IN THE SUPREME COURT OF FLORIDA

DARRYL BRYAN BARWICK,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

_____/

CASE NO. 70,097

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

INITIAL BRIEF OF APPELLANT

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INITITAL BRIEF OF APPELLANT

PRELIMINARY STATEMENT

The Appellant, Darryl Bryan Barwick, will be referred to by name in this brief. The record on appeal consists of twenty volumes and a supplement of three volumes. References to the original record will be designated with the prefix "R," and references to the supplement will be similarly designed with the prefix "SR."

Barwick is appealing judgments in two cases. The first involves his conviction for murder and death sentence. (Circuit Court number 86-940) The second is a violation of probation in a sexual battery and burglary case premised upon his conviction for the murder. (Circuit Court number 83-1056)

STATEMENT OF THE CASE AND FACTS

Procedural Progress of the Case

A Bay County grand jury indicted Darryl Bryan Barwick on April 28, 1986, for first degree murder, armed burglary, attempted sexual battery and armed robbery. (R 1924-1925) Barwick pleaded not guilty. (R 1921) He proceeded to a jury trial relying on the defense of insanity. (R 1966, 1970, 2152, 2188-2205) On November 24, 1986, the jury found Barwick guilty as charged. (R 2266-2267) After hearing additional evidence, the jury recommended a death sentence for the murder. (R 2293)

Before sentencing, the court ordered a presentence investigation report (R 2294)(SR 1-18), and considered sentencing memorandums from counsel. (R 2310-2337) On January 30, 1987, Circuit Judge W. Fred Turner adjudged Barwick guilty on all counts. (R 2339-2335) He sentenced Barwick to death for the murder, life for the armed burglary, fifteen years for attempted sexual battery, and life for the armed robbery. (R 2331-2335) In his written findings in support of the death sentence, Judge Turner found four aggravating circumstances: (1) Barwick had a previous conviction for a violent felony; (2) the homicide was committed during a robbery, attempted sexual battery and burglary; (3) the homicide was committed to avoid arrest; and (4) the homicide was especially heinous atrocious or cruel. (R 2336-2338) The court departed from the recommended guidelines sentence on the other counts because of the capital felony as an additional offense at conviction and

the 37 knife wounds the victim received during the offenses. (R 2339)

Barwick filed a motion for a new trial on December 3, 1986 (R 2306-2309), which the trial court denied on March 11, 1987. (R 2360) He timely filed notice of appeal to this Court on February 20, 1987. (R 2348)

On December 2, 1983, Barwick was convicted for a sexual battery and burglary and sentenced to five years followed by ten years probation. (R 1868-1872) He was on probation at the time he was indicted for the murder and related offenses. On April 30, 1986, a affidavit for violation of probation was filed alleging as the sole violation the commission of the murder. (R 1878-1881) At a hearing after Barwick's conviction for murder, the court found him in violation of probation on the basis of the murder conviction. (R 1679-1689, 1891) Judge Turner adjudged Barwick guilty and sentenced him to seventeen years on each count. (R 1690-1691, 1886-1890) Barwick timely filed his notice of appeal on February 20, 1987.(R 1893)

Facts -- The State's Case

Rebecca Wendt shared an apartment with her sister, Michael Ann Wendt, and worked as a waitress at a nearby restaurant. (R 374-375) On March 31, 1986, Michael left the apartment around 10:15 a.m. to go to take her younger brother and sister, who were visiting, to the beach. (R 377) Rebecca was sunbathing on the grass just outside the front door of their apartment. (R 378) Michael and her friend, JoAnn Parrillo, returned at 8:00

p.m. and noticed all the lights were out in the apartment. (R 378) Michael also saw that the television cord was plugged into an outside electrical outlet. (R 378) Rebecca frequently watched a show at noon, but Michael was sure that Rebecca would have unplugged the set before taking it back inside the apartment. (R 378) Michael tried to open the door and found it unlocked. (R 378-379) Once inside the women discovered the apartment in disarray, and Parrillo identified a large red stain on the carpet to be blood. (R 379) With the assistance of a neighbor, they checked through the apartment and found Rebecca's body in the bathroom wrapped in a comforter from the bed. (R 379-380)

Lieutenant Frank McKeithen of the Bay County Sheriff's Department testified about his observations at the apartment. (R 405-468) He found the victim lying on the bathroom floor partially wrapped in a comforter. (R 412-413) She wore a lavender bikini; the top was pulled down to her midsection and the bottom was pulled down in the back. (R 412-413) A hand print in blood was on her stomach. (R 413) In addition to the pool of blood on the carpet, McKeithen found blood spattered on other areas of the living room floor, along the walls, on the kitchen floor and counter, and the bathroom. (R 416-417) Two shoe prints in blood were present. (R 416-417) One was located on the tile kitchen floor, and a second partial shoe track was on the comforter. (R 416-417) McKeithen also took five steak knives from the kitchen after Michael Ann Wendt said there had been six. (R 382-383, 479) The victim's purse had been emptied

onto the living room floor. (R 415-416) McKeithen said it appeared as if someone with a bloody hand had emptied the purse because of stains on the wallet. (R 490) Although the victim normally had cash from tips in her purse, no money was found among the scattered contents.(R 376, 495)

According to Dr. Terrance Steiner, associate medical examiner, the victim had received 38 stab wounds. (R 508-537) These occurred over the neck, chest, abdomen, arms and hands. (R 508) Steiner characterized the wounds to the hands as defensive wounds. (R 509) Thirty of the wounds were less than one inch deep. (R 537) One wound to the neck cut the carotid artery. (R 513) Wounds to the right and left chest penetrated the chest cavity, and a considerable amount of blood was inside the right chest cavity. (R 515) She died from shock due to loss of blood. (R 517) Based on the injuries, Steiner concluded the victim did not live more than five or ten minutes and would have lost consciousness before death. (R 518, 538-539) Because of the extensive number and nature of the wounds, Steiner said this was an example of a phenomenon forensic pathologists call "overkill" which is usually associated with emotional killings--crimes of passion or rage. (R 554)

Three witnesses testified to their observations at the apartment around the time of the homicide. Lora Raffield lived near the Wendt's apartment. (R 387) She said she saw a young woman sunbathing in front of the apartments the morning of March 31, 1986. (R 388) She saw the woman go inside her apartment, leaving her blanket outside, about 11:45. (R 389)

Raffield left her house and returned at 2:30 p.m. (R 390) At that time, she did not see the woman, but the blanket was still outside. (R 390) Michael Ann Wendt's boyfriend, Tim Cherry, telephoned the apartment between 1:30 and 2:00 p.m. but no one answered. (R 393-395) Suzanne Capers, who lived at the same apartments, was also sunbathing that day. (R 396) Between 12:30 and 1:00, she saw a man walking by the apartments. (R 397) He had blonde hair and wore jeans and a blue tank top. (R 397) Since she saw him walking by four or five times, she thought he might be a new tenant. (R 400) The last time she saw him he was standing near the edge of the road and appeared to be staring at her. (R 400) She looked up, and he walked away into some nearby woods. (R 400-401) Investigator McKeithen examined the wooded area where Capers said she saw the man. (R 468-476) He found 20 to 30 sets of footprints in the area. (R 469-474) One set appeared to be similar to the tread design of the tracks inside the apartment. (R 469-476) The design included a square with the word "Nike." (R 475)

McKeithen focused his investigation on Darryl Barwick. On April 1, 1986, McKeithen asked Barwick to come the sheriff's office for questioning. (R 563-564) Barwick agreed, and after McKeithen read him his Miranda rights, Barwick gave a statement detailing his activities on the day of the homicide. (R 564-584)(SR 168-175) He said he spent the night of March 30th at his girl friend's house. (R 580)(SR 169) Between 5:30 and 6:00 a.m., Barwick drove to his parent's house where he lived. (R 581)(SR 170) His sister, Lovie Barwick, was talking

on the telephone to their father who was out of town. (R 581)(SR 170) Barwick then talked to his father who gave him instructions for the day's work. (R 581)(SR 170) Barwick worked for his father's concrete construction business. (R 581) He dressed for work in blue jeans, a blue tank top, a blue checkered shirt, brown work boots and an orange cap. (R 581)(SR 170) After he and a co-worker completed the work, Barwick returned home about 11:30 a.m. (R 582)(SR 171-173) His brother's girl friend, Vickie Burns was there, and after talking to her briefly, Barwick picked up chicken at Church's Chicken. (R 582)(SR 173) He ate at home and took a shower around 1:00 p.m. (R 582)(SR 173) A short time later, he left to meet his girl friend. (R 582)(SR 173) Barwick told McKeithen that he had owned a pair of Nike tennis shoes, but he had thrown them away the previous Saturday. (R 584)(SR 173) He denied any involvement in the murder. (SR 174)

On April 15, 1986, Darryl's sister, Lovie Barwick, responded to a state attorney's investigative subpoena. (R 591) She also testified at trial about a conversation she had with Darryl on April 12th. (R 590) At that time, she asked Darryl if he had killed the girl. (R 591) He told her he did not know why it happened. (R 591) After driving by the apartments, he went home, left his car and walked back. (R 591) He followed the woman inside and pulled her swim suit bottoms down. (R 591) She began to struggle, and he fell back. (R 591) Then, he said he just did it. (R 591) He said he had to do it. (R 592) His sister assumed he killed the woman because she saw Darryl's

face, but he never told her that was the reason. (R 592-593) After the investigative interview, McKeithen obtained a warrant and arrested Barwick as he and his father were driving to a job site at Mexico Beach. (R 606)

