IN THE SUPREME COURT OF FLORIDA

DARRYL BRYAN BARWICK,

Appellant,

v. CASE NO. 70,097

STATE OF FLORIDA,

Appellee.

_____/

ON APPEAL FROM THE CIRCUIT COURT
OF THE FOURTEENTH JUDICIAL CIRCUIT,
IN AND FOR BAY COUNTY, FLORIDA

ANSWER BRIEF OF APPELLEE

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PRELIMINARY STATEMENT

Darryl Bryan Barwick, the criminal defendant in the Circuit Court of Bay County, Florida, will be referred to herein as Barwick or Appellant. The State of Florida, the prosecution below, will be referred to herein as the State or Appellee. All proceedings took place before Circuit Court Judge W. Fred Turner.

For the Court's convenience, Appellee will use the Appellant's designations. (AB 1). The record on appeal consists of twenty volumes; citations will be indicated parenthetically as "R" followed by the appropriate page number(s). The supplemental record consists of three volumes; citations will be indicated parenthetically as "SR" followed by the appropriate page number(s). Citations to Appellant's initial brief will be

indicated parenthetically as "AB" followed by the appropriate page number(s).

Barwick is appealing judgments in two cases. The first involves his conviction for murder, attempted sexual battery, armed burlary and armed robbery. (Circuit Court Number 86-940). The second involves a probation violation of his prior sexual battery and burglary convictions. (Circuit Court Number 83-1056).

STATEMENT OF THE CASE AND FACTS

For the purpose of resolving the issues raised herein Appellee accepts Appellant's Statement of the Case (AB 2-3), and Statement of the Facts (AB 3-20) as essentially accurate, though incomplete, and therefore submits the following additional information:

Relative to the guilt phase the jury was excused for deliberation at 3:30 p.m. and returned with a verdict at 4:15 p.m. (R 2204).

Relative to the penalty phase the jury was excused to deliberate at 11:06 a.m. and returned with an advisory sentence of death, by a vote of 9/3, at 11:45 a.m. (R 1516, 2205).

In his written findings in support of the death sentence, Judge Turner found no mitigating circumstances. (R 2336-2338).

Michael Wendt testified that she and her sister, Rebecca, had a set of six steak knives in the kitchen. After the murder, one was missing. (R 382-383). Rebecca always kept money on her because she did not have a bank account. Rebecca had waitressed the night before she was murdered, consequently, her tips would have been in her purse. (R 385).

Dr. Steiner testified that there were multiple wounds and cuts on the fingers and thumbs of both hands commonly called defense wounds. The victim was attempting to ward off an attack from a moving knife with her hands. There was a stab wound in

the mid-back. (R 508-509). The victim was alive when some of the chest wounds were inflicted. (R 510). The wound in the right middle lung was inflicted while the victim was alive. (R 514). One of the wounds in the left chest cavity was a compound knife wound; the knife was taken and reinserted without pulling it out which resulted in it entering the chest cavity twice while she was still alive. (R 515). There was a significant amount of shock, evident by the amount of bleeding. People do not tend to lose their sense of feeling as a result of shock as it progresses. They eventually will lose consciousness. (R 538).

James Beller testified that Barwick's full scale IQ was average. His verbal IQ was in the average range; his performance IQ was 16 points higher than his verbal IQ. Barwick scored nonverbally in the high average area. (R 907).

SUMMARY OF ARGUMENT

ISSUE I: The record clearly does not support Barwick's assertion of discriminatory use of peremptory challenges. Furthermore, Barwick has no standing under the circumstances of this case to contest the peremptory challenges by the prosecutor.

ISSUE II: The trial court did not abuse its discretion in refusing to declare James Beller an expert witness. Moreover, Beller's testimony was not unduly restricted. Beller testified as to the tests he administered Barwick, including the results and his diagnosis of Barwick.

ISSUE III: Investigator McKeithen was clearly qualified to render a lay opinion as to Barwick's sanity. His opinion was based on observations made in close time proximity to those events upon which Barwick's sanity was in question.

ISSUE IV: It was not reversible error for the trial court to refuse to give Barwick's requested instruction relative to diminished capacity.

ISSUE V: Barwick's conviction for capital murder is due to be affirmed. The subsequent revocation of probation and sentences imposed for the 1983 sexual battery and burglary of a dwelling with assault charges are also due to be affirmed.

ISSUE VI: Barwick was properly sentenced to death. The homicide was committed to avoid arrest. Rebecca Wendt was brutally murdered in her own home, having been stabbed by Barwick

thirty-seven times. The trial court's finding that the homicide was especially heinous, atrocious and cruel must be upheld. After consideration of the mitigating circumstances presented by Barwick, the trial court concluded that none existed in this case.

ISSUE VII: Valid aggravating factors exist and no mitigating factors were found. The trial court properly sentenced Barwick to death.

ISSUE VIII: The trial court properly instructed the jury on all relevant aggravating circumstances. The trial court in its sentencing order did not sever single aggravating factors into two or more.

ISSUE IX: The trial judge recognized the importance of the jury recommendation of death but as is apparent from his careful consideration of aggravating and mitigating circumstances he clearly exercised his own independent judgment in imposing sentence.

ISSUE X: The trial court did not dilute the jury's understanding of its sentencing responsibility in instructing the jury as to the rendition of an advisory sentence.

Barwick has failed to demonstrate reversible error and his judgment and sentence should be affirmed.

ARGUMENT

ISSUE I

THE TRIAL COURT PROPERLY RULED THAT BARWICK HAD NO STANDING TO OBJECT TO THE PEREMPTORY CHALLENGES USED BY THE PROSECUTOR AGAINST SEVERAL BLACKS. (Restated by Appellee)

Barwick states that the "question presented here is whether a white defendant has standing to object to the State's discriminatory use of peremptory challenges to exclude blacks from jury service." First, Appellee submits that the record clearly does not support Barwick's assertion of "discriminatory use" of peremptory challenges. Second, Appellee submits that Barwick has no standing under the circumstances of this particular case to contest the peremptory challenges used by the prosecutor against several blacks. (Specific reference was made to jurors Miller, Cannon, Nicholas and Tibbs. Juror Tibbs was, however, excused for cause. (R 229)). Barwick is white and the victim was white.

This question is before this court in Kibler v. State, Case No. 70,067, on discretionary review of the decision of the Fifth District Court of Appeal, Kibler v. State, 501 So.2d 76 (Fla. 5th DCA 1987), and in Reed v. State, Case No. 70,069 on direct appeal.

Following is the account of what occurred in the trial court:

> **MR. STONE:** Judge, I have to put an objection on the record to the striking

of Ms. Miller.

THE COURT: Peremptory.

MR. STONE: Under State vs. Neil and Kentucky vs. Batson, I need to object to that because we have a record now of the prosecutor challenging for cause which I understand is not attackable for this reason, but virtually every prospective juror has been black has has either been removed or challenged except for Ms. Miller. Now she--(Interrupted).

THE COURT: Under the very cases you have cited, you don't have any standing to object to that. Your Defendant is white and the victim certainly is.

MR. STONE: I would disagree--(Interrupted).

THE COURT: Well, disagree, but the way I read it, I don't think you have any standing to object to it.

MR. STONE: I believe there's a right to a fair cross section jury regardless of the race of the juror or the Defendant so all I would do, Judge, is ask that Ms. Miller not be excused based on the Neil and Batson cases.

