IN THE SUPREME COURT OF FLORIDA

DARRYL BRIAN BARWICK,

Appellant,

v. CASE NO. SC07-1831

STATE OF FLORIDA,

Appellee.

_____/

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

ANSWER BRIEF OF THE APPELLEE

BILL McCOLLUM
ATTORNEY GENERAL

MEREDITH CHARBULA
Assistant Attorney General
Florida Bar No. 0708399

DEPARTMENT OF LEGAL AFFAIRS
PL-01, THE CAPITOL
Tallahassee, Florida 32399-1050
(850) 414-3300, Ext. 3583
(850) 487-0997 (Fax)

COUNSEL FOR APPELLEE

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PRELIMINARY STATEMENT

Appellant, DARRYL BRIAN BARWICK raises eleven claims in his appeal from the denial of his motion for post-conviction relief. He presents argument, however, as to only five of the claims.

References to the appellant will be to "Barwick" or "Appellant". References to the appellee will be to the "State" or "Appellee".

The twenty-three (23) volume record on appeal in the instant case will be referenced as "PCR" followed by the appropriate volume number and page number. References to Barwick's initial trial proceedings will be referred to as "1TR" followed by the appropriate volume and page number. References to the record on appeal from Barwick's 1992 convictions and sentence to death will be referred to as "2TR" followed by the appropriate volume and page number.

References to Barwick's initial brief will be to "IB" followed by the appropriate page number. Contemporaneously with the filing of the initial brief in this case, Barwick filed a petition for writ of habeas corpus raising nine claims. References to Barwick's state habeas petition will be to "Pet." followed by the appropriate page number.

STATMENT OF THE CASE AND FACTS

Darryl Barwick, born September 29, 1966, was 19 years and six months old when he murdered Rebecca Wendt. Barwick murdered Ms. Wendt just three months after being released from prison. Barwick had been in prison as a result of his conviction for sexual battery and burglary. The circumstances of that burglary and sexual battery were similar to the circumstances surrounding the attack on Rebecca Wendt.

The relevant facts concerning the March 31, 1986 murder are recited in this Court's opinion on direct appeal:

> …On the morning of March 31, 1986, Michael Ann Wendt left her apartment in Panama City to travel to Fort Walton Beach. Rebecca Wendt, Michael Ann's sister and roommate, remained at the apartment complex and lay outside sunbathing until approximately 11:45 a.m. Another resident of the complex who was also outside sunbathing observed a man walking around the complex at about 12:30 p.m. The witness indicated that she saw the man walk toward the Wendts' apartment and later walk from the Wendts' apartment into the woods. She subsequently identified that man as Darryl Barwick.
>
> On the evening of March 31, Michael Ann returned to the apartment and found Rebecca's body in the bathroom wrapped in a comforter. Investigators called to the scene observed bloody footprints at various places throughout the apartment and bloody fingerprints on the victim's purse and wallet. Rebecca's bathing suit had been displaced, and she had been stabbed numerous times. An autopsy revealed that she sustained thirty-seven stab wounds on her upper body as well as a number of defensive wounds on her hands. The medical examiner concluded that the potentially life-threatening wounds were those to the neck, chest, and abdomen and that death would have occurred within three to ten minutes of the first stab wound. The

> examiner found no evidence of sexual contact with the victim, but a crime laboratory analyst found a semen stain on the comforter wrapped around the victim's body. After conducting tests on the semen and Barwick's blood, the analyst determined that Barwick was within two percent of the population who could have left the stain.
>
> When initially questioned by investigators, Barwick denied any involvement in Rebecca's murder. However, following his arrest on April 15, 1986, he confessed to committing the crime. He said that after observing Rebecca sunbathing, he returned to his home, parked his car, got a knife from his house, and walked back to the apartment complex where he had previously observed Rebecca. After walking past her three times, he followed her into her apartment. Barwick claimed he only intended to steal something, but when Rebecca resisted, he lost control and stabbed her. According to Barwick, he continued to stab Rebecca as the two struggled and fell to the floor.

Barwick v. State, 660 So.2d 685 (Fla. 1995).

Barwick was indicted for first-degree murder, armed burglary, attempted sexual battery, and armed robbery. After a jury trial, Barwick was convicted as charged.

The jury recommended Barwick be sentenced to death by a vote of 9-3. The trial judge followed the jury's recommendation and sentenced Barwick to death.

On appeal, however, this Court reversed Barwick's convictions and sentence. This Court found a violation of State v. Neil, 457 So. 2d 481 (Fla. 1984) and remanded the case for a new trial. Barwick v. State, 547 So. 2d 612 (Fla. 1989).

Barwick was once again tried and convicted of first-degree murder, armed burglary, attempted sexual battery, and armed

robbery. Barwick called fourteen (14) witnesses in mitigation, including seven mental health experts.

This time, the jury recommended Barwick be sentenced to death by a vote of 12 to 0. Once again, the trial court followed the jury's recommendation and sentenced Barwick to death. Barwick v. State, 660 So.2d 685, 690 (Fla. 1995).

The trial judge found the state had proven six aggravators beyond a reasonable doubt: (1) previous convictions for the violent felonies of sexual battery with force likely to cause death or great bodily harm and burglary of a dwelling with an assault; (2) the murder was committed during an attempted sexual battery; (3) the murder was committed to avoid arrest; (4) the murder was committed for pecuniary gain; (5) the murder was especially heinous, atrocious, or cruel; and (6) the murder was committed in a cold, calculated, and premeditated manner without any pretense of moral justification. The trial court found no statutory mitigation.

As to non-statutory mitigation, the trial judge recognized that Barwick suffered abuse as a child and had some mental deficiencies. Although the trial judge found neither factor to be mitigating, the trial judge considered the evidence in imposing sentence. Barwick v. State, 660 So.2d 685, 690 (Fla. 1995).

Once again, Barwick appealed. Barwick raised fourteen issues, five as to the guilt phase and nine as to the penalty phase. Id.

As to the guilt phase, Barwick alleged: (1) the trial court erred in denying his motions to disqualify Judge Foster; (2) the prosecutor improperly used his peremptory challenges to exclude African-Americans from the jury; (3) the trial court erred in denying Barwick's motion for judgment of acquittal on the attempted sexual battery charge; (4) the trial court erred in allowing Tim Cherry, Michael Ann's boyfriend at the time of the murder, to testify as to his blood type; and (5) the trial court erred in denying Barwick's motions for mistrial after the prosecutor, through comments made during his opening and closing statements, improperly commented on Barwick's silence. Barwick v. State, 660 So.2d 685, 690 n.8 (Fla. 1995). This Court rejected each of Barwick's guilt phase claims and affirmed his convictions. Id. at 695.

As to the penalty phase, Barwick claimed: (1) the trial court erred in finding that the murder was committed during an attempted sexual battery; (2) the trial court erred in finding that the murder was especially heinous, atrocious, or cruel; (3) the trial court erred in finding that the murder was cold, calculated, and premeditated; (4) the trial court erred in rejecting the non-statutory mitigator of abuse as a child; (5)

the death sentence was not proportionate in this case; (6) the trial court inadvertently instructed the jury to consider sympathy for the victim and erroneously instructed the jurors not to consider sympathy for the defendant in evaluating the sentence; (7) the instruction for the heinous, atrocious, or cruel aggravator was unconstitutional; (8) the trial court failed to instruct the jury on the mitigating circumstance of extreme duress; and (9) the trial court erred in denying Barwick's motion to preclude the death penalty based on alleged racial bias. This Court rejected all of Barwick's penalty phase claims except one. Barwick v. State, 660 So.2d 685 (Fla. 1995).

This Court determined the evidence was insufficient to support the CCP aggravator. This Court found, however, that even after CCP was eliminated, five valid aggravators remained to be weighed against only minimal mitigating evidence. This Court concluded that, as such, there was no reasonable likelihood of a different result. This Court also found Barwick's sentence proportionate. Barwick v. State, 660 So.2d 685, 697 (Fla. 1995).

On July 20, 1995, this Court affirmed Barwick's convictions and sentence to death. Barwick's motion for rehearing was denied on September 19, 1995. Barwick v. State, 660 So.2d 685, 697 (Fla. 1995).

Barwick filed a petition for writ of certiorari in the United States Supreme Court. Review was denied on January 22, 1996. Barwick v. Florida, 516 U.S. 1097 (1996).

On March 17, 1997, Barwick filed an initial motion for post-conviction relief (shell). (PCR Vol. XI 1542-1574). On August 26, 2002, Barwick filed an amended motion for post-conviction relief. In his motion, Barwick raised twenty-one (21) claims. (PCR Vol. XII 2098-2259). The State filed a response. (PCR Vol. XIII 2263-2370).

On December 4, 2003, the collateral court granted Barwick an evidentiary hearing on four claims. (Claims I, II, III, and X). (PCR Vol. XIV 2540-2542). The court reserved ruling on Claim IV (Barwick's cumulative error claim) and summarily denied the remainder of his claims. (PCR Vol. XIV 2540-2542).[1]

On April 8, 2005, Barwick filed a second amended motion for post-conviction relief. The motion included all of the claims previously presented in Barwick's first amended motion for post-conviction relief and two additional purely legal claims, both

[1] Judge Michael Overstreet was presiding over the collateral proceedings at the time an evidentiary hearing was granted. On the day the evidentiary hearing was due to commence, Barwick filed a motion to disqualify Judge Overstreet. (PCR Vol. XIV 2557-2576). Over the objection of the State, Judge Overstreet granted the motion. (PCR Vol. XIV 2592). Ultimately, a successor judge, Judge Don T. Sirmons, was appointed to preside over Barwick's post-conviction proceedings. At the evidentiary hearing that was ultimately held, collateral counsel did not call Glenn Barwick to testify.

under the auspices of the United States Supreme Court decision in Roper v. Simmons, 543 U.S. 551, 125 S.Ct. 1183 (2005). (PCR Vol. XV 2600-2760).

In the first new claim, Claim XXII, Barwick contended his sentence to death was unconstitutional. Barwick alleged that, while he was chronologically over the age of 18 when he murdered Rebecca Wendt, he was brain damaged and mentally and emotionally under the age of 18. In Barwick's second new claim, Claim XXIII, Barwick contended his sentence to death violated Roper because a prior violent felony used in aggravation was committed when he was under the age of 18 (Claim XXIII). (PCR Vol. XV 2744-2760).

The State filed a response in opposition to the motion. (PCR Vol. XV 2762-2766). On September 8, 2005, the collateral court summarily denied the two supplemental claims. (PCR Vol. XVI 2871).

On November 2-3, 2006, the collateral court held an evidentiary hearing on Barwick's motion for post-conviction relief. At the time of the evidentiary hearing, trial counsel, Bob Adams was dead.

On August 28, 2007, the collateral court denied Barwick's motion for post-conviction relief. (PCR Vol.XVI 2871-2882). On October 1, 2007, Barwick filed a notice of appeal.

On July 21, 2008, Barwick filed his initial brief. This is the State's answer brief.

SUMMARY OF THE ARGUMENT

ISSUE I: In this claim, Barwick alleges trial counsel was ineffective for calling the seven expert witnesses he called at trial. Barwick alleges that trial counsel should have called Dr. Eisenstein instead. This claim may be denied because Dr. Eisenstein's testimony was, largely, cumulative to the other experts. Moreover, while some of the experts' trial testimony was unfavorable, so was much of Dr. Eisenstein's. For instance, if Barwick would have called Dr. Eisenstein, instead of the seven he experts he did, the jury would have still learned that Barwick is an explosively aggressive violent sexual deviant with anti-social traits who has engaged in sexual violence and deviant behavior since the age of 13. Trial counsel is not ineffective for failing to present cumulative or unfavorable testimony.

ISSUE II: In this claim, Barwick alleges trial counsel was ineffective for failing to impeach Suzanne Capers on the difficulties she encountered identifying Barwick after the murder. Barwick suggests this difficulty was even more significant because the police presented Ms. Capers with suggestive line-ups and made inappropriate remarks to assist her to identify Barwick. Barwick also alleges trial counsel was

ineffective because he failed to cross-examine Ms. Capers on an apparent change in testimony about her subjective impressions of Barwick's conduct shortly before the murder.

As to the latter allegation, Barwick claims that before Barwick's 1992 trial, Ms. Capers testified that she saw Barwick walking around her apartment complex several times. She also saw him point in different directions. Barwick alleges that before 1992, Ms. Capers considered Barwick's actions, before the murder, as innocent or of no concern at the time. At Barwick's 1992 trial, however, Ms Capers told the jury she found Barwick's pre-murder behavior worrisome and suspicious. Barwick claims counsel should have impeached her on these inconsistent statements.

This claim may be denied because Barwick can show no prejudice. Barwick's identity as the killer was not genuinely at issue. Barwick confessed to the killing. Accordingly, impeaching Ms. Capers on any difficulty she had in identifying Barwick or her alleged inconsistent statements about her subjective impressions of his conduct immediately before the murder, could not have had any impact on the jury's verdict.

ISSUE III: This claim may be denied because the record refutes any notion the State failed to disclose Brady material. Moreover, the record refutes the State committed a Giglio violation or engaged in prosecutorial misconduct.

ISSUE IV: In this claim, Barwick raises a cumulative error claim. Barwick failed to prove any of the individual errors he raised in his amended motion for post-conviction relief. Accordingly, Barwick's cumulative error claim is without merit.

ISSUE V: In this claim, Barwick claims Bay County's general qualification procedure is unconstitutional because it is held outside the presence of both the defendant and his attorney. Barwick also claims the State is allowed to participate in the proceeding. This claim should be denied, first, because it is procedurally barred. Such claims can, and should, be raised on direct appeal. Failure to do so acts as a procedural bar in post-conviction proceedings.

This claim may also be denied because this Court has held the general jury qualification procedure is not a critical stage of trial at which the defendant must be present. Finally, this claim may be denied because Barwick's factual allegations that, he claims, distinguish Barwick's case from every other case in which this Court has rejected this same claim, were refuted by the testimony presented at the evidentiary hearing.

ISSUES VI-XI: These issues are not preserved for appeal. Barwick presents no argument in support of his claims, does not identify any specific error, and improperly attempts to incorporate arguments from his state habeas petition. Such a

tactic is improper and serves as an abandonment of these issues on appeal.

ARGUMENT

ISSUE I

WHETHER TRIAL COUNSEL WAS INEFFECTIVE AT THE PENALTY PHASE OF BARWICK'S CAPITAL TRIAL (RESTATED)

In his first claim, Barwick raises a claim of ineffective assistance of counsel. To establish a claim of ineffective assistance of counsel, two elements must be proven.

First, the defendant must show that trial counsel's performance was deficient. This requires a showing that counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed the defendant by the Sixth Amendment. Kimbrough v. State, 886 So.2d 965, 978 (Fla. 2004).

In order to meet this first element, a convicted defendant must first identify, with specificity, the acts or omissions of counsel that are alleged not to have been the result of reasonable professional judgment. The court must then determine whether, in light of all the circumstances, the identified acts or omissions were outside the wide range of professionally competent assistance. Pietri v. State, 885 So.2d 245 (Fla. 2004).

In reviewing counsel's performance, the court must indulge a strong presumption that trial counsel's conduct falls within

the wide range of reasonable professional assistance. It is the defendant's burden to overcome this presumption. Mungin v. State, 932 So.2d 986 (Fla. 2006).

Trial counsel, Bob Adams, was deceased at the time of the evidentiary hearing. Accordingly, neither party had the opportunity to examine Mr. Adams regarding his trial strategy or explore the course of investigation Mr. Adams conducted in his defense of Mr. Barwick.

