IN THE SUPREME COURT OF FLORIDA NO.

SC07-1831

DARRYL BRIAN BARWICK,

Appellant,

v.

WALTER A. McNEIL,
Secretary, Florida Department of Corrections,

Appellee.

REPLY BRIEF

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ARGUMENT IN REPLY[1]

THE TRIAL COURT ERRED IN DENYING MR. BARWICK' S CLAIM THAT HE WAS DENIED AN ADEQUATE ADVERSARIAL TESTING AT THE SENTENCING PHASE OF HIS TRIAL, IN VIOLATION OF THE SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

During his postconviction evidentiary hearing, and thereafter in his Initial Brief before this Court, Mr. Barwick demonstrated that trial counsel failed to conduct a reasonable investigation in preparation for the penalty phase. As a result, the jury never heard crucial mitigating evidence, both statutory and non-statutory in nature.

In opposition to Mr. Barwick's claim, Appellee's argument appears to rest on the premise that trial counsel cannot be ineffective because he in fact presented a vast amount of mitigation. Appellee attempts to diminish Mr. Barwick's penalty phase claim by caustically stating that, "Barwick's claim centers on the notion that trial counsel's performance was deficient because trial counsel should not have called any of the experts he did. Instead, he should have called Dr. Eisenstein." AB 38.[2]

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[1]Mr. Barwick will not reply to every issue and argument. However, he expressly does not abandon the issues and claims not specifically replied to herein. For arguments not addressed herein, Mr. Barwick stands on the arguments presented in his Initial Brief.

[2]The following abbreviations will be utilized to cite to the record in this cause, with appropriate page number(s) following

Mr. Barwick's claim actually centers upon the fact that trial counsel did not consult with the doctors beforehand, provide them any background information, prepare them in any meaningful way to testify, nor present the statutory mitigators that Mr. Barwick committed the murder of Rebecca Wendt while under the influence of an extreme mental or emotional disturbance, did not have the capacity to appreciate the criminality of his conduct or that his ability to conform his conduct to the law was substantially impaired and the mental age of the Mr. Barwick at the time of the crime was less than eighteen. See, §921.142(7), Fla. Stat. Trial counsel's unreasonable strategy and presentation resulted in the trial court not finding any statutory mitigators whatsoever.

Appellee also emphasizes that fourteen witnesses, including seven doctors, testified at Mr. Barwick's 1992 penalty phase and seemingly argues that somehow the sheer number of witnesses alone renders trial counsel effective. Appellee's argument, however, is flawed because it is based on an inaccurate view of the record. In fact, the record at trial clearly establishes that an

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the abbreviation:

"Vol. R." – record on direct appeal to this Court;
"PC-R." – record on appeal after an evidentiary hearing;
"T." - transcript of evidentiary hearing;
"PC-S." - supplemental record on appeal after an evidentiary hearing;
"D-Ex." - Defense exhibits entered at the evidentiary hearing;
"S-Ex." - State exhibits entered at the evidentiary hearing;
"AB" - State's Answer Brief.

effective mitigation case was not presented. Rather than presenting powerful testimony such as that introduced at Mr. Barwick's postconviction evidentiary hearing, trial counsel merely offered, through his seven doctors a chaotic defense that painted Mr. Barwick as having an anti-social personality and being an extreme danger to society in the future. Here, trial counsel's failure to investigate and prepare prejudiced Mr. Barwick. Strickland v. Washington, 466 U.S. 668 (1984) . Had Mr. Barwick's jury been presented with the poignant, powerful mitigation now of record and available at trial, there is a reasonable probability that the outcome would have been different.

