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IN THE SUPREME COURT OF FLORIDA

DARRYL BARWICK, :

Appellant, :

v. : CASE NO. 80,446

STATE OF FLORIDA, :

Respondent. :

_____/

INITIAL BRIEF OF APPELLANT

NANCY A. DANIELS
PUBLIC DEFENDER
SECOND JUDICIAL CIRCUIT

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ASSISTANT PUBLIC DEFENDER
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ATTORNEY FOR APPELLANT

SERVED 12 DAYS LATE

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INITIAL BRIEF OF APPELLANT

PRELIMINARY STATEMENT

The lower court's record and the trial transcripts are numbered separately. References to the record will be designated with the prefix "R" and references to the transcripts will be designated with a "TR." A supplemental record on appeal includes the transcript of the partial trial of this case which resulted in a mistrial, various hearings and a transcript of tape recorded statements Appellant gave police. References to the supplement will be designated with the prefix "SR."

STATEMENT OF THE CASE AND FACTS

Procedural Progress Of The Case

A Bay County grand jury indicted Darryl Bryan Barwick on April 28, 1986, for first degree murder, armed burglary, attempted sexual battery and armed robbery. (R 241-242) In November of 1986, Barwick was tried and found guilty as charged. (R 652-653, 678-684) On January 30, 1987, Circuit Judge W. Fred Turner sentenced Barwick to death in accordance with the jury's recommendation. (R 654, 678-688) This Court, on direct appeal, issued a decision reversing Barwick's judgment and sentence for a new trial. (R 694-697) Barwick v. State, 547 So.2d 612 (Fla. 1989).

The assistant public defenders who originally tried this case were reappointed for the new trial. (R 699) However, they moved to withdraw due to a conflict of interest. (R 710) Roy A. Lake was appointed to represent Barwick on February 9, 1990. (R 711) The retrial of this case was originally assigned to Judge Turner, but after his retirement, the case was reassigned to Circuit Judge N. Russell Bower. Judge Bower, on his own motion, recused himself from the case. (R 898) The chief judge assigned Circuit Judge Clinton E. Foster to the case on February 28, 1991. (R 899)

On June 5, 1991, Barwick moved to disqualify Judge Foster. (R 949-956) After a hearing, Judge Foster orally denied the motion to disqualify. (SR 40-67) Barwick, on June 7, filed a renewed motion to disqualify Judge Foster alleging the original and additional grounds. (R 975-981) Judge Foster entered a

written order on the motion to disqualify on the same day. (R 989-995) On June 11, 1991, Barwick filed a petition for writ of prohibition concerning this issue which this Court denied on June 14, 1991. (Barwick v. Foster, Case No. 78,071) Judge Foster denied the renewed motion to disqualify on June 19, 1991. (R 1002-1005)

Due to an injury he received in an automobile accident, Lake was unable to continue representation of Barwick, and on February 5, 1992, the court appointed Robert T. Adams to the case. (R 1099-1100, 1114)

Barwick proceeded to a jury trial on June 22, 1992. (R 1167-1175, 1184-1185) The court declared a mistrial on the third day of the trial. (R 1183) Barwick filed a motion to dismiss on double jeopardy grounds which the court denied. (R 1205-1214) A new trial commence on July 6, 1992. (R 1215-1257)

The jury found Barwick guilty as charged and recommended a death sentence for the murder. (R 1236-1238, 1254) On August 11, 1992, Judge Foster adjudged Barwick guilty and sentenced him to death for the murder, to life for the armed burglary, to 30 years for the attempted sexual battery and to life for the armed robbery. (R 1281-1299) In support of the death sentence, the court found six aggravating circumstances: (1) a previous conviction for a violent felony based on a 1983 conviction for sexual battery and burglary (R 1281-1282); (2) the homicide was committed during an attempted sexual battery (R 1282-1283, 1306-1307); (3) the homicide was committed to avoid arrest (R 1283); (4) the homicide was committed for pecuniary gain (R

1284, 1306-1307); (5) the homicide was especially heinous, atrocious or cruel (R 1285); (6) the homicide was cold, calculated and premeditated (R 1285-1286). Regarding mitigation, the court rejected all of the statutory mitigating circumstances. (R 1287-1290) The court acknowledged the substantial evidence of Barwick's mental disturbance at the time of the crime but concluded his condition did not rise to the level of a statutory mitigating circumstance and did not constitute "a significant mitigating circumstance." (R 1287-1288) As to nonstatutory mitigating circumstances, the court found Barwick was abused as a child but decided this was not a mitigating circumstance. (R 1290-1291) Additionally, the court acknowledged there was evidence that Barwick suffered some mental or emotional deficiencies. (R 1291)

Barwick filed his notice of appeal to this Court. (R 1309)

Motion To Disqualify Trial Judge

Barwick's motion to disqualify Judge Foster was heard on June 5, 1991. (SR 40-67) The motion alleged that Barwick had reasons to fear that he would not receive a fair trial with Judge Foster presiding because of extra-judicial conduct and statements indicating Foster had prejudged psychological issues critical to the defense and that the judge's concern for the county's finances were paramount to Barwick's ability to prepare his defense. (R 949-965) (A copy of the Motion For Disqualification Of Judge is reproduced in Appendix A, attached to

this brief) An affidavit containing the factual basis for the motion was attached to the motion. (R 358-362) (Appendix A)

The substance of the affidavit contained the following:

On February 28, 1991, Judge Foster had been assigned to handle this case after the retirement of Judge W. Fred Turner and after Judge N. Russell Bower recused himself on his own motion. (R 959) Barwick had pending at that time a second motion for interim payment of attorney's fees and a motion to appoint a psychiatrist to assist in preparing the defense. (R 959) Judge Foster held a status conference on the case at which he asked if the case had been tried previously and whether a transcript of the trial was available. (R 959-960) After receiving affirmative answers, Judge Foster "repeatedly .....questioned the necessity of any further trial preparation or additional expert assistance." (R 960) At a hearing a few days later, April 2, 1991, Judge Foster, on his own motion, rescinded Judge Turner's previous orders appointing a defense investigator, a psychologist and a neurologist. The judge, at that time, said he would determine if any additional work would authorized at county expense. Although the court reappointed the neurologist, he did so at a fee of $150 an hour without information as to the reasonableness of the fee. He did not reappoint the psychologist or investigator. (R 960) Additionally, Judge Foster refused to authorize interim fees for defense counsel even though Judge Turner had earlier granted an interim fee arrangement for counsel. (R 960)

Judge Foster's actions in denying the motion for appointment of a psychiatrist were also detailed in the affidavit. (R 961-962) The motion was filed because the defense psychologist, Theodore Blau, Ph.D., had recommended obtaining the assistance of a psychiatrist to aid in the assessment of Barwick's mental impairments as they related to the issues in the case. No psychiatrist had been previously appointed. At the hearing on March 19, 1991, the prosecutor presented no argument but requested time to file a written memorandum. Judge Foster granted the State time to file the memorandum and gave the defense time to file a response. The prosecutor never filed a memorandum. On April 2 and April 19, 1991, the defense again raised the motion and the court again gave more time to the State to prepare a memorandum. Defense counsel learned that on May 14, 1991, a discussion between the prosecutor and the judge, in defense counsel's absence, occurred. At that time, the prosecutor told the judge a hearing on the motion would be needed. Instead, the court, on the same day, summarily denied the motion. (R 962)

The final paragraph of the affidavit stated a comment Judge Foster made about the defense psychologist as told to defense counsel:

> 15. I have recently been told 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. It is my information and belief that Dr. Blau has never

testified before Judge Foster and that Judge Foster has never met Dr. Blau.

(R 962)

On June 5, 1991, Judge Foster heard the Motion For Disqualification Of Judge. (SR 40-67) The court evaluated each paragraph of the affidavit before denying the motion. (SR 40-67) Paragraphs one through nine essentially stated historical information about the progress of the case. (R 958-959) (Appendix A) Regarding paragraphs ten through 13, which concerned Judge Foster's rescission of orders Judge Turner entered for defense experts and an investigator and interim attorney's fees, Judge Foster ultimately ruled this was insufficient as a matter of law to support the motion. (R 989-1013) (Appendix B) (SR 45-52) The judge explained that he does not, as a practice, approve interim fees for attorneys. (SR 46-47, 49-52) At one point, as counsel explained that as a sole practitioner he needed interim fees, the Judge Foster said, "Then have you considered withdrawing from the case?" (SR 77) As to the allegation contained in paragraph 11 claiming Judge Foster questioned the need for further trial preparation since a transcript of the first trial was available, the Judge said he did not disagree, but he further said that he had the obligation to inquire and expedite the case. (SR 47-48) Judge Foster agreed with paragraph 12 of the affidavit that he had rescinded previous order appointing a defense investigator and defense experts on his own motion. (SR 48-49) However, the judge added that he rescinded the orders with leave to resubmit orders that put more limitations on the

costs. (SR 48-49) The judge said he would review a transcript of the hearing where the orders were rescinded before ruling on the legal sufficiency of this paragraph. (SR 49) Later, in the written order the court referenced the transcript of the April 2, 1991, hearing and denied that he had rescinded orders for all defense assistance in the case. (R 990-991) (Appendix B)

In paragraph 14, Barwick alleged that Judge Foster summarily denied his motion for appointment of an psychiatrist after an ex parte communication with the prosecutor. (R 961-962) (Appendix A) Judge Foster said this was insufficient to show prejudice, although his actions may have been error. (SR 55-57)

Finally, the claim in paragraph 15 was that Judge Foster had said that the defense psychologist, like other psychologists, "would say anything that the party that hired him wished him to say." (R 963) At the hearing, defense counsel related the claim and stated that it showed prejudice toward his expert, Dr. Blau, and toward the mental health issue which would be involved in the case. (SR 57) Judge Foster responded,

> THE COURT: Well, that, that, that could be, that could be. I do not know Dr. Blau. As far as I know he has never testified before me; he may have. But -- And I'm not getting into the truth of the matter, but I think it's insufficient when it's based totally on hearsay without identifying the source of it.

(SR 57) At the close of the hearing, Defense counsel asked for a stay to seek the issuance of a writ from this Court, which the trial court denied. (SR 63-64)

On the afternoon of the day of the hearing on the motion to disqualify, Judge Foster telephoned defense counsel's office to schedule a hearing. (R 125) Since counsel's office was out of town and he had other matters scheduled the following day, a telephone conference was arranged for the next morning, June 6, 1991. (R 125) At the telephone hearing, the prosecutor and Barwick were personally present in the Judge's chambers. (R 125-129) The Court advised defense counsel that he had received information that counsel, Roy Lake, had consulted with the public defenders who had represented Barwick on the previous trial but who had to withdraw due to a conflict of interest. (R 125-126) Judge Foster also said he had been told that, in fact, the public defenders had prepared the motion to disqualify heard the previous day. (R 125-126) Roy Lake replied that he had, indeed, consulted with the public defenders, Mr. Stone and Ms. Sutton, and that Barwick knew of this contact. (R 127-128) Lake also objected to the procedures the judge was employing at the hearing. (R 127) The judge responded stating that he wanted to bring the matter to Barwick's attention and he wanted a determination made as to whether Lake's actions impacted on Barwick's representation. (R 128-129)

On the next morning, June 7th, Barwick filed a renewed motion to disqualify Judge Foster and to place ex parte communications on the record. (R 375-388) (Appendix C) The mo- tion alleged the grounds raised earlier and the following additional grounds: (1) that Judge Foster disputed several factual

allegations during the hearing on the motion to disqualify on June 5, 1991; (2) that Judge Foster appeared angry and offended at the June 5th motion hearing and at the June 6th telephone conference which created more concern for Barwick about the judge presiding over his case; and (3) Judge Foster's actions surrounding the telephone conference and the ex parte communication upon which he based it. (R 375-388)

Shortly after noon on June 7, 1991, Judge Foster filed his order denying the original motion to disqualify him as the trial judge in the case heard on June 5th. (R 389-399) (Appendix B) Barwick filed a petition for writ of prohibition in this Court on June 11, 1991. Barwick v. Foster, Case no. 78,071. The petition included a copy of the June 7th renewed motion for disqualification, which was still pending in the trial court, for informational purposes. (R 130) This Court denied the writ on June 14, 1991. Barwick v. Foster, Case no. 78,071. On June 17, 1991, Judge Foster heard the renewed motion to disqualify and orally denied it. (R 124-148) The court filed a written order on June 19, 1991. (R 1013) (Appendix D)

Jury Selection

During jury selection, the State used a peremptory challenge on a black prospective juror. (TR 138-139) The prosecutor immediately volunteered three reasons: (1) she was the first cousin of Tony Peace, who was a Panama City police officer discharged for dishonesty; (2) another assistant state

attorney wrote a note on the jury list that he believed that the juror had been in some kind of trouble; and (3) she has a speech impediment which the prosecutor suggested might also reflect her intelligence and affect her ability to communicate with other jurors. (TR 138-139, 153-154) Defense counsel objected that these reasons were not valid and were not supported by the record. (TR 140-142, 148-152) The only fact established through questioning of Peace was that she was the first cousin of Tony Peace. (TR 131) The court allowed the peremptory challenge of the juror solely on the basis of her being Tony Peace's cousin. (TR 150-153)

Guilt Phase

Rebecca Wendt shared an apartment with her sister, Michael Ann Wendt, and worked as a waitress in the nearby Mexican Restaurant in March of 1986. (TR 203-206). Their apartment was located in a one-story complex in Panama City. (TR 204-205). On March 31, 1986, their younger brother and sister were visiting for their spring break. (TR 206). Michael picked up her brother and sister at the airport on the night of March 30, 1986, and they stopped at the restaurant where Rebecca was working to eat. (TR 207). Michael later picked up Rebecca from work since she did not have a driver's license. (TR 208). Rebecca did not have a bank account, since she had moved down to the area only a month earlier, and she kept her money in her purse. (TR 209). On the morning of March 31st, Michael planned to take her visiting brother and sister to the beach. (TR 209).

Joann Parello, a friend of Michael's, also went with them. (TR 209). They went to Ft. Walton rather than Panama City because there was a water slide in Ft. Walton. (TR 210). They left in Michael's friend's car about 10:00 in the morning. (TR 210). Rebecca was sunbathing on the grass in front of the apartment. (TR 210-213). Michael returned to the apartment about 8:00 that night. (TR 214). There were no lights on inside the apartment. (TR 214). The cord of the television was in the doorway. (TR 214). Michael and Becky frequently watched a television program at noon during the day. (TR 211). When Michael attempted to open the door, they found the door unlocked. (TR 214). Michael turned the lights on in the apartment and saw popcorn, broken glass, and other items in the apartment in disarray. The contents of Rebecca's purse were also on the floor. (TR 214). There was a red stain on the carpet which appeared to be blood. (TR 215). With the help of a neighbor, Michael and Joann checked through the apartment and found Rebecca's body in the bathroom, wrapped in a comforter from Michael's bed. (TR 215).

Investigator Frank McKeithen testified about his observations at the apartment. (TR 240-264). He found Rebecca Wendt lying on the bathroom floor, partially wrapped in a bed comforter. (TR 243). She was wearing a turquoise two-piece bathing suit; the top was pulled down to her mid section and the bottom was pulled down in the back. (TR 243). She had suffered stab wounds. (TR 243). There was blood at various places throughout the interior of the apartment. (TR 243-244). He found some

partial footprints on the floor in blood. (TR 244). There were also bloody fingerprints on the some items out of the purse and wallet. (TR 244). There was a partial footprint on the tile of the bathroom floor and on the comforter on the body. (TR 244). Over defense objections, a video of the crime scene was introduced into evidence. (TR 261-263). Additionally, numerous photographs were introduced. (TR 245-279).

Associate medical examiner, Dr. Terrance Steiner, performed the autopsy on Rebecca Wendt. (TR 426, 439-443). His examination found 37 stab wounds and several cuts to the hands that were incised wounds where a blade had been drawn across the fingers. (TR 447-448). He examined swabs from the oral, vaginal, and annal areas for the presence of spermatizoa and found none. (TR 446). He found no evidence of sexual contact. (TR 447). The victim had a blood alcohol level of .01, which is equivalent to about half a beer. (TR 447). There were five knife wounds to the neck, eight to the left chest, eight to the left breast, six to the right chest area, two to the left arm, two to the right arm, one to the left wrist, one below the breast bone, and two in the upper-left abdomen. (TR 450). There were scratch marks where the tips of the knife of the wound moved over the skin without raising the knife again for penetrating to another wound. (TR 450) He characterized the slicing wounds across the hands as defensive wounds. (TR 452-453) The life-threatening wounds were to the neck, one of them cutting the left cataroid artery. (TR 455). Five of the eight wounds to the left breast punctured into the chest ca-

vity, causing air to be pulled into the chest cavity and loss of breath. (TR 455-456). Two wounds to the abdomen penetrated the liver. (TR 457). Steiner was of the opinion that the wound penetrating the left chest was the first wound, since most of the blood was found inside the left chest area. (TR 458-459). Rebecca Wendt died from shock due to blood loss because of the multiple stab wounds. (TR 463) Steiner believed a knife-life instrument with a blade of about 5 1/2 inches produced the wounds. (TR 462). He stated that the victim would have gone into shock within three to ten minutes if the first wound was the one to the chest area. (TR 461) If the first wound was the one cutting the aorta, the blood loss would have occurred more rapidly, and shock could have been as quickly as one and one-half minutes. (TR 461) Approximately three to a maximum of ten minutes would have elapsed before death would have occurred. (TR 461-462)

Three witnesses testified to their observations at the apartment around the time of the homicide. Laura Raffield also lived in the apartment complex. (TR 216-217) During the morning hours of March 31, 1986, Raffield observed one of the Wendt girls sunbathing in front of her apartment. (TR 219) About 15 minutes until noon, the Wendt girl got up and went into her house. (TR 219) Raffield left her apartment around 1:00 p.m. (TR 220) She returned about 2:30 p.m. (TR 220) She did not see the girl outside at that time. (TR 220) Tim Cherry, who at the time of trial was Michael Ann Wendt's husband, was a lieutenant in the Coast Guard and living in Virginia, in March of

1986. (TR 221-223) He grew up with Michael Ann and Rebecca and was a classmate in highschool. (TR 220) At approximately 1:30 p.m., Cherry telephoned the apartment to talk to Michael Ann. (TR 223-224) There was no answer. (TR 224) Suzanna Capers also lived in the same apartment complex. (TR 228-230) Her apartment was at the opposite corner from the Wendt's apartment. (TR 230-231) Capers was also sunbathing by her apartment on March 31, 1986. (TR 229-231) She began sunbathing around 12:30. (TR 231) She observed a man walking around the apartment complex. (TR 230, 232) She saw him a couple of times. (TR 232) Once she saw him walking toward the Wendt's apartment. Another time he stood and stared at her. (TR 232) She became somewhat suspicious. (TR 232) He pointed toward the Wendt girl's apartment as if he was indicating a direction toward her apartment. (TR 232) Capers continued reading her book for a few minutes, and she saw him again walking into the woods. (TR 233) He was coming from the direction of the Wendt's apartment. (TR 233-235) Fifteen to thirty minutes elapsed from the time she saw him pointing toward Rebecca Wendt's apartment and the time she saw him walk back to the wooded area. (TR 236) She gave a description to Investigator McKeithen of a man of medium height, blond hair, wearing a blue tank top and blue jeans. (TR 236-237) She estimated his weight at 185 lbs. (TR 237) She did not remember the kind of shoes he wore. (TR 237) She identified Darryl Barwick in court as the man she observed. (TR 237-238)

Investigator McKeithen inspected the area of the woods where Capers indicated the man had walked. (TR 272-273). In a sandy spot, McKeithen found a number of footprints. (TR 273). He observed the tread design and noted the word "Nike" in the bottom of it. (TR 273-274). One of the footprints had a tread design similar to the one of footprints found in the apartment. (TR 273). The print in the apartment had a circle in it and some wavy lines. (TR 273). The tracks in the sand appeared to be similar and contained the word "Nike" in the bottom of the sole. (TR 273, 274-279).

