ARTHUR BARNHILL, III, **Case No. SC06-275**

Appellant,

v.

STATE OF FLORIDA

Appellee.
_____/

ON APPEAL FROM THE EIGHTEENTH JUDICIAL CIRCUIT IN AND FOR SEMINOLE COUNTY, STATE OF FLORIDA

ANSWER BRIEF OF APPELLEE

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STATEMENT OF THE CASE AND FACTS

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.
>
> 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.
>
> 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.
>
> > 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:

(1) the trial court erred in denying his motion for disqualification;

(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;

(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;

(4) the trial court erred in denying the defense motion for continuance so that the defense could present the live testimony of its expert;

(5) the trial court erred in adjudicating and sentencing Barnhill for both the robbery of Gallipeau

and the theft of Gallipeau's automobile;

(6) the trial court erred in instructing the jury on statutory mitigating circumstances which the defense had waived;

(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

[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.

With Special Request For Leave To Amend filed February 16, 2004, and Defendant:s 2nd Amended Motion filed June 8, 2004.

SUMMARY OF ARGUMENT

CLAIM I: Trial counsel was not ineffective for failing to withdraw Barnhill's guilty plea. Barnhill entered the plea against the advice of counsel. They later discussed withdrawing the plea, and together made a tactical decision not to withdraw the plea. To the extent Barnhill raises the merits of withdrawing the plea or competency to enter the plea, these issues are procedurally barred. Defense counsel recognized signs of deterioration the day after Barnhill entered the plea and immediately brought it to the judge's attention. Barnhill had a brief psychotic episode triggered by the stress of the plea. After he was determined to have recovered, the penalty phase proceeded. Defense counsel performed admirably under the circumstances. Barnhill has failed to meet the deficient performance standard of *Strickland* or prejudice standard of *Lockhart.*

CLAIM II: Trial counsel was not deficient in failing to disqualify the judge simply because the motion was legally insufficient. In order to recuse a trial judge, the defendant must have a reasonable fear he will not receive a fair trial. The simple fact a trial judge makes a credibility determination against a defendant or makes an adverse ruling is not grounds for recusal. Barnhill has not shown deficient performance or

prejudice under *Strickland.*

CLAIM III: Trial counsel was not ineffective in voir dire. Claims regarding jury selection were raised on direct appeal. As such, they cannot be re-litigated under the guise of ineffective assistance of counsel. Barnhill has failed to meet the deficient performance and prejudice prongs of *Strickland*.

CLAIM IV: Trial counsel presented abundant mitigation evidence. The evidence presented at the evidentiary hearing was either cumulative or negative. Counsel made a tactical decision not to present the testimony of Dr. Riebsame, who would testify Barnhill is antisocial. Counsel also made a tactical decision not to call the mother and sisters, who would not testify favorably and could sabotage the case. Counsel also made a tactical decision not to call the father, who was in prison. Counsel called a mental health expert and relatives who were close to Barnhill and could relate his background. Counsel was not deficient, and there was no prejudice.

CLAIM V: Counsel was not ineffective in closing argument. The isolated examples cited by Barnhill need to be read in context of the entire argument. Counsel made strategic choices. There was no prejudice. Evidence of guilt was overwhelming, and the State proved four strong aggravating circumstances.

CLAIM VI: The rules prohibiting juror interviews are not

unconstitutional, this issue is procedurally barred, and this Court has rejected this claim repeatedly.

CLAIM VII: Lethal injection is not cruel and unusual punishment, this issue is procedurally barred, and this Court has rejected this claim repeatedly.

CLAIM VIII: The jury instructions did not shift the burden of proof, this issue is procedurally barred, and this Court has rejected this claim repeatedly.

CLAIM IX: There was no error, either individually or cumulatively, and this claim is procedurally barred.

PRELIMINARY STATEMENT

In most of the claims raised in the Initial Brief, Appellant refers back or re-incorporates arguments made in the various motions filed in the lower court. To the extent a specific argument is not raised on appeal, that argument is waived. *See Hannon v.* State, 2006 Fla. Lexis 1826 (Fla. 2006). This Court has previously determined that speculative, unsupported arguments are improper and no relief is available. *See Cooper v. State*, 856 So. 2d 969, 977 n.7 (Fla. 2003) (rejecting similar argument as insufficient for consideration); *Sweet v. State*, 810 So. 2d 854, 870 (Fla. 2002) ("[B]ecause on appeal Sweet simply recites these claims from his postconviction motion in a sentence or two, without elaboration or explanation, we conclude that these instances of alleged ineffectiveness are not preserved for appellate review."); *see also Duest v. Dugger*, 555 So. 2d 849, 852 (Fla. 1990) ("The purpose of an appellate brief is to present arguments in support of the points on appeal. Merely making reference to arguments below without further elucidation does not suffice to preserve issues . . . .").

CLAIM I

COUNSEL WAS NOT INEFFECTIVE FOR FAILING TO FILE A MOTION TO WITHDRAW THE PLEA

Barnhill first claims trial counsel was ineffective for failing to withdraw the plea Barnhill entered over objection of trial counsel. Insofar as this issue addresses competency to plea, this is an issue which should have been raised on direct appeal and is procedurally barred. *See Carroll v. State,* 815 So. 2d 601, 610 (Fla. 2002) *Patton v. State,* 784 So. 2d 380, 393 (Fla. 2000); *Johnston v. Dugger*, 583 So. 2d 657, 659 (Fla. 1991).

Insofar as Appellant alleges counsel was ineffective for failing to withdraw the plea due to questionable competency, Appellant has failed to allege that he wished to withdraw the plea or that counsel prevented him from withdrawing the plea. Likewise, Barnhill failed to allege that the plea was not voluntary or that he was incompetent at the time.

The postconviction judge ruled:

> In his ninth claim, the Defendant alleges that counsel was ineffective for moving to withdraw his plea based upon his incompetency. On October 14, 1998, the Defendant pled guilty as charged, against the advice of counsel. The Court went through an extensive plea colloquy, satisfying itself that the Defendant understood the proceedings. The following day, the

Defendant appeared in court to begin the penalty phase, and counsel felt that he was behaving erratically. The Defendant's competency was also called into question when he requested that the court sentence him to death. The penalty phase jury was released and the Defendant was evaluated for competency. No formal finding of incompetency was made; ultimately, the Defendant had been found to suffer from a "brief reactive psychosis," which is a temporary psychotic episode triggered by extreme stress. He responded well to medications over the next several months. Dr Danziger testified at the evidentiary hearing that the plea was likely the stress that brought about this episode and that at the time of the plea, he was not suffering any loss of touch with reality. His testimony is more credible than Dr. Fisher's because Dr. Danziger actually evaluated the Defendant within days of the episode, whereas Dr. Fisher diagnosed the Defendant with depression five years later based upon written reports made by others. Furthermore, the doctors did not fundamentally disagree. Dr. Danziger agreed that the Defendant suffered from depression; Dr. Fisher agreed that a guilty plea could have been the "straw that broke the camel's back," although he disputes that the Defendant suffered from a brief reactive psychosis because the Defendant exhibited earlier signs of mental illness. Dr. Fisher merely took issue with Dr. Danziger's specific diagnosis.

In addition to the psychiatric testimony adduced at the evidentiary hearing, co-counsel, Timothy Caudill, testified that he and the Defendant spoke about the plea afterwards and discussed whether to withdraw it. Counsel felt that the Defendant should not withdraw the plea because the entry of the plea could be used in mitigation and withdrawing the plea could cause the court to believe that the Defendant was jerking the system and using his mental state merely as a delaying tactic. Based upon Dr. Danziger's testimony, as well as counsel's testimony that the Defendant was acting normally on the day of the plea, this Court finds that there was no reasonable belief that the Defendant was incompetent at the time that he entered the plea. Therefore, counsel was not ineffective because there was a reasonable strategic reason to forego

withdrawing the plea.

(Vol.8, PC-R1318-1319).[2] These findings are supported by substantial competent evidence.

A jury was selected for trial on October 12-14, 1998 (R1-658). The jury was released in order for the court to rule on pre-trial motions (R659). The parties proceeded with a motion to suppress, during which Appellant testified (R717-729). The motion was denied (R736). Appellant also moved to suppress statements, and the motion was denied (R738). At that point, defense counsel stated that Appellant=s grandmother was in the courtroom, that Appellant wished to speak to her, and that the case might be resolved (R748). Defense counsel stated on the record that it was against his advice that the case be resolved (R748).

After a recess, defense counsel announced that Appellant wanted to enter a plea (R750). The trial court judge conducted a complete plea colloquy (R755-777). Appellant stated he had adequate time to speak to his attorneys and that his grandmother was present[3]. Appellant stated he understood the plea agreement

[2] Cites to the record on appeal are to volume number followed by "PC-R." Because the transcripts of the evidentiary hearing start anew at number "1," cites to the evidentiary hearing transcripts are by volume number followed by "EH." Cites to the record on direct appeal are "R."

[3]As noted in the trial court judge=s sentencing order, Appellant

and had no questions (R761). Appellant stated the plea was entered voluntarily and was in his best interest. He understood the consequences of the plea (R762). The trial court judge explained the rights Appellant was giving up (R763-767). When Appellant had a question, he was given time to speak with his attorney (R763). Appellant was satisfied with the services of his attorneys (R767, 776). Appellant denied being under the influence of any medication or having any emotional problems (R767). Appellant had never been declared incompetent. He completed school to the 11th grade (R768). The trial court judge asked questions to verify competence (R768-770).

The next day, October 15, defense counsel approached the bench and stated that after the plea there had been a radical change in Appellant=s behavior and competence might be an issue (R786). The trial court judge indicated that he wished to proceed with the penalty phase and that Awide swings of emotion@ were the norm in this type situation (R788). Appellant was adjudicated (R791). The court questioned Appellant as follows:

MR. BARNHILL: I=m asking for the death penalty.

THE COURT: You=re asking for the death penalty?

---

lived with his grandparents and had a very close relationship with them.

MR. BARNHILL: Yes.

THE COURT: We use the phrase you're volunteering for the death penalty; is that correct?

MR. BARNHILL: Yes.

