IN THE SUPREME COURT OF FLORIDA

CASE NUMBER SC06-275
Lower Tribunal Case No. 95-2932-CFA

ARTHUR BARNHILL, III,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

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

INITIAL BRIEF OF APPELLANT

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PRELIMINARY STATEMENT

This is the appeal of the circuit court's denial of Arthur Barnhill, III's motion for post-conviction relief which was brought pursuant to Fla.R.Crim.P. 3.851.

Citations shall be as follows: The record on appeal concerning the trial proceedings shall be referred to as "R. ___" followed by the appropriate volume and page numbers. The postconviction record on appeal will be referred to as "PCR. ____" followed by the appropriate volume and page numbers. All other references will be self-explanatory or otherwise explained.

This appeal is being filed in order to address substantial claims of error under the Fourth, Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution and corresponding provisions of the Florida constitution. These claims demonstrate that Appellant was deprived of his right to a fair and reliable trial and that the proceedings, resulting in his conviction and death sentence, violated fundamental constitutional imperatives. Furthermore, as to the denial of Appellant's motion for post-conviction relief, there has been an abuse of discretion and a lack of competent evidence to support certain of the trial judge's conclusions.

REQUEST FOR ORAL ARGUMENT

Because of the seriousness of the claims at issue and the stakes involved, Arthur Barnhill, III, a death-sentenced inmate on Death Row at Union Correctional Institution, requests that this Court permit oral argument on the issues raised in his

appeal.

STATEMENT OF THE CASE

The Eighteenth Judicial Circuit Court in and for Seminole County, Florida, entered the judgment of conviction and death sentence at issue on February 11, 2000. (R. Vol. 2, 346-366). Arthur Barnhill, III, was convicted of first degree murder, burglary of a dwelling while armed, armed robbery and grand theft and sentenced to death for the first degree murder of Earl Gallipeau on August 6, 1995. This Court affirmed his convictions and sentences in Barnhill v. State, 834 So.2d 836 (Fla. 2002). The United States Supreme Court denied *certiorari* on June 9, 2003. Barnhill v. Florida, 539 U.S. 917, 123 S.Ct. 2281, 156 L.Ed.2d 134 (2003).

Pursuant to Fla.R.Crim.P. 3.851, the appellant filed his Motion to Vacate Judgments of Convictions and Sentences on December 1, 2003. With court authorization (PCR. Vol. 1, 181-185), the appellant amended the motion on February 16, 2004, (PCR. Vol. 2, 191-272) and June 8, 2004 (PCR. Vol. 4, 560-599). The State of Florida filed its Answers to the amended motions on or about April 19, 2004 (PCR. Vol. 2, 289-317) and July 14, 2004 (PCR. Vol. 4, 607-631). The Case Management Conference, under Fla.R.Crim.P. 3.851(f)(5)(A), was conducted on August 12, 2004, and continued through several other hearings before the evidentiary hearing took place. (PCR. Vol. 4, 632; 635; 642; 643). The

Court granted a hearing on certain of the defendant's claims and the evidentiary hearing was conducted on May 19 and 20, 2005. (PCR. Vol. 4, 695-701; Vol 9; Vol 10; Vol. 11, 401-539). The court denied the motion on January 12, 2006. (PCR Vol. 8, 1315-1320). After the filing of his notice (PCR Vol. 8, 1321), this appeal has properly come before this Court.

STATEMENT OF FACTS

TRIAL

The facts of this case at trial were succinctly summarized by this Court in the opinion issued upon direct appeal:

> Arthur Barnhill, III, 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 fammily of a 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 decided to steal a car and money from Earl Gallipeau, who was 84 years old. Gallipeau was a lawn service customer of Barnhill's grandfather. Barnhill and Gallipeau met when Barnhill did lawn work for his grandfather at Gallipeau's house.
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> On Sunday, August 6, 1995, Barnhill and Michael Jackson walked to

Gallipeau's house to steal Gallipeau's car. They entered the house through the garage and waited in the kitchen for approximately two hours. Gallipeau was in another room watching television. According to Michael Jackson, it was not until they were in Gallipeau's kitchen that Barnhill revealed his plan to kill Gallipeau before taking the car. At that point, Jackson abandoned the enterprise and left. At least one witness saw Michael Jackson walking alone in Gallipeau's neighborhood away from Gallipeau's house.

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 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.

Both the State and Barnhill presented testimony and evidence during the penalty phase. The State called twenty-four wit nesses, 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.
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> The jury recommended death by a vote of nine to three. The trial court then conducted a *Spencer* 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 court sentenced Barnhill to five years for grand theft. Each sentence was ordered to run concurrently with the sentence of death.
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> Barnhill v. State, 834 So.2d at 840-841 (footnotes omitted).

At to the penalty phase trial, the court below made the following findings as to arrgavating and mitigating factors:

Aggravating factors

1. The Defendant 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 the Defendant was engaged in the commission of a robbery;

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;

5. The capital felony was especially heinous, atrocious or cruel.

Statutory Mitigating Factors

1. The age of the Defendant was proven and given little weight;

2. Not proven was that the defendant was under the influence of extreme mental or emotional disturbance at the time of the crimes;

3. Not proven was that the defendant was an accomplice in the crimes;

4. Not proven was that the defendant acted under extreme duress or under the influence of another person.\;

5. Not proven was that the capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of the law was substantially impaired.

Non-Statutory Mitigating Factors

1. That the defendant suffers from a learning disability was proven but given little weight.\;

2. That the defendant has frontal lobe impairment was proven but given little weight;

3. Not proven was that the defendant cooperated with law enforcement;

4. That the defendant had a difficult childhood was proven (finding that the defendant was abandoned by his mother at an early age; that the defendant was placed in an environment where his mother clearly favored her daughters over the defendant; and, yet, that the defendant had other family members which assisted and supported him and provided moral guidance) but was given little weight;

5. That the defendant eliminated the need for a guilt phase of the trial by entering pleas was proven but given little weight;

6. That the defendant manifested appropriate courtroom behavior was proven but given little weight;

7. That the defendant suffers from psychiatric disorders was proven but given little weight;

8. That the defendant felt remorse for the homicide was proven but given little weight;

9. Other aspects of the defendants character and background were proven. Specifically, neglect by his mother; a physical deformity of a bad left eye for which no medical treatment was provided; the mother's excessive attention to her daughters while ignoring or inappropriately punishing the defendant; the defendant being a poor student with poor reading skills; that the defendant suffered shock and embarrassment of seeing his father arrested and later sentenced to a lengthy prison term; and that the defendant's grandparents enabled the defendant to be capable of functioning as a normal human being – all given little weight.

10. Not proven was that the defendant was less culpable as an accomplice to the crimes.

(R. Vol. 2, 346-366).

POST-CONVICTION PROCEEDING AND 2005 EVIDENTIARY HEARING

At the evidentiary hearing, testimony of the appellant's trial attorneys was heard as was that of defense witnesses including the appellant's father and

grandmother, a social worker and psychologist. The State relied on a psychologist used at trial and one retained for postconviction. Succinctly presented and pertinent to the specific issues at hand, Arthur Haft stated that he began his legal career as a public defender in 1984 and went into private practice in 2000 (PCR. Vol. 9, 10); that he may have conducted at least nine capital cases before appointment to appellant's case; (PCR. Vol. 9, 12-16); his practice was to simultaneously look at the penalty phase along with the guilt phase in a new case; that he spent many hours visiting with the appellant (PCR. Vol. 9, 26); that he did not see his client as incompetent and there was no insanity defense (PCR. Vol. 9, 28); that he used Dr. Eisenstein and Dr. Gutman for the defense (PCR. Vol. 9, 30); that he did not recall anything about planning for opening statements (PCR. Vol. 9, 36); and that he usually outlined the points to make in closing argument (PCR. Vol. 9, 37); that he did not remember the reasons for specific questioning during voir dire (PCR. Vol. 9, 39); that he did not recall anything about planning for opening argument (PCR. Vol. 9, 36); that he did not recall anything about planning for closing argument (PCR. Vol. 9, 36); that the appellant was one of the nicer clients he ever had (PCR. Vol. 9, 55); that he made a considered decision about which family members to contact while in New York (PCR. Vol. 9, 69-70); that from information gleaned from his client and others, it was a strategic decision not

to interview and call the appellant's father as a witness (PCR. Vol. 9, 77-78; 80); that he could not recall specifically the persistence of or details about his client's expressed desires to withdraw his pleas (PCR. Vol. 9, 85-87) and that his client was competent when he made the pleas at trial (PCR. Vol. 9, 92).

