issues in the case to be tried. The scope of voir dire therefore "should be so varied and elaborated as the circumstances surrounding the juror

> under examination in relation to the case on trial would seem to require . . . ." [citations omitted]. Thus, where a juror's attitude about a particular legal doctrine (in the words of the trial court, "the law") is essential to a determination of whether challenges for cause or peremptory challenges are to be made, it is well settled that the scope of the voir dire properly includes questions about and references to that legal doctrine even if stated in the form of hypothetical questions. ***Pait v. State***, 112 So.2d 380 (Fla.1959)(no error where prosecutor propounded question to prospective jurors on voir dire concerning their attitudes toward a finding of guilt on a homicide charge based solely on a theory of felony murder); ***Pope v. State***, 84 Fla. 428, 438, 94 So. 865, 869 (1922) (no error where prosecutor explained legal doctrine of criminal responsibility of aiders and abettors to prospective jurors and then asked them if they would render a verdict of guilty of all necessary elements for conviction under doctrine present).

Lavado v. State, 469 So. 2d at 919-920 (Pearson, J., dissent), *adopted as majority opinion* 492 So.2d 1322 (Fla. 1986). Generalized inquiry into the juror's view is inadequate, as is a juror's "general acknowledgment that he will follow the law and serve fairly and impartially." ***Id***. at 921; ***Sisto v. Aetna Casualty and Surety Co.***, 689 So.2d 438 (Fla. 4th DCA 1997). As stated in ***Lowe v. State***, 718 So.2d 920, 923 (Fla. 4th DCA 1998):

> The erroneous ruling in failing to remove this juror was exacerbated by the trial judge's own repeatedly demonstrated misunderstanding of voir dire

> examination by defense counsel. It is obvious that the trial judge believed that counsel was limited to asking only "yes or no" questions relating to broad principles--e.g., "Do you understand that the defendant is presumed innocent?" He plainly felt that counsel was precluded from exploring a juror's perceptions and beliefs by attempting to elicit narrative answers to more specific questions. We conclude that the voir dire questions by defendant's lawyer were generally proper and that it was error to exclude them. If voir dire examination of jurors is to have any meaning, counsel must be allowed to probe attitudes, beliefs and philosophies for the hidden biases and prejudices designed to be elicited by such examination. The failure to allow such questioning is an abuse of discretion, just as surely as if the trial judge had simply announced, e.g., that he would permit only perfunctory examination about general topics such as patriotism.

Similarly, the United States Supreme Court has ruled that such general questions, such as the trial court attempted to limit the defense to asking in the instant case, as to whether they could be fair and impartial and follow the law as instructed, is inadequate to the relevant examination, and counsel must be constitutionally permitted to delve into more detailed and specific questions:

> We deal here with petitioner's ability to exercise intelligently his complementary challenge for cause against those biased persons on the venire who as jurors would unwaveringly impose death after a finding of guilt. Were voir dire not available to lay bare the foundation of petitioner's challenge for cause against those prospective jurors who would always impose

death following conviction, his right not to be tried by such jurors would be rendered as nugatory and meaningless as the State's right, in the absence of questioning, to strike those who would never do so.

The only issue remaining is whether the questions propounded by the trial court were sufficient to satisfy petitioner's right to make inquiry. As noted above, Illinois suggests that general fairness and "follow the law" questions, of the like employed by the trial court here, are enough to detect those in the venire who automatically would vote for the death penalty. [footnote omitted] The State's own request for questioning under ***Witherspoon*** and ***Witt*** of course belies this argument. ***Witherspoon*** and its succeeding cases would be in large measure superfluous were this Court convinced that such general inquiries could detect those jurors with views preventing or substantially impairing their duties in accordance with their instructions and oath. But such jurors--whether they be unalterably in favor of, or opposed to, the death penalty in every case--by definition are ones who cannot perform their duties in accordance with law, their protestations to the contrary notwithstanding.

As to general questions of fairness and impartiality, such jurors could in all truth and candor respond affirmatively, personally confident that such dogmatic views are fair and impartial, while leaving the specific concern unprobed. More importantly, however, the belief that death should be imposed ipso facto upon conviction of a capital offense reflects directly on that individual's inability to follow the law. Any juror who would impose death regardless of the facts and circumstances of conviction cannot follow the dictates of law. See ***Turner v. Murray***, 476 U.S.,

> at 34-35, 106 S.Ct., at 1687-1688 (plurality opinion). It may be that a juror could, in good conscience, swear to uphold the law and yet be unaware that maintaining such dogmatic beliefs about the death penalty would prevent him or her from doing so. [footnote omitted] A defendant on trial for his life must be permitted on voir dire to ascertain whether his prospective jurors function under such misconception. The risk that such jurors may have been empaneled in this case and "infected petitioner's capital sentencing [is] unacceptable in light of the ease with which that risk could have been minimized." ***Id***., at 36, 106 S.Ct., at 1688 (footnote omitted). Petitioner was entitled, upon his request, to inquiry discerning those jurors who, even prior to the State's case in chief, had predetermined the terminating issue of his trial, that being whether to impose the death penalty.

Morgan v. Illinois, 112 S.Ct. 2232-2233.

Counsel must have an opportunity to ascertain latent or concealed prejudgments which will not yield to the evidence or the court's instructions. ***Jones v. State***, 378 So.2d 797 (Fla. 1st DCA 1980). *See also* ***Miller v. State***, 683 So.2d 600 (Fla. 2nd DCA 1996). Accordingly, counsel must be permitted to propose questions concerning the juror's willingness and ability to accept the court's instructions concerning such matters as the presumption of innocence, the state's burden of proof, and lawful defenses to the charges. ***Id***. at 798; ***Lavado v. State***, *supra*, 492 So.2d 1322. Furthermore, it has been held that it is not for the courts to say what type of questions counsel should deem important, as long as

they are not improper. ***Perry v. State***, 675 So.2d 976, 979 (Fla. 4th DCA 1996). Jurors' attitudes about a legal doctrine or law can be essential in a particular case to a determination of whether challenges for cause or peremptory challenges are to be made. The scope of voir dire properly includes questions about and references to such legal doctrines. ***Nicholson v. State***, 639 So.2d 1027 (Fla. 2nd DCA 1994).

This issue is controlled by this Court's decision in ***Lavado v. State***, *supra*, 492 So.2d 1322. In that case, the trial court had instructed defense counsel that during voir dire he could not inquire regarding matters of substantive law in relation to his defense of voluntary intoxication to the offense of armed robbery, and that he would only be permitted to ask whether the prospective jurors (1) were biased against drinking in general, and (2) could follow the court's instructions. This Court, adopting Judge Pearson's dissenting opinion below as its majority opinion, held that the trial court's restriction of counsel's questioning during jury selection denied Lavado his right to a fair and impartial jury, and therefore reversed and remanded for a new trial. Judge Pearson also added that such a generalized inquiry was inadequate, as was a juror's general acknowledgment that he will follow the law and serve fairly and impartially. ***Id***.