THE COURT: Okay. And is this your decision, sir?

MR. BARNHILL: Yes.

THE COURT: Okay. Are you sure this is what you want?

MR. BARNHILL: Yes.

(R792). The trial court asked Appellant to raise his right hand, and took testimony under oath (R792-794). Appellant indicated that he was able to understand what was transpiring, that he was of sound mind and able to act in his own best interest, that he was making the decision voluntarily, and that he had advice of counsel (R793-794). Defense counsel objected to the questioning because he questioned competency (R794).

Appellant told the trial court judge he wanted to be sentenced to death and that it was something he decided the night before (R795). He told his attorneys ten minutes before he was brought to court (R796). Defense counsel noted that Appellant had worn a suit every day that week except this day (R796). He indicated the change started before the plea was entered, and the plea may have been an emotional decision (R796-797).

The court appointed two experts to examine Appellant (R806, 230-231).[4] The jury was released (R852). The court re-convened on December 7, 1998, after Dr. Danziger reported that competency was no longer an issue (R1301). Appellant was present in the courtroom (R1301). He was also present on February 11, 1999, April 6, 1999, and August 20, 1999 (R1305, 1309, 1318). Jury selection began September 13, 2000. The trial court judge noted the report of Dr. Danziger finding Appellant competent (R1353). The trial court judge discussed the plea in Appellant=s presence and asked whether he was ready to proceed to the penalty phase (R1354, 1359).

The Appellant was before the trial judge several times between the plea and the penalty phase and made no indication

[4]Dr. Kirkland believed Appellant was incompetent due to AMajor Depression@ which became Amuch worse since entering his plea.@ (R 228) Dr. Gutman found Appellant competent to proceed, but noted AA noticeable change in mood, affect, behavior and demeanor occurred overnight, after he had testified regarding questions given to him by the Court regarding his Competence and knowing what he was doing when entering a plea.@(R226) Dr. Danziger was ordered to begin treatment of Appellant, and placed the latter on Haldol, Cogentin and Prozac (Vol. 10, R238).

whatsoever that he was dissatisfied with the fact he pled. As to Barnhill=s competency at the time of the plea, Mr. Caudill testified Barnhill was fine during both jury selection and the motion to suppress hearing at which he testified (Vol. 10, EH237-238). Mr. Caudill would not have let Barnhill plea if there were any indication of incompetency (Vol. 10, EH238).

Dr. Fisher, clinical psychologist, testified at the evidentiary hearing and discussed Abrief reactive psychosis@ as a response to specific stressors during which a person has a loss of contact with reality (Vol. 11, EH449). After the plea, Dr. Danziger had diagnosed Barnhill with brief reactive psychosis. Dr. Kirkland had diagnosed Barnhill with long-standing depression (Vol. 11, EH450). In Dr. Fisher=s opinion, the mental state was more akin to depression because there was a suicide attempt in 1996 or 1997 at the time of arrest (Vol. 11, EH452). Barnhill was under a great deal of stress at the time of arrest because he had been kicked out of his grandparents= house, his girlfriend had an abortion, and he believed the mother of his child in New York was taking drugs (Vol. 11, EH452). Dr. Fisher believed the psychosis was present before the plea (Vol. 11, EH453). One psychologist reported Barnhill having auditory hallucinations on November 5, 1998[5] (Vol. 11, EH455). The reports of auditory hallucinations

[5]The plea was October 14, 1998.

were all made by Barnhill himself (Vol. 11, EH462).

Dr. Fisher believed Barnhill had existing problems before the plea, and the plea was the Astraw that broke the camel=s back.@ (Vol. 11, EH460). Any statement in Dr. Fisher=s report that brief reactive psychosis[6] (ABRP@) was not recognized in the Diagnostic and Statistical Manual of Mental Disorders IV-TR (ADSM@) was a mistake (Vol. 11, EH472). It was only after Barnhill=s plea on October 14, 1998, that he reported he had previously heard voices (Vol. 11, EH476). It is reasonable for a person to re-think their chances of a successful defense once a critical motion to suppress is denied (Vol. 11, EH479). Barnhill denied any prior psychiatric disorders in the plea colloquy (Vol. 11, EH479).

After the breakdown, Barnhill was administered anti-psychotic and anti-depressant medications which could return a person=s mental state to normal (Vol. 11, EH485). Barnhill would often refuse medication because it upset his stomach (Vol. 11, EH487). Barnhill also refused adjustment reviews at the jail (Vol. 11, EH488). Dr. Fisher admitted that the psychologists who saw Barnhill closer to the time of the plea rather than 8 years later, were more qualified to evaluate his mental condition (Vol. 11, EH488). Of the two psychologists who evaluated Barnhill on October

[6]This disorder is now called ABrief Psychotic Disorder@(Vol. 11, EH473).

15, 1998, Dr. Guzman said he suffered from chronic depression but was competent to proceed. Dr. Kirkland said Barnhill had a major depression (Vol. 11, EH481). The trial judge then suspended the proceedings and Dr. Danziger was appointed to evaluate and treat Barnhill (Vol. 11, EH483).

Dr. Danziger, a psychiatrist, testified at the evidentiary hearing. He first saw Barnhill on October 17, 1998 (Vol. 11, EH516). Barnhill demonstrated motor retardation, speech latency, and claimed to hear the voice of his cousin. Dr. Danziger diagnosed Barnhill with BRP (Vol. 11, EH516). Dr. Perez, Dr. Danziger=s partner, saw Barnhill on October 22, 1998, and noted the voices were subsiding. By October 29, 1998, Barnhill was not hearing voices and was not suicidal (Vol. 11, EH483). On November 2, 1998, the Court held a hearing on the motion to disqualify, at which time Barnhill appeared in court (Vol. 11, EH484). Dr. Danziger saw Barnhill on November 15, 1998, and issued a report diagnosing Barnhill with BRP Aresolving.@ (Vol. 11, EH516). At this point, Barnhill was competent to proceed (Vol. 11, EH521).

The symptoms of BRP are disorganized speech or behavior, catatonic behavior, false fixed beliefs, or hallucinations. The symptoms have sudden onset (Vol. 11, EH516-17). In Dr. Danziger=s opinion, the October 14, 1998, plea to murder was the Akey trigger@ for Barnhill=s BRP (Vol. 11, EH518). The attorneys

noticed a dramatic change between Barnhill=s demeanor on October 14 and October 15, and advised the trial judge (Vol. 11, EH519). This dramatic change is consistent with BRP (Vol. 11, EH519). Dr. Danziger reviewed the record of the plea colloquy and found Barnhill=s responses appropriate and logical (Vol. 11, EH532). If Barnhill had been hallucinating or experiencing other psychotic symptoms, someone would have probably noticed (Vol. 11, EH533).

The fact that Barnhill tried to commit suicide after he was arrested, ripped bed sheets on two occasions, and tried to hang himself was consistent with the diagnosis of adjustment disorder made in the mental health records at the jail (Vol. 11, EH526). The notes regarding Barnhill's suicidal incidents were made by guards. The mental health records showed no major mental illness, with Elavil prescribed for depression (Vol. 11, EH526-527). It was significant that 12 years passed between the suicidal incidents and the plea (Vol. 11, EH535).

First, Barnhill cannot avoid the procedural simply by reframing the competency issue as one of ineffective assistance of counsel must fail. *Robinson v.* State, 913 So. 2d 514 (Fla. 2005); *Medina v. State*, 573 So. 2d 293, 295 (Fla. 1990).

Second, because this claim involves a guilty plea,

ineffectiveness is determined by the test set out in *Hill v. Lockhart*, 474 U.S. 52 (1985):

> The first prong is the same as the deficient performance prong of *Strickland*. Regarding the second prong, the Supreme Court in *Hill* held that a defendant must demonstrate "a reasonable probability that, but for counsel's errors, the defendant would not have pleaded guilty and would have insisted on going to trial."

Grosvenor v. State, 874 So. 2d 1176, 1179 (Fla. 2004) (*citations omitted*) (*quoting Hill*, 474 U.S. at 59).

Barnhill entered the plea against the advice of counsel. The plea was voluntary. After his mental state deteriorated, trial counsel immediately sought mental health assistance, which the court provided. Once the episode passed, trial counsel discussed the possibility of withdrawing the plea, but counsel and Barnhill made a strategic decision not to withdraw the plea. Strategic decisions do not constitute ineffective assistance of counsel if alternative courses have been considered and rejected and counsel's decision was reasonable under the norms of professional conduct. *Robinson v. State*, 913 So.2d 514, 524 (Fla. 2005); *Brown v. State*, 894 So. 2d 137, 147 (Fla. 2004); *see also Kenon v. State*, 855 So. 2d 654, 656 (Fla. 1st DCA 2003) ("Absent extraordinary circumstances, strategic or tactical decisions by trial counsel are not grounds for ineffective

assistance of counsel claims."), *review denied,* 868 So. 2d 523 (Fla. 2004). Trial counsel was not deficient in his performance surrounding the plea.

Insofar as the prejudice prong, Barnhill was before the trial judge many times and has never asserted that "but for counsel's errors, the defendant would not have pleaded guilty and would have insisted on going to trial." *Hill, supra.* Barnhill pled in spite of counsel's advice. He has never alleged he wanted to go to trial but counsel prevented him, because the facts do not support the allegation. Counsel was neither deficient nor was Barnhill prejudiced.

CLAIM II

COUNSEL WAS NOT INEFFECTIVE IN FAILING TO DISQUALIFY THE TRIAL JUDGE

Barnhill argues trial counsel was ineffective for failing to succeed in his motion to disqualify the trial judge. This was an issue on direct appeal, and the trial court judge held:

> Barnhill argues the trial court erred in denying his motion to disqualify the trial judge. We disagree and affirm the ruling that the motion was insufficient. Section 38.10, Florida Statutes (2001), gives litigants the substantive right to seek disqualification of a judge. Rule 2.160, Florida Rules of Judicial Administration, sets forth the procedure to be followed in the disqualification process.
>
> Section 38.10, provides in pertinent part:

> Whenever a party to any action or proceeding makes and files an affidavit stating fear that he or she will not receive a fair trial in the court where the suit is pending on account of the prejudice of the judge of that court against the applicant or in favor of the adverse party, the judge shall proceed no further, but another judge shall be designated in the manner prescribed by the laws of this state for the substitution of judges for the trial of causes in which the presiding judge is disqualified. Every such affidavit shall state the facts and the reasons for the belief that any such bias or prejudice exists and shall be accompanied by a certificate of counsel of record that such affidavit and application are made in good faith.