Co-counsel and second chair Timothy Caudill testified that he began his legal career as a state attorney in 1991 and became a public defender two years later. (PCR. Vol. 9, 158). He began work in the office's capital division in 1997 and may have had experience in several capital cases before the appellant's. (PCR. Vol. 9, 160-16236). appellant's case was probably seventy-five percent worked up by predecessors in the unit (PCR. Vol. 9, 165) and he continued the preparation for the penalty phase. (PCR. Vol. 9, 166. Caudill did not have specific recollections about voir dire (PCR. Vol. 9, 175) and did not provide the first chair with anything specific to say in closing argument. (PCR. Vol. 9, 178). He further testified that he had little to do with the development of the family history (PCR. Vol. 9, 181) and that the decisions were those of Mr. Haft's. (PCR. Vol. 9, 183). He also recall having previous cases where a decision was made ahead of time not to interview the parent of a capital defendant. (PCR. Vol. 9, 185). As to the change in pleas, Caudill indicated he never thought of the appellant as a volunteer for the death penalty. (PCR. Vol. 9, 192) and was surprised by the defendant's change in

position. (PCR. Vol. 9, 194). Caudill testified that his client's decision to plea was imprudent. (PCR. Vol. 9, 196). He felt that the appellant was not psychotic a month after the plea change. (PCR. Vol. 10, 219-220).

Delores Barnhill testified for her grandson that he she had told defense counsel about his special education placement, (PCR. Vol. 10, 259), that her grandson was beaten in school several times (PCR. Vol.10, 262); that her family had a history of mental illness (PCR. Vol. 10, 267) and that she arranged for prison visits with her grandson's father. (PCR. Vol. 10, 273. Social worker Andrew M. Gruler testified for the defense and presented a family history and factors involving the appellant's child development. (PCR. Vol. 10, 338-438). Dr. Brad Fisher testified that a "brief reactive psychosis" is a serious mental illness (PCR. Vol. 11, 449) and that stressors combined with depression may have caused the illness before the pleas change was made. (PCR. Vol. 11, 449). Dr. Harry McClaren testified for the State and said that appellant reported hearing voices going back to childhood illness (PCR. Vol. 11, 503), was suffering from depression before the pleas illness (PCR. Vol. 11, 504) and that the appellant met the criteria for antisocial personality disorder illness (PCR. Vol. 11, 505). Dr. Jeffrey Danziger's testimony for the State was that he met with the appellant two days after the plea change and determined that the stressor causing the brief reactive psychosis was the event of

changing the pleas. (PCR. Vol. 11, 505).

Arthur Barnhill, Jr., serving a Florida prison sentence, was transported to and testified at the evidentiary hearing. He testified to, among other matters: that his current sentence was based on convictions for a 1982 armed robbery and other felonies; that he previously served time in a New York prison for armed robbery (during which he was shot in the back, face and leg); (PCR. Vol. 10, 286); that he could not recall the year in which his son, the appellant, was born; (PCR. Vol. 10, 287); that he was available and in a Florida prison at the time of his son's arrest and trial; (PCR. Vol. 10, 292); that he was never contacted by the office of his son's lawyers and tried to communicate his willingness to testify for his son (PCR. Vol. 10, 292); that the appellant was born near the time he went to prison in New York; (PCR. Vol. 10, 298); that fellow inmates in New York alerted him to a thought he later developed–that his father and the appellant's mother were "lovers" before he became her "lover;" that he believed the appellant's mother was a "whore;" (PCR. Vol. 10, 300); that he believed the appellant's mother was a lesbian; that he had a "threesome" with his wife and her lesbian lover; (PCR. Vol. 10, 301); that his wife "fulfilled his very high intensity of sexual need at the time;" (PCR. Vol. 10, 302); that he never had a job when he lived in the Bronx; (PCR. Vol. 10, 304); that he "lived off women" ... he "used them" and "abused them;"

(PCR. Vol. 10, 305); that before prison the family was being evicted, not eating good and not looking good; that he was part of the gangs in New York, getting cut up and sewed up (PCR. Vol. 10, 305); that he consented to his parents taking his son to raise him (PCR. Vol. 10, 307); that he never shared any restaurant earnings with his family (PCR. Vol. 10, 309); that he was always unfaithful to his wife (PCR. Vol. 10, 309); that he would spank his son to stop the crying from not being allowed to go to his father's "girlfriends' places with him (PCR. Vol. 10, 311); that he sometimes would go to a bar or a girl friend's place and leave his son in the car as a toddler (PCR. Vol. 10, 312); that he was very abusive to his son (PCR. Vol. 10, 313); that if his son cried, he would grab his son, hit him up and choke him a little bit (PCR. Vol. 10, 315) just as his father was abusive to him ; (PCR. Vol. 10, 316); that if his son didn't sit down when told that he would beat his son (PCR. Vol. 10, 317); that suffering beatings from his father–including first having been tied up–made him "endurant" – he was able to fight good and wanted his son to be similarly strong and not a punk (PCR. Vol. 10, 321-322); that he was still robbing (at night) while working as a cook (in the daytime) in Florida (PCR. Vol. 10, 323); that he used a little "weed" and snorted a little "coke; " (PCR. Vol. 10, 323); that he always has liked "penetration" pornographic magazines; that he used to catch his son with his pornographic magazines; (PCR. Vol. 10, 324); that 20 to 30 such

magazines were always all over the house; (PCR. Vol. 10, 325); that he felt that the appellant was his father's child (PCR. Vol. 10, 334); and, affirmatively answering a question during cross examination, that he was part of and a leader of the Black Spades gang in New York (PCR. Vol. 10, 334).

SUMMARY OF ARGUMENT

1. Despite the timing, nature and extent of appellant's competency at the time of appellant's plea changes, trial counsel failed to file a motion to withdraw the

appellant's pleas. The appellant, himself and soon thereafter, questioned his competency to change his pleas. Despite counsel's belief that the pleas were imprudent, counsel persuaded appellant not to request a withdrawal. Appellant was therefore denied the effective assistance of counsel.

2. Appellant did not receive the effective assistance of counsel when counsel filed a legally insufficient motion to disqualify the trial judge.

3. Trial counsel's questioning during voir dire constituted ineffective assistance of counsel; it resulted in prejudice because it deprived appellant of his rights to a fair trial and capital sentencing.

4. Counsel's performance was deficient and prejudicial at the sentencing phase of his trial because counsel failed to adequately investigate, prepare and present mitigating evidence and thus failed to adequately challenge the state's case.

5. Trial counsel's closing argument constituted ineffective assistance of counsel and because it resulted in prejudice it deprived appellant of his rights to a fair trial and capital sentencing.

6. The rules prohibiting appellant's lawyers from interviewing jurors to determine if error was present violates constitutional equal protection principles and denies appellant adequate assistance of counsel in pursuing his postconviction remedies.

7. Execution by lethal injection is cruel and/or unusual punishment and violates appellant's constitutional rights.

8. The jury did not receive adequate guidance in violation of appellant's constitutional rights.

9. The combination of procedural and substantive errors deprived appellant of a fundamentally fair trial guaranteed under the Constitution.

10. Florida's capital sentencing scheme was unconstitutional as applied, denying appellant his constitutional rights.

ARGUMENT I

APPELLANT WAS DENIED THE EFFECTIVE ASSISTANCE OF COUNSEL AT HIS TRIAL IN VIOLATION OF THE SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION . TRIAL COUNSEL FAILED TO FILE A MOTION TO WITHDRAW THE APPELLANT'S PLEAS DESPITE THE APPELLANT'S QUESTIONABLE COMPETENCY. COUNSEL'S PERFORMANCE WAS DEFICIENT AND PREJUDICIAL, AND AS A RESULT, APPELLANT'S DEATH SENTENCE IS UNRELIABLE.

After the start of the trial and over the objections of defense counsel, on October 14, 1998, the appellant entered pleas of no contest to the charges against him. The entry of the pleas aborted the guilt phase of the trial and obviated the ability of counsel to present their planned guilt phase defense. While the document signed in court by the defendant is labeled a "plea agreement," the third paragraph of the preprinted form clearly and properly reflects that there was "no agreement" with the State in exchange for the defendant's pleas. (R. Vol. 2, 205).

That form provided, in part, the following:

"I enter this plea freely and voluntarily. No person has forced, threatened or coerced me into entering this plea."

"I fully understand the nature of the charges against me and the contents of this agreement."

"I do not suffer from any physical or mental disabilities to the degree that I am incapable of understanding this agreement, the nature of the proceeding against me, or assisting my lawyer in my behalf. I am not under the influence of alcohol or any drug at this time."

(R. Vol. 2, 205-06).

The record further shows that a day after the entry of the pleas, and as the penalty phase was to start, the defense brought forward the question of whether their client was competent to proceed. The court found counsel's concern as "reasonable;" it ordered and considered competency evaluations from two experts, and subsequently ordered a third expert to begin a course of treatment for the defendant's psychiatric problems. (R. Vol. 2, 230-231).