MR. HARPER: I would ask one thing, Judge, that the procedure is if the Court thinks that the peremptory challenges are being used in a racially discriminate manner--well, if the Court does not feel they are being done in a racially discriminate manner, that ends the inquiry right there, so I would ask that you hold that the challenge, that there's no basis for any.

THE COURT: That's just what I said, there's no basis, he has not standing. It's for the protection of minorities and we don't have any minority/majority down here.

MR. HARPER: But, regardless of that threshold question and the facts of this case, I would ask that you just

make that finding on the record.

THE COURT: All right, the finding is that there is no--

MR. HARPER: Indication.

THE COURT: --no pattern, no indication of a pattern of discrimination against this Defendant, either racially or otherwise.

MR. STONE: Let me just say for the record, Judge, that there have been black jurors excused for cause, that Mr. Cannon is the fifth that has been challenged for cause and now excused and now Ms. Miller is the only other black prospective juror impaneled and, of course, she's the one we're objecting to the exercise of the peremptory on discriminatory grounds.

(R 310-312).

* * *

MR. STONE: Judge, let me renew my Neil and Batson objection as to Mr. Cannon, same grounds as before.

THE COURT: Okay, same ruling.

(R 313).

* * *

MR. STONE: Let me put one thing on the record as to Nickolas. Again, I want to renew my Neil and Batson objection on the grounds of racial discriminatory use of peremptory. I believe the prosecutor has removed all black jurors peremptorily.

THE COURT: Okay, same ruling.

(R 314).

* * *

MR. STONE: Let me put something on the record if I might. In an abundance of caution, I know this was put on the

record yesterday, but the appellate rules seem to be getting more and more stringent so I would renew my objections to the prosecutor peremptorily challenging every single black juror of the prospective jurors who was not removed for cause, thus resulting in the removal of all black jurors from the panel, on the grounds that those challenges were racially discriminatory, that a Neil hearing was not held in consequence thereof and renew my objections to the panel for that reason and move for a mistrial at this time.

MR. HARPER: I would like to briefly respond. The black jurors who I exercised a peremptory challenge on, one, the first black juror whose name was Mrs.--maybe Counsel can help me--Miller, the lady that was the librarian at the high school you went to.

MR. STONE: (Nods in the affirmative.)

MR. HARPER: Mrs. Miller was a librarian at the high school Mr. Stone attended and remembered him from that. She was also extremely equivocal on her feelings regarding the death penalty; and although her feelings, I believe, would prevent her from ever imposing the death penalty, she was equivocal enough, I did not feel that a challenge for cause was warranted so I did not make that challenge.

THE COURT: Well, I can save you some trouble here. Mrs. Miller, Mrs. Tibbs, Cannon, all of them expressed the thought that they could not vote to impose the death penalty and I don't think that the challenges were racially motivated so that's the reason there was no Neil hearing so the motion will be denied.

(R 321-323).

The United States Supreme Court held in Batson v. Kentucky, 476 U.S. _____, 106 S.Ct. 1712, 90 L.Ed.2d 69 (1986), that, "The

defendant must initially show that he is a member of a racial group capable of being singled out for differential treatment." Batson, 106 S.Ct., at 1722. Batson, later on explains that discrimination within the judicial system is most pernicious because it is . . . "a stimulant to that race prejudice which is an impediment to securing to [black citizens] that equal justice which the law aims to secure all others." 106 S.Ct. at 1718. Later on the decision explains:

> . . . The equal protection clause forbids the prosecutor to challenge potential jurors solely on account of their race or on the assumption that black jurors as a group will be unable impartially to consider the state's case against a black defendant. (emphasis added)

106 S.Ct. at 1721.

The language and holding are unequivocal that in order to avail himself of the Batson decision, a defendant must prove that he is a member of the racial group which is being singled out for differential treatment by the use of arbitrary peremptory challenges. In the recent holding of Allen v. Hardy, 478 U.S. _____, 106 S.Ct. 2878, 92 L.Ed.2d 199 (1986), the Supreme Court held that a black defendant would not be able to take advantage of Batson, supra, pursuant to post-conviction relief.

Appellant cites Peters v. Kiff, 407 U.S. 493, 92 S.Ct. 2163, 32 L.Ed.2d 83 (1972), as authority for his position. In that case the court decided a claim by a petitioner who was not black, that blacks were excluded from his jury. The decision, however,

involved the overall exclusion of a particular race to a venire or a grand jury. Peters v. Kiff is clearly distinguishable from the instant case because the court did not discuss petit jury selection. The case sub judice, of course, involves petit jury selection.

The United States Supreme Court faced a standing issue again in Taylor v. Louisiana, 419 U.S. 522, 95 S.Ct. 692, 42 L.Ed.2d 690 (1975). In Taylor, a male defendant argued that the systematic exclusion of women from the venire deprived him of his right to a fair trial by a jury of a representative segment of the community. The court held that a male defendant has standing to challenge the systematic exclusion of females from his jury. This case is clearly distinguishable from the case at bar because the Taylor decision dealt exclusively with jury pools and panels and not with the ultimate selection of the petit jury itself, as is the situation in the instant case. As the court noted in Taylor:

> It should also be emphasized that in holding that petit juries must be drawn from a source fairly representative of the community, we impose no requirement that petit juries adequately chosen must mirror the community and reflect the various distinctive groups in the population. Defendants are not entitled to a jury of any particular composition . . . (citations omitted)

95 S.Ct., at 702.

The Supreme Court could have extended the Taylor decision to the distinct factual situation in Batson, supra, but chose not to do so. See also, Koenig v. State, 497 So.2d 875, 879-880 (Fla.

3rd DCA 1986) which also explained the latter principle announced in Taylor. The Eleventh Circuit in Willis v. Zant, 720 F.2d 1212, 1219 n.14 (11th Cir. 1983), recognized that the decision in Taylor was limited to venires and that the Sixth Amendment did not extend to the actual selection of the petit jury.

Barwick asserts that, "This Court's decisions in Neil and State v. Slappy, No. 70,331 (Fla. March 10, 1988) evidence this Court's strong desire to eliminate discrimination in jury selection." (AB 26). There was not, however, discrimination in the instant case. The record clearly reflects that Mrs. Miller was a librarian at the high school which Mr. Stone, defense counsel, attended, and that she remembered him. She was extremely equivocal on her feelings regarding the death penalty, sufficiently equivocal so that the prosecutor did not feel that a challenge for cause was warranted. (R 322). All the others who were struck expressed the thought that they could not vote to impose the death penalty. (R 323).

Barwick asserts that, People v. Thompson, 79 A.D.2d 87, 435 N.Y.S.2d 739 (1981), cited in State v. Neil, 457 So.2d 481 (Fla. 1984), did not decide the standing issue. However, the following comment in that case belies that assertion: "Applying these principles to the case at bar, we conclude that, from all the circumstances, including the prosecutor's use against all his many peremptory challenges, the defendant's race, . . ." 45 N.Y.S.2d, at 755. (emphasis supplied) This clearly indicates that had the defendant been white, the holding might well have

been different. It is apparent the court took account of the defendant's race in reaching its conclusion. In fact, this court in Neil, supra, reached the same conclusion when it stated, "If the party shows that the challenges were based on the particular case on trial, the parties, or witnesses, or characteristics of the challenged persons other than race, then the inquiry should end . . ." Neil at 487. (emphasis supplied) The fact that Neil was black was, no doubt, a significant factor in the holding of this court.