The fact that Mr. Adams was deceased at the time of the evidentiary hearing does not relieve the defendant of his burden to overcome the presumption Mr. Adams' conduct fell within the wide range of reasonable professional assistance. The presumption that Mr. Adams' conduct fell within the wide range of professional assistance includes, within it, the presumption that under the circumstances, the challenged action might be considered sound trial strategy. Asay v. State, 769 So.2d 974, 984 (Fla. 2000) (ruling the defendant bears the burden of proving that counsel's representation was unreasonable under prevailing professional standards and was not a matter of sound trial strategy). Neither Mr. Adams' untimely death nor his unavailability to explain his trial strategy to the collateral court should preclude this Court from determining that trial counsel's actions, when viewed as of the time of trial counsel's conduct, constituted objectively reasonable trial strategy.

If the defendant successfully demonstrates trial counsel's performance was deficient, the defendant must then show this deficient performance prejudiced the defense. In order to demonstrate prejudice, the defendant must show there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome. Rutherford v. State, 727 So.2d 216, 219 (Fla. 1998).

Barwick alleges trial counsel was ineffective in two ways. First, in calling the seven expert witnesses he called at trial. Second, in failing to call a really good expert, like Dr. Eisenstein, who testified at the evidentiary hearing.

Barwick raised this claim in his amended motion for post-conviction relief. The collateral court granted an evidentiary hearing on the claim.

After the evidentiary hearing, and after both sides had the opportunity to present written closing arguments, the collateral court denied the claim. In an extensive discussion of the evidence presented at trial and at the evidentiary hearing, the collateral court found no deficient performance and no prejudice. (PCR Vol. XVI 2881). The collateral court found:

> …As to claim III, the defendant claims that his trial counsel was ineffective for failing to call a qualified mental health expert. The defendant also

claims his trial counsel was ineffective because some of the experts he did call in the penalty phase testified in a manner more harmful than helpful to the defendant in mitigation.

In support of this claim, the defendant presented the testimony at the evidentiary hearing of Dr. Hyman Eisenstein. The defendant claims to have provided Dr. Eisenstein with substantial amounts of mitigation evidence that should have been developed by trial counsel after a proper investigation into the defendant's mental health background. Because Dr. Eisenstein was provided this additional material, the defendant argues that Dr. Eisenstein could testify to the existence of three statutory mitigating factors: First, the defendant was operating under extreme mental and emotional disturbance. Second, the defendant was substantially unable to conform his conduct to the law and third, the defendant's mental age and immaturity made the age mitigator applicable. Dr. Eisenstein also testified that the defendant had intermitted explosive disorder, a disorder of impulse control not elsewhere classified in the Diagnostic and Statistical Manuel IV. Dr. Eisenstein stated the defendant met four of the seven characteristics of an antisocial personality disorder including "failure to conform to social norms with respect to lawful behaviors as indicated by repeatedly performing acts that are grounds for arrest, deceitfulness as indicated by repeated lying, use of alias, or conning others for personal profit, impulsivity or failure to plan ahead, and a lack of remorse as indicated by being indifferent to or rationalizing having hurt, mistreated, or stolen from another. (EH Trial record 140)." He further testified the defendant engaged in a pattern of sexual deviancy (EH 131) and that the defendant showed signs of brain damage and a learning disability. Dr. Eisenstein concluded that the defendant was the victim of severe emotional and physical abuse as a child and did not get the kind of treatment or intervention necessary to successfully deal with his problems. Furthermore, the defendant claims his trial counsel failed to gather any medical, mental health, school or other records to develop the defendant's mitigation case. The defendant also claims the evidence presented in the issue of abuse was inadequate and that the "true" picture of the

years of abuse he was subjected to was not fully presented to the jury. The defendant claims this additional evidence of the details of the defendant's life would have allowed the experts to better explain to the jury how the defendant's life history led to the murder.

The record reveals that defendant's trial counsel called 14 witnesses to testify at the penalty hearing including seven mental health experts. These witnesses included the defendant's siblings who testified about the defendant's abusive upbringing. A family friend testified to witnessing abuse so severe that some of the neighbors intervened. (Trial record Vol. XXIV 822-828) The defendant's probation officer testified that the defendant sought his help after the murder and the defendant's mother testified that the defendant grew up in a home where violence was directed against her and the children. (Trial record Vol. XXIV 806-815, 857-861) Trial counsel called the defendant's father who testified as to how he "disciplined" the defendant and his siblings by beating them with 2 x 4's, rebar and shovels. The defendant's father told the jury that he did not think there was anything wrong with the way he disciplined his children. (Trial record Vol. XIII 724-737)

As noted previously, the defendant's trial counsel called seven mental health experts at the penalty phase. Dr. Walker diagnosed the defendant with intermittent explosive disorder and that testimony was given at the penalty phase (Trial record XXV 872-887). The Court notes that in order to meet the criteria for intermittent explosive disorder, there must be several separate episodes of failure to restrain aggressive impulses that result in serious assaults against others or property destruction; the degree of aggression expressed must be out of proportion to any provocation or other stressor prior to the incidents; and the behavior cannot be accounted for by another mental disorder, substance abuse, medication side effects, or such general medical conditions as epilepsy or head injuries. (EH Trial record 83) Therefore, the State is correct that Dr. Eisenstein's testimony on the diagnosis of intermittent explosive disorder would require the jury to hear that the defendant was a dangerous man who over-reacts to

common stressors and is aggressive and assaultive. This would not be favorable to mitigation.

Dr. Annis testified at the penalty phase that the defendant showed signs of being a mentally disordered sexual offender. (Trial record Vol. XXIII 689) The testimony of Dr. Warriner supported Dr. Annis' conclusions. (Trial record Vol. XXIV 828-846) Therefore, penalty phase jury heard the same opinion testimony as that given by Dr. Eisenstein. The State is correct in pointing out that if Dr. Eisenstein had testified as to the basis of his opinion on this point, the State would have been able to cross examine him about the details of the defendant's sexual aggression beginning at age 13. (EH Trial record 311) This would bring in an area of testimony that would have been inadmissible in aggravation and could have adversely impacted on mitigation.

Dr. Eisenstein's testimony as to the existence of four of the seven characteristics of an antisocial personality disorder would bring to the penalty phase jury a disorder which the Florida Supreme Court has acknowledged is "a trait most jurors tend to look disfavorably upon". Freeman v. State, 852 So.2s [sic] 216, 224 (Fla. 2003). Furthermore, Dr. Eisenstein testified that despite the existence of the four characteristics of the disorder, he did not believe the defendant was antisocial and that there was another explanation for his behavior. As the State noted, one of the reasons for Dr. Eisenstein's opinion that the defendant was not being antisocial was the defendant's antisocial behavior had not repeated itself. However, prior to the attack on Ms. Wendt, there was the attack on Ms. Dom and the defendant exposing himself at the age of 13 on at least two occasions and grabbing the breasts of a young female. (EH Trial record 132) These facts could be brought out on cross examination and could call into question the validity of Dr. Eisenstein's opinions in the minds of the jurors. This would have a negative impact on the issue of mitigation.

At the penalty phase, Dr. McClaren testified that his evaluation of the defendant showed evidence of brain dysfunction which manifested in the form of learning disabilities at school. (Trial record Vol. XXIII

748). Mr. Beller testified that tests indicated the defendant had organic brain injury to the left temporal lobe and a severe learning disability. (Trial record Vol. XXIV 774-806) The penalty phase jury therefore had the same information before it that Dr. Eisenstein testified to at the evidentiary hearing.

As to the history of severe emotional and physical abuse as a child, the penalty phase jury heard the testimony of the defendant's siblings, parents, and others as to what they saw in regards to the defendant growing up in a household torn by violence, apathy and ignorance. Dr. Annis and Dr. Warriner testified about the violence and the lack of proper intervention needed to successfully deal with the defendant's problems.

The bottom line is the testimony of Dr. Eisenstein is cumulative to the testimony offered by a variety of different persons at the penalty phase. Defendant's trial counsel's strategy was clear in that he was going to get credibility with the jury by not hiding anything and to convince them that the defendant was the way he was because of an abusive upbringing and a system that failed to recognize and treat his mental and emotional disorders. Defendant's trial counsel performed a reasonable investigation into mitigation based upon the statements given by the defendant as to the circumstances surrounding the offense. See Pace v. State, 854 So.2d 167 (Fla. 2003). A trial counsel's performance is not rendered ineffective if a defendant is later able to locate a mental health expert who can testify more favorably at the evidentiary hearing or if trial counsel failed to present cumulative evidence. See 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). The testimony of the seven mental health experts and the defendant's siblings, parents and others matched the strategy expressed by defendant's trial counsel. It allowed the penalty phase jury to have access to the defendant's background from people who had actual knowledge of the defendant. Defendant's trial counsel argued these points to the penalty phase jury. (Trial record Vol.

XXV). He pointed out the fact the defendant needed life long inpatient treatment and he did not get it. (Trial record Vol. 940). He argued the State failed to provide needed treatment to the defendant because of the costs entailed in providing that treatment (Transcript Vol. XXV, Penalty Phase, July 16, 1992, 000940, lines 8-24). He argued the defendant was a child in a man's body and that the defendant would not be released in 25 years because of the other offenses he had been found guilty of. (Trial record Vol. XXV 941) He did, in fact, bring out to the jury that the defendant's abusive upbringing could explain his behavior and that, but for a mistake on the part of a doctor, the defendant was prevented from receiving the help he needed. (Trial record Vol. XXV 945-949). The State is correct in pointing out that defendant's trial counsel did not have the choice between presenting bad childhood/mental health history and "humanizing" evidence that demonstrated the defendant was an outstanding young man who just "lost it" on the day of the murder, because no evidence of the latter choice existed. Instead, trial counsel had a defendant who invaded a woman's home, raped her, when [sic] to prison, and within three months of his release from prison, invaded the home of Ms. Wendt, attempted to rape her, robbed her and killed her because, as he reported to his siblings, she had seen his face and he was not going back to prison. (Trial record XXII 627-634)

The defendant has failed to show that no competent attorney would have made the same decisions made by defendant's trial counsel as to how this mitigation evidence was presented and argued to the jury. See White v. State, 729 So.2d 909 (Fla. 1999). Defendant's trial counsel made a reasonable investigation under objective norms and made a reasonable judgment as to his penalty phase strategy on the basis of that reasonable investigation. As trial counsel stated to Judge Foster in discussing his 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 that we're not hiding anything. And that's how I intended to try the case and this guy is my last hope. (Transcript XXIII, Penalty Phase, morning session, July 10, 1992, page 000672 lines 11-24).

His performance in the presentation of the mitigating evidence was not ineffective. Finally, there is nothing to establish that a jury would have recommended a life sentence if Dr. Eisenstein, or someone with his credentials and opinions, had testified either in lieu of, or in addition to, the testimony of all of the witnesses presented at the penalty phase.

As noted previously, the material topics covered by Dr. Eisenstein were presented through the testimony of various witnesses and was cumulative. Furthermore, there is no way to know how the jury would judge the credibility of Dr. Eisenstein and the weight they would have given to his opinions if he were subjected to vigorous cross examination. For example, Dr. Eisenstein did not know the defendant had a driver's license and was driving. He did not know the defendant had confessed to his father and brothers before he confessed to law enforcement. He did not review the defendant's trial testimony about his confession as to why the defendant did it or the trial testimony of William Barwick on the same issue. And, he did not see Dr. Shumate's neurological report in 1986 of "normal". The defendant is not entitled to relief under claim III.

(PCR Vol. XVI 2875-2882).

The collateral court's findings of fact are supported by competent, substantial evidence. At trial Mr. Adams presented fourteen penalty phase witnesses, seven lay witnesses and seven

mental health experts. At the evidentiary hearing, Barwick presented the testimony of one mental health expert, Dr. Eisenstein.

A. The Trial

(1) *Dr. Lawrence Annis*

Dr. Lawrence Annis testified that he is a clinical psychologist. (2TR Vol. XXIII 675). He examined Barwick in September 1986. (2TR Vol. XXIII 678).

In addition to talking with Barwick, Dr. Annis reviewed depositions of family members as well as the statements they gave to Law enforcement officers. Dr. Annis also read Barwick's statements to police and talked to jail personnel. Dr. Annis was aware that Barwick served time in prison. Dr. Annis talked to mental health and educational personnel at Lancaster Correctional Institution. (2TR Vol. XXIII 700-701). He conducted a psychological evaluation of Barwick and administered testing. (2TR Vol. XXIII 704).

Barwick functions intellectually in the average normal range. (2TR Vol. XXIII 679). He is better with motor skills than verbal. (2TR Vol. XXIII 679). His reading ability is very low. (2TR Vol. XXIII 681).

Barwick does not suffer from either bipolar disorder or schizophrenia. (2TR Vol. XXIII 684). Barwick was sad and

anxious and showed a lot of anger and resentment. (2TR Vol. XXIII 685).

Dr Annis learned that Barwick's father was an angry violent man who often struck his children. Dr. Annis told the jury that people who are themselves victims of violence have a stronger tendency than most people to grow up and themselves resort to aggression when they are frustrated. (2TR Vol. XXIII 687).

Dr. Annis concluded that Barwick was not insane at the time of the murder and did not suffer from any mental defect or disease. Barwick showed show signs of being a mentally disordered sex offender. (2TR Vol. XXIII 689).

Barwick reported to him that he sometimes heard what sounded like mumbling and heard ringing in his ears. This could be explained by organic brain damage, peripheral damage to the ears, or schizophrenia, and it is found in people who are profoundly depressed. Barwick did not associate the sounds he heard with any of his behavior. (2TR Vol. XXIII 693).

Dr. Annis testified that at the time of the murder Barwick knew right from wrong and he was aware of the consequences of his actions. (2TR Vol. XXIII 705). Barwick meets the criteria for anti-social personality disorder. (2TR Vol. XXIII 706).

Barwick was not under the influence of an extreme mental or emotional disturbance at the time of the murder. Likewise, at the time of the murder, Barwick's capacity to appreciate the

criminality of his conduct was not impaired. (2TR Vol. XXIII 716).

(2) Dr. David Loiry

Dr. Loiry testified that he examined Barwick. Barwick was very cooperative. He did not detect any attempt at deception of Barwick's part. (2TR Vol. XXIII 740). Dr. Loiry tested Barwick and forwarded those results to another mental health provider. He and Barwick had a normal interaction. Dr. Loiry did not find anything psychologically significant in the testing. (2TR Vol. XXIII 741).

(3) Dr. Harry McClaren

Dr. Harry McClaren testified he had about 17 years of experience as a clinical psychologist. Dr. McClaren first examined Barwick in September 1986. He spent eleven hours with him. (2TR Vol. XVIII 746).

Dr. McClaren talked to members of Barwick's family. (2TR Vol. XVIII 749). Dr. McClaren read reports and talked with police officers, probation officers, family friends, Barwick's girlfriend, and jail personnel. (2TR Vol. XVIII 751, 760).

Dr. McClaren opined that Barwick's IQ was 103, overall. (2TR Vol. XVIII 747). However, Barwick scored an 88 on the verbal portion of the test which is borderline between average and low average. On the performance portion of the exam he scored in the superior range. (2TR Vol. XVIII 746-747). Barwick

has a degree of brain dysfunction that may have shown itself in the form of learning disabilities at school. (2TR Vol. XXIII 748).

Barwick also has difficulties in the sexual area going back to the time of puberty. These difficulties were related to what happened in the homicide. (2TR Vol. XXIII 748). The violence in Barwick's household, at the hands of his father, could have contributed to Barwick's difficulties. (2TR Vol. XXIII 749).

Dr. McClaren concluded Barwick is anti-social. (2TR Vol. XXIII 768). He also meets the criteria for a mentally disordered sexual offender. (2TR Vol. XXIII 754). In Dr. McClaren's opinion, neither statutory mental mitigator applied at the time of the murder. (2TR Vol. XXIII 767).