The trial record reflects a delay in returning to the penalty phase with a continuing court oversight of the defendant's mental condition and competency. Defense counsel never addressed the appropriateness of the plea by moving to withdraw the plea. As summarized almost a year later by the treating psychiatrist, it was presumed or determined that the defendant's "brief reactive psychosis" came a day after the plea entry and was caused by, or, rather, seen being a reaction to the emotional fact of the plea entry and hearing itself. (R. Vol. 2, pp.264-67). Not directly questioned by defense counsel, with the vehicle of a formal motion to withdraw the plea, was whether the psychotic episode might have existed before the plea entry or on the day of the plea entry. Not directly questioned was whether the psychotic episode could have caused the defendant to enter his plea.

Apparent from the face of this record about the timing of the plea entry and

competency issue, being just one day apart, are the obvious questions: whether the defendant's mental condition on October 14, 1998, truly reflects a pleas "freely and voluntarily" given; whether the defendant truly understood the nature of the charges, and whether he was accurate in signing off on the pre-printed statement (that descriptively involves a large measure of self-diagnosis) that "I do not suffer from any physical or mental disabilities to the degree that I am incapable of understanding this agreement, the nature of the proceeding against me, or assisting my lawyer in my behalf..." (R. Vol. 2, 205-206). Curiously, the term "agreement" in this paragraph was not stricken out as inapplicable. This raises the additional questions as to the veracity of the defendant's understanding and as to the speed and attention given at the proceeding itself.

Counsel's failure to make a record on this matter was ineffective, deficient and unreasonable under prevailing professional norms. "Prior to the entry of pleas, counsel should ... make certain that the client understands the rights he or she will waive by entering the pleas and that the client's decision to waive those rights is knowing, voluntary and intelligent." *ABA Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases* 11.6.4(A), p. 15 (1989).

The appellant importantly notes that at least one of the defendant's trial counsel thought the decision to plead guilty was imprudent. (PCR Vol. 9, 196). The

defendant also specially refers to the fact that the defendant informed trial counsel that he wanted to withdraw his pleas "because he either thought he was not competent at the time of the plea or that he had hurt his case by entering the pleas." (PCR Vol. 10, 215-221 *et seq*.).

This Court has previously noted that "[c]ourts ordinarily will permit a plea of guilty to be with drawn if it fairly appears that the defendant was in ignorance of his rights and of the consequences of his acts, or was influenced unduly and improperly, either by hope or fear in making it, or if it appears that the plea was entered under some mistake or misapprehension. The plea of guilty should not be induced by fear, persuasion, promises, inadvertence or ignorance." Rubenstein v. State, 50 So. 708 (Fla. 1951). See also Forbert v. State, 437 So.2d 1079 (Fla. 1983).

In Eckles v. State, 180 So. 764 (Fla. 1938), this Court considered a motion by counsel to withdraw a plea filed a week after entry of guilty plea without representation by counsel. The Court held that the motion, supported by affidavits, at least raised a doubt as to the competency of the accused to enter a plea of guilty without advice of counsel; and as there was no undue delay in presenting the motion for leave to withdraw the plea of guilty and to go to trial on pleas of not guilty, it was error to deny the motion. As the Court explained:

'In a criminal prosecution, a defendant has a right to plead guilty; and the

effect of such a plea is to authorize the imposition of the sentence prescribed by law upon a verdict of guilty of the crime sufficiently charged in the indictment or information.

'A plea of guilty should be entirely voluntary by one competent to know the consequences.***

'While the trial court may exercise discretion in permitting or refusing to permit a plea of guilty to be withdrawn for the purpose of pleading not guilty, yet such discretion is subject to review by an appellate court.

'A defendant should be permitted to withdraw a plea of guilty given unadvisedly when application therefor is duly made in good faith and sustained by proofs, and proper offer is made to go to trial on a plea of not guilty.

'The law favors trials on the merits; and, if the discretion of the trial court is abused in denying leave to withdraw a plea of guilty and to got to trial on the merits, the appellate court may interfere.' Citations omitted.

'Where there is sufficient evidence to raise a doubt as to the sanity of the accused at the time that the plea of guilty is entered, he should, as of right, be allowed to withdraw his plea of guilty, and substitute not guilty. Citations omitted.

'The withdrawal of the plea of guilty should not be denied in any case where it is in the least evident that the ends of justice will be subserved by permitting not guilty to be pleaded in its place.' Citation omitted.

Eckles, 180 So. at 766 (emphasis added).

Simply put, in appellant's case, counsel did not file a motion to withdraw the pleas as the defendant wanted. Counsel talked the defendant into staying with the guilty plea even though counsel felt it was imprudent. It is clear that the trial and

postconviction record of this case also presented sufficient evidence to raise a doubt as to the competency of the defendant at the time that the plea of guilty was entered. If such a motion to withdraw the plea been filed and denied, that denial would have been reversed on appeal. As the client expressed his own position to his lawyer that he was incompetent when making the plea, it is not clear that counsel made certain that the client understood the rights he or she waived by entering the pleas and that the client's decision to waive those rights was knowing, voluntary and intelligent. Again, this situation violated *ABA Guideline* 11.6.4(A)(1989).

The court below denied the claim based on Dr. Danziger's testimony that the plea entry was "likely the stress that brought about" the "brief reactive psychosis" and that the appellant was "not suffering from any loss of touch with reality" [sic] on the day of the plea. The court also noted counsel's post-plea discussion with his client about the possibility of asking to withdraw the plea. (PCR Vol. 8, 1319).

In deciding ineffective assistance of counsel claims, this Court reviews legal questions *de novo* and gives deference to the lower court's findings of fact. Reichmann v. State, 777 So.2d 342, 350 (Fla. 2000)(citations omitted). In Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984), the United States Supreme Court held that counsel has "a duty to bring to bear such

skill and knowledge as will render the trial a reliable adversarial testing process." Strickland, 466 U.S. at 688. To prove a violation of the Sixth and Fourteenth Amendment Rights to counsel, Strickland requires a defendant to demonstrate (1) unreasonable attorney performance, and (2) prejudice. Id. As to judging performance, "[a] convicted defendant making a claim of ineffective assistance must identify the acts or omissions of counsel that are alleged not to have been the result of reasonable professional judgment. The court must then determine whether, in light of all the circumstances, the identified acts or omissions were outside the wide range of professionally competent assistance. In making that determination, the court should keep in mind that counsel's function, as elaborated in prevailing professional norms, is to make the adversarial testing process work in the particular case." Strickland, 466 U.S. at 690.

Dr. Danziger, aware of the appellant's pre-plea depression, could only give a conditional opinion of the "likely" cause of the psychotic episode. Counsel felt the plea was "imprudent." The evidentiary hearing showed that counsel believed his client's decision was imprudent; consequently, counsel's conduct was based on a self-described strategic choice made after an incomplete and improper investigation of law and facts relevant to counsel's ... options, all in violation of Strickland, 466 U.S. at 690-91 and Wiggins v. Smith, 539 U.S. 510, 123 S.Ct.

2527, 2537, 156 L.Ed.2d 471 (2003). Consequently, the court's factual findings deserve little deference and its Strickland determination was in error.

ARGUMENT II

APPELLANT DID NOT RECEIVE THE EFFECTIVE ASSISTANCE OF COUNSEL, VIOLATING HIS RIGHTS UNDER THE FOURTH, FIFTH, SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS OF THE UNITED STATES CONSTITUTION AND HIS CORRESPONDING RIGHTS UNDER THE FLORIDA CONSTITUTION, WHEN COUNSEL FILED A LEGALLY INSUFFICIENT MOTION TO DISQUALIFY THE TRIAL JUDGE.

The appellant presented the claim below in the following fashion. On October 23, 1998, counsel for the defendant, Arthur Barnhill, III, filed a Motion to Disqualify Trial Judge. (R. Vol. 2, 232-35). The motion was considered by the court during a hearing on November 2, 1998. (R. Vol. 10, 1280-98). The motion was denied without comment by the court on December 7, 1998, (R. Vol. 10, 1302) and denied again, upon counsel's verbal renewal, on September 13, 1999. (R. Vol. 11, 1353).

In the opinion on the direct appeal of Appellant's case, this Court summarized the motion and its denial as follows:

> Barnhill argues that 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, set forth the procedure to be followed in the disqualification process.
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> 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.
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> ...
>
> (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. [citations omitted].

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 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 this 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 at 842-43.

In Strickland v. Washington, 466 U.S. 668 (1984), the United States Supreme Court held that counsel has "a duty to bring to bear such skill and knowledge as will render the trial a reliable adversarial testing process." Strickland, 466 U.S. at 688. To prove a violation of the Sixth and Fourteenth Amendment Rights to counsel, Strickland requires a defendant to demonstrate (1) unreasonable attorney performance, and (2) prejudice. Id. As to judging performance, "[a] convicted defendant making a claim of ineffective assistance must identify the acts or omissions of counsel that are alleged not to have been the result of reasonable professional judgment. The court must then determine whether, in light of all the circumstances, the identified acts or omissions were outside the wide range of professionally competent assistance. In making that determination, the court should keep in mind that counsel's function, as elaborated in prevailing professional norms, is to make the adversarial testing process work in the particular

case." Strickland, 466 U.S. at 690.