While driving to the sheriff's office, McKeithen told Barwick about his sister's statement. (R 607) He responded that his sister was lying. (R 607) Barwick said several times that he wanted to talk to his girl friend. (R 608, 623-626) Barwick's girl friend, Teri Race, was present at the sheriff's office when they arrived. (R 608, 623-626) Finally, Barwick said he would talk to McKeithen if he could talk to his girl friend first. (R 608, 623-626) McKeithen agreed and gave Darryl and Teri approximately three minutes to talk. (R 608, 623-626) Barwick then gave a tape recorded statement. (R 610-615)(SR 176-206)

Darryl Barwick confessed to stabbing Rebecca Wendt. (R 611-614)(SR 176-206) He said he went by Russ Lake Apartments about 12:15 p.m. as he drove to Church's Chicken to get something to eat. (SR 179-180) On his way back, he saw a woman in a bikini sunbathing. (SR 180) After parking his car at home, Barwick walked back to the apartments. (SR 180-181) He walked passed the woman three times, and the third time, he walked into her apartment. (SR 181) The door was open, and she was sitting on a couch watching television. (SR 181) Barwick was wearing blue jeans, a white tank top, baseball batter's gloves and Nike sneakers.(SR 181) He also had a small knife in his pocket which he described as a tomato knife with a serrated

edge. (SR 181-182, 195) As Barwick walked inside, the woman jumped up and yelled, "Get out." (SR 182) He pushed her down and said he would leave in a few minutes. (SR 182) She struck Barwick, and he pulled the knife and said, "Don't wanna hurt you. I can leave in a few minutes; don't give me no trouble." (SR 202) He then dumped her purse and picked up her wallet. (SR 202) Barwick said his only intent was to steal something; he denied any intent to rape. (SR 182, 185) She struck Barwick two or three more times. (SR 202) Barwick stabbed her, and they struggled, lost their balance and fell to the floor. (SR 203) She continued hitting him and he continued stabbing her. (SR 203) Barwick told the detectives, "[I]t's like I lost control. I, I cou ...I didn't, I, I wanted to stop, I knew I did, you know, like I was wrong, but I couldn't." (SR 196)

After the stabbing, Barwick thought of hiding the body. (SR 183-186) He said he rolled her in a blanket and carried her to the bathroom. (SR 184) Realizing that he could not carry the body from the apartment undetected, Barwick left. (SR 187-188) He walked through the woods to the lake across the street from the apartments and threw the knife in the lake. (SR 188) He proceeded to his house, showered and, later, threw his clothes and shoes in a dumpster. (SR 188-191)

A state crime laboratory analyst, Sue Livingston, examined the comforter found wrapped around the body. (R 633-636) She found human blood stains and a semen stain. (R 635-636) The semen stain was left by someone whose blood type was group O with an enzyme factor of PGM 2. (R 636) An examination of

Barwick's blood and saliva showed him to be a secretor with group O blood and a enzyme factor of PGM 2. (R 643) This placed him in the two percent of the population who could have left the stain. (R 643)

The Insanity Defense

Barwick presented several witnesses in support of his insanity defense. His mother, father, brothers and sisters testified about his background and growing up experiences. (R 715, 733, 746, 786, 799, 810) Barwick's girl friend testified about their relationship. (R 673) And a clinical psychologist, Dr. Clell Warriner, and his associate, James Beller, testified about their examination and testing of Barwick and his mental state at the time of the homicide. (R 900, 974)

Home life for Darryl while growing up was dominated by his father's explosive anger and brutal discipline. All of the children and Darryl's mother were subjected to Ira Barwick's violence. Darryl's father testified that when Darryl was five years old he whipped him with a belt. (R 750) Later, he hit Darryl with his fists, a piece of 2x4 lumber or any other available weapon. (R 750) Before Darryl was a teenager, his father once knocked him to the floor causing him to strike his head on a coffee table which rendered him unconscious. (R 756-757, 816-817) His father was afraid that he had killed him, but he did not seek medical attention after Darryl re-gained consciousness. (R 757) William Barwick related an

instance when their father beat him and Darryl with a steel reinforcement rod from a construction site. (R 814, 817-818) On another occasion when Darryl was sixteen, William saw his father hit Darryl hard enough in the face and nose to cause blood to gush from his nose. (R 830) His father then held Darryl's head in a cooler of ice supposedly to stop the bleeding. (R 830-831) William perceived this as further punishment. (R 831) Darryl's sister, Sheila Santiago, said that no one was exempt from Ira Barwick's beatings. (R 736-737) He would use his fists, his feet or anything available to him. (R 737) She related a time when Ira Barwick had left the family and tried to return to the house. Everyone was terrified and Darryl's mother handed a shotgun to William and told him not to allow his father in the house. (R 738) Ira Barwick came inside, took the gun away and tried to unload the gun. (R 738) However, the gun discharged and shot a hole in the floor. (R 738) Darryl was 12 years old at the time of this incident. (R 739) Glenn Barwick said he remembered being beaten by his father from about the age of four or five. (R 789) He said his father used a belt, his fists, his feet or a board. (R 789-791) The children never fought back from these beatings because they were too scared. (R 791-792) Lovie Barwick said their father beat them regularly, sometimes with objects. (R 800) In fact, one time she saw Glenn Barwick cleaning the blood from his head after being hit with a shovel. (R 802-803) She said she and William were once beaten on Lovie's birthday because she was rude to one of the girls at the party. (R 800) Lovie went to

school with a black eye as a result. (R 800) She said she and the other children would lie about how they received their injuries. (R 801) She said Darryl never fought back, but she remembered one time when he ran away. (R 802)

Twice as a child, Darryl was knocked unconscious. In addition to the beating by his father, his brother, William, once hit Darryl with a baseball. (R 812-813) William testified that Darryl once became upset during a baseball game and walked away which made William angry. (R 813) William threw a baseball at Darryl while he was running home. The ball hit Darryl in the top of the head, knocking him to the ground. (R 813) He lay still for several seconds before getting up and continuing home. (R 813)

According to Darryl's mother, Imogene Barwick, Darryl was a timid child. (R 719) He was the youngest of her seven children. (R 716) Other children sometimes considered him a sissy. (R 742) He suffered a speech problem, stuttering, and was a slow learner in school. (R 717-718) Although he never received any special help, he repeated the first grade. (R 718) After being in trouble as a teenager, Darryl did go to the Bay County Guidance Clinic one time. (R 725-726) Other than being shy, Darryl's family did not recall him having problems with girls. (R 727, 742, 804)

Teri Race had known Darryl since they were in the sixth grade together. (R 674) She saw him frequently until the tenth grade when Darryl went to prison for the sexual battery conviction. (R 674) She wrote him during that time, and they had

been dating constantly since he returned home three months before the homicide. (R 675) They began discussing marriage. (R 676) Darryl discussed his mental problems with her. (R 677) Teri testified that Darryl told her he wanted to know why he had committed the sexual battery. (R 677-678) He did not understand his feelings or what made him commit the crime. (R 678) He asked his probation officer to send him to a psychiatrist. (R 678-679, 684-687) A social worker at the Bay County Guidance Clinic, Ralph Batsen, saw Darryl on April 14, 1988. (R 1083-1085) Teri also said that Darryl told her that he committed the homicide. (R 703-714) He said that while in the apartment the woman started fighting him and he killed her with a steak knife from the kitchen in the apartment. (R 712-714) Teri testified that Darryl told her that "once he started that he just couldn't quit and it was like someone inside of him that took over, and from that point on it was like somebody different." (R 713)

James E. Beller, an associate of Dr. Clell Warriner, testified about the neuropsychological testing he performed on Barwick. (R 900-973) Although the court allowed Beller to testify, the court would not qualify him as an expert witness because he did not have a doctorate and was not a licensed clinical psychologist. (R 880-899, 911, 932, 972-974) Beller has a masters degree in psychology and considerable experience in his area. (R 1031-1035)(SR 68-71,91-167) He was allowed to give his opinion, but he was not allowed to give the psychological basis for his opinion. (R 880-899, 972-974, 1031-1035) As

a result, his testimony was restricted. (R 911, 932, 972-974, 1031-1035) Beller gave Barwick approximately six hours of tests. (R 905) He also interviewed Barwick's mother and reviewed depositions and reports concerning the case. (R 906) Barwick's IQ was average, but Beller found that performance IQ was 16 points higher than the verbal range which can be an indicator of brain damage. (R 907-908) Testing disclosed that Barwick suffers from several learning disabilities which impaired his ability to speak, read, spell and remember. (R 908-909) The Minnesota Multiphasic Personality Inventory indicated that Barwick's substantial thought disorder had the potential for psychotic behavior. (R 912-913) Barwick's personality profile described him as a person with "schizoid, dissociative, depersonalized, psychopathic and exhibitionist tendencies." (R 914)

Beller learned several things about Barwick's mental state when he conducted a an interview and examination. (R 916) Barwick told him that his father beat him almost daily. (R 917) During those times, Barwick said he would "turn to stone". (R 917, 921) Beller observed that Barwick lacked emotional spontaneity; he contains his emotions and is unable to express them. (R 919) As a result, he appears to have a cold personality. (R 919) Barwick described experiences where he felt as if he were two people -- one good, the other bad. (R 920) Beller concluded that Barwick was unable to control anger, and instead, he repressed it. (R 920) Barwick is not capable of dealing with emotions or controlling anger. (R 920) At the

homicide, Barwick explained that he felt like two different people with the good standing and watching the bad one. (R 921) Beller stated that Barwick was unable to stop the bad person because he lacks the ability to control his behavior when under stress. (R 948-952) He described the experience as a dream or watching a movie. (R 921) When the woman panicked and became violent, Barwick also panicked. (R 922) They fell during the struggle and Barwick hit his head. (R 922, 968) Their struggle took them to the kitchen where Barwick grabbed something and began striking. (R 922, 968) He did not realize until later that the object he grabbed was a knife. (R 923, 968)