Similarly, rule 2.160 provides in pertinent part as follows:

> (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; or
>
> (2) that the judge before whom the case is pending, or some person related to said judge by consanguinity or affinity within the third degree, is a party thereto or is interested in the result thereof, or that said judge is related to an attorney or counselor of record in the cause by consanguinity or affinity within the third degree, or that said judge is a material witness for or against one of the parties to the cause.
>
> (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. If any motion is legally insufficient, an order denying the motion shall immediately be entered. No other reason for denial shall be stated, and an order of denial shall not take issue with the motion.

The test a trial court must use in reviewing a motion to disqualify is set forth in *MacKenzie v. Super Kids Bargain Store, Inc.*, 565 So. 2d 1332 (Fla. 1990). In *MacKenzie*, we held that "the standard for determining whether a motion is legally sufficient is 'whether the facts alleged would place a reasonably prudent person in fear of not receiving a fair and impartial trial.'" *Id.* at 1335 (quoting *Livingston v. State*, 441 So. 2d 1083, 1087 (Fla. 1983)). Whether the motion is "legally sufficient" is a question of law. See Id. It follows that the proper standard of review is de novo. *See Armstrong v. Harris*, 773 So. 2d 7 (Fla. 2000); *Sume v. State*, 773 So. 2d 600 (Fla. 1st DCA 2000); *Rittman v. Allstate Ins*. Co., 727 So. 2d 391 (Fla. 1st DCA 1999).

Barnhill's motion to disqualify was based on the trial judge's finding that Barnhill was untruthful when he testified that he was living with his girlfriend in New York. The judge's complete statement is as follows:

> There may be reason for a lawsuit where you can sue them [the police] under a 1983 action, there may be grounds for a lawsuit or a motion to suppress for the homeowner who lives there, okay, and I'm not finding by any stretch of the imagination that your client lives there. In fact, I find him to be a totally unbelievable explanation as to what happened. It about borders on perjury, in fact, when you say that somebody's going to be living at a house, they can't tell you who it is that says they live there, either the mother-in-law or, I use the word mother-in-law, the girlfriend's mother and stepfather, can't give me their names, arrives there eleven o'clock at night, says there's a

> phone call at midnight that says, yes, you can live there. He hasn't been there for quite sometime. Additionally, it's a two bedroom apartment. The way I counted it, there's his girlfriend and three sisters, a baby, a mother and a stepfather, and he says he's gonna live in one of the bedrooms. That's not believable under any stretch of the imagination.

In the motion to disqualify, Barnhill asserts that he has a well-grounded fear that the judge will not be fair and impartial, and that the judge's statements indicate bias against him because the judge denied his motion to suppress despite the fact that the State offered no evidence to contradict Barnhill's testimony that he lived with his girlfriend in New York.

The motion to disqualify is legally insufficient because the supporting affidavit made by the defendant does not state the specific facts which lead him to believe he will not receive a fair trial. The oath that appears in the record merely refers to "the matters, which are contained in this motion." Barnhill did not file an affidavit stating the facts and the reasons for the belief that bias or prejudice exists. Further, the certificate of counsel of record is attached to the motion itself and states only that the statements of the defendant contained "herein" are made in good faith. The motion was technically insufficient, and the trial judge's ruling was correct.

Without discussing the technical requirements, Barnhill argues that the motion was legally sufficient because the grounds upon which the motion was based were legally sufficient. Barnhill cites several cases where the judge's commentary on the truthfulness of a witness affected the outcome of the trial and warranted disqualification. Whether that is true or not, the technical requirements of the motion were not met and the trial court's decision to deny the motion as legally insufficient was proper.

Barnhill v. State, 834 So. 2d 836, 842-843 (Fla. 2002).

Barnhill now argues that counsel was ineffective for failing to file a legally sufficient motion. In order to establish that trial counsel was ineffective, Barnhill must establish that his counsel failed to act within the wide range of professionally competent assistance of counsel. The case law is clear that the proper test for attorney performance is that of reasonably effective assistance. *Strickland v. Washington*, 466 U.S. 668 (1984). The two-prong test for ineffective assistance of counsel established in *Strickland* requires a defendant to show (1) deficient performance by counsel and (2) that the deficient performance prejudiced the defense. In any ineffectiveness of counsel case, judicial scrutiny of an attorney's performance must be highly deferential and there is a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance. *Strickland,* 466 U.S. at 694. A fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight. *Id.* at 696. Moreover, courts have recognized that "because representation is an art and not a science, '[e]ven the best criminal defense attorneys would not defend a particular client in the same way.'" *Waters v. Thomas*, 46 F.3d 1506, 1522 (11th Cir. 1995) (quoting *Strickland*, 466 U.S. at 689).

Even with the benefit of hindsight in the instant case, it is readily apparent that Assistant Public Defender Timothy Caudill's motion to disqualify was filed and argued in a reasonably competent manner.

As previously noted, this Court found that the trial judge properly denied the motion as legally insufficient. Although this Court stated that the motion was technically insufficient without addressing the legal sufficiency of the motion, such a ruling does not, as argued by Barnhill, result in a finding that trial counsel was ineffective as a matter of law. For example, in order to show deficient performance under *Strickland*, Barnhill must show that trial counsel's actions were outside the wide range of professionally competent assistance. This requires showing that trial counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed the defendant by the Sixth Amendment. *Valle v. State*, 778 So. 2d 960, 965-66 (Fla. 2001).

In evaluating whether an attorney's conduct is deficient, "there is a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance, and the defendant 'bears the burden of proving that counsel's representation was unreasonable under prevailing professional

norms and that the challenged action was not sound strategy.'" *Brown v. State*, 755 So. 2d 616, 628 (Fla. 2000) (quoting *Strickland*, 466 U.S. at 688-89).

In the instant case, Barnhill is unable to demonstrate deficient performance. Barnhill's trial counsel filed a motion to disqualify and argued within the body of the motion that his client had a well-founded fear that the trial judge would not give him a fair penalty phase based on the court's comments made at the suppression hearing regarding Barnhill's credibility. (R233) Defense counsel attached an oath from Barnhill to the motion which did not contain any statements from Barnhill, but rather stated "I hereby swear or affirm that the matters, which are contained in this motion, are true and correct." (R.235) Although the motion was technically insufficient because the defendant's oath did not contain the necessary facts (but the motion itself did), this does not equate to a finding that counsel was deficient for drafting and arguing the motion. The presentation of the motion in the form prepared by defense counsel was well within the wide range of reasonable, professional assistance.

The postconviction judge held:

> The first claim addresses counsel's conduct regarding the filing of a motion to disqualify the trial court. Counsel moved to disqualify the court for comments

> made by the court during a pre-trial hearing in which the court quest-toned the Defendant's credibility. The motion to disqualify' was denied. The Defendant argues that the Court's denial of the motion showed that it was legally insufficient because the court would have been required to grant a legally sufficient motion. Therefore, he claims counsel was ineffective because he should known to filed an amended, legally sufficient, motion. The Florida Supreme Court affirmed the denial of the motion. ***Barnhill,*** 834 So. 2d at 842-43. This claim, raised in the direct appeal, cannot now be recast under the guise of ineffective assistance of counsel. ***See Kight v. Dugger,*** 574 So. 2d 1066 (Fla. 1990). As such, it is procedurally barred.
>
> Notwithstanding the procedural bar, the Defendant cannot meet the prejudice prong of ***Strickland*** with this claim. Regardless of whether the Defendant could have presented a legally sufficient claim for recusal, the Florida Supreme Court affirmed each of the aggravators, with the exception of the pecuniary gain aggravator because of improper doubling. ***Id.*** at 852. The overwhelming weight of the aggravators outweighed the mitigating evidence, and a death sentence would have been imposed even had sentencing occurred in front of a different judge. As such, there is no reasonable possibility that the result of the proceeding would have been different. Because of the procedural bar and, alternatively, based upon its merits, this claim should be denied.

(Vol. 8, PC-R1316).

Barnhill is likewise unable to establish prejudice as a result of his counsel's alleged ineffectiveness to file a technically sufficient motion to disqualify. As argued extensively on direct appeal to this Court, the allegations contained in the motion to disqualify were legally insufficient to warrant disqualification. Thus, even if defense counsel had

filed a technically sufficient motion, the allegations contained therein would not have been legally sufficient to warrant disqualification. The fact that a judge has previously made adverse rulings is not an adequate ground for recusal *Schoenwetter v. State*, 931 So. 2d 857, 872 (Fla. 2006), *Gilliam v. State*, 582 So. 2d 610, 611 (Fla. 1991). A "mere subjective fear of bias will not be legally sufficient, rather, the fear must be objectively reasonable." *Arbelaez v. State*, 898 So. 2d 25, 41 (Fla. 2005).

Furthermore, Barnhill is unable to establish that even had the trial court granted his motion to disqualify, the outcome of his sentence would have been different. The evidence was overwhelming surrounding the existence of the five aggravating factors in this case: (1) Barnhill was previously convicted of a felony and under sentence of imprisonment or placed on community control or on felony probation; (2) the capital felony was committed while Barnhill was engaged in the commission of a robbery or burglary; (3) the capital felony was committed for pecuniary gain; (4) the capital felony was a homicide and was committed in a cold calculated and premeditated manner without any pretense of moral or legal justification; and (5) the capital felony was especially heinous, atrocious or cruel. This

Court found that the trial court erred in doubling the pecuniary gain and during-the-course-of-a-felony aggravator, but nevertheless found that the evidence supported each of the aggravators. *Barnhill*, 834 So. 2d at 849-52. Accordingly, there is no question that the State would have been able to present evidence on these aggravators to any judge, and these aggravators would have outweighed the minimal amount of mitigation presented by Barnhill. *Id*. at 854 (finding death sentence proportional). Thus, because Barnhill is unable to establish either prong of *Strickland*, this Court should deny the instant claim.