By filing and arguing a legally insufficient motion for disqualification, counsel's conduct fell short of the standards for capital defense work articulated by the American Bar Association (counsel failed to pursue an "appropriate pretrial motion[], filed and zealously pursued")(ABA Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases 11.5.1 [Commentary, para. 4](1989). The United States Supreme Court has long referred to the ABA Guidelines as "guides to determining what is reasonable." Strickland at 688, (as quoted in Wiggins, 123 S.Ct. at 2537).

By its ruling on the direct appeal, this Court, in essence, found trial counsel ineffective as a matter of law for his failure to file a legally sufficient motion to disqualify.

It should also be repeated that counsel verbally renewed his motion to disqualify at the start of the penalty phase on September 13, 1999:

> MR. CAUDILL: Just for the record, Your Honor, I think out at a hearing that was actually held after the case was postponed, after Appellant entered his plea, we did file a motion to disqualify the Trial Court which the Court denied that motion. And I wanted to renew that motion for the record.
>
> THE COURT: Same ruling.

(R. Vol. 11, 1352-53).

This was almost eleven months after counsel filed the written motion that was made at a time when his client had been ruled incompetent to proceed with the penalty phase of the trial. Because the written motion was verbally denied, and, under Rule 2.160(f), Fla.R.Jud.Admin., for "no other [stated] reason" and by which the court did not "take issue with the motion," counsel should have realized that the motion was previously denied because it was found to be legally insufficient.

Only the repeated ineffective assistance of counsel can explain why the 1999 renewal of the motion to disqualify was done verbally and not made with a current, properly prepared and legally sufficient written motion and affidavit according to Florida law. See Rogers v. State, 630 So.2d 513 (Fla. 1993)("Accordingly, we hold that upon filing of this opinion all motions for disqualification of a trial judge must be in writing and otherwise in conformity with this Court's rules of procedure. The writing requirement cannot be waived and a presiding judge must afford a petitioning party a reasonable opportunity to file its motion. Where a party discovers mid-trial or mid-hearing that a motion for disqualification is required, he or she may request a brief recess–which must be granted–in order to prepare the appropriate documents." Rogers v. State, 630 So.2d at 516).

The court below found the claim raised on direct appeal and improperly recast under the guise of an ineffective claim. It denied the claim as procedurally barred

and, alternatively, on the merits (finding that the sentencing results would be the same under any different judge. (PCR Vol. 8, 1316).

In deciding ineffective assistance of counsel claims, this Court reviews legal questions *de novo* and gives deference to the lower court's findings of fact. Reichmann v. State, 777 So.2d 342, 350 (Fla. 2000)(citations omitted).

The standard for determining prejudice under Strickland is whether confidence in the outcome is undermined. Strickland, 466 U.S. at 688. Regarding the prejudice prong, the Supreme Court has held:

> An ineffective assistance claim asserts the absence of one of the crucial assurances that the result of the proceeding is reliable, so finality concerns are somewhat weaker and the appropriate standard of prejudice should be somewhat lower. The result of a proceeding can be rendered unreliable, and hence the proceeding itself unfair, even if the errors of counsel cannot be shown by a preponderance of the evidence to have determined the outcome.

Strickland, 466 U.S. at 688.

"The defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." Strickland, 466 U.S. at 694. Here, but for counsel's repeated unprofessional errors, either the trial court would have been compelled to

remove himself immediately or the defendant would have been granted a new sentencing on direct appeal. See Livingston v. State, 441 So.2d 1083 (Fla. 1983) and Cave v. State, 660 So.2d 705 (Fla. 1995). Counsel was ineffective and the result of counsel's errors rendered the proceeding unreliable and, hence, unfair.

ARGUMENT III

TRIAL COUNSEL'S QUESTIONING DURING VOIR DIRE CONSTITUTED INEFFECTIVE ASSISTANCE OF COUNSEL AND BECAUSE IT RESULTED IN PREJUDICE IT DEPRIVED APPELLANT OF HIS RIGHTS TO A FAIR TRIAL AND CAPITAL SENTENCING UNDER THE FIFTH, SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS OF THE UNITED STATES CONSTITUTION AND THE CORRESPONDING PROVISIONS OF THE FLORIDA CONSTITUTION.

In reincorporating the argument contained in his motion, the appellant repeats that this Court and the State of Florida know that, in the words of the Attorney General, "defense counsel's questioning [was] bifurcated, rambling, disjointed, and nonsensical ... his questions were confusing the jury." (AB - p. 34).

It is argued that counsel's handling of voir dire was ineffective, deficient, unreasonable and prejudicial under prevailing professional norms. An evidentiary hearing was granted to determine whether counsel's conduct during voir dire was

based on "strategic choices made after thorough investigation of law and facts relevant to counsel's ... options." Strickland, supra and Wiggins,, supra.

Further than confusing the jury, defense counsel also skipped over and abandoned the opportunity and duty to question jurors Robinson and Lowe. This Court previously noted that the following exchanges occurred during voir dire:

> DEFENSE: ... 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 the 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 you understand that?
>
> VENIRE: Yes
>
> COURT: Is there anybody at this point in time just because there has been an entry of the plea set forth in the indictment that feel they're more predisposed because that finding has 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,....

As to the evidentiary testimony, Arthur Haft said the following as to the reason he did not return to questioning Juror Robinson after the court's intervention:

> I would think that there was a reason. I don't again exactly remember my thought process in terms of why I didn't return to this juror. (PCR R. Vol. 9, 39).

At to the evidentiary testimony, Arthur Haft said the following as to the reason for not addressing Juror Lowe:

> Given the context that I am provided right here, I don't recall the reason why I didn't question Mr. Lowe. (PCR R. Vol. 9, 41).

In granting relief to a postconviction petitioner, this Court addressed the matter of when a trial attorney is unable to provide the reason or basis for an act or omission during his handling of a trial in State v. Duncan, 894 So.2d 817, 824 (Fla. 2004):

> If the trial court's order was understood as holding that Duncan is entitled to relief *solely* because his former attorney was unable to provide the court with a reason for his failure to call Dr. Berland to testify, then such a holding would be in error, as it would constitute improper burden shifting. Ineffective assistance of counsel is not proven, per se, merely because the attorney whose acts are being

> questioned cannot provide a justification for his actions. The United States Supreme Court has held, and we have recognized, that the burden is on the moving party to demonstrate that the two components of Strickland, namely that the acts or omissions of the lawyer were outside the broad range of reasonably competent performance and that the substantial deficiency so affected the proceeding that confidence in the outcome is undermined, have been satisfied. See Strickland, 466 U.S. [668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984)] at 690, 104 S.Ct. 2052; Asay, 769 So.2d [974 (Fla. 2000)] at 984. Once the moving party has made the required showing, an objective basis for counsel's action's actions must be found, within the record, to justify counsel's performance, and thereby rebut the moving party's claim. If the record itself does not provide such justification, then the court has no choice but to require the State, and the attorney whose performance is in question, to answer the moving party's allegation.

Trial attorneys in death penalty cases "must be able to apply sophisticated jury selection techniques...," *ABA Guideline* 1.1, Commentary p. 21 (1989) and "... ensure that the client is not harmed by improper, inaccurate or misleading information being considered by the sentencing entity or entities in determining the sentence to be imposed." *ABA Guideline 11.8.2(C)*, p. 69 (1989).

Regarding the abandonment of additional questioning of jurors Robinson and Lowe, Professor Lubet's words are repeated: "... voir dire must be planned as carefully as any other aspect of the trial ... [The] areas of inquiry must be designed to obtain the maximum amount of information ... [The] first goal, therefore, should be to assure your client a fair trial by identifying those potential jurors who, for whatever reason, cannot be objective about your client's case ... [I]t is essential to

regard voir dire as [the] best opportunity to begin to develop a positive relationship with the jury. Often the best way to make a good impression is to avoid making a bad impression." *Modern Trial Advocacy: Analysis and Practice,* (National Institute for Trial Advocacy, 2nd Ed. 1997) 505; 511; 516; 524.

The court below found that prejudice was not proven even while finding the voir dire as disjointed and rambling. It denied the claim. (PCR Vol. 8, 1318).

In deciding ineffective assistance of counsel claims, this Court reviews legal questions *de novo* and gives deference to the lower court's findings of fact. Reichmann v. State, 777 So.2d 342, 350 (Fla. 2000)(citations omitted).

Counsel's conduct constituted failures that prejudiced appellant. There is a reasonable probability that the outcome of the penalty phase would have been different had a different, sophisticated, non-rambling, non-disjointed and non-confusing voir dire taken place. Confidence in the outcome of the penalty phase of the trial is thus undermined.

