IN THE SUPREME COURT OF FLORIDA

DARRYL BARWICK,

Appellant,

vs.

STATE OF FLORIDA,

Appellee.

CASE NO. 80,446

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

ANSWER BRIEF OF APPELLEE

ROBERT A. BUTTERWORTH
ATTORNEY GENERAL

RICHARD B. MARTELL
CHIEF, CAPITAL APPEALS
FLORIDA BAR NO. 0300179

DEPARTMENT OF LEGAL AFFAIRS
THE CAPITOL
TALLAHASSEE, FL 32399-1050
(904) 488-0600

COUNSEL FOR APPELLEE

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES — PAGES

CONSTITUTIONS AND STATUTES PAGES

OTHER SOURCES PAGES

STATEMENT OF THE CASE AND FACTS

Appellee generally accepts Appellant's Statement of the Case and Facts, subject to the following additions and/or clarifications.

As to the facts relevant to the pretrial motions to disqualify the trial judge, the State does not read the record as reflecting that Barwick was aware that Attorney Lake had consulted with his prior attorneys concerning the motion to recuse (Initial Brief at 9). Further factual amplifications as to this claim are presented in Point I of the Argument section, infra.

As to the evidence presented at the guilt phase, it should be noted that one of a set of six knives, kept in the kitchen of the victim's apartment, was discovered to be missing after the murder (T 215-6; 307-9).[1] Detective McKeithen testified, at one point, that at the time the victim's body was discovered, the top portion of her bikini bathing suit had been pulled up (T 256). As to the condition of the victim's body, the medical examiner testified that there were "one and a half dozen" defensive wounds on each hand (T 453). Finally, as to Barwick's confession of April 15, 1986, Barwick told Detective McKeithen that he had walked through the Russ Lake Apartment complex, and, by his own admission, had seen the victim sunbathing outside in a bikini (SR 313, 325, 332). Another resident of the complex saw Barwick staring at her, as she lay sunbathing, and she also saw Appellant

---

[1] (T ___) represents a citation to the transcript in the instant case, whereas (R ___) represents a citation to the formal record of pleadings etc.; (SR ___) represents a citation to the supplemental record.

walk towards to the victim's apartment (T 232-3). After initially viewing the victim, Rebecca Wendt, Barwick went home, where he ate lunch, gathered up his batting gloves and his "tomato cutting knife", which he hid in the back pocket of his pants (SR 314, 333).

As to the evidence presented by the State at the penalty phase, it should be noted that the victim of Barwick's prior sexual assault, Melissa Dom, testified that she had asked Appellant why he had brought his own knife to his apartment, in that he had utilized her own butcher knife in holding her at bay; Barwick replied that it was "better to use the other person's" (T 615-16). Further, as to the testimony presented by Barwick's family members, it should likewise be noted that Appellant's sister, Lovey, testified that Appellant's father had not singled Darryl out for beatings, and that, in general, the good times and the bad times were about equal, as far as growing up with her parents was concerned (T 644, 648). Barwick's brother, William, likewise testified that the bad times did not outweigh the good (T 660). Barwick's half-sister, Janice Santiago, testified that Appellant's father had been more lenient towards him than towards the other children (T 827-8); she also stated that when Appellant's father had discharged a gun into the floor of the house, he had thought that it had been unloaded (T 826).

The defense called six mental health experts at the penalty phase, and additionally read into evidence the testimony of Dr. Walker, who was too ill to attend; the defense also called Barwick's probation officer, Ernest Langford, who stated that he had seen Appellant on the afternoon after the murder, and that

Appellant had not seemed to be acting unusual at such time, although he had stated that he "might do something he should not" (T 814). One of the experts, Dr. McClaren, diagnosed Appellant as suffering from an antisocial personality disorder, something which was not as serious as a mental illness, and something which a lot of criminal defendants suffered from, given the fact that the disorder was characterized by rebelliousness and repeated conflict with society's rules (T 761-4). Like Dr. Annis, McClaren specifically testified that neither statutory mitigating factor relating to mental state applied (T 767-8). Barwick presented one of the experts, Dr. Beller, with a relatively detailed account of the murder (T 789-792). In this version, Barwick apparently did not initially cruise through the apartment complex, but rather was drawn there while walking along the street. Appellant allegedly saw a shining object on the ground, went over to examine it, and bumped into a car, whereupon he entered the victim's apartment and she began screaming (T 789); in this version of events, Barwick "panicked" and stabbed the victim with a knife from the kitchen table (T 770). Another expert, Dr. Warriner, testified that, in the past, Appellant had been accused of exposing himself and also of "hitting a girl after she called him a name"; Barwick had "touched a lady inappropriately" (T 839). The final expert, Dr. Walker, who diagnosed Appellant as suffering from IED or intermittent explosive disorder, testified that such diagnosis was somewhat controversial, in that other mental health experts did not recognize it as a mental condition; he also stated that such condition could not coexist with an antisocial personality disorder (T 887-8).

Finally, as to the sentencing findings (Initial Brief at 4), it is the State's position, as more fully set forth in Point VII, infra, that the sentencer afforded weight to all nonstatutory factors "on which there [had] been any significant evidence produced." (R 1291-2).

SUMMARY OF ARGUMENT

Appellant raises twelve points on appeal, five in regard to his convictions, and seven as to his sentence of death. As to his convictions, Appellant's primary point relates to the denial of his pretrial motions to disqualify the judge. It is the State's position that reversible error has not been demonstrated, in that neither motion to recuse was legally sufficient, and, contrary to the allegations in the Initial Brief, the judge did not dispute the truth of any of the allegations therein; Appellee also contends that this Court's prior denial of Barwick's petition for writ of prohibition constituted a merits ruling as to the sufficiency of his motion to disqualify Judge Foster. Appellant's other conviction issues are not compelling. Assuming that Barwick sustained his initial burden of proof, the State proffered a sufficient and proper racially-neutral explanation for its peremptory challenge of prospective juror Peace - the fact that a relative of hers had recently been discharged from the police force for dishonesty and/or involvement with drugs. As to the admission into evidence of a witness's blood type, it is clear that no error therein could justify relief to Barwick, and the prosecutor's remarks now at issue were either innocuous or fair reply to the prior defense argument. Appellant attacks the sufficiency of the evidence as to only one of his convictions - that for attempted sexual battery - and Appellee would contend that sufficient evidence was adduced to present a question for the jury to resolve.

As to the sentence of death, Barwick challenges only three of the six aggravating circumstances found. Appellant's attack upon the heinous, atrocious or cruel factor is without merit, as the victim in this case was stabbed thirty-seven (37) times and sustained a significant number of defensive wounds, thus indicating not only resistance but also conscious pain, suffering and awareness of impending death; assuming that any point of error has been preserved, the jury instruction utilized as to this factor has previously been adjudged constitutional by this Court. Appellant's attacks upon the aggravating circumstances relating to the commission of the homicide during an attempted sexual battery and commission of the felony in a cold, calculated and premeditated manner are unavailing, as is any allegation of disproportionality. This crime was in every respect a calculated murder, whose express purpose was sexual battery. Barwick, in 1983, broke into a woman's apartment and raped her at knifepoint; although the victim in that case convinced Barwick that she would not report the offense, she in fact did so, and Barwick went to prison. Several months after being released and put on probation, Barwick committed the instant offense, and murdered the victim in an unsuccessful attempt to avoid yet another arrest.

Contrary to the representations in the Initial Brief, the sentencing judge did not ignore the non-statutory mitigation presented as to Barwick's childhood, and, in fact, the sentencing order expressly reflects that such evidence was considered and afforded weight. Caselaw is clear that Appellant was not

entitled to a jury instruction on the statutory mitigating circumstance of duress or domination by another, and fundamental error has not been demonstrated in regard to the prosecutor's references to sympathy. Finally, this Court has already rejected Barwick's allegation concerning alleged racial bias in sentencing in Bay County, and the instant convictions and sentence of death should be affirmed in all respects.

ARGUMENT

POINT I

REVERSIBLE ERROR HAS NOT BEEN DEMONSTRATED, IN REGARD TO THE DENIAL OF APPELLANT'S MOTION TO DISQUALIFY JUDGE FOSTER

As his first, and primary, point on appeal, Barwick contends that Judge Foster erred in denying Appellant's motions to disqualify, in that such were allegedly legally sufficient; Appellant also maintains that the judge erred in denying the renewed motion to disqualify, and that he improperly disputed the merits of the motions, thus creating another ground for recusal. Based upon such precedents of this Court as Livingston v. State, 441 So.2d 1083 (Fla. 1983), and Bundy v. Rudd, 366 So.2d 440 (Fla. 1978), Barwick argues that his convictions should be reversed, and that the cause should be remanded to the circuit court for what would be his fourth trial on these charges. The State would contend that such extraordinary relief is not warranted, and that the motions to disqualify were legally insufficient; the State would also note that Barwick's trial was not held until a year after the denial of the recusal motions, and that the attorney who actually represented Appellant at trial never voiced any concern that Judge Foster might be less than impartial. Because the record facts are highly relevant to the issue presented on appeal, Appellee will briefly review such before proceeding to the legal arguments.

A. RELEVANT FACTS OF RECORD

Barwick was indicted on these offenses in April of 1986, and the original trial judge, Judge Bowers, recused himself on his own motion (R 239). Barwick was at this point represented by

the public defender, and Judge Costello was the presiding judge. The public defender moved for the appointment of psychiatric experts, and additionally moved to have Barwick examined by a neurologist, and such relief was granted (R 235, 267-269, 295-297, 302). In November of 1986, Barwick moved to recuse Judge Costello on the basis that she had received an ex parte communication; the motion was granted, and Judge Turner assumed responsibility for the case (R 484-500). The matter proceeded to trial before Judge Turner shortly afterwards, and Barwick was convicted on all counts and sentenced to death. On appeal, this Court reversed and remanded for a new trial on June 15, 1989. Barwick v. State, 547 So.2d 612 (Fla. 1989).

When jurisdiction returned to the trial court, Barwick moved to fire his attorneys, and the Public Defender's Office certified a conflict of interest; Judge Turner then appointed Roy Lake to represent Appellant (R 700-701, 710-711). In June of 1990, defense counsel moved for the appointment of an expert, pursuant to Fla.R.Crim.P. 3.216, and Dr. Blau was appointed (R 712-714). In September of 1990, defense counsel moved for a neurological examination of Appellant, and such was granted (R 762); defense counsel's request for leave to hire an investigator was likewise granted (R 763-769, 774-776, 770). Defense counsel Lake also moved for the appointment of co-counsel, on the grounds that he could not be effective without assistance; that request was granted (R 789-790, 888). On January 9, 1991, Barwick's counsel requested appointment of a psychiatrist, and Judge Bowers, who had once again resumed responsibility for the case, once again recused himself (R 893-898). On February 28, 1991, Judge Foster was assigned to the case (R 899).

A hearing was held on pending motions on March 19, 1991, and, at such time, the judge expressed some concern that the prior order appointing the defense investigator had not included a fee cap or hourly rate; defense counsel presented no objection to the judge's statement that a subsequent hearing should be held, at which the county attorney would be present (T 85-87). It was also confirmed that Dr. Miller would be appointed as the defense neurologist (T 92-95). Defense counsel subsequently requested that Dr. Robert Phillips of Yale be appointed as the defense psychiatrist; Judge Foster asked the defense to attempt to locate a local psychiatrist, but indicated that if one were not available, then one would be appointed "wherever he, where he may be" (T 110).

At a subsequent hearing on April 2, 1991, defense counsel requested interim payment of attorney's fees for himself and co-counsel, as well as interim payment to the investigator (SR 17-18); the record contains only a written motion for interim payment for the investigator (R 904-908). Defense counsel requested payment of $6,075.00, which represented eighty hours of work, at the rate of $45.00 per hour, and five days out of town, at the rate of $400.00 per day, plus costs. Judge Foster indicated that he was concerned as to this amount of money, as well as the fact that the original order of appointment had contained no hourly rate or fee cap (SR 17-21); accordingly, he rescinded the prior order and requested a proposal as to the extent of any further anticipated costs (SR 22-27). At this point, the county attorney expressed concern as to the bills for interim payment submitted by the attorneys, and Judge Foster

noted that, while the expenses would be paid, he felt that any fee should be deferred until the conclusion of the case, as was the customary practice; he further noted that attorney Lake had already been paid between $6,000.00 and $7,000.00 in interim fees (SR 29-31).

On June 5, 1991, Appellant filed his motion to disqualify Judge Foster, pursuant to Fla.R.Crim.P. 3.230 (R 949-965). In such pleading, Barwick contended that Judge Foster had reached out "to interfere with the adversarial process in an extra-judicial manner", and had, inter alia, indicated that his abiding priority was "protection of the county's finances." Barwick also contended that, at the April 2, 1991, hearing, Judge Foster had "rescinded all of Judge Turner's appointments for defense assistance, including the defense investigator, psychologist and neurologist", and had denied counsel's motion for interim fees. Appellant also alleged that counsel had been informed that Judge Foster,

> once made reference specifically to Dr. Blau, the defense psychologist in this case, saying in substance that the doctor - like other psychologists, would say anything that the party that hired him wished him to say (R 954-955).

Defense counsel contended that the above had created a well-grounded fear that Barwick would not receive a fair trial, and the motion was accompanied by affidavits from Lake and Barwick, and a certificate of good faith from the former (R 957-965).

A hearing was held on June 5, 1991 (SR 40-83). At this time, defense counsel itemized the specific allegations in his affidavit, and the judge noted that such allegations were legally

insufficient (SR 44-62). During the course of this proceeding, Judge Foster repeatedly observed that he would not, and could not, dispute the truthfulness of any of the allegations (SR 55, 57, 58, 60). The judge announced that he would deny the motion, but also observed that he was going to study the transcript as to whether he had formally asked counsel to resubmit orders of appointment for their expert with "parameters" (SR 62). At this point, discussion was had as to Appellant's motion for appointment of a psychiatrist, and the State pointed out that there had previously been at least six mental health experts appointed for Barwick - Drs. Annis, McClaren, Hord, Warriner, Beller and Blau - all of them psychologists or neuropsychologists (SR 70-71). Additionally, as the hearing progressed, defense counsel made further references to the court having "rescinded" all of the prior orders of appointment for the defense experts; this observation was made in the course of defense counsel's request for a continuance (SR 76, 78).