In the instant case, while the court (when it took over defense's voir dire examination) asked merely general questions concerning whether the jurors had any

preconceived feelings on the propriety of a death sentence in the case, the defense was precluded from inquiring individually as to whether they were willing to accept established legal mitigating circumstances, such as a troubled childhood, and weigh those circumstances according to the law, the court ruling that the defense was trying to "precondition" the jurors. (Vol. 12, R 1669) Similarly, the defendant sought to question further certain jurors who had previously expressed their favor of the death penalty and that it should be imposed if someone kills someone. The court stopped the defense when it attempted to delve into the intricacies of their beliefs and their expressed promises to the court that they could put aside those beliefs and follow the law, by questioning them about aggravating and mitigating circumstances and any preconceived notions on the weight to be given each. (Vol. 12, R 1624-1625) Such questioning did not rise to a level of pretrying the facts or attempting to elicit a promise from the jurors as to how they would weigh the defense in this case, and thus, was proper. ***Walker v. State***, 724 So.2d 1232, 1234 (Fla. 4th DCA 1999).

> Although defense counsel's questions could have been more artfully crafted to avoid any claim that defense counsel was attempting to "pre-try" the factual issues in the case, defense counsel should have been permitted to inquire of the venire to ascertain whether potential jury members could, and would, apply the law regarding this issue if instructed to do so

by the trial judge.

Chandler v. State, 744 So.2d 1058, 1061-1062 (Fla. 4th DCA 1999). *See also* ***Morgan v. Illinois***, *supra*; ***Perry v. State***, *supra*.

The trial court thus has abused its discretion here and impermissibly limited the defendant's relevant voir dire inquiries. Moreover, by its repeated interruptions and admonishments of defense counsel, the court impaired the fairness of the trial for the defendant. ***Brown v. State***, 678 So.2d 910, 912-913 (Fla. 4th DCA 1996). There the appellate court reversed the defendant's conviction, finding that the trial court conveyed to the jury that counsel had done something improper, creating a stigma on defense counsel in the minds of the jurors and destroyed the fairness of the trial.

> We find counsel's attempted inquiry of the jurors neither insulting nor improper. Unfortunately, the judge's interjection conveyed to the jury that counsel had done something improper. Forcing him to apologize in the presence of the jurors could only have created a stigma on defense counsel in the minds of the jurors. That stigma was undoubtedly intensified by the judge's castigation of this lawyer during closing argument--that he had never heard "so much improper argument in a final argument." These unjustified remarks undoubtedly prejudiced defense counsel in the eyes of the jury and destroyed the fairness of the trial. If we were not already required to reverse for a new trial on account of the judge's comment on the credibility of the prosecution witnesses, we would

> surely require a new trial because of these unwarranted statements.
>
> We feel constrained to add a final observation. It is clear that the trial judge interjected himself into the defense counsel's voir dire examination of jurors and final argument without any objection from the prosecutor. While it is certainly true that a trial judge has the power to take such action even in the absence of an objection from the opposing lawyer, it should be exceedingly rare to do so. Repeated interjections without objection can recast the judicial role from impartial adjudicator to an apparent advocate for the party foreswearing objection. The occasion authorizing such judicial action should thus be both singular and intolerably offensive.

Brown v. State, *supra* at 913.

So, here, too, the trial court's repeated interjections and admonishments recast the judge from a neutral impartial arbiter to an apparent advocate for the state, and undoubtedly prejudiced the defense in the minds of the jurors, destroying the fairness of the trial. The court should have granted the motion to strike the panel and should have permitted more extensive voir dire. A new trial is required.

POINT IV.

THE TRIAL COURT ERRED IN DENYING THE DEFENDANT'S MOTION FOR A CONTINUANCE IN ORDER TO OBTAIN THE LIVE TESTIMONY OF ITS EXPERT WITNESS DEPRIVING HIM OF HIS RIGHT TO A FAIR TRIAL AND TO SECURE WITNESSES IN HIS BEHALF UNDER THE FIFTH, SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION, AND ARTICLE I, SECTIONS 9, 16, 17, AND 22 OF THE FLORIDA CONSTITUTION.

An order denying a continuance in a criminal case may be reversed upon a showing of an abuse of discretion. ***Sliney v. State***, 699 So.2d 662 (Fla. 1997). Here, it is submitted, the denial of the defendant's continuance in order to secure the live testimony of its expert witness was a "palpable abuse of discretion" resulting in undue prejudice to the defendant. ***Fennie v. State***, 648 So.2d 95 (Fla. 1994).

The defendant's medical expert witness, Dr. Feegel, was scheduled for medically necessary surgery when the case was scheduled to commence for penalty phase. The purpose of Dr. Feegel's testimony was to rebut the opinions of the medical examiner, Dr. Gore, as to certain aspects of the death, including the amount of time for the victim to become unconsciousness, and the force and pain involved in the strangulation. The court denied the continuance, ruling that it would

be sufficient for the defense to perpetuate the doctor's testimony via videotape. The defendant objected to the procedure, expressing the necessity for live testimony on this crucial witness. As fate would have it, Dr. Gore surprised the defense by opining at the penalty phase trial that the discoloration of the victim's shorts could be indicative of fear at or around the time of loss of consciousness or death. Because Dr. Feegel's videotape testimony had already been accomplished, the defense was unable to rebut this salient testimony, and the prosecution was able, without any chance of rebuttal, to dramatically portray the incident as causing the victim to urinate out of fright.

Although appellate courts recognize the deference due a trial court's ruling on a motion for continuance, that deference is not absolute. ***Smith v. State***, 525 So.2d 477, 480 (Fla. 1st DCA 1988). It appears the common thread running through those cases in which a palpable abuse of discretion has been found, is that defendant must be afforded an adequate opportunity to investigate or prepare for presentation any applicable defense. ***Id***. at 479; ***Beachum v. State***, 547 So.2d 288 (Fla. 1st DCA 1989).

Inability to secure the attendance of a crucial state witness at trial has been held to be an abuse of discretion, requiring a new trial. ***Robinson v. State***, 561 So.2d 419 (Fla. 1st DCA 1990); ***Beachum v. State***, *supra*. In ***Robinson***, the court

noted

> The facts of this case clearly show that appellant has met that heavy burden . . . .
>
> This case is a far cry from the typical eleventh-hour motions for continuance which are dumped on the trial courts with disturbing regularity wherein counsel urges that he has not had adequate time to prepare for trial, or has not "completed discovery," or has just learned of the existence of a new witness, etc.