ARGUMENT IV

APPELLANT WAS DENIED THE EFFECTIVE ASSISTANCE OF COUNSEL AND THEREBY PREJUDICED AT THE SENTENCING PHASE OF HIS TRIAL IN VIOLATION OF THE SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS. TRIAL COUNSEL FAILED TO ADEQUATELY PREPARE, INVESTIGATE AND PRESENT MITIGATING EVIDENCE AND THUS FAILED TO ADEQUATELY CHALLENGE THE STATE'S CASE.

With this claim below, the court had to consider the reasonableness of trial counsel's decisions not to interview the defendant's father, Arthur Barnhill, Jr., and, thus, not present him as a penalty phase witness. In contrast to the trial record, the defendant refers to the family history provided in the postconviction testimony of Arthur Barnhill, Jr.

As Justice O'Connor wrote in Wiggins:

> In this case, as in Strickland, petitioner's claims stems from counsel's decision to limit the scope of their investigation into potential mitigating evidence. (Citation omitted). Here, as in Strickland, counsel attempt to justify their limited investigation as reflecting a tactical judgment not to present mitigating evidence at sentencing and to pursue alternate strategy instead. In rejecting Strickland's claim, we defined the deference owed such strategic judgments in terms of the adequacy of the investigations supporting those judgments:
>
> > "[S]trategic choices made after thorough investigation of law and facts relevant to plausible options are virtually unchallengeable; and strategic choices made after less than complete investigation are reasonable precisely to the extent that reasonable professional judgments support the limitations on investigation." (Citation omitted).

Wiggins at 2535.

The postconviction record shows that Mr. Haft made a purposeful decision not to interview Arthur Barnhill, Jr., despite the availability of the defendant's father being in a Florida prison at the time of trial (PCR. Vol. 9, 76-81). Yet Mr. Haft conceded that "[y]ou are right that there could have been something the father

might have had to say that could have made my decision in how I use my work time to not even interview him a bad decision." (PCR. Vol. 9, 82). Mr. Caudill noted that "[s]o, you're right, we couldn't possibly know what he [the father] had to say without talking to him." (PCR. Vol. 9, 185).

The postconviction record also reflects that (a) Mr. Haft did not take the opportunity to visit family members in the Bronx while on his one and sole trip to New York City (PCR. Vol. 9, 69-70); and (b) defense counsel limited their social history to the mother's component of the family history and the defendant's developmental years (as Mr. Caudill testified: "The – part of the social history that we were going to present on Appellant's behalf is that his mother had not been a very good mother to him. That she had at some point in time during his earlier years abandoned him. That she had mistreated him in various ways throughout his childhood.")(PCR. Vol. 9, 186).

Arthur Barnhill, Jr., serving a Florida prison sentence, was transported to and testified at the evidentiary hearing. He testified to, among other matters: that his current sentence was based on convictions for a 1982 armed robbery and other felonies; that he previously served time in a New York prison for armed robbery (during which he was shot in the back, face and leg); (PCR. Vol. 10, 286); that he could not recall the year in which his son, the appellant, was born; (PCR. Vol. 10,

287); that he was available and in a Florida prison at the time of his son's arrest and trial; (PCR. Vol. 10, 292); that he was never contacted by the office of his son's lawyers and tried to communicate his willingness to testify for his son (PCR. Vol. 10, 292); that the appellant was born near the time he went to prison in New York; (PCR. Vol. 10, 298); that fellow inmates in New York alerted him to a thought he later developed–that his father and the appellant's mother were "lovers" before he became her "lover;" that he believed the appellant's mother was a "whore;" (PCR. Vol. 10, 300); that he believed the appellant's mother was a lesbian; that he had a "threesome" with his wife and her lesbian lover; (PCR. Vol. 10, 301); that his wife "fulfilled his very high intensity of sexual need at the time;" (PCR. Vol. 10, 302); that he never had a job when he lived in the Bronx; (PCR. Vol. 10, 304); that he "lived off women" ... he "used them" and "abused them;" (PCR. Vol. 10, 305); that before prison the family was being evicted, not eating good and not looking good; that he was part of the gangs in New York, getting cut up and sewed up (PCR. Vol. 10, 305); that he consented to his parents taking his son to raise him (PCR. Vol. 10, 307); that he never shared any restaurant earnings with his family (PCR. Vol. 10, 309); that he was always unfaithful to his wife (PCR. Vol. 10, 309); that he would spank his son to stop the crying from not being allowed to go to his father's "girlfriends' places with him (PCR. Vol. 10, 311); that

he sometimes would go to a bar or a girl friend's place and leave his son in the car as a toddler (PCR. Vol. 10, 312); that he was very abusive to his son (PCR. Vol. 10, 313); that if his son cried, he would grab his son, hit him up and choke him a little bit (PCR. Vol. 10, 315) just as his father was abusive to him ; (PCR. Vol. 10, 316); that if his son didn't sit down when told that he would beat his son (PCR. Vol. 10, 317); that suffering beatings from his father–including first having been tied up–made him "endurant" – he was able to fight good and wanted his son to be similarly strong and not a punk (PCR. Vol. 10, 321-322); that he was still robbing (at night) while working as a cook (in the daytime) in Florida (PCR. Vol. 10, 323); that he used a little "weed" and snorted a little "coke; " (PCR. Vol. 10, 323); that he always has liked "penetration" pornographic magazines; that he used to catch his son with his pornographic magazines; (PCR. Vol. 10, 324); that 20 to 30 such magazines were always all over the house; (PCR. Vol. 10, 325); that he felt that the appellant was his father's child (PCR. Vol. 10, 334); and, affirmatively answering a question during cross examination, that he was part of and a leader of the Black Spades gang in New York (PCR. Vol. 10, 334).

The trial court below found the father's testimony to be "colorful, but it added very little to the mitigation given to the jury during the penalty phase." (PCR. Vol. 8, 1318). The court denied the claim based on a finding of reasonable strategy of

counsel in avoiding family certain family members, in finding that the father's testimony added very little to the mitigation, as noted, and in the failure to prove prejudice. (PCR Vol. 8, 1318). In deciding ineffective assistance of counsel claims, this Court reviews legal questions *de novo* and gives deference to the lower court's findings of fact. Reichmann v. State, 777 So.2d 342, 350 (Fla. 2000). The appellant argues that the record is otherwise and that the court's findings are not supported by competent and substantial evidence. Blanco v. State, 702 So.2d 1250 (Fla. 1997). With three jurors voting for a life recommendation, the appellant disagrees with the court below and argues here that the father's testimony was competent, substantial evidence to the contrary of just being colorful and of limited value.

In context of what was missing from trial counsels' work and the trial, it seems that Professor Slobogin's observations are applicable. He references the fact that "[a] number of studies indicate that genes, organic processes, and early childhood experiences play a very influential role in criminal behavior ..." and there is extensive research literature indicating that "most character formation occurs in the developmental years leading up to the age 14, when the person can hardly be held responsible for how he or she turns out." Christopher Slobogin, Stephen C. O'Connell Professor of Law, University of Florida Levin College of Law, "The

Civilization of the Criminal Law," pp. 33-35, Current Working Papers, http://www.law.ufl.edu/faculty/publications/workingpers.html (July 14, 2005).

Well before the time of the defendant's trial, capital litigation attorneys and experts were well aware of and used complete social histories when presenting mitigation to capital juries. Professor Haney wrote in 1995 that:

> The social history of the defendant has become the primary vehicle with which to correct the misinformed and badly skewed vision of the capital jury ... mitigation evidence is not intended to excuse, justify or diminish the significance of what they [i.e., capital defendants] have done, but to help explain it, and explain it in a way that has some relevance to the decision capital jurors must make about sentencing ... no jury can render justice in the absence of an explanation. In each case, the goal is to place the defendant's life in a larger social context and, in the final analysis, to reach conclusions about how someone who has had certain life experiences, been treated in particular ways, and experienced certain kinds of psychologically-important events has been shaped and influenced by them.
>
> Craig Haney, "The Social Context of Capital Murder: Social Histories and the Logic of Mitigation." 35 Santa Clara L.Rev. 547, 559-61 (1995).

As the ABA Guidelines provided, in 1989, "counsel should present to the sentencing entity or entities *all reasonably available* evidence in mitigation unless there are strong strategic reasons to forego some portion of such evidence. 11.8.6(A)(emphasis added). Among the topics counsel should consider presenting are the ... "family and social history" [11.8.6(B)(5) ... [and] "expert testimony concerning [any of] the above and the resulting impact on the client..."

11.8.6(B)(8).