On June 6, 1991, Judge Foster rendered an order formally denying Barwick's motion for disqualification and for continuance; the judge attached a transcript of the April 2, 1991, hearing and an administrative order from the chief judge regarding fees and expenses for witnesses or persons employed by counsel in capital cases (R 989-999). In the course of the order, Judge Foster noted that the transcript of the prior hearing indicated that although the investigator's appointment had been rescinded, request had simultaneously been made that the matter be resubmitted with guidelines or a fee cap; the judge likewise noted that the record did not contain any order of the

court rescinding the appointment of any other defense expert (R 990). Judge Foster stated, "While this Court is not permitted to inquire into the truth of proper factual allegations in support of a motion to disqualify, by the same token the court cannot ignore its own record." (R 990). As to the allegations concerning Dr. Blau, Judge Foster reiterated that such were insufficient as a matter of law to form a basis for disqualification; the court did observe that it was "common knowledge" that no party would offer the testimony of an expert witness who would testify contrary to the position of the party (R 993).

On the same day, a telephone conference was held (R 125-129). At this time, the judge related that he had heard that one of Barwick's prior attorneys, who had withdrawn following the certification of conflict, had assisted in the drafting of the recusal motion; the judge expressed concern that any possible conflict of interest could continue to carry over (T 125-126). Attorney Lake stated that he had simply used the prior attorneys' equipment, whereupon the judge stated that if Barwick wished a further hearing on the matter, such would be allowed (T 127).

The next day, defense counsel filed a renewed motion for disqualification of the judge, stating that the judge was hostile to defense counsel Lake and that he had attempted to drive a wedge between Lake and his client (R 975-988). Counsel incorporated by reference the contents of the first motion, and contended that the judge had, during the hearing of June 5, 1991, disputed the factual accuracy of several of the allegations (R 976); counsel also contended that Judge Foster had appeared angry

at the hearing (R 977). Attorney Lake stated that the judge had seemed angry with him during the telephone conference of June 6, 1991, and suggested that the purpose of the telephone conference had been to drive him from the case (R 980). Counsel also stated that the judge had engaged in unspecified ex parte communications (R 980). The motion was accompanied by an affidavit from Lake, as well as Barwick, and a certificate of good faith.

As noted by Appellant (Initial Brief at 10), Barwick filed a petition for writ of habeas corpus in this Court on June 11, 1991, such case styled, Barwick v. Foster, Florida Supreme Court Case Number 78,071, in which he asked this Court to prohibit his scheduled trial, due to the circuit court's denial of his motion to disqualify. This Court summarily denied the petition on June 14, 1991, without requesting a response.

A hearing was held on June 17, 1991 (T 130-164). At this time, defense counsel asked the judge about the source of his knowledge as to the fact that former counsel had assisted with the recusal motion, and Judge Foster stated that he had bumped into an individual at the post office, who had volunteered this information (T 131); when pressed by defense counsel, the judge stated that he had "no problem" with Lake's contact with prior counsel, although it was Barwick's position that was important (T 138). Judge Foster then stated that he denied the renewed motion for disqualification (T 139). Defense counsel stated that it was his impression that "the further we go in this thing", the angrier the judge became with him, stating that he felt that the judge's "prejudice" had shifted more from Barwick to himself (T 146). The judge later reiterated that he found the motion

insufficient, and the parties discussed Appellant's motion for a continuance (T 148-162); at the conclusion of the hearing, the judge stated that he would grant Appellant's motion for a six-month continuance (T 162). A formal order was entered on June 19, 1991, denying the renewed motion for disqualification, stating that such was insufficient as a matter of law (R 1013).

Likewise, another hearing was held on June 19, 1991 (T 166-180). At this time, defense counsel formally requested the reappointment of the defense investigator, and such was granted, subject to the usual fee schedule for appointment (R 1016-17). Likewise, Judge Foster granted counsel's request for payment of costs, and set forth the procedure for such action in the future (R 1014-15). It was also clarified that Dr. Walker would serve as the defense neurologist (T 173-6). On July 30, 1991, the court granted defense counsel $785.00 in costs (R 1031), and, on August 14, 1991, the defense investigator was awarded $7,180 (R 1051). On August 6, 1991, Attorney Lake formally requested interim attorney's fees, and on August 30, 1991, he was awarded $7,500 (R 1047, 1060).

Defense counsel Lake however, was involved in a serious automobile accident, and the trial was further continued; on February 4, 1992, Lake was removed from the case, and, the next day, Robert Adams was appointed to represent Barwick (R 1099, 1144). The case did not ultimately proceed to trial until June of 1992, and the proceedings were declared a mistrial, with yet another trial beginning on July 6, 1992. During this time, Attorney Adams never sought to disqualify or recuse Judge Foster, and Appellant never evinced any dissatisfaction or discomfort

with the judge. On June 6, 1992, Attorney Adams moved for the appointment of Dr. Ralph Walker, a psychiatrist, as an additional defense expert, and such request was granted (R 1151-3). The record reflects that at the penalty phase in this cause, Attorney Adams called six (6) mental health experts - Drs. Annis, McClaren, Loiry, Beller, Warringer and Hord - and the deposition of Dr. Walker, who was ill, was likewise read into evidence. The record further reflects that Dr. Blau was unable to testify because of poor health (R 1227-8, 1239-1245; T238-240).

B. REVERSIBLE ERROR HAS NOT BEEN DEMONSTRATED

Appellee would respectfully contend that under all of the facts and circumstances of this case, reversible error has not been demonstrated. There are, it should be noted, a number of components to Barwick's claim - whether the initial motion to recuse of June 5, 1991 was legally sufficient, whether, in the course of ruling upon such motion, a factual controversy was created, and whether the subsequent motion of June 7, 1991 was legally sufficient. It is the State's position that neither motion was legally sufficient, and that, at no time did Judge Foster violate the tenets of Bundy v. Rudd, 366 So.2d 440 (Fla. 1978) or Rogers v. State, 630 So.2d 513 (Fla. 1993) to such an extent that his recusal was mandated. Further, it is the State's position that, in determining whether Barwick is not entitled to any relief, this Court must consider the entire record.

Although Fla.R.Crim.P. 3.230 was repealed by the adoption of Florida Rule of Judicial Administration 2.160, this case was tried prior to the effective date of such amendment. See The Florida Bar Re: Amendment to Florida Rules of Judicial

Administration, 609 So.2d 465 (Fla. 1992). In construing Rule 3.230, as well as §38.10 Fla. Stat. (1985), this Court has held that a motion to disqualify must be well-founded and contain facts germane to the judge's bias, prejudice or sympathy. Jackson v. State, 599 So.2d 103 (Fla. 1992). The asserted facts must be reasonably sufficient to create a well-founded fear in the mind of a party that he or she will not receive a fair trial. Fisher v. Knuck, 497 So.2d 240, 242 (Fla. 1986); Gilliam v. State, 582 So.2d 610, 611 (Fla. 1991) ("To justify recusal, a motion must be well-founded."). The facts and reasons given in any sworn affidavit must tend to show personal bias or prejudice, Tafero v. State, 403 So.2d 355, 361 (Fla. 1981), and, in determining the sufficiency of the allegations, a "reasonably prudent person" standard is applied. MacKenzie v. Super Kids Bargain Store, 565 So.2d 1332, 1335 (Fla. 1990). This Court has consistently held that the fact that a judge has made an adverse ruling is insufficient to justify disqualification, see Tafero, supra, Gilliam, supra, Jackson, supra, and this Court has likewise held that the allegation that a judge has formed a fixed opinion of the defendant's guilt is likewise insufficient. Dragovich v. State, 492 So.2d 350, 352 (Fla. 1986). Courts have additionally held that the mere allegation of ex parte communication is not per se grounds for disqualification, see Nassetta v. Kaplan, 557 So.2d 919, 921 (Fla. 4th DCA 1990), Parnell v. State, 627 So.2d 1246 (Fla. 3d DCA 1993), and, further, that a judge's remark that he is not impressed with the behavior of an attorney, or his client, is, without more, a similarly insufficient basis for recusal. Nassetta, supra

(judge's comment that he "did not care whether defendant got out of jail or not"); Oates v. State, 619 So.2d 23 (Fla. 4th DCA 1993) (judge's comment that defendant was "just being an obstinate jerk").

Applying these standards to the June 5, 1991 motion for disqualification, it is clear that such motion was facially, and legally, insufficient. Although the motion averred that recusal was not sought "based on pretrial rulings made by Judge Foster which are adverse to the defense" (R 949), in fact such was the case. Defense counsel was no doubt upset that Judge Foster, who had inherited the case as a successor judge, had expressed concern as to the financial arrangements, or lack thereof, in regard to various appointees. The fact that the judge rescinded the appointment of the defense investigator, while simultaneously inviting defense counsel to seek re-appointment under some sort of guideline or parameter, was insufficient to cause a well-founded fear in the mind of Barwick that he could not receive a fair trial; subjective fears are insufficient. See Fischer, supra; Tafero, supra; Gilliam, supra; Dragovich, supra; Jackson, supra. Likewise, Judge Foster's alleged remark concerning Dr. Blau, to the affect that an expert witness might be expected to offer testimony favorable to the party who called him, does not evince sufficient bias or prejudice so as to justify recusal. See Jackson, supra; Dragovich, supra; Nassetta, supra; Oates, supra.

Additionally, the State would maintain that Judge Foster did not impermissibly "cross the line", in denying the recusal motion, and in adjudging the allegations therein to be legally

insufficient. This Court held in Bundy v. Rudd, that reversible error had occured in a situation in which the trial judge, in ruling upon a motion to disqualify, impermissibly looked beyond the mere legal sufficiency of the suggestion of prejudice, and attempted to refute the charges of partiality. Other courts have rendered similar conclusions, even in situations in which the underlying motion for recusal was deemed to be insufficient. See e.g., Haggerty v. State, 531 So.2d 364 (Fla. 1st DCA 1988) (although judge correctly concluded that motion to recuse was insufficient, he created "intolerable adversary atmosphere" by passing on the truth of the allegations); Gulfstream Park Racing Association Inc., v. Gale, 540 So.2d 196 (Fla. 3rd DCA 1989) (same); Turner v. State, 598 So.2d 186 (Fla. 1st DCA 1992) (same).[2] While it is undisputed that Judge Foster did more than simply say, "Denied", in regard to Barwick's motion, Appellee would contend that the judge did not contest the truth of the allegations to such an extent that he became a litigant. Compare Rogers (judge held mini-trial on truth of allegations which "degenerated into a heated, contentious melee, with the judge calling and questioning witnesses. . ."); Turner, supra (judge describes allegations as "absolute idiocy", "nonsense" and "preposterous", and specifically disputes truth of allegations); Stewart v. Douglas, 597 So.2d 381 (Fla. 1st DCA 1992) (judge specifically states that allegations are "untrue"); Hill v. Feder, 564 So.2d 609 (Fla. 3rd DCA 1990) (judge describes

---

[2] Although Appellant cites to this Court's decision, Brown v. St. George Island, Ltd., 561 So.2d 253 (Fla. 1990) in support of this proposition (Initial Brief at 40), Appellee cannot agree that such precedent involves that factual situation.

allegations as "totally false"); Townsend v. State, 564 So.2d 594 (Fla. 2nd DCA 1990) (judge debates allegations with attorney, and states, "I may be prejudiced against counsel but not against your client"); Taylor v. State, 557 So.2d 158 (Fla. 1st DCA 1990) (judge denies truthfulness of allegations and accuses defendant of calling him a liar).

As the court observed in Nassetta v. Kaplan, it was difficult to expect a judge "to sit as silent as a sphinx on the Nile in the face of personal attacks on his impartiality and his integrity", and "[a] certain amount of visceral reaction is unavoidable." Id. at 921. While Judge Foster may have discussed the specific allegations "broader than was wise or necessary", Sanders v. Yawn, 519 So.2d 28, 29 (Fla. 1st DCA 1987), it was apparently his concern, as in Nassetta, that his remarks were being taken out of context. In Nassetta, the district court, while denying the writ of prohibition, noted that the judge had "held a dialogue with trial counsel" about the comment at issue. The court found that this was permissible because "the judge here defended himself, not by saying that the remarks attributed to him were false, but by saying that he was being quoted out of context." Here, Judge Foster attached a transcript of the prior hearing of April 2, 1991 to his order of denial, because he wished it noted that any "recision" he had made of the appointment of the defense expert had been coupled with a request for defense counsel to seek re-appointment with certain parameters or guidelines. It would not appear that such was impermissible. See Kowalski v. Boyles, 557 So.2d 885, 887 (Fla. 5th DCA 1990) (in denying motion to recuse, judge could properly

"state the status of the record"). Judge Turner repeatedly stated that he would not, and could not, dispute the truthfulness of any of the allegations (SR 55, 57, 58, 60), and his written order likewise stated that it was not addressing the truth of those matters (R 989-992). Accordingly, Rogers and Bundy are distinguishable, and Barwick is entitled to no relief on this basis.

Appellee would also contend that this Court, in essence, already passed upon the sufficiency of the June 5, 1991, recusal motion and the propriety of the court's order denying relief. As Appellant notes in his brief, Barwick filed a petition for writ of prohibition in this Court, on June 11, 1991, Barwick v. Foster, Florida Supreme Court Case Number 78,071, and such petition was denied on June 14, 1991. Although Appellant cites precedents from the second district, Public Employees Relations Commission v. District School Board of DeSoto County, 374 So.2d 1005 (Fla. 2d DCA 1979), and Fyman v. State, 450 So.2d 1250 (Fla. 2d DCA 1984), for the proposition that a court's ruling of this kind cannot constitute law of the case (Initial Brief at 41), such view of the law is by no means unanimous.