Beller concluded that at the moment of the killing, Barwick was insane. (R 931) He was suffering from a psychosis and was not able to deal with reality. (R 931) Barwick suffered from a disease and did not know what he was doing or its consequences at the time of the homicide. (R 934) He did not know the difference between right and wrong at that time. (R 934)

Dr. Clell Warriner testified that Barwick was temporarily insane at the time of the murder.(R 981) Warriner first examined Barwick in 1980 and found him to be a fairly normal 13 year old boy, although suffering from a sexual perversion. (R 979, 989) He examined him again in 1983 and found Barwick's personality to be more schizoid. (R 989) Warriner was able to detect a progression of severity in Barwick's mental condition. (R 981) When he examined Barwick after the homicide, Warriner concluded that Barwick suffered from temporary insanity at the

time of the killing induced by a panic rage reaction. (R 981, 983-988, 993-1001) He concluded that the rage reaction was induced by a blow to the head Barwick received while struggling with victim. (R 984-987) This caused him to relive a time in his childhood when he was knocked unconscious and awoke in a rage. (R 984-986) Because of Barwick's poor behavior controls and a tendency to act compulsively, he was unable to control this rage, and the intensity of the reaction temporarily rendered him unaware of his behavior or its consequences. (R 987-988) This uncontrolled, compulsive, rage behavior explained the why 38 stab wounds were administered. (R 986-988) Barwick did not know right from wrong at the moment of the homicide and could not know the consequences of his actions. (R 994-995)

In rebuttal, the State presented testimony from a social worker, an HRS counselor, a prison counselor, and two psychologists. (R 1083, 1097, 1104, 1156, 1224) Ralph Bratsen was the social worker at the Bay Guidance Clinic who saw Barwick on April 14, 1986. (R 1083) He testified that Barwick did not appear to be suffering from insanity at that time. (R 1088-1089) Deborah Sasser was the HRS counselor who worked with Barwick when he was a juvenile in 1980 and 1981. (R 1097) During that time, she visited his home eight to ten times and never received a report of child abuse. (R 1098-1101) She only saw Barwick's father one time. (R 1101) She did not observe any behavior of Barwick's which appeared bizarre. (R 1099) She said that Barwick was always respectful and progressed well.

(R 1103) Harold Bartlett was a prison counselor who saw Barwick in group therapy sessions for mentally disordered sex offenders. (R 1104-1112) He said he never saw any psychosis in Barwick's behavior. (R 1115-1116) Bartlett said that Barwick seemed genuinely interested in receiving treatment and was always cooperative. (R 1134) Furthermore, Bartlett saw no indication that Barwick would be violent in the prison setting. (R 1138-1139)

Two psychologists testified for the State. (R 1156, 1224) Dr. Lawrence Annis, a senior psychologist with the Corrections Mental Health Institution and Dr. Harry McClaren examined Barwick. (R 1156-1167) Annis did not diagnose any mental illness but did identify a antisocial personality disorder. (R 1167-1168) He did say that Barwick reported hearing voices and ringing in his ears, but he did not conclude this was the product of mental illness. (R 1189) At the time of the offense, Annis said that Barwick probably knew the difference between right and wrong. (R 1198-1199) He acknowledged that a person could become temporarily insane from a blow to the head. (R 1218) McClaren testified that Barwick was sane under Florida law at the time of the offense. (R 1224-1237) He said that Barwick did report auditory hallucinations and suffered from an antisocial personality disorder. (R 1237-1243) McClaren was of the opinion that the homicide occurred as the result of momentary extreme anger. (R 1250-1251)

Jury Selection

The court excused four black prospective jurors for cause. (R 227, 300)(SR 23-31) When the prosecutor challenged a fifth black juror, Juror Miller, peremptorily, Barwick objected and requested a hearing pursuant to State v. Neil, 457 So.2d 481 (Fla. 1984). (R 310) The judge ruled that Barwick did not have standing to object because both he and the victim are white. (R 310-311) At the prosecutor's insistence, the court also said,

> 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.
>
> [THE PROSECUTOR]: 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 --
>
> [THE PROSECUTOR]: Indication.
>
> THE COURT: --no pattern, no indication of a pattern of discrimination against this Defendant, either racially or otherwise.

(R 311-312) The State used peremptory challenges on two more blacks, Jurors Cannon and Nickolas. (R 313, 314) Relying on his earlier ruling, the judge overruled Barwick's objections. (R 311-314) At the close of jury selection, Barwick renewed his objections and asked for a mistrial. (R 321-322) The prosecutor volunteered that he excused Juror Miller because she was hesitant regarding her feelings about the death penalty. (R 322) Interrupting, the court said,

> 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 322-323) Neither Juror Cannon nor Juror Nickolas indicated any reservations about the death penalty, and they were never questioned on the subject. (R 12, 46-52, 229, 246-252)

Jury Instructions

At the jury instruction charge conference, Barwick submitted a special, written requested jury instructions 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. (R 1270-1271) Barwick argued that his diminished mental capacity should be a defense to the specific intent and the premeditation elements of the offenses charged. (R 1271) He analogized the defense to the availability of an intoxication defense for specific intent crimes. (R 1271) The court denied the requested instructions on this theory. (R 1271)

Penalty Phase And Sentencing

The State presented three additional witnesses during the penalty phase of the trial. First was Melissa Sahm. (R 1385) She was the victim of the sexual battery and burglary Barwick committed in 1983, and her testimony detailed the circumstances of that crime. (R 1385-1399) Second, Harry McClaren, a clinical psychologist, testified that in his opinion that

Barwick did not suffer from an extreme mental or emotional disturbance or from substantial impairment of his ability to appreciate the criminality of his conduct or his ability to conform his conduct to the requirements of the law. (R 1400-1405) Third, Lawrence Annis, another psychologist, testified that Barwick was under emotional stress at the time of the crime but not suffering from an extreme mental or emotional disturbance. (R 1405-1406) Annis also concluded that Barwick's capacity to appreciate and to conform his conduct was not substantially impaired. (R 1406-1408)

Barwick presented one additional witness, clinical psychologist James Hord. (R 1409) He concluded that Barwick was competent to stand trial and sane at the time of the offense. (R 1413) However, he found Barwick to be suffering from a severe emotional disturbance. (R 1414-1417) In Hord's opinion, Barwick experienced a tremendous amount of panic during the struggle with the victim at the time of the killing. (R 1417-1418) His mental impairment would have left him with little control over his behavior in those circumstances. (R 1419-1422)

SUMMARY OF ARGUMENT

1. Barwick objected to the prosecutor's use of peremptory challenges to excuse black prospective jurors. The court ruled that Barwick had no standing to object under State v. Neil, because he is white. Both the United States and Florida Constitutions gives white defendants standing to object to discrimination in jury selection. Every defendant is entitled to a jury fairly selected from cross section of the community. Additionally, as a policy matter, every defendant has the right to object to racial discrimination in the selection of juries in order to preserve the integrity of the judicial process.

2. The defense offered James Beller as an expert witness in the field of neuropsychology. In spite of his training and experience, the court refused to qualify him as an expert on the sole ground that he does not hold a Ph.D. degree. Beller was allowed to testify, but he could not provide any psychological explanations for the results of his testing and observations. This ruling was an abuse of discretion, and it severely limited Beller's testimony and effectiveness as a witness.

3. Investigator Frank McKeithen first saw Darryl Barwick over 24 hours after the homicide. He spent a total of three hours with him during five or six sessions spanning several days. Overruling Barwick's objection, the court allowed McKeithen to give his lay opinion that Barwick was sane at the time of the offense. McKeithen did not have any contact with

Barwick at the time of the offense. As a result, he was not competent to render an opinion on Barwick's sanity.

4. Barwick requested a jury instruction to the effect that impaired mental capacity, short of insanity, could be a defense to crimes requiring the element of premeditation or specific intent. The court denied the request on the ground that Florida does not recognize the defense. Since this Court implicitly recognized the defense in Gurganus v. State, 451 So.2d 817 (Fla. 1984), Barwick was entitled to the instruction.

5. The trial court revoked Barwick's probation for the 1983 burglary and sexual battery solely on the basis of the subsequent conviction for murder. Since the murder conviction must be reversed, the order revoking probation must also be reversed.

6. The trial judge improperly found and considered two aggravating circumstances which were not proven beyond a reasonable doubt. Barwick killed in a spontaneous, uncontrolled panic reaction during a struggle with the victim. The homicide was not especially heinous, atrocious or cruel and was not committed to avoid arrest. The court also failed to properly evaluate and consider the mitigating circumstances based on Barwick's family history and mental condition.

7. Darryl Barwick's death sentence is disproportional to his crime. The State proved a felony murder committed in a panic reaction during a struggle with the victim. When compared to similar cases in which this Court reduced sentences to life, Barwick's death sentence cannot stand.

