IN THE SUPREME COURT OF FLORIDA

NO. SC07-1831

DARRYL BRIAN BARWICK,

Petitioner,

v.

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

Respondent.

INITIAL BRIEF

D. TODD DOSS
Florida Bar No. 0910384
725 Southeast Baya Drive
Suite 102
Lake City, FL 32025-6092
Telephone (386) 755-9119
Facsimile (386) 755-3181

COUNSEL FOR PETITIONER

PRELIMINARY STATEMENT

This proceeding involves the appeal of the circuit court's denial of Mr. Barwick's motion for postconviction relief. The motion was brought pursuant to Fla. R. Crim. P. 3.850/3.851. The circuit court denied Mr. Barwick's claims after an evidentiary hearing.

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

"Vol. R." – record on direct appeal to this Court;

"PC-R." - record on appeal after an evidentiary hearing;

"T." - transcript of evidentiary hearing;

"PC-S." - supplemental record on appeal after an vidientiary hearing;

"D-Ex." - Defense exhibits entered at the evidentiary hearing;

"S-Ex." - State exhibits entered at the evidentiary hearing.

REQUEST FOR ORAL ARGUMENT

Mr. Barwick has been sentenced to death. This Court has not hesitated to allow oral argument in other capital cases in a similar procedural posture. A full opportunity to air the issues through oral argument would be more than appropriate in this case, given the seriousness of the claims involved. Mr. Barwick, through counsel, urges that the Court permit oral argument.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Other Authorities

Constitutional Provisions

STATEMENT OF THE CASE

The Circuit Court of the Fourteenth Judicial Circuit, Bay County, entered the judgements of conviction and sentence under consideration. On April 28, 1986, a Bay County grand jury indicted Mr. Barwick for first-degree and related offenses. (R. 241-242) After a jury trial, Mr. Barwick was found guilty on November 24, 1986. (R. 652-653) That same day, the jury recommended a sentence of death, by a vote of 9-3, for the first-degree murder conviction. (R. 654) On January 30, 1987 the trial court sentenced Mr. Barwick to death. (R. 680-683)

The Florida Supreme Court, in an opinion dated June 15, 1989, reversed Mr. Barwick's conviction and directed that he be retried. See Barwick v. State, 547 So. 2d 613 (Fla. 1989); (R. 694-696) A second jury trial began on June 22, 1992. (R. 1171) Shortly thereafter, the trial court declared a mistrial. (R. 1183) A third jury trial began on July 6, 1992. (R. 1216-1218) Mr. Barwick was found guilty on July 9, 1992. (R. 1236-1238) On July 16, 1992, the jury recommended a sentence of death. (R. 962) On August 11, 1992, the trial court sentenced Mr. Barwick to death. (R. 1281-1292, 1295-1299)

On direct appeal, the Florida Supreme Court affirmed Mr. Barwick's convictions and sentences. See Barwick v. State, 660 So. 2d 685 (Fla. 1995). The United States Supreme Court denied certiorari on January 22, 1996. See Barwick v. Florida, 116 S. Ct. 823 (1995). On March 14, 1997, Mr. Barwick filed his initial

but incomplete postconviction motion in order to toll the time limits under AEDPA. Mr. Barwick filed his first amended postconviction motion on August 23, 2002. The Court subsequently entered an order granting an evidentiary hearing on claims I, II, III, and X. The trial court summarily denied the other claims, while reserving ruling on the cumulative error claim.

On April 8, 2005, Mr. Barwick filed his second amended motion for post conviction relief. On September 8, 2005 the trial court summarily denied the two additional claims in the second amended motion. On November 2-3, 2006, the trial court held an evidentiary hearing on claims I, II, III, and X. After both parties submitted written closing arguments the trial court denied Barwick's claims in a written order dated August 28, 2007. This appeal follows.

STATEMENT OF THE FACTS

Trial counsel was appointed to Mr. Barwick's case on February 5, 1992. (R. 1114) At the time, he was simultaneously representing another defendant charged with first degree murder as he was readying for Mr. Barwick's trial. (R. 1145, volumes preceding trial transcripts) Mr. Barwick's first retrial, which ended in a mistrial, began June 22, 1992, less than five months after trial counsel was appointed. The next retrial, which led to Mr. Barwick's instant death sentence, began on July 6, 1992, just two weeks later. Despite the fact that Mr. Barwick was facing a possible penalty of death, trial counsel waited to request a

confidential expert until June 5, 1992, approximately two weeks before the retrial began. (R. 1150)

Trial counsel essentially relied solely upon the work done by counsel for Mr. Barwick's first trial. As a result, he failed to gather any medical, mental health, school, or other records to develop Mr. Barwick's mitigation case. Additionally, rather than presenting his own mental health experts, trial counsel called or attempted to call experts who had not done any work on the case for several years, and did virtually nothing to prepare those experts. (R. 674; 737; 846; 1227)

Trial counsel compounded his failures by subsequently putting these experts on during the penalty phase without ever discussing with the experts what their possible testimony would be. (Id.) This resulted in several experts who testified to opinions that were contradictory to the opinions of the other experts called by the defense. Trial counsel also called several experts who had nothing but damaging opinions about Mr. Barwick. To make matters worse, when an expert would give an opinion that was beneficial to Mr. Barwick, trial counsel would move forward without allowing the expert to explain his opinion to the jury. (R. 748; 851-52; 882) Trial counsel's decision to call these experts was so detrimental to Mr. Barwick's case that the State did not cross-examine some of the experts, and the State did not even bother to call their own experts.

A complete record of Mr. Barwick's mental deficiencies,

learning disabilities, and psychological problems was never properly compiled by his trial counsel or presented in Mr. Barwick's defense.

The facts developed at trial and the facts developed at the evidentiary hearing are markedly different. The complete mitigation case for Mr. Barwick was presented at his evidentiary hearing, primarily through the testimony of defense mental health expert Dr. Hyman Eisenstein.[1] Mr. Barwick was born, unexpectedly, on September 29, 1966 in Chicago, Illinois. Mr. Barwick's mother, Emma Jean Barwick, had no knowledge of her pregnancy until a week prior to Mr. Barwick's birth. EH-T53. Mrs. Barwick neither sought nor received any prenatal care. Additionally, due to her apparent lack of knowledge or concern regarding the pregnancy, Mrs. Barwick continued taking birth control pills for the duration of the pregnancy and fetal development. Additionally, Mrs. Barwick abused pharmaceutical drugs throughout her pregnancy, which served to retard fetal development and increase the likelihood of significant brain damage. Emma Jean Barwick also reported falling down the stairs, while pregnant with Mr. Barwick. The father said that she wanted to abort the fetus. Horrifically, Mr. Barwick was abused before he even left his mother's womb. EH -T 53-54. This

[1] As is explained more fully *infra,* Dr. Eisenstein was presented with copious amounts of information relating to Mr. Barwick's severely deprived and abusive childhood, including background records and interviews with numerous family members, as well as with Mr. Barwick himself.

prenatal abuse suffered by Mr. Barwick contributed to the severely dysfunctional, mentally ill, and maladjusted individual evaluated by Dr. Eisenstein.

Ira Barwick, Mr. Barwick's father, habitually abused his wife and seven children, physically and sexually. The marital relationship between Emma Jean Barwick and Ira Barwick, a dominating and abusive ex-con, is best described as explosive and abnormal. Ira Barwick would fly into bitter rage fueled by alcohol which routinely ended with the emotional and physical abuse of his wife and children. Ira Barwick's continual rages and abuse created a continuous and palpable sense of fear in the Barwick household which affected Mr. Barwick, his siblings, and his mother. As a result, no one in the home ever felt safe, particularly Mr. Barwick. EH-T 62-64. Dr. Eisenstein explained,

> I think that probably there was such a huge fear factor which was very intermittent, you didn't know when the father was going to be off or what set the father off . . . The man was raging bull but you, it was unpredictable, and children growing up in this enviroment are fearful, are timid. They lack security and their responses are just way out of kilter because there's no, there's no stability, there's no, there's no consistency other than random terror. EH-T 64.