CLAIM III

COUNSEL WAS NOT INEFFECTIVE IN QUESTIONING JURORS

Barnhill claims trial counsel was ineffective in *voir dire*. This claim is a variation of Claims 2 and 3 raised on direct appeal. It is improper to raise a merits claim previously raised on direct appeal under the guise of an ineffective assistance claim. *See Sireci v. State,* 469 So. 2d 119, 120 (Fla. 1985) ("Claims previously raised on direct appeal will not be heard on a motion for post-conviction relief simply because those claims are raised under the guise of ineffective assistance of counsel."). On direct appeal, this Court held:

2. Failure to Strike Jurors

Barnhill next asserts that the trial court erred in refusing to excuse at least two jurors for cause, forcing him to use his peremptory challenges to remove them. He claims, without elaboration, there were other jurors he would have moved to strike and could not because he was out of challenges. Barnhill specifically argues that jurors Cotto and Robinson should have been stricken for cause because they both expressed strong bias in favor of the death penalty. The trial court asked the two jurors whether they could follow the law and they both responded that they could. Barnhill argues that the court asked a much more general question than what he would have asked, and simply saying they could follow the law is not enough to rehabilitate a juror.

The test for determining juror competency is whether the juror can set aside any bias or prejudice and render a verdict solely on the evidence presented and the instructions on the law given by the court. See *Lusk v. State*, 446 So. 2d 1038, 1041 (Fla. 1984). A juror must be excused for cause if any reasonable doubt exists as to whether the juror possesses an impartial state of mind. *See Bryant v. State*, 656 So. 2d 426, 428 (Fla. 1995). A trial court has great discretion when deciding whether to grant or deny a challenge for cause based on juror incompetency. *See Pentecost v. State*, 545 So. 2d 861 (Fla. 1989). The decision to deny a challenge for cause will be upheld on appeal if there is competent record support for the decision. *See Gore v. State*, 706 So. 2d 1328, 1332 (Fla. 1997); *Johnson v. State*, 660 So. 2d 637 (Fla. 1995). In reviewing a claim of error such as this, we have recognized that the trial court has a unique vantage point in the determination of juror bias. The trial court is able to see the jurors' voir dire responses and make observations which simply cannot be discerned from an appellate record. *See Smith v. State*, 699 So. 2d 629, 635-36 (Fla. 1997); *Taylor v. State*, 638 So. 2d 30, 32 (Fla. 1994). It is the trial court's duty to determine whether a challenge for cause is proper. Id. In a death penalty case, a juror is only unqualified based on his or her views on

capital punishment, if he or she expresses an unyielding conviction and rigidity toward the death penalty. *See Farina v. State*, 680 So. 2d 392 (Fla. 1996).

Barnhill argues that Cotto and Robinson were not rehabilitated by the judge's simple question regarding whether they could apply the law, despite their statements otherwise, because of their unequivocal answers to other questions in voir dire.

The following is the exchange with Cotto:

STATE: Mr. Cotto, what do you feel about the death penalty?

COTTO: I strongly agree with the death penalty. I think if you kill you should be executed.

STATE: Okay. Well, Florida law doesn't quite agree with you on that, it weighs out circumstances when it should and when it should not and things to consider and weigh out that way in making your decision, it's not all the time. Can you set aside your opinions and follow what the law says?

COTTO: Yes, I could.

STATE: Even if it lead [sic] you to saying no death penalty in this case?

COTTO: Yes, I could.

As for Cotto, there was no wavering and no indication from his statements that he was equivocating. Cotto did not express unyielding conviction and rigidity toward death penalty. Because there is support in this record, we uphold the trial court's decision to deny Barnhill's challenge for cause of juror Cotto. See *Gore v. State*, 706 So. 2d 1328, 1332 (Fla. 1997). The testimony supports the trial court's decision, and in view of the trial court's ability to assess Cotto's demeanor and honesty in answering the questions, we find that the trial court's judgment was proper.

As for Robinson, the exchange went as follows:

DEFENSE: Ms. Robinson, okay. The same question, you've heard the reading of the indictment here and you can consider what I've said about the weighing process to be consistent with the law of Florida. Do you feel that you're inclined to favor one sentence versus the other at this point? And as Ms. Schwartz pointed out it's somewhat backwards, you haven't heard the facts yet but you're going to—

ROBINSON: I do tend to favor the death penalty in murder cases. But I'm more than willing to listen and I'm not head strong enough that I wouldn't listen to what is being said and consider the life imprisonment.

DEFENSE: Okay. So you would be inclined to give greater weight, you think, to aggravating circumstances because you favor the death penalty than you would be to give to mitigating circumstances, generally speaking?

ROBINSON: Yes.

COURT: We're going to stop it right now. Counsel approach the bench. (Whereupon, a benchside conference was held out of the hearing of the Venire as follows:)

At the benchside conference, the court told counsel that he needed to explain aggravating and mitigating factors before asking a juror how he or she would weigh the factors and pointed out that a juror may not know what these terms mean. The judge then addressed the panel as follows:

COURT: Ladies and Gentlemen of the panel, do you understand my instructions on the law in this case, do all of you understand that?

VENIRE: Yes.

COURT: Is there anybody at this point in time just because there has been entry of the plea set forth in the indictment that feel they're more predisposed because that finding had been made to favor the death penalty then not favor the death penalty? Is there

anybody who's of that mind set at this time?

VENIRE: No.

COURT: We have one, if you will, please raise your hand. Mr. Lowe, I see your hand raised. Anybody else?
....

Okay, thank you. You may continue.

DEFENSE: Mr. Chenet, I'm back to you now,....

Barnhill argues that the court did not adequately rehabilitate Robinson after she indicated that she believed in the death penalty and had her own opinions as to when it should be imposed. This argument ignores the fact that Robinson also said that despite her feelings, she was more than willing to listen to the evidence and would consider life imprisonment based on what she heard. "[J]urors who have expressed strong feelings about the death penalty nevertheless may serve if they indicate an ability to abide by the trial court's instructions." *Johnson v. State*, 660 So. 2d 637, 644 (Fla. 1995) (*citing Penn v. State*, 574 So. 2d 1079 (Fla. 1991)). Again, the trial court is given broad discretion to determine whether a prospective juror is qualified to serve based on the juror's demeanor and attitude about whether he or she will follow the law. Appellate courts are disinclined to reverse this decision based on a cold record. *See Johnson*, 660 So. 2d at 644.

Because there is competent support in the record for the trial judge's decision, we deny Barnhill's claim.

Barnhill, 834 So. 2d. at 844-846.

3. Voir Dire

Barnhill raises two issues concerning voir dire questioning: (1) he complains that he was deprived of a fair trial because the trial judge unreasonably limited defense counsel's voir dire and thereby deprived him of the right to a fair and impartial jury; and (2) the trial judge lacked neutrality as evidenced by his

unreasonable limitations and restrictions on defense counsel's voir dire, his repeated interruptions, chastising counsel and threatening to replace counsel, and the fact that the trial judge took over defense counsel's questioning. The State argues that the trial judge did not abuse his discretion because he interrupted both sides, did not restrict the defense's voir dire, and only questioned jurors to clarify certain points because defense counsel's inquiries were rambling, disjointed and confusing. Voir dire examination has been explained thusly:

> The examination of a juror on his voir dire has a two fold purpose, namely, to ascertain whether a cause for challenge exists, and to ascertain whether it is wise and expedient to exercise the right of peremptory challenge given to parties by the law....
>
> ... [F]ull knowledge of all material and relevant matters is essential to the fair and just exercise of the right to challenge either peremptorily or for cause.

Loftin v. Wilson, 67 So. 2d 185, 192 (Fla. 1953) (*quoting Pearcy v. Mich. Mut. Life Ins. Co.*, 111 Ind. 59, 12 N.E. 98, 99 (1887)). If counsel knows nothing more of the jurors, the single thing defense counsel must ascertain is whether the prospective jurors can fairly and impartially consider the defense offered by the defendant. *See Lavado v. State*, 492 So. 2d 1322 (Fla. 1986). A trial judge abuses his or her discretion if he or she precludes counsel from asking specific questions about bias or prejudice against the defendant or the defense theory, even if the judge permits the general question as to whether the prospective juror can follow the law. Id.

The issue here is whether the trial judge's actions amount to a denial of defense counsel's right to question the prospective jurors as to any bias or prejudice against Barnhill or his defense strategy. While it is true that the judge asked the prospective jurors whether they were predisposed to the death penalty because the defendant pled guilty, before he did

so, defense counsel questioned the jurors about whether they were biased against the defendant because of his plea. Defense counsel attempted to find out if the venire was biased, but the questions were long and compound. The court called defense counsel up to the bench twice and several times tried to re-ask the questions about bias as the court understood them in an attempt to clarify the questions.

The record in this case indicates the trial court did not unreasonably limit defense counsel's voir dire. The trial judge was trying to help defense counsel focus in on the questions defense counsel was trying to ask. At no time did the court say that defense counsel could not explore the issue of bias. Although the court conditioned this line of inquiry on counsel providing a clear recitation of the entire law on mitigation and aggravation, there was no bar or limit to the actual questioning.

As to Barnhill's allegation that the trial judge lacked neutrality by unreasonably limiting and restricting defense counsel's voir dire because he repeatedly interrupted, chastised, and threatened to replace counsel and improperly took over defense counsel's questioning, the record shows otherwise. Defense counsel's own testimony during his motion to strike the panel is that he was called to the bench twice. It was during one of the bench conferences that the judge told defense counsel if he did not make his questions more comprehensible, co-counsel would have to continue for him. The warning was at benchside, and not before the jury. Although defense counsel argued that he "felt a bad vibe" from the prospective jurors after he was called to the bench, and this was the basis of his motion to strike, the judge disagreed and said the panel's attitude was more likely from the questioning than from the judge's actions.