8. At the State's request, the court modified the penalty phase jury instructions concerning aggravating circumstances. As given, the instruction allowed the jury to consider each of Barwick's two previous convictions for crimes of violence and his three contemporaneous convictions for robbery, attempted sexual battery and burglary as separate aggravating circumstances. The impact was to artificially increase the number of aggravating circumstances given to the jury for consideration.

9. The trial judge used an improper legal standard to consider the jury's death recommendation in sentencing. In his sentencing order, the trial judge began his analysis with the proposition that the the jury's recommendation of death could not be overstressed. While the jury's recommendation is to be given considerable weight, it can be overstressed. Barwick's death sentence is now based on the court's use of an erroneous standard and must be reversed.

10. The trial court should not have read the standard penalty phase jury instruction which told the jury that the sentencing decision was solely the judge's responsibility. An instruction stressing the importance of the jury's recommendation should also have been given. The instruction as read improperly diminishes the role of the jury in violation of the Eighth and Fourteenth Amendments. Caldwell v. Mississippi, 472 U.S. 320, 105 S.Ct. 2633, 86 L.Ed.2d 231 (1985).

ARGUMENT

ISSUE I

THE TRIAL COURT ERRED IN RULING THAT BARWICK, WHO IS WHITE, HAD NO STANDING TO OBJECT TO THE PROSECUTOR'S DISCRIMINATORY USE OF PEREMPTORY CHALLENGES TO EXCLUDE BLACKS FROM THE JURY IN VIOLATION OF ARTICLE I, SECTION 16, OF THE FLORIDA CONSTITUTION AND AMENDMENTS SIX AND FOURTEEN OF THE UNITED STATES CONSTITUTION.

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. Both the United States and Florida Constitutions answer the question affirmatively. Although this Court has not yet spoken directly on the subject, the question is before this Court in Kibler v. State, Case No. 70,067, on discretionary review of the decision of the Fifth District. Kibler v. State, 501 So.2d 76 (Fla. 5th DCA 1987). Barwick, who is white, had standing to object, and the trial judge erred in ruling that he did not.

When the prosecutor first challenged a black juror, Juror Miller, peremptorily, Barwick objected and requested a hearing pursuant to State v.Neil, 457 So.2d 481 (Fla. 1984). (R 310) The judge ruled that Barwick did not have standing to object because both he and the victim are white. (R 310-311) At the prosecutor's insistence, the court also said,

> 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.

> [THE PROSECUTOR]: 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 --
>
> [THE PROSECUTOR]: Indication.
>
> THE COURT: --no pattern, no indication of a pattern of discrimination against this Defendant, either racially or otherwise.

(R 311-312) The State used peremptory challenges on two more blacks, Jurors Cannon and Nickolas. (R 313, 314) The judge overruled Barwick's objections on the same grounds. (R 311-314) Barwick renewed his objections and asked for a mistrial which the court denied. (R 321-322)

The Fifth District Court of Appeal held that a white defendant has no standing to object to a prosecutor's deliberate use of peremptory challenges to exclude blacks from his jury. Kibler v. State, 501 So.2d 76 (Fla. 5th DCA 1987). The court wrote that the question had been settled -- as far as the federal constitution was concerned -- in Batson v. Kentucky, 476 U.S. ___, 106 S.Ct. 1712, 90 L.Ed.2d 69 (1986). Although this Court's decision in State v. Neil, 457 So.2d 481 was specifically based on the state constitution, the Fifth District Court majority reasoned that had Batson been available at the time Neil was decided, it would have provided the basis for opinion. Judge Orfinger wrote in a concurring opinion that he would not have reached the standing question and was not confident that this Court would "embrace the more restricted test of Batson v. Kentucky." He acknowledged that in Castillo

v. State, 466 So.2d 7 (Fla. 3d DCA 1985), approved in part, quashed in part, 486 So.2d 565 (Fla. 1986), the court noted that the question of whether a defendant may protest the systematic exclusion of an identifiable group other than his own from the jury had been answered in the affirmative in Peters v. Kiff, 407 U.S. 493, 92 S.Ct. 2163, 33 L.Ed.2d 83 (1972).

Kibler is incorrectly decided for two reasons. First, this Court would not necessarily have been swayed by Batson, had it been decided earlier, to base Neil on the federal constitution. This Court should not now bind itself to an interpretation of the federal constitution when answering a right clearly founded upon the Florida Constitution. Second, Kibler misinterpreted Batson as settling the standing issue under the federal constitution. When Batson is carefully read in light of related cases which directly address standing, it is apparent that the federal constitution also affords white defendants standing to complain.

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. The goal is broader than merely protecting the individual litigant. As stated in Slappy,

> One would think it unnecessary to point out again, as did the court in Batson v. Kentucky, 476 U.S. 79, 87-88 (1986) (citation omitted) (quoting Strauder v. West Virginia, 100 U.S. 303, 308 (1879)), that "[d]iscrimination within the judicial system is [the] most pernicious." It would

> seem equally self-evident that the appearance of discrimination in court procedure is especially reprehensible, since it is the complete antithesis of the court's reason for being--to insure equality of treatment and evenhanded justice. Moreover, by giving official sanction to irrational prejudice, courtroom bias only enflames bigotry in the society at large.
>
> The need to protect against bias is particularly pressing in the selection of a jury, first, because the parties before the court are entitled to be judged by a fair cross section of the community, and second, because our citizens cannot be precluded improperly from jury service. Indeed, jury duty constitutes the most direct way citizens participate in the application of our laws.

Slappy, slip opinion at page 3.

This policy is protected by the tools given in Neil to both the defense and the prosecution. 457 So.2d at 486-487. Were the evil limited to the protection of the defendant and his racial group, alone, the prosecution would not need the authority to object. This Court correctly recognized the expanse of the discrimination problem and fashioned a remedy broad enough to cure the ill. Giving the same tools to any defendant, regardless of his race, will only further enhance the protection of the goal of eliminating prejudice from the judicial system. Moreover, every defendant, regardless of race, has a right to a jury fairly selected from a cross section of the community. Based on the Florida Constitution, this Court should hold that a white defendant has standing to object to discrimination in jury selection.

In State v. Neil, this Court cited three state court decisions that had dealt with the issue of peremptory challenges and race. One of those decisions, People v. Thompson, 79 A.D. 2d 87, 435 N.Y.S.2d 739 (1981) did not decide the standing question presented here. The two others did and both allow a defendant of any race to raise the issue. In People v. Wheeler, 148 Cal.Rptr. 890, 583 P.2d 748, 764 (1978) the Court cited Peters v. Kiff and Taylor v. Louisiana, 419 U.S. 522, 95 S.Ct. 692, 42 L.Ed.2d 690 (1975), as resolving the standing question. Similarly in Commonwealth v. Soares, 387 N.Ed.2d 499, 517 (Mass. 1979), the court specifically held that common group membership of the defendant and those jurors excluded is not a prerequisite to assertion of the right.

The United States Constitution also gives a white defendant the right to object to discrimination against blacks in jury selection. Batson v. Kentucky, does state that in order to make a prima facie case of purposeful discrimination in jury selection, "The defendant must initially show that he is a member of a racial group capable of being singled out for differential treatment." 106 S.Ct. at 1722. However, the Batson court was not faced with a standing issue. The court's statement on standing is dicta because James Batson is black. There was no need to decide the issue, and the Court gave no explanation for the position stated.

In 1972 the U.S. Supreme Court was directly faced with a standing issue. Unlike Batson, the Court in Peters v. Kiff, 407 U.S. 493, decided a claim by a petitioner who was not black

that blacks were excluded from his jury. After finding that the jury selection system was discriminatory, the Court held that the defendant had standing regardless of his race. In reaching this conclusion, the Court said,

> If it were possible to say with confidence that the risk of bias resulting from the arbitrary action involved here is confined to cases involving Negro defendants, then perhaps the right to challenge the tribunal on that ground could be similarly confined. The case of the white defendant might then be thought to present a species of harmless error.
>
> But the exclusion from jury service of a substantial and identifiable class of citizens has a potential impact that is too subtle and too pervasive to admit of confinement to particular issues or particular cases.
>
> * * * *
>
> Moreover, we are unwilling to make the assumption that the exclusion of Negroes has relevance only for issues involving race. When any large and identifiable segment of the community is excluded from jury service, the effect is to remove from the jury room qualities of human nature and varieties of human experience, the range of which is unknown and perhaps unknowable.

407 U.S. at 498-500. (footnotes omitted)

Three years later, the Court faced a similar standing question in Taylor v. Louisiana, 419 U.S. 522. 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. Justice White, writing for seven members of the Court relied in part on Peters v. Kiff, to hold that a male defendant has standing to challenge the systematic exclusion of females from his jury.