Dr. Eisenstein further explained that the fear and terror that perpetually permeated the Barwick household was not limited to the child actually receiving the beating. When explaining this pervasive fear Dr. Eisenstein observed:

> No, it was constant. I mean, I think that if one received beatings, the other ones were equally, they were equally affected. Um, and I don't think it was all

> that clear as to who received the beatings and why. I do know that Darryl received beatings because of his own deficiencies and he, and because of his own, because of all of his limitations. Id.

The thoroughly dysfunctional relationship between Ira and Emma Jean Barwick also involved numerous instances of sexual abuse. The children witnessed their father forcibly raping their mother on several occasions. Dr. Eisenstein testified:

> But the father also, the father also would fight over sex with the mother, and they saw, the children saw a very unhealthy situation in terms of the sexual conduct of the parents . . . They often saw the father fight with the mother, struggling over sex in public. They saw that the father was violent with the mother, raped the mother. So the entire situation, um, of the home was where the father was abusive, um, both in a physical sense, um, and also in a sexual sense and without regard to his conduct, without regard to anyone. He just carried on his behavior and would just do whatever he pleased doing and no one was really able to stop him. EH-T 59-60.

Although Ira and Emma Jean Barwick knew that their children witnessed many of their abusive, violent sexual encounters, they did nothing to try and correct or mitigate the situation. Rather, the Barwick parents blatantly failed to acknowledge what the children witnessed, and, more importantly, failed to place sexual contact in the proper context for the children. Unfortunately, this covert sexual abuse had its greatest impact on the youngest and most impressionable child in the household – Darryl Barwick.

The fact that observing their parents' sexual encounters had a profound impact on the cognitive and emotional development of

the Barwick children is undisputed. An exhaustive post-conviction social history investigation revealed that the children unknowingly *learned* from their parents' abnormal sexual relationship. As a result, Mr. Barwick and his siblings acted out the inappropriate and emotionally damaging behavior that they witnessed. Dr. Eisenstein testified regarding the effect of the inappropriate sexual contact between the siblings. Mr. Barwick, who was the youngest and most impressionable of the Barwick children, was the most obviously affected and was the most vulnerable victim of this sexual abuse from having routinely witnessed his parents engage in consensual and non-consensual sex.

Dr. Eisenstein testified that on one occasion, Mr. Barwick and his sister came upon an extensive collection of hard-core pornography hidden away in a loft of their backyard shed. After looking through the large collection of photographs depicting men and women in various sex acts, Mr. Barwick and his older sister began to emulate what they had seen in the pornographic images. When their "discovery" was exposed, Mr. Barwick and his sister were beaten severely. There was also evidence other incidents involving inappropriate sexual contact among the Barwick children. EH-T 61.

Though Ira Barwick physically abused all of his children, he clearly singled out Mr. Barwick for the most extreme physical and

emotional abuse.[2] EH-T 80. Perhaps because Mr. Barwick was "slow" and young, he suffered the most abuse. Dr Eisenstein cogently observed when questioned as to the birth order affecting the level of abuse suffered by Mr. Barwick:

> Well, it's like the trickle down theory, you know, the, everyone blames the youngest for all of the bad things that happen in the family. The vulnerability that Mr. Barwick had because of all of his deficiencies, together with the fact that, you know, they finally, put, blame the youngest, he was an easy target, an easy scapegoat, and I think that because of that he sufferred at a greater extent than the rest of them. You know, for everything I have said up to this point and the fact is that that pecking order, that does not mean necessarily just because you are the youngest you can't be successful. You know, it depends on, it depends on, it depends really what you do with, with your given situation. It also depends on the tools you have to deal with the situation and, of course, it deals with the type of encouragement and support that you are given, so those are all significant. Id.

Dr. Eisenstein testified that Mr. Barwick was abused, mocked, taunted, and tormented by his father, not only at home but also at work. EH-T 66-68. On several occasions, Mr. Barwick suffered significant injury to his head resulting from his father's physical rage. Except for one summer where Mr. Barwick worked at a local amusement park, his only form of employment was working for his father doing construction work, as was required of all the boys in the Barwick family. EH-T 67. As a child, and

[2] As explained more fully below, although some the physical abuse which Mr. Barwick suffered at the hands of his father was presented at trial, post-conviction testimony established that the actual extent **and effect** of this abuse was much more severe and pervasive than the picture presented by trial counsel.

later an adolescent, Mr. Barwick would work alongside his father, brothers, and whatever other men worked for Ira Barwick at the time. Mr. Barwick was viewed by his co-workers and family as a slow, dawdling kid who, unlike his brothers, could not function on the job. Due to his obvious developmental deficits, speech problems, learning disabilities, and aimless nature, Mr. Barwick quickly became the brunt of his father's physical and verbal abuse on the job – just as he was at home. Dr. Eisenstein analyzed the dysfunctional, abusive work situation as follows:

> Well, unfortunately, you know, the family business was concrete, concrete business and because of Darryl's limitations he really was not unable (sic) to perform job functions. So if you were able to go to the job site and at least perform the job, so you would at least receive, if you didn't receive negative criticism, at least you just went on doing your job, and you were able to exist. But unfortunately Darryl was unable to complete the task at hand, so not only did he have academic failing he had job failings, and the job failings only then made him more vulnerable for insults and for the, the level of emotional abuse that was meted out to him more than the other brothers because the other brothers at least were capable in terms of completing the required job task. EH-T 67.

Dr. Eisenstein went on to observe that Mr. Barwick was more vulnerable than his brothers because he was singled out for abuse at the job site and because the other brothers were more capable they escaped the level of abuse at the job site that Mr. Barwick suffered. EH-T 67-68.

On one occasion, Ira Barwick, for an unknown reason, picked up a piece of lumber with a protruding piece of "rebar" and struck Mr. Barwick on the left side of his head. Mr. Barwick fell

to the ground unconscious. EH-T 53. His father hit him with the large piece of metal and wood again, this time in the back of his head. EH-T 55. Such abuse happened at work on more than one occasion. The physical abuse was compounded by the emotional abuse Mr. Barwick suffered by his own father beating him in front of his peers. This repeated humiliation further diminished Mr. Barwick's minimal self-esteem. EH-T 67-68.

As aforementioned, while all of the Barwick siblings suffered abuse within the familial unit, Mr. Barwick is easily distinguished – physically, emotionally, and mentally – from his brothers and sisters. All of the family members refer to Mr. Barwick, in general terms, as the "odd one." This differentiation specifically relates to why Mr. Barwick turned out differently from his siblings and they have not been convicted of murder or any sexual violent crimes. Dr. Eisenstein extensively analyzed the differentiation between the siblings and perceptively observed:

> Well, there was such, there was so severe emotional abuse that Darryl received. If it wasn't the sexual abuse and physical abuse, the emotional abuse is finally the third prong that really just set him off. He was called stupid, idiot, illiterate dummy, jack ass (sic), son of a bitch , the milkman's son, because Darryl has blonde hair, ass hole (sic), girls, (sic) called whores, sluts. There's nothing, there was nothing that was held back from dehumanizing and the vulgar insulting and the entire psychological fabric of what we refer to as self esteem, (sic) one's make-up in terms of feeling self-worth, confidence, it was all shattered. It was all knocked out. EH-T 65.