Justice Souter summarized the holding in Rompilla v. Beard, — U.S. —, 125 S.Ct. 2456 (2005) as follows:

> This evidence adds up to a mitigation case that bears no relation to the few naked pleas for mercy actually put before the jury, and although we suppose it is possible that a jury could have heard it all and still have decided on the death penalty, that is not the test. It goes without saying that the undiscovered "mitigating evidence, taken as a whole, 'might well have influenced the jury's appraisal' of [Rompilla's] culpability," Wiggins, (citation omitted)(quoting Williams v. Taylor, citation omitted) and the likelihood of a different result if the evidence had gone in is "sufficient to undermine confidence in the outcome" actually reached at sentencing, Strickland (citation omitted).

Rompilla at 2469.

The same conclusions can be reached about the basis and effect of trial counsel's limited investigation and presentation of family and social history in the appellant's case.

ARGUMENT V

TRIAL COUNSEL'S CLOSING ARGUMENT CONSTITUTED INEFFECTIVE ASSISTANCE OF COUNSEL AND BECAUSE IT RESULTED IN PREJUDICE IT DEPRIVED APPELLANT OF HIS RIGHTS TO A FAIR TRIAL AND CAPITAL SENTENCING UNDER THE FIFTH, SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS OF THE UNITED STATES CONSTITUTION AND THE CORRESPONDING PROVISIONS OF THE FLORIDA CONSTITUTION.

As noted in Argument III, the State argued on direct appeal that the trial court's

interruptions of defense counsel during voir dire "was simply a result of defense counsel's questioning which the court properly characterized as bifurcated, rambling, disjointed, and nonsensical ... his questions were confusing the jury." (AB - p. 34). It is argued here that the record reflects an equally bifurcated, rambling, disjointed, nonsensical and confusing closing argument by defense counsel.

"The goal of the sentencing phase is to help the jury see the client as someone they do not want to kill." *ABA Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases* 11.8.6, Commentary p. 73 (1989).

A sampling of the closing argument reflects that counsel said the following:

> (a) While stating that anger should not be part of the jury's decision, defense counsel, nevertheless, stated: "If someone were to ask whether anger can play a part in these proceedings, whether anyone may feel angry at the close of these proceedings, *it would be hard to find a human who might not be angry after seeing a tragic death like this*." (R. Vol 14, p. 3311)(emphasis added).
>
> (b) "First degree murder is a horrible thing. So one thing I'm not going to do when I stand up here is tell you that first degree murder is not a horrible thing. It is." (R. Vol 14, p. 3311)
>
> (c) "... one thing that's going on , which is that Earl Gallipeau is dead. It appears from all indications that he was a very nice, good man who had a good life and that he was a good individual, right. You combine that with the fact that you have control over the fate of someone who was involved in his killing and there can be a tendency to take the person who you're making recommendation on and to judge his statement more harshly..." (R. Vol 14, p. 3320).

(d) "All the bad stuff he [the defendant in his statement] says about Mr. Gallipeau's suffering and so forth, Mr. Whitaker wants you to accept." (R. Vol 14, p. 3321).

(e) "... he admitted his involvement in a murder. And I don't know is he being truthful ..." (R. Vol 14, p. 3324).

(f) "You may view Arthur Barnhill's conduct as more or less aggravated overall, and that makes sense, it appeals to common sense that that would be the case." (R. Vol 14, p. 3321).

(g) "Again, I would suggest that you could find any, of what probably may be the more serious aggravating circumstances against Arthur Barnhill." (R. Vol 14, p. 3354).

In closing argument, where counsel indicates his own doubts or distaste for the case, attacks his client's character and emphasizes the seriousness of the crime, counsel fails to function reasonably as effective counsel. Prejudiced is established where counsel essentially offered the jury no alternative but to impose the death penalty. Clark v. State, 690 So.2d 1280 (Fla. 1997).

The court below denied the claim by finding that the whole context of closing argument reflected reasonable strategic choices for the points made while exhibiting no distaste for the client. (PCR Vol. 8, 1319).

In deciding ineffective assistance of counsel claims, this Court reviews legal questions *de novo* and gives deference to the lower court's findings of fact. Reichmann v. State, 777 So.2d 342, 350 (Fla. 2000). The appellant argues that the record is otherwise and that the court's findings are not supported by competent

and substantial evidence. Blanco v. State, 702 So.2d 1250 (Fla. 1997).

ARGUMENT VI

THE RULES PROHIBITING APPELLANT'S LAWYERS FROM INTERVIEWING JURORS TO DETERMINE IF CONSTITUTIONAL ERROR WAS PRESENT VIOLATES EQUAL PROTECTION PRINCIPLES, THE FIRST, SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND THE CORRESPONDING PROVISIONS OF THE FLORIDA CONSTITUTION AND DENIES APPELLANT ADEQUATE ASSISTANCE OF COUNSEL IN PURSUING HIS POSTCONVICTION REMEDIES.

The appellant first notes that a new procedural rule regarding juror interviews has been established since the time of filing this claim in the court below. Effective on January 1, 2005, Fla.R.Crim.P. 3.575 provides as follows:

> A party who has reason to believe that the verdict may be subject to legal challenge may move the court for an order permitting an interview of a juror or jurors to so determine. The motion shall be filed within 10 days after the rendition of the verdict, unless good cause is shown for the failure to make the motion within that time. The motion shall state the name of any juror to be interviewed and the reasons that the party has to believe that the verdict may be subject to challenge. After notice and hearing, the trial judge, upon a finding that the verdict may be subject to challenge, shall enter an order permitting the interview, and setting therein a time and a place for the interview of the juror or jurors, which shall be conducted in the presence of the court and the parties. If no reason is found to believe that the verdict may be subject to challenge, the court shall enter its order denying permission to interview. COURT COMMENTARY: This rule does not abrogate Rule Regulating the Florida Bar 4-3.5(d)(4), which allows an attorney to interview a juror to determine whether the verdict may be subject to legal challenge after filing a notice of intention to interview.

The thrust of the appellant's argument is that Florida's restrictions on post-trial juror interviews is an equal protection violation as enunciated, importantly, in *Bush v. Gore*, 531 U.S. 98, 121 S.Ct. 525, 148 L.Ed.2d 388 (2000). Criminal defense counsel in Florida are treated differently, unfairly and unequally compared to academics, journalists and those lawyers not connected with a particular case.

Florida lawyers, including defense trial and postconviction counsel, cannot interview jurors on behalf of their clients outside the constraints created by Fla.R.Crim.P. 3.575 and Rule Regulating the Florida Bar 4-3.5(d)(4). Yet, academics are allowed to and, in fact, do interview capital jurors, post-trial, about a wide range of matters, not just those factors which may be "grounds for legal challenge" under the rules. See the Capital Jury Project website at http://www.cjp.neu.edu which discusses, in part, the completed 1,198 interviews with jurors from 353 capital trials in 14 states, including Florida, (as of August 15, 2005). The CJP website also lists a number of doctoral dissertations based on Capital Jury Project data including Julie Goetz, "The Decision-Making of Capital Jurors in Florida: The Role of Extralegal Factors." Unpublished dissertation (1995), School of Criminology and Criminal Justice, Florida State University, Tallahassee, Florida.

Additionally, journalists are permitted without restriction to interview jurors

post-trial. See, e.g., Chris Tisch, "Defense Fears Comments Affect Verdict;" St. Petersburg Times, Oct. 25, 2004 (available at http://www.sptimes.com/advancedsearch.html), where the jury foreman of a murder trial is interviewed about the jury's deliberations.

Lastly, Fla.R.Crim.P. 3.575 and Rule Regulating the Florida Bar 4-3.5(d)(4) only apply to cases "with which the lawyer is connected." Hence, lawyers not connected with a case are treated differently because the rule does not apply to them.

The court below denied the claim based on a procedural bar for failure to raise it on direct appeal and, alternatively, on Florida law prohibiting "fishing expeditions" regarding juror misconduct. (PCR Vol. 8, 1317).

The point remains that this court, as well as that below, could well benefit from learning whether the defendant's jurors (a) agree with the State of Florida that defense counsel's voir dire was "bifurcated, rambling, disjointed and nonsensical ... his questions were confusing the jury;" (b) may have voted differently if exposed to the missing components of the defendant's social history as provided by the father and social worker at the evidentiary hearing; and (c) felt that defense counsel's closing argument was an expression of distaste for the case, an attack on the defendant's character or emphasized the seriousness of the crime. The answers

to these questions are presently unknown and cannot come from counsel for the defendant because of the “catch-22" nature of the rules. That the answers to these questions could come from an academic researcher, a journalist or a lawyer not connected with the case infringes upon the defendant’s rights to due process, access to the courts, and the equal protection concepts enunciated in Bush v. Gore, supra. The reliability and integrity of Appellant’s capital sentence is thereby questionable.

ARGUMENT VII

EXECUTION BY LETHAL INJECTION IS CRUEL AND/OR UNUSUAL PUNISHMENT AND VIOLATES APPELLANT’S RIGHTS UNDER THE EIGHTH AND FOURTEENTH AMENDMENTS OF THE UNITED STATES CONSTITUTION AND UNDER OF THE FLORIDA CONSTITUTION.