On April 1, 1986, McKeithen asked Barwick to come the sheriff's office for questioning. (TR 280-281) Barwick agreed, and after McKeithen read him his Miranda rights, Barwick gave a statement detailing his activities on the day of the homicide. (TR 282-284) An initial statement was not recorded, but the substance of it was repeated on tape. (TR 283-284)(the recording was admitted as Exhibit 52 and a transcript appears in the supplemental record SR 304-309) Barwick said he spent the night of March 30th at his girl friend's house. (TR 284)(SR 304-305) Between 5:30 and 6:00 a.m., Barwick drove to his parent's house where he lived. (TR 284)(SR 305) His sister, Lovie Barwick, was talking on the telephone to their father who was out of town. (TR 284)(SR 305) Barwick then talked to his father who gave him instructions for the day's work. (TR 284) (SR 305-306) Barwick worked for his father's concrete construction business. (TR 284) He dressed for work in blue jeans, a blue tank top, a blue checkered shirt, brown work

boots and an orange cap. (TR 284)(SR 305) After he and a co-worker completed the work, Barwick returned home about 11:30 a.m. (TR 284-285)(SR 305-307) Vickie Burns was there, and after talking to her briefly, Barwick picked up chicken at Church's Chicken. (TR 285)(SR 307) He ate at home and took a shower around 1:00 p.m. (TR 285)(SR 307) A short time later, he left to meet his girl friend. (TR 285)(SR 307) Barwick told McKeithen that he had owned a pair of Nike tennis shoes, but he had thrown them away the previous Saturday. (TR 286)(SR 307-308) He denied any involvement in the murder. (SR 308)

Investigator McKeithen arrested Barwick for the homicide on April 15, 1986. (TR 294) On that day, Barwick confessed to stabbing Rebecca Wendt. (TR 294-305)(a tape recorded statement was admitted at trial as Exhibit 54 and transcript appears in the supplemental record SR 310-338) He said he went by Russ Lake Apartments about 12:15 p.m. as he drove to Church's Chicken to get something to eat. (SR 312) On his way back, he saw a woman in a bikini sunbathing. (SR 313) After parking his car at home, Barwick walked back to the apartments. (SR 313) He walked passed the woman three times, and the third time, he walked into her apartment. (SR 313-314) The door was open, and she was sitting on a couch watching television. (SR 314) Barwick was wearing blue jeans, a white tank top, baseball batter's gloves and Nike sneakers.(SR 314) He also had a small knife in his pocket which he described as a tomato knife with a white handle and a serrated edge. (SR 314-315, 327-328) As Barwick walked inside, the woman jumped up and yelled, "Get

out." (SR 315) He pushed her down and said he would leave in a few minutes. (SR 315) She struck Barwick, and he pulled the knife and said, "Don't want to hurt you. I can leave in a few minutes; don't give me no trouble." (SR 334) He then dumped her purse and picked up her wallet. (SR 334) Barwick said his only intent was to steal something; he denied any intent to rape. (SR 315-318) She struck Barwick two or three more times. (SR 334) Barwick stabbed her, and they struggled, lost their balance and fell to the floor. (SR 334-335) She continued hitting him and he continued stabbing her. (SR 335) Barwick told the detectives, "[I]t's like I lost control. I, I couldn't, I didn't, I, I wanted to stop, I knew I did, you know, like I was wrong, but I couldn't." (SR 329)

After the stabbing, Barwick thought of hiding the body. (SR 316-317) He said he rolled her in a blanket and carried her to the bathroom. (SR 316-317) Realizing that he could not carry the body from the apartment undetected, Barwick left. (SR 316-317) He walked through the woods to the lake across the street from the apartments and threw the knife into the lake. (SR 320) He proceeded to his house, showered and, later, threw his clothes and shoes in a dumpster. (SR 321-324)

A state crime laboratory analyst, Sue Livingston, examined the comforter found wrapped around the body. (TR 402, 407-408, 414-417). She found blood stains on the comforter and one semen stain. (TR 415-416). A blood typing on the semen stain showed that it came from a person with "O" type blood with the enzyme PGM-2. (TR 416-417). Livingston also typed a known sam-

ple of Darryl Barwick's blood and saliva. (TR 405-406, 408-414). She determined that Darryl is a type "O" secretor and his blood also contains the enzyme PGM-2. (TR 413). Livingston further testified that approximately two percent of the population have blood-type "O" with the enzyme PGM-2, and are also secretors. (TR 418). She further explained that this testing showed that Darryl Barwick was within the group of approximately two million men who could have deposited the semen on the comforter. (TR 420).

Tim Cherry, Michael Ann's husband (boyfriend at the time of the murder), testified he visited Michael Ann for a weekend and stayed in her apartment in February of 1986. (TR 223-225) Over a hearsay objection, he testified that he has blood type "A". (TR 224-225)

Penalty Phase And Sentencing

The State and the defense called several additional witnesses during the penalty phase of the trial. Three witnesses testified for the State. (TR 609- 634) Melissa Dom testified about the sexual battery committed upon her which resulted in Barwick's conviction in 1983. (TR 609-621) Barwick's sister and brother testified about statements Barwick made to them about the homicide. (TR 622-634) Eleven witnesses testified for the defense. These included Darryl's mother, father, sisters, brother, probation officer and four mental health experts. (TR 635-888)

In 1983, Darryl was convicted of sexual battery and burglary of a dwelling with an assault. (TR 620-621) Melissa Dom, the victim in that case, testified about the offense. (TR 609-620) She was cleaning her apartment, and around noon, she had just returned inside after hanging clothes on her clothesline. (TR 610-611) She had sat down for a minute when she heard a noise in her kitchen. (TR 611-612) A man was standing in her kitchen. (TR 612) He wore shorts, tennis shoes, a mask, and gloves. (TR 612) He held a butcher knife from her kitchen, and she later learned, he also had a buck knife which he apparently brought with him. (TR 615) Dom was forced into her bedroom where the sexual battery took place. (TR 613-615) She convinced the man to remove his mask during the assault. (TR 613-614) Before he left, he threatened to kill her if she reported the offense to the police. (TR 616) The man said he would help her if she became pregnant, and he left. (TR 619-620) Dom identified Barwick as the man who committed the crime. (TR 618-619)

Lovey and William Barwick, Darryl's sister and brother, testified to statements Darryl allegedly made to them about the homicide. (TR 622-634) Darryl admitted the homicide to his sister. (TR 622-626) When the prosecutor asked Lovey Barwick if Darryl said why he killed the victim, she stated that Darryl said either she or he fell back during the struggle and he "knew he had to do it." (TR 624-626) William Barwick said Darryl also confessed to him. (TR 628-629) Darryl told him that the victim took his mask off during the struggle and

Darryl said he killed her because she could identify him. (TR 629-630)

Darryl's brother and sisters described their family experiences growing up with their father, Ira Barwick. (TR 635, 649, 822) Their father's extreme, violent outbursts and physical abuse permeated their lives. Ira Barwick's idea of discipline was to beat his children with his fist, a piece of wood, a shovel or a steel bar. (TR 640, 646, 647, 651-653, 727, 734-735) Ira Barwick, himself, testified about his discipline of Darryl:

> Q. Can you tell us particularly as it relates to to Daryl, was there discipline in your home as this young boy was growing up?
>
> A. (No response)
>
> Q. By that I mean, how did you make him do what you thought he ought to do, particularly Daryl?
>
> A. Well, I told one to do something he better done it.
>
> * * * *
>
> Q. And when you say you are telling him something do do, he better do it, what happens in your home or about the home or even perhaps at work if he didn't do what you told him to do?
>
> A. Put one on him.
>
> Q. And you are 65, you're my vintage. What do you mean when you say you put one on him?
>
> A. Well, if I hit him right quick, I hit him, if I didn't I got something to hit him with. I tear his butt up, in other words.
>
> * * * *

Q. When you say you tear them up, did you ever use anything other than your hand?

A. Two-by-fours, anything I could get my hands on.

Q. Two-by-fours?

A. If I could get one.

Q. How about ... what's that re-bar stuff, that reinforcing bar?

A. Yeah, steel.

Q. Steel reinforcing bars. Do you recall using one of them?

A. No, not right off, I don't. Hit him with a two-by-four.

Q. Do you recall any occasions in your home when he was a youngster wherein he became unconscious?

A. I knocked him out.

Q. You knocked him out?

A. Yeah.

* * * *

Q. You didn't think it was wrong to be hitting with two-by-fours and knocking him out? That's not wrong to you?

A. Yeah. No, if I told him to do something or didn't do something, he didn't do it quick enough, I don't think it's wrong.

Q. Not only if he didn't do it but if he didn't do it quick enough, that was wrong too?

A. That might be, yeah.

Q. During that period of time, I'm talking about younger years, did one of your boys have to be taken to the hospital, to the doctor, because you hit him with a shovel?

A. I imagine Glen did.

Q. Did you really hit Glen with shovel?

A. Hell, yeah, I got mad.

(TR 726-730)

Lovey Barwick testified that all the children were "always real scared of our father." (TR 637) None of the family members, including the children's mother, was spared from Ira Barwick's beatings. (TR 637-638) Because Darryl and her brothers worked with their father, starting when they were seven or eight years-old, they were sometimes beaten more often. (TR 644) Lovey described one incident when Darryl, who was in the sixth or seventh grade, ran from his father wearing one shoe. (TR 637-638) Their father chased him down, but Darryl refused to get into the car unless his father promised not to beat him. (TR 637) Ira usually punished the children. (TR 637) As Lovey stated,

> Well, my father worked but my mom would always tell my father about things we did during the day so when he came home he would usually punish us, which was not the normal spanking with a belt or whatever across your behind. It was, you could get slapped or just depends on however he felt, if he was angry ... I've had black eyes, just varied.

(TR 637) Ira would hit the children in the face with his fist or beat them with whatever might be available. (TR 647) Lovey described being beaten on her birthday with a piece of wood from an old bed headboard. (TR 640) She suffered a black eye. (TR 640) When asked if she ever told anyone about the beatings, Lovey said,

No, we didn't talk about it because it was just a normal thing in our family.

* * * *

I don't know [why], I guess we all loved our father and we just didn't think it was, you know, like I said, when you got in trouble you always covered, you know. Your mama says, you go to school, you lie, say something else happened if somebody asks you.

(TR 643)

William Barwick was about two years older than Darryl, the youngest of the Barwick children. (TR 649-650) He testified that his father would come home angry and vent it on his family. (TR 650) All of the children were whipped with various objects or hit with their father's fists. (TR 650-652) Ira Barwick also struck his wife; William said he had seen her knocked down and her eyes blackened. (TR 656) William described being beaten with a guitar until it broke and his father continuing to beat him with the broken end of the guitar. (TR 651-652) The broken pieces of wood stuck and drew blood as William was hit. (TR 651-652) William also remembered when his older brother was hit with a shovel and required medical attention for the cut. (TR 652) William and Darryl began working with their father in his concrete finishing business when William was about seven or eight years-old. (TR 726) On a job site, their father once used a three-foot piece of steel reinforcement bar to beat Darryl and William. (TR 653) William witnessed the time when his father knocked Darryl unconscious.

(TR 653-654) Darryl was punched, knocked down into a rocking chair and fell to the floor unconscious. (TR 653)

Ira Barwick left his wife and family for another woman for a period of time when Darryl and William were preteens. (TR 655) He returned, but he was not consistently in the home. (TR 656) His return also meant a return of his violent outbursts. (TR 656) Having seen his father's violent behavior toward his mother, William was scared. (TR 656) Upon hearing that his father was coming home, William found his father's rifle, loaded it and kept it in his room. (TR 656-657) His father came home, found the rifle and became enraged. (TR 657) William fled and heard a gunshot as he ran. (TR 657) When William came back home two days later, he learned his father had shot into the floor of the house. (TR 657-658) After this incident, an older sister, Janice Santiago, who was then married to a police officer, called HRS for William and Darryl's protection. (TR 825-827) Ira Barwick said he attended sessions with mental health professionals about how the children were treated (TR 728-729), but when asked if he changed his methods of discipline, Ira testified, "Well, I didn't think anything was wrong." (TR 729)

The Barwick family's neighbors were aware of the abusive beating the Barwick children suffered at the hands of their father. (TR 815-816) Sheila Morgan lived across the street from the Barwick residence. (TR 815) She testified that Ira Barwick would beat the children in front of their house or in the carport. (TR 816) Finally, three men in the neighborhood,

including Morgan's husband, talked to Ira Barwick about the beatings. (TR 816-817) Morgan said she no longer saw Ira beating the children. (TR 820) However, she assumed the beatings continued because the children were still seen with bruises. (TR 820-821)

Darryl's mother, Ima Barwick, confirmed the violence in the family. (TR 858) She said her husband beat the children with his hands and other objects. (TR 858) Sometimes, her husband beat her as well. (TR 858-859) As she explained, "I couldn't butt in." (TR 859) When asked why she stayed in this abusive home, she responded, "Well, I wanted to keep my children, my family together." (TR 859)

Dr. Clell Warriner, a clinical psychologist, first evaluated Darryl in 1980, when Darryl was 13-years-old. (TR 828-831). He had been referred for an evaluation because of some minor sexual misconduct charges pending against him in Duval County Court. (TR 831). Warriner saw Darryl again in 1983, because of a sexual battery charge. (TR 832). Finally, he evaluated Darryl a third time in 1986, as a result of the homicide charge. (TR 833-834). Warriner candidly admitted that his evaluation of Darryl in 1980, was wrong. (TR 835). At that time, he believed Darryl would be capable of correcting his behaviors (TR 835). In 1983, Warriner concluded that Darryl was a seriously disturbed individual and diagnosed him as psychopathic sexual deviant. (TR 835-836). He explained that a psychopathic sexual deviant is someone with a psychological sexual disfunction which is characterized by escalating amount

of violence used in the commission of sexual crimes. (TR 838). Warriner stated that in the 30 years of his experience practicing psychology, Darryl was only the third person he had seen with this diagnoses. (TR 839-340). This mental condition is extremely rare. (TR 839). Sufferers of this condition exhibit behaviors of a escalating and uncontrollable incidence of aggressive sexual behavior. (TR 839). Warriner described the problem as a compulsive, obsessive behavior. (TR 840). The sexual psychopath has a build-up of intensity, and the process in their brain is such that the only way to relieve this pressure or anxiety is to conduct these acts. (TR 840). When the person is relaxed, their behavior becomes within the normal parameters until the intensity builds up. (TR 841). Then, the obsessive thought patterns and compulsive behavior cycle begins again. (TR 841). Warriner also describes the dissociative behavior. (TR 841-842). He stated that a person suffering from this condition learns to deal with traumatic events by separating themselves from their body. (TR 842). It's a defense mechanism to deal with severe trauma and pain. (TR 842-843). Children who have been severely beaten develop the ability to dissociate as well as those who suffered other types of trauma. (TR 842-843). Warriner also was of the opinion that Barwick's condition was untreatable. (TR 844-845).

James Beller, an associate of Clell Warriner's, also examined Darryl. (TR 774-777). Beller administered a full battery of neuro-psychological tests on Darryl. (TR 777-779). He found that Darryl suffered from a serious temporal lobe

deficit -- a learning disability he suffered from birth. (TR 780-781). Darryl also had a significant memory problem. (TR 781). Beller did find that Darryl's IQ was in the average range. (TR 781). AS a result of his brain damage, Barwick would have difficulty integrating information. (TR 781).

Beller also concluded that Darryl's abusive childhood had seriously distorted his personality (TR 784). The abuse had turned him into an abnormal person who could not function in the manner society accepts as normal. (TR 784). He diagnosed Darryl as a psychopathic sexual deviant. (TR 784-785). He noted these people are typically from abused or deprived childhood situations. (TR 785). Their feelings are not available to them, and they tend to act out with alcohol, drug abuse, sexual deviancy or violence against themselves or others. (TR 785). These people are extremely impulsive people. (TR 785). Darryl's history exhibited the symptoms for this condition. (TR 785). His counseling began at age 13. (TR 785-786). Darryl also suffered from dissociative experiences where he would separate himself from his behavior, and he would depersonalize his behavior. (TR 786). He would also suffer flashbacks of traumatic experiences. (TR 786-787). Someone who is having a dissociative experience merely exchanges one reality for another. (TR 787). This is a defense mechanism to avoid the negative of reliving some prior trauma. (TR 787-788).

Darryl talked to Beller at length about the crime and his mental condition and feelings during the criminal episode. (TR 788-790). Barwick's behavior during the episode was consistent

with the personality disorder Beller diagnosed. (TR 789). Barwick said that he walked through the open apartment door, and saw the lady sitting on the sofa. (TR 789). She panicked. (TR 789). Darryl said he also panicked. (TR 790). He tried to reassure her. (TR 790). She hit Darryl in the chest and slapped and grabbed his hand. (TR 790). They fell and Darryl hit his head. (TR 790). The woman fell on top of him. (TR 790). She screamed and hit him. (TR 790). They struggled and ended up in the kitchen. (TR 790). Darryl reached on the table and grabbed an object and began hitting her with it. (TR 790). He later realized it was a knife. (TR 790). He struck her a few more times. (TR 790). He put her body in the bathroom. (TR 790). Darryl said he did not rape her. (TR 790). Darryl said he was confused, he did not understand why she was hitting him. (TR 790). He had become angry. (TR 790). He had hurt his head when he fell. (TR 790). He said he felt as if he wasn't really present during this episode, that he was watching himself do these acts. (TR 790). It was as if he was not present. (TR 790). He said this type of behavior happens to him every time he gets angry. (TR 790). A bad part of him has no feelings and later the good part of him feels bad knowing that his behavior has been wrong. (TR 790). Darryl said he learned to separate and depersonalize his feelings as a result of the beatings he received from his father. (TR 791). He said his father was extremely violent and would beat him one minute and then the next minute, tell him he was sorry. (TR 791). Darryl concluded

he was much like his father, good one minute and bad the next. (TR 791).