(4) Mr. James Beller

Mr. James Beller also testified. Mr. Beller is a Masters Level clinical psychologist. He administered psychological tests and spent between 6-7 hours with Barwick. He administered an IQ test and Halstead Ratan Neurological test battery designed to detect brain damage.

Barwick has an overall average IQ. He exhibited a rather serious left temporal lobe deficit that is most likely a learning disability. (2TR Vol. XXIV 780). Barwick has difficulty integrating information coming into his brain and has a significant memory problem. (2TR Vol. XXIV 781).

Mr. Beller told the jury that Barwick's test results could indicate organic brain damage. This kind of brain damage is not the type that causes someone to be deranged or have behavioral problems. (2TR Vol. XXIV 796).

Mr. Beller testified that Barwick reported he had an abusive childhood that had warped his personality and turned him into an abnormal person. In Mr. Beller's opinion, Barwick could not function in a way that most of us would accept as normal behavior. (2TR Vol. XXIV 784).

Mr. Beller believes that Barwick is a psychopath and sexual deviant. (2TR Vol. XXIV 785, 797). He's also obsessive compulsive and has a dissociative disorder. (2TR Vol. XXIV 793,802).

Mr. Beller also believes that Barwick is schizoid. A schizoid has difficulty relating to people. They split reality. They are like Jekyll and Hyde. They are very odd people who are at a great distance from their feelings. Negative feelings are repressed. (2TR Vol. XXIV 799). Mr. Beller believes Barwick knew what he was doing at the time he was stabbing Ms. Wendt. However, he just could not control himself. (2TR Vol. XXIV 804).

(5) Dr. Clell Warriner

Dr. Clell Warriner is a forensic psychologist who first saw Barwick when he was just 13. Dr. Warriner evaluated Barwick at

the request of an attorney who defended him on juvenile charges. (2TR Vol. XXIV 831). He did a considerable amount of psychological testing. Dr. Warriner believed, at the time, that Barwick could be rehabilitated. There is no evidence, however, that Barwick got any treatment.

Dr. Warriner evaluated Barwick again in 1983 at the request of another attorney when Darryl was charged with sexual battery. He did not recommend any treatment for Barwick.

Dr. Warriner evaluated him a third time in 1986 when he was accused of murdering Rebecca Wendt. Dr. Warriner realized he had been wrong in 1980 when he opined that Barwick could be rehabilitated. (2TR Vol. XXIV 831-833).

In 1983, after Barwick raped Ms. Dom, Dr. Warriner concluded that Barwick was a psychopathic sexual deviant. Dr. Warriner advised Barwick's lawyer that he could not help him. He came to the same conclusion in 1986. (TR Vol. XXIV 836).

Dr. Warriner concluded that Barwick is a psychopathic sexual deviant who shows an escalating pattern of uncontrollable sexual acts. (2TR Vol. XXIV 838). For instance, Barwick exposed himself and hit a girl after she called him a name. Another time, when he was 13, he touched a lady inappropriately. These events were accumulating since Barwick was 13. (2TR Vol. XXIV 839). In Barwick's case, there were likely more episodes of escalating violence for which Barwick was not caught. Such

behavior is part of the sexual psychopathy. (2TR Vol. XXIV 839). Barwick's abusive upbringing typically would have an effect on his behavior.

People like Barwick are rare. (2TR Vol. XXIV 839). They are also extraordinarily dangerous because they can pass for a normal person during a casual, social contact. (2TR Vol. XXIV 840). Barwick is at risk for repetition of his behavior. (2TR Vol. XXIV 844). Barwick should be off the streets. (2TR Vol. XXIV 845). Treatment for Barwick is not really an option. Containment is. (2TR Vol. XXIV 845).

(6) Dr. James Hord

Dr. James Hord testified that he is a clinical psychologist who was appointed to do a competency examination in 1986. Dr. Hord interviewed Barwick, administered psychological tests and examined a lot of background information. (2TR Vol. XXIV 850). Dr. Hord administered the MMPI, the visual motor testing, draw a person test, and the Rorschach Ink Blot test. Barwick's verbal IQ is 90. (2TR Vol. XXIV 851). In Dr. Hord's opinion, Barwick is very unstable and disturbed. (2TR Vol. XXIV 851).

(7) Dr. Ralph Walker

Dr. Ralph Walker testified, via deposition, that he is a medical doctor and psychiatrist. He evaluated Barwick in June 1992. (2TR Vol. XXV 872). Barwick was not insane at the time of the murder.

In his opinion, Barwick has intermittent explosive disorder. (2TR Vol. XXV 875). This is a condition in which people, normally males, have temper tantrums that are beyond the conception of the usual temper tantrum. They “lose it”. When they blow up, it is difficult for them to stop what they are doing.

Frequently, people black out during an explosive episode. (2TR Vol. XXV 875). At some point during the attack on Ms. Wendt, Barwick blacked out and became temporarily unaware of what was going on. (2TR Vol. XXV 876).

He believes Barwick fits the profile of someone with bipolar disorder, however he cannot confirm it. (2TR Vol. XXV 877-878). Dr. Walker believes that Barwick is a sexual deviant. He enjoys forcing sexual attention on women. (2TR Vol. XXV 880). This condition could be caused by an excessive amount of testosterone or a lack of impulse control. Barwick was not tested for excess testosterone. (2TR Vol. XXV 881).

Barwick’s abusive background could have affected his behavior on the day of the murder. Victims of physical or sexual abuse frequently identify with their abuser. In turn, they can get a sexual thrill from physically abusing other people. (2TR Vol. XXV 882).

Barwick has a great deal of trouble with impulse control. His impulse control focuses on sexual behaviors. Once he got

into his head he wanted to have sex with someone it would be difficult to deter him. Barwick would feel a compulsion to have sex in order to relieve the tension. (2TR Vol. XXV 883). There is no cure for his condition. Barwick should be institutionalized and off the streets. (2TR Vol. XXV 883).

Dr. Walker believes that Barwick does have an anti-social personality disorder. (2TR. Vol. XXV 887). Some psychologists believe that Intermittent Explosive Disorder is a part of an anti-social personality disorder. There is some controversy about this disorder. (2TR. Vol. XXV 887).

(8) The Lay witnesses

Barwick also called several lay witnesses during the penalty phase designed to present the jury with a picture of Barwick's social history and abusive upbringing. It was also designed to show that Barwick was well aware of his behavioral problems and wanted help to stop his destructive and harmful behavior.

A family friend witnessed abuse so severe that some of the neighbors intervened. (2TR Vol. XXIV 822-828). Barwick's probation officer testified that Barwick sought his help immediately after the murder. Barwick told him that he needed counseling. (2TR Vol. XXIV 806-815). Barwick's mother testified that Barwick grew up in a home where violence was present, not only against her, but against the children. (2TR

Vol. XXIV 857-861). Barwick's sister, Janice Santiago, testified that the abuse was so bad in her household that after she moved out, she called HRS. (2TR Vol. XXIV 822-828). Barwick's father, Ira, admitted he beat his son with anything he could get his hands on, including 2x4's and metal re-bar. Ira Barwick told the jury he knocked his son unconscious and hit Barwick's brother with a shovel. The jury heard from Mr. Barwick that he did not think there was anything wrong with the way he disciplined his sons. (2TR Vol. XXIII 724-737).

(9) Trial counsel's closing argument

Trial counsel's closing argument was consistent with his obvious strategy at trial. Mr. Adams told the jury he intended from the very beginning to conduct the trial with integrity both on his part and on the part of the defendant. Mr. Adams told the jury that in calling every witness, whether favorable or not particularly favorable, he intended to let the jury hear from people who have some knowledge of this young man because they had the right to know everything. (2TR Vol. XXV 939).

Mr. Adams highlighted that all of the evidence he presented showed that the system failed because Barwick needed life-long in-patient treatment and he did not get it. (2TR Vol. XXV 940). For instance, Mr. Adams noted that Dr. Annis' testimony established that while Barwick was in need of sex offender treatment, he did not get it. (2TR Vol. 2XXV 940).

Mr. Adams pointed to the fact that, through no fault of his own, Barwick was a child in a man's body. He told the jury that Barwick would not get out of prison in his life time. Mr. Adams told the jury that it need not worry the possibility of parole in 25 years because Barwick would be sentenced on the other offenses for which he was found guilty. He reassured jurors that Barwick would not be on the street in 25 years. (2TR Vol. XXV 941).

Mr. Adams also pointed out that Barwick's abusive upbringing could explain his problems and noted that Dr. McClaren's testimony lent support for that notion. (2TR Vol. XXV 945- 947). Mr. Adams reminded the jury of Dr. Warriner's testimony and pointed out that Dr. Warriner made a mistake when he examined Barwick when he was 13 years old for "sexual problems" and determined it was not that severe. (TR Vol. XXV 949). Consistent with his theme, Mr. Adams pointed out that Dr. Warriner's testimony showed the system failed Barwick and that, but for, that failure, Barwick would have gotten the early treatment he needed.

B. <u>The Evidentiary Hearing</u>

Dr. Eisenstein testified at the evidentiary hearing. He told the collateral court he has never testified for the State. (PCR Vol. XXII 2985). In short, he is a defense expert.

Dr. Eisenstein examined Barwick for the purpose of post-conviction proceedings. Dr. Eisenstein conducted extensive testing on Barwick. Dr. Eisenstein also reviewed other evaluations done on Barwick. He reviewed records, including school and DOC records. He spoke with family members. (PCR Vol. XXII 3016).

Barwick was fully cooperative. As a result, Dr. Eisenstein is confident the measures were valid. (PCR Vol. XXII 2986). Barwick was honest and straightforward during the testing. He did not malinger. (PCR Vol. XXII 3009).

Barwick's full scale IQ is 96. His verbal IQ is 91 and his performance IQ is 102. (PCR Vol. XXII 2991). Barwick's verbal skills are just at the average or at the low average range. (PCR Vol. XXII 2993).

Barwick's academic performance was also tested. Consistent with his school records, Barwick obtained very low scores. These scores have been consistent throughout testing. (PCR Vol. XXII 294). Barwick clearly has a long standing learning disability. (PCR Vol. XII 2996). He struggles to read. His vocabulary and word naming testing put him at about the 12-14 year old level. (PCR Vol. XXII 2997). Barwick scored well on tests that required visual spatial skills.

Dr. Eisenstein's testing revealed that Barwick has left brain impairment. This impairment makes Barwick deficient in

terms of encoding information. It also adversely affects Barwick when the information gets in. Barwick's brain impairment and the resulting deficiencies in Barwick's brain function result in frustration. In Barwick, it manifested itself in poor academic performance and resulting frustration. (PCR Vol. XXII 3000).

Barwick grew up in a physically abusive home. His father gave him constant beatings to his head and body. Ira Barwick used 2 x 4s, rebar and his open fist to beat his son.

Barwick was knocked unconscious on several occasions. His mother fell down the stairs when Barwick was still in the womb. (PCR Vol. XXII 3020-3021).

Barwick and his other siblings saw his father fight with his mother and rape her. (PCR Vol. XXII 3026). The kids were left to fend for themselves. Barwick and his sister once found pornographic material. The pair emulated and copied what they saw in the pictures. Barwick's father discovered them and beat them severely. (PCR Vol. XXII 3027).

The Barwick children lived in constant fear of their father. His explosions were intermittent. Ira Barwick drank. His alcohol use also caused him to lose impulse control. Ira Barwick was a raging bull. (PCR Vol. XXII 3030).

In addition to the physical abuse, Barwick was also emotionally abused. He was called dummy, stupid, idiot, and

profane names. (PCR Vol. XXII 3031). It was dehumanizing and insulting and it shattered Barwick's self-esteem and confidence. (PCR Vol. XXII 3031).

Barwick performed poorly in school. Barwick's parents gave him no help, having little to no involvement in his school work. (PCR Vol. XXII 3037).

Barwick is not mentally retarded. His adaptive functioning is impaired. (PCR Vol. XXII 3039-3040).

Barwick is odd and asocial. He has difficulty relating to others. He would be considered "different." (PCR Vol. XX 3041).

Interactions with the opposite sex would be difficult. He would have difficulty in modulating his emotional expression. He would be unable to behave in a normal socially acceptable manner. (PCR Vol. XXII 3041).

Barwick was so severely traumatized in the first twelve years of his life that he has no memory of it. This is significant in understanding the real pain and suffering that he sustained during his early years. (PCR Vol. XXII 3022). Barwick never received any treatment or intervention that would be needed to help him with his difficulties. Treatment after the fact is very, very, very highly unlikely to be successful. Treatment must begin in childhood. Even then abused children would have their trials and tribulations. (PCR Vol. XXII 3045)

Dr. Eisenstein opined that Barwick has Intermittent Explosive Disorder. The disorder is marked with several discrete episodes of failure to resist aggressive impulses that result in serious assaultive acts or destruction of property. (PCR Vol. XX 3049). The degree of aggressiveness is grossly out of proportion to any precipitating psychosocial stressors. Additionally, the episodes are not better accounted for by any mental disorder, substance abuse, medication, or general medical condition. (PCR Vol. XXII 3050).

Barwick has an inability to control his rage and anger. (PCR Vol. XXII 3050). During the murder, Barwick's behavior was grossly out of proportion to the situation he faced. The act was not volitional and not premeditated in the sense that he wanted to do this. (PCR Vol. XXII 3051). The act was done because of all the unresolved trauma, the blocking, the unconscious learned behavior he saw from his father, the learned helplessness he saw and how he behaved. It was a repetition where unfortunately the victim became the perpetrator. (PCR Vol. XXII 3051).

Dr. Eisenstein opined that Barwick did not meet the criteria for anti-social personality disorder. (PCR Vol. XXII 3051). To diagnose anti-social personality disorder, one must meet three of the seven criteria. The behavior also has to be consistent. (PCR Vol. XXII 3052).

Barwick never received any significant psychological treatment when he was incarcerated for raping Melissa Dom. He did get his GED and took a training course. (PCR Vol. XXII 3055).

Dr. Eisenstein believes that Barwick is functioning linguistically, emotionally, and intellectually at an age of 11-13 years of age. (PCR Vol. XXII 3063-3064). Dr. Eisenstein testified that both statutory mitigators applied at the time of the murder. (PCR Vol. XXII 3064).

Barwick told him he did not remember why he killed Ms. Wendt. (PCR Vol. XXII 3069). Barwick told Dr. Eisenstein he was talking to Ms. Wendt in the kitchen and wanted to have sex with Ms. Wendt and "couldn't." (PCR Vol. XXII 3070). Barwick did not tell Dr. Eisenstein why he put gloves on before he went into Ms. Wendt's apartment. (PCR Vol. XXII 3071).

Dr. Eisenstein did not ask Barwick about the details of the murder. He is not a crime scene investigator. Dr. Eisenstein did not read Barwick's confession to the murder. (PCR Vol. XXII 3072, 3076). There are times he reads a defendant's confession, other times he does not. (PCR Vol. XXII 3078). Why Barwick committed the murder was not important to his evaluation. (PCR Vol. XXII 3078).

Dr. Eisenstein told the collateral court that Dr. Walker had diagnosed Barwick with intermittent explosive disorder. (PCR Vol. XXII 3096). There is no cure for his disorder.

Dr. Eisenstein testified that in Barwick there is a pattern of deviate sexual behavior starting at age 13. Barwick exposed himself and grabbed the breast of a young female. (PCR Vol. XXII 3098).