Upon further questioning, Dr. Eisenstein observed that the

name calling was constant and that, although many have been called such names it was different for Mr. Barwick. The doctor testified:

> Well, the reason it is significant is because some of it has a kernel of truth, which makes it even more hurtful. He was illiterate until the tenth grade, he was stupid. Um, that certainly addresses some huge issues in terms of his academic failings, in terms of his language failings, in terms of the organic problems that I mentioned earlier, um, so when you zero in on, and you depict someone's failings and they are actually true, to a certain extent the level of humiliation and degradation is even greater, **so that was unique to Darryl**. Some of these problems - - (emphasis added). EH-T 66.

In addition to being the youngest, Mr. Barwick was easy to manipulate due to his learning disabilities and his being "slow natured." EH-T 80-81. This dynamic was not lost on Mr. Barwick, who remembers always feeling "like a pig [sic] in a cage, being tested and stuff." His older brothers would sometimes use Mr. Barwick as a buffer between their misdeeds and their father. They believed that they could decrease the likelihood of severe beatings by offering up Mr. Barwick up "as sacrifice." On one particular occasion Mr. Barwick "took the fall" for the actions of his older brother William. His father, in a drunken rage, ripped a post off of his bed and beat Mr. Barwick with it. The first blow was to Mr. Barwick's head causing him to, once again, lose consciousness. On his fall to the ground, Mr. Barwick hit the temple area of his head on the corner of the living room coffee table.

In addition to being beaten by his father, Mr. Barwick's mother would also engage in bizarre, excessive discipline of her youngest son. During the summers, when all seven of her children were at home, Emma Jean Barwick would "lock" the kids out of the house forcing them to stay in the back yard where the fences were locked. The Barwick children aptly referred to the back yard as the "prison." At lunchtime, Mrs. Barwick would leave them food at the back door. If they got thirsty while playing in the hot Florida sun, they were forced to drink from the hose which hung on the back side of the small concrete block house. If they interrupted their mother or left the confines of the back yard, Mrs. Barwick would tell their father, whom the kids referred to as "The Enforcer" because he would act on Mrs. Barwick's information. EH-T 61, 68-69. In addition to the private pain of being physically, emotionally, and sexually abused at home, Mr. Barwick had to endure the increasing demands of school, where he felt "stupid" and extremely awkward. EH-T 34, 69-75. A primary source of his uneasiness stems from his borderline intellectual functioning, which manifested itself early in Mr. Barwick's life. Id. Another primary source of his negative feelings toward school is the combination of his learning disabilities and speech pathology – an impairment described by most teachers and counselors as "severe," which made his speech "difficult to understand." Id.

Dr. Eisenstein's review of Mr. Barwick's school records and

reports from early psychological testing[3] indicated severe learning and adaptive deficits which undoubtedly hampered his ability to conform to the world around him. His grade school records indicate clear problems related to his maturity, speech impairments, and learning disabilities. Yet despite his well-established limitations and deficits, he was promoted year after year. This advancement was despite several semesters in junior high and high school where the only above average grades earned by Mr. Barwick were in physical education. Dr. Eisenstein, when discussing Mr. Barwick's long-standing disabilities, tellingly observed:

> So from the very early age he had difficulties, um, and he was passed on from grade to grade, he was never held back, but when one looks at the scores he basically had Ds, some Cs. There was some recommendation in remediation for both reading and mathematics, he was in a special class, but he was always promoted. There was never, the issues were really never addressed.
>
> I think the, the way he was able to get through school is that he was, he was, he was a jock and he was very good on the sports team, so he was in the school wrestling, as well as the football team, and I think basically as long as he, he did a decent job in sports and wrestling and football, he was just promoted through his school. They kept him in school without really addressing his issues. EH-T 70-71.

One of the issues never addressed by anyone in Mr. Barwick's life was the fact he suffered from brain damage. Dr. Eisenstein was clear

[3] As expounded upon more fully, *infra*, such records were apparently never gathered by any of Mr. Barwick's trial attorneys. As a result, the crucial mitigating information contained therein was never presented to his mental health experts at trial, or to the jury and judge who sentenced Mr. Barwick to death.

in diagnosing this long-standing problem. EH-T 33-36, 40-41, 73-75, 92. When directly asked about his opinion as to whether he detected the presence of brain damage, Dr. Eisenstein responded: "There's definitely indications of some brain impairment, brain damage. EH-T 73. Of great significance is how this brain damage affects his ability to interact and deal with other people. When questioned about how the brain damage affected Mr. Barwick's ability to deal with others, Dr. Eisenstein responded:

> Well, he's considered to be odd. He was considered to be somewhat asocial. He had difficulty relating to others. He was considered to be a little different. Um, agian the words that the father depict showed off all of these deficiencies, again with that kernel of truth, are indicative of the difficulties that he had socially relating, vocationally being able to function, and academically and intellectually being able to either process or deal with information in an efficient manner. EH-T 74-75.

Dr. Eisenstein went on to explain that the damage to the left temporal lobe of Mr. Barwick's brain particularly affected his interactions with the opposite sex in a sexually charged situation. Dr. Eisenstein compared his ability to modulate his behavior as there being no control button on a thermostat. EH-T 75. Dr. Eisenstein testified that in a sexually charged or emotionally charged situation, Mr. Barwick could not deal with the situation in a socially acceptable manner and is unable to control his behavior or figure out how to deal with the situation. Therefore, his responses end up being exaggerated and out of control. EH-T 75-76.

Anger and frustration would particularly result in an uncontrollable situation for Mr. Barwick. As testified to by Dr. Eisenstein, Mr. Barwick reported that before and during periods of anger, he has always felt an intense “tingling” sensation which originates in his face and envelopes his entire body. Because it is consistently tied to explosive angry outbursts, the tingling indicates the possibility of frontal lobe damage. Notably, after a period of intense anger, he had no recollection of exactly what occurred. EH-T 91-92.

Mr. Barwick’s angry outburst and uncontrollable behavior directly relate to the Intermittent Explosive Disorder, as diagnosed by Dr. Eisenstein, and the aforementioned tragic brain damage and horrific abuse. Mr. Barwick was diagnosed by Dr. Eisenstein with an Intermittent Explosive Disorder, an Axis One major mental disorder. EH-T 83, 89. Dr. Eisenstein explained in part the effect this disorder had upon Mr. Barwick when he observed:

> It’s my clinical opinion that because of the trauma, the sexual, physical, emotional trauma, the way he dealt with it and the father’s response, the father also had this (sic) explosive tendencies. The learned behavior of the blocking of the sexual, highly sexual nature behavior (sic), and holding in the humiliation, the insults, which led to a tremendous amount of rage and anger, uncontrolled rage and anger, and therefore the impulses were basically there. There was the inability to control that. It was disproportionate to, obviously to any situation. And, um, it took on a form that he was unable to control. That’s (A).
>
> The second was the degree of aggressiveness expressed during the episode is grossly out of proportion. Well, that’s clear. There were no

> precipitating psycho-social stresstors (sic) per se that could explain the nature of the act. **The act was not volitional. The act was not premeditated** in the sense that he wanted to do this. The act was done because of all the unresolved trauma, the blocking, the unconscious learned behavior that he saw from his father, the learned helplessness that he saw, how he behaved. **It was a repetition where unfortunately the victim became the perpetrator.** EH-T 84-85.

(Emphasis added).

