IN THE SUPREME COURT OF FLORIDA

CASE NO. SC06-1803

ARTHUR BARNHILL

Petitioner,

v.

JAMES McDONOUGH, Secretary,
Florida Department of Corrections

Respondent.

RESPONSE TO PETITION FOR WRIT OF HABEAS CORPUS

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PROCECURAL HISTORY

This Court summarized the procedural and factual history in the opinion on direct appeal:

> Arthur Barnhill, III, (Barnhill) was raised by his grandparents after his mother essentially abandoned him and his father was imprisoned. When he was 20 years of age, Barnhill's grandparents asked him to leave the house because Barnhill did not follow their rules. He went to live with the family of his friend, Michael Jackson, a codefendant in this case. He lived with the Jacksons for approximately two weeks before he was asked to leave their home as well. Barnhill decided to go to New York, where his girlfriend lived. To get there, Barnhill planned to steal a car and money from Earl Gallipeau, who was 84 years old. Gallipeau was a lawn service customer of Barnhill's grandfather. Barnhill and Gallipeau met when Barnhill did lawn work for his grandfather at Gallipeau's house.
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> On Sunday, August 6, 1995, Barnhill and Michael Jackson walked to Gallipeau's house to steal Gallipeau's car. They entered the house through the garage and waited in the kitchen for approximately two hours. Gallipeau was in another room watching television. According to Michael Jackson, it was not until they were in Gallipeau's kitchen that Barnhill revealed his plan to kill Gallipeau before taking the car. At that point, Jackson abandoned the enterprise and left. At least one witness saw Michael Jackson walking alone in Gallipeau's neighborhood away from Gallipeau's house.
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> When Gallipeau got up from watching television and went into the kitchen, Barnhill ambushed him and attempted to strangle him. When the attempt failed, Barnhill got a towel to use as a ligature around Gallipeau's neck. The second attempt was unsuccessful, so Barnhill removed Gallipeau's belt from around his waist and wrapped it around Gallipeau's neck four times, breaking Gallipeau's neck and killing him. Barnhill then dragged Gallipeau through the house to a back bedroom and left him there.

Barnhill took Gallipeau's money, wallet, keys, and car, and eventually met Jelani Jackson, Michael Jackson's brother. Barnhill and Jelani Jackson drove to New York and Barnhill went to his girlfriend's apartment. Shortly thereafter, New York police located Gallipeau's vehicle, found Barnhill, and arrested him on an old warrant.

Barnhill told police that he was at Gallipeau's house with Jelani Jackson, but that Jelani Jackson actually killed Gallipeau and he only held Gallipeau's hands down to help. This, Barnhill indicated, explained the presence of Gallipeau's blood on his shirt. Barnhill filed a motion to suppress his statement to police and evidence obtained during his arrest, which the trial court denied. Within ten days after the suppression hearing, defense counsel requested a competency hearing for Barnhill. After counsel requested the competency hearing, he filed a motion to disqualify the trial judge based on certain comments made at the suppression hearing. The trial judge denied the motion to disqualify. Barnhill thereafter entered pleas of no contest to first-degree murder, burglary of a dwelling while armed, armed robbery, and grand theft. The trial court made a finding of guilt as to each charge. n1

> n1 The facts and evidence are sufficient to demonstrate first-degree murder and Barnhill's participation as a principal.

Both the State and Barnhill presented testimony and evidence during the penalty phase. The State called twenty-four witnesses, including the medical examiner, Gallipeau's neighbors and housekeeper who called police to investigate after Gallipeau's wallet was found in the street, the police officer who found Gallipeau's body, police officers from New York who arrested Barnhill and questioned Jelani Jackson, and Jelani and Michael Jackson. Barnhill called thirteen witnesses, including various family members and friends who testified to Barnhill's home life, upbringing, and mental and emotional performance. Barnhill called Dr. Eisenstein and Dr. Gutman to testify to his mental health and presented the perpetuated testimony of Dr. Feegel.

The jury recommended death by a vote of nine to three.