Dr. Eisenstein was aware of Barwick's attack on Melissa Dom. He did not read any reports or the defendant's statement in that case. (PCR Vol. XXII 3098). Dr. Eisenstein did not talk with Barwick about the attack. The crime had been committed and the facts speak for themselves. He did not feel there was anything in that episode that needed to be looked at in terms of his evaluation of Barwick. (PCR Vol. XXII 3098). He does not believe Barwick killed Ms. Wendt to eliminate her as a witness. (PCR Vol. XXII 3104).

Dr. Eisenstein agreed that Barwick met four of the seven criteria for anti-social personality disorder: (1) failure to conform to social norms with respect to lawful behaviors by repeatedly performing acts that are grounds for arrest, (2) impulsivity or failure to plan ahead, (3) consistent irresponsibilities indicated by repeated failure to sustain consistent work behavior or honor financial obligations, and (4) lack of remorse, as indicated by being indifferent to or

rationalizing having hurt, mistreated, or stolen from another. Despite Barwick's acts of sexual deviancy including indecent exposure, fondling of a woman's breasts without her consent, rape and murder, Dr. Eisenstein opined that Barwick did "not really" display a reckless disregard for the safety or self or others. (PCR Vol. XXII 3105-3106). Dr. Eisenstein agreed that Barwick met the criteria for anti-social but felt there was another explanation for his behavior. (PCR Vol. XXII 3107).

Given Dr. Eistenstein's testimony, the collateral court's findings that trial counsel's performance was not deficient should be sustained. 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.

The only significant difference between Dr. Eisenstein's testimony and the testimony of all of the fourteen witnesses who testified at Barwick's 1992 trial is his opinion that both mental mitigators applied. However, this Court has consistently found that trial counsel is not rendered ineffective simply because a defendant finds an expert, in post-conviction proceedings, that will testify more favorably for him. Hertz v. State, 941 So.2d 1031, 1040 (Fla. 2006); Davis v. State, 875 So. 2d 359, 371 (Fla. 2003) ("[T]rial counsel was not deficient where the defendant had been examined prior to trial by mental

health experts and the defendant was simply able to secure a more favorable diagnosis in postconviction."); Asay v. State, 769 So. 2d 974, 986 (Fla. 2000)(a reasonable investigation into mental health mitigation "is not rendered incompetent merely because the defendant has now secured the testimony of a more favorable mental health expert").

Likewise, trial counsel is not ineffective for failing to present cumulative evidence. Maharaj v. State, 778 So. 2d 944, 957 (Fla. 2000) ("Failure to present cumulative evidence is not ineffective assistance of counsel."). Dr. Eisenstein's testimony at the evidentiary hearing can be distilled into several key points.

First, Barwick has intermittent explosive disorder, a disorder of impulse control not elsewhere classified in the Diagnostic and Statistical Manuel IV. This means that Barwick has had several episodes where he has failed to restrain aggressive impulses that result in serious assaults against others or property destruction. Barwick's failure to restrain his aggressive impulses are not cause by another mental disorder, substance abuse, medication side effects, or such general medical conditions as epilepsy or head injuries. (PCR Vol. XII 3049).

Dr. Walker testified at trial, that in his opinion, Barwick has Intermittent Explosive Disorder. (2TR Vol. XXV 875). This

is a condition in which people, normally males, have temper tantrums that are beyond the conception of a usual temper tantrum. They "lose it". When they blow up, it is difficult for them to stop what they are doing. Dr. Eisenstein's opinion that Barwick has Intermittent Explosive Disorder mirrored Dr. Walker's.

Second, Dr. Eisenstein testified that Barwick meets four of the seven characteristics of an antisocial personality disorder, a disorder the Florida Supreme Court has acknowledged is "a trait most jurors tend to look disfavorably upon." Freeman v. State, 852 So. 2d 216, 224 (Fla. 2003). Several of the experts testified at Barwick's trial that Barwick is anti-social or shows anti-social traits.

Dr. Eisenstein agreed that Barwick shows characteristics of an antisocial personality including a failure to conform to social norms with respect to lawful behaviors as indicated by repeatedly performing acts that are grounds for arrest, deceitfulness as indicated by repeated lying, use of alias, or conning others for personal profit, impulsivity or failure to plan ahead, and a lack of remorse as indicated by being indifferent to or rationalizing having hurt, mistreated, or stolen from another. (PCR Vol. XXII 140). Though Dr. Eisenstein admitted that the presence of three of the seven criteria would warrant a diagnosis of antisocial personality

disorder and Barwick met four of them, he claimed that Barwick was not antisocial because there was another explanation for his behavior.

At trial, Dr. McClaren testified that Barwick does meet the criteria for anti-social personality disorder. (2TR Vo. XXIII 768). Dr. Walker testified that Barwick has an anti-social personality disorder. (2TR Vol. XXV 887).

Third, Dr. Eisenstein testified that Barwick has engaged in a pattern of sexual deviancy. Dr. Eisenstein's opinion that Barwick has shown a pattern of sexual deviancy was consistent with the testimony of Dr. Annis, Dr. McClaren, Mr. Beller, and Dr. Warriner.

If defense counsel would have presented Dr. Eisenstein rather than the other seven doctors he did, the State still would have been able, on cross-examination, to elicit testimony about the details of Barwick's sexual aggression beginning at the age of 13. Dr. Eisenstein's testimony was also entirely consistent with Dr. Annis and Dr. Warriner, both of whom opined that Barwick was a sexual deviant. (TR Vol. XXIII 689, XXIV 828-846).

Fourth, Dr. Eisenstein testified that Barwick shows signs of brain damage and a learning disability. Both Dr. McClaren and Mr. Beller testified at Barwick's 1992 trial, that Barwick has a severe learning disability and brain damage.

Dr. McClaren testified that his evaluation showed evidence of brain dysfunction which has shown itself in the form of learning disabilities at school. (TR Vol. XXIII 748). Mr. Beller, a master's level clinical psychologist, testified that tests indicated that Barwick had organic brain damage to the left temporal lobe and a severe learning disability. (TR Vol. XXIV 774-806).

Fifth, Dr. Eisenstein concluded Barwick was a victim of severe emotional and physical abuse as a child. Dr. Eisenstein recounted for the collateral court the pattern of abuse that Barwick endured throughout his childhood, including being knocked unconscious and beaten regularly by his father with whatever was handy.

At Barwick's 1992 trial, Mr. Adams presented testimony from people who had witnessed Barwick's horrific upbringing first hand. Barwick's siblings, parents, and even a family friend testified, without rebuttal from the State, that Barwick grew up in a household marred by violence, apathy, and ignorance.

Sixth, Dr. Eisenstein concluded Barwick did not get the kind of intervention necessary to successfully deal with his problems. (PCR Vol. XXII 3044-3045). Both Dr. Annis and Dr. Warriner testified similarly. Indeed, Dr. Warriner admitted to making a mistake in his conclusions. As a result, trial counsel was able to point that the system failed to recognize the

severity of Barwick's condition, and then intervene early enough for it to make a difference.

Along with the experts' and lay witness testimony, Mr. Adams maintained his consistent theme throughout his closing argument. Mr. Adams argued that the murder of Rebecca Wendt was a product of Barwick's horrific upbringing rather than an act of evil or ill will. Mr. Adams pointed out that the system had failed Barwick when it would not have been too late to intervene. Trial counsel told the jury that "system failure" was not of Barwick's making, was something the jury should consider when determining whether to recommend death or a life sentence.

In addition to being cumulative, some of his opinions were not consistent with the record evidence. Others were not fully informed.

Dr. Eisenstein's opinion that Barwick did not have full blown anti-social personality disorder was inconsistent with the record. Dr. Eisenstein did not diagnose Barwick as antisocial apparently because he concluded that Barwick's antisocial behavior has not repeated himself. (PCR Vol. XXII 3097).

The record contradicts the notion the attack on Ms. Wendt was a random occurrence or that Barwick's criminal behavior "has not repeated itself." In addition to the rape of Ms. Dom, Barwick exposed himself at the age of 13, at least twice and

grabbed the breasts of a young female for which juvenile sanctions were imposed. (PCR Vol. XXII 3098-3099).

Dr. Eisenstein also denied that Barwick showed other indices of antisocial personality disorder, such as a reckless disregard for the safety of self or others or showed irritability and aggressiveness. However, Barwick has, at least twice, broken into women's homes and raped them. One, Melissa Dom, he left alive, the other, Rebecca Wendt, he did not. Dr. Eisenstein's denial of these symptoms are totally inconsistent with his own diagnosis of intermittent explosive disorder, a disorder characterized by aggressive and serious assaultive behavior.

Finally, Dr. Eisenstein's conclusions about Barwick's mental and emotional conditions at the time of the murder, were uninformed. In forming his opinion, Dr. Eisenstein accepted Barwick's claims that he did not remember why he did what he did. (PCR Vol. XXII 3069-3070). Dr. Eisenstein did not read Barwick's confession that Barwick gave to law enforcement officials shortly after the murder. (PCR Vol. XXII 3072,3076). Nor did Dr. Eisenstein seek to learn the details of Barwick's earlier attack on Melissa Dom. He did not read Barwick's account of his attack on Ms. Dom. (PCR Vol. XXII 3098).

Barwick has failed to show deficient performance because he failed to show that no reasonable trial counsel would have

called the seven experts he did or refrained from calling Dr. Eisenstein instead. The collateral court's finding of no deficient performance should be sustained.

Even if this Court were to find counsel should have called Dr. Eisenstein instead of the seven experts he did call to testify, Barwick can show no prejudice. In trying to save Barwick's life, trial counsel was faced with a daunting task. Mr. Adams did not have the choice between presenting bad childhood/mental health testimony and "humanizing" evidence that demonstrated Barwick was an outstanding young man who just "lost it" on the day of the murder, because no evidence of the latter choice existed.

Barwick had been in prison since the age of 17 for sexual battery of another young woman and murdered Rebecca Wendt only three months after he was released. Barwick had engaged in sexually deviant behavior and had become involved in the juvenile justice system since the age of 13. Barwick was a high school drop-out. He was not a Boy Scout. He was not a good worker, had never served in the military, and did no community service.

If trial counsel would have called Dr. Eisenstein instead of the seven experts he did, the jury would have learned, just as they did from all of the witnesses that actually testified at the penalty phase, that Barwick was the victim of horrific

emotional and physical abuse as a child. If trial counsel would have called Dr. Eisenstein, the jury would have heard, like they did at trial, that Barwick has brain damage that affects his ability to learn, read, and express his emotions. If trial counsel would have called Dr. Eisenstein, they would have learned that Dr. Eisenstein formed his opinions about Barwick's mental and emotional state at the time of the murder without reading what Barwick actually told the police right after he murdered Rebecca Wendt. Finally, if trial counsel would have called Dr. Eisenstein, the jury would have heard, as they did from the seven experts that testified at trial, that Barwick has anti-social traits, will blow up with little to no provocation and then engage in violent behavior toward women, had committed acts of sexual deviancy and violence since the age of 13, and was in all respects a dangerous man with no hope of treatment or rehabilitation this late in life. Barwick has failed to show that calling Dr. Eisenstein probably would have resulted in a life sentence. This claim should be denied.

ISSUE II

WHETHER TRIAL COUNSEL WAS INEFFECTIVE DURING THE GUILT PHASE OF BARWICK'S CAPITAL TRIAL (RESTATED)

In this claim, Barwick alleges that trial counsel was ineffective for failing to effectively cross-examine Suzanne Capers. Barwick's claim centers around his allegation trial

counsel was ineffective for failing to effectively cross-examine Ms. Capers about her ability to identify Barwick.

At Barwick's first trial, Ms. Capers was not asked to make an in-court identification of Barwick. During Barwick's 1992 trial, Ms. Capers identified Barwick as the man she saw walking around her apartment complex, staring at her, and then walking toward Rebecca Wendt's apartment. (2TR Vol. XVIII 237-238).

Barwick alleges trial counsel was ineffective for failing to effectively cross-examine Suzanne Capers on the fact she had substantial difficulties identifying Barwick from a photographic line-up shortly after the murder. Barwick avers that counsel should have exploited the fact that only after three "extremely prejudicial" photo lineups and several improper comments by law enforcement officials did Capers finally identify Mr. Barwick as the man she saw that day." (IB 47). Barwick points to several places in Ms. Capers' deposition he claims supports his arguments. (IB 47-51).

Barwick also claims trial counsel was ineffective for failing to challenge Ms. Capers' change in testimony. According to Barwick, Ms. Capers described, in her pre-trial deposition, Barwick's demeanor and gestures as "innocent". During Barwick's first trial in 1986, Ms. Capers testified before the jury that she did really not think anything of this behavior, at the time.

Barwick avers that at Barwick's second trial, in 1992, Ms. Capers changed her testimony and testified that Barwick's conduct (staring and pointing) made her worried, suspicious and uneasy. Barwick claims that counsel was ineffective because he failed to point out these inconsistencies in her testimony and impeach her with her prior inconsistent statements. (IB 55).

At Barwick's first trial, Ms. Capers' testimony was fairly brief. Ms. Capers testified that on March 31, 1986, she lived on Russ Lake Drive in an apartment complex. On that day, she was sunbathing. She saw a man about 12:30 or 1:00 in the afternoon. (1TR Vol. III 397). He was medium tall with a stocky build and real blonde hair. He was wearing a blue tank top and blue jeans. After the murder, she described the man to the police.

The man walked by four or five times. The next time she saw him, he was standing on the edge of the road, kind of on the edge of the dirt and the grass. She was reading and happened to look up. She saw him standing there and staring at her. She looked up and he looked like he might have gotten embarrassed or that she had caught him looking at her. The man pointed in two different directions.[2] Then he went toward Ms. Wendt's

[2] The record indicates that Ms. Capers showed the jury how the man was pointing. (1TR Vol. III 404). Of course, the record cannot show the gesture that Ms. Capers showed the jury. At

apartment. The next time she saw him, he walked by where he was standing before. He did not stop; he just walked across into the woods. (1TR Vol. III 402).

During cross-examination, Ms. Capers was asked by trial counsel whether the man made any menacing gestures. She answered, "no sir—well, he just pointed like this." (gesturing). She thought it looked kind of odd. She did not think anything of it at the time. (1TR Vol. III 404).

During Barwick's 1992 trial, Ms. Capers testified again. She testified that on March 31, 1986, she was living at the Russ Lake Apartments. She did not know Rebecca Wendt during her lifetime. She found out about her after the murder. (2TR Vol. 230).

On March 31, 1986, she was sunbathing at her apartment complex at about 12:30 in the afternoon. She was reading. (2TR Vol. XVIII 230).

Out of the corner of her eye, Ms. Capers saw something and looked up. She saw a man walking around the apartment complex toward where Ms. Wendt's apartment was. She saw him two or three or four times and she started getting suspicious. (2TR Vol. XVIII 232). A little while later, the man came back around and she saw him standing in the woods across from her. He just

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Barwick's 1992 trial, the prosecutor elicited a more detailed description of the gesture.

sort of stared. She started getting a little worried, thinking about laying out by herself. (2TR Vol. XVIII 232).

The man started pointing. He pointed at Ms. Capers and then pointed toward Ms. Wendt's apartment. He did it a few times. The man then walked away toward Ms. Wendt's apartment. The next time she saw him, about fifteen to thirty minutes later, the man was walking back and cut across into the woods. (2TR Vol. XVIII 235-236).

She later found out that Rebecca Wendt had been murdered. She talked with Sheriff McKeithan about what she had seen. She described the man she saw.

The man was medium height, about 5'11". He had real blonde hair. He was wearing a blue tank top and blue jeans. (2TR Vol. XVIII 237). She thought the man probably weighed 185 pounds. She did not see his shoes. Ms. Capers identified Barwick as the man she saw walking toward Rebecca Wendt's apartment. (2TR Vol. XVIII 237-238).