Thus, it must be noted that the third district has adopted a contrary point of view, and has expressly held that the denial of a petition for writ of prohibition constitutes a ruling on the merits, such that the underlying legal issue cannot be relitigated in a subsequent appeal. See, e.g., Obanion v. State, 496 So.2d 977 (Fla. 3rd DCA 1986), cert. denied, 503 So.2d 187 (Fla. 1987); Freeman v. State, 554 So.2d 621 (Fla. 3rd DCA 1989); Nordqvist v. Nordqvist, 586 So.2d 1282 (Fla. 3rd DCA 1991).

Further, at least some members of the fourth district feel the same, as Justice Anstead observed in his concurrence in DeGennaro v. Janie Dean Chevrolet, 600 So.2d 44, 45 (Fla. 4th DCA 1992):

> Unless an order or opinion denying prohibition indicates to the contrary, such a ruling should constitute the law of the case on the issue raised. Judicial resources, already heavily taxed, are hardly efficiently allocated when they are used to twice review the same issue.
>
> We have already decided the issue of judicial disqualification by our previous denial of prohibition. I would hold that the denial bars a second review of the issue in this appeal.
>
> (Opinion of Anstead, J., specially concurring).

Further, this Court in Brown stated that the district court of appeal had "confirmed the correctness" of the circuit court's denial of a motion for recusal, when the appellate court denied a petition for writ of prohibition. Brown, 561 So.2d at 256. This Court's prior denial of prohibition must be read as a merits ruling on the sufficiency of Barwick's June 5, 1991, motion to disqualify, as well as any claim of error that Judge Foster addressed the merits of such motion, in his order of denial.

The only matter thus remaining is the correctness of the judge's denial of Barwick's renewed motion for disqualification, filed on June 7, 1991. This motion primarily focused upon the alleged hostility between Judge Foster and attorney Lake; during the hearing of June 17, 1991, attorney Lake stated that it was his impression that the judge's "prejudice" was directed toward him, as opposed to Barwick (T 146). While a judge's hostility toward an attorney can rise to the level such that

disqualification is mandated, see Livingston, supra, Appellee would maintain that the requisite level of prejudice was not reached sub judice. Under Livingston, such prejudice must be "of such degree that it adversely affects the client". The primary impetus behind defense counsel's filing of the renewed motion was the fact that Judge Foster had held a hearing on the record to ensure that Barwick was personally aware of any potential conflict of interest. While such fact may have caused defense counsel some annoyance, it was not an occurrence which could provide Barwick with a well-founded fear that he would not receive a fair trial. The renewed motion was legally insufficient, and its denial was not error. Further, Judge Foster said nothing at the hearing of June 17, 1991, nor in his order of June 19, 1991, to suggest that he violated the tenets of Bundy or Rogers.

It must also be noted that any antipathy between attorney Lake and Judge Foster, as well as any collateral effects thereof, must have ended five months prior to Barwick's trial, when Lake withdrew from the case due to poor health. Grounds for disqualification of a judge may become stale through the passage of time. See Milmir Construction v. Jones, 626 So.2d 985, 987 (Fla. 1st DCA 1993), cert. denied, 637 So.2d 236 (Fla. 1994). Following Lake's withdrawal from the case, attorney Robert Adams assumed representation of Barwick, and neither he nor Barwick ever evinced any concern over Judge Foster's impartiality. Cf. Sweet v. State, 624 So.2d 1138, 1141 (Fla. 1993) (court's failure to hold inquiry on defendant's dissatisfaction with attorney rendered moot by defendant's satisfaction with new counsel and

dissipation of his reason for wanting counsel removed). Likewise, the record reflects that the defense investigator was, as promised, reappointed, and that the defense was able to secure the assistance of a psychiatrist. Indeed, the defense utilized seven mental health experts, and Dr. Blau was not one of them, simply due to his own poor health. In short, it would appear that all of the reasons asserted for the recusal of Judge Foster dissipated of their own accord, prior to trial. Pursuant to §924.33, Fla.Stat. (1985), no conviction, including one in a capital case, shall be reversed unless the appellate court is of the opinion that any error committed injuriously effected the substantial rights of the Appellant. See Perri v. State, 441 So.2d 606, 607 (Fla. 1983). Based on all of the above, it cannot be said that Barwick made such showing, and the instant convictions and sentence of death should be affirmed in all respects.

POINT II

REVERSIBLE ERROR HAS NOT BEEN DEMONSTRATED, IN REGARD TO APPELLANT'S CLAIM INVOLVING PEREMPTORY CHALLENGES.

As his next claim, Barwick contends that his convictions and sentence of death must be reversed, because the state's use of a peremptory challenge against prospective juror Peace allegedly violated State v. Neil, 457 So.2d 481 (Fla. 1984) and Batson v. Kentucky, 476 U.S. 79, 106 S.Ct. 1712, 90 L.Ed.2d 69 (1986). As Appellant notes, the prosecutor proffered three reasons for the challenge: (1) that the prospective juror was the first cousin of a local police officer who had been discharged from his job

for dishonesty and/or substance abuse; (2) that it was believed that the prospective juror had been in some kind of trouble and (3) that the prospective juror had a speech impediment which could interfere with her ability to communicate with the other jurors; the judge allowed the challenge, based solely upon the first reason. On appeal, Barwick maintains that this was error, in that the record was allegedly insufficiently developed on this point, and that Ms. Peace's familial relationship with her troubled cousin was not "close enough" to merit excusal. Appellee disagrees and would submit that, assuming Barwick met his initial threshold burden of proof, the trial court did not abuse its discretion in concluding that the state had proffered a racially neutral basis for the challenge at issue.

The record in this case indicates that Ms. Peace was one of forty-three prospective jurors examined on July 6, 1992. In answer to preliminary questions, she stated that she had lived in Bay County for forty-six years, was not married, and was employed at an elementary school (T 31). When the judge asked whether any of the prospective jurors had any close friends or relatives in law enforcement, Ms. Peace did not volunteer any information; another prospective juror, Sherry Russo, indicated that her son was a "reserve officer", stating that such would not affect her verdict (T 49-52). Ms. Peace likewise did not answer when the venire was collectively asked whether a close friend or family member had ever been charged with a crime; five prospective jurors did, however, answer affirmatively, veniremen Denton, Moehling, Stafford, Hathaway and Kent (43-46). During state voir dire, Ms. Peace stated that she could vote to recommend

either life or death (T 83); another prospective juror, James Kelly, who was a pastor at a local church, stated that he basically "didn't agree with the death penalty", and that, in his view, it had not been fairly meted out (T 86).

At the conclusion of the state's voir dire, a number of jurors were challenged for cause, and the state announced that it would exercise a peremptory challenge on Mr. Kelly, and the following exchange took place:

> MR. PAULK [prosecutor]: I'm going to peremptory him, Judge --
>
> THE COURT: If you, if you're going to take him off --
>
> MR. PAULK: -- based on sitting in judgment -- right, sitting in judgment on people, and, too, he, he just wouldn't feel comfortable sitting on this jury, not that he couldn't do it.
>
> MR. ADAMS [defense counsel]: Well, if you're seeking to peremptory, I understand.
>
> MR. PAULK: I'm going to peremptory him.
>
> MR. ADAMS: I, I mean I have no choice on that.
>
> THE COURT: Okay.
>
> MR. ADAMS: Other than the fact he's peremptorily challenging a black.
>
> THE COURT: But from what I heard there is legitimate nondiscriminatory reasons to support that, so I'm going to let you do that. (T 97).

Mr. Kelly was then excused (T 97).

During defense voir dire, Ms. Peace confirmed that she worked for the school system (T 128-129); she also stated that she had children, and that lawyers were "all right" with her (T 129). When state voir dire recommenced, the prosecutor asked Ms.

Peace if she was any relation to Tony Peace, a police officer for the Panama City Police Department, and Ms. Peace stated that he was her first cousin (T 131). At the conclusion of voir dire, defense counsel successfully struck Ms. Russo for cause, because her son was a reserve police officer (T 135-136). The state exercised a number of peremptory challenges, including two against prospective jurors Stafford and Denton, who had previously indicated that a close family member had been charged with a crime (T 137). The prosecutor then stated that he intended to peremptorily challenge Ms. Peace, and set forth his reasons, which included her speech impediment and the fact that her first cousin, Tony Peace, had been discharged from the police department for dishonesty (T 138-139). Although the judge originally expressed a preference that the record be more fully developed on this matter, the prosecutor subsequently cited two cases for the proposition that further development of the record was not necessary, and that Barwick had failed to demonstrate that a strong likelihood existed that Ms. Peace was being challenged solely based upon her race; the precedents cited were United States v. Bennett, 928 F.2d 1548 (11th Cir. 1991), and King v. State, 514 So.2d 354 (Fla. 1987) (T 150-152).

The judge announced that he would allow the challenge, and the prosecutor additionally stated that he could verify that Tony Peace had been dismissed from the force for "drugs", as well as dishonesty, and "it was notorious enough for her to have known about it" (T 153); the judge clearly indicated that the challenge was permitted on this ground alone, as opposed to the other two proffered (T 154-155). It was only after this ruling that

defense counsel spoke up, and started to observe that there would be no blacks on the jury, if this challenge were allowed; when the prosecutor challenged this, defense counsel conceded that this was not the case (T 155). Defense counsel then stated, "This is the second one, and, of course, I oppose it because I think it is racially discriminatory on its face." (T 155). Barwick's counsel likewise stated that there had been no showing of how close Ms. Peace might be to her cousin (T 155-156). No further ruling, or request for a ruling, was made, and Ms. Peace was excused (T 156-157). Jury selection progressed, and the state subsequently exercised a peremptory challenge upon venireman Kent, another prospective juror who had indicated that a close friend or family member had been charged with a criminal offense (T 162). Both the state and appellant accepted the jury without objection (T 177), and the jury included Marcus Hodge, who, apparently, was a black male (T 156, 176-177).

Under these facts, Barwick has failed to demonstrate that he is entitled to relief. Because this case was tried in 1992, the holding of this Court's recent decision, State v. Johans, 613 So.2d 1319 (Fla. 1993), is not applicable, and it was Appellant's initial burden to show that there was a "strong likelihood" that the individuals challenge by the state had been challenged "solely because of their race." Appellant failed to do so. There were apparently three minority members of the jury panel. One, Marcus Hodge, actually served on the jury, and the state specifically announced that it had no intention of striking him (T 156). Although the state had exercised a peremptory challenge against prospective juror Kelly, defense counsel indicated no

objection at that time, and seemed to agree that the challenge was appropriate, given the venireman's discomfort with the death penalty (T 97).

Given the fact, as will be discussed more fully below, that the state provide proffered appropriate and racially neutral reasons for striking Ms. Peace, it cannot be said that Barwick sustained his burden of proof under State v. Slappy, 522 So.2d 18 (Fla. 1988). See King, supra (defendant's Neil challenge unavailing, where he failed to demonstrate strong likelihood that jurors challenged solely because of race); Taylor v. State, 583 So.2d 323 (Fla. 1991) (court did not err in failing to require State to provide reasons for challenge, where no substantial likelihood existed that juror challenged for discriminatory reasons); Reed v. State, 560 So.2d 203 (Fla. 1990) (trial court did not abuse its discretion in concluding that defendant had failed to make prima facie showing of likelihood that challenges were improperly motivated). Further, the State would question whether Barwick has even preserved this claim at all. Defense counsel did not formally object to the challenge of Ms. Peace until the judge had already granted it, and he neither moved to strike the jury panel nor evinced any displeasure with the jury actually chosen; under these court's decision in Joiner v. State, 618 So.2d 174 (Fla. 1993) and Valle v. State, 581 So.2d 40 (Fla. 1991), this claim should be regarded as waived.

In any event, Appellee would contend that the state demonstrated a racially-neutral reason for its challenge of Ms. Peace - the fact that her cousin, a police officer, had been discharged from the police department due to "dishonesty" or

"drugs". This Court held in Bowden v. State, 588 So.2d 225, 229 (Fla. 1991) that "the fact that a juror has a relative who has been charged with a crime is a race-neutral reason for excusing that juror", and such holding is in accordance with ther precedent. See, e.g. United States v. Bennett, 928 F.2d at 1551 (fact that prospective jurors' uncle and ex-wife faced drug charges race-neutral reason for excusal); Adams v. State, 569 So.2d 782 (Fla. 4th DCA 1990) (fact that one of juror's children "had some kind of conflict with the law" valid reason for peremptory challenge); Fotopoulos v. State, 608 So.2d 784 (Fla. 1992) (fact that juror's grandson faced drug charges valid reason for excusal).

Although Appellant argues that there was no showing as to how "close" Ms. Peace was to her cousin, such point cannot constitute a valid objection. It should be noted that this Court approved the challenge in Bowden, although the identity and relationship of the family member at issue is not known, and, apparently, was never of record. Ms. Peace affirmed on the record that Tony Peace was her first cousin, and that their fathers were brothers, and they obviously both lived in the same community, given the fact that she was called for jury duty in Panama City. The prosecutor also argued that her cousin's dismissal from the force had been so "notorious" that Ms. Peace had to have known about it. Because racially neutral grounds do not have to rise to the level of cause challenges, see Happ v. State, 596 So.2d 991, 996 (Fla. 1992), there was no requirement that the State affirmatively demonstrate bias on the record, as Appellant suggests (Initial Brief at 48), and Barwick's reliance

upon Gibson v. State, 603 So.2d 711 (Fla. 4th DCA 1992) is misplaced. In this case, the prosecutor could quite reasonably have concluded that Ms. Peace would not be a juror favorable to the state, given the fact that her cousin had just been discharged from the local police department under less than amicable, and apparently criminal, circumstances. As the record indicates, as is not unusual in capital prosecutions, a number of the state's witnesses were law enforcement officers.