In Hamilton v. State, 487 So.2d 407 (Fla. 3rd DCA 1986), it was held that there was not even a need for the trial court to hold a Neil inquiry and it would be unnecessary to examine the state's reasons when the defense had not carried its burden of overcoming the initial presumption that the peremptory challenges were used properly. See also, Parker v. State, 476 So.2d 134 (Fla. 1985), where a Neil challenge was rejected and where the prosecutor volunteered reasons for excluding one black.

Likewise, in the instant case, there was ample support in the record to justify the use of the peremptory challenges. The trial court properly found that the prosecutor did not exercise his peremptory challenges in a racially discriminatory manner. Barwick was tried by a fair and impartial jury selected from a cross section of the community. Further, Barwick has no standing under the circumstances of this case to contest the peremptory challenges of the prosecutor.

ISSUE II

THE TRIAL COURT CORRECTLY REFUSED TO DECLARE DEFENSE WITNESS JAMES BELLER AN EXPERT WITNESS. (Restated by Appellee)

Barwick argues that the trial court erred in refusing to declare defense witness James Beller an expert witness and in restricting his testimony. This argument is without merit and must be rejected.

James E. Beller testified that he is employed in a supervised private practice as a psychological associate, employed with Dr. Clell Warriner. (R 900). The trial court allowed Beller to testify but did not qualify him as an expert in clinical psychology and in neuropsychology. The court emphasized that Beller indicated that he is support personnel. (R 892, 889). Beller testified on proffer that he did not possess a license in the State of Florida in the field in which he is employed. The trial court concluded, after hearing lengthy testimony by Beller, on proffer, that he could not qualify him as an expert. (R 891, 892-899).

Barwick argues that the court refused to declare Beller an expert witness on the sole ground that he did not hold a doctorate in psychology. (AB 32). This statement is completely inaccurate. The court never said he was denying Beller's qualifications as an expert witness solely because he did not possess a Ph.D. or because he was not licensed. It is clear that Beller was employed basically as an assistant to a professional person and his qualifications did not meet the level of expertise

necessary for the court to declare him an expert witness.

The trial court allowed Beller to testify as to the neuropsychological testing he performs. He explained the testing and what is looked for in the results of the testing. (R 900-904).

Beller testified that Barwick was sent to him at the request of his parents through their attorney, Mr. Stone, for neuropsychological evaluation and clinical interviews. (R 905). Barwick came to his office and spent about six hours going through a neuropsychological test battery. Beller also saw him on two occasions at the county jail; on the first occasion for approximately an hour and on the second occasion for approximately half an hour. (R 905). He interviewed Barwick's mother for one hour and was provided with the depositions of psychologists, various medical personnel, witnesses and law enforcement personnel, because part of the neuropsychological evaluation is a complete and exhaustive medical and social history. (R 906). Beller described in detail the testing he performed on Barwick and the results. (R 907-911).

The court ruled that Beller could give his opinion based upon personal observations. (R 915). Beller was not permitted to give a psychological basis for his opinion, because he was not qualified as an expert. In fact, Beller is not a psychologist and thus was not competent to express opinion as though he were a psychologist. (R 912). He was allowed to testify as to the results of the tests given Barwick. (R 912). He testified that

the results of one of the psychological tests given Barwick, the Minnesota Multiphasic Personality Inventory, indicated a very disturbed person, revealing a rather substantial thought disorder and the potential for at least psychotic behavior. (R 912-913). Beller diagnosed Barwick as a psychopathic sexual deviant. (R 1,044).

Beller testified as to his interviews with Barwick. (R 916). He was allowed to testify as to his observations of Barwick, and further allowed to define the terms he used. (R 918-919). Beller even related to the jury Barwick's explanation of the murder. (R 921-923).

Beller's testimony was confined to his observations of Barwick and the things he told him. (R 927). Beller testified that in his opinion, at the time he killed Rebecca Wendt, Barwick was suffering from a mental infirmity, disease or defect: a thought disorder. In his opinion, Barwick was not dealing with reality and was insane. Beller's diagnosis of Barwick, based on his observations of him and the testing he performed on him, was that Barwick is a psychopathic sexual deviant. (R 931-932). In Beller's opinion, Barwick did not know what he was doing or its consequences at the time of the killing. (R 933, 934). All of the information obtained by Beller, including the test results, was made available to Dr. Warriner. (R 935).

Beller testified that he does not have equal status with Dr. Warriner who has a Ph.D. He is unable to sign insurance forms which require a diagnosis. (R 936). He possesses no licenses in

the mental health field from any state and he could not work without Dr. Warriner. (R 937).

Beller was hired by Barwick's family to examine Barwick. (R 937). Beller testified that he had not seen any hospital or medical reports on Barwick. (R 938). After spending approximately seven and one-half hours with Barwick he found that there was nothing organically wrong with Barwick, other than a mild learning disability and memory impairment. (R 938). Beller further found no organic reason which would have caused him to kill Rebecca Wendt. (R 939).

Beller was asked on cross-examination to look at page 29, line 16, of his deposition given on November 12th (twelve days before) where he was asked if he recalled being asked, "If I understand it, you think that, that Barwick was aware of what he was doing when he was committing this crime, is that correct?" Beller's answer was, "Yes." He was further asked, "And, that he knew it was wrong, is that correct?" Beller responded, "Yes." The state attorney asked Beller if he recalled giving these answers to his questions and Beller replied, "Yes." (R 944).

It is clear that Barwick's argument that Beller's testimony was unduly restricted is clearly without merit and must be rejected by this court. In fact, defense counsel indicted, on proffer, that Beller had testified to everything the defense wanted, except for some testimony relative to the DSM. (R 1,044-1,068).

Barwick cites Rose v. State, 506 So.2d 467 (Fla. 1st DCA), review denied, 513 So.2d 1063 (Fla. 1987), as authority for his position that the trial court in the instant case erred when it refused to declare Beller an expert witness. Rose, supra, is clearly distinguishable from the case sub judice. In Rose the trial court refused to qualify Beller (the same James Beller as in the instant case) as an expert on the issue of the defendant's ability to form intent to commit murder. The psychiatrist for whom Beller worked, Dr. Warriner, (the same Dr. Warriner as in the instant case) testified that Beller was more knowledgeable regarding episodic dyscontrol syndrome. Beller was the only witness willing to catagorically diagnose the defendant as suffering from the syndrome.

In the instant case, Beller's testimony was not so restricted and there was ample other evidence presented by the defense relative to the alleged insanity of Barwick. In Rose, the trial court ruled Beller was not qualified as an expert in the legal sense to express an opinion as to the broad area of psychology and also the area of neuropsychology being offered by the defense. Beller was allowed to testify in Rose only as to the specifics of the test he had administered to the defendant and the scores the defendant had received. He was not allowed to give any opinions or conclusions relating to the meaning of those scores. These facts are totally unlike the facts in the case at bar where Beller testified extensively.

Appellee recognizes that a witness need not have a specific

degree or license in order to testify as an expert. §90.702, Fla.Stat. Neither a doctorate nor prior experience as an expert witness are essential prerequisites to being qualified as an expert witness. Allen v. State, 365 So.2d 456 (Fla. 1st DCA), cert. dismissed, 368 So.2d 1373 (Fla. 1978).