Robinson v. State, *supra* at 420-412. In contrast, the court noted, the defense in ***Robinson***, through appropriate investigation, determined the existence of a crucial witness well before trial, but was having trouble securing that witnesses attendance.

The defense in the instant case was in the same posture. Through no fault of its own, its crucial witness was unavailable for trial when it was scheduled to commence. The continuance for a crucial witness in a life or death trial was critical. Since this witness was for rebuttal of the state's expert's testimony, it was imperative that he have that state's experts' opinions first in order to rebut them. When Dr. Gore surprised the defense with his conjecture regarding evidence of fear, the defense was unable to rebut this striking testimony which the prosecutor featured prominently in his closing argument regarding HAC, the defense was doomed with the jury on the question of fear. Had a continuance been granted and Dr. Feegel been presented live, his rebuttal of this item would have allowed the

opportunity to cure the damaging blow to the defendant's case.

A palpable abuse of discretion having been shown, reversal for a new trial is necessary.

POINT V.

THE TRIAL COURT ERRED IN ADJUDICATING AND SENTENCING THE DEFENDANT TO BOTH ROBBERY OF THE VICTIM'S KEYS AND THEFT OF HIS AUTOMOBILE IN VIOLATION OF THE PROHIBITION AGAINST DOUBLE JEOPARDY UNDER THE FIFTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION, AND ARTICLE I, SECTION 9 OF THE FLORIDA CONSTITUTION.

Double jeopardy prohibits a defendant for being convicted of the offenses of both grand theft of an automobile and robbery of the victim's car keys, where the taking is one continuous episode. ***Castleberry v. State***, 402 So.2d 1231 (Fla. 5th DCA 1981). When robbery is accomplished by a defendant entering a residence and taking car keys along with other property and then proceeding immediately to the stolen vehicle, only one taking has occurred. ***J.M. v. State***, 709 So.2d 157 (Fla. 5th DCA 1998).

Even though the defendant entered a plea in this case, he is not precluded from raising this issue on appeal as it constitutes fundamental error. Where the defendant has entered a plea "straight up," (as opposed to a negotiated plea where the state has given up something), the multiple convictions and sentences will be vacated. ***Roedel v. State***, ___ So.2d ___, 26 FLW D157 (Fla. 5th DCA December 29, 2000). The grand theft charge and sentence thereon must be vacated here.

POINT VI.

THE TRIAL COURT ERRED IN INSTRUCTING THE JURY ON STATUTORY MITIGATING CIRCUMSTANCES WHICH THE DEFENSE HAS WAIVED IN VIOLATION OF HIS RIGHTS TO A FAIR TRIAL, DUE PROCESS OF LAW, AND PROHIBITION AGAINST CRUEL OR UNUSUAL PUNISHMENT UNDER THE FLORIDA AND FEDERAL CONSTITUTIONS.

The defense sought to waive the presentation of the statutory mental mitigating circumstances because of a fear that the jury would find that his mental mitigation did not rise to the level of the modifiers in the statute, and thus inappropriately give them lesser weight. As this is a pure question of law, the appellate courts will consider this issue *de novo*.

In ***Maggard v. State***, 399 So.2d 973 (Fla. 1981), this Court ruled that the defendant can waive a mitigating circumstance, even in the face of a state objection:

> Mitigating factors are for the defendant's benefit, and the State should not be allowed to present damaging evidence against the defendant to rebut a mitigating circumstance that the defendant expressly concedes does not exist. Furthermore, the jury should not be advised of the defendant's waiver. In instructing the jury, the court should exclude the waived mitigating circumstance from the list of mitigating circumstances read to the jury, and neither the State nor the defendant should be allowed to argue to the jury the existence or the nonexistence of such mitigating circumstance.

Id. at 978.

Mitigating circumstances are most often referred to as "statutory" or "nonstatutory." Reference to these mitigating factors as "nonstatutory" mitigating factors has the effect of communicating to the jury which will make a recommendation as to penalty that these mitigating factors are inferior to those mitigating factors specifically listed in the statute, by virtue of not being listed specifically in the statute.

In actuality, though, those factors not specifically enumerated in the statutes have never been held to have any different weight under the law than the so-called "statutory" mitigating factors. On the contrary, the jury must be instructed upon, and the judge must consider and weigh, any aspect of the offense or of the accused's character or record that are mitigating. ***Lockett v. Ohio***, 492 U.S. 302 (1978); ***Eddings v. Oklahoma***, 455 U.S. 104 (1982); ***Penry v. Lynaugh***, 492 U.S. 302 (1989).

Whether law provided to the jury comes from statutory or caselaw has never been deemed to be appropriate to provide to a jury trying any type of criminal case. For that reason, the standard jury instructions in criminal cases do not provide citation as to their sources for the jury, although some portions derive from statute and some from caselaw.

Permitting reference to these mitigating factors which are not specifically enumerated as "nonstatutory" has the effect of undermining the validity of the Florida death penalty sentencing scheme, by suggesting to the jury which mitigating factors should be given more weight than others. It is, of course, exclusively the responsibility of the penalty phase jury, in the penalty phase of a capital case, to assign to each mitigating factor presented them the proper weight, as the jury sees fit.

By presenting to the jury two different sets of instructions for mental mitigators, one with the qualifiers of "extreme" and "substantial" and one set without, the jury is essentially told by the court that those mental mitigators being argued by the defense were automatically entitled to less weight than the statutory circumstances. This violates Florida's death penalty scheme and deprives the defendant of a fair trial by jury on the issue of his sentence and renders the advisory verdict and resultant death sentence cruel or unusual punishment.

A new penalty phase trial is required.

POINT VII.

THE APPELLANT'S DEATH SENTENCE WAS IMPERMISSIBLY IMPOSED BECAUSE THE TRIAL COURT INCLUDED IMPROPER AGGRAVATING CIRCUMSTANCES, EXCLUDED EXISTING MITIGATING CIRCUMSTANCES, AND FAILED TO PROPERLY FIND THAT THE MITIGATING CIRCUMSTANCES OUTWEIGH THE AGGRAVATING CIRCUMSTANCES, RENDERING THE DEATH SENTENCE UNCONSTITUTIONAL UNDER THE EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND ARTICLE I, §17 OF THE FLORIDA CONSTITUTION.