Batson v. Kentucky, appears to contradict Peters and Taylor on the question of standing. However, a careful reading of the cases shows a consistency and a foundation for ruling that a white defendant has standing. Recently, a Texas appellate court analyzed this facial contradiction and reached this result. Seubert v. State, Nos. 01-86-00057 & 01-86-00059 (Tex. Ct.App. 1st Dist. 1988). After discussing the federal authorities, the Texas court harmonized them upon recognizing that Batson was an equal protection case while Peters involved due process and Taylor the Sixth Amendment. The Seubert court stated:

> Swain v. Alabama, 380 U. S. 202 (1965), plainly recognized the right here in issue, but placed an impossible burden on defendants to prove a violation. "All Batson did was give defendants a means of enforcing this prohibition." Allen v. Hardy, 106 S.Ct. 2878, 2883 (1986) (Marshall, J., dissenting). Batson created a new remedy, not a new right. Batson requires the defendant to show that he belongs to the excluded class. This is a reasonable requirement for a defendant claiming denial of equal protection on the basis of race, and Batson was squarely grounded on the equal protection clause of the 14th Amendment. This was the narrowest basis on which to decide Batson because the defendant there was black.
>
> * * * *
>
> Appellant is white; therefore, he was not denied equal protection when [the black juror] was struck. He cannot meet that requirement of Batson, but he need not do so because he also asserted a denial of due process of law, see, Peters v. Kiff, and a Sixth Amendment violation, see, Taylor v. Louisiana, 419 U. S. 522, 538 (1975). Batson established a remedy for black defendants claiming denial of equal protection. To apply its "same race" or "membership" requirement to deny relief in this

> case would require us to ignore contrary holdings in Peters v. Kiff, Taylor v. Louisiana, Ballard v. United States [329 U. S. 187 (1946)], and Thiel v. Southern Pac. Co.[328 U. S. 217 (1946)]. We decline to do so.

Seubert, slip opinion at pages 6-7.

There is no legitimate policy goal served by limiting the application of the Neil decision to black defendants. All persons, including Darryl Barwick, are entitled to be tried by a fair and impartial jury selected from an cross section of the community. The trial court erred in ruling that Barwick lacked standing to object to the exclusion of blacks from his jury. This Court must reverse this case for a new trial.

ISSUE II

THE TRIAL COURT ERRED IN REFUSING TO DECLARE DEFENSE WITNESS JAMES BELLER AN EXPERT WITNESS AND IN RESTRICTING HIS TESTIMONY ON THE SOLE GROUND THAT HE DID NOT HOLD A DOCTORATE IN PSYCHOLOGY.

James E. Beller, an associate of Dr. Clell Warriner, testified about the neuropsychological testing he performed on Barwick. (R 900-973) Although the court allowed Beller to testify, the court would not qualify him as an expert witness because he did not have a doctorate and was not a licensed clinical psychologist. (R 880-899, 911, 932, 972-974) Although a trial judge's decision to find a witness to be an expert is discretionary, an abuse of discretion is evident here. Rose v. State, 506 So.2d 467 (Fla. 1st DCA), rev. denied, 513 So.2d 1063 (Fla. 1987). The error denied Barwick his right to present his insanity defense and violated his right to due process and a fair trial.

Beller has a masters degree in psychology and considerable experience in the field. (R 880-899, 1031-1035) (SR 68-71, 91-167) His work includes neuropsychological assessments and psychological evaluations. (R 880-881) He conducts group and individual therapy and makes psychological diagnoses. (R 883-884) He frequently consults on neuropsychological matters with neurologists and neurosurgeons who refer patients to him. (R 884) During his three years of practice, Beller said he has seen between 500 and 700 patients. (R 886) He has also lectured on psychological topics for Gulf Coast Community College, Tyndall Air Force Base, the State of Florida

continuing education programs for correctional officers and the Bay County School system. (R 886-887) He taught a course for graduate students in industrial psychology for the University of Southern California. (R 886-887) Beller has previously testified as an expert in both civil and criminal cases. (R 889) After considering these qualifications, the trial judge ruled that Beller was not an expert because he does not hold a Ph.D. in psychology. (R 892-899)

The court allowed Beller to give his opinion much like a lay witness, but did not permit him to give the psychological basis for his opinion. (R 880-899, 972-974, 1031-1035) As a result, his testimony was restricted and, in many instances, tentative as he tried to remain within the confines of the court's ruling. (R 911-913, 914-916, 918-919, 924-930, 932, 933, 972-974, 1031-1035) Barwick submitted a deposition as a proffer of testimony after the court denied a live proffer during trial. (R 914-916)(SR 91-167) Additionally, the trial judge and the prosecutor further compounded the problem at trial. While making objections, the prosecutor continually prefaced his statements with references to the effect that Beller was not an expert. (R 911, 912, 913, 918, 924-926) Then, after the State's cross-examination, the judge personally questioned Beller in such a manner as to convey to the jury that the court did not think the witness was credible. (R 944-949)

Recently, the First District Court of Appeal decided a case directly on point. Rose v. State, 506 So.2d 467.

Coincidently, this case was also from Bay County and James Beller was the witness involved. The defense in Rose offered Beller as an expert witness in the field of psychology. Denying Beller expert witness status, the trial judge ruled that Beller was not qualified because he did not hold a Ph.D. and was not a licensed clinical psychologist. Beller testified about the specifics of the tests he administered to Rose, but he was not allowed to testify to psychological conclusions derived from his tests and examination. Reversing the case for a new trial, the First District stated:

> We find merit in appellant's first point and hold that the trial court abused its discretion in denying appellant's request to have James Beller testify as an expert witness. The record clearly shows that the reason the trial court refused to qualify Beller as an expert was because it agreed with the prosecutor that appellant [sic] is not qualified since he is not licensed in this state as a psychologist. However, it is equally clear that a witness need not have a specific degree or license in order to testify as an expert. Section 90.702, Florida Statutes, specifically provides that a witness may be qualified as an expert "by knowledge, skill, experience, training, or education. ..." In Allen v. State, 365 So.2d 456 (Fla. 1st DCA), cert. dismissed, 368 So.2d 1373 (Fla. 1978), this Court expressly held that neither a doctorate nor prior experience as an expert witness are essential prerequisites to being qualified as an expert witness.

Rose, 506 So.2d at 470. Precisely the same error occurred in Barwick's case. The trial court, like the trial court in Rose, abused its discretion in not qualifying Beller as an expert witness.

The First District Court's decision in Rose is consistent with other court's interpretation of the rule of evidence on expert witnesses. Section 90.702, Florida Statutes, provides:

> If scientific, technical, or other specialized knowledge will assist the trier of fact in understanding the evidence or in determining a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education may testify about it in the form of an opinion; however, the opinion is admissible only if it can be applied to evidence at trial.

This rule tracks Federal Rule of Evidence 702. Neither rule requires the witness to possess any particular degree in higher education or any particular license from the state. As stated by the reporter of the evidence code: "A witness may qualify as an expert by his study of authoritative sources without any practical experience in the subject matter". Ehrhardt, Florida Evidence, Sec. 702.1 at 395 (2d ed. 1984). See, also, Seaboard Airline Railroad Company v. Lake Region Packing Association, 211 So.2d 25, 30-31 (Fla. 4th DCA 1968). In order to give an opinion on medical questions, for example, one may be qualified by study without practice, or by practice without study. Copeland v. State, 58 Fla. 26, 50 So. 621 (1909). One may also give an expert opinion based solely on the subjective symptoms of the party he examined. Tampa Transient Lines v. Smith, 155 So.2d 557 (Fla. 2d DCA 1963).

There is no fixed method by which expertise may be achieved. Likewise, there is no fixed level of achievement required. The quality of the expertise goes to the weight of the testimony and is left to the trier of fact to consider.

For example, it was error in an eminent domain case to exclude the testimony of a property appraiser who held a bachelor's degree, but who had never testified as an expert in the forum county. Estate of Horowitz v. City of Miami Beach, 420 So.2d 936 (Fla. 3d DCA 1982). As the Second District Court noted in Lee County Electric Co-op v. Lowe, 344 So.2d 308, 310 (Fla. 2d DCA 1977): "Neither must an expert -- if otherwise qualified -- be licensed in his speciality in the State of Florida in order to qualify for expert testimony". Despite a lack of formal education, an expert may qualify by showing his experience, skill, and independent study in a particular field. Sallas v. State, 246 So.2d 621 (Fla. 3d DCA 1971).

The federal cases, construing the nearly identical federal rule, are in accord. In Grindstaff v. Coleman, 461 F.2d 740 (11th Cir. 1982), the Eleventh Circuit, applying Georgia law, found an abuse of discretion where the trial court refused to allow a third year medical student to testify as an expert in childbirth procedures. The sole basis for the ruling was the fact he was not a medical doctor at the time of the plaintiff's birth in 1969. The Sixth Circuit in United States v. Barker, 553 F.2d 1013 (6th Cir. 1977), found an abuse of discretion in the judge refusing to allow a Kentucky public defender investigator to testify as a fingerprint expert. The ruling was grounded on the fact that witness belonged to no professional societies, subscribed to no professional journals, held no degree in fingerprint analysis and was not a full-time

fingerprint examiner. He had, however, worked as a fingerprint examiner in California for 1 1/2 years.

James Beller qualified as an expert in psychology and should have been allowed to testify as an expert witness. The trial court abused its discretion in ruling otherwise, and Barwick has been denied his right to due process and a fair trial. This Court must reverse this case for a new trial.

ISSUE III

THE TRIAL COURT ERRED IN ALLOWING INVESTIGATOR FRANK MCKEITHEN TO TESTIFY TO HIS LAY OPINION REGARDING BARWICK'S SANITY, SINCE MCKEITHEN HAD NO CONTACT WITH BARWICK UNTIL THE DAY AFTER THE HOMICIDE.

Investigator Frank McKeithen first contacted Barwick on the night of April 1, 1986, over 24 hours after the homicide allegedly occurred. (R 563) While investigating the crime, McKeithen saw Barwick five or six times and spent a total of about three hours in his presence. (R 1153-1154) He said Barwick conversed normally during those contacts, except for one instance when he angrily denied involvement when confronted about the homicide. (R 1154) Upon this predicate, the prosecutor asked McKeithen if he had an opinion on Barwick's sanity. (R 1154) Defense counsel objected on the ground that McKeithen was not qualified to give an opinion. (R 1154) The court overruled the objection, and McKeithen testified to his opinion that Barwick was sane. (R 1154-1155) McKeithen was not qualified to render a lay opinion about Barwick's sanity, and the trial court should not have admitted this testimony.