Professor Ehrhardt points out;

> An expert is defined in Section 90.702 as a person who is qualified as an expert in a subject matter "by knowledge, skill, experience, training, or education." . . . It applies not only to persons with scientific or technical knowledge but also to anyone with any specialized knowledge . . . . A witness may qualify as an expert by his study of authoritative sources without any practical experience in the subject matter.

C. Ehrhardt, Florida Evidence §702.1 (Second Ed. 1984) [footnotes omitted].

The trial court in Rose was reversed by the First District Court of Appeal because the court abused its discretion when it premised its denial to qualify Beller as an expert on the fact that Beller was not a licensed psychologist. In that case Beller was the only witness willing to catagorically diagnose the defendant as suffering from episodic dyscontrol syndrome and the trial court consequently refused to give the tendered instruction on insanity on the basis that no evidence had been adduced to present that defense to the jury. Those were not the facts in the case sub judice.

The trial court has wide discretion concerning the

admissibility of evidence and the range of subjects about which an expert can testify. Johnson v. State, 438 So.2d 774 (Fla. 1983).

Plainly, in the instant case the trial court did not abuse its discretion in denying Barwick's request to have Beller declared an expert witness. The First District Court of Appeal noted, in Rose, that the record clearly shows that the reason the trial court refused to qualify Beller as an expert was because he is not licensed in this state as a psychologist. The trial court in Barwick, as noted earlier, did not so base his reasoning.

Finally, the comments by the prosecutor that Beller is not an expert, did not constitute error. In fact, Beller is not an expert. Moreover, most of the comments referred to in brief were not even objected to by the defense. (R 911-913, 918, 972-974). Following the state's cross-examination, the judge questioned Beller which questioning was not improper but clarified his prior testimony. (R 944-948).

Barwick was not denied his right to present his insanity defense. His rights to due process and a fair trial were not violated. Reversible error did not occur and the trial court must therefore be affirmed.

ISSUE III

INVESTIGATOR FRANK MCKEITHEN PROPERLY TESTIFIED TO HIS LAY OPINION REGARDING BARWICK'S SANITY. (Restated by Appellee)

On rebuttal Investigator McKeithen testified that during the investigation of this case he had contact with Barwick on five or six separate occasions, for a total of three hours. (R 1,153). Barwick got mad at him one time, briefly, when McKeithen accused him of murdering Rebecca Wendt which he denied. His other contacts with Barwick were very normal. McKeithen stated, over defense objection, that in his opinion Barwick was sane. (R 1,154-1,155).

McKeithen was clearly qualified to render a lay opinion as to Barwick's sanity. Reversible error was not committed when the trial court admitted this testimony.

This court observed in Garron v. State, 13 F.L.W. 325 (Fla. May 27, 1988), "As this Court stated in Rivers v. State, 458 So.2d 762, 765 (Fla. 1984), '[i]t is a well established principle of law in this state that an otherwise qualified witness who is not a medical expert can testify about a person's mental condition, provided the testimony is based on personal knowledge or observation.'" The Garron and Rivers cases, like the present case, involved the testimony of a detective who was allowed to give opinion testimony as to the defendant's sanity. Such testimony is permissible if based on the witness's personal knowledge.

A lay witness, testifying on his or her personal observation to a defendant's sanity, must have gained this personal knowledge in a time period reasonably proximate to the events giving rise to the prosecution. Thus, in Garron, the opinion testimony as to appellant's sanity could only come from those whose personal observation took place either at the shooting or in close time proximity thereto. See Garron at 326. It was further noted that those lay witnesses whose opinions were based on observations occurring the next day or sometime thereafter, should not be admitted. Any lay opinion testimony as to the appellant's sanity must necessarily be based on observations made in close time proximity to those events upon which appellant's sanity is in question. Garron at 326. The court held, however, that it did not consider admission of all the lay testimony to be error. One of the five witnesses who gave a nonexpert opinion as to appellant's sanity was actually an eyewitness to the shooting and knew appellant well enough to render such an opinion. Of the other four lay witnesses, only the deputy who arrested appellant could even arguably have been capable of rendering such an opinion. Garron at 326.

Likewise, in the instant case, arresting Officer McKeithen, who was in contact with Barwick the day following the murder, based his lay opinion on observations made in close time proximity to those events upon which Barwick's sanity was in question. Reversible error was not committed.

ISSUE IV

THE TRIAL COURT DID NOT ERR IN REFUSING TO GIVE BARWICK'S REQUESTED INSTRUCTION THAT HE LACKED THE MENTAL CAPACITY TO FORM A SPECIFIC INTENT OR TO PREMEDITATE AT THE TIME OF THE CRIME. (Restated by Appellee)

At the jury instruction charge conference, Barwick submitted a jury instruction on his alternate theory of defense which was that he lacked the mental capacity to premeditate or to form a specific intent to commit an offense. The trial court denied the requested instruction. (R 1270-1272).

The denial of this requested instruction was proper. Barwick notes that Florida cases have held that the diminished capacity defense is not available for specific intent crimes and cites as authority the cases of Bradshaw v. State, 353 So.2d 188 (Fla. 2d DCA 1977) and Tremain v. State, 336 So.2d 705 (Fla. 4th DCA 1976).

Barwick notes also that the First District Court of Appeal in Chestnut v. State, 505 So.2d 1352 (Fla. 1st DCA 1987) has certified to this court the question, "Is evidence of an abnormal mental condition not constituting legal insanity admissible for the purpose of proving either that the accused could not or did not entertain the specific intent or state of mind essential to proof of the offense in order to determine whether the crime charged, or a lesser degree thereof, was in fact committed?" Chestnut at 1357. In Chestnut, the defendant was precluded from presenting expert testimony about his diminished mental

responsibility which prevented him from premeditating or formulating a specific intent to carry out the crime for which he was charged. The facts in Chestnut completely differ from the facts in the instant case because Barwick was not precluded from presenting evidence of his mental capacity.

This court held in Gurganus v. State, 451 So.2d 817 (Fla. 1984), also cited by appellant, that proffered testimony of two clinical psychologists taking into consideration effects of combined consumption of drugs and alcohol, though not admissible to establish insanity of the defendant or whether his action more closely resembled "depraved mind" as opposed to premeditated behavior, was relevant to defendant's ability to entertain specific intent required to convict him of first-degree murder under either premeditated or felony-murder theories, and its exclusion was prejudicial.

Gurganus is not on point with the instant case as the evidence presented in Barwick was that drugs and alcohol were not involved. Further, the proffered evidence in Gurganus was excluded. Barwick is not complaining about the exclusion of evidence but rather exclusion of a jury instruction and has cited no authority in support thereof.

Barwick has not shown that reversible error has occurred. Thus, the trial court is due to be affirmed.

ISSUE V

THE TRIAL COURT DID NOT ERR IN REVOKING BARWICK'S PROBATION FOR THE OFFENSES OF SEXUAL BATTERY AND BURGLARY BASED ON HIS SUBSEQUENT CONVICTION FOR MURDER. (Restated by Appellee)

On December 2, 1983, Barwick was convicted of the offenses of sexual battery and burglary of a dwelling with assault and was sentenced to five years imprisonment followed by ten years probation. (R 1868-1872). Barwick was released from prison on January 13, 1986. He murdered Rebecca Wendt on March 31, 1986. He was subsequently convicted for first degree murder, armed burglary, attempted sexual battery and armed robbery.