The sentence of death imposed upon Arthur Barnhill, III, must be vacated. The trial court found improper aggravating circumstances, failed to consider (or gave only little weight to) highly relevant and appropriate mitigating circumstances, and improperly found that the aggravating circumstances outweighed the mitigating factors. These errors render Barnhill's death sentence unconstitutional in violation of the Eighth and Fourteenth Amendments to the United States Constitution and Article I, Section 17 of the Florida Constitution. Aggravating circumstances must be proven beyond a reasonable doubt to exist and review of those factors is by the competent substantial evidence test. Where evidence exists to reasonably support a mitigating factor (either statutory or non-statutory), the court must find as

mitigating that factor. Review of the weight given to mitigation is subject to the abuse-of-discretion standard. *See* ***Cole v. State***, 701 So.2d 845, 852 (Fla. 1997). It is submitted that this Court's proportionality review, being a question of law, is a *de novo* review.

A. The Trial Judge Considered Inappropriate Aggravating Circumstances.

It is well established that aggravating circumstances must be proven beyond a reasonable doubt by competent, substantial evidence. ***Martin v. State***, 420 So.2d 583 (Fla. 1982); ***State v. Dixon***, 283 So.2d 1, 9 (Fla. 1973). The state has failed in this burden with regard to at least two of the aggravating circumstances found by the trial court, that of heinous, atrocious, or cruel; and cold, calculated and premeditated. Additionally, the court engaged in improper doubling of during the course of a robbery/burglary and pecuniary gain aggravators. The court's findings of fact, based in part on matters not proven by substantial, competent evidence beyond a reasonable doubt, and on erroneous findings, do not support these circumstances and cannot provide the bases for the sentence of death.

This Court has defined the aggravating circumstance of heinous, atrocious, or cruel in ***State v. Dixon***, ***supra*** at 9:

> It is our interpretation that heinous means extremely wicked or shockingly evil; that atrocious means outrageously wicked and vile; and that cruel means designed to inflict a high degree of pain with utter indifference to, or even enjoyment of, the suffering of others.

Recognizing that all murders are heinous, ***Tedder v. State***, 322 So.2d 980, 910 (Fla. 1975), this Court further defined its interpretation of the legislature's intent that the aggravating circumstance only apply to crime **especially** heinous, atrocious, or cruel.

> What is intended to be included are those capital crimes where the actual commission of the capital felony was accompanied by such additional acts as to set the crime apart from the norm of capital felonies -- the conscienceless or pitiless crime which is unnecessarily tortuous to the victim.

State v. Dixon, ***supra*** at 9.

As this Court has stated in ***Santos v. State***, 591 So.2d 160, 163 (Fla. 1991), and ***Cheshire v. State***, 568 So.2d 908, 912 (Fla. 1990), this factor is appropriate only in torturous murders which exhibit a *desire* to inflict a high degree of pain, or an utter indifference to or enjoyment of the suffering of another. ***See***, ***e.g.***, ***Douglas v. State***, 575 So.2d 165, 166 (Fla. 1991) (torture-murder involving heinous acts extending over four hours). The present murder happened too quickly with no substantial suggestion that Barnhill *intended* to inflict a high degree of pain

or otherwise torture the victim. Accordingly, the trial court erred in finding this factor to be present.

While this Court has upheld this factor numerous times in cases involving strangulation, those cases involved facts specifically showing that the victims were acutely aware of their impending deaths and all involved torture and suffering beyond the fact of the strangulation. ***See***, ***e.g.***, ***Hildwin v. State***, 531 So.2d 124 (Fla. 1988); ***Thompkins v. State***, 502 So.2d 415, 421 (Fla. 1986).

The appellant submits that the state failed to meet its burden in this case. In ***Rhodes v. State***, 547 So.2d 1201 (Fla. 1989), the decomposing body of an approximately forty-year-old female, missing her lower right leg, was found in debris being used to construct a berm in St. Petersburg. The medical examiner determined manual strangulation to be the cause of death because the hyoid bone in the victim's throat was broken. Rhodes was interviewed by detectives, and during that and subsequent interviews, Rhodes gave different and sometimes conflicting statements to his interviewers, always denying that he raped or killed the victim. He subsequently offered to tell how the victim had died if he could be guaranteed he would spend the rest of his life in a mental health facility. Rhodes then claimed the victim died accidentally when she fell three stories while in a hotel. At trial three of Rhodes' fellow inmates at the jail were called as witnesses for the state. Each

inmate testified that Rhodes admitted killing the victim.

The trial court in ***Rhodes*** had found that HAC applied stating:

> That the murder of Karen Nieradka was especially heinous, atrocious and cruel in that the victim was manually strangled and the clumps of her own hair found in her clenched hands indicates the pain and mental anguish that she must have suffered in the process.

This Court, however, rejected the trial court's finding of the HAC aggravating circumstance finding that the victim may have been semiconscious at the time of her death according to the conflicting stories told by Rhodes. Further, the Court, quoting ***State v. Dixon***, *supra*, found nothing about the commission of this capital felony "to set the crime apart from the norm of capital felonies."

In ***DeAngelo v. State***, 616 So.2d 440 (Fla. 1993), on facts similar to the instant case, the defendant struck the victim on the head, used manual strangulation, and then strangled the victim with a ligature. The trial court did not find the presence of this aggravator. In rejecting the state request for the HAC aggravating circumstance, this Court upheld the trial court, agreeing that the state had failed to prove that the victim was conscious during the ordeal, relying on the medical examiner's testimony as to the possibility that at the time she was strangled with the ligature the victim was unconscious as a result of the pressure of the manual

choking or as a result of a blow to her head and the absence of a struggle or defensive wounds. This is precisely the situation here.

The facts of the instant case reveal that there was no intentional torture of the victim. The victim may well have suffered some minor bruising while alive either before or during this strangulation. The bruising, just as likely, could have occurred after he lost consciousness. There was no evidence to suggest that the infliction of this bruising or the strangulation was so prolonged as to amount to lengthy, deliberate torture, as that term is rationally and legally understood.