Trial counsel failed to investigate and prepare for the penalty phase. This failure rendered his presentation damaging and chaotic. There is no indication that counsel spoke with the doctors nor attempted to vet their opinions to make a cogent presentation. None of the doctors had even spoken to Mr. Barwick since 1986. In fact, trial counsel's preparation was so woefully ineffective that Dr. Annis, at the beginning of his testimony, commented that he was unsure which side (the prosecution or the defense) wanted him to testify the most. (R. 677) . Dr. Annis' testimony essentially provided nothing in mitigation. Dr. Annis testified that Mr. Barwick suffered from no major mental disorder, defect, or disease. (R. 684; 688) To make matters

worse, during cross-examination, the State elicited from Dr. Annis that Mr. Barwick met the criteria for anti-social personality disorder. (R. 706) The State also elicited from Dr. Annis that on the day of the murder, Mr. Barwick was not acting under the influence of an extreme mental or emotional disturbance, and that his capacity to appreciate the criminality of his conduct or to conform his conduct to the requirements of the law was not impaired. (R. 716)

In addition to providing only damaging testimony to Mr. Barwick, Dr. Annis's testimony was misleading and inaccurate because trial counsel failed to supply the doctor with available evidence, as was provided in postconviction to Dr. Eisenstein. This evidence would have established that Mr. Barwick did suffer from a major mental disorder or defect at the time of the murder, that he did not meet the criteria for anti-social personality disorder, and that he was acting under the influence of an extreme mental or emotional disturbance, and that his capacity to appreciate the criminality of his conduct or to conform his conduct to the requirements of the law was impaired. Clearly, Dr. Annis should have never been called by trial counsel and was devastating to Mr. Barwick's case.

Another example of trial counsel's ineffectiveness in calling experts who had little or nothing beneficial to say was counsel's decision to call Dr. Clell Warriner. (R. 828) Dr.

Warriner had warned trial counsel ahead of time that his testimony would not assist Mr. Barwick's case. (R. 838) Despite this specific warning, trial counsel still called Dr. Warriner to testify. Dr. Warriner's warning to trial counsel was accurate and failed to provide any testimony that had any mitigating value to Mr. Barwick. However, plenty of negative information was provided to the jury. Trial counsel repeatedly elicited from Dr. Warriner that Mr. Barwick was a very dangerous individual, at one point referring to him as "extraordinarily dangerous." (R. 840, 841, 844, 845) **Trial counsel** also elicited from Dr. Warriner **his opinion** that Mr. Barwick had committed other similar criminal acts that he had not been caught for. (R. 839) Not only is evidence such as this inadmissible, it is unconscionable that it would be elicited by trial counsel, who knew or should have known of its inadmissibility and devastating prejudice. The fact that Dr. Warriner realized this fact and warned trial counsel not to call him as a witness only serves to graphically expose trial counsel's ineffectiveness.

Dr. Warriner's testimony was so extremely prejudicial to Mr. Barwick, and of so little value to the Defense and so beneficial to the prosecution, that the State did not even bother to cross-examine him. The State capitalized on Dr. Warriner's testimony during closing arguments in several ways: reminding the jury of Dr. Warriner's conclusion that Mr. Barwick was dangerous (R. 914); arguing to the jury in support of aggravating circumstances (R.

914; 920-21); and, arguing to the jury that they should not find certain facts to be mitigating. (R. 927) The prejudice lies in the jury's unanimous death recommendation which was based on inaccurate and misleading information.

The cruel truth of the flawed mitigation presentation was that each and every doctor presented failed to provide mitigation and that each and every doctor was not provided the wealth of information that Dr. Eisenstein possessed in postconviction. This is even demonstrated in the State's answer brief where the various doctors' trial testimony is outlined. AB 21-29. When reviewing the State's summary it becomes patently obvious, even by their statement of the doctors testimony, that these doctors clearly provided no mitigation and only served to assist the State in their quest to obtain a death sentence for Mr. Barwick.

There is no merit to Appellee's subsequent argument that trial counsel's stated strategy was reasonable. This strategy was revealed when trial counsel was discussing the need for Dr. Walker to testify:

> So that you know that I have already got this in my brain, some theory of how to present this, the theory is I want to maintain integrity for myself and my client to this jury even at this stage. That's one of the considerations as to whether he testifies in the case in chief. And again, whether or not he will testify today. Part of that is that I intended to call every available mental health person to show, even knowing that some other testimony, some of the testimony was not going to be that favorable to me but

> just to show this jury we're not hiding anything. And that's how I intended to try this case and this guy is my last hope. Vol. XXIII 672.