Dr. Eisenstein was eventually able to translate all the information he reviewed and his evaluation into three powerful statutory mitigators. Dr. Eisenstein rendered his opinion that Mr. Barwick was operating under an extreme mental and emotional disturbance, was substantially unable to conform his conduct to the law, and his mental age and immaturity rendered the age mitigator applicable. Dr. Eisenstein pointedly explained when discussing the fact Mr. Barwick was unable to conform his conduct to the law that the behavior was not exhibited by someone that was "consciously, deliberately, planning and thinking and wanting and knowingly committing the act." EH-T 99-100. This lack of volition and premeditation was present because of the extreme emotional and mental disturbance that Mr. Barwick was suffering from. Dr. Eisenstein succinctly summarized the contributing factors when he observed:

> Well, Mr. Barwick meets the criteria for extreme mental and emotional disturbance because he, he's been traumatized, physical, sexual, emotional abuse, history of brain impairment, history of learning disabilities, where there's both soft and hard neuropsychological and neurological findings, numerous head beatings, and

behavior that takes on disproportionate, and that's what extreme is, disproportionate levels in terms of the dysfunction, the impairment. Um, obviously somebody with normal emotional and mental functioning would not commit such acts. It only takes the extreme form of emotional or mental impairment that could explain and understanding as to what happened, so it really meets the criteria. EH-T 98-99.

The facts of the guilt/innocence phase of the trial was stated by this Court as follows:

> 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 Wendt's 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. (Footnote omitted). 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 ocurred 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 commiting 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).

SUMMARY OF ARGUMENT

Mr. Barwick was denied an adequate adversarial testing at the sentencing phase of his trial, in violation of the Sixth, Eighth, and Fourteenth Amendments to the United States Constitution. Trial counsel was ineffective for not presenting copious mitigation that was present to establish three powerful statutory mitigators, that Mr. Barwick was suffering from extreme emotional distress, that he could not substantially conform his conduct to the law, and that his mental age rendered the age mitigator appropriate.

Furthermore, Mr. Barwick was deprived of his right to a reliable adversarial testing due to trial counsel's ineffective assistance during the guilt/innocence phase of Mr. Barwick's trial, in violation of Mr. Barwick's rights to due process and equal protection under the Fourteenth Amendment to the United States Constitution, as well as his rights under the Fifth, Sixth and Eighth Amendments. As a result, confidence is undermined in the reliability of the jury's verdict of guilty. Examples of this ineffectiveness included, but were not limited to, the fact that

trial counsel failed to adequately cross-examine an eyewitness and failed to utilize a medical examiner's investigative report impeaching testimony regarding the allegations of attempted rape.

Mr. Barwick was deprived of his right to a reliable adversarial testing due to the state's failure to disclose critical exculpatory evidence which was never presented to the jury and highly improper and prejudicial prosecutorial misconduct, in violation of Mr. Barwick's rights to due process and equal protection under the Fourteenth Amendment to the United States Constitution, as well as his rights under the Fifth, Sixth and Eighth amendments. This is argued alternatively with the ineffective assistance of counsel claims due to the uncertainty of whether certain items were disclosed to defense counsel. Defense counsel is deceased and was unavailable for testimony at the evidentiary hearing.

Mr. Barwick's trial court proceedings were fraught with procedural and substantive errors which cannot be harmless when viewed as a whole since the combination of errors deprived him of the fundamentally fair trial guaranteed under the Sixth, Eighth, and Fourteenth Amendments. Mr. Barwick's arguments and claims entitle him to relief both individually and cumulatively.

The general jury qualification procedure employed by the Bay County Circuit Court deprived Mr. Barwick of his rights under the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution and corresponding provisions of Florida law.

This procedure constitutes fundamental error, and counsel was ineffective for failing to litigate this issue. This claim was brought for state exhaustion purposes as a predicate for filing Mr. Barwick's federal habeas petition , if necessary.[4]

STANDARD OF REVIEW

The constitutional arguments advanced in this brief present mixed questions of fact and law. As such, this Court is required to give deference to the factual conclusions of the lower court. The legal conclusions of the lower court are to be reviewed independently. See Ornelas v. United States, 517 U.S. 690, 116 S. Ct. 1657, 134 L.Ed.2d 911 (1996); Stephens v. State, 748 So. 2d 1028 (Fla. 1999).

ARGUMENT I

MR. BARWICK WAS DENIED AN ADEQUATE ADVERSARIAL TESTING AT THE SENTENCING PHASE OF HIS TRIAL, IN VIOLATION OF THE SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

A. The Legal Standard

As explained by the United States Supreme Court, an ineffective assistance of counsel claim is comprised of two components:

> First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment. Second, the defendant must show

[4] Arguments VI - XI are argued more extensively in the state habeas petition being filed simultaneously with this initial brief and therefore will not be summarized herein.

> that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable.

Williams v. Taylor, 120 S. Ct. 1495, 1511 (2000), quoting Strickland v. Washington, 466 U.S. 668, 687 (1984).

In Williams, the Supreme Court found deficient performance where counsel failed to prepare for the penalty phase of a capital case until a week before trial, "failed to conduct an investigation that would have uncovered extensive records," "failed to seek prison records," and "failed to return phone calls of a certified public accountant." 120 S. Ct. at 1514. As Justice O'Connor succinctly explained in her concurring opinion, "trial counsel failed to conduct investigation that would have uncovered substantial amounts of mitigation," thereby resulting in a "failure to conduct the requisite, diligent investigation" required by the Sixth Amendment. Id.

The Court elaborated on the need of trial counsel to conduct a diligent investigation in the landmark case of Wiggins v. Smith, 123 S. Ct. 2527 (2003). In Wiggins, the Court described the role a reviewing court must play in evaluating counsel's the reasonableness of counsel's investigation:

> [A] court must consider not only the quantum of evidence already known to counsel, but also whether the known evidence would lead a reasonable attorney to investigate further. Even assuming [trial counsel] limited the scope of their investigation for strategic reasons, *Strickland* does not establish that a cursory investigation automatically justifies a tactical decision with respect to sentencing strategy. Rather, a reviewing court must consider the reasonableness of the investigation said to support that strategy.

Wiggins, 123 S. Ct. at 2538.

More recently, in Rompilla v. Beard, 125 S.Ct 2456, 2466 (2005), the Supreme Court referenced clearly established, longtime ethical guidelines in support of its position on effective representation:

> 'It is the duty of the lawyer to conduct a prompt investigation of the circumstances of the case and to explore all avenues leading to facts relevant to the merits of the case and the penalty in the event of conviction. The investigation should always include efforts to secure information in the possession of the prosecution and law enforcement authorities. The duty to investigate exists regardless of the accused's admissions or statements to the lawyer of facts constituting guilt or the accused's stated desire to plead guilty.' 1 ABA Standards for Criminal Justice 4-4.1 (2d ed. 1982 Supp.).

(Emphasis added)(note omitted).

Additionally, as has been recognized by the Supreme Court and numerous lower courts, absolutely no tactical motive can be ascribed to an attorney who fails to properly investigate or prepare, or whose omissions are based on ignorance. See, e.g., Kimmelman v. Morrison, 477 U.S. 365 (1986); Brewer v. Aiken, 935 F.2d 850 (7th Cir. 1991); Kenley v. Armontrout, 937 F.2d 1298 (8th Cir. 1991).

A capital defendant is entitled to expert mental health assistance when the state makes his or her mental state relevant to guilt-innocence or sentencing. Ake v. Oklahoma, 470 U.S. 68 (1985). Florida law made Mr. Barwick's mental condition relevant to both guilt/innocence and sentencing in the following areas:

(a) specific intent; (b) statutory mitigating factors; (c) aggravating factors; and (d) non-statutory mitigating factors. What is required is an "adequate psychiatric evaluation of [the defendant's] state of mind." See Blake v. Kemp, 758 F.2d 523, 529 (11th Cir. 1985). In this regard, there exists a "particularly critical interrelation between expert psychiatric assistance and minimally effective representation of counsel." See United States v. Fessel, 531 F.2d 1278, 1279 (5th Cir. 1976) (quoting United States v. Edwards, 488 F.2d 1154, 1163 (5th Cir. 1974)). When mental health is at issue, as it is here, there is a duty to conduct proper investigation into the defendant's mental health background, and to assure that the defendant is not denied a professional and professionally conducted mental health evaluation. See State v. Michael, 530 So. 2d 929 (Fla. 1988). A qualified mental health expert serves to assist the defense "consistent with the adversarial nature of the fact-finding process." See Smith v. McCormick, 914 F.2d 1153, 1157 (9th Cir. 1990). Under Florida law, an indigent defendant is entitled to an appointed mental health expert to assist in the preparation of a defense. See Garron v. Bergstrom, 453 So. 2d 405 (Fla. 1984); Hall v. Haddock, 573 So. 2d 149 (Fla.1st DCA 1991).