Based on the record, we cannot say that the judge abused his discretion. The court's rationale for calling the attorneys to the bench, conditioning defense counsel's questions, and questioning the panel himself was reasonable given the circumstances.

Barnhill, 834 So. 2d at 846-847.

Thus, on direct appeal Barnhill blamed the trial judge for restricting juror questioning. When that did not succeed, he claims trial counsel was ineffective. Trial counsel was not deficient in his questioning simply because, in hindsight, it could have been more concise. *Strickland* requires reasonably competent counsel, not perfect counsel. Barnhill failed to even allege prejudice or that any of the jurors who did sit on the jury were biased. Simply pointing to weaknesses in trial counsel's presentation does not mean any juror was prejudiced or that the outcome of the trial would have been different had counsel questioned differently. The most that present counsel has done is demonstrate that, with the benefit of hindsight and a record, he would have conducted *voir dire* differently. That is not what *Strickland* requires, and is insufficient to plead a claim for relief that would entitle Appellant to a hearing. *See Waters v. Thomas*, 46 F.3d 1506, 1511 (11th Cir.1995) (en banc).

The postconviction judge held:

> The seventh claim, that counsel was ineffective during voir dire, is without merit. The record indicates that the voir dire presentation was disjointed and rambling and that the court sustained objections and interrupted questioning to speak with counsel. The Florida Supreme Court found that the voir dire examination was not unreasonably limited. *See Barnhill,* 834 So. 2d at 846. The Defendant has failed to state with specificity how the result of the trial would have been different had

> voir dire been conducted differently; he only sets forth a speculative and conclusory claim that the result would have been different. The Defendant has failed to meet his burden under *Strickland* with this claim.

(Vol. 8, PC-R1318).

It is entirely appropriate for the trial court to rule on the prejudice prong of *Strickland* without addressing the deficiency prong. *See, e.g., Sweet v. State*, 810 So. 2d 854, 863-64 (Fla. 2002) (noting that the Court did not need to reach the issue of whether trial counsel was deficient in failing to have additional penalty phase witnesses testify, because the testimony of the witnesses at the evidentiary hearing did not establish prejudice where the majority of the testimony was cumulative with other witnesses' trial testimony). *See also, Henyard v. State,* 883 So.2d 753 (Fla. 2004). This Court has repeatedly held that "conclusory allegations are insufficient to warrant relief" on an ineffective assistance claim. *Wright v. State*, 857 So. 2d 861, 877 (Fla. 2003) (citing *Kennedy v. State*, 547 So. 2d 912, 913 (Fla. 1989)). *Lott v. State,* 931 So. 2d 807, 816 (Fla. 2006). Barnhill has made only conclusory allegations of deficiency and prejudice.

CLAIM IV

COUNSEL WAS NOT INEFFECTIVE IN HIS INVESTIGATION AND PRESENTATION OF MITIGATING

EVIDENCE

Barnhill next alleges that trial counsel conducted an inadequate investigation and presentation of mitigation evidence. Specifically, counsel failed to present the testimony of Appellant=s father.

The postconviction judge held:

> Next, the Defendant claims that counsel was ineffective for failing to present adequate mitigation evidence. He claims that counsel should have called his father, mother, and sisters. Counsel had legitimate, strategic reasons for not calling these witnesses. All information that they would have provided was brought forth through other witnesses at the penalty phase. If called at the penalty phase, counsel reasonably believed that the mother would have denied being neglectful to the Defendant. Also, the sisters had severe animosity toward the Defendant and had strong influence of the mother, even going so far as to prevent her from speaking to counsel. Since all of the information these witnesses would have presented was brought out by other relatives, such as the grandmother and the Defendant's aunt and uncle, there was no reason to risk putting forth these unpredictable witnesses. Similarly, the Defendant's father was not a good witness for mitigation. He is currently in prison for armed robbery. His testimony was colorful, but it added very little to the mitigation given to the jury during the penalty phase. The Defendant simply cannot show that he was prejudiced by the failure to interview or call these witnesses.

(Vol. 8, PC-R1318).

These findings are supported by substantial competent evidence. The testimony presented at the evidentiary hearing simply duplicated, and was cumulative of, the mitigation presented

at the penalty phase. See *Gudinas v. State*, 816 So. 2d 1095, 1106 (Fla. 2002) (finding that trial counsel was not ineffective for failing to present evidence in mitigation that was cumulative to evidence already presented in mitigation).

The evidence presented at the evidentiary hearing did not add to the mitigation. In fact, it was counter-productive. Delores Barnhill[7] provided the background information showing Barnhill was anti-social, a fact trial counsel avoided by not calling Dr. Riebsame. Dr. Riebsame had diagnosed Barnhill as antisocial and had gained information regarding facts of the case that were detrimental. Therefore, he was not called as a witness (EH137-138). Dolores testified that Barnhill was truant, had fights, and was expelled from school (EH265, 280). He could not hold a job (EH280). Delores had Barnhill removed from her house (EH281). At the time, Barnhill was on community control for stealing (EH281).

Barnhill=s father, Arthur Jr., had been in and out of prison his entire life (EH286). The trial attorneys discussed with Barnhill whether or not to call his father (Arthur Jr.) in the penalty phase and made a tactical decision not to call him[8]

[7] This witness did, in fact testify at the penalty phase.

[8]Counsel also made a tactical decision not to call the mother or sisters. Their strategy was to show Barnhill had a difficult childhood and was abandoned. They felt the mother and sisters would deny this and be difficult witnesses (EH186-187).

(EH154, 184). If the defendant consents to counsel's strategy, there is no merit to a claim of ineffective assistance of counsel. See *Nixon v. Singletary*, 758 So. 2d 618, 623 (Fla. 2000). *Gamble v. State,* 877 So. 2d 706, 714 (Fla. 2004).

Arthur Jr.=s testimony at the evidentiary hearing was hardly endearing. Not only was he constantly in prison[9], the way he made his living was to live off women. He liked to Ause them, abuse them.@ (Vol. 10, EH305). He didn=t care who he was with, he just wanted the woman to fulfill his sexual needs (Vol. 10, EH302). He was always unfaithful to Nadine (Barnhill=s mother) (Vol. 10, EH310). Arthur Jr. testified Nadine) was a Awhore@ who was always out on the street (Vol. 10, EH300). Arthur Jr. claimed his father (Barnhill=s grandfather, AArthur, Sr.@) had an affair with Nadine (Vol. 10, EH300). Also, Nadine was a lesbian who had a Adyke@ named Ruby (Vol. 10, EH301). Arthur Jr. described a threesome he had with Nadine and Ruby (Vol. 10, EH301).

Arthur Jr. never had a job. He and Nadine moved to Florida when his parents bought a home there (Vol. 10, EH308). The parents always wanted to raise Barnhill (Vol. 10, EH307). When he got to Florida, Arthur Jr. noticed the jewelry stores were not locked up like they were in New York (Vol. 10, EH308). He started

[9] Arthur Jr. had been in prison since he was very young (Vol. 9, EH148).

robbing for a living (Vol. 10, EH323). He also worked at a restaurant so he could meet women (Vol. 10, EH322-23).

Barnhill was between four and six years old when Arthur Jr. went to prison and did not return (Vol. 10, EH316, 331). Arthur Jr. was quite displeased that he was brought back from prison to testify about Abad@ things and was concerned about all the people in the courtroom (Vol. 10, EH319). Arthur Jr. enjoyed pornography and always had it in the house (Vol. 10, EH324). Arthur Jr. felt it was better for Barnhill to sit in a closet with magazines than to look under ladies= dresses (Vol. 10, EH325). Arthur Jr. was a member of a gang in New York, the Black Spades (Vol. 10, EH334). He felt that Nadine always took good care of the children and loved them (Vol. 10, EH329).

Not only was Arthur Jr. not a part of Barnhill=s life, but he didn=t even think he was his father. Arthur believed his father (Nadine=s father-in-law, Arthur Sr.) was Barnhill=s father (Vol. 10, EH334). One thing Arthur Jr. did remember was that when Barnhill was around six years old, he started a fire in the house (Vol. 10, EH334). This is yet another sign of antisocial personality disorder which trial counsel sought to avoid.

Arthur Jr. was a recalcitrant witness, and his evidentiary hearing testimony only damaged Barnhill. Trial counsel had a certain methodology and made a strategic decision whether to

present certain testimony. Arthur Jr.=s testimony was hardly helpful.

At the evidentiary hearing, both defense attorneys, Arthur Haft and Tim Caudill, testified about the selection of mental health experts. Dr. Riebsame was selected as the penalty phase expert, but when he met with Barnhill, the latter related a version of the murder which made him much more culpable (EH135, 138). The attorneys made a strategic decision not to use Dr. Riebsame because Barnhill told him a different version of the murder which made him more culpable (EH137). Further, Dr. Riebsame diagnosed Barnhill as antisocial (EH140).

The mental health expert used at the penalty phase, Dr. Eisenstein, testified Barnhill had frontal lobe impairment (Vol. 9, EH146). The attorneys did not want a PET scan because it might show no impairment, whereas, Dr. Eisenstein testified there was neurological impairment (Vol. 9, EH152).

Mr. Haft talked to everyone Barnhill asked him to talk to (Vol. 9, EH143, 151). Barnhill had concerns about his mother testifying (Vol. 9, EH144). The attorneys discussed with Barnhill whether his mother and father should testify (Vol. 9, EH154). They made a tactical decision not to call the father or sisters (Vol. 9, EH184, 187). The scenario the attorneys wanted to portray was that the mother abandoned Barnhill, that she failed to

provide treatment for his eye injury at age six, that she treated him poorly as exemplified by painting his room black and denying him Christmas presents (Vol. 9, EH186). There were many discussions with Barnhill about which witnesses to call (Vol. 9, EH192).