Darryl described a beating he received in the sixth grade where his father cracked his head. (TR 791). His father took him out of school for a week and took him to the mountains for him to recover. (TR 791). Darryl's head had to be shaved so the cut could be treated. (TR 791). His father usually hit him with a bat, a stick, or anything that wouldn't break. (TR 791). Darryl also learned not to yell or scream when he was being beaten; he remained silent. (TR 791). He knew that if he yelled in pain, his father would beat even more severely. (TR 791).

Regarding the homicide, Darryl description fit Beller's diagnoses of psychopathological sexual deviance in experiencing depersonalization of his behavior and reality. (TR 792). Darryl said he knew it was wrong, he was scared, but he could not control himself. (TR 792). Beller also explained that schizoidial people have a difficult time relating to people. They have a split reality. (TR 799). Their internal states are not integrated with their external. (TR 799). They are very distant from their feelings. (TR 799). Any negative feelings that might exists are repressed out of their consciousness. (TR 799). Beller also noted that Darryl is obsessive-compulsive in his behavior. (TR 802). Beller was of the opinion that Darryl lost control of his behavior before he ever entered the apartment. (TR 802-804). Darryl lost control resulting in the homicide. (TR 804).

Lawrence Annis, a clinical psychologist, examined Darryl in 1986. (TR 675, 679, 688). Darryl was 19-years-old at the time of the examination. (TR 688). As a result of his testing and evaluation, Annis concluded that Darryl did not suffer from a major mental disorder. (TR 683-684). Based on the history of violence perpetrated on Darryl during his childhood years by his father, Annis did find a great deal of anger and frustration in Darryl's mental makeup. (TR 686-688). He concluded that Darryl did meet the criteria for anti-social personality disorder and many of the criteria for mentally disordered sex offender. (TR 689-706). Annis testified that Darryl's mental condition did not qualify for the two statutory mitigating circumstances. (TR 716). However, Darryl did report hearing voices. (TR 690-691). Annis said this could occur from three possible sources: (1) organic brain damage, (2) peripheral damage to the ears, and (3) schizophrenia. (TR 691). Annis did not diagnose Darryl as psychotic or suffering from schizophrenia. (TR 693-695).

Harry McLarin, a forensic psychologist, also examined Darryl in 1986. (TR 741-744). He testified that Darryl was quite cooperative during the testing interviews. (TR 746). McLarin concluded that Darryl was of average intelligence. (TR 747). He also determined that Darryl had some brain damage disfunction manifesting itself in learning disabilities. (TR 748). He concluded that Darryl was not psychotic. (TR 748). Darryl did suffer from a personality disorder. (TR 749-751). He said that Darryl told him that once the aggressive behavior

started, he could not control himself. (TR 751). The 37 stab wounds to the body of the victim reflect a loss of control. (TR 752). McLarin admitted that it also could mean a very deliberate continuation of the assault. (TR 752-753). Anti-social personality disorder is McLarin's primary diagnoses of Darryl. (TR 753). He concluded that Darryl did fit the criteria of a mentally disordered sex offender. (TR 754-755). On cross-examination, McLarin defined a personality disorder is a form of a mental disorder which is more like exaggerated personality traits. (TR 761). These personalities tend to be rigid and cause a person to have difficulty later in life. (TR 761). Such a disorder is not as severe as a biogenetic disorder such as schizophrenia. (TR 761). McLarin concluded that at the time of the crime, Darryl, even though suffering from a personality disorder, was not under the influence of an extreme mental or emotional disturbance. (TR 767).

James Hord, another clinical psychologist, also examined Darryl. (TR 846-848). He examined him in 1986 to perform a competency evaluation. (TR 848). He concluded that Darryl was of average intelligence. (TR 851). The results of the MMPI showed Darryl to have considerable schizoid thinking. (TR 851). This suggested a very unsettled and unstable person. (TR 851). Hord concluded Darryl was a very disturbed individual. (TR 851).

Finally, Ralph Walker, a psychiatrist, examined Darryl in 1992. (TR 871-872). Walker diagnosed Darryl as having intermittent explosive disorder, which is a condition where the in-

dividual has a loss of control of anger and temper and frequently black out during this period of time. (TR 875). The person explodes and becomes violent. It's difficult for them to stop what they are doing, or for other people to stop them. (TR 875). Walker concluded that Darryl suffered such an explosion when the victim began to strike him during the offense. (TR 876). He became temporarily unaware of what was going on and unable to control his behavior. (TR 876). This is consistent with someone who has a dissociative behavior. (TR 876-877). The person loses contact with reality. (TR 877). The ability to disassociate is common in people who were abused as children. (TR 876-877). A part of Walker's diagnoses was also bipolar disorder of the manic type. (TR 877). Darryl suffers from extreme mood swings. (TR 877-878). Walker also described a psychopathic sexual deviant as someone who loses control over and acts on his sexual behavior. (TR 880). As Walker explained, the difference between someone fantasizing about certain sexual behavior and acting on those impulses. (TR 880-881). The person who has been abused as a child frequently identifies with his abuser. (TR 881-882). These people associate the receiving or inflicting of pain with sexual gratification. (TR 882). They learn to associate a sexual thrill with being physically abused or physically abusing others. (TR 882). These individuals also suffer from obsessive-compulsive behavior. (TR 882). They become obsessed with an idea and intrusive thoughts often require them to engage in some type of behavior before they can be relieved of this pressure. (TR

882). Darryl has a great deal of difficulty with impulse control, and once the idea of having sex with someone came to his head, it was difficult for him to deter himself. (TR 882-883).

SUMMARY OF ARGUMENT

1. Barwick presented a legally sufficient motion to disqualify Judge Foster which should have been granted. The motion complied with the procedural requirements of Florida Rule of Criminal Procedure 3.230. As a factual basis, the motion alleged facts, when assumed true and and taken as a whole, are legally sufficient to create a fear that Judge Foster was biased against the defense and biased against the psychological issues which were to be a significant part of the case. Additionally, in denying the motion, Judge Foster disputed the allegations which created an independent basis for disqualification. The trial court committed reversible error in denying the motion.

2. The State used a peremptory challenge on a black prospective juror, and the prosecutor offered three reasons as a race-neutral basis for the challenge. Defense counsel objected that these reasons were not valid and were not supported by the record. One of the offered reasons was that the juror was the cousin of a deputy who had been discharged from the sheriff's department for substance abuse problems. The trial judge twice offered to allow the prosecutor to question the juror further on these issues, but the the assistant state attorney declined the offer. However, the court allowed the peremptory challenge of the juror on the basis of her being the discharged deputy's cousin. Although familia relationship with someone involved in criminal activity can create a bias and a race-neutral reason for a challenge, such a relationship was not developed on the

record in this case. The court improperly allowed the challenge for a reason which had no record support.

3. The trial court should have granted Barwick's motion for judgment of acquittal on the charge of attempted sexual battery. This charge was based on circumstantial evidence which failed to exclude the reasonable possibility of Barwick's innocence. Barwick confessed to the killing and admitted he intended to steal. However, he said nothing about an intent to commit sexual battery. The physical evidence did not prove such an offense to the exclusion of every reasonable hypothesis of Barwick's innocence. Barwick asks this Court to reverse this conviction.

4. State witness Tim Cherry was permitted to testify to his blood type. The prosecutor asked the question to eliminate Cherry as a possible source of the semen stain on the comforter found wrapped around the victim. Defense counsel objected on hearsay and lack of predicate grounds, and he asked that the answer be stricken. Admitting the testimony, the trial judge erroneously overruled the objection because the testimony was hearsay.

5. The prosecutor commented during his opening statement and closing argument to the jury that the defense had the burden of presenting evidence. These remarks improperly commented on the defendant not testifying and shifted the burden of proof and presenting evidence to the defense. Amends. V, XIV U.S. Const.; Art. I, Secs. 9, 16 Fla. Const. Defense counsel's motion for mistrial should have been granted.

6. The trial court improperly found and considered three aggravating circumstances. First, the court found that the homicide occurred during an attempted sexual battery. However, the evidence was insufficient to prove that offense beyond a reasonable doubt. Second, the circumstances of this homicide did not establish that it was committed in an especially heinous, atrocious or cruel manner. Third, the homicide was not committed in a cold, calculated and premeditated manner. The trial judge improperly relied on the finding that Barwick planned a burglary, robbery or sexual battery to find the pre-meditation aggravating circumstance.

7. Darryl Barwick was emotionally and physically abused by his father. Several of the mental health professionals testified that Darryl's abuse as a child caused or contributed to his psychological impairments and difficulties. The trial judge found this child abuse occurred, but he concluded it did not constitute a nonstatutory mitigating circumstance. This Court has held that child abuse is a mitigating circumstance, as a matter of law, which must be weighed in the sentencing decision. E.g., Nibert v. State, 574 So.2d. 1059, 1062 (Fla. 1990); Campbell v. State, 571 So.2d 415, 419 (Fla. 1990). The court's failure to consider the child abuse as mitigating violates Barwick's constitutional right to have the sentencer weigh relevant mitigating circumstances. Amends. V, VIII, XIV U.S. Const.; Art. I, Secs. 9, 16, 17 Fla. Const. Barwick death sentence has been improperly imposed.

8. Barwick's death sentence is disproportional. The State proved that Barwick killed during the commission of a felony when the victim struggled with him. Barwick did not plan a murder. Due to his mental and emotional impairment, Barwick lost control in a panic reaction when the victim struggled with him. He did not commit an offense warranting his execution.

9. During his closing penalty phase argument, the prosecutor improperly invited the jury to consider sympathy for the victim in reaching its sentencing recommendation. At the same time, the prosecutor incorrectly told the jury that it could not consider sympathy for the defendant and denigrated the mitigating factors presented. This argument constitutes fundamental error warranting a new penalty phase trial.

10. The defense objected to the use of the standard penalty phase jury instruction on the heinous, atrocious or cruel aggravating factor and requested a substitute instruction. The trial court overruled the objections and gave the standard instruction. The jury was not sufficiently instructed on this aggravating circumstance. Although this Court has approved as constitutional the current standard jury instruction for this circumstance, Barwick asks this Court to reconsider the issue in this case.

11. Barwick requested a jury instruction on the statutory mitigating circumstance that he acted under extreme duress at the time of the homicide. The request was based on the provocation which resulted when the victim attacked Barwick during the robbery and Barwick's mental condition which causes

panicked, impulsive reactions when such an outside provocation occurs. The jury should have been given the instruction. Barwick has been deprived his constitutional right to have the jury instructed on mitigating circumstances supported by the evidence.

12. The trial court improperly denied Barwick's Motion to Preclude The Death Penalty Because It Is Sought And Imposed On The Basis Of Racial Bias. This motion was premised on a number of factors: (1) the history of racism in Bay County; (2) evidence of racial bias in the attitudes of the staff of the State Attorney's Office; (3) a showing that defendants whose victims were white were four times more likely to be charged with first degree murder that defendants whose victims were black; (4) a showing that murder defendants whose victims were white were six times more likely to proceed to trial; (5) a showing that of defendants who went to trial, those whose victims were white were 26 times more likely to be convicted of first degree murder. This Court rejected the identical issue in Foster v. State, 614 So.2d 455, 463 (Fla. 1993), however Barwick asks for its reconsideration in his case.

ARGUMENT

ISSUE I

THE TRIAL COURT ERRED IN DENYING BARWICK'S MOTION TO DISQUALIFY THE TRIAL JUDGE.

This Court has long held that an initial, legally sufficient motion to disqualify a trial judge must be granted, without regard to the truth of the allegations in the motion and supporting affidavits. E.g., Livingston v. State, 441 So.2d 1083 (Fla. 1983); Bundy v. Rudd, 366 So.2d 440 (Fla. 1978); State ex rel. Brown v. Dewell, 131 Fla. 566, 179 So. 695 (1938). The legal sufficiency of the motion is determined by accepting the allegations as true and evaluating whether those alleged facts would create, in the mind of the party, the fear that the judge has a personal bias which would prevent him from presiding fairly on the case. Ibid. In order to avoid an adversarial posture between the judge and the party, the judge, in denying a legally insufficient motion, cannot dispute the facts alleged or comment on their truthfulness. Brown v. St. George Island, LTD., 561 So.2d 253, 255 (Fla. 1990); Bundy v. Rudd, 366 So.2d at 442.; Haggerty v. State, 531 So.2d 364 (Fla. 1st DCA 1988), rev. denied, 542 So.2d 988 (Fla. 1989). If a judge disputes the facts alleged or comments on their truthfulness in denying a motion, that action, alone, requires disqualification, even if the motion denied was legally insufficient. Bundy v. Rudd, 366 So.2d at 442; Stewart v. Douglas, 597 So.2d 381 (Fla. 1st DCA 1992); Turner v. State, 598 So.2d 186 (Fla. 1st DCA 1992); Hill v. Feder, 564 So.2d 609 (Fla. 3d DCA 1990).

Barwick presented a legally sufficient motion to disqualify Judge Foster which should have been granted. (R 949-965) (Appendix A) Moreover, in denying the motion, Judge Foster disputed the allegations which created an independent basis for disqualification. (SR 42-67, 989-999) (Appendix B) In a renewed motion to disqualify the judge, Barwick again presented valid grounds for the judge to enter an order disqualifying himself from the case. (R 975-988) (Appendix C) The trial court committed reversible error in denying the motion and denied Barwick's right to due process in violation of the United States and Florida Constitutions. Amends. V, XIV U.S. Const.; Art. I, Secs. 9, 16 Fla. Const.

A petition for writ of prohibition was filed in this Court after Judge Foster denied the Motion For Disqualification Of Judge and while the Renewed Motion For Disqualification Of Judge was pending in the trial court. Barwick v. Foster, Case no. 78, 071. This Court denied the petition for writ of prohibition without an opinion in an order dated June 14, 1991. Although the recusal issue was presented in the petition, this Court's denial of the petition was not a ruling on the merits of the recusal question. The denial is not law of the case or res judicata on the issue. Fyman v. State, 450 So.2d 1251 (Fla. 2d DCA 1984); Public Employees Relations Commission v. District School Board of DeSoto County, 374 So.2d 1005 (Fla. 2d DCA 1979), cert. denied, 383 So.2d 1193 (Fla. 1980). The issue is properly before this Court now for a ruling on the merits. Barwick asks this Court to remand his case for a new trial.

The motion to disqualify the trial judge was legally sufficient. The motion complied with the procedural requirements of Florida Rule of Criminal Procedure 3.230 -- it was timely filed and was supported by the appropriate affidavits and counsel's certificate of good faith. As a factual basis, the motion alleged the following conduct which created a fear that Barwick would not receive a fair trial before Judge Foster (see Appendix A):

> 1. Judge Foster, on his own motion, rescinded previously entered orders granting the defense an investigator and mental health experts to aid in the preparation of a defense.
> 2. Judge Foster denied interim attorney's fees, when such fees had been previously awarded and relied upon by defense counsel who was a sole practitioner.
> 3. Judge Foster questioned the need for further defense preparation and whether further work by defense experts would be paid for at county expense.
> 4. Judge Foster summarily denied a defense motion for appointment of a psychiatrist without a hearing and without legal memorandums and after an ex parte communication with the prosecutor.
> 5. Judge Foster said that Dr. Blau, the defense psychologist, like other psychologists, would say anything the party who hired him wanted him to say.

(Appendix A) These facts, when assumed true and and taken as a whole, are legally sufficient to create a fear that Judge Foster was biased against the defense and biased against the psychological issues which were to be a significant part of the case. See, Livingston v. State, 441 So.2d 1083, 1086-1087 (Fla. 1984).

In denying the motion to disqualify, Judge Foster disputed the accuracy of the factual allegations both orally at the time of the hearing and in his seven page written order. (SR 42-67) (R 989-999) (Appendix B) Although he claimed not to be addressing the truth of the allegations, his order proceeds to dispute both the accuracy of the allegations and the characterization of his motives behind his actions. (R 42-67) (R 989-999) (Appendix B) Offering an explanation for his actions, alone, constitutes a basis for disqualification, even if the motion had been legally insufficient. Bundy v. Rudd, 366 So.2d. 440, 441 (Fla. 1978)(judge's order "explain[ed], and in some respects controvert[ed] the specific factual allegations contained in the motion"); Turner v. State, 598 So.2d 186, 187 (Fla. 1st DCA 1992)(judge denied allegation stating they could not be proven); Haggerty v. State, 531 So.2d 364, 365 (Fla. 1st DCA 1988)(judge "added his own explanation of events and denied the allegations"); Gulfstream Park Racing Assoc., Inc. v. Gale, 540 So.2d 196 (Fla. 3d DCA 1989)(judge added his explanation of the events and denied allegations). Even making a single statement that the allegations are not true, constitutes grounds for recusal. Stewart v. Douglas, 597 So.2d 381 (Fla. 1st DCA 1992); Hill v. Feder, 564 So.2d 609 (Fla. 3d DCA 1990). Here, Judge Foster not only offered his explanations, but he also ordered a transcript of a hearing and attached an administrative order to establish his point. (R 989-999)(Appendix B) Additionally, regarding the allegation concerning the judge's comments about psychologists and Dr. Blau in particular, Judge

Foster again disputed the allegations. He incorrectly ruled that allegation was legally insufficient and that it could not be proven since the it was based on hearsay. (SR 57-60)(R 993) See, Suarez v. Dugger, 527 So.2d 190, 192 (Fla. 1988) (allegation based on comment judge made as reported in newspaper held legally sufficient); Turner v. State, 598 So.2d 186 (Fla. 1st DCA 1992)(judge asserting allegation could not be proven constitutes grounds for recusal even though motion legally insufficient).

The judge's actions violated the disqualification procedures and created the adversarial position between the court and the party which the procedures were designed to prevent. As this Court said in Bundy v. Rudd,

> When a judge has looked beyond the mere legal sufficiency of a suggestion of prejudice and attempted to refute the charges of partiality, he has then exceeded the proper scope of his inquiry and on that basis alone established grounds for his disqualification. Our disqualification rule, which limits the trial judge to a bare determination of legal sufficiency, was expressly designed to prevent what occurred in this case -- the creation of "an intolerable adversary atmosphere" between the trial judge and the litigant. See, Department of Revenue v. Golder, 322 So.2d 1, 7 (Fla. 1975)(On Reconsideration).