Barwick raised this claim in his second amended motion for post-conviction relief. Barwick was granted an evidentiary hearing on the claim.

However, Barwick put on no evidence in support of this claim. Barwick failed to call Ms. Capers to question her about the apparent change in her testimony. Likewise, Barwick put on no evidence to support his allegation the line-ups were actually

suggestive or the police actually did anything improper I conducting the photo line-ups. Barwick did not put the photo packs into evidence or call the police officers who allegedly made improper comments to Ms. Capers to assist in her identification.

The collateral court denied the claim. The court found neither deficient performance nor prejudice. (PCR Vol. XVI 2872). The court noted that there was no issue as to the identity of the killer in this case. The defendant gave a taped statement in which he confessed to killing Ms. Wendt. He also described his actions before the murder. (PCR Vol. XVI 2872). The collateral court found that, as such, Barwick's actions toward Ms. Capers were not a key factor in the issues to be decided by the jury. (PCR Vol. XVI 2872).

This Court should deny the claim because Barwick can show no prejudice for trial counsel's alleged failures to impeach Ms. Capers. Barwick confessed to the murder.[3] He also admitted that another woman (Ms. Capers) saw him walking around the apartment complex.

[3] Barwick's taped confession was played for the jury. (2TR Vol. XVIII 291). The jury was provided a transcript to follow along with the tape. The jury was not permitted to take the transcript to the jury room.

A transcript of Barwick's confession is in Volume VI of the trial record.

In his confession, Barwick told investigators that on the day of the murder, he drove by the Russ Lake Apartments. He believed it was about 11:55 a.m., as he was on the way to get something to eat at Church's Chicken. (2TR Vol. VI 312). He did not see anyone when he went by. When he returned from lunch at about 12:15, he saw a lady laying out on the front of the driveway, sunbathing. She was wearing a bikini. (2TR Vol. VI 312-313).

Barwick went home, parked the car, got a sharp knife from his home, got gloves from the back of his car, and walked back up to the Russ Lake Apartments, cutting through a field on the way to the apartment complex. (2TR Vol. VI 327, 333). Barwick walked by the place Ms. Wendt was sunbathing three times.

The first two times, Ms. Wendt was still sunbathing. The third time she had gone into her apartment. (2TR Vol. VI 333).

Barwick walked into her apartment. The door was open. When Barwick entered Ms. Wendt's apartment, he was wearing blue jeans, a tank top, and batting gloves. The gloves he got from the back seat of his car.

When Barwick walked in, Ms. Wendt was sitting on the couch watching TV. Barwick told the investigators that she saw him and jumped up and hollered. He pushed her down. Barwick told the police his only intent was to burglarize the apartment. (2TR Vol. VI 315).

Barwick told the officers that Rebecca hit him. He threw her down and stabbed her in the chest. (2TR Vol. VI 315). She continued to struggle so he stabbed her some more times. He did not remember how many times he stabbed her. (2TR Vol. VI 316). She finally quit moving. He quit stabbing her. (2TR VI 336). Barwick shook her to see if she was alive. She didn't move or say anything. (2TR Vol. VI 336). Barwick knew she was dead. He knew he needed to hide her. (2TR Vol. VI 318).

Barwick wanted to take Ms. Wendt from the apartment but knew he would be seen carrying a body. He decided instead to roll her into a blanket. Barwick laid Ms. Wendt in the bathroom. (2TR Vol. VI 317). Barwick told investigators that while he did not take any clothes off of Ms. Wendt, her bottoms may have come down in the struggle. (2TR Vol. VI 317).

He had blood all over him so he washed up in the bathroom sink before he left. Barwick took the murder weapon from the scene and threw it in a lake. (2TR Vol. VI 319-320).

Barwick went home, took a shower, and disposed of his bloody clothes, shoes, and gloves in a Dumpster. (TR Vol. VI 323). He believed another woman saw him at the Russ Lake Apartments. (2TR Vol. VI 326). Barwick told the investigators that he knew what he was doing was wrong and wanted to stop but couldn't. (2TR Vol. VI 329).

Sheriff McKeithan testified that Barwick told him that on the day of the murder he was wearing a pair of blue jeans and a blue tank top. (2TR Vol. XVIII 286). The clothing Barwick admitted wearing matched the clothing that Ms. Capers reported seeing on the man she saw walking toward Rebecca Wendt's apartment on the afternoon of the murder. (2TR Vol. XVIII 286).

Given Barwick's confession he killed Ms. Wendt, it was completely irrelevant whether Ms. Capers believed that Barwick's actions shortly before the murder were completely innocent or entirely sinister. Likewise, given Barwick's confession that Ms. Capers saw him walking around the Russ Lake Apartment complex, Barwick's admission he was wearing the same clothing Ms. Capers described to the police, and Barwick's confession he killed Ms. Wendt, it was completely irrelevant if Ms. Capers originally had difficulty identifying Barwick from a photo line-up.

Even assuming that trial counsel could have done a better job at cross-examining Ms. Capers on either her identification of Barwick or her impressions of whether Barwick looked "innocent" or "suspicious", Barwick can show no prejudice. Barwick admitted he killed Ms. Wendt. Barwick has failed to show that trial counsel's failure to challenge Ms. Capers' observations or identification undermines the confidence in the outcome of Barwick's capital trial. His claim should be denied.

ISSUE III

WHETHER THE STATE IMPROPERLY WITHELD EXCULPATORY EVIDENCE IN VIOLATION OF BRADY V. MARYLAND AND/OR KNOWINGLY PRESENTED FALSE OR MISLEADING TESTIMONY IN VIOLATION OF THE DICTATES OF THE UNITED STATES SUPREME COURT IN GIGLIO v. UNITED STATES (RESTATED)

In this claim, Barwick alleges that the state failed to disclose information favorable to the defense in violation of the United States Supreme Court's decision in Brady v. Maryland, 373 U.S. 83 (1963). Barwick also alleges the state committed a Giglio[4] violation when it permitted two witnesses to testify falsely. Finally, Barwick makes a claim of improper prosecutorial misconduct. Barwick alleges the prosecutor spoke with defense expert, Dr. Ralph Walker when he was still a confidential defense expert. Barwick alleges this unauthorized contact hindered the preparation of his mitigation evidence by depriving him of a confidential expert. (IB 71).

A. The Brady claim

In this portion of his third claim, Barwick alleges the State withheld two medical examiners' reports indicating that Rebecca Wendt's bathing suit was not pulled down in the back.[5] (IB 61). In support of his claim, Barwick points to two reports

[4] Giglio v. United States, 405 U.S. 150 (1972)

[5] This is a mischaracterization of what the reports actually said. Neither report said "the bathing suit was not pulled down." Instead, the writer observed the bathing suit bottoms were intact and in place. (Defense Exhibit 1, Appellee's Appendix, Exhibit A).

that reflected the writers' observation about Ms. Wendt's bathing suit bottoms. The first reported that Ms. Wendt's bathing suit bottoms were "in place." The other described them as "intact and in place." (Defense Exhibit 1, Appellee's Appendix, Exhibit A). (IB 61). Barwick alleges these observations were critical to the defense case because they would have rebutted the State's theory that Barwick attempted to rape Ms. Wendt. [6]

Barwick raised this claim in his motion for post-conviction relief. The collateral court granted an evidentiary hearing on the claim.

Barwick did not call either of the report writers to testify at the evidentiary hearing. However, three witnesses testified at the evidentiary hearing on this issue. Additionally, the State presented three photos that were pertinent to the claim. The photos, state trial exhibits, 28,

[6] At the evidentiary hearing, collateral counsel admitted he did not know whether Mr. Adams had these allegedly "withheld" reports, prior to trial, because he did not have Mr. Adams' trial file. (PCR Vol. XXII 3168).

Collateral counsel told the court that if Mr. Adams had these reports, he was ineffective for not exploiting them. Given the photos which conclusively show that Ns. Wendt's bathing suit was pulled down slightly in the back and the fact that Barwick did not call the report writers at the evidentiary hearing, Barwick failed to demonstrate that trial counsel was ineffective.

31, and 33 were introduced at the evidentiary hearing. (Appellee's Appendix, Exhibit B). [7]

Assistant State Attorney Alton Paulk testified that he was the prosecutor during Barwick's 1992 trial. Mr. Paulk was asked about the ME investigator reports. Mr. Paulk had no recollection of seeing the reports. (PCR Vol. XXII 3129). He cannot say one way or the other if he got the reports or if he furnished the reports to the defense. (PCR Vol. XXII 3142).

Mr. Paulk could say that if it was in his file, the defense had it. (PCR Vol. XXII 3131). Anything in the State Attorney's files was absolutely, totally, and completely available to the defense attorney. (PCR Vol. XXII 3132). At the time of Barwick's trial, his office had an open discovery policy. Everything was furnished to the defense initially when they make a request and then he would supplement as they went along.

Any report the State Attorney would get, his office would turn it over to the defense. (PCR Vol. XXII 3141). There was really no decision to be made when it came to whether to release something to the defense. "If you had it, you gave it." (PCR Vol. XXII 3143). He did not think the ME reports were

[7] The parties have agreed to put these two statements and the photographs from the crime scene into an Appendix attached to Appellee's answer brief. Given the voluminous record, both counsel agreed the Appendix would allow the court to quickly find the reports and photos referenced in our arguments.

inconsistent with any of the other testimony. (PCR Vol. XXII 3135).

Sheriff Frank McKeithan testified about the reports. His office would not typically receive medical examiner investigative reports. He assumes the Medical Examiner would send reports to the State Attorney's Office. (PCR Vol. XXII 3149). Normally, the only report from the M.E.'s office that he would get is the autopsy report. (PCR Vol. XXII 3150). Sheriff McKeithan examined Defense Exhibit 1. To the best of his knowledge he has never seen the reports. (PCR Vol. XXII 3151).

Sheriff McKeithan also testified about his trial testimony. In particular, Sheriff McKeithan was questioned about his testimony that Ms. Wendt's bathing suit was intact. Sheriff McKeithan testified that when he testified at Barwick's trial that Ms. Wendt's bathing suit was intact, he meant the bathing suit was not torn, ripped, or broken apart. (PCR Vol. XXII 3154).

Detective Don Cioeta testified, at the evidentiary hearing, about the condition of Ms. Wendt's body. Detective Cioeta also identified photographs taken at the scene.

Detective Cioeta testified that he responded to Ms. Wendt's apartment after the murder. At the time, he was a Crime Scene Investigator. As part of his duties, he took photographs of the victim's body. (PCR Vol. XXII 3157). Once he arrived,

Detective Cioeta was advised that Ms. Wendt's body had been found in the bathroom covered in a quilt or some sort of bedding. He confirmed that report when he looked into Ms. Wendt's bathroom. (PCR Vol. XXII 3157). Ms. Wendt's body was not moved before the photos were taken. (PCR Vol. XXII 3159-3160).

Detective Cioeta identified three photographs of Ms. Wendt's body. One photo, State's Exhibit 33, showed Ms. Wendt's body before investigators unwrapped the blanket which Barwick wrapped around her body. Ms. Wendt's knees were showing from underneath the blanket. (PCR Vol. XXII 3158).

Another photograph showed Ms. Wendt's body as the blanket was removed. (State's Exhibit 28). Ms. Wendt is on her back. Her bathing suit bottoms appear to be in place and intact over the front part of her pubic area. The bottoms are slightly askew and pulled down. Her tan line depicts the extent of the disturbance of the bottoms. (PCR Vol. XXII 3158).

The final photo that Detective Cioeta identified for the collateral court, introduced at trial as State's Exhibit 31, shows a view of the right side of Ms. Wendt's body. The photo shows clearly Ms. Wendt's bathing suit bottoms slightly pulled down in the back exposing her buttock. (PCR Vol. XXII 3159).

The collateral court denied Barwick's Brady claim. (PCR Vol. XVI 2873). The collateral court found that Barwick had

failed to establish a Brady violation. The court found that the testimony at the evidentiary hearing, as well as the photographic evidence presented at the trial, showed that Ms. Wendt's bathing suit was pulled down in back. The collateral court observed that Barwick was questioned about Ms. Wendt's bathing suit bottoms. Barwick explained that Ms. Wendt's bottoms may have come down "when they were wrestling around." (PCR Vol. XVI 2873). The court also noted that the defendant's semen was found on the blanket in which Ms. Wendt's body was wrapped. (PCR Vol. XVI 2873).

The findings of the collateral court are supported by competent, substantial evidence and should be affirmed. In order to establish a Brady violation, the defendant has the burden to show (1) that favorable evidence-either exculpatory or impeaching, (2) was willfully or inadvertently suppressed by the State, and (3) because the evidence was material, the defendant was prejudiced. Strickler v. Greene, 527 U.S. 263, 281-82, 119 S. Ct. 1936, 144 L. Ed. 2d 286 (1999); Way v. State, 760 So. 2d 903, 910 (Fla. 2000).

To meet the materiality prong, the defendant must demonstrate a reasonable probability that, had the suppressed evidence been disclosed, the jury would have reached a different verdict. Strickler, 527 U.S. at 289. A reasonable probability is a probability sufficient to undermine confidence in the

outcome. Way, 760 So. 2d at 913; *see also* Strickler, 527 U.S. at 290.

Barwick's claim must fail for two reasons. First, Barwick presented no proof the reports were actually withheld from defense counsel. Barwick even admits in his initial brief that he did not prove the reports were withheld. (IB 60).

Even if he had met his burden to show these reports were withheld, Barwick is still not entitled to relief because he cannot show that, if these reports had been disclosed, there is a reasonable probability the jury would have reached a different verdict. Barwick's entire claim turns on the notion that the medical examiner's investigators' reports, that noted Ms. Wendt's bathing suit bottoms were intact and in place meant Ms. Wendt's bottoms were not pulled down in back.

However, Barwick did not call either report writer to testify at the evidentiary hearing. By failing to do so Barwick failed to prove the medical examiner investigator's observations that her bathing suit bottoms were intact and "in place" meant they were not pulled down. Moreover, the testimony of Detective Cioeta at the evidentiary hearing, as well as the crime scene photos taken before Ms. Wendt's body was unwrapped from the blanket that Barwick wrapped her in after he murdered her, demonstrated conclusively Ms. Wendt's bathing suit bottoms were pulled down in the back.

Barwick has failed to prove the State committed a Brady violation and his claim should be denied.[8]

B. The Giglio claim

In this part of claim three, Barwick alleges two violations. First, Barwick alleges the State committed a Giglio violation when it allowed testimony that, when Ms. Wendt's body was found in the bathroom of her apartment, her bathing suit was pulled down in the back. Barwick also alleges the State committed a Giglio violation when it permitted Suzanne Capers to testify, contrary to her 1986 trial testimony, that she was suspicious and uneasy when she saw Barwick staring at her while she was sunbathing. (IB 64-65).

False testimony that materially misleads the jury is the essence of a Giglio violation. A prosecutor may not knowingly present false testimony. Napue v. Illinois, 360 U.S. 264, 79 S.Ct. 1173, 3 L.Ed.2d 1217 (1959).

To establish a Giglio violation, it must be shown that: (1) the testimony given was false; (2) the prosecutor knew the testimony was false; and (3) the statement was material. Under Giglio, where the prosecutor knowingly uses perjured testimony, or fails to correct what the prosecutor later learns is false testimony, the false evidence is material "if there is any

[8] Barwick produced no evidence at the evidentiary hearing to impeach evidence that his semen was found on the blanket.

reasonable likelihood that the false testimony could have affected the judgment of the jury." Guzman v. State, 868 So.2d 498 (Fla. 2003) quoting from United States v. Agurs, 427 U.S. 97, 103 (1976).