Andrew Gruler, a clinical social worker licensed to practice in September 1998, [10] testified at the evidentiary hearing. He constructed a genogram (family tree) for Barnhill (Vol. 10, EH351). The genogram showed no contact between Barnhill and his sisters (Vol. 10, EH354). The retarded nephew was on Delores' (Arthur Jr.'s mother) side of the family (Vol. 10, EH356). Susie Mae Jackson, Delores' mother, was paranoid schizophrenic (Vol. 10, EH352, 356). However, if Arthur Jr. was not Barnhill's father, the genetics of Arthur Jr.'s mother was irrelevant. Even if, as Arthur Jr. implied, his father (Arthur Sr./Delores' husband) was Barnhill's father, the family tree of Delores' family is not relevant. Dr. Gruler admitted this fact would change the social history (Vol. 10, EH383). There were broken lines between Barnhill and his father, his mother, and his sisters. The broken

[10]Barnhill must show the witness was available to testify at the penalty phase. *Nelson v. State*, 875 So. 2d 579 (Fla. 2004). Since Mr. Gruler was not licensed until September 1998, he would not have been available to collect the history and testify at the penalty phase which started September 13, 1998.

lines indicated either abuse or a broken relationship (Vol. 10, EH385). Mr. Gruler admitted that James Horne, who was a significant factor in Barnhill=s life and who testified at the penalty phase, was a firefighter for 25 years (Vol. 10, EH386).

Mr. Gruler interviewed Arthur Jr., Barnhill=s father, in prison; Tonya Graham, sister; Angela Brown, maternal aunt in South Carolina; Dorothy Wilkinson, maternal grandmother in New York; Darlene Parker, maternal aunt in New York; Helen Harris, maternal aunt in New York; Tia Graham, maternal cousin in New York; James Graham, maternal cousin in New York, James and Bernadine Horne,[11] maternal uncle and aunt in New York; Tonya Graham in New York, Nadine Graham, mother in New York; Arthur (AArthur Sr.@) and Delores Barnhill, grandparents in Sanford (Arthur Sr. testified for the State at trial); Kevin and Renee Pierce, maternal aunt and uncle in Winter Springs (Vol. 10, EH360-362).

In order to collect this information, Mr. Gruler traveled to Buffalo, NY, Kingston, NY, and the Bronx, NY. Buffalo is across the state from New York City and Kingston was about 100 miles north (Vol. 10, EH389). From these people, Mr. Gruler learned Barnhill was born prematurely (Vol. 10, EH362). Nadine attempted suicide while she was pregnant by taking some kind of medication

[11]James Horne, Dorothy Wilkenson, and Angela Brown were marked on the genogram as having a strong bond with Barnhill (Vol. 10, EH380). They all testified in the penalty phase.

(Vol. 10, EH363). Arthur Jr. abused Barnhill physically, and Nadine neglected him (Vol. 10, EH366). Arthur Jr. beat Barnhill after the latter set a fire in the house (Vol. 10, EH377). Barnhill was Abounced back and forth between families whenever his mother would get tired of him or couldn=t work with him.@ (Vol. 10, EH366). Barnhill moved 19 times before he was 15 years old (Vol. 10, EH367). The moves were either within Florida or New York or between Florida and New York (Vol. 10, EH371). Some of the moves were due to evictions for nonpayment of rent (Vol. 10, EH367). There were times the family lived in apartments with no electricity or food. At one point, they lived in their cars, washing up at McDonald=s and gas stations (Vol. 10, EH367). It would have been very confusing to live without structure, then be sent to an uncle or grandmother who required structure (Vol. 10, EH369).

Mr. Gruler gathered the following history: When Barnhill injured his eye, Grandmother Wilkinson tried to get medical assistance, but Nadine took him back to New York and did not follow up (Vol. 10, EH373). Uncle James Horne tried to enroll Barnhill in a school for children with learning disabilities, but Nadine intervened (Vol. 10, EH373). Barnhill had several head injuries. One time he dove into the shallow end of the pool, hit his head and became dizzy. He was taken to the doctor. Barnhill

was hit in the head with a table leg by his mother. He was hit in the head at school with a lock from a locker. He fell down concrete steps riding a bike (Vol. 10, EH374).

There was pornography in the house (Vol. 10, EH375). Tonya used to lock Barnhill out of the house (Vol. 10, EH375). Tonya may have abused Barnhill sexually (Vol. 10, EH378). Tonya denied any sexual contact (Vol. 11, EH439).

Barnhill fathered a child when he was a teenager. Another girlfriend got pregnant but aborted the child (Vol. 10, EH376).

On cross-examination, Mr. Gruler acknowledged that Angela Brown testified at the penalty phase and provided many details of Barnhill's life. Angela testified that life was very hard for Barnhill, and Nadine tried to commit suicide when she was five months pregnant (Vol. 10, EH391). She also testified that Arthur Jr. was in prison for armed robbery when Barnhill was born (Vol. 10, EH391). Barnhill was hit in head by a rock when he was 4 years old and had emergency surgery. Nadine did not follow up with treatment and Barnhill lost an eye (Vol. 10, EH392, 394). Angela testified about the move to Florida and living with different family members (Vol. 10, EH394). They realized he was still in kindergarten when he should have been in the second grade. The grandmother went to the school and was informed the school had tried to reach Nadine repeatedly and had even sent

telegrams (Vol. 10, EH395). Nadine was insulted when the uncle tried to help Barnhill learn to read (Vol. 11, EH405). In 1982, Nadine came to a wedding and just left Barnhill with Angela (Vol. 10, EH395). Barnhill was homesick and they would leave messages for Nadine, but she never called back (Vol. 10, EH396). Barnhill would ask AWhy doesn=t my mother love me?@ (Vol. 10, EH396) Nadine was supposed to pick Barnhill up at a family reunion in Hilton Head, but she did not show. Angela sent him back to New York with relatives (Vol. 10, EH397). The family moved around a lot (Vol. 11, EH405). Nadine was always angry with Barnhill and favored the sisters (Vol. 10, EH397, 398). Nadine painted the girls= bedrooms a nice, bright color and painted Barnhill=s dark (Vol. 10, EH398). One time there was a gun in the house, and Barnhill asked why it was in the house (Vol. 10, EH399).

Angela also testified that Barnhill was a sweet child who she claimed as her own. He was helpful to her and helped her during a pregnancy (Vol. 10, EH398). He knew Nadine loved the sisters more than she loved him (Vol. 10, EH398). Barnhill went to church when he was 13-14 and had a Bible with his name inscribed (Vol. 11, EH405). Barnhill was illiterate and slow, with learning disabilities (Vol. 11, EH405-406). Uncle James Horne tried to get Barnhill into special programs but Nadine refused (Vol. 11, EH406). Angela also described Nadine in less-than-glowing terms

(Vol. 11, EH406).

Uncle James testified at the penalty phase that he was a firefighter for 25 years, that Barnhill=s eye was injured, that he was passed around among relatives, that his brother died in 1996 which affected Barnhill, and that Arthur Jr. was incarcerated most of his life (Vol. 11, EH407-08).

Dorothy (Wilkenson) testified at the penalty phase about Nadine neglecting Barnhill, about the abuse and the eye injury, about Barnhill becoming destructive when he was angry, about Barnhill asking why his mother hated him (Vol. 11, EH409).

The facts presented at the evidentiary hearing that were not presented at the penalty phase can be summarized as follows: the reason Arthur Jr. beat Barnhill with the electrical cord was because he started a fire, that Tonya may have been raped in front of Barnhill when she was nine, that Tonya sexually abused Barnhill (which she denied and Barnhill never mentioned to his attorneys (Vol. 9, EH147)), that Barnhill fell down some stairs on his Big Wheel but that he laughed about it as if it were a joke (Vol. 11, EH413). Mr. Gruler added to the penalty phase testimony that Barnhill got into lots of fights, was truant from school, stole from family and friends, and stole gifts from Tonya=s baby shower and gave them to his girlfriend (Vol. 11, EH413-416). Barnhill also stole the car of a manager at Boston Market where he worked,

and was never employed for any period of time (Vol. 11, EH418). When he was six or seven years old, Barnhill liked to set fires in alleys and vacant lots (Vol. 11, EH419). At the time of the murder, Barnhill had an eight-month old daughter by one girlfriend and a second girlfriend had recently aborted his child (Vol. 11, EH422). Barnhill's prior record showed a series of burglaries which he described as having seen the items and wanted them, so he took them (Vol. 11, EH422). Barnhill denied use of drugs or alcohol (Vol. 11, EH426).

Barnhill told Dr. Riebsame that if the victim were allowed to live, he would never see his daughter again (Vol. 11, EH427). Barnhill told Mr. Gruler he needed a car to get back to New York to see his daughter (Vol. 11, EH427). Barnhill's sisters lived with Nadine for a longer period than he did and they had no criminal history (Vol. 11, EH428-429).

Dr. Fisher testified as a defense expert at the evidentiary hearing. He did no psychological testing, but did review the testing of Dr. Riebsame and Dr. McClaren (the State expert) (Vol. 11, EH464). Dr. Fisher agreed with the conclusions of both Dr. Riebsame and Dr. McClaren (Vol. 11, EH468). Barnhill has a borderline IQ, suffers from depression, and is not psychotic (Vol. 11, EH470, 472). Dr. Riebsame diagnosed Barnhill as anti-social. Barnhill made a full confession to Dr. Riebsame (Vol. 11, EH491).

The testimony presented at the evidentiary hearing: that Barnhill set fires, was truant, stole, was expelled, and had juvenile arrests, was consistent with conduct disorder, a pre-requisite to a diagnosis of anti-social personality disorder (Vol. 11, EH491, 492).

Dr. Fisher did not discuss the facts of the murder with Barnhill and had no opinion as to Barnhill=s mental state at the time of the incident (Vol. 11, EH493).

Dr. McClaren conducted psychological testing (Vol. 11, EH498). The IQ testing showed a full-scale IQ of 81; whereas, Dr. Eisenstein=s testing in 1997 showed an IQ of 87 (Vol. 11, EH499). Barnhill had an elevated AF@ scale on the MMPI tests of Dr. McClaren, Dr. Riebsame, and Dr. Eisenstein (Vol. 11, EH501). There are several explanations for an elevated AF@ scale, among which are a cry for help, or exaggerating symptoms (Vol. 11, EH501). Barnhill endorsed a lot of psychotic symptoms that even psychotics did not have (Vol. 11, EH507).