366 So.2d at 442. This concern was manifested in this case based on the apparent friction which occurred between the judge and defense counsel throughout the hearing on the motion to disqualify on June 5th (SR 40-67), the telephone conference the judge convened on June 6th (R 123-129), and the hearing on the renewed motion to disqualify on June 17 (R 130-148). In fact,

the discord which developed was appropriately made a part of the renewed motion to disqualify the judge. (R 975-980) (Appendix C) Townsend v. State, 564 So.2d 594 (Fla. 2d DCA 1990) (judge debated motion with counsel and then commented on each allegation one by one); Lamendola v. Grossman, 439 So.2d 960 (Fla. 3d DCA 1983)(judge said he would "deal with" the attorney).

The trial judge erred in denying the motion to recuse himself from the case. This Court must grant Barwick a new trial.

ISSUE II

THE PROSECUTOR'S DISCRIMINATORY USE OF PEREMPTORY CHALLENGES TO EXCLUDE BLACKS FROM THE JURY DENIED BARWICK HIS RIGHT TO AN IMPARTIAL JURY AS GUARANTEED BY ARTICLE I, SECTION 16 OF THE FLORIDA CONSTITUTION AND THE SIXTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

Both the United States and Florida Constitutions prohibit the the discriminatory use of peremptory challenges when selecting a jury in a criminal case. The Fifth, Sixth and Fourteenth Amendments to the United States Constitution forbids a prosecutor to exercise peremptory challenges solely on the basis of race. Batson v. Kentucky, 476 U.S. 79, 106 S.Ct. 1712, 90 L.Ed.2d 69 (1986). This Court condemned purposeful racial discrimination in the selection or exclusion of prospective jurors in State v. Neil, 457 So.2d 481 (Fla. 1984) as a violation of a defendant's right to an impartial jury under Article I, Section 16, of the Florida Constitution. The prosecutor offended these principles in using one of his peremptory challenges to excuse a black prospective juror from from serving on Barwick's jury. Barwick, although white, has standing to assert this claim. Powers v. Ohio, 499 U.S.400, 111 S.Ct. 1364, 113 L.Ed.2d 411 (1991); Holland v. Illinois, 493 U.S. 474, 110 S.Ct. 803, 107 L.Ed.2d 905 (1990); Kibler v. State, 546 So.2d 711 (Fla. 1989). This Court must reverse Barwick's case for a new trial.

The State used a peremptory challenge on a black prospective juror, Willie Peace. (TR 138-139) Upon using the challenge, the prosecutor immediately volunteered three reasons:

(1) Ms. Peace was the first cousin of Tony Peace, who was a Panama City police officer discharged for dishonesty; (2) another assistant state attorney wrote a note on the jury list that he believed that Ms. Peace had been in some kind of trouble; and (3) she has a speech impediment which the prosecutor suggested might also reflect her intelligence and affect her ability to communicate with other jurors. (TR 138-139, 153-154) Defense counsel objected that these reasons were not valid and were not supported by the record. (TR 140-142, 148-152) One of the two assistant state attorneys trying the case stated that he used to work with Tony Peace and that Peace was discharged from the sheriff's department for substance abuse problems. (TR 142, 150-151) The trial judge twice offered to allow the prosecutor to question Willie Peace further on these issues, but the the assistant state attorney declined the offer. (TR 143, 148) However, after the prosecutor cited a federal case stating that prior family involvement with drugs was a sufficient race-neutral reason, the court allowed the peremptory challenge of Peace on the basis of her being Tony Peace's cousin. (TR 150-153)

Willie Peace should not have been excused peremptorily. Although familia relationship with someone involved in criminal activity can create a bias and a race-neutral reason for a challenge, such a relationship was not developed on the record here. This was a factual issue which was not explored. The court improperly allowed the challenge for a reason which had no record support. See, State v. Slappy, 522 So.2d 18 (Fla.

1988); Tillman v. State, 522 So.2d 136 (Fla. 1988); Williams v. State, 574 So.2d 136 (Fla. 1991); Mitchell v. State, 548 So.2d 823 (Fla. 1st DCA 1989); Mansell v. State, 609 So.2d 679 (Fla. 1st DCA 1992); McKinnon v. State, 547 So.2d 1254 (Fla. 4th DCA 1989).

Only two facts relevant to this issue were arguably established: (1) Tony Peace was a law enforcement officer who was dismissed for a drug abuse problem (TR 142, 150-151); and (2) Willie Peace and Tony Peace are first cousins. (TR 131) The prosecutor never questioned Ms. Peace about the kind of relationship she actually had with her cousin. She may not have associated with him at all. She may not have had any knowledge about her cousin's trouble. If she did have knowledge, she may have totally agreed with his dismissal from the sheriff's department. The fact that she is Tony Peace's cousin is not the kind of relationship from which bias against the State could be presumed. See, Fotopoulos v. State, 608 So.2d 784 (Fla. 1992) (juror's son had extensive contact with juvenile section of State Attorney's Office); Adams v. State, 559 So.2d 1293 (Fla. 1990)(juror's son accused of a crime); Gonzalez v. State, 569 So.2d 782 (Fla. 4th DCA 1990)(juror's son accused of a crime). There are simply no facts in the record to show that Ms. Peace harbored a bias as the result of her relative's troubles. Gibson v. State, 603 So.2d 711 (Fla. 4th DCA 1992)(juror never questioned about alleged bias)

Allowing the peremptory challenge of prospective jurors because their cousins have been in trouble, without any showing

that they are biased as a result, gives the prosecutor an overly broad basis for excusing a juror and opens the door for pretextual reasons for peremptory challenges. This Court has carefully crafted the requirement that offered race-neutral reasons be supported by the record to avoid such abuses. See, Slappy. There is no record basis for the reason used to excuse Ms. Peace from the jury in this case. Barwick is entitled to a new trial.

ISSUE III

THE TRIAL COURT ERRED IN DENYING A MOTION FOR JUDGEMENT OF ACQUITTAL TO THE CHARGE OF ATTEMPTED SEXUAL BATTERY SINCE THE EVIDENCE WAS INSUFFICIENT TO PROVE THE OFFENSE.

The State failed to prove the charge of attempted sexual battery and the trial court should have granted Barwick's motion for judgment of acquittal on that count. (TR 477-482) This charge was based on circumstantial evidence. Barwick confessed to the killing and admitted he intended to steal. (SR 310-338) However, he said nothing about an intent to commit sexual battery. The circumstantial evidence did not preclude a reasonable hypothesis of Barwick's innocence on this charge. See, Scott v. State, 581 So.2d 887 (Fla. 1991); State v. Law, 559 So.2d 187 (Fla. 1989); Jaramillo v. State, 417 So.2d 257 (Fla. 1982); McArthur v. State, 351 So.2d 972 (Fla. 1982). Barwick asks this Court to reverse his conviction for attempted sexual battery.

In support of the charge, the prosecutor relied on the following facts: (1) the victim was a young woman Barwick had seen sunbathing; (2) she was found with the top and bottom of her bathing suit partially pulled down but not fully exposing her; (3) she was found with a bed comforter over her body and testing reveals a semen stain on the comforter; and (4) blood typing of the stain shows that Barwick's blood type is within the two percent of the population who could have left the stain. (TR 479-480) These facts do not exclude every reasonable hypothesis of Barwick's innocence. First, the fact that

Barwick saw the victim sunbathing does not lead to the conclusion that he entered her apartment to commit sexual battery. Such a conclusion from this fact is pure speculation. Furthermore, Barwick's confession contradicts such a conclusion. He admitted entering the apartment, to killing the victim and said his purpose was to steal. Second, the fact that the victim/'s bathing suit was partially pulled down does not support the attempted sexual battery charge. Barwick said the killing occurred during a struggle with the victim which is consistent with the other evidence showing a struggle occurred. Her bathing suit could easily have been pulled down during the struggle rather than as part of an attempted sexual attack. Third, the semen stain also is insufficient to prove the charge. There is no evidence as to when the semen was left on the comforter. Additionally, the blood testing, while including Barwick as the source of the semen, also included a significant portion of the male population as well. Finally, even if Barwick left the stain, there is no evidence to show this occurred before the victim's death. If the stain occurred after death, there can be no attempted sexual battery. Owen v. State, 560 So.2d 207, 212 (Fla. 1990).

Barwick's motion for judgment of acquittal on the attempted sexual battery should have granted. He asks this Court to reverse his conviction on this count.

ISSUE IV

THE TRIAL COURT ERRED IN ALLOWING A WITNESS TO TESTIFY TO HIS BLOOD TYPE.

The trial court should not have permitted State witness Tim Cherry to testify to his blood type. Cherry, who married Michael Ann in 1988, testified he visited Michael Ann one time while she lived in Panama City. (TR 224) This visit occurred in February before the homicide in March of 1986. (TR 224) He stayed in Michael Ann's apartment during the visit. (TR 225) The prosecutor, wanting to eliminate Cherry as a possible source of the semen stain on the comforter, asked him his blood type. (TR 224) He answered, "I'm type A." (TR 224) Defense counsel objected on hearsay and lack of predicate grounds and asked that the answer be stricken. (TR 225) The trial judge erroneously overruled the objection because the testimony was hearsay. (TR 225)

Blood tests may be admitted in court in two ways. See, Dutilly v. Dept. of Health and Rehabilitative Services, 450 So.2d 1195 (Fla. 5th DCA 1984). First, the expert who performed the tests can testify directly about his testing and the results. Ibid, at 1196. Second, a blood test report can be admitted as a business record exception to the hearsay rule. Sec. 90.803(6) Fla. Stat.; Dutilly, 450 So.2d at 1196-1197. Admissibility of blood tests results does not eliminate the need to follow the rules of evidence. Dutilly, 450 So.2d 1195 (summary judgment in paternity action reversed where supporting affidavit concerning the blood tests report failed to satisfy

business records exception); Seiler v. Stingham, 567 So.2d 1078 (Fla. 4th DCA 1990) (same); Ferguson v. Williams, 566 So.2d 9 (Fla. 3d DCA 1990)(same). The State failed to follow either method in its attempt to prove Tim Cherry's blood type. Cherry's own testimony was hearsay. Furthermore, there was no evidence of the source or reliability of this hearsay. During argument on the objection, the prosecutor responded that Cherry's military ID shows type A. This comment did not establish admissibility as a business record. Defense counsel pointedly replied, "Honorable military ID hearsay, its all hand written items". (TR 225)

The State simply failed to follow the rules of evidence and did not properly prove Cherry's blood type. Establishing Cherry's blood type was critical to the prosecution because, if different from the semen stain on the comforter, Cherry was eliminated as a source. Defense counsel's objections should have been sustained and the testimony stricken.

ISSUE V

THE TRIAL COURT ERRED IN NOT DECLARING A MISTRIAL BECAUSE OF THE PROSECUTOR'S IMPROPER ARGUMENTS THAT THE DEFENSE HAD THE BURDEN OF PRESENTING EVIDENCE.

The prosecutor made several improper comments during his arguments to the jury. In opening statement, the prosecutor stated:

> At the conclusion of all the evidence, the defense evidence, as well as mine, I'm going to ask you to find ...

(TR 201) Defense counsel objected and move for a mistrial because the state had told the jury that the defense had the burden of presenting evidence. (TR 201-202) The court denied the motion. (TR 201-202) Later, during closing argument, the prosecutor told the jury the following:

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

(TR 534-535) Again, the trial court overruled defense counsel's objection and denied a motion for mistrial. (TR 535) The remarks improperly commented on the defendant not testifying and shifted the burden of proof and presenting evidence to the defense. Amends. V, XIV U.S. Const.; Art. I, Secs. 9, 16 Fla. Const.; Griffin v. California, 380 U.S. 609, 85 S.Ct. 1229, 14 L.Ed.2d 106 (1965); Trafficante v. State, 92 So.2d 811 (Fla. 1957); Jackson v. State, 575 So.2d 181 (Fla. 1991).

The prosecutor's comments are almost identical to the ones the Fourth District Court of Appeals condemned twenty years ago in Childers v. State, 277 So.2d 594 (Fla. 4th DCA 1973). In Childers, the court wrote,

> In commenting upon the circumstantial evidence, the prosecutor said,
> " The Judge will also instruct you, and I will tell you right now, that if a man can offer you a reasonable hypothesis of innocence, the you should look to that reasonable hypothesis of innocence when you are dealing with circumstantial evidence.
> "I submit to you, what reasonable hypothesis has been offered to you, other than the one which indicates ...."
>
> * * * *
>
> Referring to the quoted remarks of the prosecutor and particularly the emphasized portions, we think it clear that such a comment is subject to an interpretation which would bring it within the prohibited area. The prosecutor's statement of the applicable law, followed immediately by his rhetorical question, "What reasonable hypothesis has been offered to you ..." is fairly susceptible of being interpreted by the jury as a statement to the effect that "an innocent man would attempt to explain the circumstances but the defendant offered no such explanation." The comment as thus interpreted or construed violates the prohibition of the rule.

277 So.2d at 595. Here, the prosecutor contended there was not reasonable hypothesis of innocence and, like the prosecutor in Childers, asked the jury the rhetorical question suggesting that there had been no evidence presented from the defendant, personally, or the defense of a hypothesis of innocence:

> But, what, what in this courtroom, what evidence, what fact, what testimony, what anything have you heard as a result of him

> going down to that police station would create a reasonable doubt in your mind what he has done, what he is guilty of. Nothing.

(TR 534-535) (emphasis added) Just as in Childers, the assistant state attorney here commented on Barwick's failure to testify and present witness.

These comments violated Barwick's constitutional privilege against self-incrimination and due process. He asks this Court to reverse his convictions for a new trial.

ISSUE VI

THE TRIAL COURT ERRED IN SENTENCING BARWICK TO DEATH BECAUSE IT IMPROPERLY CONSIDERED INVALID AGGRAVATING CIRCUMSTANCES IN VIOLATION OF THE EIGHTH AND FOURTEENTH AMENDMENTS.

A.

The Trial Court Should Not Have Found And Considered As An Aggravating Circumstance That The Homicide Was Committed During An Attempted Sexual Battery.

The trial court found as an aggravating circumstance that Barwick committed the homicide during an attempted sexual battery. Sec. 921.141 (5)(d) Fla. Stat. In his sentencing order, the judge wrote:

> The Capital Felony was committed while the Defendant was engaged in the commission of or an attempt to commit any robbery, burglary, sexual battery or kidnapping or flight after committing any such offense. Finding: The jury found the defendant guilty of an Attempted Sexual Battery, Burglary and Robbery. The evidence clearly established that the Murder was committed while the defendant was attempting to commit a sexual battery. Although the defendant denied in his confession the sexual battery, his modus operandi in this case is the same as it was in the 1983 sexual battery case for which he was convicted. In addition, the defendant, by his confession, admitted arming himself with a knife and gloves and entering the victim's residence to commit a burglary or robbery. This aggravating circumstance is established by the evidence beyond a reasonable doubt.

(R 1282-1283) The court entered an order clarifying that his sentencing order relied solely on the attempted sexual battery to establish the aggravating circumstance provided for in

Section 921.141(5)(d), Florida Statutes to avoid any doubling with the pecuniary gain aggravating circumstance. (R 1306-1307)

Although Barwick was convicted of attempted sexual battery, the evidence was insufficient to support the conviction. The insufficiency of the evidence has been addressed in Issue III, supra., and the argument is incorporated by reference here. If this Court discharges Barwick on the attempted sexual battery count, the aggravating circumstance based on that offense must also be reversed. Atkins v. State, 452 So.2d 529, 532-533 (Fla. 1984).

B.

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

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

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

Ibid at 9. Later, in Cheshire v. State, 568 So.2d 908 (Fla. 1990), this Court further explained the HAC circumstance:

> The factor of heinous, atrocious or cruel is proper only in torturous murders-- those that evince extreme and outrageous depravity as exemplified either by the desire to inflict a high degree of pain or utter indifference to or enjoyment of the suffering of another.

568 So.2d at 912.

Finding that the homicide fit this definition, the trial court stated,

> The Capital Felony was especially heinous, atrocious or cruel. Finding: The victim was stabbed thirty-seven times, thirteen of which were life threatening. In addition, there were at least twelve slices or cuts on her hands which were defensive wounds where she had attempted to ward off blows of the knife. The medical examiner testified that she could have struggled three to five minutes depending on the sequence of the wounds and even though she would have been in shock after three to five minutes, she would have felt pain and would have bleed to death within ten to fifteen minutes. This kind of crime is heinous, atrocious or cruel. This aggravating circumstance is established beyond a reasonable doubt.

(R 1285)

This aggravating factor should not have been weighed in the sentencing process for several reasons. First, multiple stab wounds do not necessarily render a homicide especially heinous, atrocious or cruel. Demps v. State, 395 So.2d 501 (Fla. 1981). Second, the victim's physical suffering was of relatively short duration. The medical examiner said she died within three to ten minutes of the wounds depending on which

wound occurred first. (TR 461-462) However, the victim would have gone into shock as quickly as one and one-half minutes to a maximum of ten minutes depending on the sequence of the wounds. (TR 461) She may or may not have remained conscious after going into shock. (TR 462) The length of time before the the victim became unconscious or semi-conscious was brief and negates a HAC finding. See, Rhodes v. State, 547 So.2d 1201 (Fla. 1989); Herzog v. State, 439 So.2d 1372 (Fla. 1983). Living for several minutes in pain does not qualify the crime for the HAC aggravating circumstance. E.g., Teffeteller v. State, 439 So.2d 840, 846 (Fla. 1983). Finally, and most importantly, the manner of the killing was directly caused by Barwick's mental impairment at the time. Administering numerous stab wounds is consistent with the frenzied, repetitive attack of someone who is mentally disturbed and panicked. On several occasions, this Court has held that the causal relationship between a defendant's mental state and the severity of the manner of death, such a multiple stab wounds, mitigates the aggravating quality of those wounds. E.g., Amazon v. State, 487 So.2d 8 (Fla. 1986); Miller v. State, 373 So.2d 882 (Fla. 1979); Burch v. State, 343 So.2d 831 (Fla. 1977); Jones v. State, 332 So.2d 615 (Fla. 1976). Consequently, the trial court's failure to consider Barwick's mental impairment when evaluating the aggravated quality of the manner of death renders the finding of this circumstance invalid. It is not the crime of someone consciously trying to deliberately inflict pain. The mental state of the

perpetrator is an important factor in the finding of this aggravating circumstance. Cheshire v. State, 568 So.2d at 912.

The trial court should not have found and considered the heinous, atrocious or cruel aggravating circumstance. This factor has skewed the sentencing decision, and this Court must reverse Darryl Barwick's death sentence.

C.

The Trial Court Should Not Have Found And Considered As An Aggravating Circumstance That The Homicide Was Cold, Calculated And Premeditated.