When reviewing a properly pled Giglio claim, the trial court must first determine whether false testimony was given at trial and whether the prosecutor knew the testimony was false. If the first two prongs of an alleged Giglio violation are not met, the court need look no further.

If, however, the defendant meets his burden as to the first two prongs of the Giglio analysis, the court must then determine whether there is any reasonable likelihood the false testimony could have affected the court's judgment. The State bears the burden of proving that the presentation of the false testimony was harmless beyond a reasonable doubt. Guzman v. State, 868 So.2d 498 (Fla. 2003). If there is any reasonable likelihood that the false testimony could have affected the judgment, a new trial is required.

(1) The bathing Suit

At issue, in this claim, is Sheriff Frank McKeithan's trial testimony that Ms. Wendt's bathing suit bottoms were pulled down in the back. (IB 65). At trial, Sheriff McKeithan testified that when he arrived at the crime scene, he observed the body of a white female lying on the floor of the bathroom. The body had

numerous stab wounds on it and blood was all over the place. The woman had a turquoise bathing suit on. The top of the bathing suit was pulled down and the rear of the bottoms were pulled down in the back. (2TR Vol. XVIII 243). Sheriff McKeithan identified State's Trial Exhibits 28, 31, and 33 as photographs of Ms. Wendt's body as it was found by police investigators. (2TR Vol. XVIII 255-256).

Barwick claims Sheriff McKeithan's testimony was false. As he did to support his Brady claim, Barwick relies on two medical examiner reports that describe Ms. Wendt's bathing suit bottoms as intact and in place. (Defense Exhibit 1, Appellee's Appendix Exhibit A.)

Barwick did not call the investigators to testify. Nonetheless, Barwick claims that the State committed a Giglio violation because, based on these two reports, the State knew or should have known Ms. Wendt's bathing suit was not pulled down. (IB 65).

Barwick raised this claim in his amended motion for post-conviction relief. The collateral court granted an evidentiary hearing on the claim.

At the evidentiary hearing, Barwick called Sheriff Frank McKeithan to testify. Barwick did not question him about his testimony that Ms. Wendt's bathing suit was pulled down in the back. (PCR Vol. XXII 3146-3152).

During cross-examination, the prosecutor asked Sheriff McKeithan about his 1992 testimony that Ms. Wendt's bathing suit was intact. Sheriff McKeithan testified when he described Ms. Wendt's bathing suit as intact, he meant that it was not torn or ripped. The bathing suit was not broken, meaning it was all together. (PCR Vol. XXII 3154).

Detective Don Cioeta also testified. He was questioned about the bathing suit.

Detective Cioeta testified that Ms. Wendt's bathing suit top was down mid-chest. He described the top as basically intact and still in place. (PCR Vol. XXII 3158).

Detective Cioeta told the collateral court that Ms. Wendt's bottoms were askew with the bottoms pulled down a little bit. (PCR Vol. XXII 3158). Detective Cioeta also testified that when investigators turned Ms. Wendt's body over, they could see that the back side of her bathing suit bottoms were pulled down, leaving part of her buttocks exposed. (PCR Vol. XXII 3159).

Detective Cioeta was present when Ms. Wendt's body was turned over. (PCR Vol. XXII 3160). No one disturbed Ms. Wendt's body before it was rolled over. (PCR Vol. XXII 3160).

Finally, Assistant State Attorney Alton Paulk testified. Mr. Paulk testified that all of the photographs of the murder scene showed that Ms. Wendt's bathing suit bottoms were in place in the front and pulled down in the back. Mr. Paulk testified

the photographs showed the position of the bathing suit and that is what Frank McKeithan testified to. (PCR Vol. XXII 3123).

Based on the crime scene evidence, Mr. Paulk did not have any grounds to believe that Frank McKeithan's testimony about Ms. Wendt's bathing suit was false. (PCR Vol. XXII 3143). Mr. Paulk was aware that Sheriff McKeithan questioned Barwick about the bathing suit. Barwick told him that when they were fighting he may have pulled them down. (PCR Vol. XXII 3144).

The collateral court denied this claim. (PCR Vol. XXII 2873). The court concluded that Barwick failed to show a Giglio violation because he failed to demonstrate the State presented any false testimony about the condition of Ms. Wendt's bathing suit. The court found that, to the contrary, the testimony of Captain McKeithan and Detective Cioeta, as well as the photographic evidence that was introduced at trial proved Ms. Wendt's bathing suit was pulled down in the back. (PCR Vol. XVI 2873).

The collateral court's findings of fact are supported by competent substantial evidence. Barwick has completely failed to prove a Giglio violation. Although he points, consistently to the two allegedly undisclosed medical examiner reports to support his claim, he simply ignores all of the evidence that clearly shows Ms. Wendt's body with her bathing suit bottoms

slightly pulled down in the back. (State's Trial Exhibits 28, 31, 33).

Moreover, Barwick did not call the medical examiner investigators to testify as to their actual observations of the bathing suit. Given the testimony at the evidentiary hearing about the condition of Ms. Wendt's bathing suit, coupled with the crime scene photographs that clearly show Ms. Wendt's bathing suit was pulled down in the back, Barwick has wholly failed to prove the State committed a Giglio violation.

(2) Suzanne Capers

In this claim, Barwick alleges the State committed a Giglio violation when Suzanne Capers testified about Barwick's actions on the day of the murder, including a gesture that Barwick made with his fingers, as he was walking around the Russ Lake Apartments observing Ms. Capers sunbathe.

According to Barwick, Ms. Capers described, in her pre-trial deposition, Barwick's demeanor and gestures as "innocent". Barwick alleges that at his first trial, Ms. Capers testified before the jury she did really not think anything of it.

Barwick alleges that at Barwick's second trial, Ms. Capers changed her testimony and testified that Barwick's conduct (staring and pointing) made her worried, suspicious and uneasy. Barwick claims the State committed a Giglio violation when it failed to point out to the jury she had previously testified she

perceived Barwick's conduct, on the day of the murder, as innocent and unworthy of concern.

At Barwick's first trial, Ms. Capers' testimony was fairly brief. Ms. Capers testified that on March 31, 1986, she lived at 901 Russ Lake Drive. On that day, she was sunbathing. She saw a man whose description she later gave to the police. It was about 12:30 or 1:00 in the afternoon. (1TR Vol. III 397). She saw a man at the apartments. He was medium tall with a stocky build and real blonde hair. He was wearing a blue tank top and blue jeans.

The man walked by four or five times. The next time she saw him, he was standing on the edge of the road, kind of on the edge of the dirt and the grass. She was reading and happened to look up. She saw him standing there staring at her. She looked up and he looked like he might have gotten embarrassed or that she had caught him looking at her. The man pointed in two different directions.[9] Then he went toward Ms. Wendt's apartment. The next time she saw him, he walked by where he was standing before. He did not stop; He just walked across into the woods. (1TR Vol. III 402).

[9] The record indicates that Ms. Capers showed the jury how the man was pointing. (1TR Vol. III 404). Of course, the record cannot show the gesture that Ms. Capers showed the jury. At Barwick's 1992 trial, the prosecutor elicited a more detailed description of the gesture.

During cross-examination, Ms. Capers was asked by trial counsel whether the man made any menacing gestures. She answered, “no sir—well, he just pointed like this.” (gesturing). She thought it looked kind of odd. She did not think anything of it at the time. (1TR Vol. III 404).

Ms. Capers was not asked to identify Barwick at trial. She did not identify him as the man she saw walking toward Ms. Wendt’s apartment complex.

During Barwick’s 1992 trial, Ms. Capers testified again. She testified that on March 31, 1986, she was living at the Russ Lake Apartments. She did not know Rebecca Wendt during her lifetime. She found out about her after the murder. (2TR Vol. 230).

On March 31, 1986, she was sunbathing at her apartment complex at about 12:30 in the afternoon. She was reading. (2TR Vol. XVIII 230).

Out of the corner of her eye, Ms. Capers saw something and looked up. She saw a man walking around the apartment complex toward where Ms. Wendt’s apartment was. She saw him two or three or four times and she started getting suspicious. (2TR Vol. XVIII 232). A little while later, the man came back around and she saw him standing in the woods across from her. He just sort of stared. She started getting a little worried, thinking about laying out by herself. (2TR Vol. XVIII 232).

The man started pointing. He pointed at Ms. Capers and then pointed toward Ms. Wendt's apartment. He did it a few times. The man then walked away toward Ms. Wendt's apartment. The next time she saw him, about fifteen to thirty minutes later, the man was walking back and cut across into the woods. (2TR Vol. XVIII 235-236).

She later found out that Rebecca Wendt had been murdered. She talked with Sheriff McKeithan. She described the man she saw. He was medium height, about 5'11". He had real blonde hair. He was wearing a blue tank top and blue jeans. (2TR Vol. XVIII 237). She thought the man probably weighed 185 pounds. She did not see his shoes. Ms. Capers identified Barwick as the man she saw walking toward Rebecca Wendt's apartment. (2TR Vol. XVIII 237-238).

At the evidentiary hearing, Barwick did not call Ms. Capers to explain her apparent change of testimony as to her subjective feelings about Barwick's intent when he walked around several times, stared at her, pointed in different directions, and then walked toward Ms. Wendt's apartment. Nonetheless, Assistant State Attorney Alton Paulk provided some insight at the evidentiary hearing.

Mr. Paulk testified that when Barwick raised this claim in his motion for post-conviction relief, he went back and reviewed her statements, deposition, and trial testimony. (PCR Vol. XXII

3124). Mr. Paulk told the collateral court that in one of Ms. Capers' statements she had said that his actions were not sinister. In another, she said he looked weird. (PCR Vol. XXII 3124).

Mr. Paulk testified that it was clear to him that after she found out what he was charged with and gone home to talk with her parents, she realized that "…it could have been me." (PCR Vol. XXII 3124). Mr. Paulk did not perceive anything false or sinister about her testimony. Instead, he perceived Ms. Capers' perceptions likely changed with time and reflection. (PCR Vol. XXII 3124). Mr. Paulk also told the collateral court there was no issue of identity in the case. Barwick had confessed on tape. (PCR Vol. XXII 3124).

The collateral court denied the claim. The court found that Barwick had failed to prove that Ms. Capers' testimony was in any way false. Second, the collateral court found there was no evidence the prosecution knew her testimony was false. Finally, the court found that there was no issue of identity at trial. The collateral court found that Ms. Capers' testimony as to Barwick's behavior could not have reasonably affected the outcome of the trial. (PCR Vol. XXII 2874).[10]

[10] The collateral court improperly shifted the burden on the defendant to show materiality. However, any error in this finding is harmless because the collateral court correctly found that identity has never been an issue in this case. Moreover,

This Court can deny this claim for three reasons. First, Barwick cannot show a Giglio violation because there is no evidence that Ms. Capers' testimony was false. Barwick did not call Suzanne Capers to testify about what prompted her to testify, at Barwick's second trial, that Barwick's behavior and gestures made her suspicious and uneasy. By failing to do so, Barwick failed to show Ms. Capers' testimony was false. Maharaj v. Secretary for Dept. of Corrections, 432 F.3d 1292, 1313 (11th Cir. 2005). In the Giglio context, the suggestion that a statement may have been false is simply insufficient; the defendant must conclusively show that the statement was actually false).[11]

Second, Barwick presented no evidence that the prosecutor knew that Ms. Capers "changed" impressions of Barwick's behavior

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the collateral court found Barwick had failed to bear his burden to prove the first two prongs of a Giglio violation, thereby mooting any necessity to address the materiality prong.

[11] Assuming solely for the sake of argument that some of Ms. Capers' testimony was "true" and some was "false", there is no evidence that Ms. Capers' testimony at Barwick's second trial was false. One cannot assume that simply because a witness's latter statement is inconsistent in some respects with an earlier statement, that the first statement she makes is true and the second false, or vice versa. Indeed, even assuming the worst from the witness, Ms. Capers could have been putting on a brave face by downplaying her impressions of Barwick's conduct at her deposition and at Barwick's first trial and been totally truthful at his second trial, the only proceeding at issue. By failing to call Ms. Capers at the evidentiary hearing, Barwick failed to produce any evidence that Ms. Capers' testimony at the second trial was false and her previous statements were true.

was “false”. Indeed, Mr. Paulk testified, without rebuttal, that, in his view Ms. Caper’s thoughts about Mr. Barwick’s conduct evolved with time and reflection of how lucky she was that she was not Barwick’s victim that day.

Finally, his claim may be denied because there is no reasonable likelihood Ms. Capers’ “changed” testimony affected the outcome of the trial. Barwick’s identity was never an issue at trial. Barwick confessed to police investigators he killed Ms. Wendt. He confessed to Lovey and William Barwick that he killed Ms. Wendt.

Barwick confessed to the police he saw Ms. Wendt sunbathing as he was returning from lunch, drove home, parked the car, got a knife from his home, took baseball gloves from the backseat of his car, walked back to Ms. Wendt’s apartment complex, walked by her three times, waited till she went into her apartment, entered her apartment unmasked and wearing gloves, and stabbed Rebecca Wendt multiple times. (2TR Vol. VI 310-338).

Given Mr. Paulk’s testimony at the evidentiary hearing and given that Barwick confessed to stalking and killing Ms. Wendt, this Court should deny Barwick’s Giglio claim.

(3) Alleged prosecutorial misconduct

In this portion of his claim which is neither a Brady nor Giglio violation, but instead seems to raise some sort of due process argument, Barwick alleges the prosecutor engaged in

misconduct when he spoke with confidential expert, Dr. Ralph Walker. (IB 71). Barwick alleges this conduct deprived Barwick of his access to a confidential expert and hindered in the preparation of the penalty phase. Barwick points to a hearing held on July 10, 1992, the last day of the penalty phase. (TR Vol. XIII 666-674).

During that hearing, trial counsel requested a recess so that Dr. Walker could be available to testify for Mr. Barwick. Assistant State Attorney Paulk indicated that he had talked to Dr. Walker. (TR Vol. XXIII 667). Trial counsel expressed some surprise that Mr. Paulk had spoken with Dr. Walker already but noted that "it didn't matter." (TR Vol. XXIII 667-668). Trial counsel made no allegation or claim that the prosecutor's interview of Dr. Walker hindered his trial preparation or interfered with his client's confidential relationship with Walker. TR Vol. XXIII 667-668).

Barwick raised this claim in his motion for post-conviction relief. The collateral court granted an evidentiary hearing on the claim.

As trial counsel was dead, Assistant State Attorney Alton Paulk testified on the issue. Mr. Paulk testified that on June 17, 1992 or June 18, 1992, he received a witness list from the

defense that listed Dr. Walker as a defense witness.[12] The new penalty phase was to commence on June 22, 1992.

Mr. Paulk testified that he spoke with Dr. Walker after Dr. Walker was listed as a defense witness. (PCR Vol. XXII 3118). Initially, he could not specifically recall calling Mr. Adams before he talked to him. It was his practice, however, to call trial counsel to let him know he was going to talk to the doctor because he was listed as a witness. (PCR Vol. XXIII 3118). Subsequently, Mr. Paulk testified that actually did recall talking to Mr. Adams before talking to Mr. Walker because he asked Mr. Adams if he wanted to be present. Mr. Adams declined because he already knew what Dr. Walker was going to say. (PCR Vol. XXII 3118).

Subsequently, the June 22, 1992 trial resulted in a mistrial and Mr. Paulk got an opportunity to depose Dr. Walker. Mr. Adams was present at the depositions because he asked some questions. (PCR Vol. XXII 3120).