The State would also contend that the state's lack of discriminatory motive is clear from the record. As noted, earlier during the voir dire, the prospective jurors had been asked whether any close friend or relative had been charged with a criminal offense (T 43-44). Although one of the prospective jurors who answered in the affirmative served on Barwick's jury, the State utilized peremptory challenges on three of the others - Denton, Stafford and Kent (T 137, 162); apparently, the other veniremen was excused due to poor health (T 92-3, 96). It is, thus, apparent that in challenging Ms. Peace on this basis, the State was not treating her in a manner different from that in which it treated other jurors with similar "family problems". Cf. Slappy, supra (challenge may not be racially neutral if it is based on reasons, "equally applicable to jurors not challenged"). This Court has consistently recognized that trial judges are in the best position to determine if peremptory challenges have been properly exercised, see, e.g., Green v. State, 583 So.2d 647, 652 (Fla. 1991), and, further, that trial courts are vested with broad discretion in this regard. See, Reed, supra; Fotopoulos, supra; Files v. State, 613 So.2d 1301, 1303 (Fla. 1992).

Appellant has simply failed to demonstrate any abuse of discretion sub judice, and the instant convictions and sentence of death should be affirmed in all respects.

POINT III

DENIAL OF APPELLANT'S MOTION FOR JUDGMENT OF ACQUITTAL, AS TO THE CHARGE OF ATTEMPTED SEXUAL BATTERY, WAS NOT ERROR.

While making no specific attack upon the sufficiency of the evidence underlying his convictions of first-degree murder, burglary while armed or robbery, Barwick maintains on appeal that insufficient evidence was presented as to Count III of the indictment, charging attempted sexual battery with great force. At trial, Appellant moved for judgment of acquittal on this charge, contending that the state had failed to prove its case, and the trial court denied such motion (T 477-9, 482). On appeal, Barwick repeats these arguments, contending that the circumstantial evidence did not preclude a reasonable hypothesis of innocence on this charge, and that, indeed, Barwick's own statements, which were introduced by the state, indicated that he had only intended to "burglarize" or steal. Appellee would contend that Appellant's reliance upon such precedents of this Court as State v. Law, 559 So.2d 187 (Fla. 1989) and Scott v. State, 581 So.2d 887 (Fla. 1991) is misplaced, and that this charge, as well as all the others, was properly submitted to the jury.

This Court has consistently held that the circumstantial evidence standard does not require the jury to believe the defense version of the facts on which the State has produced conflicting evidence and that the State, as Appellee, is entitled

to a view of any conflicting evidence in the light most favorable to the jury's verdict. See Peterka v. State, 640 So.2d 59, 68 (Fla. 1994); Cochran v. State, 547 So.2d 928, 930 (Fla. 1989). In Songer v. State, 322 So.2d 481, 483 (Fla. 1975), this Court specifically rejected the contention that a defendant's interpretation of circumstantial evidence should be accepted unless it is specifically contradicted, and in Peek v. State, 395 So.2d 492, 495 (Fla. 1980), this Court held that a jury could disbelieve a defendant's version of events when it was contradicted by another inconsistent statement by the defendant. It perhaps bears noting that the offense at issue was not sexual battery, but rather the attempt to commit such. The case law is clear that an attempt to commit a crime consists of two essential elements: a specific intent to commit the crime, and an overt act, beyond mere preparation, done towards its commission; the intent and the act must be such that they would have resulted in the completed commission of the crime, but for the interference of some cause preventing the carrying out of the intent. See e.g., Adams v. Murphy, 394 So.2d 411 (Fla. 1981); State v. Coker, 452 So.2d 1135 (Fla. 2nd DCA 1982). The latter requirement has been otherwise described as "a separate overt, ineffectual act" done toward the commission of the crime. L.J. v. State, 421 So.2d 198 (Fla. 3rd DCA 1982).

Under all of the facts and circumstances of this case, Barwick was not entitled to a directed verdict on this count. The State proved below that Barwick had "scoped out" the apartment complex where the victim lived, and that he had observed her as she lay outside sunbathing in a bikini. Barwick

then returned to his home, procured a pair of gloves and a knife, and returned to the victim's apartment; he entered through the open door, while she was lying inside on the couch, watching television. At the time that the victim was found, she had been stabbed thirty-seven (37) times, and she had extensive defensive wounds on her hands, where she had attempted to defend herself; she also had bruises on her eyelid and chin (T 449-450). Although tests for spermatozoa were negative, in regard to the swabs taken from her bodily cavities, a semen stain was found on the comforter, in which her body was wrapped, such stain consistent with having come from the two percent of the population with Barwick's blood, enzyme and secretor status (T 446, 415-19). Further, at the time that the victim was found, it was discovered that the top portion of her bathing suit had been pulled up, whereas the bottom portion of her suit had pulled down in the rear (T 243, 256).

Appellee respectfully suggests that sufficient evidence was presented that an attempted sexual battery occurred, so as to present a jury question. See, L.J., supra (unsnapping of victim's pants and touching of various portions of her body, sufficient "overt acts" in prosecution for attempted sexual battery); Sochor v. State, 619 So.2d 285 (Fla. 1993) (sufficient evidence of attempted sexual battery presented even though victim's body never recovered); Dailey v. State, 594 So.2d 254 (Fla. 1991) (sufficient evidence presented to support aggravating circumstance that murder occurred during attempted sexual battery, where body of victim, who had been stabbed repeatedly, was found nude, with clothing found nearby; immersion in water

had prevented scientific tests on body). Appellant's suggestion that he might have deposited the semen stain after the victim's death, thus, precluding a conviction of this offense under Owen v. State, 560 So.2d 207, 212 (Fla. 1990) (Initial Brief at 51), is unavailing. Under Holton v. State, 573 So.2d 284, 290 (Fla. 1990), this matter was properly left to the finder of fact. Barwick himself retains responsibility for the victim's death, which could have constituted the "interference" which precluded a completed offense. Cf. Bates v. State, 465 So.2d 490, 491-2 (Fla. 1985) (defendant's claim that he "abandoned" attempted sexual battery of murder victim, by virtue of premature ejaculation, properly rejected).

As to Barwick's statement, it must be noted that he gave two statements - one on April 1, 1986 and one on April 15, 1986. In the first statement, Barwick declined any knowledge of the homicide, and insisted that he had been somewhere else when it occurred (T 280-6; SR 302-9). Given the existence of this prior inconsistent statement, it was not required that the jury accept any portion, exculpatory or otherwise, of Barwick's subsequent statement. Peek, supra (where defendant gave prior inconsistent statement, jury was "justified in disbelieving appellant's version of events"). Further, Appellant's statement of April 15, 1986 would not seem to have been as exculpatory as Barwick's appellate counsel now believes. Thus, when Barwick was asked whether he had been "going to" rape the victim, his answer was hardly an unequivocal no:

> No. I didn't have that in mind. I just, like I said, I, I, I actually, I, I believe I just went ahead and burglarized. O.K. I

> don't -- that's what I believe. I totally don't really know, be honest with you, I, I -- you know, I lost - - - you know, I was driving back, I saw her and I came back by. It was just like, you know, I just couldn't control myself. I was trying, but couldn't. Then when I caught control of myself, it was too late. (SR 318).

This version of events hardly indicates that, even if Barwick initially lacked the intent to commit sexual battery, he could not have formed such once his encounter with the victim began. Additionally, Barwick's claim that he only intended to "burglarize" or steal, as well as his account of how the murder actually transpired was implausible, and contradicted, in certain respects, by other evidence.

According to Barwick, he only entered the victim's apartment with the intent to "burglarize"; one must wonder, then, why he picked one of the few apartments which he knew to be occupied at that point and time. Appellant claimed that when he entered the apartment, the victim immediately jumped up from the couch or chair where she had been sitting, and told Barwick to get out (SR 315, 334). Barwick stated that the victim then struck him, and that he pulled out the knife and told her to "quit"; the victim was 5'6" and weighed 115 pounds, whereas Barwick was desribed as 5'11" and weighing 185-190 pounds (T 445, 236-7). According to Appellant, he had begun going through the victim's purse and wallet, and had dumped out their contents, when the victim once again attacked him, whereupon he stabbed her for the first time, in the chest (SR 334). The victim fell to the ground, and Barwick picked her up, allegedly to show that he "hadn't meant to hurt her", and they fell. The victim kept hitting Barwick, so he

kept stabbing her (SR 35). Barwick stated that he did not pull down the victim's bathing suit, and that such "might have" happened when they were "wrestling around" (SR 317). According to Barwick, once he realized that the victim was dead, he immediately left the apartment, without taking anything (SR 319).

Putting aside the essential implausibility of the victim in this case somehow attacking her taller, heavier attacker with such force that she precipitated her own methodical murder, it must be noted that Barwick's description of the robbery attempt is inconsistent with other evidence. Detective McKeithen testified that there were bloody fingerprints on the items dumped out of the victim's purse or wallet (T 244). If, as Appellant claims, he touched these items prior to any stabbing of the victim, and while she was still alive, and that he left the apartment after she was dead without taking anything from the purse or wallet (SR 319), the presence of the bloody fingerprints is unexplained. Equally unexplained, of course, is the semen stain on the comforter in which the body was found. Appellee would contend that this Court has found a sufficient jury question presented in comparable cases, in which the defendant's hypothesis of innocence is either contradicted or undermined by other evidence. See e.g., Peterka, supra; Atwater v. State, 626 So.2d 1325, 1328 (Fla. 1993); DeAngelo v. State, 616 So.2d 440, 441-2 (Fla. 1993); Cochran, supra (defendant's claim of killing during a panic contradicted by other evidence).

Finally, even should this Court disagree as to the sufficiency of the evidence as to this one count, neither Barwick's conviction of first-degree murder nor his sentence of

death would be effected. At the conclusion of the guilt phase, the jury was instructed on premeditated murder, felony murder, and burglary, attempted sexual battery and robbery, both as independent felonies and as potential bases for the felony murder (T 571-591). The jury found Barwick guilty of first-degree murder "as charged", as well as of burglary, attempted sexual battery, and robbery (T 603-4). While Barwick's conviction for first-degree murder could well rest upon a finding of premeditated murder, the jury's separate verdicts of guilt as to burglary and robbery indicate that any felony murder verdict could be sustainable on the basis of those felonies, as opposed to that now at issue. In the instant appeal, Barwick has nowhere contested the sufficiency of the evidence as to premeditation or as to the existence of a burglary or a robbery, and the record fully supports such convictions. Accordingly, no basis would exist for this Court to disturb Appellant's murder conviction. See e.g., Atwater, supra (reversal of defendant's robbery conviction would not effect conviction for murder, where jury returned general verdict, and ample evidence demonstrated premeditation); Griffin v. United States, ___ U.S. ___, 112 S.Ct. 466, 116 L.Ed.2d 371 (1991). As will be argued Point VI(A), infra, the State presented additional evidence at the penalty phase as to the existence of the attempted sexual battery. Accordingly, the instant convictions and sentence of death should be affirmed in all respects.

POINT IV

REVERSIBLE ERROR HAS NOT BEEN DEMONSTRATED, IN REGARD TO THE ADMISSION OF EVIDENCE CONCERNING TIM CHERRY'S BLOOD TYPE.

During the trial, Tim Cherry, the fiance' of the victim's sister, testified that he had visited the victim's apartment in February of 1986; at this point, the victim and her sister were sharing the apartment (T 224). The prosecutor then asked Cherry his blood type, and the witness stated that he was type A; at this point, defense counsel objected and moved that the testimony be stricken, unless a predicate was laid as to "how he knows his blood type" (T 224-5). The prosecutor pointed out that the witness' military ID showed "type A", and the court overruled the objection (T 225); Cherry had previously testified that he was in the Coast Guard (T 222). On cross-examination, Cherry stated that he had stayed at the victim's apartment when he visited (T 225). At the conclusion of the State's case, defense counsel renewed his motion that the testimony be stricken, stating that such had been hearsay; the court denied the motion (T 472-4). On appeal, Barwick repeats his arguments, suggesting that a new trial is warranted, and pointing out that the State did not follow the procedures for the admission of blood test results ordered in such cases as Dutilly v. Dept. of Health and Rehabilitative Services, 450 So.2d 1195 (Fla. 5th DCA 1984), in which paternity was at issue.

The simple answer to the above is that this was not a paternity action, and Tim Cherry's blood type per se was not at issue. The issue before the jury was whether Barwick, who had otherwise admitted murdering the victim and the other charged

offenses, had also attempted to sexually batter her, and, in the course of doing so, had left behind a semen stain on the comforter in which her body was found; medical testimony was presented to the effect that the individual who had deposited the stain had type O blood, and that Barwick was within the two percent of the population who could have done so. In asking Cherry his blood type, the prosecutor was obviously seeking to exclude him from the percentage of the population who could have fit this description, but there essentially was no need for this inquiry. Although Cherry, on direct examination, had stated that he had visited the victim's apartment during the month prior to the murder, and, on cross-examination, had likewise stated that he had stayed there, the witness was never questioned as to whether he had engaged in any sexual activity while there, such that he could be responsible for the semen stain. Accordingly, it would appear that the introduction of this evidence was unnecessary, and any error harmless beyond a reasonable doubt under State v. DiGuilio, 491 So.2d 1129 (Fla. 1986). Cf. Grala v. State, 414 So.2d 621 (Fla. 3rd DCA 1982) (wrongful admission of results of blood alcohol tests harmless error).