The aggravating circumstance of the homicide being committed in a cold, calculated and premeditated manner without any pretense of moral or legal justification, Sec. 921.141(5)(i), Fla. Stat., was found and applied in the trial judge's sentencing decision. (R 1285-1286) This was error for two reasons. First, the facts of the case failed to prove the existence of this aggravating factor. Second, the court considered and found this factor even though the prosecutor never asserted it, the jury was never instructed on it, and the defense was not on notice it was being considered in the sentencing decision. Application of the premeditation aggravating circumstance violated Barwick's rights to due process, a fair sentencing trial, and his right to be free from cruel or unusual punishment. Art. I, Secs. 9, 16, 17 Fla. Const.; Amends. V, VI, VIII, XIV U.S. Const. The death sentence has been unconstitutionally imposed and must be reversed.

In finding the CCP circumstance, the court wrote as follows:

> The Capital Felony was committed in a cold calculated, and premeditated manner without any pretense of moral or legal justification. Finding: The defendant in a calculated manner selected his victim and watched for an opportune time. He planned his crimes, selected a knife, gloves for his hands, and a mask for his face so that he could not be identified. When struggling with the victim the mask was pulled from his face, and knowing that he could be identified, he proceeded in a cold, calculated manner, and with premeditation to kill her without any pretense of moral or legal justification. The defendant had planned a sexual battery or burglary or robbery or all three, had armed himself to further those purposes and when a killing became necessary, without any moral or legal justification or remorse, he killed her. The evidence clearly establishes this aggravating circumstance beyond any reasonable doubt.

(R 1285-1286) These findings negate, rather that support, the existence of the premeditation aggravating circumstance.

This Court has required proof that a murder was committed as the result of "... a careful plan or prearranged design to kill...." Rogers v. State, 511 So.2d 526, 533 (Fla. 1987). The careful planning of another felony during which the murder occurs is insufficient to establish the CCP factor. Lawrence v. State, 614 So.2d 1092 (Fla. 1993); Jackson v. State, 498 So.2d 906 (Fla. 1986); Hardwick v. State, 461 So.2d 79 (Fla. 1984). In finding this aggravating circumstance, the trial judge relied on the evidence showing that the "defendant had planned a sexual battery or burglary or robbery or all three." (R 1286) The fact that one or more of these other felonies may have be

pre-planned does not prove the murder was CCP. Ibid. One fact the court noted--use of a mask -- tends to negate, not support, that the homicide was preplanned. Evidence that the perpetrator wore a mask to conceal his identity shows a plan to leave the victim alive.

One sentence in the court's finding relates to the murder itself:

> When struggling with the victim the mask was pulled from his face, and knowing that he could be identified, he proceeded in a cold, calculated and premeditated manner, and with premeditation to kill her without any pretense of moral or legal justification.

(R 1286) Again, this finding negates a finding of the CCP circumstance. Murders occurring during other felonies as a reaction to the victim's resistance are not cold, calculated and premeditated. See, e.g., Blanco v. State, 536 So.2d 520 (Fla. 1984)(victim confronted and struggled with defendant during a burglary); Hamblen v. State, 527 So.2d 800 (Fla. 1988)(defendant shot robbery victim after victim activated a silent alarm); Maxwell v. State, 446 So.2d 1031 (Fla. 1984) (victim verbally protested giving up his gold ring). The evidence in this case shows, at best, a spontaneous, impulsive killing after the victim resisted and Barwick panicked during the ensuing struggle. Such a homicide simply does not qualify for the premeditation aggravating circumstance. Ibid. Furthermore, assuming Barwick did formulate an intent to kill to eliminate a witness during the struggle, this fact does not raise

the killing to a preplanned, calculated one as the CCP factor requires. See, Rogers v. State, 511 So.2d 526.

Finally, the court inferred that the killing was done without remorse. (R 1286) Lack of remorse is not a proper consideration as an aggravating circumstance or an enhancement of an aggravating circumstance. Pope v. State, 441 So.2d 1073 (Fla. 1983).

If this Court concludes the evidence supports the CCP circumstance, Barwick's death sentence must be reversed for its consideration anyway. The trial court improperly considered and found the premeditation circumstance because Barwick was never placed on notice that this factor was to be considered. Neither the prosecutor nor the judge indicated that this circumstance was to be a factor in sentencing. At the jury charge conference, the prosecutor did not request an instruction on the circumstance. (TR 903-904) During closing statements at penalty phase, the prosecutor never urged the jury to consider the CCP factor. (TR 913-922) The trial judge did not instruct the jury on the circumstance. (TR 956-957) At the conclusion of the trial and prior to sentencing, the State never asked the court to consider it in sentencing. (TR 12-17) Furthermore, at the sentencing hearing, the judge did not orally state the aggravating circumstances he considered. (TR 12-17) Only after filing of the sentencing order did Barwick learn that the judge considered the CCP aggravating circumstance. (TR 12-18, 1281-1292) Although a capital defendant is not entitled to a statement of particulars pretrial of the aggravating circumstances

to be relied upon, Clark v. State, 379 So.2d 97, 104 (Fla. 1979), he has the due process right to notice of the circumstances he is defending against sometime during the trial and before sentencing. Barwick was not given the opportunity to defend against the CCP factor before the court considered it in sentencing him to death.

The cold, calculated and premeditated aggravating circumstance was improperly considered and found in sentencing Barwick to death. He was entitled to some notice and opportunity to be heard on its use before sentence was imposed. Additionally, the facts did not support the circumstance. This Court must reverse Barwick's death sentence to remedy this error.

ISSUE VII

THE TRIAL COURT ERRED IN REJECTING BARWICK'S ABUSE AS A CHILD AS A NONSTATUTORY MITIGATING CIRCUMSTANCE.

Darryl Barwick was emotionally and physically abused by his father. His father beat Darryl with his fists, boards, steel reinforcments rods, and other objects. On one occasion, Darryl's father took him out of state until the wounds to Darryl's head could heal. (TR 791) Darryl was knocked unconscious at the hands of his father. (TR 653-654) Psychological testing revealed that Darryl suffers from brain damage. (TR 748, 780-781) Several of the mental health professionals who examined Darryl and testified stated that Darryl's abuse as a child caused or contributed to his psychological impairments and difficulties. (TR 791-799, 852, 880-883) After hearing this extensive testimony of abuse and the experts' testimony, the trial judge found this child abuse occurred, but he concluded it did not constitute a nonstatutory mitigating circumstance. (R 1290) This Court has held that child abuse is a mitigating circumstance, as a matter of law, which must be weighed in the sentencing decision. E.g., Nibert v. State, 574 So.2d 1059, 1062 (Fla. 1990); Campbell v. State, 571 So.2d 415, 419 (Fla. 1990); Livingston v. State, 565 So.2d 1288, 1292 (Fla. 1988). The court's failure to consider the child abuse as mitigating violates Barwick's constitutional right to have the sentencer weigh relevant mitigating circumstances. Amends. V, VIII, XIV U.S. Const.; Art. I, Secs. 9, 16, 17 Fla. Const. Eddings v. Oklahoma, 455 U.S. 104, 102 S.Ct. 869, 71 L.Ed.2d 1

(1982); Lockett v. Ohio, 438 U.S. 586, 98 S.Ct. 2954, 57 L.Ed.2d 973 (1978). Barwick now asks this Court to reverse his death sentence for resentencing.

This Court has recognized that childhood abuse is, as a matter of law, a mitigating circumstance when established by the evidence. Campbell, 571 So.2d at 471, n. 4.; Nibert, 574 So.2d at 1062. In this case, the trial judge found that the evidence established that Darryl was abused as a child. (R 1290) The judge wrote,

> The evidence established that the defendant was abused as a child by his father and grew up in a dysfunctional family.

(R 1290) After finding childhood abuse existed, the trial judge was not free to conclude that such abuse was not a mitigating circumstance. The factor had to be weighed as a mitigation circumstance in the sentencing process. As this Court noted in Campbell,

> Although the relative weight given each mitigating factor is within the province of the sentencing court, a mitigating circumstance once found cannot be dismissed as having no weight.

Campbell, 571 So.2d at 420. However, the trial court rejected Darryl's abuse as a child noting that he had brothers and sisters who were also abused who did not commit crimes:

> The evidence also established that the defendant's siblings were likewise abused and they apparently grew up to be responsible persons. Two of the siblings had the unfortunate experience of being compelled to testify against their brother. While there are doubtless numerous cases where the abuse received by children influence their actions in adult life and result in or

> contribute to criminal behavior. The Court does not find in this case that the abuse received by the defendant as a child is a mitigating circumstance.

(R 1290) The trial court erred in not finding Darryl's child abuse as a mitigating circumstance.

In rejecting this valid mitigating factor, the court has skewed the sentencing process and improperly imposed the death sentence. On this point, Barwick now asks this Court to reverse his sentence and remand for resentencing.

ISSUE VIII

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

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

This Court has recognized the mitigating quality of crimes committed impulsively while the perpetrator suffers from a mental disorder rendering him temporarily out of control. E.g., Holsworth v. State, 522 So.2d 348 (Fla. 1988); Amazon v. State, 487 So.2d 8 (Fla. 1986); Miller v. State, 373 So.2d 882 (Fla. 1979); Burch v. State, 343 So.2d 831 (Fla. 1977); Jones v. State, 332 So.2d 615 (Fla. 1976). In Holsworth, the defendant, like Barwick, had a personality disorder with schizoid characteristics. His mental disorder, like Barwick's, was attributable to physical abuse at the hands of his father. While committing a residential burglary, Holsworth attacked a mother and her daughter with a knife. The mother broke Holsworth's knife, but he obtained another from the kitchen and continued his attack. Both victims received multiple stab wounds. The daughter died. Although the jury recommended life, the trial judge found no mitigating circumstances and imposed death. However, this Court reduced the sentence to life citing Holsworth's drug usage, his mental impairment, his abuse as a

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

Impulsive killings during the course of other felonies, even where the defendant was not suffering from an impaired mental capacity, have also been found unworthy of a death sentence. See, Proffitt v. State, 510 So.2d 896 (Fla. 1987) (defendant stabbed victim as he awoke during a burglary of his residence); Caruthers v. State, 465 So.2d 496 (Fla. 1985) (defendant shot a convenience store clerk three times during an armed robbery); Rembert v. State, 445 So.2d 337 (Fla. 1984) (defendant bludgeoned store owner during a robbery); Richardson

v. State, 437 So.2d 1091 (Fla. 1983)(defendant beat victim to death during a residential burglary in order to avoid arrest). Certainly, with the added mitigation of mental impairment contributing to the crime, Barwick's life must be spared.

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

ISSUE IX

THE TRIAL COURT COMMITTED FUNDAMENTAL ERROR IN ALLOWING THE PROSECUTOR TO ARGUE DURING PENALTY PHASE THAT THE JURY SHOULD HAVE SYMPATHY FOR THE VICTIM BUT THAT SYMPATHY FOR THE DEFENDANT SHOULD NOT BE A CONSIDERATION.

During his closing argument at penalty phase, the prosecutor invited the jury to consider sympathy for the victim and at the same time told the jury that sympathy for the defendant was an improper consideration. This argument was a misstatement of the law and prejudiced the jury's consideration of the evidence in violation of the United States and Florida Constitutions. Amends. V, VI, VIII, XIV U.S. Const.; Art. I, Secs. 9, 16, 17 Fla. Const. The argument was as follows:

> The last thing I wanted to talk to you about, I'll sit down then. I've been talking too long and you're tired of it. Again, I appreciate your patience but I don't want you to fall into sympathy, I can't argue sympathy. It's improper. I can't sit here and show you the photograph and say, feel sorry for this young lady right here. But the only reason I can show you this photograph in life and in death is for this one right down here, which is particularly heinous, atrocious and cruel. That's the reason the photographs are there. That's the reason the photographs are there. That's the reason you can look at them. It is because of the pain that he inflicted, put upon here and the joy that he may have gotten out of it that I can talk about or I can even get close to these photographs or even point to these photographs or show these photographs to you.
>
> Don't get me wrong. I am not arguing sympathy but do not let the defense attorney sway you or inflame you with any sort of argument for sympathy.
>
> The reason we're here, there's no money. It sort of falls in the category, poor fellow. He can't help himself, poor

> fellow. Psychologists and psychiatrists can't help him. Poor fellow. Me, the defense lawyer, I can't help him. Poor fellow. All boils down to money because that's why we can't cure him. It is lack of ability is why we can't cure him. Poor fellow. Everybody has given up on him, poor fellow, don't y'all give up on him.
>
> Don't fall into that category. Don't fall into that sympathy. Sympathy has no place in this courtroom. You are to follow this law. Do these aggravating circumstances outweigh these mitigating circumstances. And if you have any sympathy and if sympathy just comes in there, tell yourselves, no, Mr. Paulk told me we can't have sympathy for that lady or that, the fact that she endured pain and she was being tortured. We can take that into consideration but 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 in prison with the possibility of parole after 25 years in prison. Don't let sympathy make you vote that way.

(TR 933-934)

Sympathy For The Victim Argument Improper

The prosecutor correctly told the jury that he was not permitted to argue sympathy for the victim as a basis for the jury's sentencing decision. However, the prosecutor argued sympathy for the victim. By juxtaposing his comments about the pain the victim suffered and the disclaimer that he was not arguing sympathy, the prosecutor effectively communicated a sympathy argument to the jury. This Court has, on several occasions, condemned prosecutorial argument which invites the jury to base its sentencing decision on such emotions. E.g., King v. State, 623 So.2d 486 (Fla. 1993); Rhodes v. State, 547 So.2d 1201 (Fla. 1989); Garron v. State, 528 So.2d 353 (Fla.

1988); Bertolotti v. State, 476 So.2d 130 (Fla. 1985). The comments prejudiced the jury's sentencing recommendation, and Barwick is entitled to a new penalty phase trial.

Argument Precluding Jury's Consideration Of Sympathy For Defendant Improper

The prosecutor's argument improperly told the jury that sympathy for the defendant could not be a consideration for the jury in evaluating the proper sentence to recommend. The prosecutor specifically told the jury that "Sympathy has no place in this courtroom." Furthermore, this directive followed the prosecutor's mocking reference to the mitigating evidence and a characterization of it as mere pleas for sympathy. This argument violates Barwick's right to have the jury fairly consider the mitigation present in his case as guaranteed by the United States and Florida Constitutions. Amends. V, VI, VIII, XIV U.S. Const.; Art. I, Secs. 9, 16, 17 Fla. Const. Eddings v. Oklahoma, 455 U.S. 104, 102 S.Ct. 869, 71 L.Ed.2d 1 (1982); Lockett v. Ohio, 438 U.S. 586, 98 S.Ct. 2954, 57 L.Ed.2d 973 (1978).

Sympathy and mercy are valid concerns for a jury in the penalty phase of a capital trial. Drake v. Kemp, 762 F.2d 1449, 1460 (Cir. 1985). Although mere sympathy, which has no source in the mitigating evidence, may not appropriately be the sole foundation for a jury's decision, feelings of sympathy grounded in the evidence can be considered. See, California v. Brown, 479 U. S. 538, 107 S. Ct. 837, 93 L. Ed. 2d 934 (1987); Saffle

v. Parks, 494 U. S. 484, 109 S. Ct. 322, 108 L. Ed. 2d 415 (1990); Valle v. State, 581 So.2d 40, 46-47 (Fla. 1991). A juror's feelings of sympathy may naturally coincide with his or her recognition of the mitigating characteristics of the defendant's background or condition. Consequently, the prosecutor's admonition not to allow feelings of sympathy to be a consideration could have misled the jury to disregard the mitigating quality of the evidence presented.

The prosecutor's argument prejudiced the penalty phase of Barwick's trial. This Court must reverse for a new penalty phase trial with a new jury.

ISSUE X

THE TRIAL COURT ERRED IN GIVING INVALID AND UNCONSTITUTIONAL JURY INSTRUCTION ON THE HEINOUS, ATROCIOUS OR CRUEL AGGRAVATING CIRCUMSTANCE.

The defense objected to the standard penalty phase jury instruction on the heinous, atrocious or cruel aggravating factor and requested a substitute instruction. (TR 870-871, 903) Counsel renewed his objection at the close of the instructions. (TR 961) The trial court overruled the objections and refused to give the requested instruction. (TR 870-871, 903, 961) The jury was not sufficiently instructed on the heinous, atrocious or cruel aggravating circumstance. Barwick recognizes that this Court has approved as constitutional the current standard jury instruction on the heinous, atrocious or cruel aggravating circumstance in Hall v. State, 614 So.2d 473 (Fla. 1993). However, he urges this Court to reconsider the issue in this case.

The trial court followed the standard jury instruction and instructed on the aggravating circumstances provided for in Section 921.141(5)(h), Florida Statutes as follows:

> The crime for which the defendant is to be sentenced is especially heinous, atrocious or cruel.
> "Heinous" means extremely wicked or shockingly evil.
> "Atrocious" means outrageously wicked and vile.
> "Cruel" means designed to inflict a high degree of pain with utter indifference to or even enjoyment of the suffering of others.
> The kind of crime intended to be included as heinous, atrocious or cruel is one accompanied by additional acts that show

> that the crime was conscienceless or pitiless and was unnecessarily torturous to the victim.

(TR 956-957) The instructions given were unconstitutionally vague because they failed to inform the jury of the findings necessary to support the aggravating circumstance and a sentence of death. Amends. VIII, XIV U.S. Const.; Art. I, Secs. 9, 16 & 17, Fla. Const.; Espinosa v. Florida, 505 U.S. 112, 112 S.Ct. 2926, 120 L.Ed.2d 854 (1992); Maynard v. Cartwright, 486 U.S. 356, 108 S.Ct. 1853, 100 L.Ed.2d 372 (1988); Shell v. Mississippi, 498 U.S. 1, 111 S.Ct. 313, 112 L.Ed.2d 1 (1990). Barwick recognizes that this Court has approved as constitutional the current standard jury instruction on the heinous, atrocious or cruel aggravating circumstance in Hall v. State, 614 So.2d 473 (Fla. 1993). However, he urges this Court to reconsider the issue in this case.

The United States Supreme Court recently held Florida's previous heinous, atrocious or cruel standard penalty phase jury instruction unconstitutional in Espinosa v. Florida. This Court had consistently held that Maynard v. Cartwright, which held HAC instructions similar to Florida's unconstitutionally vague, did not apply to Florida since the jury was not the sentencing authority. Smalley v. State, 546 So.2d 720 (Fla. 1989). However, the Espinosa Court rejected that reasoning since Florida's jury recommendation is an integral part of the sentencing process and neither of the two-part sentencing authority is constitutionally permitted to weigh invalid aggravating circumstances. Although the instruction given in this

case included definitions of the terms "heinous, atrocious or cruel" (TR 956-957), where the instruction in Espinosa did not, the instruction as given, nevertheless, suffers the same constitutional flaw. The jury was not given adequate guidance on the legal standard to be applied when evaluating whether this aggravating factor exists.