The collateral court denied the claim. The collateral court found that Barwick had made no showing Mr. Paulk's conversation with Dr. Walker affected the preparation of his mitigation evidence. (PCR Vol. XVI 2874). The court noted that Mr. Paulk testified at the evidentiary hearing he had spoken

[12] At the evidentiary hearing, the State introduced the defense witness list, listing Dr. Walker as a witness. *State's Exhibit 2.*

with Mr. Adams before talking with Dr. Walker. (PCR Vol. XVI 2875). He also found that Mr. Paulk learned from Dr. Walker that Barwick had an impulse disorder and was not insane. The collateral court noted that Dr. Walker testified consistently with what he told the prosecutor. (PCR Vol. XVI 2874).

This Court should deny this claim. Barwick points to nothing in the case law, the rules of criminal procedure, or the rules of professional responsibility that precludes the prosecutor, after consultation with defense counsel, from interviewing a defense expert witness after he was listed on the witness list. Moreover, Barwick does not attempt to explain how this alleged unauthorized conduct hindered in his preparation for the penalty phase or deprived him of his access to a confidential expert. Below and before this Court, Barwick has failed to show any error or prosecutorial misconduct. This claim should be denied.

ISSUE IV

WHETHER CUMULATIVE ERROR DEPRIVED MR. BARWICK OF A FUNDAMENTALLY FAIR TRIAL (RESTATED)

Barwick's claim of cumulative error must fail because Barwick has failed to show that trial counsel was ineffective during the guilt phase and penalty phase of Barwick's capital trial. If, after analyzing the individual issues above, the alleged errors are either meritless, procedurally barred, or do

not meet the Strickland standard for ineffective assistance of counsel, there can be no cumulative error. Because Barwick's alleged individual errors are without merit, his contention of cumulative error is similarly without merit. Griffin v. State, 866 So.2d 1, 22 (Fla. 2003) ("Because the alleged individual errors are without merit, the contention of cumulative error is similarly without merit, and [the defendant] is not entitled to relief on this claim.").

ISSUE V

WHETHER BAY COUNTY'S GENERAL QUALIFICATION PROCEDURE IS UNCONSTITUTIONAL AND WHETHER COUNSEL WAS INEFFECTIVE FOR FAILING TO CHALLENGE THESE PROCEDURES (RESTATED)

In this claim, Barwick alleges that Bay County's general qualification procedure is unconstitutional because it is held outside the presence of both the defendant and his attorney and the State is allowed to participate in the proceeding. (IB 76). Barwick also alleges that trial counsel was ineffective for failing to challenge the general qualification procedures.[13]

Barwick raised this same claim in his motion for post-conviction relief. The collateral court denied the claim after an evidentiary hearing. The court ruled the claim was procedurally barred because it should have, but was not, raised on direct appeal. (PCR Vol. XVI 2882).

[13] Barwick presents no argument in support of his ineffective assistance of counsel claim.

The collateral court also found, pursuant to this Court's decision in Orme v. State, 896 So.2d 725 (Fla. 2005), that Bay County's general jury qualification procedure is not a critical stage of the proceedings at which the defendant must be present. Finally, the collateral court found that Barwick failed to present any evidence the State participated in excusing any prospective juror. The collateral court ruled that Barwick failed to prove the factual basis for his claim. (PCR Vol. XVI 2882).

In his initial brief, Barwick acknowledges this Court has repeatedly rejected this same claim.[14] Barwick alleges, however, there are three "facts" that distinguish Barwick's case: (1) neither Barwick nor his attorney were present (2) an assistant state attorney may have been present and objecting to the release of certain venire persons and not objecting to others and (3) there is no transcript. (IB 77).[15] This claim should be denied for three reasons.

[14] Barwick concedes this issue has been repeatedly rejected by this Court. Barwick notes he is raising this claim solely to exhaust the issue for federal habeas purposes. (IB 76, n. 11).

[15] Barwick provides no support for his allegation that his distinguishing factors were not present in the cases in which this Court had repeatedly rejected the claim.

First, Barwick's substantive claim is procedurally barred. This claim could have been, and should have been, raised on direct appeal. Orme v. State, 896 So. 2d 725, 737 (Fla. 2005)(Petitioner's challenge to Bay County's general jury qualification procedure is a matter that should have been raised by objection at trial and argument on appeal).

Barwick did not raise this as a claim of error on direct appeal of his convictions and sentence to death. Barwick v. State, 660 So.2d 685, 690 n.8 (Fla. 1995). Claims that could have been or should have been raised on direct appeal, but were not, are barred in post-conviction proceedings. Orme v. State, 896 So. 2d 725,737 (Fla. 2005)(Petitioner's challenge to Bay County's general jury qualification procedure is procedurally barred in post-conviction proceedings because this is a matter that could have, and should have, been raised on direct appeal).

Second, this claim should be denied because this Court has held the general jury qualification procedure is not a critical stage of trial at which the defendant must be present. Orme v. State, 896 So. 2d 725, 737 (Fla. 2005)(the general jury qualification procedure is not a critical stage of trial at which the defendant must be present). *See also* Bates v. State, 750 So.2d 6 (Fla. 1999); Wright v. State, 688 So. 2d 298 (Fla. 1996).

Finally, this claim should be denied because the factual assumptions underlying Barwick's claims were refuted by testimony at the evidentiary hearing. Though Bob Adams, Barwick's trial counsel, was dead at the time of the evidentiary hearing, Assistant State Attorney Alton Paulk testified for the State on this claim. Contrary to Barwick's allegations, Mr. Paulk's testimony established that no attorney for the State "object[ed] to the release of certain venirepersons but [did not object] to others." (IB 77). Likewise, contrary to Barwick's allegation, Mr. Paulk's testimony refutes Barwick's allegations that "the state attorney acts with impunity in advising the court which venire persons ought to be released and which ought to be retained." (IB 78).

Mr. Paulk described the general jury qualifications procedure. The jury pool room is opened up, the judge comes in, the roll is called, potential jurors are qualified by the clerk, and then asked to line up and come forward to the judge to give excuses. (PCR Vol. XXII 3116).

Mr. Paulk testified that "he [the judge] never consults the prosecutor, and to my knowledge never a defense attorney. It's never happened any time I have been in the jury room." (PCR Vol. XXII 3116). Instead, the judge makes the sole decision. (PCR Vol. XXII 3116).

Mr. Paulk testified that while he could not say for certain that Bob Adams was present when Barwick's jury was generally qualified, Mr. Adams would often attend these proceedings because "he usually wanted to be there to hear the excuse in private so he did not put his foot in his mouth during the voir dire of the jurors...." (PCR Vol. XXII 3117). In any event, the proceeding is open to the public. (PCR Vol. XXII 3117).

During re-cross, Mr. Paulk reiterated that he has never objected to the excusal, or denial of a request for excusal, during the jury qualification proceedings and he has never seen any other Assistant State Attorney do so. (PCR Vol. XXII 3138). He also told the collateral court that no judge has ever asked his input on whether to excuse a prospective juror. (PCR Vol. XXII 3138).

This claim may be denied on the merits because Barwick put on no evidence to support his allegation that a state attorney may have objected to the release of certain venire persons but not to others. Moreover, Barwick put on no testimony to establish his attorney was not present at the general qualification procedure. Indeed the only evidence presented at the evidentiary hearing was that: (1) the trial judge never asked for input from the state attorney or defense counsel regarding prospective juror's requests for excusal; (2) Mr. Paulk has never offered any comment nor seen any other State

Attorney offer an objection or comment; and (3) trial counsel, Bob Adams, often attended these proceedings.

As Barwick's substantive claim has no merit, Barwick's claim of ineffective assistance of counsel must also fail. Counsel cannot be deemed ineffective for failing to make a meritless objection. Hitchcock v. State, 33 Fla. L. Weekly S 343, *59 (Fla. May 22, 2008). *See also* Melendez v. State, 612 So.2d 1366, 1369 (Fla. 1992).

ISSUE VI

WHETHER TRIAL COUNSEL WAS INEFFECTIVE FOR FAILING TO ARGUE AGAINST THE AVOID ARREST AGGRAVATOR AND FAILING TO OBJECT WHEN THE JURY WAS INSTRUCTED ON THE AVOID ARREST AGGRAVATOR (RESTATED)

In this claim, Barwick alleges trial counsel was ineffective for failing to argue against the avoid arrest aggravator. Barwick also alleges trial counsel was ineffective because he failed to "adequately" object when the court proposed to instruct the jury on the avoid arrest aggravator. (IB 79).

In his initial brief, Barwick presents no argument on his claim the jury was improperly instructed on the avoid arrest aggravator. Nor does he present any support for the notion trial counsel's objection to the avoid arrest aggravator was "inadequate". (IB 79).

Instead, he asks this Court to look to his habeas petition and incorporate his argument there into his initial brief. This

Court should demur. Barwick has waived this claim by attempting to incorporate, by reference, his claims and arguments made in his state habeas petition. *See* Simmons v. State, 934 So.2d 1100 (Fla. 2007), quoting Duest v. Dugger, 555 So.2d 849, 852 (Fla. 1990)("The purpose of an appellate brief is to present arguments in support of the points on appeal. Merely making reference to arguments below without further elucidation does not suffice to preserve issues, and these claims are deemed to have been waived.").

Even if this Court were to consider this claim on the merits, Barwick is entitled to no relief. First, trial counsel did object to instructing the jury on the avoid arrest aggravator. This objection prompted the prosecutor to point to the evidence that supported the instruction. The trial court noted trial counsel's objection. (TR XXV 904-905). It is axiomatic that trial counsel cannot be ineffective for failing to do something he actually did.

Barwick is also not entitled to relief because there was competent, substantial evidence to support the avoid arrest aggravator. Accordingly, Barwick can show no prejudice stemming from trial counsel's failure to "adequately" object to a jury instruction on the aggravator or argue against the avoid arrest aggravator.

"[T]o establish the avoid arrest aggravating factor where the victim is not a law enforcement officer, the State must show beyond a reasonable doubt that the sole or dominant motive for the murder was the elimination of a witness." Connor v. State, 803 So.2d 598, 610 (Fla. 2001), *cert. denied*, 535 U.S. 1103, 122 S.Ct. 2308, 152 L.Ed.2d 1063 (2002). In determining whether the avoid arrest aggravator is supported by the evidence, this Court has looked, in other cases, to matters such as whether the victim knew and could identify their killer, whether the defendant used gloves or wore a mask, whether the victim offered any resistance, or whether the victim was in a position to pose a threat to the defendant. Parker v. State, 873 So.2d 270, 289 (Fla. 2004); Farina v. State, 801 So. 2d 44, 54 (Fla. 2001). Of particular import in this case, this Court has upheld the avoid arrest aggravator when the defendant made incriminating statements about witness elimination. Walls v. State, 641 So. 2d 381, 390 (Fla. 1994) (holding a confession that witness elimination was the reason for the murder satisfies this aggravating circumstance).

The aggravator may be proven by direct evidence. Direct evidence of intent is not required, however. The avoid arrest aggravator may also be proven by circumstantial evidence from which the motivation for the murder may be inferred. Parker v. State, 873 So.2d 270, 289 (Fla. 2004). In the instant case,

there was both direct and circumstantial evidence that Barwick's sole or dominant motive for murdering Rebecca Wendt was to eliminate her as a witness.

During the penalty phase of Barwick's trial, the State presented two witnesses in support of the avoid arrest aggravator.[16] The first was Melissa Dom (formerly Melissa Hoole).

Ms. Dom testified that she was 21 years old when Darryl Barwick raped her after breaking into her apartment. Ms. Dom described what happened. Ms. Dom told the jury that around noon on August 18, 1983, she was at home cleaning the house. She had to be at work by 4:00 at the Western Steer Family Steak House. (TR Vol. XXII 611).

During the housecleaning, she went outside to hang her clothes on the line. When Ms. Dom came back inside her apartment, she sat down for a minute to watch some television. She heard a noise in her kitchen. (TR Vol. XXII 612).

[16] The State also called Lovey Barwick who gave a statement before trial that her brother told her he killed Ms. Wendt because she saw his face. At trial she testified that she now did not know whether he said that or not and that she might have assumed that's what he meant by what he said. (TR Vol. XXII 624, 626).

She went to investigate and saw Barwick standing in her kitchen with a butcher knife in his hand.[17] He wore a ski mask and gloves. He was dressed only in shorts and tennis shoes.

Barwick backed her up against the wall and put a knife to her throat. He told her to cooperate and she would not get hurt. Barwick backed Ms. Dom into her bedroom and onto the bed. He got on top of her. (TR Vol. XXII 613).

Barwick kept trying to kiss her. Ms. Dom asked Barwick to put the knife down. He did so. (TR Vol. XXII 613).

Ms. Dom asked Barwick to take his mask off. Barwick told her that if she would take her pants off, he would take his mask off. Ms. Dom did not do anything so Barwick took her pants off for her.

Barwick then took the mask off at her request. He tried to penetrate her vaginally and could not. Barwick tried to roll her over on top of him but she would not budge. (TR Vol. XXII 614).

Barwick then got up and sat on Ms. Dom's chest. He tried to force her to do oral sex on him and commanded her to "suck it." Ms. Dom refused. (TR Vol. XXII 614).

Barwick asked Ms. Dom if she lived alone. She lied to him and told him no. Barwick asked her when her husband got home.

[17] At trial, Ms. Dom identified Barwick as the man who attacked her. Barwick pled guilty. His conviction and sentence were also introduced into evidence.

Ms. Dom told Barwick that he normally got home at five but sometimes would get home earlier. (TR Vol. XXII 615).

Barwick got a little anxious. He finally penetrated her vaginally. After he ejaculated, Barwick noticed that Ms. Dom was shaking. He asked her if it was the knife and she said yes. (TR Vol. XXII 615).

Barwick proposed that they get dressed and go put the knife up. They got dressed and went into the kitchen. She discovered the knife he had used was one of hers. (TR Vol. XXII 615). He had taken it from her kitchen drawer. (TR Vol. XXII 616).

She saw Barwick's buck knife on the counter. Barwick told her that it was always better to use the other person's. (TR Vol. XXII 615).

Barwick then told Ms. Dom that they "have a problem." Barwick's problem was that his victim had "seen [his] face. (TR Vol. XXII 616).

Ms. Dom told Barwick she had not seen his face and this never happened. Barwick told her not to call the police. If she did, Barwick would come and get her. (TR Vol. XXII 616).

Barwick asked Ms. Dom what she would do if she saw him on the street. She told him she would look the other way and hoped he would do the same. (TR Vol. XXII 617).

Barwick left. Ms. Dom locked the door and called her mother. (TR Vol. XXII 618). Her mother and her mother's boss came immediately to her apartment.

Her mother's boss called the police. Ms. Dom identified Barwick as her assailant from a photographic line-up. (TR Vol. XXII 618-619).

Ms. Dom's testimony provided circumstantial evidence of Barwick's motive to kill Ms. Wendt. Barwick had been previously tricked into believing he would not go to prison because his victim would not call the police. Ms. Dom convinced Barwick that, despite his concern she had seen his face, she would pretend the incident never happened. Barwick was fooled once. He would not fooled again.

Apart from Ms. Dom's testimony, the State presented direct evidence that Barwick's motive was to eliminate Ms. Wendt as a witness and to avoid arrest. This evidence was Barwick's own confession that he killed Ms. Wendt because she saw his face and he did not want to go back to prison.[18]

William Barwick, Darryl Barwick's brother, told the jury that Barwick confessed to him that he killed Rebecca Wendt.

[18] Philmore v. State, 820 So.2d 919, 935 (Fla. 2002) (ruling that a confession that witness elimination was the motive for the murder is direct evidence of the avoid arrest aggravating circumstance); Walls v. State, 641 So. 2d 381, 390 (Fla. 1994) (holding that a confession is direct evidence of motive and that a confession that witness elimination was the reason for the murder satisfies this aggravating circumstance).