This circumstance is proper only in "tortuous murders," such as that found in the contrasting case of ***Brown v. State***, 721 So.2d 274 (Fla. 1998), where the victim was stabbed nine or ten times, and received additional blunt trauma injuries. Expert testimony showed there that the victim was alive and conscious during the attack. ***Id***. at 278. By contrast, here, the medical examiner Dr. Gore, and Dr. Feegel, the defense expert, agreed that, given the victim's age and health, consciousness would have been lost during a very brief period of time, within as little as thirty seconds or less during the *manual* strangulation (before the ligature was applied – a finding which even the trial court found in the defendant's favor – *see* paragraph (f) at Vol. 2, R 352), and that death could have occurred in as short a time as one minute or less. (Vol. 13, R 1856-1860, 1885-1886, 1894-1895; Vol. 20,

R 3205-3208, 3210) Dr. Feegel, whose testimony was uncontradicted on this point, indicated that less pressure was needed to strangle someone in the victim's state of health, which would necessarily translate into "less constant suffering." (Vol. 20, R 3228) A lack of blood to the brain, which would have been revealed by an examination of the carotid arteries, had one been done by the state's medical examiner, would have caused the loss of consciousness and death to occur quicker than simply the blocking of oxygen. (Vol. 20, R 3214-3217) The discoloration of the victim's shorts cannot be used to support a finding of this factor as the state cannot show anything more than mere speculation on this point and, as such, has failed to prove it beyond a reasonable doubt, especially given Dr. Feegel's affidavit presented to the judge at the *Spencer* hearing, also refuting Dr. Gore's speculation and swearing that such discoloration did *not* mean that he had to have experienced fright around or at the time of loss of consciousness. (Vol. 2, R 340; Vol. 21, R 3418-3426) Moreover, the trial court's sentencing order makes no mention of this speculative evidence and, thus, it must be considered rejected. (*See* Vol. 2, R 353, wherein the court indicated that nothing except what was contained in the sentencing order was considered for this factor.)

There was no external bleeding, other than from sores from the victim's prior surgery, and, aside from some faint bruising and minor scrapes, no external injuries

which would have evidenced any beating or torture. While the trial court in its sentencing order, by its citation to ***Sochor v. State***, 580 So.2d 595 (Fla. 1991), suggested that a strangulation death is per se HAC due to a foreknowledge of death, the above-cited cases show that a strangulation death requires something above and beyond a simple choking, which rendered the victim unconscious in a very brief time. The only factor really relied on by the court in finding this factor was the time frame provided by the defendant's confession. (Vol. 2, paragraph (g) at R 352-353) As noted, however, in the statement of facts, the time frames provided by the defendant in his statements to police are suspect (and probably a result of his learning and mental disabilities) as they are irreconcilable with all of the other evidence in this case. (Vol. 13, R 1824; Vol. 14, R 1973; Vol. 15, R 2451; Vol. 19, R 2956-2959, 2979, 3024) The state did not even rely on them during trial.

The state presented absolutely no testimony from the medical examiner to support any conclusion that there was excessive pain or torture involved here. There was no testimony the victim was acutely aware of impending death. The testimony and evidence is all to the contrary; the victim here was rendered unconscious in a very brief time, with little suffering and pain. *Contrast, e.g.*, ***Davis v. State***, 604 So.2d 794 (Fla. 1992), wherein the medical examiner testified that the 73-year-old victim likely was not rendered unconscious by a blow to the head and

could have been conscious for thirty to sixty *minutes*, while slowly bleeding to death from the stab wounds.

The contrast between those cases involving torture or depravity and the instant case should be clear. As such, in the instant case, the state has failed to prove this factor of torture or depravity beyond a reasonable doubt. The conclusion of the trial court should be rejected.[11] Even if not rejected outright, the medical testimony by both doctors reveals that this factor should, at most, be given minimal consideration in the weighing process.

Similarly, this Court must reject the aggravating factor of cold, calculated and premeditated. This aggravating circumstance has four specific elements which must be proven beyond a reasonable doubt. ***Jackson v. State***, 648 So.2d 85 (Fla. 1994); ***Walls v. State***, 641 So.2d 381 (Fla. 1994) As this Court explained them in ***Walls***,

> Under ***Jackson***, there are four elements that must exist to establish cold calculated premeditation.

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[11] The trial court's finding of this factor also should fall because it is based in part on the non-statutory aggravating factor mentioned in paragraph (b) under its discussion of HAC, that "this was a person to whom [the victim] had only shown kindness and generosity." (Vol. 2, R 352) This Court has repeatedly denounced such usage of nonstatutory aggravating circumstances. *See, e.g.*, ***Lucas v. State***, 376 So.2d 1149 (Fla. 1979); ***Elledge v. State***, 346 So.2d 998 (Fla. 1977). *See also* ***Barclay v. Florida***, 463 U.S. 939, 956 (1983).

> The first is that "the killing was the product of cool and calm reflection and not an act prompted by emotional frenzy, panic or a fit of rage." ***Jackson*** [648 So.2d at 89]
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> * * *
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> Second, ***Jackson*** requires that the murder be the product of "a careful plan or prearranged design to commit murder before the fatal incident." ***Jackson***, [648 So.2d at 89]
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> * * *
>
> Third, ***Jackson*** requires "heightened premeditation," which is to say, premeditation over and above what is required for unaggravated first-degree murder
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> * * *
>
> Finally, ***Jackson*** states that the murder must have "no pretense of moral or legal justification." . . . Our cases on this point generally establish that a pretense of moral or legal justification is any colorable claim based at least in part on uncontroverted and believable factual evidence or testimony that, but for its incompleteness, would constitute an excuse, justification, or defense as to the homicide . . . .

Walls, 641 So.2d at 387-388.

Regarding the first element, that of the product of calm, cool reflection, the state of mind of the perpetrator is critical to an analysis of the evidence for this aggravating circumstance. As noted in ***Jackson***, an essential element is that "the

killing was the product of cool and calm reflection and not an act prompted by emotional frenzy, panic or a fit of rage." 648 So.2d at 89. A killing in a fit of rage is inconsistent with the CCP factor. ***Crump v. State***, 622 So.2d 963 (Fla. 1993); ***Richardson v. State***, 604 So.2d 1107 (Fla. 1992); ***Mitchell v. State***, 527 So.2d 179 (Fla. 1992). Consequently, impulsive or panic killings during a felony do not qualify for CCP. *See, e.g.*, ***Hardy v. State***, 716 So.2d 765 (Fla. 1998)(Defendant and companions stopped by police officer who begins searches them for weapons. Defendant had a stolen pistol which he uses to shoot officer twice in the head on the "spur-of-the-moment" panic.); ***Rogers v. State***, 511 So.2d 526 (Fla. 1987), (defendant shot robbery victim three times because he was "playing hero"); ***Hamblen v. State***, 527 So.2d 800 (Fla. 1988)(defendant shot robbery victim in the back of the head after becoming angry with her for activating the silent alarm); ***Thompson v. State***, 456 So.2d 444 (Fla. 1984) (defendant shot gas station attendant after being told there was no money on the premises); ***Maxwell v. State***, 443 So.2d 967 (Fla. 1984)(defendant shot his robbery victim when he verbally protested handing over his gold ring); ***White v. State***, 446 So.2d 1031 (Fla. 1984)(defendant shot two people and attempted to shoot two others during a robbery). The "coldness" or the "calm and cool reflection" element is simply missing in these cases. ***Richardson v. State***, 604 So.2d.1107 (Fla 1992).