Dr. McClaren believed Barnhill had a depressive disorder which may have reached psychotic proportions after the plea (Vol. 11, EH502). Being incarcerated can also trigger psychotic symptoms if a person has a history of depression (Vol. 11, EH503). Dr. McClaren diagnosed Barnhill as anti-social and, perhaps, personality disorder, NOS (Vol. 11, EH505). Dr. McClaren believed

Dr. Eisenstein may have been correct when he testified at the penalty phase that Barnhill has ADHD, is learning disabled, and may have frontal lobe impairment (Vol. 11, EH509). However, Dr. Eisenstein said Barnhill was not anti-social. The testimony adduced at the evidentiary hearing supported Dr. McClaren=s diagnosis of anti-social personality disorder, i.e., the fire setting, fights, and stealing (Vol. 11, EH510).

The lay witness testimony presented at the evidentiary hearing was mostly cumulative to that presented at the penalty phase. Counsel cannot be ineffective for failing to present cumulative evidence. See ***Gudinas v. State***, 816 So. 2d 1095, 1106 (Fla. 2002) (finding that trial counsel was not ineffective for failing to present evidence in mitigation that was cumulative to evidence already presented in mitigation). ***Henyard v. State,*** 883 So. 2d 753 (Fla. 2004).

The lay witness testimony also provided the factual basis for a mental health diagnosis of anti-social personality disorder, precisely the diagnosis made by Dr. Riebsame which the defense attorneys rejected as a strategic decision. Defense expert Dr. Fisher agreed with Dr. Riebsame and Dr. McClaren that Barnhill was anti-social. Trial counsel made a strategic decision not to call Dr. Riebsame as a witness because a diagnosis of anti-social

personality was inconsistent with trying to show Barnhill as an abused and neglected child who never had a chance but who had redeeming qualities. This strategic decision was not deficient. *See Cave v. State*, 899 So. 2d 1042, 1053-55 (Fla. 2005); *Hamilton v. State* 875 So. 2d 586, 593 (Fla. 2004); *Cummings-El v. State*, 863 So. 2d 246, 252-53 (Fla. 2003); *Van Poyck v. State*, 694 So. 2d 686, 689-92 (Fla. 1997).

On direct appeal, Barnhill claimed the trial court failed to consider mitigating evidence. The initial brief on appeal summarized the mitigating evidence as follows:

> 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 arid neuro-psychologist), 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)

(Initial Brief on Appeal, p. 21-28). This summary shows the extensive mitigation presented by trial counsel. Barnhill has failed to show defense counsel were deficient in their investigation and presentation of mitigating evidence or a reasonable probability the outcome would have been different. In fact, the only additional information presented at the evidentiary hearing was diametrically opposed to the theory of trial counsel and extremely detrimental to Barnhill. Neither

prong of the *Strickland* requirements was met.

CLAIM V

COUNSEL WAS NOT INEFFECTIVE IN CLOSING ARGUMENT

Appellant claims trial counsel was ineffective for making a rambling closing argument. He cites several examples from various places in the record. Those examples do not, as Barnhill alleges, illustrate Adoubts or distaste@ for the client. Appellant has failed to show any deficient performance. In fact, the closing argument was cohesive and effective. The sections cited by Appellant, taken out of context, do not show differently. Defense counsel cautioned against emotion, thus the comment about being angry at a tragic death (R3311). The comment regarding first-degree murder being a horrible thing is innocuous and a common defense approach to addressing the jury. Again, this statement was in the context of not succumbing to emotion (R3311). The next statement was to caution the jury about dissecting Appellant=s statement just because he was the person being judged (R3320). Taken in context, it is an entirely appropriate statement. The comment about accepting or rejecting Appellant=s statement was a comment on the prosecutor=s argument that the State wanted the jury to accept all the bad statements as true but disbelieve the positive statements

(R3321). The comment on Appellant=s statement was in the context of relative culpability of co-defendants and whether Appellant=s statement may have been coerced.[12] (R3324). This argument was relative to a statutory mitigator. The cite regarding Acommon sense@ does not exist on page 3321 of the record. The cite regarding the more serious aggravating circumstance was in the context of the State having to prove the aggravators beyond a reasonable doubt. There was an objection interposed and counsel was stopped in mid-sentence (R3354). The record conclusively refutes that this closing argument was deficient.

Further, Appellant cannot show prejudice. The State proved four aggravating circumstances. Appellant brutally murdered a defenseless 84-year old man in his own home after lying in wait for two hours. Even a perfect closing argument would not have changed the outcome. Under *Strickland*, Appellant is not entitled to perfect counsel, but to reasonably effective counsel, and that is what he received. Barnhill ignores the reality of death penalty litigation: that there are some cases which cannot be won. *See Clisby v. Alabama*, 26 F.3d 1054, 1056 (11th Cir. 1994)(concluding that there was no prejudice from failure to present additional mitigating evidence at capital sentencing and

[12]Counsel unsuccessfully sought to suppress the statements.

stating, "[W]e are aware that, in reality, some cases almost certainly cannot be won by defendants. Strickland and several of our cases reflect the reality of death penalty litigation: sometimes the best lawyering, not just reasonable lawyering, cannot convince the sentencer to overlook the facts of a brutal murder--or, even a less brutal murder for which there is strong evidence of guilt in fact.")(citing *Strickland*, 466 U.S. at 696); *Daugherty v. Dugger*, 839 F.2d 1426, 1432 (11th Cir.1988).

The postconviction trial judge held:

> Finally, the Defendant claims that counsel was ineffective for making a poor closing argument. While the excerpts cited in the motion, when taken out of context, appear argue for the imposition of the death penalty, this Court must look to the argument as a whole and must consider counsel's rationale in arguing the way that he did. Counsel adequately explained his strategy as to each argument, and this Court finds that his strategic choices were reasonable. Counsel's argument did not exhibit any distaste for his Client or his position. Furthermore, the arguments were somewhat effective, in that three jurors recommended a life sentence. Counsel did not act ineffectively during his closing argument.

(Vol. 8, PC-R1319). These findings are supported by competent substantial evidence.

CLAIM VI

THE RULES PROHIBITING JUROR INTERVIEWS ARE NOT UNCONSTITUTIONAL

Barnhill argues that Rule 4-3.5(d)(4) of the Rules Regulating the Florida Bar and Florida Rule of Criminal Procedure 3.575[13] violate equal protection because he is prevented from interviewing the jurors in his case. This issue is procedurally barred, as the postconviction judge held. Barnhill failed to raise this issue on direct appeal and is therefore barred from raising it in his postconviction motion. *Arbelaez v. State*, 775 So. 2d 909 (Fla. 2000).

Furthermore, Barnhill does not identify any specific incidents of juror misconduct, but merely argues that the rule is unconstitutional because it prevents him from interviewing jurors so that he can possibly discover misconduct. Not only is this claim procedurally barred, but also it has no merit. This Court has repeatedly rejected this issue on the merits. *Sweet v. Moore*, 822 So. 2d 1269 (Fla. 2002); *Johnson v. State*, 804 So. 2d 1218 (Fla. 2001); *Arbelaez, supra*.

The postconviction judge held:

> The Defendant's third claim is that the prohibition against interviewing jurors prevents him from adequately pursuing post-conviction relief. This claim should have been raised on direct appeal, and therefore, it is procedurally barred. *Arbelaez v. State,* 775 So.2d 909 (Fla 2000). Even so, the Defendant is not entitled to go on a "fishing expedition" to determine if juror misconduct occurred.

[13] Barnhill acknowledges that this rule was enacted after the evidentiary hearing in this case.

> *Id.; See also Sweet v. Moore,* 822 So.2d 1269 (Fla. 2002); *Johnson v. State,* 804 So.2d 1218 (Fla. 2001). Because of the procedural bar, and alternatively for the above substantive reasons, this claim should be denied.

(Vol. 8, PC-R1371). These findings are supported by competent substantial evidence. *See Farina v. State*, 31 Fla. L. Weekly S517 (Fla. July 6, 2006)(ineffective assistance of appellate counsel for failure to allege that Florida Rule of Professional Conduct 4-3.5(d)(4), which prohibits juror interviews, is unconstitutional is clearly meritless); *Suggs v. State*, 923 SO.2d 419, 440 (Fla. 2005); *Williamson v. Dugger*, 651 So. 2d 84, 86 (Fla. 1994).

CLAIM VII

EXECUTION BY LETHAL INJECTION IS NOT CRUEL AND/OR UNUSUAL PUNISHMENT

Barnhill challenges the constitutionality of lethal injection as a method of execution. This claim is procedurally barred and has no merit. *Farina v. State*, 31 Fla. L. Weekly S517 (Fla. July 6, 2006); *Jones v. State*, 928 So. 2d 1178, 1183 (Fla. 2006); *Suggs v. State*, 923 So. 2d 419, 441 (Fla. 2005).

To the extent the defendant may argue that lethal injection and its protocols were not in place at the time of his direct appeal and first state postconviction motion, he is time barred

from raising the matter at this juncture. It has been more that five years since the Legislature enacted the lethal injection statute and the Florida Supreme Court reviewed such, finding it constitutional in face of an Eighth Amendment Challenge as well as a separation of powers challenge. *See Sims v. State*, 754 So. 2d 657, 666, n.18, 669-70, n.23 (Fla. 2000), wherein the Florida Supreme Court found that Florida=s lethal injection statute to be constitutional. As such, he is time barred from raising that challenge now as there is no offer of a new constitutional provision held to be retroactive nor a claim of newly discovered evidence related to a separation of powers claim. *See* Rule 3.851(e)(2) and *Glock v. Moore*, 776 So. 2d 243, 251 (Fla. 2001) (holding claim of newly discovered evidence in capital case must be brought within one year of date evidence was discovered or could have been discovered through due diligence).

Florida's lethal injection statute and procedures have repeatedly been upheld against constitutional challenges. *See Hill v. State,* 921 So.2d 579, 583-83 (Fla. 2006); *Rutherford v. State*, 926 So.2d 1110, 1113-14 (Fla. 2006); *Provenzano v. State*, 761 So. 2d 1097, 1099 (Fla.), *cert. denied*, 530 U.S. 1255 (2000); *Sims v. State*, 754 So. 2d 657, 663-70 (Fla.) *cert. denied*, 528 U.S. 1183 (2000); *Bryan v. State*, 753 So. 2d 1244,

1253-55, *cert. denied,* 528 U.S. 1133 (2000).