A nonexpert witness is not incompetent to give an opinion regarding the sanity of a defendant, if his observations and knowledge of the defendant are sufficient to support such an opinion. Garron v. State, No. 67,986 (Fla. May 19, 1988); Rivers v. State, 458 So.2d 762 (Fla. 1984). In Garron, this Court, explaining the degree of observation and knowledge necessary, said,

> A lay witness, testifying on his or her personal observations as 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, 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. Those lay witnesses whose opinions were based on observations occurring the next day, or sometime thereafter, should not be admitted. A nonexpert is not competent to give lay opinion testimony based on his personal observation that took place a day removed from the events giving rise to the prosecution. This is clearly the domain of experts in the field of psychiatry. 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, slip opinion, at pages 6-7. McKeithen's knowledge and observations were insufficient. Like the inadmissible lay opinion testimony in Garron, McKeithen's opinion was premised upon observations commencing more that a day after the time of the alleged crime.

McKeithen's opinion testimony should not have been admitted. Barwick urges this Court to reverse his case for a new trial.

ISSUE IV

THE TRIAL COURT ERRED IN REFUSING TO GIVE BARWICK'S SPECIAL REQUESTED INSTRUCTION ON HIS ALTERNATE THEORY OF DEFENSE THAT HE LACKED THE MENTAL CAPACITY TO FORM A SPECIFIC INTENT OR TO PREMEDITATE AT THE TIME OF THE CRIME.

At the jury instruction charge conference, Barwick submitted a special, written requested jury instructions 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. (R 1270-1271) Barwick argued that his diminished mental capacity should be a defense to the specific intent and the premeditation elements of the offenses charged. (R 1271) He analogized the defense to the availability of an intoxication defense for specific intent crimes. (R 1271) See, e.g., Cirack v. State, 201 So.2d 706 (Fla. 1967); Garner v. State, 28 Fla. 113, 9 So. 835 (1891). The court denied the requested instructions on this theory. (R 1271)

Although several cases have held that the diminished capacity defense is not available for specific intent crimes in this state, e.g., Everett v. State, 97 So.2d 241 (Fla. 1957); Ezzell v. State, 88 So.2d 280 (Fla. 1956); Bradshaw v. State, 353 So.2d 188 (Fla. 2d DCA 1977); Tremain v. State, 336 So.2d 705 (Fla. 4th DCA 1976), this Court is currently reconsidering this question in a case certified by the First District Court of Appeal. Chestnut v. State, 505 So.2d 1352 (Fla. 1st DCA). Adam Chestnut was precluded from presenting expert testimony about his impaired mental capacity which prevented him from

premeditating or formulating a specific intent. The First District Court affirmed the trial judge's ruling. However, Judge Ervin, in his concurring and dissenting opinion in Chestnut, noted language in this Court's decision in Gurganus v. State, 451 So.2d 817 (Fla. 1984), which lead him the conclusion that this Court had implicitly receded from the position that diminished capacity is not a defense to specific intent or premeditation. Chestnut, 505 So.2d at 1355-1356. The Gurganus opinion said,

> When specific intent is an element of the crime charged, evidence of voluntary intoxication, or for that matter evidence of any condition relating to the accused's ability to form a specific intent, is relevant.

451 So.2d at 822-823. On rehearing, the First District certified the question to this Court. 505 So.2d at 1357. Even though Barwick was not precluded from presenting evidence of his mental incapacity as was the defendant in Chestnut, he was deprived of complete instructions on this theory of defense. Consequently, this Court's resolution of the question in Chestnut will control the issue here.

This question should be answered in favor of the diminished capacity defense to the elements of premeditation and specific intent. As Judge Ervin recognized, such a rule would cure the anomalous situation of allowing mental impairment as the result of intoxication to act as a defense, while not allowing mental impairment for any other reason to be a defense to specific intent crimes. 505 So.2d at 1355. Other

jurisdictions recognize such a defense. See, e.g., Hughes v. Mathes, 576 F.2d 1250 (7th Cir. 1978); United States v. Brawner, 471 F.2d 969 (D.C. Cir. 1972)(en banc); State v. Brooks, 97 Wash.2d 873, 651 P.2d 217 (1982); State v. Christensen, 129 Ariz. 32, 628 P.2d 580 (1981); Commonwealth v. Gould, 405 N.E.2d 927 (Mass. 1980); People v. Wetmore, 22 Cal.3d 318, 149 Cal.Rptr. 265, 583 P.2d 1308 (1978). See also, People v. McDowell, 69 Cal.2d 737, 73 Cal.Rptr. 1, 447 P.2d 97 (1968) (failure to introduce psychiatric testimony regarding capacity to form specific intent in prosecution for robbery, burglary and murder deprived defendant of effective assistance of counsel). The courts reason that just as evidence of intoxication bears on a defendant's ability to premeditate intent to commit murder, so, too, does evidence of a mental defect or disorder.

In United States v. Brawner, 471 F.2d 969 (D.C. Cir.1972), the Court of Appeals, sitting en banc, adopted a new standard for the insanity defense. It also considered a defense based on mental impairment, short of insanity, which would not completely exonerate but would negate a specific mental element of certain crimes. The court ruled that expert testimony of an abnormal mental condition is admissible when it bears on the existence of a specific mental element necessary for a crime, even though there is no evidence of insanity. The court reasoned:

> The issue often arises with respect to mental condition tendered as negating the element of premeditation in a charge of first degree

> premeditated murder. As we noted in Austin v. United States, 127 U.S. App.D.C. 180, 382 F.2d 129 (1967), when the legislature modified the common law crime of murder so as to establish degrees, murder in the first degree was reserved for intentional homicide done deliberately and with premeditation, and homicide that is intentional but 'impulsive,' not done after 'reflection and meditation,' was made murder only in the second degree. (127 U.S.App.D.C. at 187, 382 F.2d at 135).
>
> An offense like deliberated and premeditated murder requires a specific intent that cannot be satisfied by showing that defendant failed to conform to an objective standard. This is plainly established by the defense of voluntary intoxication. . . .
>
> * * *
>
> Neither logic nor justice can tolerate a jurisprudence that defines the elements of an offense as requiring a mental state such that one defendant can properly argue that his voluntary drunkenness removed his capacity to form the specific intent but another defendant is inhibited from a submission of his contention that an abnormal mental condition, for which he was in no way responsible, negated his capacity to form a particular specific intent, even though the condition did not exonerate him from all criminal responsibility.

471 F.2d at 998-999. The court noted that its holding found support in the opinions of the highest courts of 15 states. Florida should join that number.

Barwick urges this Court to hold that mental impairment short of insanity can be a defense to crimes requiring premeditation or specific intent. He further asks this Court to hold that he was entitled to complete instructions on this theory of defense as he requested at trial. See, e.g., Bryant v. State, 412 So.2d 347 (Fla. 1982). Finally, as a result of

such ruling, he asks that his conviction be reversed for a new trial.

ISSUE V

THE TRIAL COURT ERRED IN REVOKING BARWICK'S PROBATION FOR THE OFFENSES OF SEXUAL BATTERY AND BURGLARY BASED ON HIS SUBSEQUENT CONVICTION FOR MURDER.

On December 2, 1983, Barwick was convicted for sexual battery and burglary and sentenced to five years followed by ten years probation. (R 1868-1872) He was on probation at the time he was indicted for the murder and related offenses. On April 30, 1986, a affidavit for violation of probation was filed alleging as the sole violation the commission of the murder. (R 1878-1881) At a hearing after Barwick's conviction for murder, the court found him in violation of probation on the basis of the murder conviction. (R 1679-1689, 1891) Judge Turner adjudged Barwick guilty and sentenced him to seventeen years on each count. (R 1690-1691, 1886-1890)

Barwick's conviction for murder must be reversed for the reasons presented in Issues I through IV of this brief. Since the revocation of his probation was premised entirely on the murder conviction, the order revoking Barwick's probation and the sentences imposed for the sexual battery and burglary must also be reversed. E.g., 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).

ISSUE VI

THE TRIAL COURT ERRED IN SENTENCING BARWICK TO DEATH BECAUSE IT CONSIDERED IMPROPER AGGRAVATING CIRCUMSTANCES AND FAILED TO CONSIDER EXISTING MITIGATING CIRCUMSTANCES IN VIOLATION OF THE EIGHTH AND FOURTEENTH AMENDMENTS.

A.

The Trial Court Should Not Have Found As An Aggravating Circumstance That The Homicide Was Committed To Avoid Arrest.

Concluding that the homicide was committed to avoid arrest, the court found the offense qualified for the aggravating circumstance provided for in Section 921.141(5)(e) Florida Statutes and stated its findings as follows:

> 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 aggravating circumstance.

(R 2336-2337)

The avoiding arrest aggravating factor is not applicable in cases where the victim is not a police officer, unless the evidence proves that the only or dominate motive for the killing was to eliminate a witness. E.g., Perry v. State, No. 68,482 (Fla. March 10, 1988); Floyd v. State, 497 So.2d 1211, 1215, (Fla. 1986); Bates v. State, 465 So.2d 490, 492 (Fla. 1985); Riley v. State, 366 So.2d 19, 21-22 (Fla. 1978). Mere evidence that the homicide victim was the only witness to other felonies does not meet this requirement. 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). Nothing more was present here, and the trial judge's findings were not supported by the evidence. The trial court erred in finding and considering in sentencing that the homicide was committed to avoid arrest.