Secondly, to support CCP the evidence must also prove beyond a reasonable doubt that the murder was calculated – committed pursuant to "...a careful plan or prearranged design to kill." ***Rogers v. State***, 511 So.2d 526, 533 (Fla. 1987). "This aggravating factor is reserved primarily for execution or contract murders or witness elimination killings." ***Hansbrough v. State***, 509 So.2d 1081, 1086 (Fla. 1987); *see*, ***Maharaj v. State***, 597 So.2d 786 (Fla. 1992); ***Pardo v. State***, 563 So.2d 77 (Fla. 1990), or other carefully planned homicides. *E.g.*, ***Zakrzewski v. State***, 717 So.2d 492 (Fla. 1998)(defendant left work at lunch bought a machete and concealed it in his home, defendant then methodically kills his wife and two children later that evening with the machete).

An intentional killing during the commission of another felony does not necessarily qualify for the premeditation aggravating circumstance. ***Maxwell v. State***, 443 So.2d 967 (Fla. 1983). The fact that the underlying felony may have been fully planned ahead of time does not qualify the crime for the CCP factor if the plan did not also include the commission of the murder. ***Guzman v. State***, 721 So.2d 1161 (Fla. 1998); ***Pomeranz v State***, 703 So.2d 465 (Fla. 1997); ***Barwick v. State***, 660 So.2d 696 (Fla. 1995); ***Geralds v. State***, 601 So.2d 1157 (Fla. 1992); ***Lawrence v. State***, 614 So.2d 1092 (Fla. 1993); ***Rivera v. State***, 561 So.2d 536

(Fla. 1990); ***Jackson v. State***, 498 So.2d 906 (Fla. 1986); ***Hardwick v. State***, 461 So.2d 79 (Fla. 1984). However, if additional facts show greater planning prior to or during the killing, the homicide becomes "execution style." *E.g.*, ***Donaldson v. State***, 722 So.2d 177 (Fla. 1998)(victims held at gunpoint for extended period before being shot execution style); ***Routly v. State***, 440 So.2d 1257 (Fla. 1983)(burglary victim bound and transported to a remote area before he was killed with a gunshot). But, a plan to kill cannot be inferred from a lack of evidence – a mere suspicion is insufficient. ***Hoskins v. State***, 702 So.2d 210 (Fla. 1997); ***Besaraba*** v. State, 656 So.2d 441 (Fla. 1995); ***Gore v. State***, 599 So.2d 978 (Fla. 1992); ***Lloyd v. State***, 524 So.2d 396, 403 (Fla. 1988). If the evidence can be interpreted to support CCP, as well as a reasonable hypothesis other than a planned killing, the CCP factor has not been proven. ***Mahn v. State***, 714 So.2d 398 (Fla. 1998); ***Geralds v. State***, 601 So.2d 1157 (Fla. 1992); ***Eutzy v. State***, 458 So. 2d 755(Fla. 1984).

Heightened premeditation is also required; simply proving a premeditated murder for purposes of guilt is not enough to support the CCP aggravating circumstance – this Court has required greater deliberation and reflection. *See*, ***Walls v. State***, 641 So.2d 381, 388 (Fla. 1994). Discussion of this element in

court decisions typically notes the existence of the "calculated" and "coldness" elements as demonstrating the greater premeditation. ***Walls***; ***Buckner v. State***, 714 So.2d 388 (Fla. 1998)(CCP not proved where defendant provoked and "tussled" with victim before shooting victim, defendant walked away and came back to victim who was pleading for help and shot him three more times).

Without more, the manner of death does not establish the greater premeditation needed for the CCP factor. Even a manner of death which requires a period of time to accomplish its end does not necessarily provide the perpetrator with the needed time for calm reflection. *See*, ***Campbell v. State***, 571 So.2d 415 (Fla. 1990). Smothering or strangling the victim with evidence that the process required several minutes did not, alone, qualify the crime for the aggravating factor in ***Capehart v. State***, 583 So.2d 1009 (Fla. 1991); ***Hardwick v. State***, 461 So.2d 79 (Fla. 1984).

Applying these rulings to the case at hand reveals that this factor must be stricken. To support its finding of this aggravator, the trial court first relies on the mere fact that the defendant planned to go to the victim's home and steal his vehicle. (Vol 2, R 349) As noted above, the fact that the underlying felony may have been planned ahead of time does not qualify this crime for CCP if that plan did not include the commission of the murder. ***Guzman***, *supra*; ***Geralds***, *supra*.

This was not a case where the victim was held for an extended period of time or bound and transported to a remote area, as in ***Donaldson v. State***, *supra*; ***Routly v. State***, *supra*. And such a preconceived plan to kill cannot be inferred from the lack of evidence. ***Hoskins v. State***, *supra*.

The only hint of any such "heightened" plan comes from the unreliable time frames mentioned by the defendant in his confession, that he was in the kitchen for a couple of hours. As mentioned earlier, these time frames directly contradict all of the other evidence in the case, and thus is not competent substantial evidence that can be relied upon.[12] The third inconsistent statement and testimony of Michael Jackson likewise only reveals that there was a pre-existing plan to steal the car, not kill anyone. The defendant's decision, even by Michael's testimony, was a spur of the moment, impulsive decision during the robbery, a panic killing, without the *heightened* premeditation required (at most, only evidence of simple premeditation). *Compare with* ***Hardy v. State***, *supra*; ***Rogers v. State***, *supra*, 511 So.2d 526; ***Hamblen v. State***, *supra*, noted above. *See also* ***Buckner v. State***, *supra*.

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[12] It is peculiar that the trial court would choose to accept this fantastic evidence from the defendant's confession, when it rejected everything else the defendant told the police and the court.

Further, as noted above, the fact that "the killing was not simple" (Vol. 2, R 349), cannot support this aggravating factor. Even a manner of death, such as strangulation, which requires a period of time to accomplish its end does not prove this factor. ***Campbell v. State***, *supra*; ***Capehart v. State***, *supra*; ***Hardwick v. State***, *supra*.

Thus, all of the bases used by the court to support this factor must fall. Moreover, since this aggravator requires the necessary state of mind to exist, this Court has on numerous occasions ruled that the existence of mental and emotional problems negates the cold component of the CCP aggravator. In ***Spencer v. State***, 645 So.2d 377 (Fla. 1994), this Court ruled:

> However, we find that the evidence does not support the trial court's finding of CCP. Although there is evidence that Spencer contemplated this murder in advance, we find that the evidence offered in support of the mental mitigating circumstances also negates the cold component of the CCP aggravator. During the penalty phase, a clinical psychologist testified that Spencer thought that Karen was trying to steal the painting business, which was a recapitulation of a similar situation with his first wife. The psychologist also testified that Spencer's ability to handle his emotions is severely impaired when he is under such stress. A neuropharmocologist agreed that Spencer has "very limited coping capability," "manifests emotional instability when he is confronted with [sudden shocks and stresses]," and "is going to become paranoid when stressed." This expert opined

> that Spencer's personality structure and chronic alcoholism rendered him "impaired to an abnormal, intense degree." In light of this evidence, we find that the trial court erred in finding that the murder was CCP.