On April 28, 1986, an affidavit for violation of probation was filed alleging the commission of the murder and related charges. (R 1878-1881). Following his conviction for these offenses, a hearing was held on the violation of probation charges, after which the trial court found Barwick to be in violation of probation, on the basis of the conviction for capital murder and the related charges. (R 1679-1689, 1888-1891). Barwick was subsequently adjudged guilty and sentenced to seventeen years on each count. (R 1690-1691, 1886-1890).

If a revocation is based solely on a conviction and that conviction is subsequently reversed, the revocation must also be reversed. Stevens v. State, 409 So.2d 1051 (Fla. 1982); Wendell v. State, 404 So.2d 1167 (Fla. 1st DCA 1981); Judd v. State, 402 So.2d 1279 (Fla. 4th DCA 1981), rev. den., 412 So.2d 470 (Fla. 1982).

Barwick's conviction for capital murder is, however, due to be affirmed. (See Issues I-IV) The subsequent revocation of probation and sentences imposed for the 1983 sexual battery and burglary of a dwelling with assault charges are therefore also due to be affirmed.

ISSUE VI

APPELLANT WAS PROPERLY SENTENCED TO DEATH. (Restated by Appellee)

A

THE TRIAL COURT CORRECTLY FOUND AS AN AGGRAVATING CIRCUMSTANCE THAT THE HOMICIDE WAS COMMITTED TO AVOID ARREST.

The trial court found the aggravating circumstance that the homicide was committed to avoid arrest. See, §921.141(5)(e), Fla.Stat. The court stated:

> The capital felony was committed for the purpose of avoiding or preventing a lawful arrest. F.S. 921.141(5)(e). Both William Barwick and Victoria Burns testified at trial that the defendant told them that he killed the victim because she got a good look at his face. The victim of the 1983 Sexual Battery and Burglary testified that when the defendant approached her he was wearing a ski mask. As that episode continued, the victim talked the defendant into taking off the ski mask. After the Sexual Battery, as the defendant was preparing to leave, he stated to her "we have a problem, you have seen my face". The victim promised the defendant that she would not report the crime. After the defendant left, the victim did call the police, the defendant was subsequently arrested, convicted, and imprisoned for this offense. The testimony of William Barwick and Victoria Burns, especially in light of the testimony of the victim of the 1983 Sexual Battery and Burglary, clearly establishes this aggravated circumstance.

(R 2336-2337).

In Perry v. State, 13 F.L.W. 189 (Fla. March 10, 1988) the trial court found that the sole purpose behind the killing was to eliminate the only witness to the defendant's armed robbery and listed as an aggravating factor that the murder was committed to avoid or prevent lawful arrest. This court noted that in applying this factor where the victim is not a law enforcement officer, the court has required that there be strong proof of the defendant's motive and that it be clearly shown that the dominant or only motive for the murder was the elimination of the witness. See also, Riley v. State, 366 So.2d 19 (Fla. 1978); Bates v. State, 465 So.2d 490 (Fla. 1985); Floyd v. State, 497 So.2d 1211 (Fla. 1986). The mere fact that the victim knew and could have identified his assailant is insufficient to prove intent to kill to avoid lawful arrest. Jackson v. State, 502 So.2d 409 (Fla. 1986); Rembert v. State, 445 So.2d 337 (Fla. 1984); Foster v. State, 436 So.2d 56 (Fla. 1983).

In the case sub judice, there is strong proof of Barwick's motive. The evidence presented clearly supports the finding that Barwick murdered Rebecca Wendt to avoid being arrested for burglary, robbery and attempted sexual battery. Barwick told William Barwick, Lovie Barwick and Victoria Burns that, she saw his face and he had to kill her. (R 827-828, 850-851). He had made a similar mistake a few years before which had resulted in his being in prison for three years and he was not going to make the same mistake twice. Barwick killed Rebecca Wendt because she could identify him as the individual who had robbed her, committed burglary and attempted sexual battery on her. In his

last case after letting the victim live, he went to prison.

William Barwick's testimony was as follows:

> **Q.** He told you that he had been fighting with her and she broke loose from him and she fell back against the wall and she was staring at him and that's when he thought in his mind that he had to kill this girl, but he said "bitch", he said, "I got to kill this bitch", that's what he told you?
>
> **A.** Yeah, he said that.

(R 827).

* * *

> **Q.** Yes, he told you when he was telling you what happened, he said that "She was staring at me and I had to kill this bitch"?
>
> **A.** Yes.

(R 828).

Victoria Burns testified that William told her that Darryl killed the girl because she saw his face. Barwick told her that he knew he had to do something to her, that she knew who he was, and if he let her get away with it she would be able to tell right then who he was. (R 850-851).

Lovie Barwick, Appellant's sister, testified that Barwick told her, ". . . he fell back, she saw him and he did it." (R 591).

It was clearly shown by the evidence presented that the dominant or only motive for the murder was the elimination of the

witness. Based on the foregoing, it is clear that the trial court properly made the finding of the aggravating circumstance that the homicide was committed to avoid arrest. The death sentence must, therefore, be affirmed. (The trial court noted in its sentencing order that, "If paragraph number "3" above, i.e., that the crime was committed to avoid arrest, is determined by the Supreme Court not to exist in this case, the court would still impose the same penalty. (R 2337)).

B

THE TRIAL COURT PROPERLY FOUND THAT THE HOMICIDE WAS ESPECIALLY HEINOUS, ATROCIOUS AND CRUEL.

The trial court addressed the finding of heinous, atrocious and cruel in its sentencing order as follows:

> The capitol felony was especially heinous, atrocious, or cruel. F.S. 921.141(5)(h). The Medical Examiner testified that the victim, a 24 year old female, had suffered 37 stab wounds to her neck, thorax, abdomen, back and arms, numerous incised (defense) wounds to her hands, plus bruises and abrasions to her face. Approximately 30 of the 37 stab wounds were superficial, in that they were less than one and a half inches deep. He testified that the victim would have lived five to ten minutes from receiving any of these wounds. The numerous shallow wounds and the defense wounds to the hands indicate that the victim was struggling for her life for quite some time during this attack. These physical facts are corroborated by the defendant's statements that he struggled with the victim and that he stabbed her until she quit moving. Victoria Burns testified that the

> defense told her that "the victim was scared to death" and that she was "looking at him like she knew what was going to happen". This aggravating circumstance has clearly been established.

(R 2337).

As this court noted in Perry v. State, supra, evidence that a victim was severely beaten while warding off blows before being fatally shot has been held sufficient to support a finding that the murder was especially heinous, atrocious and cruel. Wilson v. State, 493 So.2d 1019 (Fla. 1986). The court further noted that the vicious attack in Perry was within the supposed safety of the victim's own home, a factor previously held to add to the atrocity of the crime. Troedel v. State, 462 So.2d 392, 398 (Fla. 1984); Breedlove v. State, 413 So.2d 1 (Fla.), cert. denied, 459 U.S. 882 (1982). In the instant case, Rebecca Wendt was brutally attacked by Barwick in the supposed safety of her own home.