Additionally, Appellee would contend that Appellant's hearsay objection was not well-taken. Certainly, a witness should be deemed competent to testify as to medical data pertaining to himself, which is within his own personal knowledge. Cf. §90.604 Fla. Stat. (1991). Additionally, although the matter was not fully explored on the record, it would appear that Cherry had a military ID listing his blood type (T 224-5). This document could have been admitted, if necessary,

pursuant to two exceptions to the hearsay rule, §§90.803(4) and (6) Fla. Stat. (1991). No doubt the reason that the military would list an enlistee's blood type would be to insure that, if an emergency blood transfusion were required, the correct blood type would be utilized. As such, the document possesses sufficient indicia of reliability to withstand exclusion on the basis of hearsay. Cf. Love v. Garcia, 611 So.2d 1270 (Fla. 4th DCA 1992) (proponents of §90.803(6) have contended that such hearsay exception is proper, because health care providers make life and death decisions based upon information in files, thus establishing trustworthiness, and that little purpose would be served by requiring the testimony of unknown or unavailable technicians who actually perform medical tests, where great inconvenience is involved); Brevard County v. Jack, 238 So.2d 156 (Fla. 4th DCA 1970). To the extent that any error is perceived, such was, again, harmless beyond a reasonable doubt. See, e.g., Rodriguez v. State, 609 So.2d 493, 500 (Fla. 1992) (wrongful admission of hearsay harmless error in capital case); Hayes v. State, 581 So.2d 121, 124-5 (Fla. 1991) (same); Brown v. State, 473 So.2d 1260, 1264 (Fla. 1985) (same). The instant convictions and sentence of death should be affirmed in all respects.

POINT V

REVERSIBLE ERROR HAS NOT BEEN DEMONSTRATED, IN REGARD TO THE PROSECUTOR'S ARGUMENTS AT THE GUILT PHASE.

During his opening statement to the jury, the prosecutor, while concluding, stated that he would ask the jury to find Barwick guilty, "at the conclusion of all the evidence, the

defense evidence, as well as mine. . ." (T 201). Defense counsel objected, and moved for mistrial, which was denied (T 201-2). Subsequently, during the closing arguments, defense counsel used the initial portion of his argument to highlight the existence of reasonable doubt. Defense counsel emphasized that the State bore the burden of proof, and specifically invited the jury to "think about the circumstances" surrounding the taped statement which Barwick had given to Detective McKeithen (T 499). Defense counsel pointed out that another officer, Cauley, had been present during the statement, and that the State had not called him as a witness:

> Did you see Mr. Cauley in here as a witness to verify the conditions of the taking of that statement as to whether it was a gun at the kid's head or anything like that? No. Did you see a videotape of that? No. (T 499).

Defense counsel also pointed out that prior to his statement to the police, Barwick had not been advised of his rights "by an independent individual", but had, in fact, been taken to the police station for interrogation (T 501-2). Defense counsel again pointed out that the prosecution had not called all of the police officers who had come into contact with Appellant at that time, stating, ". . . There were officers available over at the police department who might shed light on what was going on with that young man", and adding, ". . . Why wasn't there a witness in here, other than McKeithen, to tell you what happened on the 8th or 9th or the 7th" (T 502).

During the prosecutor's closing argument, the assistant state attorney addressed this theme presented by the defense:

> Now, let's go, he says, all right, Frank McKeithen. Oh, well, excuse me. First of all, where is Jimmy Cauley and Joe Coram. What can they tell you? Jimmy Cauley is there during the taping of this particular tape. You heard the tape. It's in evidence. What can he add to that? You heard his voice, that's the evidence. Does that create a lack, is that a lack of evidence that creates a reasonable doubt. So, don't let that be misleading to you at all. It is not the lack of evidence the State didn't bring. We didn't bring in a whole bunch of stuff. (T 534).

The prosecutor later continued:

> But what, what in this courtroom, what evidence, what fact, what testimony, what anything have you heard as a result of him going to down to that police state would create a reasonable doubt in your mind what he has done, what he is guilty of. Nothing. (T 534-5).

It was at this juncture that defense counsel objected, and moved for a mistrial, contending that the State had made an indirect comment on the defendant not testifying; the motion was denied (T 535).

On appeal, Barwick contends that the two remarks at issue constituted improper comment upon his not testifying, and further constituted improper suggestion that the defense bore a burden of proof. Appellant maintains that reversal is mandated, under such precedents as Jackson v. State, 575 So.2d 181 (Fla. 1991) and Childers v. State, 277 So.2d 594 (Fla. 4th DCA 1973).[3] Appellee

---

[3] Appellee would contend that Appellant's reliance upon these precedents is misplaced, and would further note that the Childers case relies heavily upon Mathis v. State, 267 So.2d 846 (Fla. 4th DCA 1972), a decision subsequently quashed by this Court in State v. Mathis, 278 So.2d 280 (Fla. 1973). In the latter case, this Court expressly held that a prosecutor may properly comment upon the absence of evidence, and, as in this case, the prosecutor in Mathis properly pointed out to the jury that there had been no evidence presented in support of defense counsel's suggestion that the defendant's confession had been coerced.

disagrees, and would suggest that neither remark was fairly susceptible to being interpreted by the jury as a comment upon Barwick's rights. As to the first remark, such was innocuous in the extreme, and was clearly intended to advise the jury that, at the conclusion of all the evidence, the State would urge the jury that conviction was appropriate. Only a strained reading of the record could lead one to conclude that any improper comment had been made. See, e.g., Gosney v. State, 382 So.2d 838, 839 (Fla. 5th DCA 1980) (prosecutor's question to prospective jurors during voir dire as to whether they could wait until they heard "the State's side and the defense's side" not an impermissible comment). It should additionally be noted that the jury in this case was specifically instructed not only that the State bore the burden of proof, but that it was not necessary for the defendant to disprove anything or to prove his innocence (T 595).

As to the second remark, such was clearly an invited response to the defense's prior argument to the effect that the State was hiding something as to the circumstances under which Barwick had made his taped statement. Under these circumstances, the prosecutor was well within his rights to point out to the jury that there had been absolutely no evidence presented of any impropriety in regard to Barwick's statement, and that Appellant's statements, which had been introduced, provided no corroboration for this theory. See, e.g., White v. State, 377 So.2d 1149, 1150 (Fla. 1979) (prosecutor may properly refer to evidence as it exists before the jury and point out that there is an absence of evidence on a certain issue); DuFour v. State, 495 So.2d 154, 160-1 (Fla. 1986) (prosecutor's comment that no one

had contradicted testimony of state witness "invited response" to prior defense argument); Waterhouse v. State, 596 So.2d 1008 (Fla. 1992). To the extent that any error is perceived, such was unquestionably harmless beyond a reasonable doubt, under the standards set forth in State v. DiGiulio, supra. See Dailey, supra (prosecutor's improper comment upon defendant's failure to testify harmless error, in light of other substantial evidence of guilt); Wesley v. State, 498 So.2d 1277, 1278 (Fla. 2d DCA 1986), cert. denied, 503 So.2d 328 (Fla. 1987) (same). The instant convictions and sentence of death should be affirmed in all respects.

POINT VI

REVERSIBLE ERROR HAS NOT BEEN DEMONSTRATED, IN REGARD TO THE SENTENCER'S FINDINGS IN AGGRAVATION.

In sentencing Darryl Barwick to death, Judge Foster found that six (6) aggravating circumstances applied - (1) that Barwick had a prior conviction for a crime of violence, to wit: sexual battery, pursuant to §921.141(5)(b) Fla. Stat. (1985); (2) that the homicide had occurred during an attempted sexual battery, pursuant to 921.141(5)(d), Fla. Stat. (1985); (3) that the homicide had been committed for the purpose of avoiding arrest, pursuant to §921.141(5)(e), Fla. Stat. (1985); (4) that the homicide had been committed for pecuniary gain, pursuant to §921.141(5)(f), Fla. Stat. (1985); (5) that the homicide had been especially heinous, atrocious or cruel, pursuant to §921.141(5)(h), Fla. Stat. (1985) and (6) that the homicide had been committed in a cold, calculated and premeditated manner, pursuant to §921.141(5)(i), Fla. Stat. (1985) (R 1281-6; 1306).

The judge found that these aggravating circumstances outweighed the non-statutory mitigation weighed (R 1291). On appeal, Barwick challenges only three of the aggravating circumstances found - that in regard to the existence of an attempted sexual battery, and those in regard to the homicide having been especially heinous, atrocious or cruel and cold, calculated and premeditated. While, as will be demonstrated below, all of the sentencer's findings were correct, the State would contend, in light of the three unchallenged aggravating circumstances and the relatively unpersuasive mitigation, that any error would be harmless under such precedents as Rogers v. State, 511 So.2d 526, 535 (Fla. 1987), Bassett v. State, 449 So.2d 863 (Fla. 1984), Hamblen v. State, 527 So.2d 800 (Fla. 1988) and Wyatt v. State, 19 Fla. L. Weekly S351 (Fla. June 30, 1994). Each of Barwick's claims will be addressed.

A. THE FINDING THAT THE HOMICIDE OCCURRED DURING AN ATTEMPTED SEXUAL BATTERY WAS NOT ERROR

Barwick initially contends that Judge Foster erred in finding that the instant homicide occurred during an attempted sexual battery. To a large extent, this claim has already been addressed in Point III, and Appellee would incorporate by reference the arguments set forth therein. As noted earlier, the evidence presented during the trial included testimony to the effect that a semen stain consistent with having come from the two percent of the population with Barwick's blood and enzyme type and secretor status, had been found on the comforter in which the victim's body had been found (T 415-19). At the time that the victim's body was found, she was wearing a two piece

bathing suit; the top portion had been pulled up, and the rear of the bottom portion had likewise been pulled down in the back (T 243). The jury, by separate verdict, convicted Barwick of attempted sexual battery, as well as armed burglary and robbery, and murder (T 603-604).

In addition to the evidence presented at trial, the circumstances of Barwick's prior conviction for sexual battery and burglary were introduced for the first time at the penalty phase. Thus, Melissa Dom, the surviving victim of Barwick's 1983 crime, offered chilling testimony which sheds illumination upon Barwick's intent in this case. She testified that she, like Rebecca Wendt, had been attacked in her apartment, in a similar part of Panama City; she had previously been outside, and had come into the house to watch television (T 609-612). After hearing a noise, Ms. Dom found a man in her kitchen, wearing ski gloves and a mask, and holding a butcher knife (T 612). She identified Barwick as this individual, and stated that he placed the knife against her throat and backed her into the bedroom, where he forced on to the bed (T 612-13). Barwick removed the victim's clothing and attempted to penetrate her vaginally, but was unsuccessful (T 614); after a likewise unsuccessful attempt at oral sex, Barwick had intercourse with the victim (T 614-15). Ms. Dom had persuaded Barwick to remove his mask and he then told her that they "had a problem", in that she had seen his face; Barwick also pointed out that he had brought his own knife over (the butcher knife belonged to Ms. Dom), stating that it was "better to use the other person's" (T 615-6). Ms. Dom was able to convince Barwick that she would not report the incident, and he left, after threatening to kill her if she did so (T 615-16).

As Judge Foster noted in his sentencing order, Barwick's "modus operandi" was essentially the same in both cases, although, of course, Barwick chose to murder Ms. Wendt to see to it that she would never report his crime (R 1282-3). The fact that Barwick's semen was found on the comforter, as opposed to actually within the victim's body, may be explained by the fact, as in the prior crime, that he suffered from some sort of sexual dysfunction. Under all of the circumstances of this case, his intent to commit a sexual battery is unmistakable, and the finding of this aggravating circumstance was not error. See, e.g., Sochor v. State, 619 So.2d 285 (Fla. 1993) (not error for court to have found in aggravation that homicide occured during an attempted sexual battery, even though victim's body never recovered); Dailey v. State, 594 So.2d 254, 258 (Fla. 1991) (same, where victim's body found in water, and potential physical evidence of actual sexual battery lost; victim found nude, with underwear and jeans discovered along waterway); Holton v. State, 573 So.2d 284 (Fla. 1990) (aggravating circumstance properly found, even where tests for sperm in victim's body were negative). As with other aggravating circumstances, the sentencer was entitled to apply a common sense inference from the circumstances, see Gilliam v. State, 582 So.2d 610, 612 (Fla. 1991), and there is no record support for any suggestion that the victim might have already been dead prior to any attempt to sexually batter her. It is additionally more than a little disingenous for Barwick to deny any sexual motivation for this crime, when his expert witnesses testified that Barwick's status as "psychopathic sexual deviant" constituted mitigation (T 840, 883-4). See Point VIII, infra.

Appellee would also contend that, even should this Court disagree with the applicability of this factor, reversal of the death sentence would not be warranted, as it was in Atkins v. State, 452 So.2d 529 (Fla. 1984), relied upon by Barwick. As noted, the jury convicted Barwick of four felonies, including burglary while armed and armed robbery (R 1237-8). The judge instructed the jury upon burglary with an assault as a potential basis for this aggravating circumstance (T 956), and, in his original sentencing order, Judge Foster premised the finding of this aggravating circumstance upon all three felonies - burglary, robbery and attempted sexual battery (1283). It was only after the State expressed concern that this aggravating circumstance could merge with that involving pecuniary gain, cf. Provence v. State, 337 So.2d 783 (Fla. 1976) (R 1304-5), that the judge clarified his order to delete the references to burglary and robbery, and Appellee would contend that the record supports a "merged" finding of this aggravating circumstance, premised upon such felonies, as well as one predicated upon pecuniary gain. Cf. Routly v. State, 440 So.2d 1257, 1262 (Fla. 1983) (even if sentencer's finding that crime occurred during burglary was error, facts supported finding that it occurred during a robbery and kidnapping); Echols v. State, 484 So.2d 568 (Fla. 1985); Cannady v. State, 620 So.2d 165 (Fla. 1993). The instant sentence of death should be affirmed in all respects.

B. THE FINDING THAT THE HOMICIDE WAS ESPECIALLY HEINOUS, ATROCIOUS OR CRUEL WAS NOT ERROR.

Barwick next contends that Judge Foster erred in finding that the homicide was especially heinous, atrocious or cruel,

under §921.141(5)(h). In his sentencing order, the judge noted that there had been testimony from the medical examiner to the effect that the victim had been stabbed thirty-seven (37) times, and that there had been at least twelve (12) defensive wounds to her hands "where she attempted to ward off the blows"; the sentencer likewise noted the testimony to the effect that Ms. Wendt could have struggled from three to five minutes depending on the sequence of the wounds, and that, even if she had lapsed into shock, she would have felt pain and would have bled to death within ten to fifteen minutes (T 1285). On appeal, Appellant maintains that this was error because: (1) multiple stab wounds "do not necessarily render a homicide especially heinous, atrocious or cruel" (Initial Brief at 59); (2) the victim's physical suffering "was of relatively short duration" (Id.) and (3) the manner of the killing was directly caused by Barwick's "mental impairment at the time" (Initial Brief at 60). Appellee disagrees with all the above, and suggests that no error has been demonstrated.