Spencer v. State, *supra* at 384. *See also* ***Almeida v. State***, 748 So.2d 922, 932-933 (Fla. 1999)(evidence of mental disturbance, lack of impulse control, and brutal childhood specifically negated aggravating circumstance of CCP); ***Woods v. State***, 733 So.2d 980 (Fla. 1999)(court strikes CCP holding that with the defendant's limited mental ability he could have resulted to violence out of frustration).

Similarly, in the instant case, the defendant's uncontroverted mental problems, a learning disability, attention deficit disorder, and frontal lobe impairment, according to both the psychiatrist and neuropsychologist, caused Barnhill to have a lack of impulse control, an inability to control his actions and to plan or think ahead, especially in a stressful situation (a "very unfortunate combination"). (Vol. 14, R 2131-2133, 2137-2138; Vol. 15, R 2152-2153; Vol. 17, R 2572-2573, 2577, 2581-2582) This unrefuted evidence, as in ***Spencer***, ***Almeida***, and ***Wood***, *supra*, negates the cold component of the CCP aggravator.

The aggravating circumstance of CCP must therefore be rejected.

The sentencing order also shows that the trial court counted the same aspects of the crime as two separate aggravating circumstances. (Vol. 2, R 347,

348) Case law is clear, and the trial court even so instructed the jury, that, where both aggravating circumstances rely on the same circumstances, it is improper doubling to find both of the aggravators of pecuniary gain and during the course of a robbery and burglary. ***Provence v. State***, 337 So.2d 783, 786 (Fla. 1976); ***Campbell v. State***, 571 So.2d 415, 418 (Fla. 1990)(commission of a capital felony in the course of an armed robbery and burglary, and for pecuniary gain should have been counted as one, not two, factors, where the offense underlying the burglary was robbery); ***Davis v. State***, 604 So.2d 794, 798 (Fla.1992) (improper doubling where murder was found to be both committed during the course of a burglary and for pecuniary gain where purpose of burglary was pecuniary gain). Thus, these should have been considered as only a single aggravating circumstance.

B. Mitigating Factors, Both Statutory and Non-Statutory, Are Present Which Outweigh Any Appropriate Aggravating Factors.

In ***Campbell v. State***, 571 So.2d 415 (Fla. 1990), this Court reiterated the correct standard and analysis which a trial court must apply in considering mitigating circumstances presented by the defendant. In ***Campbell***, the Court quoted from prior federal and Florida decisions to remind courts that the sentencer may not refuse to consider, as a matter of law, any relevant mitigating evidence.

See Eddings v. Oklahoma, 455 U.S. 104, 114-115 (1982); ***Rogers v. State***, 511 So.2d 526 (Fla. 1987). Where evidence exists to reasonably support a mitigating factor (either statutory or non-statutory), the court must find as mitigating that factor. Once a factor is reasonably established, it cannot be dismissed as having no weight as a mitigating circumstance. ***Campbell***, ***supra***. For a trial court's weighing process and its sentencing order to be sustained, that weighing process must be detailed in the findings of fact and must be supported by the evidence.

It is submitted that the trial court's sentencing order here totally fails to meet this standard necessitated by the capital sentencing scheme. The trial court glossed over the statutory and non-statutory mitigating factors and improperly rejected them or abused its discretion in given them little weight.

The defendant was twenty years old at the time of the crime. The trial court found this statutory mitigator, but, despite undisputed evidence from mental health experts and family and acquaintances that Artie was extremely regressed and emotionally, intellectually, and behaviorally immature (Vol. 14, R 2131-2133; Vol. 15, R 2162-2164; Vol. 17, R 2572-2573; Vol. 18, R 2926-2928, 2950-2951; Vol. 19, R 3133-3135; Vol. 20, R 3153, 3158-3159), the court inexplicably gave his age little weight. This Court has explained that "age is simply a fact, every murderer has one." ***Echols v. State***, 484 So.2d 568, 575 (Fla. 1985)(defendant was fifty-

eight years old at the time of the crime). However, where the age of the defendant is accompanied by other factors showing emotional immaturity, intellectual immaturity, behavioral immaturity, mental instability, organic brain problems, or learning disabilities, the age of the defendant is a valid mitigating circumstance. ***Ramirez v. State***, 739 So.2d 568 (Fla. 1999)(finding that trial court abused its discretion in finding the defendant's age of seventeen to be entitled to only little weight where testimony that he was more immature emotionally, intellectually and behaviorally than his chronological age); ***Mahn v. State***, 714 So.2d 391, 400 (Fla. 1998)(finding that the trial court abused its discretion in refusing to consider defendant's age of twenty as a statutory mitigating factor in light of the fact that Mahn had an extensive history of drug and alcohol abuse, coupled with lifelong mental and emotional instability); ***Urbin v. State***, 714 So.2d 411, 418 (Fla. 1998)(young age entitled to greater weight when there is extensive evidence of parental neglect and abuse that played a significant role in the child's lack of maturity and responsible judgment); ***Scull v. State***, 533 So.2d 1137, 1143 (Fla. 1988)(although Skull was twenty-four years old at the time of the killing, his age was found to be mitigating in light of other factors such as emotional and maturity level). *See also* ***Ellis v. State***, 622 So.2d 991, 1001 (Fla. 1993)(the weight given to a young age can be diminished by other evidence showing unusual maturity);

LeCroy v. State, 533 So.2d 750, 758 (Fla. 1988)(finding that the weight of the mitigating factor was diminished by LeCroy's unusual mental and emotional maturity). Based on these rulings, it is clear that the trial court abused its discretion in assigning this mitigator little weight. Under the holdings of ***Mahn***, ***Ramirez***, and ***Urbin***, *supra*, the defendant's youthful age, when coupled with the uncontroverted evidence of his emotional immaturity, intellectual immaturity, behavioral immaturity, frontal lobe impairment, and learning disabilities, are entitled to great weight, rather than little. The trial court attempts to justify its diminished weight for this factor by the bald assertion that the defendant had the "ability to work and socially interact in an appropriate fashion with other members in his community." (Vol. 2, R 353) A review of the record finds absolutely no support for this assertion. In fact, all the evidence was quite to the contrary: He bumbled in the Job Corps; he bumbled in interpersonal relations; he bumbled in trying to succeed at school. (Vol. 17, R 2584) Artie's mind was like a child's. (Vol. 17, R3134) He was mentally slow and acted like a much younger child. (Vol. 17, 2926-2928, 3133) Absolutely all of the evidence demonstrated conclusively that Artie was extremely regressed and emotionally, intellectually, and behaviorally immature. (Vol. 14, R 2131-2133; Vol. 15, R 2162-2164; Vol. 17, R 2572-2573; Vol. 18, R 2926-2928, 2950-2951; Vol. 19, R 3133-3135; Vol. 20, R 3153, 3158-3159)

The mitigating circumstance of age is clearly entitled to great, not little, weight. The trial court wholly abused its discretion.