The appellant relied on the following pleadings in his motion below while acknowledging such rulings on this claim as found in Johnson v. State, 904 So.2d 400, 412 (Fla. 2005). Also acknowledged is that the disposition of this claim may be affected by the outcome of *Hill v. Crosby,* – U.S. –, 126 So.2d 1189, 74 USLW 3437 (U.S. Jan. 25, 2006).

The Eighth Amendment prohibits governmental imposition of "cruel and unusual punishments," and bars "infliction of unnecessary pain in the execution of the death sentence," Louisiana ex rel. Francis v. Resweber, 329 U.S. 459, 464, 67

S.Ct. 374 (1947) (plurality opinion). "Punishments are deemed cruel when they involve torture or a lingering death ..." In re Kemmler, 136 U.S. 436, 447, 10 S.Ct. 930 (1890).

Despite the perception that lethal injection is a painless and swift death, negligent or intentional errors have caused persons executed intense suffering. Even when persons executed by lethal injection are first paralyzed, no evidence clearly demonstrates that they become unconscious to their pain and impending death. Indeed, a significant number of the persons executed by lethal injection in other states have suffered extremely painful and prolonged deaths resulting in wanton and unnecessary pain. Accounts of botched executions have been widely reported. *See, e.g.*, Joe Farmer "Rector, 40 Executed for Officer's Slaying," *Arkansas Democrat-Gazette*, January 25, 1995; Sonya Clinesmith, "Moans Pierced Silence During Wait," *Arkansas Democrat-Gazette*, January 26, 1992.

Based on eyewitness accounts of such executions and available scientific evidence regarding the hazards, lethal injection is clearly unreliable as a "humane" method of execution. See also, Mears, “Lethal Injection and the Georgia Supreme Court’s New Millennium,” The Champion, Jan.-Feb. 2004, pp. 33-38 and Radelet, “Post-Furman Botched Executions,” http://deathpenalty info.org/article.php. Accordingly, execution by lethal injection constitutes cruel and unusual

punishment. The court below denied the claim based on this Court's previous rulings. (PCR Vol. 8, 1317).

ARGUMENT VIII

THE JURY DID NOT RECEIVE ADEQUATE GUIDANCE IN VIOLATION OF THE FIFTH, SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS OF THE UNITED STATES CONSTITUTION AND THE CORRESPONDING PROVISIONS OF THE FLORIDA CONSTITUTION. APPELLANT'S DEATH SENTENCE IS PREMISED ON FUNDAMENTAL ERROR WHICH MUST BE CORRECTED. TO THE EXTENT TRIAL COUNSEL FAILED TO LITIGATE THESE ISSUES, APPELLANT WAS DENIED HIS RIGHTS TO COUNSEL UNDER THE SIXTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND THE CORRESPONDING PROVISIONS OF THE FLORIDA CONSTITUTION.

The jury received several instructions which constituted fundamental constitutional error and violated Appellant's rights under the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution and the corresponding provisions of the Florida Constitution. The instructions the jury received diminished their responsibility, shifted the burden of proof to Appellant, and were premised on unconstitutionally vague and overbroad aggravators. The jury's death recommendation is, therefore, unreliable. The sentencing judge was required to give "great weight" to the jury's recommendation. Thus, the trial court

indirectly weighed the unconstitutional aggravating factors the jury is presumed to have found. Espinosa v. Florida, 112 S.Ct. 2926, 2928 (1992); Kearse v. State, 662 So.2d 677 (Fla. 1995). These errors were not harmless.

In a capital case, the jurors are placed "in a very unfamiliar situation and called on to make a very difficult and uncomfortable choice . . . Given such a situation, the uncorrected suggestion that the responsibility for any ultimate determination of death will rest with others presents an intolerable danger that the jury will in fact choose to minimize the importance of its role." Caldwell v. Mississippi, 472 U.S. 320, 332-33 (1985) (emphasis added).

Appellant's jury was instructed:

> Ladies and Gentlemen of the jury it is now your duty to advise the Court as to what punishment should be imposed upon the defendant for the crime of first degree murder. As you have been told, the final decision as to what punishment shall be imposed is the responsibility of the judge; however, it is your duty to follow the law that will now be given to you by the Court and render to the Court an advisory sentence based upon your determination as to whether sufficient aggravating circumstances exist to justify the imposition of the death penalty and whether sufficient mitigating circumstances exist to outweigh any aggravating circumstances found to exist.

(Vol. 21, R. 3378-79).

Counsel made no objections.

Appellant recognizes that despite federal authority, in Grossman v. State, 525 So.2d 833 (Fla.1988), this Court held that the rationale of Caldwell is inapplicable

in Florida because the judge, not the jury, renders the sentence. The Court has rejected Caldwell claims in the past because, under Florida's statutory scheme, the jury "render[s] an advisory sentence to the court" and the trial court, "notwithstanding the recommendation of a majority of the jury," enters the sentence.

Ring v. Arizona,122 S.Ct. 2428 (2002), caused members of this Court to re-examine the holding of Grossman. In Bottoson v. Moore, 833 So.2d 693 (Fla. 2002), Justice Lewis wrote:

> I write separately to express my view that in light of the dictates of Ring v. Arizona, it necessarily follows that Florida's standard penalty phase jury instructions may no longer be valid and are certainly subject to further analysis under the United States Supreme Court's Caldwell v. Mississippi, 472 U.S. 320, 105 S.Ct. 2633, 86 L.Ed.2d 231 (1985), holding. In Caldwell, the Supreme Court concluded "it is constitutionally impermissible to rest a death sentence on a determination made by a sentencer who has been led to believe that the responsibility for determining the appropriateness of the defendant's death rests elsewhere." . . . There, the Court deemed prosecutorial statements to a jury unconstitutional because the State "sought to minimize the jury's sense of responsibility for determining the appropriateness of death." . . . Following the decision in Caldwell, this Court evaluated the constitutionality of Florida's standard jury instructions. . . Just as the high Court stated in Caldwell, Florida's standard jury instructions "minimize the jury's sense of responsibility for determining the appropriateness of death."

Id., 833 So.2d at 731-34 (Lewis, J., concurring in result only)(citations omitted).

Caldwell embodies the principle stated in Justice Breyer's concurring opinion

in Ring: "the Eighth Amendment requires individual jurors to make, and to take responsibility for, a decision to sentence a person to death" and it clearly establishes that Appellant' death sentence violates his rights under the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution.

The jury instructions unconstitutionally relieved the state of its burden to prove an element of the death penalty eligible offense. Under Florida law and the death penalty scheme approved by the United States Supreme Court, a death sentence may not be imposed unless the jury is instructed:

> that the state must establish the existence of one or more aggravating circumstances before the death penalty could be imposed . . .
>
> [S]uch a sentence could be given *if the state showed the aggravating circumstances outweighed the mitigating circumstances.*

State v. Dixon, 283 So.2d 1 (Fla. 1973)(emphasis added); Proffitt v. Florida, 428 U.S. 242, 251 (1976). Appellant's jury was instructed:

> As you have been told, the final decision as to what punishment shall be imposed is the responsibility of the judge; however, it is your duty to follow the law that will now be given to you by the Court and render to the Court an advisory sentence based upon your determination as to whether sufficient aggravating circumstances exist to justify the imposition of the death penalty and whether sufficient mitigating circumstances exist to outweigh any aggravating circumstances found to exist.

(Vol. 21, R. 3378-79).

* * *

> Should you find sufficient aggravating circumstances do exist, it will then be your duty to determine whether mitigating circumstances exist that outweigh the aggravating circumstances.

(Vol. 21, R. 3382).

The jury instruction violated the Due Process Clause of the Fourteenth Amendment of the United States Constitution because it relieved the state of its burden to prove beyond a reasonable doubt the element that "sufficient aggravating circumstances" exist which outweighed mitigating circumstances. The instruction shifted the burden of proof to Appellant to prove that the mitigating circumstances outweigh sufficient aggravating circumstances.

The heinous, atrocious or cruel jury instruction was unconstitutionally vague and broad, violating Appellant's Eighth and Fourteenth Amendment Rights. Appellant's jury was given the following instruction regarding the heinous, atrocious or cruel aggravating element:

> Four, the crime for which the defendant is to be sentence[d] was especially heinous, atrocious or cruel.
>
> Heinous means extremely wicked or shockingly evil. Atrocious means outrageously wicked or vile. Cruel means designed to inflict a high degree of pain with utter indifference to or even enjoyment of the suffering of others.
>
> The kind of crime intended to be included as heinous, atrocious or cruel is one accompanied by additional acts that show the crime was consciousless or pitiless or was unnecessarily torturous to the victim.

(Vol. 21, R. 3379-80).