In Shell v. Mississippi, the state court instructed the jury on Mississippi's heinous, atrocious or cruel aggravating circumstance using the same definitions for the terms as the trial judge used in this case. The Mississippi court told the jury the same definitions of "heinous", "atrocious" and "cruel" as the trial judge told Barwick's jury. 112 L.Ed.2d at 4, Marshall, J., concurring. The Supreme Court remanded to the trial court stating, "Although the trial court in this case used a limiting instruction to define the `especially heinous, atrocious, or cruel' factor, that instruction is not constitutionally sufficient." 112 L.Ed.2d at 4. Since the definitions employed here are precisely the same as the ones used in Shell, the instructions to Barwick's jury were likewise constitutionally inadequate. This Court recently held that the mere inclusion of the definition of the words "heinous," "atrocious," or "cruel" does not cure the constitutional infirmity in the HAC instruction. Atwater v. State, 626 So.2d 1325 (Fla. 1993).

The remaining portion of the HAC instruction used in this case reads:

> The kind of crime intended to be included as heinous, atrocious, or cruel is one accompanied by additional acts to show that

> the crime was conscienceless or pitiless and was unnecessarily torturous to the victim.

(TR 957) This addition also fails to cure the constitutional infirmities of the HAC instruction. First, the language in this portion of the instruction was taken from State v. Dixon, 283 So.2d 1, 9 (Fla. 1973) and was approved as a constitutional limitation on HAC in Proffitt v. Florida, 428 U. S. 242, 96 S. Ct. 2960, 49 L. Ed. 2d 913 (1976). However, its inclusion in the instruction does not cure the vagueness and overbreadth of the whole instruction. The instruction still focuses on the meaningless definitions condemned in Shell. Proffitt never approved this limiting language in conjunction with the definitions. Sochor v. Florida, ___ U. S. ___, 112 S. Ct. 2114, 2121, 119 L. Ed. 2d 326 (1992). This limiting language also merely follows those definitions as an example of the type of crime the circumstance is intended to cover. Instructing the jury with this language as only an example still gives the jury the discretion to follow only the first portion of the instruction which has been disapproved. Shell; Atwater. Second, assuming the language could be interpreted as a limit on the jury's discretion, the disjunctive wording would allow the jury to find HAC if the crime was "conscienceless" even though not "unnecessarily torturous." The word "or" could be interpreted to separate "conscienceless" and "pitiless and was unnecessarily torturous." Actually, the wording in Dixon was different and less ambiguous since it reads: "conscienceless or pitiless crime which is unnecessarily torturous." 283 So.2d at 9. Third, the

terms "conscienceless," "pitiless" and "unnecessarily torturous" are also subject to overbroad interpretation. A jury could easily conclude that any homicide which was not instantaneous would qualify for the HAC circumstance. Furthermore, this Court said in Pope v. State, 441 So.2d 1073, 1077-1078 (Fla. 1983) that an instruction which invites the jury to consider if the crime was "conscienceless" or "pitiless" improperly allows the jury to consider lack of remorse.

Proper jury instructions were critical in the penalty phase of Barwick's trial. However, the jury instruction as given failed to apprise the jury of the limited applicability of the HAC factor when death occurs relatively quickly. The prosecutor compounded this error when he argued in his summation that the HAC factor was by far the most important aggravating circumstance: "...probably the most important. And, weighs on a scale from zero to ten, probably a hundred." (TR 918) Barwick was entitled to have a jury's recommendation based upon proper guidance from the court concerning the applicability of the aggravating circumstance. The jury should have received a specific instruction on HAC which advised the jury of the factual parameters necessary before HAC could be considered. The deficient instructions deprived Barwick of his rights as guaranteed by the Eighth and Fourteenth Amendments to the United States Constitution and Article I, Sections 9, 16 and 17 of the Florida Constitution. This Court must reverse the death sentence.

ISSUE XI

THE TRIAL COURT ERRED IN REFUSING TO INSTRUCT THE JURY ON THE MITIGATING CIRCUMSTANCE CONCERNING BARWICK'S BEING UNDER EXTREME DURESS AT THE TIME OF THE OFFENSE.

Barwick requested a jury instruction on the statutory mitigating circumstance provided for by Section 921.141(6)(e) Florida Statute that he acted under extreme duress at the time of the homicide. (TR 870) There was sufficient evidence of an outside provocation which impacted with Barwick's mental impairments to place him under extreme duress. The request was based on the provocation which resulted when the victim attacked Barwick during the robbery and Barwick's mental condition which causes panicked, impulsive reactions when such an outside provocation occurs. The jury should have been given the instruction. Barwick has been deprived his constitutional right to have the jury instructed on mitigating circumstances supported by the evidence. Art. I, Secs. 9, 16, 17 Fla. Const.; Amends. V, VI, VIII and XIV U.S. Const. Consequently, the reliability of the jury's sentencing recommendation has been tainted and the death sentence unconstitutionally imposed. Ibid.

In Toole v. State, 479 So.2d 731 (Fla. 1985), this Court defined the term "duress" as used in the statutory mitigating circumstance:

> "Duress" is often used in the vernacular to denote internal pressure, but it actually refers to external provocation such as imprisonment or the use of force or threats.

479 So.2d at 734. This Court agreed with the trial judge in Toole that there was no duress in that case because there was no evidence of external pressure at the time of the crime. However, in Fead v. State, 512 So.2d 176 (Fla. 1987), this Court approved a duress mitigating factor which did not directly involve external threats but was the product of an outside provocation coupled with the defendant's particular mental state. There, the factor was supported because the defendant acted under extreme duress because of his obsessive jealously over his former wife taking a new lover and his alcohol use.

In this case, Barwick's mental impairments rendered him unusually sensitive to impulsive rage reactions when provoked. The victim's attack triggered such a reaction. Barwick lost control and the homicide resulted. This was sufficient evidence of extreme duress because of an external provocation to justify an instruction to the jury to consider the mitigating factor. The trial court's failure to so instruct the jury has tainted the sentencing process. Barwick's death sentence must be reversed.

ISSUE XII

THE TRIAL COURT ERRED IN DENYING BARWICK'S MOTION TO PRECLUDE THE DEATH PENALTY IN HIS CASE BECAUSE OF A HISTORY IN BAY COUNTY OF RACIAL BIAS IN THE PROSECUTOR'S DECISION TO SEEK THE DEATH PENALTY.

The trial court improperly denied Barwick's Motion to Preclude The Death Penalty Because It Is Sought And Imposed On The Basis Of Racial Bias. (R 909) Barwick incorporated the similar motion filed and decided in another Bay County case, State of Florida v. Charles Kenneth Foster, No. 75-486. (R 911-935) This motion was premised on a number of factors: (1) the history of racism in Bay County; (2) evidence of racial bias in the attitudes of the staff of the State Attorney's Office; (3) a showing that defendants whose victims were white were four times more likely to be charged with first degree murder than defendants whose victims were black; (4) a showing that murder defendants whose victims were white were six times more likely to proceed to trial; (5) a showing that of defendants who went to trial, those whose victims were white were 26 times more likely to be convicted of first degree murder. The motion was denied in State v. Foster, and this Court affirmed the denial of the motion relying on the federal standard announced in McCleskey v. Kemp, 481 U. S. 279, 107 S. Ct. 1756, 95 L. Ed. 2d 262 (1987), requiring a showing purposeful discrimination in the movant's particular case. Foster v. State, 614 So.2d 455, 463 (Fla. 1993).

Barwick asks this Court to recede from the holding in Foster and to adopt as a Florida constitutional standard the

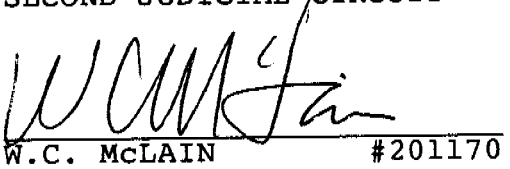
one proposed in Justice Barkett's dissent in Foster, which lessens the impossible burden of showing purposeful racial discrimination in a particular case. 614 So.2d at 468.

CONCLUSION

For the reasons presented in Issues I, II, IV, and V, Barwick asks this Court to reverse his convictions and remand for a new trial. In Issue III, he asks this Court to reverse his conviction for attempted sexual battery and remand for his discharge on that offense. In Issues V through XII, Barwick asks that his death sentence be vacated and the case remanded for imposition of a life sentence.

Respectfully submitted,

NANCY A. DANIELS
PUBLIC DEFENDER
SECOND JUDICIAL CIRCUIT



W.C. McLAIN #201170
Assistant Public Defender
Leon Co. Courthouse, #401
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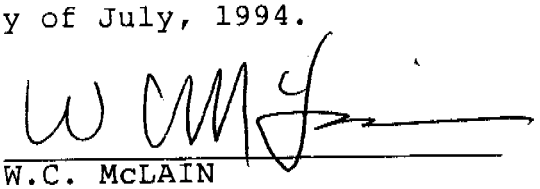
(904) 488-2458

ATTORNEY FOR APPELLANT

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing Initial Brief of Appellant has been furnished by delivery to Mr. Richard B. Martell, Assistant Attorney General, Criminal Appeals Division, The Capitol, Plaza Level, Tallahassee, Florida, 32301; and a copy has been mailed to appellant, Mr. Darryl Barwick, on this 19th day of July, 1994.



W.C. McLAIN

IN THE SUPREME COURT OF FLORIDA

DARRYL BARWICK, :

Appellant, :

v. : CASE NO. 80,446

STATE OF FLORIDA, :

Respondent. :

_____/

A P P E N D I X

TO

INITIAL BRIEF OF APPELLANT

IN THE CIRCUIT COURT, FOURTEENTH JUDICIAL CIRCUIT, IN AND FOR BAY COUNTY, FLORIDA

Case no. 86-940-G

FILED
JUN 5 8 12 AM '91
HAROLD J. KOZEL
CLERK CIRCUIT COURT
BAY COUNTY, FLORIDA

STATE OF FLORIDA

v.

DARRYL BRYAN BARWICK.

_____/

MOTION FOR DISQUALIFICATION OF JUDGE

Defendant, DARRYL BRYAN BARWICK, by and through his undersigned counsel, moves pursuant to Florida Rule of Criminal Procedure 3.230 to disqualify the Honorable Clinton E. Foster, Circuit Judge, from presiding in this cause on the grounds that Judge Foster is prejudiced against the movant and as grounds therefor states as following:

1. The defendant is charged with first degree murder, a capital offense, and other felony offenses.

2. This is the first motion for disqualification of a judge which the defendant has filed in this case.

3. This motion is not based on pretrial rulings made by Judge Foster which are adverse to the defense. This motion is based on the statements and conduct of the judge, including the judge's reaching out to interfere with the adversarial process in an extra-judicial manner, which give the defendant a well-grounded fear that Judge Foster is prejudiced against him and his case.

4. The defendant has a well-grounded fear that he will be unable to receive a fair trial if Judge Foster continues to preside in this cause for the following reasons:

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a. Judge Foster has engaged in extra-judicial conduct to restrict the ability of the defense to prepare this case for trial to the detriment of the defense;

b. Judge Foster has by his conduct and his statements indicated that he has prejudged the case in general and has prejudged and is predisposed against the defense on certain specific issues crucial to both phases of the case which involve psychological and psychiatric concepts and expertise;

c. Judge Foster has by his conduct and his statements indicated that his first and abiding priority is protection of the county's finances at the expense of minimal due process for the defendant;

d. Judge Foster has by his conduct and his statements indicated that he has prejudged and rejected any opinions which might be expressed by the distinguished psychologist retained by the defense pursuant to authorization by the predecessor judge.

5. The factual basis for these allegations is as follows:

a. The defendant was previously tried for the instant offenses, was convicted, and was sentenced to death for first degree murder. All of the defendant's convictions and sentences, including his death sentence, were reversed by the Florida Supreme Court of Florida in 1989, and the case remanded for retrial on all issues.

b. The undersigned were appointed as counsel and

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BAY COUNTY, FLORIDA

co-counsel respectively on February 9, 1990, and December 13, 1990, by the Honorable W. Fred Turner, Circuit Judge, who had presided over the first trial in this case and to whom the case remained assigned following remand.

c. The undersigned filed motions for appointment of a psychologist, a neurologist, and an investigator to prepare for the retrial, all of which were granted by Judge Turner.

d. On August 29, 1990, undersigned counsel Roy A. Lake filed a motion for interim payment of attorney's fees, requesting payment of 150.5 hours of work, which was granted by Judge Turner on September 7, 1990.

e. On October 11, 1990, undersigned counsel Roy A. Lake filed a motion for interim payment of psychologist's fees for services performed for the defense by Theodore Blau, Ph.D., which was granted by Judge Turner on November 12, 1990.

f. On January 7, 1991, Judge Turner retired from office and this cause was reassigned to the Honorable N. Russell Bower, Circuit Judge, who, on February 28, 1991, entered an order on his own motion recusing himself from presiding over this cause. This cause was then reassigned to the Honorable Clinton E. Foster, Circuit Judge.

g. On January 9, 1991, undersigned counsel Roy Lake filed a second motion for interim payment of attorney's fees for an additional 107 hours of work. On January 9, 1991, undersigned counsel filed a motion for appointment of a psychiatrist to assist the defense in preparation of the case. On

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BROWARD COUNTY, FLORIDA

March 19, 1991, undersigned counsel filed a motion for interim payment of investigator's fees for in excess of 120 hours of work for services performed for the defense by Lee Norton, Ph.D., an investigator who specializes in capital mitigation investigation.

h. At a status conference on the case set on the Court's own motion, (believed to be on March 19, 1991,) Judge Foster inquired whether the case had been tried before, whether a conviction had been obtained, whether the conviction had been reversed, and whether a transcript of the previous trial existed. All of these questions were answered in the affirmative. Thereupon and repeatedly thereafter, Judge Foster has questioned the necessity of any further trial preparation or additional expert assistance.

i. At a hearing on April 2, 1991, although no request was made that he do so, and no evidence was presented to warrant doing so, Judge Foster, on his own motion, rescinded all of Judge Turner's appointments for defense assistance, including the defense investigator, psychologist, and neurologist, announcing that he would review each appointment to determine whether any further work by any of them would be authorized for payment by Bay County. The same day, the Judge orally amended Judge Turner's order appointing a defense neurologist by appointing Dr. Michael Walker by name at an hourly rate of $150.00, which the judge fixed without consultation with counsel and without any evidence as to the reasonableness of the rate fixed. Judge Foster has not reappointed either the defense psychologist or the defense

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investigator.

j. On April 2, 1991, Judge Foster heard defense counsel Roy Lake's motion for interim payment of attorney's fees. Counsel explained that, because he was a sole practitioner, the survival of his practice was at risk if he continued to give the defendant's case the time it required in preparation for trial. Counsel stated that he would be financially unable to prepare the case effectively, unless he received interim fees. At first, Judge Foster stated that he would not grant the motion because the practice in the circuit was not to grant interim fees. Subsequently, he was advised that interim fees had been paid to lawyers in other death penalty cases in the circuit. Judge Foster then stated that he would not be bound by what other judges did with respect to interim fees. Judge Foster expressed concern that the request for fees exceeded the statutory cap. He was informed that the earlier interim payment had already exceeded the cap and that the cap had been held inapplicable by Judge Turner in this case. Judge Foster then stated that he could only determine what was reasonable at the end of the case. When asked what inquiry he would make then that he could not make at the present, Judge Foster would not say. He simply denied the motion.

k. On March 19, 1991, defense counsel argued the motion for appointment of a psychiatrist and represented to the court that the psychologist appointed by Judge Turner, Theodore Blau, Ph.D., had diagnosed the defendant as having as having long-standing and severe emotional problems, organic brain deficits,

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BAY COUNTY, FLORIDA

and, possibly, episodes of dyscontrol stemming from a convulsive disorder, and had recommended that the defense retain a competent psychiatrist to assess the significance of these factors with regard to the issues in the case. No psychiatrist had ever been appointed in this case before. The Assistant State Attorney made no factual representations or legal arguments in response to the defense argument but rather requested an opportunity to file a written memorandum on the issue. The Court gave the state five days to file a memorandum, and gave the defense leave to file a response to the state's memorandum. The state failed to submit a memorandum. On April 2, 1991, defense counsel again argued the motion. The state requested additional time to file a memorandum, which the Court granted, but no memorandum was filed. On April 19, 1991, the defense again argued the motion and the state again requested additional time to file a memorandum, which the Court granted. The undersigned has been told by a person who was present in the courtroom that on May 14, 1991, Judge Foster and the assistant state attorney had a colloquy in the courtroom but in the absence of defense counsel and of the defendant, in which the assistant state attorney requested that the court hold a hearing on the issue of the defense motion for psychiatrist. The Court instead entered an order summarily denying the motion.

1. Counsel has recently been told 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

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that hired him wished him to say. It is believed that Dr. Blau has never testified before Judge Foster and that Judge Foster has never met Dr. Blau.

6. Judge Foster's comments reflecting his assumption that the case properly could be retried without additional preparation by defense counsel is evidence of prejudgment concerning the case. His rulings which have effectively prevented any such additional preparation by defense counsel confirm this apprehension. The case should simply be repeated, in the judge's view, apparently with the same predetermined result.

7. Judge Foster's reaching out to rescind orders entered by Judge Turner, actions which neither the state nor the defense nor the county requested him to take, constitute interference with the adversarial process that is extra-judicial and is instinct with prejudice against the defendant.

8. Judge Foster's remarks denigrating Dr. Blau, whom the judge has never seen nor heard testify, and apparently denigrating psychologists or mental health experts as a group, dictate the conclusion that Judge Foster has decided to reject any mental health testimony offered in this case. This conclusion is strengthened by the court's summary treatment of the defense motion for a psychiatrist. Mental health issues are central to both phases of the jury trial and are matters which the judge is legally required to consider in sentencing, should the defendant be convicted as charged.

WHEREFORE, the defendant respectfully requests this court

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CLERK CIRCUIT COURT
BAY COUNTY, FLORIDA

enter an order disqualifying himself from presiding in this cause.

I hereby certify that a copy of the foregoing motion, with affidavits and certificate, was furnished to Alton Paulk, Assistant State Attorney, by hand delivery this 5th day of June, 1991.

ROY A. LAKE, ESQ.
Florida Bar No. 0714811
P. O. Box 456
Bonifay, FL 32425
(904) 547-5959

and

STEVEN L. SELIGER, ESQ.
Florida Bar No. 0244597
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(904) 875-4668

ATTORNEYS FOR THE DEFENDANT

BY: _____
ROY A. LAKE

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JUN 5 8 13 AM '91
HAROLD BAZZEL
CLERK CIRCUIT COURT
BAY COUNTY, FLORIDA

IN THE CIRCUIT COURT, FOURTEENTH JUDICIAL CIRCUIT, IN AND FOR BAY COUNTY, FLORIDA

Case no. 86-940-G

STATE OF FLORIDA

v.

DARRYL BRYAN BARWICK.