The court rejected the statutory mitigating circumstances of extreme mental or emotional disturbance and the capacity to appreciate the criminality of his conduct was substantially impaired, but found similar mental and emotional problems to constitute nonstatutory mitigators of little weight.[13] Whether characterized as statutory or nonstatutory, these factors were uncontroverted and directly related to the crime for which he is being sentenced. As such, the court abused its discretion in not finding them or giving them little weight. As recounted extensively throughout this brief, the defendant suffered from a learning disability, attention deficit disorder, was placed in a learning disabled class, had organic brain damage (frontal lobe impairment), a lack of impulse control, and an inability to control his actions and to plan or think ahead. The mental health experts unanimously opined that these disabilities destined him to failure and were directly related to his actions in this crime. Lay witnesses agreed. No evidence was presented to the contrary. Similar evidence in other death penalty cases has proven

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[13] Trial counsel attempted to waive the statutory mental mitigators out of concern with the modifiers in the statutory language and out of fear that the jury, if it did not consider them to meet those modifiers, would give them lesser weight. However, the trial court instructed the jury on these statutory (at the state's request) and nonstatutory mitigating circumstances. (*See* Point VI, *supra*.)

to be entitled to great weight in the balance of life or death. A defendant's brain abnormality has been found to be mitigating and justification for a life imposition. ***Hawk v.*** State, 718 So.2d 159 (Fla. 1998); ***Carter v. State***, 560 So.2d 166 (Fla. 1990); ***Hall v. State***, 541 So.2d 1125 (Fla. 1989); ***State v. Sireci***, 502 So.2d 1221 (Fla. 1987). The testimony here was unrefuted that Barnhill suffered from a frontal lobe impairment, which impairment, coupled with his emotional disabilities, and stressful situations would have had a direct impact on his actions surrounding this crime. Low mental abilities or learning disorders such as that from which Barnhill suffered have been afforded weight sufficient to reduce a death sentence to life. ***Woods v. State***, 733 So.2d 980 (Fla. 1999); ***Larkins v. State***, 739 So.2d 90 (Fla. 1999); ***Almeida v. State***, *supra*; ***Hawk v. State***, *supra*; ***Hall v. State***, *supra*; ***Morris v. State***, 557 So.2d 27 (Fla. 1990); ***Down v. State***, 574 So.2d 1095 (Fla. 1991); ***Neary v. State***, 384 So.2d 881 (Fla. 1980); ***Meeks v. State***, 336 So.2d 1142 (Fla. 1976). *See also* ***Amazon v. State***, 487 So.2d 8 (Fla. 1986)(mental problems need not reach the level of statutory mitigating factors to be considered).

The mental health experts specifically related these mental, emotional, and learning disabilities to the crime at bar, relating that they affected the defendant's judgment, impulse control, and inability to think ahead. Specifically, Dr. Gutman indicated that his mental disabilities made him like a house built on muck with no

pilings or foundation causing him to crash or sink (Vol. 17, R 2582-2584); Dr. Eisenstein indicated that he did not have adequate mental processing, causing him to make the wrong decisions. (Vol. 15, R 2153-2154) Since these mental and emotional deficiencies are related to the offense, they should carry great weight in mitigation.

Also firmly established, but inexplicably given little weight, were the highly relevant mitigators of:

the defendant's cooperation with the police, which both police officers involved in questioning him testified to. *See* ***Johnson v. State***, 720 So.2d 232 (Fla. 1998); ***Perry v. State***, 522 So.2d 867 (Fla. 1988); ***Washington v. State***, 362 So.2d 658 (Fla. 1978).

the defendant was remorseful, apologizing to the families for his crimes. *See* ***Snipes v. State***, 733 So.2d 1000 (Fla. 1999); ***Morris v. State***, 557 So.2d 27 (Fla. 1990); ***Pope v. State***, 441 So.2d 1073 (Fla. 1984).

defendant had an abusive and deprived childhood, wherein his mother abandoned and neglected him. *See* ***Almeida v. State***, *supra*; ***Livingston v. State***, *supra;* ***Campbell v. State***, *supra*; ***Nibert v. State***, 574 So.2d 1059 (Fla. 1990). The trial court gave this factor little weight due to the fact that the defendant did have some moral guidance through his paternal grandparents, with whom he had

lived for a time (a factor the court said was compelling). (Vol. 2, R 363) However, as recounted by the neuropsychologist, this would not really minimize Artie's problems – instead, he had some serious family issues, and the lack of a family home. "Even though there were individuals who did or do care and love Mr. Barnhill, but his growing up was extremely erratic and inconsistent and seriously feeling senses of alienation and/or rejection." (Vol. 15, R 2155-2156) This unrebutted evidence runs contrary to the judge's minimalization of this mitigator; thus, the trial court's findings and weight should be rejected.

In conclusion, the trial court found improper aggravating circumstances, including cold, calculated and premeditated; heinous, atrocious or cruel; and the improper doubling of pecuniary gain with during the course of a robbery. As such only two aggravators are left in the equation: on felony community control and during the course of the robbery/burglary. The substantial statutory and nonstatutory mitigating circumstances, unrebutted by the evidence, clearly tips the scale in favor of life imprisonment. His sentence of death, when compared to others, is disproportional and constitutes cruel or unusual punishment under the circumstances. It must be vacated.

CONCLUSION

BASED UPON the cases, authorities, and policies cited herein, the appellant requests that this Honorable Court reverse the sentence of death as to Points I through IV, and VI, and remand for a new penalty phase trial before a new jury; as to Point VII, vacate the death sentence for an imposition of life imprisonment, and, as to Point V, vacate the conviction and sentence for grand theft.

Respectfully submitted,

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_____
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been delivered via U.S. Postal Service to Stephen D. Ake, Assistant Attorney General, 2002 North Lois Avenue Suite 700, Westwood Center, Tampa, FL 33607 and mailed to Mr. Arthur Barnhill, DC#992634, Union Correctional Institution, P.O. Box 221, Raiford, FL. 32083, this 13th day of February, 2001.

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CERTIFICATE OF FONT

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

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