A state cannot use such aggravating factors "which as a practical matter fail to guide the sentencer's discretion." Stringer v. Black, 503 U.S. 527 (1992). If an aggravating circumstance "applies to every defendant eligible for the death penalty, the circumstance is constitutionally infirm." Arave v. Creech, 507 U.S. 463, 474 (1993). Moreover, "it is not enough for an aggravating circumstance, as construed by the state courts, to be determinate. Our precedents make clear that a State's capital sentencing scheme also must `genuinely narrow the class of persons eligible for the death penalty.'" Arave, 507 U.S. at 474 quoting Zant v. Stephens, 462 U.S. 862, 877 (1983)). Nevertheless, the heinous atrocious or cruel instruction Appellant's jury received was nothing more than a conglomeration of language the United States Supreme Court had held to be unconstitutional to support a death sentence. It gave no discernable content to the aggravating element and violated the Eighth and Fourteenth Amendments because it was unconstitutionally vague.

Appellant's sentencing jury is presumed to have found this aggravator established. Espinosa v. Florida, 112 S.Ct. 2926, 2928 (1992). Under these circumstances, erroneous instructions presumably tainted the jury's recommendation and, in turn, the judge's death sentence in violation of the Eighth and Fourteenth Amendments. Espinosa, 112 S.Ct. 2926.

The cold, calculated and premeditated jury instruction was unconstitutionally vague and broad, violating Appellant's Eighth and Fourteenth Amendment Rights. Appellant's jury was given the following instruction regarding the cold, calculated and premeditated element:

> Five, the crime for which the defendant is to be sentenced was committed was committed in a cold, calculated and premeditated manner. And without any pretense of moral or legal justification.
>
> Cold means the murder was a product of calm and cool reflection. Calculated means having a careful plan or prearranged design to commit murder. A killing is premeditated if [it] occurs after the Defendant consciously decides to kill. The decision must be present in the mind at the time of the killing. The law does not fix the exact period of time that must pass between the formation of the premeditated intent to kill and the killing. The period of time must be long enough to allow reflection by the defendant. The premeditated intent to kill must be formed before the killing.
>
> However, in order for this aggravating circumstance to apply, a heightened level of premeditation, demonstrated by a substantial period of reflection is required. A pretense of moral or legal justification is any claim of justification or excuse that, though insufficient to reduce the degree of murder, nevertheless rebuts the cold, calculated or premeditated nature of the murder.

(Vol. 21, R. 3380-81).

A state cannot use such aggravating factors "which as a practical matter fail to guide the sentencer's discretion." Stringer v. Black, 503 U.S. 527 (1992). If an aggravating circumstance "applies to every defendant eligible for the death penalty, the circumstance is constitutionally infirm." Arave v. Creech, 507 U.S. 463, 474

(1993). Moreover, "it is not enough for an aggravating circumstance, as construed by the state courts, to be determinate. Our precedents make clear that a State's capital sentencing scheme also must `genuinely narrow the class of persons eligible for the death penalty.'" Arave, 507 U.S. at 474 quoting Zant v. Stephens, 462 U.S. 862, 877 (1983).

Two of the aggravating instructions the jury received were constitutionally flawed, the court unconstitutionally shifted the burden of proof of an element of the offense to Appellant, and led the jury to believe that responsibility for the sentencing decision rested elsewhere. Appellant was denied a reliable and individualized capital sentencing determination in violation of the Fifth, Sixth, Eighth, and Fourteenth Amendments. To the extent trial counsel did not litigate and preserve these issues, Appellant did not receive the assistance of counsel to which he was entitled under the Sixth and Fourteenth Amendments to the United States Constitution and the corresponding provisions of the Florida Constitution. The court below denied the claim based on this Court's previous rulings. (PCR Vol. 8, 1317).

ARGUMENT IX

CUMULATIVELY, THE COMBINATION OF PROCEDURAL AND SUBSTANTIVE ERRORS DEPRIVED APPELLANT OF A FUNDAMENTALLY FAIR TRIAL GUARANTEED UNDER THE FOURTH, FIFTH, SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION

AND THE CORRESPONDING PROVISIONS OF THE FLORIDA CONSTITUTION.

Appellant did not receive the fundamentally fair trial to which he was entitled under the Eighth and Fourteenth Amendments. See Heath v. Jones, 941 F.2d 1126 (11th Cir. 1991); Derden v. McNeel, 938 F.2d 605 (5th Cir. 1991). The number and types of errors in appellant's guilt and penalty phases, when considered as a whole, virtually dictated the sentence of death. While there are means for addressing each individual error, addressing these errors on an individual basis will not afford adequate safeguards required by the Constitution against an improperly imposed death sentence. Repeated instances of ineffective assistance of counsel, flawed jury instructions, and an unconstitutional process significantly tainted appellant's capital proceedings. These errors cannot be harmless. Under Florida case law, the cumulative effect of these errors denied appellant his fundamental rights under the Constitution of the United States and the Florida Constitution. State v. DiGuilio, 491 So.2d 1129 (Fla. 1986); Ray v. State, 403 So.2d 956 (Fla. 1981); Taylor v. State, 640 So.2d 1127 (Fla. 1st DCA 1994); Stewart v. State, 622 So.2d 51 (Fla. 5th DCA 1993); Landry v. State, 620 So.2d 1099 (Fla. 4th DCA 1993); Jackson v. State, 575 So.2d 181, 189 (Fla. 1991)

(citations omitted). The court below denied the claim based on this Court's previous rulings regarding the failure to prove individual claims. (PCR Vol. 8, 1318).

ARGUMENT X

FLORIDA'S CAPITAL SENTENCING SCHEME WAS UNCONSTITUTIONAL AS APPLIED, DENYING APPELLANT HIS RIGHTS UNDER THE FIFTH, SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION. TO THE EXTENT TRIAL COUNSEL FAILED TO LITIGATE THESE ISSUES, APPELLANT WAS DENIED HIS SIXTH AND FOURTEENTH AMENDMENT RIGHTS TO COUNSEL.

The appellant relied on the following pleadings in his motion below while acknowledging such rulings on this claim as found in Schriro v. Summerlin, 542 U.S. 348, 124 S.Ct. 2519, 159 L.Ed.2d 442 (2004) and Johnson v. State, 904 So.2d 400, 412 (Fla. 2005).

In Ring v. Arizona, 122 S.Ct. 2428 (2002), the United States Supreme Court held that the Arizona statute pursuant to which, following a jury adjudication of a defendant's guilt of first-degree murder, the trial judge, sitting alone, determines the presence or absence of the aggravating factors required by Arizona law for imposition of the death penalty, violates the Sixth Amendment right to a jury trial in capital prosecutions; receding from Walton v. Arizona, 497 U.S. 639, 110 S.Ct. 3047 (1990). If a State makes an increase in a defendant's authorized punishment contingent on the finding of a fact, that fact--no matter how the State labels it--must be found by a jury beyond a reasonable doubt. A defendant may not be

exposed to a penalty *exceeding* the maximum he would receive if punished according to the facts reflected in the jury verdict alone. The Court noted that the "right to trial by jury guaranteed by the Sixth Amendment would be senselessly diminished" if it encompassed the fact-finding necessary to increase a noncapital defendant's sentence by a term of years, as was the case in Apprendi v. New Jersey, 530 U.S. 466 (2000), but not the fact-finding necessary to put him to death. Ring, 122 S.Ct. at 2243.

In Florida, death is not within the maximum penalty for a conviction of first degree murder. Florida Statute § 775.082 (1996). While the jury gives a recommendation, it is the judge who makes the findings and imposes the sentence. Under Florida law, the court conducts a separate sentencing proceeding after which the jury renders an advisory verdict. Fla. Stat. §§ 921.141. The ultimate decision to impose a sentence of death, however, is made by the court after finding at least one aggravating circumstance. Because the Florida death penalty statutory scheme requires fact-finding by the trial judge before a death sentence may be imposed, it is unconstitutional under the principles announced in Ring. The court below denied the claim based on this Court's previous rulings. (PCR Vol. 8, 1317). However, Mr. Barnhill urges the Court to recognize that the United States Supreme Court has still not rendered a post-Ring opinion regarding the Florida death penalty

statutory sentencing scheme.

CONCLUSION AND RELIEF SOUGHT

Based on the foregoing, the lower court improperly denied Rule 3.851 relief. This Court is respectfully urged to order that appellant's convictions and sentences be vacated and the case remanded for such further relief as the Court deems proper.

Respectfully submitted,

_____

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing Initial Brief of the Appellant has been furnished by United States Mail, first class postage prepaid, to Barbara C. Davis, Senior Assistant Attorney General, Office of the Attorney General, 444 Seabreeze Boulevard, 5th Floor, Daytona Beach, Florida 32118-3958 on this _____ day of _____, 2006.

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CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY, pursuant to Fla.R.App.P. 9.210, that the foregoing was generated in Times New Roman 14-point font.

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