William testified Barwick told him he killed Rebecca because "when he was struggling with her and she took his mask off, when he seen her, when she seen his identity he didn't want to go back to where he came from, from prison, from… that's why he said he did it." (TR Vol. XXII 630, 634).

The circumstances of Barwick's prior violent sexual assault on another young woman under nearly identical circumstances, his stint in prison because of it, and Barwick's statement to his brother that he killed Ms. Wendt because she saw his face and he did not want to go back to prison, provided competent substantial evidence that Barwick murdered Ms. Wendt to eliminate a witness and avoid arrest. Schoenwetter v. State, 931 So. 2d 857, 874 (Fla. 2006); Nelson v. State, 850 So. 2d 514, 526-527 (Fla. 2003) (Nelson's admissions to police, including statement that he killed the victim because he thought she could identify would, alone, support his intentional elimination of a witness). As such, the State was entitled to have the jury instructed on the aggravator. Floyd v. State, 850 So. 2d 383, 405 n. 33 (Fla. 2002) (where competent substantial evidence exists to support an aggravator it is not error for the trial judge to instruct the jury on the aggravator).

As there was competent substantial evidence to support both the jury instruction and the trial judge's finding the murder was committed to avoid arrest, trial counsel cannot be deemed

ineffective for failing to "adequately" object or to argue more fiercely against the aggravator. This claim should be denied. Mungin v. State, 932 So.2d 986, 997 (Fla. 2006) (counsel is not ineffective for failing to raise a meritless objection).

ISSUE VII

WHETHER BARWICK WAS DENIED A PROPER DIRECT APPEAL AND EFFECTIVE ASSISTANCE OF POST-CONVICTION COUNSEL DUE TO OMISSIONS IN THE RECORD (RESTATED)

In his initial brief, Barwick presents no argument in support of his claim he was deprived of a proper direct appeal because of unidentified omissions in the record. (IB 80). Barwick does not identify either the legal grounds upon which he bases this claim or the portions of the record he alleges were improperly omitted.

While Barwick does cite to certain page numbers of the initial trial record, he does not explain what "error or omission" is revealed on these particular pages.[19] (IB 80). Indeed, he does not explain at all how these citations are relevant to the claim he brings to this Court.

Instead, Barwick invites this Court to comb through the appellate record and determine on its own what was improperly

[19] For instance R.17 is a page from Barwick's sentencing hearing. During that hearing, trial counsel refers to "the bailiff" situation and acknowledges the court held a hearing on the issue (a juror caught a ride home with the bailiff but neither discussed the case at all) right before the penalty phase commenced. That hearing is in the record.

omitted. He also asks this Court to refer to his state habeas petition and "incorporate" those arguments in his initial brief. (IB 80, n. 14). This Court should decline Barwick's invitation and rule that Barwick has waived or abandoned this claim. *See* Simmons v. State, 934 So. 2d 1100 (Fla. 2007), quoting Duest v. Dugger, 555 So.2d 849, 852 (Fla. 1990)("The purpose of an appellate brief is to present arguments in support of the points on appeal. Merely making reference to arguments below without further elucidation does not suffice to preserve issues, and these claims are deemed to have been waived.").

Even if this Court were to consider this issue, a claim alleging omissions of the record on direct appeal is procedurally barred in collateral proceedings. Thompson v. State, 759 So.2d 650 (Fla. 2000). Moreover, Barwick is not entitled to relief on a claim that post-conviction counsel was ineffective because of omissions in the record. A claim of ineffective assistance of post-conviction counsel is not cognizable in Florida. Lambrix v. State, 698 So. 2d 247, 248 (Fla. 1996).

ISSUE VIII

WHETHER BARWICK'S JURY WAS MISLED BY COMMENTS AND INSTRUCTIONS WHICH UNCONSTITUTIONALLY AND INACCURATELY DILUTED ITS SENSE OF RESPONSIBILITY FOR SENTENCING IN VIOLATION OF THE EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION (RESTATED)

In his initial brief, Barwick presents no argument in support of his claim the jury was misled by comments that diluted its sense of responsibility for its sentencing role in this capital case. Indeed, he does not even identify the comments about which he takes issue.

Instead, he merely points to places in the trial record where trial counsel referred to the jury's sentence as a "recommendation". (IB 80). Moreover, while Barwick purports to present a substantive claim of error (a Caldwell v. Mississippi[20] claim), Barwick's "argument" presents an allegation that trial counsel was ineffective for failing to object to unspecified "diluting" comments. (IB 80).

Rather than presenting any argument to support his claim of substantive error and ineffective assistance of counsel, Barwick asks this court to consider the arguments he made on this same issue in his state petition for habeas corpus. This is improper. Barwick has waived this claim by attempting to incorporate, by reference, his claims and arguments made in his

[20] Caldwell v. Mississippi, 472 U.S. 320, 105 S. Ct. 2633, 86 L. Ed. 2d 231 (1985)

habeas petition. *See* Simmons v. State, 934 So. 2d 1100 (Fla. 2007), quoting Duest v. Dugger, 555 So.2d 849, 852 (Fla. 1990)("The purpose of an appellate brief is to present arguments in support of the points on appeal. Merely making reference to arguments below without further elucidation does not suffice to preserve issues, and these claims are deemed to have been waived.").

Even if this Court were to consider this issue, Barwick is not entitled to relief. This is so for two reasons.

First, the claim is procedurally barred. This claim can and should be raised on direct appeal. Barwick did not, however, raise this as a claim of error on direct appeal from his 1992 convictions and sentence to death. Barwick v. State, 660 So.2d 685, 690 n.9 (Fla. 1995). Failure to do so acts as a procedural bar in collateral proceedings. Jones v. State, 928 So. 2d 1178, 1183 n.5 (Fla. 2006)(holding Caldwell claim procedurally barred because not raised on direct appeal). Moreover, this Court has consistently held it will not consider such procedurally barred claims under the guise of ineffective assistance of counsel.

This claim is also without merit. This Court has repeatedly denied the same claim Barwick presents here. Miller v. State, 926 So. 2d 1243, 1257 (Fla. 2006) (rejecting claim that instruction diluted the jury's responsibility by labeling

their penalty phase verdict as advisory and not binding); Dufour v. State, 905 So.2d 42 (Fla. 2005) (noting that this Court has repeatedly determined that challenges to the standard jury instructions that refer to the jury as advisory and to the jury's verdict as a recommendation, on the grounds they violate Caldwell v. Mississippi, are without merit).

Because Barwick's claim is without merit, his ineffective assistance of counsel claim must also fail. Counsel is not ineffective for failing to make a meritless objection. Mungin v. State, 932 So.2d 986, 997 (Fla. 2006) (counsel is not ineffective for failing to raise a meritless objection).

ISSUE IX

WHETHER BARWICK WAS DEPRIVED OF A FAIR TRIAL BECAUSE THE PROSECUTOR'S ARGUMENTS PRESENTED IMPERMISSIBLE CONSIDERATIONS TO THE JURY AND WHETHER TRIAL COUNSEL WAS INEFFECTIVE FOR FAILING TO OBJECT TO THE PROSECUTOR'S IMPROPER ARGUMENTS (RESTATED)

In his initial brief, Barwick presents no argument in support of his claim he was deprived of a fair trial because the prosecutor's arguments allowed the jury to consider matters it was not permitted to consider. Barwick does not even identify the alleged "impermissible considerations." Likewise, Barwick presents no argument that trial counsel was ineffective for failing to object to the prosecutor's arguments. (IB 81-82).

Rather than presenting any argument to support his claim of substantive error and/or ineffective assistance of counsel,

Barwick asks this court to consider the arguments he made on this same issue in his state petition for habeas corpus. This is improper. Barwick has waived this claim by attempting to incorporate, by reference, his claims and arguments made in his habeas petition. *See* Simmons v. State, 934 So. 2d 1100 (Fla. 2007), quoting Duest v. Dugger, 555 So.2d 849, 852 (Fla. 1990)("The purpose of an appellate brief is to present arguments in support of the points on appeal. Merely making reference to arguments below without further elucidation does not suffice to preserve issues, and these claims are deemed to have been waived.").[21]

This Court should deny this claim. Coolen v. State, 696 So. 2d 738, 742 n. 2 (Fla. 1997)(failure to fully brief and argue issues raised on appeal constitutes a waiver of these claims).

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[21] Because Barwick has not identified any improper comments or incidents of prosecutorial misconduct in this claim, the State has no opportunity to fairly respond to this claim. The State did fully respond to this same claim made in Barwick's habeas petition. In his petition, Barwick identified the comments about which he claims constituted error.

However, insofar as Barwick raises a claim here of substantive error, the claim is procedurally barred. Claims of prosecutorial misconduct can and should be raised on direct appeal. Knight v. State, 923 So. 2d 387, 393 n.6 (Fla. 2005) (rejecting a claim regarding improper prosecutorial comments made during closing arguments as procedurally barred in a postconviction motion for failure to raise on direct appeal); Harvey v. Dugger, 656 So. 2d 1253, 1256 (Fla. 1995) (stating that issues that could have been but were not raised on direct appeal or issues that were raised and rejected on direct appeal are not cognizable through collateral attack).

ISSUE X

WHETHER BARWICK WAS DEPRIVED OF A FAIR TRIAL WHEN THE COURT INSTRUCTED THE JURY ON THE "IN THE COURSE OF A FELONY" AGGRAVATOR (RESTATED)

In his initial brief, Barwick presents no argument in support of his claim he was deprived of a fair trial when the court instructed the jury on the "in the course of a felony aggravator. Nor does he present any argument in support of a claim that counsel was ineffective for failing to object to the instruction. (IB 82). Barwick has waived this claim by attempting to incorporate, by reference, his claims and arguments made in his habeas petition. *See* Simmons v. State, 934 So. 2d 1100 (Fla. 2007), *quoting* Duest v. Dugger, 555 So.2d 849, 852 (Fla. 1990)("The purpose of an appellate brief is to present arguments in support of the points on appeal. Merely making reference to arguments below without further elucidation does not suffice to preserve issues, and these claims are deemed to have been waived.").

Even if this Court were to decide this claim, it is without merit for two reasons. First, the claim is procedurally barred in these collateral proceedings. Claims regarding the adequacy or constitutionality of jury instructions should be raised on direct appeal. Thompson v. State, 759 So. 2d 650, 665 (Fla. 2000) (stating that substantive challenges to jury instructions are procedurally barred in post-conviction challenges because

the claims can and therefore should be raised on direct appeal). Moreover, this Court has consistently held it will not consider such procedurally barred claims under the guise of ineffective assistance of counsel.

This claim may also be denied because it is without merit. This Court has consistently rejected attacks on this mitigator. See Blanco v. State, 706 So.2d 7, 12 (Fla. 1997) ("in the course of a felony aggravator" does narrow the class of death-eligible defendants); Miller v. State, 926 So.2d 1243, 1260 (Fla. 2006) (rejecting Miller's claim that Florida's capital sentencing scheme is unconstitutional because it provides for an automatic aggravating circumstance and neither "narrows the class of persons eligible for the death penalty" nor "reasonably justifies the imposition of a more severe sentence on the defendant compared to others found guilty of murder."); Freeman v. State, 761 So.2d 1055, 1067 (Fla. 2000) (finding no merit to the argument that an underlying felony cannot be used as an aggravating factor); Thompson v. State, 759 So.2d 650, 656, 666 (Fla. 2000) (rejecting a claim the murder in the course of a sexual battery instruction was unconstitutionally vague).

In accord with the well-established jurisprudence of this state, Barwick's constitutional attacks on this statutory aggravator, as well as its standard jury instruction, is without merit. Accordingly, trial counsel is not ineffective for

failing to make a meritless objection. Mungin v. State, 932 So.2d 986, 997 (Fla. 2006) (counsel is not ineffective for failing to raise a meritless objection).

ISSUE XI

WHETHER FLORIDA'S PENALTY PHASE INSTRUCTIONS UNCONSTITUTIONALLY SHIFT THE BURDEN TO THE DEFENDANT TO DEMONSTRATE A LIFE SENTENCE IS APPROPROATE AND IMPERMISSIBLY CREATE A PRESUMPTION OF DEATH (RESTATED)

In his initial brief, Barwick presents no argument in support of his claim his death sentence is unconstitutional because Florida's standard penalty phase instructions unconstitutionally shift the burden to the defendant to prove that a life sentence is appropriate and impermissibly creates a presumption of death. Nor does he present any argument in support of a claim that counsel was ineffective for failing to object to the instructions. (IB 83).

Barwick has waived this claim by attempting to incorporate, by reference, his claims and arguments made in his habeas petition. *See* Simmons v. State, 934 So. 2d 1100 (Fla. 2007), quoting Duest v. Dugger, 555 So.2d 849, 852 (Fla. 1990)("The purpose of an appellate brief is to present arguments in support of the points on appeal. Merely making reference to arguments below without further elucidation does not suffice to preserve issues, and these claims are deemed to have been waived.").

Even if this Court were to decide this claim, it is without merit for two reasons. First, the claim is procedurally barred. claims regarding the adequacy or constitutionality of jury instructions should be raised on direct appeal. Thompson v. State, 759 So. 2d 650, 665 (Fla. 2000) (stating that substantive challenges to jury instructions are procedurally barred in post-conviction challenges because the claims can and therefore should be raised on direct appeal). Moreover, this Court has consistently held it will not consider such procedurally barred claims under the guise of ineffective assistance of counsel. *See* Rodriguez v. State, 919 So. 2d 1252, 1280 (Fla. 2005) (stating that claims that could have been raised on direct appeal cannot be relitigated under the guise of ineffective assistance of counsel). *See also* Israel v. State, 985 So. 2d 510, 520 (Fla. 2008).

This claim may also be denied because it is without merit. This Court has consistently rejected claims that Florida's standard penalty phase instructions shift the burden to the defendant to prove life is an appropriate sentence or create the presumption that death is an appropriate sentence. Rodriguez v. State, 919 So. 2d 1252, 1280 (Fla. 2005)(rejecting claim that the standard jury instruction impermissibly shifts the burden to the defense to prove that death is not the appropriate sentence); Walton v. State, 847 So.2d 438 (Fla. 2003)("Walton's

claims relating to the constitutionality of Florida's death penalty scheme - that Florida's death penalty statute shifts the burden to the capital defendant during the penalty phase and presumes that death is the appropriate punishment are entirely devoid of merit."); Sweet v. Moore, 822 So. 2d 1269, 1274 (Fla. 2002).

In accord with the well-established jurisprudence of this state, Barwick's constitutional attacks on Florida's standard jury instructions are without merit. Accordingly, trial counsel is not ineffective for failing to make a meritless objection. Mungin v. State, 932 So.2d 986, 997 (Fla. 2006) (counsel is not ineffective for failing to raise a meritless objection).

CONCLUSION

Based upon the foregoing, the State respectfully requests this Court affirm the collateral court's order denying Barwick's amended motion for post-conviction relief.

Respectfully submitted,

BILL McCOLLUM
ATTORNEY GENERAL

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MEREDITH CHARBULA
Assistant Attorney General
Florida Bar No. 0708399
Department of Legal Affairs
PL—01, The Capitol
Tallahassee, Florida 32399-1050
(850) 414-3583 Phone
(850) 487-0997 Fax
Attorney for the Appellee

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing ANSWER BRIEF OF THE APPELLEE has been furnished by U.S. Mail to D. Todd Doss, 725 Southeast Baya Drive, Suite 102, Lake City, Florida 32025-6092, this 21st day of October 2008.

_____
MEREDITH CHARBULA
Assistant Attorney General

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.

_____
MEREDITH CHARBULA
Assistant Attorney General