Initially, William Barwick and Victoria Burns did not testify that Darryl said he killed the victim because she had seen his face. (R 827-828, 850-851) Their testimony, at best, indicates that the victim looked at Darryl. This does not prove that Darryl in turn killed from the desire to eliminate a witness. Moreover, even if Darryl made such a statement, it was not necessarily true. In an affidavit submitted to the court at sentencing, Dr. James Hord explained that "it is psychologically predictable that someone who has engaged in an irrational act, when asked for an after-the-fact explanation of that act, will believe that that irrational explanation, although true, is not acceptable to his questioner." (SR 37)

On cross examination of William Barwick, questioning on this point was as follows:

> Q. He told you that he had been fighting with her and she broke loose from and she fell back against the wall and she was staring at him and that's when he thought in his mind that the 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.
>
> Q. Now, you concealed that from the police, didn't you?
>
> A. I concealed that, what do you mean?
>
> Q. You didn't tell the police that Darryl had told you that he had killed -- (Interrupted).
>
> A. In my statement?
>
> Q. That he killed this bitch, in his words?
>
> A. He said in his mind and in the statement they put that he said it which he never did say it. He just said that in his mind he said that; he told me that, yes.
>
> 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 827-828) Victoria Burns testified that William, not Darryl, told her that Darryl killed the girl because she saw his face. (R 850) Although she had attributed the statement to Darryl in a pretrial deposition, she corrected that information at trial. (R 850-851) She explained that she was scared when she gave the statement and did not correctly identify the source of her information. (R 851)

Darryl Barwick's statements to others contradict the notion that he killed primarily to avoid arrest. Darryl Barwick stabbed the victim in a panic reaction to the unexpected physical resistance he encountered during the robbery and attempted sexual battery. Elimination of a witness was not his motive. See, Perry v. State, No. 68,482 (Fla. March 10, 1988). Teri Race testified that Darryl said that while in the apartment the woman started fighting him and he killed her with a steak knife from the kitchen in the apartment. (R 712-714) She testified that Darryl told her that "once he started that he just couldn't quit and it was like someone inside of him that took over, and from that point on it was like somebody different." (R 713) In his confession to law enforcement, Barwick said as he walked inside, the woman jumped up and yelled, "Get out." (SR 182) He pushed her down and said he would leave in a few minutes. (SR 182) She struck him, and he pulled the knife and said, "Don't wanna hurt you. I can leave in a few minutes; don't give me no trouble." (SR 202) She struck Barwick two or three more times. (SR 202) Barwick stabbed her, and they struggled, lost their balance and fell to the floor. (SR 203) She continued hitting him and he continued stabbing her. (SR 203) Barwick told the detectives, "[I]t's like I lost control. I, I cou ...I didn't, I, I wanted to stop, I knew I did, you know, like I was wrong, but I couldn't." (SR 196) Finally, Barwick told the psychologists when the woman panicked and became violent, he also panicked. (R 922) They fell during the struggle and Barwick hit his

head. (R 922, 968) Their struggle took them to the kitchen where Barwick grabbed something and began striking. (R 922, 968) He did not realize until later that the object he grabbed was a knife. (R 923, 968)

The opinions of psychologists about Barwick's mental condition and the circumstances of the killing itself negate the idea that the killing was committed to avoid arrest. When he examined Barwick after the homicide, Clell Warriner concluded that Barwick suffered from a panic rage reaction. (R 981, 983-988, 993-1001) The blow the head Barwick received while struggling with victim induced the reaction. (R 984-987) This caused him to relive a time in his childhood when he was knocked unconscious and awoke in a rage. (R 984-986) Because of Barwick's poor behavior controls and a tendency to act compulsively, he was unable to control this rage. The intensity of the reaction temporarily rendered him unaware of his behavior or its consequences. (R 987-988) This uncontrolled, compulsive, rage behavior explained the why 38 stab wounds were administered. (R 986-988) The medical examiner recognized that the wounds were a product of a crime of passion or great rage. (R 546-559) Even the State's expert, Dr. Harry McClaren, was of the opinion that the homicide occurred as the result of momentary extreme anger. (R 1250-1251)

The trial court should not have found and considered as an aggravating circumstance that the homicide was committed to avoid arrest.

B.

The Trial Court Should Not Have Found And Considered As An Aggravating Circumstance That The Homicide Was Especially Heinous, Atrocious Or Cruel.

In State v. Dixon, 283 So.2d 1 (Fla. 1973), this Court defined the aggravating circumstance provided for in Section 921.141(5)(h), Florida Statutes and the type of crime to which it applies as follows:

> It is our interpretation that heinous means extremely wicked or shockingly evil; that atrocious means outrageously wicked and vile; and that cruel means designed to inflict a high degree of pain with utter indifference to, or even enjoyment of the suffering of others. What is intended to be included are those capital crimes where the actual commission of the capital felony was accompanied by such additional acts as to set the crime apart from the norm of capital felonies--the conscienceless or pitiless crime which is unnecessarily torturous to the victim.

Ibid at 9.. Finding that the homicide fit this definition, the trial court stated,

> 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 wounds were superficial, in that they were less than omne 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 the 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 defendant 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)

This aggravating factor should not have been weighed in the sentencing process for several reasons. First, multiple stab wounds do not necessarily render a homicide especially heinous, atrocious or cruel. Demps v. State, 395 So.2d 501 (Fla. 1981) Second, the victim's physical suffering was of relatively short duration. The medical examiner said she died within five or ten minutes of the wounds but would have lost consciousness before that time. (R 518, 538-539) Living for several minutes in pain does not qualify the crime for the aggravating circumstance. Teffeteller v. State, 439 So.2d 840, 846 (Fla. 1983). Finally, and most importantly, the manner of the killing was directly caused by Barwick's mental impairment at the time. Both the medical and psychological experts recognized this fact. (R 554, 986-988) Administering numerous stab wounds is consistent with the frenzied, repetitive attack of someone who is mentally disturbed. It is not the crime of someone consciously trying to inflict pain. Barwick realizes that the mental state of the perpetrator does not negate the finding of this aggravating circumstance. See, Michael v. State, 437 So.2d 138, 141-142 (Fla. 1983). However, on several occasions, this Court has held that the causal relationship

between a defendant's mental state and the severity of the manner of death, such a multiple stab wounds, mitigates the aggravating quality of those wounds. E.g., 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); Jones v. State, 332 So.2d 615 (Fla. 1976). Consequently, the trial court's failure to consider Barwick's mental impairment when evaluating the weight afforded to the aggravated quality of the manner of death renders this circumstance invalid.

The trial court should not have found and considered the heinous, atrocious or cruel aggravating circumstance. Even if not improperly found, the circumstance should not have been considered without weighing it in light of Barwick's mental impairment at the time of the crime. This factor has skewed the sentencing decision, and this Court must reverse Darryl Barwick's death sentence.

C.

The Trial Court Failed To Include Nonstatutory 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); Lockett v. Ohio, 438 U.S. 586, 98 S.Ct. 2954, 57 L.Ed.2d 973 (1978). In sentencing Barwick to death, the trial court failed to comply with this

constitutional mandate, and death sentence imposed is unconstitutional.

Barwick presented evidence of several mitigating circumstances. While the applicability of the statutory mitigating factors concerning substantially impaired capacity and extreme mental or emotional disturbance was in dispute, there was no dispute that Barwick suffered some degree of mental impairment. At the very least, Barwick's mental condition qualified for a nonstatutory mitigating circumstance. Furthermore, the evidence was undisputed that he experienced physical and emotional abuse as a child. See, e.g., Holsworth v. State, No. 67,973 (Fla. February 18, 1988); Herring v. State, 446 So.2d 1049 (Fla. 1984); Scott v. State, 411 So.2d 866 (Fla. 1982). Barwick's prison counselor testified that he presented no adjustment problems while in prison and did not evidence a tendency toward violence. (R 1115-1139) See, Fead v. State, 512 So.2d 176 (Fla. 1987). The counselor also testified that Barwick seemed genuinely interested in treatment for his mental problems. (R 1134) This fact was confirmed by Barwick's voluntarily seeking counselling just before his arrest. (R 678-679, 684-687, 1083-1085) Finally, Barwick was gainfully employed with his father's concrete business. See, McCampbell v. State, 421 So.2d 1072 (Fla. 1982).

The trial court was not free to ignore these undisputed mitigating circumstances in imposing sentence. This Court must reverse Barwick's death sentence.

ISSUE VII

THE TRIAL COURT ERRED IN SENTENCING BARWICK TO DEATH, BECAUSE THE ULTIMATE PENALTY IS DISPROPORTIONAL TO THE CRIME COMMITTED.

The State proved that Barwick killed during the commission of a felony when the victim struggled with him. Barwick did not plan a murder. Barwick, suffering from mental and emotional impairment, lost control in a panic reaction to the stress of the circumstances. He did not commit an offense warranting his execution.