B. Failure to Present Mitigation

Mr. Barwick's counsel for his retrial, Robert Adams,[5] failed

[5] Robert Adams is now deceased. Mr. Adams was not trial counsel for Mr. Barwick's original trial, which was reversed and

in his duty to provide effective legal representation for his client at the penalty phase. There was a wealth of mitigation that trial counsel never presented because his inadequate investigation failed to discover it. As a result, in the sentencing phase of Mr. Barwick's trial, relevant statutory and non-statutory mitigation was never heard by the judge or jury, both of whom are sentencers under Florida law. See Espinosa v. Florida, 112 S. Ct. 2926 (1992). Compounding this error was trial counsel's failure to supply various experts with existing and reliable information relevant to Mr. Barwick's's mental state at the time the crime was committed. Worse still, due to inadequate investigation and preparation, trial counsel ineffectively chose to present evidence in the penalty phase that damaged Mr. Barwick's case. Trial counsel also failed to present testimony, both lay and expert, to establish that Mr. Barwick's mental age at the time of the murder was well below his chronological years and a statutory mitigating factor.

Thus, an overall view of Mr. Barwick's penalty phase reveals a trial attorney who was unprepared to deal with the complicated issues that arise during the sentencing phase of a capital case. These failures by trial counsel amounted to deficient performance leading to the ultimate prejudice to Mr. Barwick – a death sentence which he would not have received had the true mitigation

---

remanded for the trial which is the subject of the instant motion.

picture been presented to the judge and jury in his retrial. Had the evidence presented at Mr. Barwick's post-conviction evidentiary hearing been presented to the sentencers, the results of the proceeding would have been different. See Strickland, 466 U.S. at 694.

Unfortunately, the true picture of Mr. Barwick's extensive mitigation and tragic home-life – including years of sexual, physical, and mental abuse – was never fully presented to his sentencers. Additionally, the clear record of Mr. Barwick's mental deficiencies, learning disabilities, and psychological problems was never properly compiled by his trial counsel or presented in Mr. Barwick's defense. As a result, the jury and judge who sentenced him to death never had a full and accurate idea of the person Mr. Barwick was and the life that he led. Because his trial counsel failed to present this extensive information to his sentencers, Mr. Barwick was deprived of a fair and constitutional trial.

Due to his lack of preparation, trial counsel was unequipped to defend Mr. Barwick's retrial. Trial counsel was appointed to the case on February 5, 1992. (R. 1114) At the time, he was simultaneously representing another defendant charged with first degree murder as he was readying for Mr. Barwick's trial. (R. 1145, volumes preceding trial transcripts) Mr. Barwick's first retrial, which ended in a mistrial, began June 22, 1992, less than five months after trial counsel was appointed. The next

retrial, which led to Mr. Barwick's instant death sentence, began on July 6, 1992, just two weeks later. Despite the fact that Mr. Barwick was facing a possible penalty of death, trial counsel waited to request a confidential expert until June 5, 1992, approximately two weeks before the retrial began. (R. 1150)

Trial counsel essentially relied solely upon the work done by counsel for Mr. Barwick's first trial. As a result, he failed to gather any medical, mental health, school, or other records to develop Mr. Barwick's mitigation case. Additionally, rather than presenting his own mental health experts, trial counsel called or attempted to call experts who had not done any work on the case for several years, and did virtually nothing to prepare those experts. (R. 674; 737; 846; 1227)

Trial counsel compounded his failures by subsequently putting these experts on during the penalty phase without ever discussing with the experts what their possible testimony would be. (Id.) This resulted in several experts who testified to opinions that were contradictory to the opinions of the other experts called by the defense. Trial counsel also called several experts who had nothing but damaging opinions about Mr. Barwick. To make matters worse, when an expert would give an opinion that was beneficial to Mr. Barwick, trial counsel would move forward without allowing the expert to explain his opinion to the jury. (R. 748; 851-52; 882) Trial counsel's decision to call these experts was so detrimental to Mr. Barwick's case that the State

did not cross-examine some of the experts, and the State did not even bother to call their own experts.

An overall view of Mr. Barwick's penalty phase reveals a trial attorney who was unprepared to deal with the complicated issues that arise during the sentencing phase in a capital case. Mr. Barwick's sentence of death is the resulting prejudice. Thus, there is an eminently reasonable probability that the results of the sentencing phase of the trial would have been different if the evidence presented at the post-conviction evidentiary hearing had been presented to the sentencer. See Strickland, 466 U.S. at 694. The key aspect of the penalty phase is that the sentence be individualized, focused on the particularized characteristics of the individual defendant. See Penry v. Lynaugh, 488 U.S. 74 (1989); Gregg v. Georgia, 428 U.S. 153 (1976). Sadly, this did not occur in Mr. Barwick's case. Instead, the judge and jury heard a fragmented, impeaching, inconsistent, sloppy penalty phase defense which utterly failed to present Mr. Barwick's full mitigation case. Mr. Barwick was unconstitutionally prejudiced as a result.

For example, at the penalty phase of Mr. Barwick's trial, counsel attempted to focus on the physical abuse Mr. Barwick suffered at the hands of his father. In support, he called two of Mr. Barwick's sisters, one brother, his father, and his mother to testify regarding the abuse. (R. 635, 649, 724, 822, 856) Trial counsel also called a neighbor, Sheila Morgan, to testify

regarding the abuse. (R. 815) However, their testimony was incomplete. Had trial counsel conducted an adequate investigation, he would have discovered that the abuse suffered by Mr. Barwick went far beyond the physical abuse touched upon by these witnesses and encompassed the tragic picture of physical, sexual, and emotional abuse detailed above.

Trial counsel's failure to adequately investigate mitigation and prepare for the penalty phase rendered futile his meager attempts to show the jury that Mr. Barwick was abused as a child. For example, during closing arguments defense counsel commented:

> Now, we don't know and no doctor can tell you what effect [the abuse] had on him. All we learned was it may have been the cause of his problems. It could be part of the cause and if the other children don't have it, they're blessed.

(R. 945) Trial counsel also attempted to connect Mr. Barwick's history of abuse to the circumstances of his offense during his questioning of several experts, but this again bore little success. (R. 687; 748-49; 784; 851-52; 10. 881-82) Most of the experts called at trial agreed that had Mr. Barwick suffered physical abuse by his father and that the abuse generally affected his behavior; most also agreed that Mr. Barwick had some sort of sexual difficulties. Nonetheless, because counsel had not properly investigated, he was unable to provide his experts with sufficient information to explain how Mr. Barwick's life history, including the abuse, led to the murder. This is in complete contrast to the evidence produced through a full investigation

and complete neuro-psychological evaluation as done in post-conviction and detailed above. Similarly, counsel failed to present the extensive evidence of extreme, ongoing physical abuse and the sexual abuse to the sentencers through lay and expert testimony.