_____/

CERTIFICATE OF GOOD FAITH

ROY A. LAKE, ESQ., hereby certifies that the motion to disqualify the Honorable Clinton E. Foster, Circuit Judge, from presiding in this cause was made in good faith.

ROY A. LAKE, ESQ.

June 5th 1991
Date

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HAROLD BAZZEL
CLERK CIRCUIT COURT
BAY COUNTY, FLORIDA

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IN THE CIRCUIT COURT, FOURTEENTH JUDICIAL CIRCUIT, IN AND FOR BAY COUNTY, FLORIDA

Case no. 86-940-G

STATE OF FLORIDA

v.

DARRYL BRYAN BARWICK.

_____/

FILED
JUN 5 8 12 AM '96
HAROLD BAZZEL
CLERK CIRCUIT COURT
BAY COUNTY, FLORIDA

AFFIDAVIT

ROY A. LAKE, ESQ., first being duly sworn, deposes and states as follows:

1. I am an attorney admitted to practice in the State of Florida and maintain on office for the practice of law in Bonifay, FL.

2. I am attorney of record for Darryl Bryan Barwick in the above-styled cause.

3. The following facts are within my personal knowledge except where otherwise indicated.

4. Darryl Bryan Barwick was previously tried for the first degree murder and other felony offenses, was convicted, and was sentenced to death for first degree murder in November, 1986. All of the Mr. Barwick's convictions and sentences, including his death sentence, were reversed by the Florida Supreme Court of Florida in 1989, and the case remanded for retrial on all issues.

5. I was appointed as counsel for Mr. Barwick on February 9, 1990, and Steven Seliger, Esq., was appointed as co-counsel on December 13, 1990, by the Honorable W. Fred Turner, Circuit Judge, who had presided over the first trial in this case

and to whom the case remained assigned following remand.

6. I filed motions for appointment of a psychologist, a neurologist, and an investigator to prepare for the retrial, all of which were granted by Judge Turner.

7. On August 29, 1990, I filed a motion for interim payment of attorney's fees, requesting payment of 150.5 hours of work, which was granted by Judge Turner on September 7, 1990.

8. On October 11, 1990, I filed a motion for interim payment of psychologist's fees for services performed for the defense by Theodore Blau, Ph.D., which was granted by Judge Turner on November 12, 1990.

9. On January 7, 1991, Judge Turner retired from office and this cause was reassigned to the Honorable N. Russell Bower, Circuit Judge, who, on February 28, 1991, entered an order on his own motion recusing himself from presiding over this cause. This cause was then reassigned to the Honorable Clinton E. Foster, Circuit Judge.

10. On January 9, 1991, I filed a second motion for interim payment of attorney's fees for an additional 107 hours of work. On January 9, 1991, I filed a motion for appointment of a psychiatrist to assist the defense in preparation of the case. On March 19, 1991, I filed a motion for interim payment of investigator's fees for in excess of 120 hours of work for services performed for the defense by Lee Norton, Ph.D., an investigator who specializes in capital mitigation investigation.

11. At a status conference on the case set on the

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CLERK CIRCUIT COURT
BAY COUNTY, FLORIDA

Court's own motion, (which I believe was held on March 19, 1991,) Judge Foster inquired whether the case had been tried before, whether a conviction had been obtained, whether the conviction had been reversed, and whether a transcript of the previous trial existed. All of these questions were answered in the affirmative. Thereupon and repeatedly thereafter, Judge Foster has questioned the necessity of any further trial preparation or additional expert assistance.

12. At a hearing on April 2, 1991, although no request was made that he do so, and no evidence was presented to warrant doing so, Judge Foster, on his own motion, rescinded all of Judge Turner's appointments for defense assistance, including the defense investigator, psychologist, and neurologist, announcing that he would review each appointment to determine whether any further work by any of them would be authorized for payment by Bay County. The same day, the Judge announced that he was reappointing the defense neurologist but at an hourly rate of $150.00, which the judge fixed without consultation with counsel and without any evidence as to the reasonableness of the rate fixed. Judge Foster has not reappointed either the defense psychologist or the defense investigator.

13. On April 2, 1991, Judge Foster heard my motion for interim payment of attorney's fees. I explained that, because I was a sole practitioner, the survival of my practice was at risk if I continued to give Mr. Barwick's case the time it required in preparation for trial. I stated that I would be financially unable

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CLERK CIRCUIT COURT
BAY COUNTY, FLORIDA

to prepare the case effectively, unless I received interim fees. At first, Judge Foster stated that he would not grant the motion because the practice in the circuit was not to grant interim fees. Subsequently, either Mr. Seliger or I advised Judge Foster that interim fees had been paid to lawyers in other death penalty cases in the circuit. Judge Foster then stated that he would not be bound by what other judges did with respect to interim fees. Judge Foster expressed concern that the request for fees exceeded the statutory cap. Mr. Seliger or I informed the judge that the earlier interim payment had already exceeded the cap and that the cap had been held inapplicable by Judge Turner in this case. Judge Foster then stated that he could only determine what was reasonable at the end of the case. Mr. Seliger asked what inquiry he would make then that he could not make at the present but Judge Foster would not say. He simply denied the motion.

14. On March 19, 1991, Mr. Seliger argued the motion for appointment of a psychiatrist and Mr. Seliger represented to the court that the psychologist appointed by Judge Turner, Theodore Blau, Ph.D., had diagnosed the defendant as having long-standing and severe emotional problems, organic brain deficits, and, possibly, episodes of dyscontrol stemming from a convulsive disorder, and had recommended that the defense retain a competent psychiatrist to assess the significance of these factors with regard to the issues in the case. No psychiatrist had ever been appointed in this case before. The Assistant State Attorney made no factual representations or legal arguments in response to the

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BAY COUNTY, FLORIDA

defense argument but rather requested an opportunity to file a written memorandum on the issue. The Court gave the state five days to file a memorandum, and gave the defense leave to file a response to the state's memorandum. The state failed to submit a memorandum. On April 2, 1991, Mr. Seliger again argued the motion. The state requested additional time to file a memorandum, which the Court granted, but no memorandum was filed. On April 19, 1991, Mr. Seliger again argued the motion and the state again requested additional time to file a memorandum, which the Court granted. I have been told by someone who was present in the courtroom that on May 14, 1991, Judge Foster and Assistant State Attorney Alton Paulk had a colloquy in the courtroom but in the absence of both Mr. Seliger and myself and in the absence of the defendant. During this colloquy I was told that Mr. Paulk requested that the court hold a hearing on the issue of the defense motion for psychiatrist. The Court did not hold a hearing. The same day, the Court entered an order summarily denying the motion.

15. I have recently been told 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. It is my information and belief that Dr. Blau has never testified before Judge Foster and that Judge Foster has never met Dr. Blau.

FURTHER AFFIANT SAYETH NOT.

ROY A. LAKE, ESQ.

FILED
JUN 5 8 12 AM '91
HAROLD BAY
CLERK CIRCUIT COURT
BAY COUNTY, FLORIDA

Affiant

STATE OF FLORIDA:
COUNTY OF BAY:

Before me, the undersigned authority, personally appeared Roy A. Lake, who, being duly sworn, stated under penalties of perjury that the foregoing facts are true and accurate to the best of his information and belief.

Notary public

My commission expires:

Notary Public, State Of Florida At Large,
My Commission Expires December 11, 1993

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JUN 5 8 12 AM '91

HAROLD BAZZEL
CLERK CIRCUIT COURT
BAY COUNTY, FLORIDA

IN THE CIRCUIT COURT, FOURTEENTH JUDICIAL CIRCUIT, IN AND FOR BAY COUNTY, FLORIDA

Case no. 86-940-G

STATE OF FLORIDA

v.

DARRYL BRYAN BARWICK.

_____/

FILED
JUN 5 8 12 AM '91
HAROLD BAZZEL
CLERK CIRCUIT COURT
BAY COUNTY, FLORIDA

AFFIDAVIT

DARRYL BRYAN BARWICK, first being duly sworn, deposes and states as follows:

1. I am the defendant in this case.

2. I have reviewed the motion to disqualify Judge Foster and my lawyer's affidavit.

3. I agree with the motion and with my lawyers. I am afraid that Judge Foster is prejudiced against me and that he will not give me a fair trial because he won't let my lawyer have the money to prepare my case and I have no money myself to pay for my defense.

FURTHER AFFIANT SAYETH NOT.

Darryl Barwick
DARRYL BRYAN BARWICK
Affiant

STATE OF FLORIDA:
COUNTY OF BAY:

Before me, the undersigned authority, personally appeared Darryl Bryan Barwick, who, being duly sworn, stated under penalties of perjury that the foregoing facts are true and accurate to the best of his information and belief.

Notary public

My commission expires:

NOTARY PUBLIC, STATE OF FLORIDA
MY COMMISSION EXPIRES: FEB. 20, 1993
BONDED THRU NOTARY PUBLIC UNDERWRITERS

FILED

JUN 5 8 12 AM '91

HAROLD BAZZEL
CLERK CIRCUIT COURT
BAY COUNTY, FLORIDA

IN THE CIRCUIT COURT, FOURTEENTH JUDICIAL CIRCUIT

OF THE STATE OF FLORIDA, IN AND FOR BAY COUNTY

IN RE:

STATE OF FLORIDA,
Plaintiff,

CASE NO. 86-940

vs.

DARRYL BARWICK,
Defendant.

O R D E R

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HAROLD J. ...
CLERK CIRCUIT COURT
BAY COUNTY, FLORIDA

THIS MATTER is before the Court on the Defendant's Motion for Disqualification of Judge and Motion for Continuance and the Court has heard argument of counsel and being otherwise advised in the premises. As to the motion for disqualification the Court finds and holds as follows:

1. Without addressing the truth the allegations of paragraph 5h of the Defendant's Motion for Disqualification of Judge which is supported by paragraph 11 of the Affidavit of Roy Lake, the Court rules as a matter of law that those allegations are insufficient to form a basis for disqualification. A trial judge has an affirmative obligation to inquire into the need for further trial preparation and further expert assistance especially when the case has been previously tried, remanded for retrial and the new attorney appointed to defend the case has been working on the case for more than one year.

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2. Paragraph 5i of the Defendant's Motion for Disqualification of Judge which supported by paragraph 12 of Mr. Lake's Affidavit is insufficient as a matter of law to form a basis for disqualification in this case. Attached hereto is a transcript of the April 2, 1991, hearing referred to in the above mentioned motion and affidavit. The transcript clearly shows that this Court was concerned as to whether or not Judge Turner in a previous order authorizing the Defendant to engage an investigator had authorized more than he thought he was authorizing. The investigator, which turned out to be an expert on mitigation, had submitted a bill in excess of $6,000.00 for partial payment of the services that she was performing. The order entered by Judge Turner contained no cap on the investigator's fee and no limitation on her services and was in fact a blank check to the Defendant for investigative services. This Court on its own motion as shown on page 5 of the transcript rescinded that order until some guidelines or cap was established. Further, in page 7 of the transcript, this Court said, "... as I previously said, I am ..., rescinding that order as of now. I would ask that you immediately ask to readdress that question. Let's put some parameters and guidelines around the investigator;...". There was no order by this Court rescinding all of Judge Turner's appointments for Defense assistance. 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 can not ignore its own record. It is obvious from the transcript of the April 2, 1991, hearing, pages 9 and 10, that Defense counsel had asked a person who was appointed as an

investigator but acting as a mitigation specialist to undertake a job without any instructions or directions. Further, at page 12 of the April 2, 1991, transcript reflects that the Court asked Mr. Lake to submit a proposal for modifying the order and nothing has been submitted at this time.

There is nothing in the record that the Court did anything other than rescind the order appointing the investigator until some guidelines could be determined. Further, at page 12 of the April 2, 1991, transcript, it is clearly shown that the Court asked Mr. Lake to submit a proposal for modifying the order and he was asked to find out from the investigator her estimate of the maximum costs and how much longer it was going to take to complete that work. The Court has not heard from Mr. Lake. Further, Mr. Lake was asked to have the expert submit a bill so that a hearing could be conducted and she could be paid. If Mr. Lake was prejudiced by the lack of an investigator it is of his own making rather than any action by the Court. As to the appointment of Dr. Michael Walker at an hourly rate of $150.00 per hour, the transcript does not reflect that that was addressed at the April 2, 1991, hearing. Instead it was addressed at the March 19, 1991, hearing when the Court appointed Dr. Walker at an hourly rate of $150.00 per hour, in keeping with and in compliance with Administrative Order 90-13 of this Court, a copy of which is attached. A copy of excerpts of the March 19, 1991, hearing is attached.

In paragraph 5j of the Defendant's Motion to Disqualify Judge which is supported by paragraph 13 of the Affidavit of Mr. Lake, alleges prejudice by the trial judge because he denied Mr. Lake's request for a second payment of interim fees. Those allegations are insufficient as a matter of law to support a motion to disqualify a judge. The approval of interim fees is discretionary with the judge. In this case, Mr. Lake was appointed in February, 1990, his first petition for interim fees was filed in August 1990, requesting an interim fee of $7,450.00, which was approved by Judge Turner. Thereafter in October 1990, alleging that he had not previously represented a defendant in a capitol case and that he could not render effective assistance of counsel without additional help. Judge Turner appointed additional counsel.

Thereafter on January 9, 1991, Mr. Lake filed a petition for additional interim fees in the amount of $5,908.37, which was denied by this Court. At the time this Court denied Mr. Lake's request for a second interim payment, he had been on the case for more than a year, had received one interim payment and the case was not ready for trial and this Court is of the opinion that the order denying Mr. Lake's second request was not an abuse of discretion.

This Court's order denying the Defendant's Motion for the Appointment of a Psychiatrist is insufficient as a matter of law to form a basis for disqualification of judge. While the Defendant may disagree with the Court's ruling, it does not establish prejudice and at worst could be error.

In connection with the allegation that this judge who had never met Dr. Blau, once remarked that Dr. Blau, like any other psychologists would say anything that the party had briefed him to say. The foregoing is insufficient as a matter of law to form a basis for disqualification of judge in two respects. First, it is based on paragraph 15 of Mr. Lake's Affidavit, which lacks the specificity required by statute. In order to meet the statutory standard, the Affidavit must make specific reference to who made the statement to Mr. Lake and the time and place at which the Court is alleged to have made the statement. However, even if the Affidavit had met the requirement of specificity that statement in and of itself as a matter of law is insufficient to establish a basis for disqualification because of prejudice. This Court does not pass on the credibility or believability of Dr. Blau nor is there any basis to suggest this Court would not give Dr. Blau's testimony the consideration to which it is entitled. It is common knowledge that no party is going to offer the testimony of an expert witness who is going to testify contrary to or in opposition to his defense or position.

The Court has considered the Affidavit of the Defendant and finds it is legally insufficient.

As to the Defendant's Motion for Continuance the Court makes the following findings and holdings. This case was originally tried by Judge Fred Turner of this Circuit. The Defendant was convicted of first degree murder and the death penalty imposed. On

appeal the Defendant's conviction was reversed by the Supreme Court by order dated June 15, 1989, because of a violation of Neil vs. State, 457 So.2nd 481. Judge N. Russell Bower replaced Judge W. Fred Turner who had retired as trial judge and Bower entered an order recusing himself. At the time the undersigned was appointed as trial judge in this cause and Mr. Lake had been working on the case for more than a year and it was not ready for trial. Even after Judge Turner had appointed additional counsel to assist him. This matter was originally set for trial on June 17, 1991, by order dated March 8, 1991. Counsel has known since that day about the trial date. Counsel's allegations in paragraph 4 of his motion that the Court rescinded the appointment of the Defense's experts is in reckless disregard of the facts and is wrong, (see transcripts attached.) The record shows that the only expert previously appointed whose appointment this Court rescinded was the investigator and then Mr. Lake was asked to submit a new order and suggest some parameters for that appointment, which he has failed and neglected to do. The Court has given careful consideration of counsel's motion for continuance and finds the same wholly without merit and that the same should therefore be denied.

It is upon consideration thereof ordered as followed:

1. The Defendant's Motion for Disqualification of Judge is denied.
2. The Defendant's Motion for Continuance is denied.
3. The Defendant's Motion for an Order of Issuance of Subpoena Duces Tecum for Susan Livingston is granted.

DONE AND ORDERED, in Chambers, at Panama City, Bay County, Florida, this 6th day of June, 1991.

Clinton E. Foster

CLINTON E. FOSTER
CIRCUIT JUDGE

copy furnished to:
Alton Paulk, Esquire
Roy Lake, Esquire
Steven Seliger, Esquire

OFFICE OF THE CHIEF JUDGE
FOURTEENTH JUDICIAL CIRCUIT

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HAROLD BAZZEL
CLERK CIRCUIT COURT
BAY COUNTY, FLORIDA

ADMINISTRATIVE ORDER 90-13

PURSUANT to Rule 2.050, Rules of Judicial Administration, and Sections 914.11, 939.07 and 112.061, Florida Statutes, there is a need to establish a uniform method for determining the amount and reasonableness of the per diem and travel expenses and fees of witnesses subpoenaed for the State or Defendant or employed to provide a service under a court order in criminal cases for which a county located in the Fourteenth Judicial circuit is requested to pay by Court order. Therefore it is

HEREBY ESTABLISHED that the following policy shall govern any determination by the Circuit or County Court for payment by a county located within the Fourteenth Judicial Circuit of witness fees and expenses incurred by witnesses while under subpoena or employed to provide a service under a court order for criminal cases in a county located within the Fourteenth Judicial Circuit.

Travel expenses and witness or individual fees shall be paid only upon submission of a Motion and Order for Payment prepared by the counsel subpoenaing the witness or hiring the individual. The Motion and Order shall be filed by counsel within 30 days of the services being rendered or upon disposition of the case, whichever occurs first. If there are travel expenses and per diem sought to be paid, there shall be attached to the Motion a "State of Florida Voucher for Reimbursement of Travel Expenses" form which is completely and accurately filled out by the

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witness or individual. The witness or individual shall attach the necessary receipts to the form. Rates for per diem and mileage shall be those prescribed by Section 112.061, Florida Statutes. If a meal expense exceeds the per diem rate only the per diem rate will be paid. Unless in a particular case the Court determines otherwise, the State of Florida's general instructions pertaining to travel and determination of expenses shall be utilized by the Court in determining the reasonableness and amount of the fee or expense charged. However, any travel fee by common carrier shall be determined by the lowest rate available to transport the witness or individual to and from his/her residence. No incidental travel expenses or rental car charges will be allowed unless pre-approved by the Court. Nothing in this order shall change the requirements of section 939.10, Florida Statutes and the duties of the County Commission.