The murder of Rebecca Wendt was without a doubt, especially heinous, atrocious and cruel. Barwick broke into her home, with a knife, wearing gloves, and commenced to viciously attack her. Thirty of the thirty-seven stab wounds were superficial, in that they were less than one and a half inches deep. According to the medical testimony, Rebecca Wendt greatly suffered in the last few minutes of her life. The medical examiner testified that Ms. Wendt would have lived five to ten minutes from receiving any of these wounds. She experienced great pain and torment as she was stabbed thirty-seven times in her neck, thorax, abdomen, back and

arms. There were numerous defensive wounds to her hands, where she unsuccessfully attempted to stop a moving knife from stabbing her further. There were bruises and abrasions to her face. Clearly, she struggled for her life.

These physical facts are corroborated by Barwick's own statements that he struggled with the victim and stabbed her until she quit moving. Additionally, Barwick told Victoria Burns that the victim was scared to death and was looking at him like she knew what was going to happen.

The facts of this case demonstrate that this murder was "extremely wicked or shockingly evil," or "designed to inflict a high degree of pain with utter indifference to, or even enjoyment of the suffering" of the victim. State v. Dixon, 283 So.2d 1, 9 (Fla. 1973), cert. denied, 416 U.S. 943 (1974); Wilson v. State, 493 So.2d 1019 (Fla. 1986). Rebecca Wendt's death was not swift and painless. This is clearly a conscienceless, pitiless crime. See also, Buenoano v. State, No. 68,091 (Fla. June 23, 1988).

There was no error in the finding that the homicide was especially heinous, atrocious and cruel. See, §921.141(5)(h), Fla.Stat. Accordingly, the death sentence must be affirmed.

C

THE TRIAL COURT CONSIDERED NON-STATUTORY MITIGATING CIRCUMSTANCES IN THE SENTENCING DECISION.

The Eighth and Fourteenth Amendments require that all evidence in mitigation be considered and weighed in the sentencing process. Eddings v. Oklahoma, 455 U.S. 104, 102 S.Ct. 869, 71 L.Ed.2d 1 (1982); Locket v. Ohio, 438 U.S. 586, 98 S.Ct. 2954, 57 L.Ed.2d 973 (1978). In sentencing Barwick to death, the trial court complied with this constitutional mandate.

Mitigating circumstances were addressed by the trial court in its sentencing order as follows:

> After studying, considering, and weighing all the evidence in the case the Court finds as to the mitigating circumstances that there are no mitigating circumstances which exist in this case. The Court has considered all the possible mitigating circumstances listed under Florida Statute 921.141(6) and any others that might apply, statutory or non-statutory, and the Court finds that the testimony and circumstances of the offense do not support any mitigating circumstance. Specifically, the Court finds that the capital felony was not committed while the defendant was under the influence of extreme mental or emotional disturbance, and that the capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was not substantially impaired. The Court also finds that the age of the defendant at the time of the crime is not a mitigating circumstance in this case in that his background, both in and out of prison, indicates that he is not of tender age but was an adult at

> the time and fully capable of understanding his crimes. Even if the Court determined that any mitigating factor raised by the defendant had been established, that would not outweigh the overwhelming nature of the evidence of aggravating circumstances established by the testimony and the evidence in this case. (emphasis added)

(R 2337).

The trial court is not required to find nonstatutory mitigating circumstances in every case. In fact, this court held in Porter v. State, 429 So.2d 293 (Fla. 1983) that,

> There is no requirement that a court must find anything in mitigation. The only requirement is that the consideration of mitigating circumstances must not be limited to those listed in §921.141(6), Fla.Stat. (1981). What Porter really complains about here is the weight the trial court accorded the evidence Porter presented in mitigation. However, mere disagreement with the force to be given [mitigating evidence] is an insufficient basis for challenging a sentence. Quince v. State, 414 So.2d 185, 187 (Fla. 1982).

Id. at 296.

It is within the province of the trial judge to decide whether a particular mitigating circumstance has been proven and the weight to be given that factor. Toole v. State, 479 So.2d 731 (Fla. 1985); Smith v. State, 407 So.2d 894 (Fla. 1982); Card v. State, 453 So.2d 17 (Fla.), cert. denied, 469 U.S. 989, 105 S.Ct. 396, 83 L.Ed.2d 330 (1984); Card v. Dugger, 512 So.2d 829 (Fla. 1987).

Barwick presented evidence of several mitigating circumstances, however, the trial court, after studying, considering, and weighing all the evidence in the case, concluded that there are no mitigating circumstances which exist in this case. There was more than sufficient evidence to support the trial court finding that the capital felony was not committed while the defendant was under the influence of extreme mental or emotional disturbance, and that his capacity to appreciate the criminality of his conduct or to conform to the requirements of law was not substantially impaired. Reversal is not warranted simply because Barwick concludes differently.

ISSUE VII

THE TRIAL COURT PROPERLY SENTENCED BARWICK TO DEATH BECAUSE THE DEATH PENALTY IS PROPORTIONATE TO THE CRIME HE COMMITTED. (Restated by Appellee)

Barwick argues that his death sentence is disproportional to his crime. This argument must be rejected.

The United States Supreme Court has clearly stated in Pulley v. Harris, 465 U.S. 37, 79 L.Ed.2d 29, 104 S.Ct. 871 (1984) that comparative proportionality review is not required under the Federal Constitution in every state court death sentence review. This court, however, does consider proportionality as part of its complete review of a capital case. Fitzpatrick v. State, No. 70,927 (Fla. June 30, 1988), Caruthers v. State, 465 So.2d 496 (Fla. 1985); Sullivan v. State, 441 So.2d 609 (Fla. 1983).

Barwick committed an offense warranting his execution. The trial court, after studying, considering, and weighing all the evidence in the case, made the following findings of fact as to aggravating circumstances:

> 1. The defendant was previously convicted of a felony involving the use or threat of violence to the person. F.S. 921.141(5)(b). In case number 83-1056 the defendant was charged and convicted, in the Circuit Court of Bay County, Florida, of Sexual Battery With a Weapon and Burglary of a dwelling With Assault. Testimony during the penalty phase established clearly that these two felonies involved the use or threat of violence to the person of the victim of those crimes.

2. The capital felony was committed while the defendant was engaged in the commission of or an attempt to commit, or flight after committing, or attempting to commit, a robbery, attempted sexual battery, and a burglary. F.S. 921.141(5)(d). The evidence at trial clearly established the defendant's committing of these crimes in the same episode as the murder.

3. The capital felony was committed for the purpose of avoiding or preventing a lawful arrest. F.S. 921.141(5)(e). Both William Barwick and Victoria Burns testified at trial that the defendant told them that he killed the victim because she got a good look at his face. The victim of the 1983 Sexual Battery and Burglary testified that when the defendant approached her he was wearing a ski mask. As that episode continued, the victim talked the defendant into taking off the ski mask. After the Sexual Battery, as the defendant was preparing to leave, he stated to her "we have a problem, you have seen my face". The victim promised the defendant that she would not report the crime. After the defendant left, the victim did call the police, the defendant was subsequently arrested, convicted, and imprisoned for this offense. The testimony of William Barwick and Victoria Burns, especially in light of the testimony of the victim of the 1983 Sexual Battery and Burglary, clearly establishes this aggravated circumstance.