Barnhill notes that the disposition of his claim may be affected by the outcome of the Clarence Hill case. That case and the Rutherford case have been decided against Barnhill's position. *Hill v. McDonough,* Fla. L. Weekly Fed. C1057 (11th Cir. Sept. 15, 2006)*; Rutherford v. McDonough*, 2006 U.S. App. LEXIS 24860 (11th Cir. Oct. 5, 2006).

The postconviction judge held:

> In his fourth claim, the Defendant alleges that execution by lethal injection is cruel and unusual punishment in violation of his Eighth and Fourteenth Amendment rights. This claim is without merit, as it has been repeatedly rejected by the Florida Supreme Court. *See Provenzano v. State,* 761 So.2d 1097 (Fla. 2000), *cert. denied,* 530 U.S. 1255, 120 S. Ct 2709, 147 L.Ed.2d 978 (2000); *Sims v. State,* 754 So.2d 657, *cert. denied,* 528 U.S. 1183, 120 S. Ct 1233, 145 L.Ed.2d 1122(2000); *Bryan v. State,* 753 So.2d 1244, *cert. dismissed,* 528 U.S. 1133, 120 S. Ct 1003, 145 L.Ed.2d 927 (2000). Relief should be denied as to this claim.

(Vol. 8, PC-R 1317). These findings are supported by competent substantial evidence.

CLAIM VIII

THE JURY INSTRUCTIONS DO NOT RENDER THE FLORIDA DEATH PENALTY UNCONSTITUTIONAL

Barnhill asserts that the jury instructions violated his constitutional rights, and to the extent trial counsel failed to

litigate these issues, trial counsel was ineffective.

The postconviction judge held:

> The Defendant's fifth claim addresses the jury instructions. He claims that the instructions failed to properly advise the jurors of the law and their role in the case. He divides this claim into several subclaims. He claims that 1) the jury instructions minimize the jury's role in imposing a death sentence; 2) the instructions relieved the State of its burden of proof; 3) the heinous, atrocious or cruel instruction was unconstitutionally vague and overbroad; and 4) the cold, calculated and premeditated instruction was unconstitutionally vague and overbroad. These claims should have been raised on direct appeal, and therefore, they are procedurally barred. *See Kight, supra.*
>
> In an abundance of caution, however, this Court will specifically address each of these claims. First, he claims that the instructions minimized the jury's role in imposing a death sentence, in violation of *Caldwell v. Mississippi,* 472 U.S. 320, 105 S. Ct. 2633, 86 L.Ed.2d 231 (1985). However, *Caldwell* does not apply in Florida. *See Combs v. State,* 525 So.2d 853 (Fla. 1988). The standard jury instructions do not shift the burden of proof to the Defendant with regard to the weighing of aggravating factors versus mitigating factors. *See Griffin v. State,* 866 So.2d 1 (Fla. 2003). Finally, the HAC and CCP instructions given by the trial court were upheld by the Florida Supreme Court in the Defendant's direct appeal. *Barnhill,* 834 So. 2d at 849-51. Because of the procedural bar, and alternatively for the above substantive reasons, these claims should be denied.

(Vol. 8, PC-R1317). These findings are supported by competent substantial evidence.

In his first subissue under this claim, Barnhill alleges that the jury was unconstitutionally relieved of its

responsibility to determine the appropriate sentence. Barnhill relies on *Caldwell v. Mississippi*, 472 U.S. 320 (1985), to support his legal argument. However, to the extent that Barnhill is complaining about *Caldwell* error in his sentencing proceeding, he is not entitled to relief since such claims must be urged, if properly preserved by contemporaneous objection at trial, on direct appeal and are not cognizable via postconviction challenge; the postconviction vehicle is not a conduit or substitute vehicle to raise barred claims. *See Gore v. State*, 846 So. 2d 461, 466 n.4 (Fla. 2003); *Jones v. State*, 845 So. 2d 55, 72 n.38 (Fla. 2003); *Cherry v. State*, 659 So. 2d 1069, 1072 (Fla.1995). Additionally, a defendant cannot avoid or evade a procedural bar simply by urging a claim under the cloak of an ineffective assistance of counsel claim. *Gore*, 846 So. 2d at 466 n.4.

In addition to the valid procedural bar, this Court has repeatedly rejected this claim on the merits as it is well established that the rationale of *Caldwell* is not applicable to Florida because the judge, rather than the jury, renders the sentence. *See Card v. State*, 803 So. 2d 613, 628 (Fla. 2001) ("We hold the following claims are without merit: . . . (2) the standard jury instructions that refer to the jury as advisory

and that refer to the jury's verdict as a recommendation violate *Caldwell v. Mississippi*, 472 U.S. 320 (1985); *Melendez v. State*, 612 So. 2d 1366, 1369 (Fla. 1992)(stating that *Caldwell* does not control Florida law on capital sentencing and the instructions as given adequately advised the jury of its responsibility); *Grossman v. State*, 525 So. 2d 833 (Fla. 1988); *Combs v. State*, 525 So. 2d 853, 855-56 (Fla. 1988) (holding *Caldwell* inapplicable to Florida death cases). Likewise, in the instant case, the court correctly instructed the jury on the applicable law. Therefore, this claim has no merit and counsel cannot be ineffective for failing to object raise the issue at the trial level.

This Court has opined "the standard jury instruction fully advises the jury of the importance of its role, correctly states the law, see *Burns v. State*, 699 So. 2d 646 (Fla. 1997), *cert. denied*, 522 U.S. 1121 (1998), and does not denigrate the role of the jury." *Brown v. State*, 721 So. 2d 274, 283 (Fla. 1998). Accordingly, this Court should deny the instant claim as procedurally barred and to the extent that Barnhill claims ineffective assistance of counsel for failing to object to the jury instructions, such claim should also be denied. *See Thomas v. State,* 838 So. 2d 535 (Fla. 2003) (rejecting defendant's

claim because counsel was not ineffective for failing to object to standard jury instruction which has been held to be in compliance with *Caldwell); Mendyk v. State*, 592 So. 2d 1076, 1080 (Fla. 1992) ("When jury instructions are proper, the failure to object does not constitute a serious and substantial deficiency that is measurably below the standard of competent counsel).

Barnhill's next subissue claims that "the jury instructions unconstitutionally relieved the state of its burden to prove an element of the death penalty eligible offense." (Initial Brief at 53). Of course, this issue could have and should have been raised on direct appeal, and is now procedurally barred. Furthermore, as properly recognized by Barnhill's postconviction counsel, this claim has repeatedly been rejected by this Court and lacks merit. See *Griffin v. State*, 866 So. 2d 1 (Fla. 2003) ("We have also repeatedly rejected claims that the standard jury instruction impermissibly shifts the burden to the defense to prove that death is not the appropriate sentence"); *see also Sweet v. Moore*, 822 So. 2d 1269, 1274 (Fla. 2002); *Carroll v. State*, 815 So. 2d 601, 622-23 (Fla. 2002); *San Martin v. State*, 705 So. 2d 1337, 1350 (Fla. 1997) (concluding that weighing provisions in Florida's death penalty statute requiring the jury

to determine "whether sufficient mitigating circumstances exist which outweigh the aggravating circumstances found to exist" and the standard jury instruction thereon did not unconstitutionally shift the burden to the defendant to prove why he should not be given a death sentence).

Barnhill's next subissue in this claim challenges the jury instruction on the heinous, atrocious, or cruel aggravating circumstance. (Initial Brief at 54) Because this claim should have been raised on direct appeal, the claim is procedurally barred. Furthermore, counsel cannot be deemed ineffective for failing to object to the standard HAC instruction which was given in this case and has been repeatedly approved by this Court. *Thomas v. State*, 838 So. 2d 535, 542 (Fla. 2003); *Hall v. State*, 614 So. 2d 473, 478 (Fla. 1993).

Finally, Barnhill claims that the jury instruction on the CCP aggravating factor was unconstitutionally vague.(Initial Brief at 56). Similar to the arguments above, the State submits that the instant claim is procedurally barred. *Jennings v. State*, 782 So. 2d 853, 862 (Fla. 2001).

CLAIM IX

THERE WAS NO ERROR, EITHER INDIVIDUALLY OR CUMULATIVELY.

Barnhill claims that his penalty phase proceeding was

constitutionally unfair due to the alleged errors pointed out in his postconviction motion which he claims rendered the sentencing result unreliable. This is an issue which could have been raised on direct appeal, but was not. As such, the claim is procedurally barred. *See Occhicone v. State*, 768 So. 2d 1037, 1040 n.3 (Fla. 2000) (finding claim that the cumulative impact of judicial error at trial was an issue which must be raised on direct appeal and is procedurally barred in postconviction litigation); *Torres-Arboleda v. Dugger*, 636 So. 2d 1321, 1323-24 (Fla. 1994).

Moreover, because the individual claims are procedurally barred and meritless, Barnhill has suffered no cumulative effect which invalidates his sentence. *See Downs v. State*, 740 So. 2d 506, 509 (Fla. 1999) (finding that where allegations of individual error are found to be without merit, a cumulative error argument based on the asserted errors must likewise fall); *Melendez v. State*, 718 So. 2d 746, 749 (Fla. 1998) (reasoning that where each claim is either meritless or procedurally barred, cumulative error cannot be considered).

The postconviction judge held:

> In his sixth ground, the defendant asserts that cumulative errors have denied him of a fundamentally fair trial. Since all of the allegations of individual legal error are without merit, a cumulative error argument based upon these errors must also fail. *See*

> *Bryan v, State,* 748 So.2d 1003, 1008 (Fla. 1999). Relief should be denied as to this claim.

(Vol. 8, PC-R1318). These findings are supported by competent substantial evidence.

CONCLUSION

Based on the foregoing arguments and authorities, Appellee respectfully requests this Honorable Court affirm the order of the trial court and deny all 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.

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Assistant Attorney General