The record in this case does indeed reflect that the medical examiner identified thirty-seven (37) separate stab wounds to the victim's body, and that such wounds were inflicted to the neck, back, chest, breasts, arm, wrist and abdomen (T 45); the cause of the victim's death was attributed to shock due to blood loss from multiple stab wounds (T 463). The expert likewise noted the existence of drag or scratch marks on the victim's neck, which had occurred when she moved (T 450-1); he also testified that the carotid artery had been cut (T 450). Dr. Steiner identified one stab wound to the back, which he stated could have been inflicted

relatively early, and which had gone straight into the aorta (T 457-8). Dr. Steiner also stated that the stab wounds to the left chest had penetrated the chest cavity, such that the victim had been sucking air through her chest, instead of her windpipe, and had not been able to breathe (T 455). All told, four pints of blood were found in the victim's chest cavity, and her left lung had been cut in several places (T 456-460). Dr. Steiner identified thirteen (13) of the wounds as life threatening, and hypothesized that if the back wound had been inflicted first, she would have remained conscious for several minutes, whereas if the wounds to the lung had occurred first, it could have been up to ten minutes (T 460-2). The witness also identified "one and a half dozen" defensive wounds upon each of the victim's hands, where she had attempted to grab the knife or ward a blow (T 452-4).

Appellant's first contention, as noted above, is that, allegedly, under such precedents as Demps v. State, 395 So.2d 501 (Fla. 1981), multiple stab wounds allegedly "do not necessarily render a homicide especially heinous, atrocious or cruel." (Initial Brief at 59). This case has nothing to do with Demps. Although, in such decision, this Court struck the heinous, atrocious or cruel aggravating factor, the factor in Demps had simply been predicated upon the judge's belief that the victim's death had been cruel, in that it had "deprived him of his right to live"; the finding had not been based upon the number of stab wounds inflicted, or the physical suffering which the victim endured. Demps, 395 So.2d at 505-6 n.5. This Court, has, of course, approved the finding of this aggravating circumstances in

cases such as this, in which the victim suffered mental anguish and physical pain as he or she was repeatedly stabbed to death. See, e.g., Garcia v. State, 19 Fla. L. Weekly S401 (Fla. August 11, 1994); Derrick v. State, 19 Fla. L. Weekly S341 (Fla. June 23, 1994); Taylor v. State, 630 So.2d 1038 (Fla. 1983); Atwater v. State, 626 So.2d 1325 (Fla. 1993); Campbell v. State, 571 So.2d 415 (Fla. 1990). This claim is utterly without merit.

Equally unpersuasive, and more than a little callous, is Barwick's suggestion that, in essence, Ms. Wendt did not "suffer long enough" to qualify for this aggravating circumstance (Initial Brief at 59-60). In determining the applicability of this factor, the sentencer was, of course, entitled to rely upon a common sense inference from the circumstances. See, Gilliam, supra. The fact that the victim had "one and a half dozen" defensive wounds on each hand obviously demonstrated that she fought long and hard for her life. Likewise, even if the lowest estimate of her consciousness is accepted, i.e., three to five minutes, such period of conscious pain and suffering is sufficient to justify the finding of this aggravating circumstance. See, e.g., Davis v. State, 604 So.2d 794 (Fla. 1992); Floyd v. State, 569 So.2d 1225 (Fla. 1990); Hansbrough v. State, 509 So.2d 1081 (Fla. 1987); Nibert v. State, 508 So.2d 1 (Fla. 1987). The cases relied upon by Barwick - Herzog v. State, 439 So.2d 1372 (Fla. 1983) and Rhodes v. State, 547 So.2d 1201 (Fla. 1989) - are distinguishable, in that there is no evidence presented sub judice to suggest that the victim had been intoxicated or unconscious at any time. This claim is without merit.

Barwick finally contends that error has been demonstrated, due to the fact that the sentencer allegedly failed to consider the cause or relationship between Barwick's mental illness and the manner of the killing; in support of his position, Barwick cites to four precedents of this Court - Amazon v. State, 487 So.2d 8 (Fla. 1986), Miller v. State, 373 So.2d 882 (Fla. 1979), Burch v. State, 343 So.2d 831 (Fla. 1977) and Jones v. State, 332 So.2d 615 (Fla. 1976) (Initial Brief at 60). None of these cases possesses applicability sub judice, and no error was committed in regard to the sentencer's finding of this aggravating factor. First of all, Appellant has greatly overstated the evidence presented as to his "mental illness". None of the defense mental health experts testified that any of the statutory mental mitigating circumstances applied, and, indeed, two of Barwick's own experts, Drs. Annis and McClaren, specifically testified that they did not (T 715-16, 767-8). Dr. Walker stated that Barwick had known what he was doing and known that it was wrong at the time of the murder (T 854). Additionally, Dr. McClaren was the only expert who was expressly asked his opinion as to whether the number of stab wounds meant that Appellant "lost control" while stabbing the victim. The witness's answer, to the effect that he could not say whether such fact reflected a loss of control or "a very deliberate continuation of an assault until resistance stopped" was hardly helpful to the defense (T 752-3); he likewise stated that he did not draw any connection between the number of stab wounds and other mental defects (T 752-3). Thus, there would not seem to be any factual basis for Barwick's claim.

Appellee, however, would also contend that a legal basis is lacking as well. In Michael v. State, 437 So.2d 138, 141-2 (Fla. 1983), this Court specifically rejected the defendant's contention that, under Jones, the heinous, atrocious or cruel aggravating circumstance could not apply "because his mental condition and emotional problems caused the murder", holding

> A defendant's emotional and mental problems do not affect the application of these two aggravating factors [the heinous, atrocious or cruel and cold, calculated and premeditated factors], but, rather, affect weight given the mitigating factors.

To the extent that Miller v. State is to the contrary, Appellee would respectfully contend that Michael is the better reasoned decision. See also Card v. State, 453 So.2d 17, 23 (Fla. 1984) (testimony of psychologist as to defendant's mental problems did not preclude finding of cold, calculated and premeditated aggravating factor). Additionally, in neither Burch nor Amazon did this Court strike this aggravating circumstance due to the defendant's mental state; rather, this Court held that in each case, on the basis of all the evidence, the jury's recommendation of life should not have been overridden. Because the finding of this aggravating circumstance is in accord with the precedent set forth above, especially Capehart, Davis and Taylor, reversible error has not been demonstrated.

C. THE FINDING THAT THE HOMICIDE WAS COMMITTED IN A COLD, CALCULATED AND PREMEDITATED MANNER WAS NOT ERROR.

Barwick finally contends that the sentencer's finding that the homicide was cold, calculated and premeditated was error on two grounds - because the facts allegedly failed to support the

factor and because Appellant was not placed on notice that the circumstance was being considered. In his sentencing order, Judge Foster found that Barwick had "in a calculated manner selected his victim and watched for an appropriate time"; the judge also noted that Barwick had planned his crime, by selecting a knife, gloves and a mask (R 1285-6). The sentencing judge further found that Barwick murdered the victim to keep her from identifying him as the individual who had committed the other crimes at issue, i.e., burglary, robbery and attempted sexual battery (R 1285-6). Appellee would respectfully contend that error has not been demonstrated, but that, even if such were the case, the jury's recommendation was not effected thereby. Because the jury, without hearing any argument or instruction upon this aggravating circumstance, nevertheless unanimously returned a recommendation of death, it is clear that this matter played no part in their sentencing determination. Cf. Sochor v. Florida, ___ U.S. ___, 112 S.Ct. 2114, 119 L.Ed.2d 326 (1992).[4]

Turning to Barwick's latter allegation, i.e., that regarding lack of notice, the State would contend that such claim is without merit. This Court has repeatedly held that due process does not require that a defendant be afforded actual notice of the aggravating circumstances. See e.g., Sireci v. State, 399 So.2d 964, 970 (Fla. 1981); Johnson v. State, 438 So.2d 774, 779 (Fla. 1983); Dufour v. State, 495 So.2d 154, 163 (Fla. 1986).

---

[4] As a subsidiary matter, Barwick also notes that the sentencing order at one point states that Appellant murdered the victim "without any moral or legal justification or remorse" (R 1286). Appellee would respectfully contend that Judge Foster's reference to remorse was mere surplusage. See, e.g., Rutherford v. State, 545 So.2d 853, 856 (Fla. 1989).

Certainly, by virtue of the fact that Barwick was charged with, inter alia, premeditated murder, he was aware that his mental state, as well as the existence of premeditation, heightened or otherwise, would be at issue (R 241). Cf. Combs v. State, 403 So.2d 418, 421 (Fla. 1981). Appellee would note that in Hoffman v. State, 474 So.2d 1178, 1182 (Fla. 1985), this Court rejected an argument virtually identical to that now propounded by Barwick:

> Hoffman also argues that the trial court erred in finding that the murder was especially heinous, atrocious or cruel even though the jury itself was not instructed on this particular aggravating circumstance. We fail to see how the jury's not being instructed on this aggravating circumstance has worked to the Appellant's disadvantage and therefore find this argument to be without merit.

Likewise, in Fitzpatrick v. State, 437 So.2d 1072, 1078 (Fla. 1983), this Court had held that it had not been improper for the judge to have found an aggravating circumstance, even though such had not been submitted to the jury. See also Engle v. State, 438 So.2d 803, 813 (Fla. 1983). Barwick's due process claim is without merit.

As to the factual basis for this claim, the State likewise sees no error. Appellant's contention this was "a spontaneous, impulsive killing" (Initial Brief at 63) is not supported by the record, and the court was entitled to reject any self-serving account of Barwick's to this effect, whether related by the mental health experts or contained in the confession. See e.g., Wuornos v. State, 19 Fla. L. Weekly S455, 458 (Fla. September 22, 1994); Walls v. State, 19 Fla. L. Weekly S377, S378 (Fla. July

7, 1994). The record indicates that Barwick did indeed select the victim in this case, whom he admitted having seen earlier at the beach (SR 310, 331). Appellant left his work site and walked through the Russ Lake Apartments, and, by his own admission, saw the victim sunbathing outside in a bikini (SR 313, 325, 332). Another resident of the apartment complex identified Barwick as the individual whom she had seen staring at her and walking around the complex in the vicinity of the victim's apartment (T 232-3). After initially passing through the complex, Barwick went home, had lunch, and gathered up his batting gloves and "tomato cutting knife", which he hid in the back pocket of his pants (SR 314, 333). Appellant then returned to the victim's apartment, and walked in through the open door; Ms. Wendt was inside watching television in the living room (SR 314, 333-4).

Barwick's claim to the effect that his only intent was "to burglarize" the apartment, and that the victim precipitated the fatal attack by attacking him while he was rummaging through her purse, as well as his disclaimer of any intent to rape or murder the victim (SR 315, 318-319, 328), is belied by the record. Inasmuch as Barwick also gave a statement in which he disclaimed any knowledge of the murder (SR 304-9), it is questionable the extent to which any of his statements must now be credited, see Wuornos, supra. Nevertheless, Barwick's exculpatory version of the homicide is not only inconsistent with other evidence but also implausible. If Barwick's intent was simply to "burglarize", then why would he choose one of the few apartments which was unquestionably occupied on this Monday after Easter? Presumably, one whose only intent is burglary would wish to

minimize the chances of encountering another human being; here, Barwick deliberately chose an apartment which he knew to be inhabited by a young lady whom he had previously seen sunbathing in a bikini. Additionally, Barwick's claim that the victim precipitated the assault by attacking him while he was going through her purse and wallet is contradicted by the fact that bloody fingerprints were found on some of the items which had been removed from the wallet and/or purse (T 244); obviously, some sort of attack preceded Barwick's perusal of the wallet contents. Further, despite Barwick's disavowal of any intent to commit rape, there was, as noted earlier, a semen stain found on the comforter in which the victim's body had been wrapped (T 415-19).

All the facts and circumstances of this offense indicate that Barwick intended to repeat the conduct evinced in his 1983 sexual battery of Ms. Dom with, of course, one important difference - he did not intend to leave behind any living witness to file charges against him. After entering Ms. Dom's apartment under very similar circumstances, and raping her, Barwick had allowed himself to be convinced she would not report the incident; Barwick had, of course, threatened to kill her if she did so (T 616-17). Ms. Dom courageously reported the crime, and Appellant was convicted of sexual battery with great force and burglary with an assault, and sentenced to incarceration, to be followed by probation (T 621-2). Undeterred by these attempts at retribution and/or rehabilitation, Barwick repeated his crime, with Ms. Wendt as the victim, and this time ensured her silence by thirty-seven separate stab wounds. It should be noted that in

the prior case, Ms. Dom testified that Barwick had not only brought a knife to her apartment, but that he had also taken one of hers as well; Barwick had explained that it was "better to use the other person's" (T 615). In this case, the victim's sister testified that there had originally been a set of six white handled serrated knives in the kitchen (T 216); only five were found after the murder (T 308-9). Further, at the penalty phase, the State introduced testimony from Appellant's brother and sister, to the effect that Barwick had told them that after the assault had begun he had known that he had to kill the victim, and that he did not want to go back to prison (T 626, 630).