During closing arguments, the State capitalized on trial counsel's failure to make the connection between the abuse and the murder:

> You are here to recommend a sentence as to his murder. **His impulsive behavior is to the sexual acts, not the murder**.
>
> * * *
>
> He is impulsive. He cannot conform his conduct. What conduct is he talking about? Not murder. The murder itself. The sexual offense.
>
> * * *
>
> We're not going to sentence him on the attempted rape, that he could not control his conduct. Even if you believe those experts were not talking about that so do not be confused. Were talking about the murder.
>
> * * *
>
> Your job here today is to make a determination as to whether you are going to recommend to the judge to impose death. **But remember, when you are talking about it, there's no inability to control his killing desire. Just his sexual desires.** That's what they're talking about.

(R. 926-27) Had trial counsel adequately investigated, the State would not have been able to effectively make this argument to the jury. Mr. Barwick was clearly prejudiced.

The prejudice suffered by Mr. Barwick is best demonstrated in the trial court's sentencing order. The trial court rejected two strong statutory mitigating circumstances based upon the testimony of the experts called by trial counsel: (1) that the murder was committed while Mr. Barwick was under the influence of extreme mental or emotional disturbance and (2) that the capacity of Mr. Barwick to appreciate the criminality of his conduct or conform his conduct to the requirements of the law was substantially impaired. (R. 1287; 1289) The trial court also found that the evidence presented relevant to these statutory mitigating circumstances was not even enough to rise to the level of nonstatutory mitigating circumstances. (R. 1291) Lastly, the trial court found that the abuse Mr. Barwick suffered did not amount to mitigation at all:

> While there are doubtless numerous cases where the abuse received by children influence their actions in adult life and result in or contribute to criminal behavior. **The Court does not find in this case that the abuse received by the defendant as a child is a mitigating circumstance**.

(R. 1290-91) Had trial counsel properly investigated, the experts would have had sufficient information to connect the abuse and Mr. Barwick's mental deficiencies, to the murder, thereby establishing the mitigation rejected by the trial court as Dr. Eisenstein did in post-conviction.

At the evidentiary hearing, Dr. Eisenstein's testimony cogently explained the connection between the abuse Mr. Barwick

suffered and the murder. In addition to trial counsel ineffectiveness for failing to present evidence of the physical, sexual, and mental abuse that influenced Mr. Barwick, counsel was further ineffective for failing to explain how and why this abuse had a more significant and severe affect on Mr. Barwickl than it did on his siblings.

Trial counsel failed to explain to the jury how Mr. Barwick's personality deficits distinguished him from the rest of his siblings. Trial counsel called five of Mr. Barwick's family members to testify regarding him: two sisters (R. 635; 822), one brother (R. 649), his mother (R. 856), and his father. (R. 724) However, the sentencers were never told that Mr. Barwick was considered the "odd" member of the family, that he did not act or behave like the other children, and that most members of his family believed that he had behavior deficits long before he came into contact with the criminal justice system.

This information was essential and should have been provided to the sentencers. The State capitalized on trial counsel's failure to bring this information to the jury's attention. During the cross-examination of sister Lovie Barwick, the State pointed out that the other siblings had experienced the same abuse as Mr. Barwick but had not committed murder. (R. 644-46) The State did the same during the cross-examination of his brother, William Barwick, as well as during the cross-examination of his father, Ira Barwick. (R. 660-61; 736) Clearly, the State was trying to

downplay the significance of the abuse and convince the jury that Mr. Barwick was no different that the rest of his siblings.

The State further capitalized on trial counsel's ineffectiveness during the penalty phase closing arguments:

> The only way I can deal with that and give you any sort of criteria to weigh this man's physical child abuse and rearing is to bring out the qualities of the other kids who equally suffered the physical beatings.
>
> And it may have sounded awfully dumb and stupid. Well, gee, did anybody else in your family go out and rape somebody? Did anybody else in your family go out and murder somebody? No, they didn't.

(R. 930) Testimony regarding Mr. Barwick's odd behavior growing up would have taken the wind out of the State's argument by showing that he was not affected like the other siblings because he was mentally (and emotionally) different that the rest of the Barwick children.

The greatest prejudice Mr. Barwick suffered from trial counsel's failure to present this testimony is found in the trial court's sentencing order. The trial court also relied on the fact that his siblings had not committed crimes when it rejected outright the child abuse as a non-statutory mitigator:

> The evidence establishes that the defendant was abused as a child by his father and grew up in a dysfunctional family. The evidence also established that the defendant's siblings were likewise abused and they apparently grew up to be responsible persons. Two of the siblings had the unfortunate experience of being compelled to testify against their brother. While there are doubtless numerous cases where the abuse received by children influences their actions in adult life and result in or contribute to criminal behavior, the Court does not find in this case that the abuse received by

the defendant as a child is a mitigating circumstance. (R. 1290-91) Testimony regarding Mr. Barwick's odd behavior, stretching back to his earliest childhood years, would have provided the sentencers with an explanation for why the abuse affected him differently than his siblings.

At the evidentiary hearing, Dr. Eisenstein testified that Mr. Barwick exhibited "odd" behavior from his earliest childhood. See supra. Dr. Eisenstein also testified regarding the relevance of this behavior, the fact that this behavior stems from Mr. Barwick's mental deficiencies, and how these deficiencies combined with the abuse he suffered predestined his actions on the day of the murder. The same expert testimony established both statutory and non-statutory mitigation, something trial counsel could have done had he represented Mr. Barwick effectively. All of this testimony was available at the time of trial and should have been presented to the judge and jury. Mr. Barwick was clearly prejudiced by trial counsel's failure to place this information before the sentencers.

Trial counsel's ineffective investigation – that resulted in the sentencers not hearing testimony regarding the sexual abuse Mr. Barwick suffered, as well as the sentencers not hearing testimony regarding hiss odd behavior from early childhood – also affected the opinions and conclusions formed by the experts who evaluated him. The same information that the jury never heard, the mental health experts never heard, despite the fact that it

was relevant to Mr. Barwick's mental state at the time the crime was committed. As a result of counsel's ineffective investigation and deficiencies in preparing his mental health experts, every psychiatric evaluation of Mr. Barwick was inadequate. This violated his constitutional right to adequate mental health assistance. See Ake and Blake, *supra*. Mr. Barwick was prejudiced by counsel's failure.

Trial counsel failed to supply the experts with information relevant to Mr. Barwick's mental state. For example, trial counsel called Dr. Harry McClaren to testify. Dr. McClaren had testified in the first trial, yet trial counsel did not provide any new materials to Dr. McClaren before he testified.

Consequently, Dr. McClaren also relied on Mr. Barwick's self-report, including his version of an earlier rape that was the basis of his prior felony conviction. (R. 746) Mr. Barwick's version of the previous rape, however, was totally inaccurate. In fact, in his version to Dr. McClaren, he painted himself in a much worse light that the actual facts show. Trial counsel never provided Dr. McClaren with the victim's version of that rape, the same version she testified to in the penalty phase of Mr. Barwick's's retrial. The victim's version of the events, the accurate version, does not show him to be the cold and violent individual that Dr. McClaren thought he was when he conducted the examination. Mr. Barwick was prejudiced by trial counsel's failure to ensure that Dr. McClaren receive an accurate version

of the rape. Of all the experts who testified, Dr. McClaren's diagnosis presented the most damaging testimony to the jury. Dr. McClaren's diagnosis relied heavily on Mr. Barwick's self-report, but due to his mental deficits, he was unable to provide an accurate self-report to Dr. McClaren, which makes Dr. McClaren's testimony inaccurate at best. During closing arguments, the State heavily relied on Dr. McClaren's testimony in arguing for a death sentence. The resulting prejudiced is a death sentence which was based on inaccurate information.

The inaccuracy of Mr. Barwick's version of the prior felony, however, is more significant than the impact it had on Dr. McClaren's testimony. His version of the rape has almost no basis in fact or reality. The inaccuracy of this self-reporting is relevant to several different mental health diagnosis, including many that were testified to by the experts: learning disabilities, mental retardation, post-traumatic stress disorder, memory problems, schizoid thinking, and disassociative behavior. The prejudiced suffered is the resulting death sentence, which was based on inaccurate information.