Trial counsel's decision to not consult the doctors prior to their testimony nor conduct any testing at his request simply fails under well-established U.S. Supreme Court case law, as does the decision not to refrain from presenting witnesses that only damaged Mr. Barwick's case. Trial counsel cannot strategically decide to refrain from presenting mitigation that he is unaware of due to a lack of investigation. See Wiggins v. Smith, 539 U.S. 510, 123 S.Ct. 2527,2543, 156 L.Ed2 471 (2003); Henry v. State, 862 So. 2d 679, 685 (Fla. 2003)("A reasonable strategic decision is based on informed judgement."). There clearly was not any informed judgment by trial counsel on behalf of Mr. Barwick. Trial counsel simply called any expert that had ever come into contact with Mr. Barwick and randomly questioned him about Mr. Barwick's mental status. This haphazard uninformed approach fails under Wiggins v. Smith. Id.

Appellee also attempts to discredit Dr. Eisenstein's conclusions by arguing that he failed to consider important information in arriving at his findings (Answer at 44) . As part of his evaluation Dr. Eisenstein administered an in-depth neuropsychological examination and evaluation which included administering the Weschler Adult Intelligence Scale, Third Edition, the Weschler Individual Achievement Test, Second
Edition, an IQ test, the Wide Range Achievement Test, Third Edition,

the Weschler Memory Scale, Third Edition, the Peabody Picture Vocabulary Test, the Expressive Vocabulary Test, the Boston Naming Test, the Benton Word Fluency Test, the Stroop Color and Word Test, the Rey Complex Figure Test, the Hooper Visual Organization Test, the Trail Making Test, the Lafayette Peg Board Test, the Halsted-Reitan Neuropsychological Battery, the Tactile Performance Test, the Category Test, the Wisconsin Card Sort Test, and the Tomm to screen for malingering. T 24. Additionally, Dr. Eisenstein reviewed the Florida Supreme Court opinion, police reports, transcripts from the trial, reports from experts, school records, and D.O.C. records. Dr. Eisenstein also spoke to all of Mr. Barwick's family and read the trial testimony of his deceased father. T. 51, 63. Further, Dr. Eisenstein reviewed prior evaluations, reports, where available, and the testimony of the doctors utilized by trial counsel. T 44-50.

Unlike trial counsel or the seven experts he called to testify, Dr. Eisenstein was the only one to thoroughly review Mr. Barwick's background. His information was the most complete and included records, interviews, and testing that trial counsel never obtained, reviewed, or questioned. Clearly, it is trial counsel, and not Dr. Eisenstein, who failed to consider important information on behalf of Mr. Barwick. "[A]n attorney has a strict duty to conduct a reasonable investigation of a

defendant's background for possible mitigating evidence." Riechmann, 777 So. 2d at 350, quoting Rose v. State, 675 So. 2d 567, 571 (Fla. 1996) . Here, trial counsel's failure to conduct a reasonable investigation and present a reasonable, cogent penalty phase prejudiced Mr. Barwick.[3]

CONCLUSION AND RELIEF SOUGHT

Mr. Barwick prays his convictions and sentences, including his sentence of death, be vacated.

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[3]The trial court and Appellee provide the typical talismanic cite to the line of cases that hold a trial counsel's performance is not rendered ineffective if a defendant is able to produce an expert in postconviction that can simply testify more favorably. PCR XVI 2875-2882; AB 38; See also, Hertz v. State, 941 So.2d 1031, 1040 (Fla. 2006); Davis v. State, 875 So.2d 359, 371 (Fla. 2003); Asay v. State, 769 So.2d 974, 986 (Fla. 2000); Maharaj v. State, 778 So.2d 944, 957 (Fla. 2000) . These cases do not hold that once an expert is presented an attorney is forever insulated from a claim of ineffectiveness. To do so would be akin to holding that just because an attorney was appointed and showed up to trial that a defendant was afforded his Sixth Amendment right to counsel under the U.S. Constitution. This line of cases does not relieve counsel of his duty to prepare the experts, provide background information and present an effective cogent theory of defense.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing motion has been furnished by United States Mail, first class postage prepaid, to Meredith Charbula, Assistant Attorney General, The Capitol, PL-01, Tallahassee, FL 32399-1050 on January 28, 2009.

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CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that the instant brief has been prepared with 12 point Courier New type, a font that is not spaced proportionately.

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