4. The capital felony was especially heinous, atrocious, or cruel. F.S. 921.141(5)(h). The Medical Examiner testified that the victim, a 24 year old female, had suffered 37 stab wounds to her neck, thorax, abdomen, back and arms, numerous incised (defense) wounds to her hands, plus bruises and abrasions to her face. Approximately 30 of the 37 stab wounds were superficial, in that they were less than one and a half inches deep. He testified that the victim would have lived five to ten minutes from receiving any of these wounds. The numerous shallow wounds and the defense wounds to the

> hands indicate that the victim was struggling for her life for quite some time during this attack. These physical facts are corroborated by the defendant's statements that he struggled with the victim and that he stabbed her until she quit moving. Victoria Burns testified that the defense told her that "the victim was scared to death" and that she was "looking at him like she knew what was going to happen". This aggravating circumstance has clearly been established.
>
> The court finds that the above aggravating circumstances have been proven beyond reasonable doubt.

(R 2336-2337).

The court further found, after studying, considering, and weighing all the evidence in the case, that no mitigating circumstances exist in this case. (R 2337-2338).

The aggravating circumstances were proven beyond any reasonable doubt and there were no mitigating circumstances to outweigh the aggravating circumstances. Death is the appropriate penalty for Barwick.

Barwick's arguments relative to mental and emotional impairment and loss of control in a panic reaction to stress, were rejected by both the jury and the trial court who chose not to accept Barwick's defense. Barwick argues that he has a reputation for nonviolence. This argument is absurd given the fact that he has a violent criminal history.

Barwick relies on Proffitt v. State, 510 So.2d 896 (Fla. 1987) as authority for his position that he is entitled to a

reduction of his death sentence to life. This reliance is misplaced. In Proffitt at resentencing, the trial court found two mitigating circumstances. The court in the instant case found none. In Proffitt, there was no evidence that Proffitt entered the dwelling armed in any way, whereas Barwick entered Rebecca Wendt's home wearing gloves and armed with a knife. (After seeing the victim, Barwick had gone home, where he got his gloves and knife and returned to the victim's residence whereupon he brutally murdered her.)

Also in Proffitt, the defendant had been drinking and had no criminal history. In the instant case, Barwick had not been drinking and had a history of criminal activity.

Appellant's reliance on Caruthers v. State, 465 So.2d 496 (Fla. 1985) likewise is easily distinguished from the case sub judice. In Caruthers, one valid aggravating circumstance existed, along with one mitigating circumstance and several non-statutory mitigating factors. In the case sub judice, Appellant had several aggravating circumstances and no mitigating circumstances.

In Rembert v. State, 445 So.2d 337 (Fla. 1984) the court found that one aggravating factor and no mitigating circumstances had been established, and further held that given the facts and circumstances of the case, as compared with other first-degree murder cases, the death penalty was unwarranted. This is unlike the instant case where several aggravating circumstances were found and the murder was particularly brutal.

Contrary to Barwick's arguments and assertions to the contrary, the mitigating circumstance of mental impairment of Barwick, was clearly not accepted by either the jury or the trial judge. Evidence of mental impairment was presented and rejected.

Barwick cites several cases for his assertion that this court has recognized the mitigating quality of crimes committed impulsively while the perpetrator suffers from a mental disorder rendering him temporarily out of control. Holsworth v. State, No. 67,973 (Fla. Feb. 18, 1988); Amazon v. State, 487 So.2d 8 (Fla. 1986); Miller v. State, 373 So.2d 882 (Fla. 1979); Burch v. State, 343 So.2d 831 (Fla. 1977) and Jones v. State, 332 So.2d 615 (Fla. 1976). An analysis of those cases, however, reveals that they greatly differ from the instant case.

In Holsworth, supra, the court felt there was sufficient evidence for the jury to have concluded that appellant's conduct was affected by his use of drugs and alcohol. This is completely unlike the instant case.

In Amazon, supra, the court concluded that there was sufficient evidence for the jury to have found that Amazon acted under extreme mental or emotional disturbance. There was some inconclusive evidence that Amazon had taken drugs on the night of the murders. Another mitigating factor was found: age, which included consideration of emotional maturity.

In Miller, supra, the trial court found that the defendant was suffering from mental illness at the time of the murder,

unlike the instant case.

The court in Burch, supra, noted that the evidence established that at the time of the offenses the defendant was mentally disturbed and his capacity to conform his conduct to the requirements of law was substantially impaired as found by the trial judge, clearly unlike the facts in Barwick.

Finally, in Jones, supra, the jury unanimously recommended that the defendant be sentenced to life imprisonment, but the trial court sentenced him to death. The defendant suffered a paranoid psychosis to such an extent that his mental illness contributed to his strange behavior. In Barwick, however, neither the jury nor the trial judge accepted the defense of insanity.

Given the facts and circumstances of this case, the trial court properly sentenced Barwick to death. The death penalty is proportionate to the crime he committed. This court must affirm the sentence imposed as valid aggravating factors exist and no mitigating factors were found.

ISSUE VIII

THE TRIAL COURT PROPERLY INSTRUCTED THE JURY AS TO BARWICK'S PREVIOUS AND CONTEMPORANEOUS CONVICTIONS FOR OTHER OFFENSES. (Restated by Appellee)

Barwick states that he realizes that the court can instruct the jury on all relevant aggravating circumstances. Barwick argues that in the jury instructions the trial court improperly severed single aggravating factors into two or more. This argument must fail.

The complained of instructions to the jury regarding aggravating circumstances were as follows:

> "The aggravating circumstances that you may consider are limited to any of the following that are established by the evidence:
>
> "The Defendant has been previously convicted of another capital offense or a felony involving the use of threat of violence to some person. The crime of sexual battery is a felony involving the use or threat of violence to another person. The crime of burglary with assault is a felony involving the use or threat of violence to some person.
>
> "The crime for which the Defendant is to be sentenced was committed while he was engaged in the commission of, attempt to commit, or flight after committing or attempting to commit the crime of burglary.
>
> "The crime for which the Defendant is to be sentenced was committed while he was engaged in the commission of, attempt to commit, or flight after committing or attempting to commit the crime of sexual battery.
>
> "The crime for which the Defendant is to be sentenced was committed while he was engaged in the commission of, attempt to commit, or flight after

> committing or attempting to commit the crime of robbery.

(R 1511-1512).

Barwick asserts that by so instructing the jury, the trial court created additional aggravating circumstances from his contemporaneous convictions, i.e., that he severed a single aggravating circumstance into two or more. Plainly, the trial judge did not, as is evidenced by the sentencing order. (R 2336-2337).

Section 921,141(5), Fla.Stat. provides for the finding of aggravating circumstances:

> The capital felony was committed while the defendant was engaged, or was an accomplice, in the commission of, or flight after committing or attempting to commit any robbery, sexual battery, arson, burglary, kidnapping, or aircraft piracy or the unlawful throwing, placing, or discharging of a destructive device or bomb.

Barwick had prior convictions for the offenses of sexual battery and burglary with assault. The contemporaneous offenses were three, the crime of burglary, the crime of attempted sexual battery and the crime of robbery. The jury was properly instructed as to these prior and contemporaneous convictions.