At the evidentiary hearing, Dr. Eisenstein explained how the diagnoses from the trial experts were inaccurate due to the fact that trial counsel failed to supply them with readily available information, including the information detailed above. Dr. Eisenstein clearly established that Mr. Barwick was suffering from Intermittent Explosive Disorder when the murder occurred;

that this disorder combined with other existing mental deficits resulted in his actions on the day of the murder; and, that this diagnosis was based on information readily available to trial counsel had he only conducted an effective investigation. See supra.

Yet another result of trial counsel's inadequate investigation and preparation was trial counsel's decision to place before the jury damaging testimony that severely undermined the sentencing phase. Trial counsel's decision to do so was even more egregious considering that much of the damaging testimony was inaccurate.

During the penalty phase of Mr. Barwick's retrial, the defense called Dr. Lawrence Annis to testify. (R. 674) Dr. Annis had seen him six years earlier, before his first trial, and did not see him again before testifying. (R. 678) Dr. Annis had practically nothing mitigating to testify to in the penalty phase. In fact, at the beginning of his testimony, Dr. Annis commented that he was unsure which side (the prosecution or the defense) wanted him to testify the most. (R. 677) Dr. Annis testified that Mr. Barwick suffered from no major mental disorder, defect, or disease. (R. 684; 688) To make matters worse, during cross-examination, the State elicited from Dr. Annis that Mr. Barwick met the criteria for anti-social personality disorder. (R. 706) The State also elicited from Dr. Annis that on the day of the murder, Mr. Barwick was not acting

under the influence of an extreme mental or emotional disturbance, and that his capacity to appreciate the criminality of his conduct or to conform his conduct to the requirements of the law was not impaired. (R. 716)

There was no valid reason for trial counsel to call Dr. Annis. Dr. Annis presented nothing but negative testimony regarding Mr. Barwick. Worse still, Dr. Annis's testimony was erroneous because trial counsel failed to supply the doctor with available evidence that would have established that Mr. Barwick did suffer from a major mental disorder or defect at the time of the murder, that he did not meet the criteria for anti-social personality disorder, and that he was acting under the influence of an extreme mental or emotional disturbance, and that his capacity to appreciate the criminality of his conduct or to conform his conduct to the requirements of the law was impaired.

Mr. Barwick was clearly prejudiced by trial counsel's decision to call Dr. Annis. Trial counsel's decision resulted in the sentencers receiving inaccurate testimony to weigh in deciding the appropriate sentence. Trial counsel's decision also denied Mr. Barwick the benefit of the three statutory mitigating circumstances established by Dr. Eisenstein's testimony and as demonstrated by the trial court's sentencing order. (R. 1287-89) In fact, the trial court specifically relied on Dr. Annis's testimony in denying the statutory mitigator that Mr. Barwick was acting under the influence of an extreme mental or emotional

disturbance. (R. 1287-88) During closing arguments, the State capitalized on trial counsel's failure by relying on Dr. Annis's testimony to argue that Mr. Barwick was not acting under the influence of an extreme mental or emotional disturbance on the day of the murder, and to argue that his capacity to appreciate the criminality of his conduct or to conform his conduct to the requirements of the law was not impaired. (R. 923-925) The clear prejudice lies in the death sentence itself, which was based on inaccurate and misleading information.

Like Dr. Annis, Dr. McClaren could provide scant testimony to the jury regarding mitigation. Dr. McClaren, however, provided a large amount of negative testimony. This testimony was utilized by the State in arguing for death, as well as by the trial court to justify a death sentence. During both direct and cross-examination, Dr. McClaren testified that it was possible that Mr. Barwick was exaggerating or fabricating information during the clinical interviews. (R. 746; 758-59) Dr. McClaren also testified that Mr. Barwick was of average intelligence. (R. 747-48) Trial counsel, as well as the State, also elicited from Dr. McClaren that Mr. Barwick had an anti-social personality disorder. (R. 752; 762) Lastly, during cross-examination, the State elicited from Dr. McClaren that on the day of the murder, Mr. Barwick was not acting under the influence of an extreme mental or emotional disturbance, and that his capacity to appreciate the criminality of his conduct or to conform his conduct to the requirements of

the law was not impaired. (R. 767-68)

Like Dr. Annis, there was no valid reason for trial counsel to call Dr. McClaren. Dr. McClaren testified to nothing truly mitigating for Mr. Barwick. Like Dr. Annis's testimony, Dr. McClaren's testimony was erroneous because trial counsel failed to supply the doctor with available evidence which would have established that Mr. Barwick suffered from a mental disorder at the time of the murder, that he did not meet the criteria for anti-social personality disorder, that he was acting under the influence of an extreme mental or emotional disturbance on the day of the murder, that his capacity to appreciate the criminality of his conduct or to conform his conduct to the requirements of the law was impaired, and that his mental and emotional age qualified him for the statutory age mitigator.

The prejudice to Mr. Barwick from trial counsel's decision to call Dr. McClaren is the same as the prejudice from trial counsel's decision to call Dr. Annis. Trial counsel's decision resulted in the sentencers receiving inaccurate testimony to weigh in deciding Mr. Barwick's sentence. Trial counsel's decision also denied Mr. Barwick the benefit of the three statutory mitigating circumstances established by Dr. Eisenstein's testimony and demonstrated by the trial court's sentencing order. (R. 1287-89) Like the testimony of Dr. Annis, the trial court specifically relied on Dr. McClaren's testimony in denying the statutory mitigator that Mr. Barwick was acting under the

influence of an extreme mental or emotional disturbance. (R. 1288) During closing arguments, the State capitalized on trial counsel's error by arguing that he was not acting under the influence of an extreme mental or emotional disturbance on the day of the murder, and to argue that his capacity to appreciate the criminality of his conduct or to conform his conduct to the requirements of the law was not impaired. (R. 923-925) Again, the clear prejudice lies in the death sentence itself, which was based on inaccurate and misleading information.

Another example of trial counsel's ineffectiveness in calling experts who had little or nothing beneficial to say was counsel's decision to call Dr. Clell Warriner. (R. 828) Dr. Warriner had warned trial counsel ahead of time that his testimony would not assist Mr. Barwick's case. (R. 838) Despite this specific warning, trial counsel still called Dr. Warriner. Once the testimony began, it was clear that Dr. Warriner's warning to trial counsel was accurate. Dr. Warriner provided no testimony that had mitigating value to Mr. Barwick. Dr. Warriner, however, did have plenty of negative information for the jury. Trial counsel elicited from Dr. Warriner on more than one occasion that Mr. Barwick was a very dangerous individual, at one point referring to him as "extraordinarily dangerous." (R. 840, 841, 844, 845) **Trial counsel** also elicited from Dr. Warriner **his opinion** that Mr. Barwick had committed other similar criminal

acts that he had not been caught for. (R. 839)

Trial counsel's decision to call Dr. Warriner was clear ineffectiveness that prejudiced Mr. Barwick. Dr. Warriner's testimony was of so little value to the Defense and so beneficial to the prosecution, that the State did not even bother to cross-examine him. The State capitalized on Dr. Warriner's testimony during closing arguments in several ways: reminding the jury of Dr. Warriner's conclusion that Mr. Barwick was dangerous (R. 914); arguing to the jury in support of aggravating circumstances (R. 914; 920-21); and, arguing to the jury that they should not find certain facts to be mitigating. (R. 927) The prejudice lies in the jury's unanimous death recommendation which was based on inaccurate and misleading information.