Should any witness or individual performing services under a court order be required to stay overnight in a commercial establishment in a county located within the Fourteenth Judicial Circuit while under subpoena, or while on a criminal case assignment, that witness or individual shall be required to stay in a commercial establishment pre-approved by the Court. The Court Administrator shall maintain a listing of those commercial establishments which will offer the most reasonable rates to the County, and the Court shall select the appropriate establishment for the witnesses or individuals to stay. Should a witness or individual elect to stay in any other commercial establishment, the witness or individual shall only be reimbursed at the rate

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charged by the court-approved establishment.

All witness hourly fees or the hourly fees of those employed to provide a service under a court order shall be submitted on an itemized form showing a breakdown by date and time in fifteen (15) minute increments with a listing of the services provided during that time interval. This itemized form shall also show the hourly rate and how the total fee is arrived at. No hourly fee shall be based upon a portal to portal time charge to the County unless specifically pre-approved by Court. An individual shall not be entitled to compensation for an hourly fee for those hours devoted to sleeping. An individual shall be entitled to compensation only for those hours that were exclusively devoted to the case he/she was employed for or testifying in and seeking payment for. Any request for hourly fees shall contain a statement under oath by the witness or individual indicating that the witness or individual has not billed any other person, entity or agency for any portion of the time contained in the hours he/she is submitting to the County for payment.

Any witness fee or other fee for services under court order that exceeds $150.00 per hour or that could exceed a total fee of $1,500.00 must be specifically pre-approved by the Court. In obtaining this pre-approval, counsel employing or subpoenaing the individual must show to the Court the necessity for a higher hourly rate for the witness or individual and/or the anticipated number of hours that his/her services will be needed and billed for. This pre-approval procedure does not relieve counsel or the individual from complying with the other requirements of this

Order.

The terms of this order are not applicable to those cases wherein the Defendant has been found not guilty and has applied to the Court for payment of his costs as provided by Florida Statutes from the county in which he was prosecuted.

DONE AND ORDERED this 19th day of July, 1990 at Panama City, Bay County, Florida.

DON T. SIRMONS, Chief Judge

000339

IN THE CIRCUIT COURT, FOURTEENTH JUDICIAL CIRCUIT, IN AND FOR BAY COUNTY, FLORIDA

Case no. 86-940-G

STATE OF FLORIDA

v.

DARRYL BRYAN BARWICK.

_____/

FILED
JUN 7 8 AM '91
CLERK CIRCUIT COURT
BAY COUNTY, FLORIDA

RENEWED MOTION FOR DISQUALIFICATION OF JUDGE AND FOR PLACING CONTENTS OF EX PARTE COMMUNICATIONS ON RECORD

Defendant, DARRYL BRYAN BARWICK, by and through his undersigned counsel, renews and amends his motion, pursuant to Florida Rule of Criminal Procedure 3.230, to disqualify the Honorable Clinton E. Foster, Circuit Judge, from presiding in this cause on the grounds that Judge Foster is prejudiced against the movant and also to cause the judge to place on record the contents of all ex parte communications had by him, and as grounds therefor states as follows:

1. The defendant is charged with first degree murder, a capital offense, and other felony offenses.

2. The motion for disqualification of Judge Foster is the first such motion which the defendant has filed in this case.

3. This motion is not based on pretrial rulings made by Judge Foster which are adverse to the defense. Rather, this motion is based on the statements and conduct of the judge, including the judge's reaching out to interfere with the adversarial process in an extra-judicial manner and the creation by the judge of an intolerable adversarial atmosphere between the judge and the defense, all of which give the defendant a well-

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grounded fear that Judge Foster is prejudiced against him, his counsel, and his case.

4. The defendant has a well-grounded fear that he will be unable to receive a fair trial if Judge Foster continues to preside in this cause for the reasons set forth in ¶ 4(a)-(d) of the motion to disqualify judge, which allegations are incorporated by reference herein. As additional reasons, the defendant states the following:

a. Judge Foster has by his conduct and his statements indicated that he is hostile to defense counsel Roy Lake;

b. Judge Foster has engaged in extra-judicial conduct to drive a wedge between movant and his counsel and to intimidate counsel from conferring with other lawyers concerning the litigation of this case.

5. The factual basis for these allegations includes the allegations of ¶ 5 of the motion for disqualification of judge. These allegations are incorporated by reference herein.

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HARRIET L. [illegible]
CLERK CIRCUIT COURT
BAY COUNTY, FLORIDA

6. As further factual basis for the assertions in paragraph 4 herein, the defendant states as follows:

a. At the hearing on the motion to disqualify Judge Foster, held on June 5, 1991, the judge disputed the factual accuracy of several allegations in the motion, disputing that he had rescinded Judge Turner's appointments of the defense psychologist and investigator, disputing that he had denied the motion for interim payment of counsel's attorney's fees, and

CR91-375

disputing that he was prejudiced against the movant. The judge argued with counsel by defending his actions. Moreover, Judge Foster ordered a transcript prepared of the April 2 hearing, the events of which the judge had disputed. The judge stated that if it turned out that counsel had misrepresented the facts of that hearing then the court would take some unspecified action, presumably against counsel. The undersigned counsel inferred that Judge Foster was threatening him with sanctions if the judge could prove representations in the motion and counsel's affidavit were inaccurate.

b. During the colloquy on the motion, the judge referred to the allegations concerning his refusal to pay interim fees to counsel. Although the judge claimed he did not deny the motion for interim payment, he also went on to state that anyone who takes on a death penalty case knows that he will not get paid until the end of the case and will never be paid as much as was justified. The judge asked counsel, "Have you considered moving to withdraw?" or words to that effect.

c. Throughout the hearing, the judge spoke loudly and heatedly and appeared both angry and offended by allegations in the motion and counsel's affidavit.

d. On the record at the hearing, the judge denied the motion to disqualify and denied a request for a stay pending appellate review. When the undersigned submitted a written order to the judge, a few hours later, the judge said he would be writing his own order. He indicated he knew counsel needed the order and

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HARRY O. SEZELL
CLERK CIRCUIT COURT
BAY COUNTY, FLORIDA

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said he would fax a copy of the order to counsel that day, i.e. June 5, 1991. As of 5:00 P.M., June 6, 1991, counsel has not received a written order.

e. Late in the afternoon of June 5, 1991, the undersigned was in his office in Bonifay, FL. He received a telephone call from Judge Foster. The judge stated that something had just come up that had to be addressed but he would not say what it was. He asked the undersigned to come to Panama City first thing the next morning, i.e., Thursday, June 6, 1991. The undersigned explained he was unable to attend due to his schedule and suggested a phone conference. The judge agreed to hold the conference by telephone but insisted that the defendant would be present.

f. On the morning of June 6, 1991, counsel's secretary called the judge's office with co-counsel Steven Seliger's telephone number so that Mr. Seliger could participate in the telephone conference. When the undersigned was called to the phone for the hearing, the undersigned asked whether Mr. Seliger was on the line and stated he had made special arrangements to give the judge Mr. Seliger's number and had verified that Mr. Seliger was present at that number. The judge told the undersigned that Mr. Seliger was not on the line but that counsel could relate the conversation to him later.

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CLERK CIRCUIT COURT
BAY COUNTY, FLORIDA

g. The judge then stated that it had come to his attention that counsel was conferring about the case with the two lawyers from the Public Defender's Office who had handled the

defendant's first trial and whose office had later certified a conflict of interest. The judge did not reveal the source of his information or state specifically what he was told.

h. The judge expressed the opinion that the conversations with previous counsel were suspect or improper. The judge stated he felt it necessary to inform the defendant of Mr. Lake's conduct in case the defendant had any problem with that conduct.

i. Counsel responded that he had indeed conferred with the lawyers in question, who had given him the benefit of considerable knowledge and resources. Counsel believes he also stated that the defendant was fully aware of counsel's conversations with the other lawyers.

j. During the hearing, the judge repeatedly interrupted counsel, at times raising his voice and seeming angry with counsel.

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CLERK CIRCUIT COURT
BAY COUNTY, FLORIDA

k. In light of the heatedness of the judge's statements to counsel at the June 5 hearing, counsel felt particularly uncomfortable with the judge's criticism of him in counsel's physical absence and in the presence of the defendant. Counsel had the strong feeling that the judge was trying to undermine the defendant's confidence in counsel and to intimidate counsel from any further communications with the defendant's previous counsel.

7. The defendant incorporates by reference the allegations of ¶ ¶ 6 through 8 of the motion for disqualification

of judge as though fully set forth herein.

8. Judge Foster's aggressive disputing of the factual allegations in the motion removed the judge from his proper role and placed him in the role of advocate and adversary hostile to defense counsel.

9. Judge Foster has created the appearance that he is attempting, clandestinely and without legal basis, to secure the removal of the undersigned as counsel in this case, by suggesting that counsel consider withdrawing (6/5/91) and by convening an extraordinary and irregular proceeding for the announced purpose of notifying the defendant of counsel's alleged wrongdoing (6/6/91), evidencing a hostility to defense counsel that necessarily places Mr. Barwick in fear of the judge's prejudice.

10. Judge Foster further has engaged, by his own admission, in an ex parte communication about the case, as to which he has not disclosed the identity of the other party or parties and the specific content of the conversation. These facts, and the facts of any other ex parte communication the judge may have had concerning this most serious case, should be fully disclosed on the record, whether or not the judge is disqualified from presiding in this case.

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CLERK CIRCUIT COURT
DADE COUNTY, FLORIDA

WHEREFORE, the defendant respectfully requests this court enter an order disqualifying himself from presiding in this cause. Further, the court should place on the record the details of any and all ex parte discussions he may have had concerning this cause, including the identity of the persons with whom he communicated and

the detailed content of any such communications.

I hereby certify that a copy of the foregoing motion, with affidavits and certificate, was furnished to Alton Paulk, Assistant State Attorney, by hand delivery this 7th day of June, 1991.

ROY A. LAKE, ESQ.
Florida Bar No. 0714811
P. O. Box 456
Bonifay, FL 32425
(904) 547-5959

and

STEVEN L. SELIGER, ESQ.
Florida Bar No. 0244597
P. O. Box 324
Quincy, FL 32351
(904) 875-4668

ATTORNEYS FOR THE DEFENDANT

BY: _____
ROY A. LAKE

FILED
JUN 7 8 30 AM '91
HAROLD BAZZEL
CLERK CIRCUIT COURT
BAY COUNTY, FLORIDA

IN THE CIRCUIT COURT, FOURTEENTH JUDICIAL CIRCUIT, IN AND FOR BAY COUNTY, FLORIDA

Case no. 86-940-G

STATE OF FLORIDA

v.

DARRYL BRYAN BARWICK.

_____/

CERTIFICATE OF GOOD FAITH

ROY A. LAKE, ESQ., hereby certifies that the renewed motion for disqualification of the Honorable Clinton E. Foster, Circuit Judge, from presiding in this cause was made in good faith.

_____
ROY A. LAKE, ESQ.

6/6/91
Date

FILED
JUN 7 8 30 AM '91
HAROLD BAZZEL
CLERK CIRCUIT COURT
BAY COUNTY, FLORIDA

IN THE CIRCUIT COURT, FOURTEENTH JUDICIAL CIRCUIT, IN AND FOR BAY COUNTY, FLORIDA

Case no. 86-940-G

STATE OF FLORIDA

v.

DARRYL BRYAN BARWICK.

_____/

FILED
JUN 7 8 30 AM '91
HARRELL WATKINS
CLERK CIRCUIT COURT
BAY COUNTY, FLORIDA

AFFIDAVIT

DARRYL BRYAN BARWICK, first being duly sworn, deposes and states as follows:

1. I am the defendant in this case.

2. In the morning, on June 6, 1991, I was taken over to the courthouse from the Bay County Jail and brought to Judge Foster's chambers. No one told me why I was there. Judge Foster's bailiff told me, "Your lawyer's not even here."

3. In the room were Judge Foster, the prosecutor, the bailiff, a court reporter, a clerk, and another woman I had not seen before. No one said who this woman was.

4. The first thing anyone said was "Mr. Lake is on the phone." Then, Judge Foster started talking to my lawyer, who was on the phone. My lawyer asked if my other lawyer was also on the phone and said he had given them my other lawyer's phone number before so they could call him, too. The judge said, "No, but you can tell him about it."

5. Then, Judge Foster started in on my lawyer. He said someone had told him that my lawyer was talking to Mike Stone and Pam Sutton, who were my lawyers for my first trial. The judge said

he thought that was wrong for my lawyer to do and said that he had brought this up in case I had a problem with it. The judge and Mr. Lake got into it and the judge was mad at him.

6. The whole time the judge was talking to my lawyer, he was looking at me. I thought he wanted me to say something but Mr. Lake told the judge he did not want them talking to me so I didn't say anything.

7. I thought the judge was trying to make me mad at Mr. Lake. He acted like Mr. Lake had done something wrong, which was bad for the case. I think the judge wants me to get Mr. Lake off the case.

8. It made me feel even worse about the judge than I felt after the hearing they had the day before because now the judge is mad at me and my lawyer.

FURTHER AFFIANT SAYETH NOT.

FILED
JUN 7 8 30 AM '91
HAROLD BAZZEL
CLERK CIRCUIT COURT
BAY COUNTY, FLORIDA

Daryl Barwick
DARRYL BRYAN BARWICK
Affiant

STATE OF FLORIDA:
COUNTY OF BAY:

Before me, the undersigned authority, personally appeared Darryl Bryan Barwick, who, being duly sworn, stated under penalties of perjury that the foregoing facts are true and accurate to the best of his information and belief.

SWORN AND SUBSCRIBED before me this 7 day of June, 1991.

Debra J. Ledger
Notary public

My commission expires:

NOTARY PUBLIC, STATE OF FLORIDA
MY COMMISSION EXPIRES: FEB. 20, 1995.
BONDED THRU NOTARY PUBLIC UNDERWRITERS.

me by defending his actions. Moreover, Judge Foster ordered a transcript prepared of the April 2 hearing, the events of which the judge had disputed. The judge stated that if it turned out that I had misrepresented the facts of that hearing then the court would take some unspecified action, presumably against me. I inferred that Judge Foster was threatening me with sanctions if the judge could prove representations in the motion and my affidavit were inaccurate.

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CLERK CIRCUIT COURT
DAY COUNTY, FLORIDA

6. During the colloquy on the motion, the judge referred to the allegations concerning his refusal to pay me interim fees. Although the judge claimed he did not deny the motion for interim payment, he also went on to state that anyone who takes on a death penalty case knows that he will not get paid until the end of the case and will never be paid as much as was justified. The judge asked me, "Have you considered moving to withdraw?" or words to that effect.

7. Throughout the hearing, the judge spoke loudly and heatedly and appeared both angry and offended by allegations in the motion and my affidavit.

8. On the record at the hearing, the judge denied the motion to disqualify and denied a request for a stay pending appellate review. When I submitted a written order to the judge, a few hours later, the judge said he would be writing his own order. He indicated he knew I needed the order and said he would fax a copy of the order to my office that day, i.e. June 5, 1991. As of 5:00 P.M., June 6, 1991, I have not received a written order.

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9. Late in the afternoon of June 5, 1991, I was in my office in Bonifay, FL. I received a telephone call from Judge Foster. The judge stated that something had just come up that had to be addressed but he would not say what it was. He asked me to come to Panama City first thing the next morning, i.e., Thursday, June 6, 1991. I explained I was unable to attend due to my schedule and suggested a phone conference. The judge agreed to hold the conference by telephone but insisted that my client would be present.

10. On the morning of June 6, 1991, my secretary called the judge's office with co-counsel Steven Seliger's telephone number so that Mr. Seliger could participate in the telephone conference. When I was called to the phone for the hearing, I asked whether Mr. Seliger was on the line and stated I had made special arrangements to give the judge Mr. Seliger's number and had verified that Mr. Seliger was present at that number. The judge told me that Mr. Seliger was not on the line but that I could relate the conversation to him later.

11. The judge then stated that it had come to his attention that I was conferring about the case with the two lawyers from the Public Defender's Office who had handled the defendant's first trial and whose office had later certified a conflict of interest. The judge did not reveal the source of his information or state specifically what he was told.

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IN THE CIRCUIT COURT
BAY COUNTY, FLORIDA

12. The judge expressed the opinion that the conversations with previous counsel were suspect or improper. The

judge stated he felt it necessary to inform the defendant of my conduct in case the defendant had any problem with that conduct.

13. I responded that I had indeed conferred with the lawyers in question, who had given me the benefit of considerable knowledge and resources. I believe I also stated that the defendant was fully aware of my conversations with the other lawyers.

14. During the hearing, the judge repeatedly interrupted me, at times raising his voice and seeming angry with me.

15. In light of the heatedness of the judge's statements to me at the June 5 hearing, I felt particularly uncomfortable with the judge's criticism of me in my physical absence and in the presence of my client. I had the strong feeling that the judge was trying to undermine the defendant's confidence in me and to intimidate me from any further communications with my client's previous counsel.

FURTHER AFFIANT SAYETH NOT.

ROY A. LAKE, ESQ.
Affiant

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HAROLD BAZZEL
CLERK CIRCUIT COURT
BAY COUNTY, FLORIDA

STATE OF FLORIDA:
COUNTY OF BAY:

Before me, the undersigned authority, personally appeared Roy A. Lake, who, being duly sworn, stated under penalties of perjury that the foregoing facts are true and accurate to the best of his information and belief.

SWORN TO AND SUBSCRIBED before me this 7th day of June, 1991.

Notary public

My commission expires:

NOTARY PUBLIC STATE OF FLORIDA
GLORIA A. DELAUTER
My Comm. Exp. 3-8-94
Bonded Thru Service Ins. Co.

6/19/91

IN THE CIRCUIT COURT, FOURTEENTH JUDICIAL CIRCUIT
OF THE STATE OF FLORIDA, IN AND FOR BAY COUNTY

IN RE:

STATE OF FLORIDA,
Plaintiff,

vs.

DARRYL BRYAN BARWICK,
Defendant.

CASE NO. 86-940

O R D E R

THIS MATTER is before the Court on the Defendant's Renewed Motion for Disqualification of Judge and for Placing Contents of Ex-parte Communications on Record. While the Defendant's Renewed Motion for Disqualification of Judge was an exhibit to his original Petition for a Writ of Prohibition, which was recently denied by the Florida Supreme Court, the undersigned does not assume that the Florida Supreme Court addressed the Renewed Motion for Disqualification because that motion was not properly before that Court. This Court has heard the arguments of counsel and has reviewed the Affidavits of Roy Lake and the Defendant filed in connection with the renewed motions and finds that those allegations are insufficient as a matter of law to form a basis of disqualification because of prejudice. It is upon consideration thereof

ORDERED that the Defendant's Motion be and the same is hereby denied.

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CLERK CIRCUIT COURT
BAY COUNTY, FLORIDA

DONE AND ORDERED, in Chambers, at Panama City, Bay County, Florida, this 19 day of June, 1991.

CLINTON E. FOSTER
CIRCUIT JUDGE

copy furnished to all parties

POSTED