> The trial court then conducted a Spencer n2 hearing, at which Barnhill testified. After considering the jury recommendation action, evidence presented at the penalty phase trial, additional evidence in mitigation presented at the Spencer hearing, including Barnhill's own testimony, memoranda and arguments of counsel, the trial court imposed the following sentence: On count I of the indictment, the trial court sentenced Barnhill to death for the first-degree murder of Gallipeau; on count II, the trial court sentenced Barnhill to life for burglary while armed; on count III, the trial court sentenced Barnhill to life for robbery with a deadly weapon; on count IV, the trial sentenced Barnhill to five years for grand theft. Each sentence was ordered to run concurrently with the sentence of death.
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> > n2 Spencer v. State, 615 So. 2d 688 (Fla. 1993). At a Spencer hearing the defendant is allowed to present additional mitigating evidence to the trial judge.

Barnhill v. State, 834 So. 2d 836, 840-842 (Fla. 2002).

> Barnhill raised seven issues on direct appeal:
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> (1) the trial court erred in denying his motion for disqualification;
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> (2) the trial court erred in refusing to strike two jurors for cause who stated they had deep-rooted beliefs in favor of the death penalty;
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> (3) the trial court erred in limiting the defense's relevant voir dire examination by repeatedly interrupting counsel and chastising him in front of the venire;
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> (4) the trial court erred in denying the defense motion for continuance so that the defense could present the live testimony of its expert;
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> (5) the trial court erred in adjudicating and sentencing Barnhill for both the robbery of Gallipeau and the theft of Gallipeau's automobile;
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> (6) the trial court erred in instructing the jury on

> statutory mitigating circumstances which the defense had waived;
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> (7) the trial court included improper aggravating circumstances, excluded existing mitigating circumstances, and failed to properly find that the mitigating circumstances outweighed the aggravating circumstances.[1]

The convictions and sentences were affirmed. *Barnhill v. State*, 834 So. 2d 836 (Fla. 2002). Barnhill filed a petition for writ of certiorari in the United States Supreme Court. The petition was denied June 9, 2003. *Barnhill v. Florida*, 539 U.S. 917 (2003).

Barnhill filed three separate post-conviction pleadings: Motion To Vacate Judgments Of Conviction And Sentence With Special Request For Leave To Amend filed November 25, 2003; Amended Motion To Vacate Judgments Of Conviction And Sentence With Special Request For Leave To Amend filed February 16, 2004, and Defendant=s 2nd Amended Motion filed June 8, 2004. The appeal

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[1] The trial judge found five aggravating circumstances: Under sentence of imprisonment; during a robbery or burglary and pecuniary gain (this Court struck pecuniary gain); cold, calculated and premeditated, and heinous, atrocious and cruel.

The trial judge found age (20) as a statutory mitigating circumstance and the following non-statutory mitigation: learning disability, frontal lobe impairment, cooperation with law enforcement, difficult childhood, pled to charges, appropriate courtroom behavior, psychiatric disorders, remorse, neglected by mother, poor student, suffered shock and embarrassment because father arrested in front of him and sentenced to lengthy prison stay, grandparents provided loving atmosphere.

from denial of postconviction relief is currently pending in this Court as Case No. SC-6-275.

CLAIM I

WHETHER BARNHILL IS COMPETENT TO BE EXECUTED IS NOT REVIEWABLE AT THIS TIME SINCE THERE IS NO ACTIVE DEATH WARRANT.

Barnhill alleges no facts in support of this allegation, nor did he offer any support of this claim at the trial court. In fact, he even concedes that this claim is not ripe for consideration at this time. (Habeas petition at 3). *See Thompson v. State*, 759 So. 2d 650, 668 (Fla. 2000); *Provenzano v. State*, 751 So. 2d 37 (Fla. 1999); Fla. R. Crim. P. 3.811(d). This claim has no merit. *Johnson v. State*, 804 So. 2d 1218, 1225-1226 (Fla. 2001).

CONCLUSION

Based upon the foregoing, the State requests respectfully that this Court deny habeas corpus relief.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing was furnished by U.S. mail to **Robert T. Strain,** CCRC - Middle, 3801 Corporex Park Dr., Suite 210, Tampa, Florida 33619, this _____ day of October, 2006.

Assistant Attorney General

CERTIFICATE OF FONT

I hereby certify that a true and correct copy of the foregoing Answer Brief was generated in Courier New, 12 point font, pursuant to Fla. R. App. 9.210.

Assistant Attorney General