While Appellant is correct in noting that this Court's precedents hold that a plan to kill cannot be inferred solely from a plan to commit another felony, see e.g., Geralds v. State, 601 So.2d 1157, 1163 (Fla. 1992), Appellee respectfully suggests that more than that was presented sub judice. The evidence presented below demonstrates that Barwick selected the victim in this case, armed himself with a deadly weapon, as well as at least a pair of gloves to prevent fingerprints, and, after entering the victim's apartment, proceeded to deliberately stab her to death. The fact that other felonies may have been contemplated, as well as an intention to avoid arrest, cf. Stein v. State, 632 So.2d 1361, 1366 (Fla. 1994), did not preclude the finding of this aggravating circumstance, in that there clearly was a prearranged design to commit murder. Appellee would contend that this aggravating factor has been found under comparable circumstances. See e.g., Owen v. State, 596 So.2d

985, 990 (Fla. 1992) (aggravating circumstance properly found, where defendant selected victim, placed socks on hands to avoid fingerprints, broke into victim's home, selected murder weapons and sexually assaulted and murdered victim); Jennings v. State, 453 So.2d 1109, 1115 (Fla. 1984) (circumstance proper, where defendant located victim, left, returned and abducted victim from home, where he assaulted and murdered her); Mason v. State, 438 So.2d 374, 379 (Fla. 1983) (circumstance proper, where defendant broke into victim's home, armed himself in her kitchen and attacked her as she lay sleeping). While it is the State's position that heightened premeditation existed prior to the defendant's entry of the victim's apartment, the State would also note that there was sufficient time and opportunity for such to have arisen therein, prior to the actual murder. Cf. Wickham v. State, 593 So.2d 191, 194 (Fla. 1991) (while murder may have "begun as a caprice", it clearly escalated into a highly prearranged, planned and calculated crime). The instant sentence of death should be affirmed in all respects.

POINT VII

REVERSIBLE ERROR HAS NOT BEEN DEMONSTRATED, IN REGARD TO THE CLAIM THAT THE SENTENCER FAILED TO CONSIDER OR WEIGH NON-STATUTORY MITIGATION REGARDING APPELLANT'S ABUSED CHILDHOOD.

Barwick next contends that Judge Foster erred in failing to consider and/or weigh the non-statutory mitigating evidence presented regarding the abuse which he suffered at the hands of his father. It is argued that the sentencing order violated this Court's decisions in Campbell, supra, and Nibert v. State, 574 So.2d 1059 (Fla. 1990), as well as Lockett v. Ohio, 438 U.S. 586,

98 S.Ct. 2954, 57 L.Ed.2d 973 (1978) and Eddings v. Oklahoma, 455 U.S. 104, 71 L.Ed.2d 1, 102 S.Ct. 869 (1982). Barwick notes that, in his sentencing order, Judge Foster found that the evidence established that Appellant "was abused as a child by his father and grew up in a dysfunctional family" (R 1290), but maintains that the instant sentence of death must be reversed, due to the judge's failure to assign weight to this factor. Appellee disagrees with all of the above, but most especially with Appellant's reading of the sentencing order.

While the sentencing order in this case could have been clearer, it is the State's position that, as in this Court's recent decision, Armstrong v. State, 19 Fla. L. Weekly S.397 (Fla. August 11, 1994), the sentencer adequately considered the non-statutory mitigation at issue. Although Judge Foster stated, at one point in the order, that the abuse which the defendant had received as a child was not found to be a mitigating circumstance (R 1290-1), the conclusion of the sentencing order contains more expansive language. Thus, after discussing the two specific areas of non-statutory mitigation proffered, Judge Foster concluded:

> The Court has considered and weighed each of the applicable aggravating circumstances and each of the statutory and non-statutory mitigating circumstances that are established by the evidence or on which there has been any significant evidence produced as they relate to the murder charge. Further, the Court has considered whether the established facts are such that in all fairness, taking into consideration the totality of the defendant's life or character are sufficient to counterbalance the aggravating circumstance. The jury in this case was unanimous in recommending the death penalty. The Court has carefully considered and

> reviewed all of the foregoing as it relates to the murder charge and determines that sufficient aggravating circumstances exist to support the recommendation of the jury and that the recommendation is not counter-balanced by the mitigating circumstances (R 1291-2).

The State respectfully contends that the only reasonable reading of the above order indicates that Judge Foster weighed the non-statutory mitigation at issue (whether he personally found it persuasive or not), and that Barwick's sentence of death violates neither Campbell nor Lockett.

As noted above, the State relies upon this Court's recent decision in Armstrong v. State. In that case, the defendant, as here, contended that the sentencing judge had failed to weigh the non-statutory mitigation presented regarding his childhood; in the order, the sentencing judge had cited to the evidence presented as to this matter, but had later concluded that no mitigating circumstances applied. This Court found that, in all likelihood, the judge had meant that no statutory mitigating circumstances applied. This Court also concluded, however, that the subsequent language in the sentencing order, to the effect that the judge had weighed the aggravating and mitigating circumstances and that no mitigation existed which outweighed the former, must mean that the judge had considered the evidence at issue,

> From the wording of the trial judge's sentencing order, it does appear that he sufficiently considered the non-statutory mitigating evidence presented in this case. He specifically stated that eleven witnesses testified on Armstrong's behalf and he specifically considered the testimony presented by those witnesses. After listing the testimony presented regarding the non-

> statutory mitigation, the trial judge stated that no mitigating circumstances applied to this case. Given that the statement followed the trial judge's listing of non-statutory mitigating evidence, it appears that he was stating no 'statutory' mitigating circumstances applied to this case. Further, the trial judge specifically weighed the mitigating evidence against the evidence in aggravation, stating that 'no mitigating circumstances exist to outweigh the aggravating' circumstances. Although the trial judge's articulation of how he considered the mitigating circumstances and aggravating circumstances is somewhat less than a model of clarity, we believe that he properly considered all non-statutory mitigating circumstances in imposing the death sentence. Armstrong, 19 Fla. L. Weekly at S.400.

As in Armstrong, it is clear from the sentencing order that Judge Foster considered Barwick's abused childhood; the order includes a finding to the effect that the evidence established "that the defendant was abused as a child by his father and grew up in a dysfunctional family" (R 1290). Judge Foster expressly stated that he considered this matter (R 1290), and no viable claim under Lockett or Eddings has been presented. Further, Judge Foster also stated that he had weighed "each of the statutory and non-statutory mitigating circumstances that are established by the evidence or on which there has been any significant evidence produced. . ." (emphasis supplied). This language certainly suggests that Judge Foster weighed the evidence adduced as to Barwick's childhood, whether he found it personally compelling or not. Additionally, as in Armstrong, the sentencing order indicates that the aggravating circumstances were not outweighed or "counter-balanced" by the mitigating circumstances, demonstrating that a proper weighing occurred.

Accordingly, Barwick is entitled to no relief under Campbell or Nibert.

To the extent that this Court disagrees, Appellee would content that reversible error has not been demonstrated. There is no allegation that the jury in this case was precluded from weighing or considering the evidence in mitigation; the jury unanimously recommended a sentence of death, with full knowledge of the circumstances of Barwick's past. In other cases, this Court had held that a sentencing judge's failure to expressly articulate and/or weigh non-statutory mitigation may be harmless. See, e.g., Wickham, supra; Pace v. State, 596 So.2d 1034, 1036 (Fla. 1992); Valle v. State, 581 So.2d 40, 49 (Fla. 1991); Cook v. State, 581 So.2d 2141, 144 (Fla. 1991); Wuornos, supra; Armstrong, supra. Given the six strong factors in aggravation, and the relatively minor nature of the evidence in mitigation, Appellee would contend that any error sub judice should be regarded as harmless in accordance with the above precedents. Appellant's sister, Lovey, testified that Appellant was not "singled out" for beatings, and his half-sister, Janice Santiago, testified that Appellant's father had been more lenient with him than toward the other children. (T 644, 827-8). Not all of the mental health experts drew any link between Barwick's childhood experiences and his mental state at the time of the incident, and those that did for the most part simply noted that Barwick might have "anxiety associated with male authority figures" (T 851-2) or might be a sexual deviant who identified with his abuser (T 879-882). The mitigating nature of this evidence is so minimal that any failure to fully weigh it was harmless. Cf. Sochor v.

State, supra. The instant sentence of death should be affirmed in all respects.

POINT VIII

THE INSTANT SENTENCE OF DEATH IS NOT DISPROPORTIONATE.

As his next point, Barwick contends that the instant sentence of death is disproportionate. Appellant's premise is a direct result of his view of the evidence, to the effect that this was an "unintentional" crime, committed during a "panic", and one in which Barwick's alleged mental and emotional problems played a great part. Of course, in convicting Barwick, and sentencing him to death, the judge and jury below conclusively rejected this view of the case, and Appellant has failed to demonstrate that this Court should now, in essence, resolve factual conflicts in his favor. Cf. Wuornos, supra. In support of his position, Appellant relies upon a number of jury override cases, which are clearly distinguishable - Holsworth v. State, 522 So.2d 348 (Fla. 1988), Amazon, supra and Burch, supra - as well as other cases involving "impulsive killings during the course of other felonies", such as Proffitt v. State, 510 So.2d 896 (Fla. 1987), Rembert v. State, 445 So.2d 337 (Fla. 1984) and Caruthers v. State, 465 So.2d 496 (Fla. 1985). Appellee respectfully contends that these cases are easily distinguishable, and that the instant sentence of death is in accordance with this Court's precedents.

However much Barwick's appellate counsel chooses to stress his "mental and emotional impairment", the fact remains that, although the defense called six (6) mental health experts (and

utilized the deposition of a seventh), none of the experts testified that Barwick's mental impairment rose to the level of statutory mitigation. In fact, as noted, Drs. Annis and McClaren expressly testified that neither statutory mitigating circumstance relating to mental state applied (T 715-16, 767-8). Dr. Annis specifically testified that he saw no signs of any major affective disorder or schizophrenia, and Dr. McClaren likewise stated that he found no psychosis (T 684-5, 765); at most, both found that Barwick was frustrated, anxious and suffering from a personality disorder (T 685, 706-7, 753, 767). While Dr. McClaren found some evidence of brain dysfunction and learning disability, he also measured Barwick's IQ as 103, indicating average intelligence (T 747-8). While Dr. Beller likewise found a learning disability due to brain damage, he also assessed Barwick as having average intelligence (T 780-1); based upon Barwick's account of the murder, Beller found him to be a "psychopathic sexual deviant" (T 785-6).

Additionally, Dr. Warriner, who had originally examined Barwick in 1980 and concluded that he could be rehabilitated (a diagnosis which he disavowed and recanted and the hearing below (T 835)), likewise described Barwick as a psychopathic sexual deviant, who was extraordinarily dangerous because he could "pass for extremely normal" (T 840); the defense expert opined that there was no appropriate treatment for Barwick, and that, at most, he should be "contained" (T 845). Dr. Hord testified that, while Barwick was very unsettled and unstable, he was not psychotic, and, in fact, had an average IQ (T 851). Finally, Dr. Walker stated that, although Barwick had known the difference

between right and wrong and had known that what he was doing was wrong, he was a sexual deviant who "should not be put on the street under any circumstances" (T 883-4).

The State respectfully suggests that two "themes" emerge from the above-cited evidence. First of all, while there was testimony to the effect that Barwick suffered from the above conditions, it cannot be said that his mental impairment was on a par with that of the defendants in the cases cited in the Initial Brief. See e.g., Jones, supra (defendant suffered from paranoid psychosis); Burch, supra (judge found statutory mitigating circumstance of substantial impairment); Miller, supra (defendant suffered from paranoid schizophrenia). This case is also distinguishable from Fitzpatrick v. State, 527 So.2d 809 (Fla. 1988), in which this Court concluded that the death sentence was disproportionate, given the judge's finding that three statutory mitigating circumstances, including both involving mental state, applied; in contrast to the situation sub judice, the mental health experts had been unanimous that the defendant's mental impairment rose to that level. Further, the evidence presented by Barwick simply was not that mitigating. Being diagnosed as a sexual deviant who is too dangerous to ever be released hardly presents an uncontrovertible basis for a life sentence. Cf. Sochor, supra ("difficult to discern" whether fact that defendant became violent after being refused sex was "mitigating").

Additionally, this case is clearly distinguishable from the other cases relied upon by Barwick, such as Rembert, Proffitt, and Caruthers due not only to the dearth of mitigation, but also

the existence of extreme aggravation. As this Court noted in distinguishing the above trio of cases in other precedents, those cases involve factual situations in which minimal aggravation, and more substantial mitigation, had been presented. See e.g., Hudson v. State, 538 So.2d 829, 832 (Fla. 1989) (Proffit and Caruthers distinguished); Young v. State, 579 So.2d 721, 724-5 (Fla. 1991) (Proffitt distinguished as case with "one weak aggravator, substantial mitigation"; Caruthers distinguished as case with "one aggravator, one significant mitigator"; Rembert distinguished as case with "one aggravator, considerable mitigating evidence"); Asay v. State, 580 So.2d 610, 614 (Fla. 1991) (Proffitt and Caruthers distinguished).[5]

This case represents one in which strong aggravation was properly found, and the death sentence has been imposed, and approved, in comparable circumstances. See e.g., Rhodes v. State, 638 So.2d 920 (Fla. 1994) (death penalty proportionate, where defendant, with prior conviction, committed murder during attempted sexual battery, even in light of "substantial mental mitigation"); Sochor, supra (death penalty proportionate, in case in which defendant with prior conviction committed murder during attempted sexual battery; sentence remained proper even after striking of cold, calculated aggravator); Happ v. State, 596 So.2d 991 (Fla. 1992) (death penalty appropriate where defendant, with prior record, raped and murdered victim, even though cold, calculated aggravator stricken and non-statutory

---

[5] Although Barwick also relies upon Richardson v. State, 437 So.2d 1091 (Fla. 1993) (Initial Brief at 70-1), such was a jury override case, in which the death sentence was reversed on grounds other than proportionality.

mitigation found); Owen, supra (death penalty proportionate, where defendant with prior record broke into victim's apartment and sexually assaulted and murdered her); Hudson v. State, supra (death penalty proportionate, where defendant with prior record broke into apartment and stabbed victim to death, where minimal weight afforded to defendant's mental problems and age). The instant sentence of death should be affirmed in all respects.

POINT IX

FUNDAMENTAL ERROR HAS NOT BEEN DEMONSTRATED, IN REGARD TO THE PROSECUTOR'S CLOSING ARGUMENT AT THE PENALTY PHASE.