This court dealt with a similar issue in Suarez v. State, 481 So.2d 1201 (Fla. 1985). Suarez claimed that the trial court erred in instructing the jury at the penalty phase on aggravating circumstances which have been held to constitute doubling. The

court noted that the specific instructions involved two pairs of aggravating circumstances held to constitute improper doubling in Provence v. State, 337 So.2d 783 (Fla. 1976), cert. denied, 431 U.S. 969, 97 S.Ct. 2929, 53 L.Ed.2d 1065 (1977) and White v. State, 403 So.2d 331 (Fla. 1981), cert. denied, 463 U.S. 1229, 103 S.Ct. 3571, 77 L.Ed.2d 1412 (1983). Provence and White involved improper doubling in the trial court judge's sentencing order, and did not relate to the instructions to the penalty phase jury. The court noted, "The jury instructions simply give the jurors a list of arguably relevant aggravating factors from which to choose in making their assessment as to whether death was the proper sentence in light of any mitigating factors presented in the case. The judge, on the other hand, must set out the factors he finds both in aggravation and mitigation, and it is this sentencing order which is subject to review vis-a-vis doubling." Suarez at 1209. The sentencing order entered in the instant case was proper.

The trial judge found no mitigating circumstances but found several aggravating circumstances in the case sub judice. Reversible error did not occur as a result of the jury instructions. The conviction must, therefore, be affirmed.

ISSUE IX

THE TRIAL COURT DID NOT ERR IN ITS CONSIDERATION OF THE JURY'S RECOMMENDATION OF DEATH. (Restated by Appellee)

Appellant argues that the trial court applied an erroneous legal standard regarding the weight to be afforded a jury's recommendation of death. As support for his argument Appellant quotes from the sentencing order as follows:

> The Jury has recommended death. That recommendation should be given great weight. The importance of that recommendation cannot be overstressed.

(R 1746).

However, the court went on and further stated,

> This Court is well aware that the procedure to be followed is not a mere counting processing of "X" number of aggravating circumstances and "Y" number of mitigating circumstances, but rather a reasoned judgment and weighing process as to what factual situations require the imposition of death and which can be satisfied by life imprisonment in light of the totality of the circumstances present.

(R 1746-1747).

The court then proceeded to make findings of fact as to aggravating and mitigating circumstances. (R 1746-1752, 2336-2338).

A recommendation of life is to be given great weight and not overturned absent compelling reasons. Tedder v. State, 322 So.2d 908 (Fla. 1975). The same is not true for a recommendation of

death, in which situation the trial judge is bound to exercise his own independent judgment in imposing sentence. Bolender v. State, 422 So.2d 833, cert. denied, 103 So.2d 2111, 461 U.S. 939, 77 L.Ed.2d 315, reh. denied, 103 S.Ct. 131, 77 L.Ed.2d 1380.

It is clear that in the case sub judice, the trial court exercised his own independent judgment in imposing sentence. He obviously recognized the inportance of the jury recommendation of death but as is apparent from his careful consideration of aggravating and mitigating circumstances the trial judge clearly exercised his own independent judgment in imposing sentence. (R 1746-1752). Barwick's death sentence was not imposed in violation of the Eighth and Fourteenth Amendments and must be affirmed.

ISSUE X

THE TRIAL COURT DID NOT ERR IN GIVING THE STANDARD PENALTY PHASE JURY INSTRUCTION REGARDING THE JURY'S ROLE IN THE SENTENCING PROCESS. (Restated by Appellee)

Barwick argues that the trial court read the standard penalty phase jury instructions to the jury, stating that the instruction violates Caldwell v. Mississippi, 472 U.S. 320, 105 S.Ct. 2633, 86 L.Ed.2d 231 (1985). (R 1384, 1510). Barwick further states that the instruction is incomplete, misleading and mistates Florida law. (AB 63). This argument is completely without merit and must be rejected.

At the commencement of the penalty phase the court gave preliminary instructions to the jury as follows:

> THE COURT: All right, ladies and gentlemen of the jury, you have found the Defendant guilty of murder in the first degree.
>
> The punishment for this crime is either death or life imprisonment without the possibility of parole for 25 years. The final decision as to what punishment shall be imposed rests solely with the Judge of this Court; however, the law requires that you, the jury, render to the Court an advisory sentence as to what punishment should be imposed upon the Defendant.

(R 1384).

Read as a whole, the charge to the jury clearly was proper. The charge, in pertinent part, is as follows:

> THE COURT: "Ladies and Gentlemen of the jury, it is now your duty to advise

> the Court as to what punishment should be imposed on the Defendant for this crime of murder in the first degree. 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.
>
> "Your advisory sentence should be based upon the evidence that you have heard while trying the guilt or innocence of the Defendant and evidence that has been presented to you in these proceedings.

(R 1510-1511).

* * *

> "The sentence that you recommend to the Court must be based upon the facts as you find them from the evidence and the law. You should weigh the aggravating circumstances against the mitigating circumstances, and your advisory sentence must be based on these considerations.

(R 1514).

Appellee notes that since Barwick did not object at trial to these jury instructions he did not preserve this issue for review and thus is procedurally barred from review on appeal. (R 1516) Combs v. State, 13 F.L.W. 142 (Fla. 1988).

Appellant asserts that the instruction given violates Caldwell even though he recognizes that this Court has repeatedly

ruled unfavorably to this position. (AB 63) Combs, supra; Grossman v. State, 13 F.L.W. 127 (Fla. 1988); Aldridge v. State, 503 So.2d 1257 (Fla. 1987).

This Court in Pope v. Wainwright, 496 So.2d 798 (Fla. 1986), cert. denied, 107 S.Ct. 1617 (1987) considered the Caldwell issue, stating:

> Under Mississippi law it is the jury who makes the ultimate decision as to the appropriateness of the defendant's death. See Miss.Code.Ann. §99-19-101 (Supp. 1985). Whereas, in Florida it is the trial judge who is the ultimate "sentencer." See Thompson v. State, 456 So.2d 444 (Fla. 1984). The jury's recommendation, although an integral part of Florida's capital sentencing scheme, is merely advisory. See §921.141(2), Fla.Stat. (1985). This scheme has been upheld against constitutional challenge. See Proffitt v. Florida, 428 U.S. 242, 96 S.Ct. 2960, 49 L.Ed.2d 913 (1976).

Id. at 805.

Combs states the law in Florida, disagreeing with the Eleventh Circuit's interpretation of Florida death penalty instructions. The United States Supreme Court has recognized that the jury recommendation in Florida law is advisory. Spaziano v. Florida, 468 U.S. 447, 82 L.Ed.2d 340, 104 S.Ct. 3154 (1984); Combs at 143. In view of this, the reasoning found in Adams v. Wainwright, 804 F.2d 1526 (11th Cir. 1986), modified 816 F.2d 1493 (11th Cir. 1987), petition for cert. filed, 56 U.S.L.W. 3094 (U.S. Jul. 20, 1987) (No. 87-121) and Mann v. Dugger, 817 F.2d 1471, reh'g granted and opinion vacated, 828 F.2d 1498 (11th Cir.

1987), is not applicable.

The trial court did not dilute the jury's understanding of its sentencing responsibility in instructing the jury as to the rendition of an advisory sentence. The jury was properly instructed. Since the trial court did not err in giving this instruction it must be affirmed.

CONCLUSION

Barwick has failed to demonstrate reversible error. Based upon the foregoing argument and the authority cited herein, the judgment and sentence entered below should be affirmed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been forwarded by U.S. Mail to W. C. McLain, Assistant Public Defender, Post Office Box 671, Tallahassee, Florida 32302, this 18th day of July, 1988.

Helen P. Nelson

Helen P. Nelson
Assistant Attorney General