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. E.g., Holsworth v. State, No. 67,973 (Fla. February 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); Jones v. State, 332 So.2d 615 (Fla. 1976). In Holsworth, the defendant, like Barwick, had a personality disorder with schizoid characteristics. His mental disorder, like Barwick's, was attributable to physical abuse at the hands of his father. While committing a residential burglary, Holsworth attacked a mother and her daughter with a knife. The mother broke Holsworth's knife, but he obtained another from the kitchen and continued his attack. Both victims received multiple stab wounds. The daughter died. Although the jury recommended life, the trial judge found no mitigating circumstances and imposed death. However, this Court reduced the sentence to life citing Holsworth's drug usage, his mental impairment, his

abuse as a child and his potential for productivity in prison. In Amazon, the defendant's mental condition and crime was also similar to Barwick's. Amazon was nineteen years old with the emotional development of a thirteen-year-old, he was raised in a negative family setting and had a history of drug abuse. There was inconclusive evidence that Amazon had ingested drugs on the night of the murders. During a burglary, robbery and sexual battery, Amazon lost control and, in a frenzied attack, administered multiple stab wounds to his robbery and sexual battery victim and her eleven-year-old daughter, who was telephoning for help for her mother. The trial court found no mitigating circumstances. Reversing the death sentence, this Court said, "In light of these mitigating circumstances, one may see how the aggravating circumstances carry less weight and could be outweighed by the mitigating factors." 487 So.2d at 13. Barwick is likewise deserving of a life sentence. His crime was a product of his mental impairment which was caused by his emotional and physical abuse as a child. Like Holsworth and Amazon, Barwick had a reputation for nonviolence. Barwick also had a positive prison record, and prior to his arrest, he was actively seeking help for his mental problems.

Impulsive killings during the course of other felonies, even where the defendant was not suffering from an impaired mental capacity, have also been found unworthy of a death sentence. See, Proffitt v. State, 510 So.2d 896 (Fla. 1987)(defendant stabbed victim as he awoke during a burglary of his residence); Caruthers v. State, 465 So.496 (Fla.

1985)(defendant shot a convenience store clerk three times during an armed robbery); Rembert v. State, 445 So.2d 337 (Fla. 1984)(defendant bludgeoned store owner during a robbery); Richardson v. State, 437 So.2d 1091 (Fla. 1983)(defendant beat victim to death during a residential burglary in order to avoid arrest). Certainly, with the added mitigation of mental impairment contributing to the crime, Barwick's life must be spared.

Darryl Barwick's death sentence is disproportional to his crime. This Court must reverse his death sentence with directions to the trial court to impose life.

ISSUE VIII

THE TRIAL COURT ERRED IN INSTRUCTING THE JURY THAT EACH OF BARWICK'S PREVIOUS AND CONTEMPORANEOUS CONVICTIONS FOR OTHER OFFENSES COULD BE CONSIDERED AS SEPARATE AGGRAVATION CIRCUMSTANCES.

This question does not involve the giving of jury instructions on two or more statutory aggravating circumstances which are based on the same evidence. Although such doubling of aggravating circumstances is improper, see, e.g., Provence v. State, 337 So.2d 783 (Fla. 1976), Barwick realizes that the court can, nevertheless, instruct the jury on all relevant aggravating circumstances. See, Suarez v. State, 481 So.2d 1201, 1209 (Fla. 1985). Instead, this issue concerns the trial court's creation of two or more aggravating circumstances from one statutory circumstance. Section 921.141, Florida Statutes (1986) provides for nine aggravating circumstances, and Barwick should have been subject to no more. But, under the trial court's theory of instructing the jury, a defendant could be subject to many more aggravating circumstances depending on the number of his prior or contemporaneous convictions. Florida's capital sentencing scheme never envisioned more aggravating circumstances than the number listed in Section 921.141 Florida Statutes. See, State v. Dixon, 283 So.2d 1, 9 (Fla. 1973). Moreover, this Court never interpreted the statute as allowing a single aggravating circumstance to be severed into two or more. Ibid.

At the penalty phase jury instruction charge conference, the State asked that the jury be instructed to consider each of

Barwick's prior convictions for violent felonies and each of his contemporaneous convictions as separate and distinct aggravating circumstances. (R 1441-1448) The result was two aggravating circumstances under Section 921.141(5)(b) Florida Statutes for Barwick's prior convictions for sexual battery and burglary with an assault. Under Section 921.141(5)(d), the State's theory resulted in three aggravating circumstances because the homicide occurred during the commission of a robbery, an attempted sexual battery and a burglary. The court overruled Barwick's objections that such an instruction would constitute an improperly doubling of single statutory aggravating circumstances and instructed the jury as the State requested. (R 1441-1448, 1511-1512) As read to the jury, the instructions 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 or 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.
>
> The crime for which the Defendant is to be sentenced was committed for the purpose of preventing or avoiding a lawful arrest.
>
> The crime for which the Defendant is to be sentenced was committed for financial gain.
>
> The crime for which the Defendant is to be sentenced was especially heinous, atrocious or cruel.
>
> The crime for which the Defendant is to be sentenced was committed in a cold, calculated and premeditated manner without any pretense of moral or legal justification.

(R 1511-1512) The court compounded the prejudicial impact of the instructions by refusing to give Barwick's requested instruction prohibiting the doubling of aggravating circumstances. (R 1468-1471)

Even though the trial judge in his sentencing order did not improperly severe single aggravating factors into two or more (R 2336-2337) Barwick was entitled to have the jury properly instructed on the number of aggravating circumstances to be considered. The jury's recommendation is tainted, and Barwick's sentence based in part on that recommendation is also tainted. His rights under the Eighth and Fourteenth Amendments have been violated, and he urges this Court to reverse his death sentence.

ISSUE IX

THE TRIAL COURT ERRED IN GIVING UNDUE WEIGHT TO THE JURY'S RECOMMENDATION OF DEATH, THEREBY SKEWING THE SENTENCING WEIGHING PROCESS.

The trial court applied an erroneous legal standard regarding the weight to be afforded a jury's recommendation of death. In his sentencing order, the trial court made the following statement regarding his reasons for imposing the death sentence:

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

(R 1746, 2336) While a jury's recommendation of death should be given due consideration, it can, indeed, be overstressed. Ross v. State, 384 So.2d 1269 (Fla. 1980). 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), but the same is not true for a recommendation of death. Ross, at 1274-1275. With a recommendation of death, the trial judge is bound to exercise his own independent judgment in imposing sentence. Ibid.

Based on the sentencing court's statements, it is apparent that the court gave too much deference to the jury's recommendation and failed to use its independent judgment in imposing sentence. Barwick's death sentence has been imposed in violation of the Eighth and Fourteenth Amendments and must be reversed.

ISSUE X

THE TRIAL COURT ERRED IN GIVING THE STANDARD PENALTY PHASE JURY INSTRUCTIONS WHICH DIMINISH THE RESPONSIBILITY OF THE JURY'S ROLE IN THE SENTENCING PROCESS.

In Caldwell v. Mississippi, 472 U.S. 320, 105 S.Ct. 2633, 86 L.Ed.2d 231 (1985), the Supreme Court held that any suggestion to a capital sentencing jury that the ultimate responsibility for sentencing rests elsewhere violates the Eighth and Fourteenth Amendments. The Court noted that a fundamental premise supporting the validity of capital punishment is that the sentencing jury is fully aware of the magnitude of its responsibility.

> [An] 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, 472 U.S. at 333. Although a Florida jury's role is to recommend a sentence, not impose one, the reasoning of Caldwell is applicable. See,Adams v. Wainwright, 804 F.2d 1526 (11th Cir. 1986), modified, 816 F.2d 1493 (11th Cir. 1987), cert. granted, Dugger v. Adams, ___ U.S. ___ (case no. 87-121 March 7, 1988) A recommendation of life affords the capital defendant greater protections than one of death. Tedder v. State, 322 So.2d 908 (Fla. 1975). Consequently, the jury's decision is critical, and any diminution of its importance violates Caldwell. Adams; Mann v. Dugger, 817 F.2d 1471, 1489-1490 (11th Cir.), on rehearing, 844 F.2d 1446 (11th Cir. 1988).

The trial court read the standard penalty phase instructions to the jury. In part, those instructions stated:

> The final decision as to what punishment should 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.
>
> * * * *
>
> As you have been told, the final decision as to what punishment should be imposed is the responsibility of the Judge ....

(R 1384, 1510) The instruction is incomplete, misleading and misstates Florida law. Contrary to the court's assertion, the sentence is not solely his responsibility. The jury recommendation carries great weight and a life recommendation is of particular significance. Tedder. The instruction failed to advise the jury of the importance of its recommendation. The instruction failed to mention the requirement that the sentencing judge give the recommendation great weight. Finally, the instruction failed to mention the special significance of a life recommendation under Tedder. The instruction violates Caldwell. Barwick realizes that this Court has ruled unfavorably to this position. E.g., Combs v. State, No. 68,477 (Fla. Feb. 18, 1988); Aldridge v. State, 503 So.2d 1257, 1259 (Fla. 1987). However, he asks this Court to reconsider this ruling and reverse his death sentence.

CONCLUSION

For the reasons and arguments presented in Issues I through IV, Darryl Barwick asks this Court to reverse his judgments and sentences with directions that he be afforded a new trial. In Issue V, Barwick asks that the order revoking his probation and sentencing him on the sexual battery and burglary charges be reversed. For the reasons argued in Issues VI through X, Barwick asks that his death sentence be reduced to life imprisonment.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I have hand delivered a copy of the foregoing to the Attorney General's Office, The Capitol, Tallahassee, Florida; and a copy has been mailed to the appellant, Darryl Bryan Barwick, #092501, Florida State Prison, Post Office Box 747, Starke, Florida, 32091, on this 3 day of June, 1988.

W. C. MCLAIN