Barwick next contends that his sentence of death must be reversed due to the prosecutor's closing argument at the penalty phase. During this argument, the assistant state attorney argued, without objection, that neither sympathy for the victim nor the defendant was a valid consideration for the jury, or a proper basis for their verdict, and that the jury should "follow the law"; the prosecutor specifically admonished the jury that a life recommendation could not be premised upon "sympathy alone" (T 933-4). On appeal, Appellant maintains that this argument was erroneous in two respects - (1) that it urged the jury to consider sympathy for the victim and (2) that it improperly precluded the jury from considering sympathy as a mitigating circumstance or as a basis to recommend life. Appellee disagrees with both of Barwick's contentions.

Initially, however, and dispositive of the issue, is the fact that any claim of error has been waived due to the absence of contemporaneous objection below. This Court has consistently held that the contemporaneous objection rule applies in capital

proceedings, and that a defendant's failure to object to prosecutorial argument waives any claim of error therein for appeal. See e.g., Rose v. State, 461 So.2d 84, 86 (Fla. 1984); Teffeteller v. State, 495 So.2d 744 (Fla. 1986); Crump v. State, 622 So.2d 963 (Fla. 1993). Although the comments at issue do not even rise to this level, it should additionally be noted that this Court has specifically held that claims of error involving alleged "victim impact argument" cannot be reviewed in the absence of objection, thus precluding any contention that such could rise to the level of fundamental error. See e.g., Grossman v. State, 525 So.2d 833 (Fla. 1988); Daugherty v. State, 533 So.2d 787 (Fla. 1988). Barwick has cited no precedent of this Court which provides that the errors complained of sub judice are fundamental. Accordingly, the instant sentence of death should be affirmed in all respects.

To the extent that any further argument is required, Appellee would suggest that Barwick has failed to demonstrate the existence of error, let alone reversible error. Appellant's first argument - to the effect that the prosecutor was actually urging the jury to consider sympathy for the victim - can only have been derived from a strained reading of the record. The remarks of the prosecutor are, of course, directly to the contrary (". . . I can't argue sympathy. It's improper."). To the extent that the prosecutor discussed the victim's pain and suffering as such related to the heinous, atrocious or cruel factor, such was not improper. See Phillips v. State, 476 So.2d 194, 196 (Fla. 1985) ("The mindset or mental anguish of the victim is an important factor in determining whether this

aggravating circumstance applies"). Under this Court's precedents, no relief is warranted. See e.g., Johnson v. State, 442 So.2d 185 (Fla. 1983) (prosecutor's brief request for sympathy for victim's family not so prejudicial as to warrant reversal); Nixon v. State, 572 So.2d 1336 (Fla. 1990) (prosecutor's request that victim not be forgotten not "golden rule" argument).

As to Appellant's second argument, it should be noted that Barwick himself concedes that "mere sympathy, which has no source in the mitigating evidence, may not appropriately be the sole foundation for the jury's decision," correctly citing to California v. Brown, 479 U.S. 538, 107 S.Ct. 837, 93 L.Ed.2d 934 (1987) and Valle v. State, 581 So.2d 40 (Fla. 1991), for such proposition. (Initial Brief at 74-5). Inasmuch as this is exactly what the prosecutor argued, (" . . . don't fall into that category that this man, that just on the basis of sympathy, sympathy alone that you are going to vote, to recommend to the judge that he be sentenced to life imprisonment with the possibility of parole after twenty-five years in prison. Don't let sympathy make you vote that way." (T 934)), Barwick's point on appeal is difficult to discern. It is likewise difficult to fathom how asking the jury to put aside irrational emotion, and to decide their verdict in accordance with the law, could amount to fundamental error. See, e.g., Jones v. State, 569 So.2d 1234, 1239 (Fla. 1990) ("A verdict is an intellectual task to be performed on the basis of the applicable law and facts."). The instant sentence of death should be affirmed in all respects.

POINT X

REVERSIBLE ERROR HAS NOT BEEN DEMONSTRATED, IN REGARD TO THE JURY INSTRUCTION ON THE HEINOUS, ATROCIOUS OR CRUEL AGGRAVATING CIRCUMSTANCE.

In this claim, Barwick contends that his sentence of death must be vacated, because an inadequate instruction was given to the jury on the heinous, atrocious or cruel aggravating circumstance; Appellant maintains that he objected to this instruction and proposed an alternate. Barwick concedes, however, that this Court has held, in such cases as Hall v. State, 614 So.2d 473 (Fla. 1993), that the instruction sub judice is constitutional (Initial Brief at 76), but asks this Court to reconsider such position. Appellee respectfully suggests that, under all of the facts and circumstances of this case, Appellant is entitled to no relief.

Initially, the state would question the preservation of this point. Although Barwick did voice an objection to the definitions contained in this jury instruction (T 870-1, 903, 961), he never formally stated the basis for his objection, and never placed the court on notice that a constitutional claim existed. Likewise, although defense counsel stated that he had a proposed instruction in this regard (T 903), the record does not contain any alternative instruction. Accordingly, Appellee contends that it would be inconsistent with James v. State, 615 So.2d 668 (Fla. 1993) for this Court to review this claim on the merits. See, e.g., Kujawa v. State, 405 So.2d 251, 252, n.3 (Fla. 3rd DCA 1981) (objection that jury instruction violated defendant's constitutional rights "too generalized to preserve

claim of error"); Courson v. State, 414 So.2d 207, 209-210 (Fla. 3rd DCA 1982) (in order to preserve for appellate review objection to court's giving or denial of instruction, defendant must state distinctly the matter to which he objects and the grounds for his objection); Castor v. State, 365 So.2d 701 (Fla. 1978) (in order to further the purposes behind the contemporaneous objection rule, objection must be specific enough to apprise the trial court of the putative error and preserve the issue for intelligent review on appeal). This claim is waived.

To the extent that this Court disagrees, Appellee would contend that Barwick is nevertheless entitled to no relief. The jury in this case was given the full instruction contemplated by this Court in State v. Dixon, 283 So.2d 1 (Fla. 1973):

> The crime for which the defendant is to be sentenced was especially heinous, atrocious or cruel.
>
> 'Heinous' means extremely wicked or shockingly evil.
>
> 'Atrocious' means outrageously wicked and vile.
>
> 'Cruel' means to designed to inflict a high degree of pain with utter indifference to or even enjoyment of the suffering of others.
>
> The kind of crime intended to be included as heinous, atrocious or cruel is one accompanied by additional acts that show that the crime was conscienceless or pitiless and was unnecessarily torturous to the victim (T 956-7).

As Appellant concedes, this Court has previously, and repeatedly, held that this jury instruction is constitutionally sufficient. See, e.g., Power v. State, 605 So.2d 856, 864-5, n.10 (Fla. 1992), cert. denied, ___ U.S. ___, 113 S.Ct. 863, 123

L.Ed.2d 483 (1993); Preston v. State, 607 So.2d 404, 410 (Fla. 1992), cert. denied, ___ U.S. ___, 113 S.Ct. 1619, 123 L.Ed.2d 178 (1993); Hall v. State, supra; Taylor v. State, 630 So.2d 1038, 1043 (Fla. 1993), cert. denied, ___ U.S. ___, (October 3, 1994); Mordenti v. State, 630 So.2d 1080, 1085 (Fla.), cert. denied, ___ U.S. ___, 114 S.Ct. 2726, 129 L.Ed.2d 849 (1994); Stein v. State, 632 So.2d 1361, 1367 (Fla.), cert. denied, ___ U.S. ___ (October 3, 1994). Appellee respectfully submits that Barwick has failed to offer this Court any good cause to recede from the above precedents.

Further, because this murder was heinous, atrocious or cruel under any definition of the terms, given the number of stab wounds and the suffering endured by the victim, any error would be harmless beyond a reasonable doubt, as this Court has concluded in comparable circumstances. See, e.g., Foster v. State, 614 So.2d 455, 462 (Fla. 1992) (insufficient definition of terms of heinous, atrocious or cruel aggravating factor harmless error, where jury could not have been misled by inadequate instruction); Davis v. State, 620 So.2d 152 (Fla. 1993) (under facts of case and under any instruction, jury would have recommended, and judge would have imposed, death); Atwater v. State, 626 So.2d 1325, 1328-9 (Fla. 1993) (because heinous, atrocious or cruel factor consistently found in cases involving repeated stabbings, jury instruction error harmless); Gorby v. State, 630 So.2d 544, 548, n.6 (Fla. 1993) (jury instruction error harmless, where murder qualified for aggravating factor "under any definition of the terms"). The instant sentence of death should be affirmed in all respects.

POINT XI

DENIAL OF APPELLANT'S REQUESTED JURY INSTRUCTION ON DURESS WAS NOT ERROR.

Barwick next contends that the court below erred in denying his request that the jury be instructed on the statutory mitigating circumstance relating to extreme duress or domination by another person, under §921.141(6)(e), Fla. Stat. (1985). It is Appellant's contention that the victim's "attack" upon Barwick somehow exacerbated his own mental problems, such that this mitigating circumstance could have been applicable. Appellant acknowledges this Court's contrary decision in Toole v. State, 479 So.2d 731 (Fla. 1985), but suggests that the holding of that case was somehow modified in Fead v. State, 512 So.2d 176 (Fla. 1987) (Initial Brief at 82). Appellee disagrees with all the above.

While Barwick unquestionably requested that the jury be instructed on this statutory factor, and such request was denied (T 870), it is uncontrovertible that *no error* has been demonstrated. In Toole, this Court held that this mitigating circumstance was only applicable where external provocation "such as imprisonment or the use of force or threats" existed. Under no stretch of the imagination was such factual scenario present sub judice. Even if the victim sought to defend herself against Barwick's murderous advances, as one would assume that she had a right to do, such act could not justify her subsequent slaughter. Rebecca Wendt bore no responsibility for Barwick's alleged "internal turmoil", and she certainly did not exert pressure upon him so that he would be compelled to murder her. In Fead, this

Court disapproved a jury override, and noted that the jury could have believed, inter alia, that the defendant therein had been under the influence of alcohol and "under extreme mental and emotional disturbance and duress, partly as a result of his alcohol consumption and partly because of his jealousy." Id. at 179. Regardless of this Court's reference to "duress" in Fead, such opinion evinces no clear intent on this Court's part to recede from Toole, and to hold, as Appellant apparently would have this Court, that a victim can somehow bring about his or her own demise by resisting a murderer. In any event, it is clear, that Fead did not expressly discuss the issue herein, i.e., that regarding jury instructions, and Appellant's claim is utterly without merit.

To the extent that any further argument is necessary, Appellee would note that the jury in this case was specifically instructed on three statutory mitigating circumstances - including extreme mental and emotional disturbance, substantial impairment of capacity and age - and was additionally advised that they could consider any other aspect of the defendant's character or record or any other circumstance of the offense in mitigation (T 957-8). The State contends that such instructions provided the jury with a more than adequate vehicle to weigh the evidence presented regarding Barwick's mental state and the circumstances of the offense. Error has not been demonstrated. See, e.g., Roman v. State, 475 So.2d 1228, 1235 (Fla. 1985) (not error for court only to instruct on one statutory mitigating circumstance relating to mental state); Cave v. State, 476 So.2d 180, 187-8 (Fla. 1985) (not error for court to have declined

specific instruction on defendant's age and minor participation, where jury instructed that it could consider "any aspect of the appellant's character or record or any other circumstance of the offense"); Nixon, supra ("catchall" instruction provided adequate vehicle for jury to consider evidence presented as to defendant's mental infirmities). The instant sentence of death should be affirmed in all respects.

POINT XII

DENIAL OF APPELLANT'S MOTION TO PRECLUDE THE DEATH PENALTY, DUE TO ALLEGED RACIAL BIAS, WAS NOT ERROR.

As his final claim, Barwick contends that the trial court erred in denying his motion to preclude the death penalty due to alleged racial bias. The record in this case reflects that Appellant filed such motion on March 19, 1991, and that the motion simply incorporated by reference a similar pleading filed in another Bay County capital case, that of Charles Kenneth Foster (R 909-936). The matter was brought up during a hearing on that same date, and denied without discussion (T 117-118; R 903). As Appellant notes in his brief, this Court rejected this claim in Foster's appeal, Foster v. State, 614 So.2d 455, 463-4 (Fla. 1992) (Initial Brief at 83), but he now contends that this Court should recede from Foster, and adopt the views of the dissent therein.

Appellee respectfully contends that Foster was correctly decided, and that Barwick has failed to demonstrate any basis for relief. This Court found in Foster that the defendant had "offered nothing to suggest that the state attorney's office acted with purposeful discrimination in seeking the death penalty

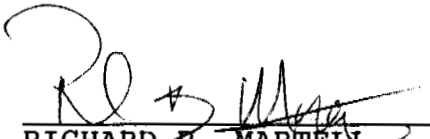
in his case." Id. at 463. It should be noted that in his motion, Foster at least discussed the facts of his particular case and contrasted them with other Bay County cases in which the death penalty had not been imposed (R 930-1). Here, Barwick simply incorporated Foster's motion in toto, and, accordingly, failed to make any specific allegation regarding his own case. If Foster's offer of proof was insufficient, Barwick's must be doubly so, and the State would contend that Barwick's "proffer" fails, whether under the standard promulgated by the majority or the dissent in Foster. The instant sentence of death should be affirmed in all respects.

CONCLUSION

WHEREFORE, for the aforementioned reasons, Barwick's convictions and sentence of death should be affirmed in all respects.

Respectfully submitted,

ROBERT A. BUTTERWORTH
ATTORNEY GENERAL



RICHARD B. MARTELL
Chief, Capital Appeals
Florida Bar No. 0300179

DEPARTMENT OF LEGAL AFFAIRS
The Capitol
Tallahassee, FL 32399-1050
(904) 488-0600

COUNSEL FOR APPELLEE

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Mail to W. C. McClain, Assistant Public Defender, Leon County Courthouse, Fourth Floor North, 301 South Monroe Street, Tallahassee, Florida 32301, this 24 day of October, 1994.

RICHARD B. MARTELL
Chief, Capital Appeals