Trial counsel also failed to present testimony to establish that Mr. Barwick's mental age and maturity at the time of the murder was well below his chronological years. Mr. Barwick was 19 when the murder occurred but his mental and emotional age fell well below that of an adult. At the evidentiary hearing, Dr. Eisenstein's testimony clearly established Mr. Barwick's mental and emotional age at the time of the murder mitigated his responsibility for the crime and met the statutory requirements for such. EH-T 97-98. Dr. Eisenstein perceptively noted that Mr. Barwick was functioning in the 12 to 14 year old range emotionally and linguistically, and further stated, "Clearly, he does not have the, he does not have the maturity level that's

required to, to be able to make decisions and to be able to make mature decisions and control impulses, um, in a, in a healthy and law-abiding manner." EH-T 98.

Trial counsel was ineffective for not investigating and presenting this testimony to the sentencers, and Mr. Barwick was prejudiced by trial counsel's failure. The trial court, at the request of the defense, instructed the jury on the mitigating factor regarding the age of the defendant at the time of the crime. (R. 958) Trial counsel, however, presented nothing for the sentencers' consideration regarding mental or emotional age at the time of the crime. The State capitalized on trial counsel's failure during closing arguments by pointing out to the jury that Mr. Barwick's chronological age at the time of the murder (19) made him an adult and that adults are presumed responsible for their actions. (R. 922-23) Trial counsel presented nothing to challenge the State's argument due to the fact that trial counsel, for no apparent reason, failed to investigate or present this mitigation. The results of trial counsel's failures are also seen in the sentencing order where the trial court rejects age as a mitigator:

> There is no evidence that his age interfered with his ability to cope with the responsibilities of life.

(R. 1288-89). Had trial counsel acted effectively and presented information regarding Mr. Barwick's mental age and immaturity, the trial court would have been required to consider it in

determining whether Mr. Barwick's age at the time of the murder was mitigating. See Hurst v. State, 819 So. 2d 689 (Fla. 2002); Mahn v. State, 714 So. 2d 391 (Fla. 1998). The ultimate prejudice is a death sentence based on inaccurate and incomplete information.

The humanity of a person about to be sentenced for a capital offense is the critical matter at the penalty phase of a first degree murder trial. Evidence bearing on who Mr. Barwick was and where he came from suggests that his actions could have been explained by his compelling background, as well as an accurate picture of his poor mental health. It is precisely this kind of evidence the United States Supreme Court had in mind when it wrote that unless the sentencer could consider "compassionate and mitigating factors stemming from the diverse frailties of humankind," a capital defendant will be treated not as a unique human being, but rather as a "faceless, undifferentiated mass to be subjected to the blind infliction of the penalty of death." Woodson v. North Carolina, 428 U.S. 280, 304 (1976). This is just the kind of humanizing evidence that "may make a critical difference, especially in a capital case." Stanley v. Zant, 697 F.2d 955, 969 (11th Cir. 1983). The U.S. Supreme Court has also affirmed the necessity of appropriate background investigation at the penalty phase of the trial. See, Wiggins, Williams v. Taylor, and Rompilla. A new sentencing is required when counsel fails to adequately investigate and, as a result, substantial mitigating

evidence is never presented to the judge or jury. Id. In Mr. Barwick's case, an adequate investigation would have made the difference between life and death.

The judge and jury were not able to "make a sensible and educated determination about the mental condition of the defendant at the time of the offense." See Ake, 105 S. Ct. at 1095. A wealth of compelling mitigation was never presented to the sentencers charged with the responsibility of deciding whether Mr. Barwick would live or die. Important, necessary, and truthful information was withheld from the jury, and this deprivation violated Mr. Barwick's constitutional rights. See Penry v. Lynaugh, 109 S. Ct. 2934 (1989); Eddings v. Oklahoma, 455 U.S. 104 (1982); Lockett v. Ohio, 438 U.S. 586 (1978).

Mr. Barwick was suffering from serious mental deficiencies that rise to the level of statutory mitigation. This mitigation would have weighed heavily in the weighing process had it been presented. Available evidence of Mr. Barwick's mental health problems could have established three statutory mitigating factors and numerous non-statutory mitigating factors. Armed with evidence that counsel could have discovered, a mental health expert would have conclusively established significant statutory mitigation and would have presented substantial non-statutory mental health mitigating evidence.

Had trial counsel conducted an adequate investigation into Mr. Barwick's background, he would have discovered that his

client's history contained classic mitigation that without a doubt should have been presented to the sentencing judge and jury. Both statutory and non-statutory mitigating factors were readily supportable, yet they were not presented during the penalty phase because the information went undiscovered. The prejudice to Mr. Barwick resulting from counsel's failure to seek mental health expert assistance is clear. Confidence in the outcome is undermined, and the results of the penalty phase are unreliable. This Court should grant relief.

ARGUMENT II

MR. BARWICK WAS DEPRIVED OF HIS RIGHT TO A RELIABLE ADVERSARIAL TESTING DUE TO TRIAL COUNSEL'S INEFFECTIVE ASSISTANCE DURING THE GUILT/INNOCENCE PHASE OF MR. BARWICK'S TRIAL, IN VIOLATION OF MR. BARWICK'S RIGHTS TO DUE PROCESS AND EQUAL PROTECTION UNDER THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION, AS WELL AS HIS RIGHTS UNDER THE FIFTH, SIXTH AND EIGHTH AMENDMENTS. AS A RESULT, CONFIDENCE IS UNDERMINED IN THE RELIABILITY OF THE JURY'S VERDICT OF GUILTY.

The United States Supreme Court has explained that "[a] fair trial is one in which evidence subject to adversarial testing is presented to an impartial tribunal for resolution of issues defined in advance of the proceeding." See Strickland v. Washington, 466 U.S. 668, 685 (1984). In order to ensure that an adversarial testing, and hence a fair trial, occurs, defense counsel is obligated "to bring to bear such skill and knowledge as will render the trial a reliable adversarial testing process." See id. at 685. To show that trial counsel did not fulfill this

duty, Mr. Barwick must show deficient attorney performance and prejudice. See id. at 687.

Suzanne Capers was a key prosecutorial in this case, yet defense counsel failed to cross examine her. (R. 238) Capers testified that she saw a man around the apartment complex where the crime occurred. She described the man as blonde, stocky, about 5'11" and 185-190 lbs. (R. 236-37) At trial, she identified Mr. Barwick as the man she had seen that day. (R. 237-38)

Had counsel cross examined Capers, the jury would have learned that Capers had substantial difficulties making an identification from photographic lineups.[6] Only after three

[6] In addition to not being able to conclusively identify any of the photographs from the line-up as being of the man she saw, Capers also had problems providing the Sheriff's Office with information for them to prepare a composite.

> **Q.** When they got through [making the composite picture], was it accurate?
>
> **A.** Yeah, because I was satisfied with the way it looked. It was hard to really get it to a T, but I was satisfied with the way it looked to me.
>
> **Q.** There wasn't any other combination of features that you saw that looked more the like person?
>
> **A.** I don't understand.
>
> **Q.** In other words, they didn't show you some alternative features that you thought looked more like him than the one that they finally put together?
>
> **A.** Well, it was difficult to do it because we couldn't get him the way I pictured him in my mind. The only thing I could picture was him being

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.

Capers was shown three different photo line-ups during the week after the offense. (Deposition of S. Capers, July 8, 1986, at 27, 35) During the first line-up, the night after the offense, she was shown between five and seven photos. (Deposition of S. Capers, July 8, 1986, at 26, 39).

> One photograph that he showed me I said looked a lot like him. Because I wasn't positively sure that was him, because I didn't want to – I was scared, I didn't want to say, "Yeah, that's him," you know, when it wasn't for sure. Because he looked different in the sun and from a distance. But then the man that I did show them, was the same person. And then he showed me some more pictures at one occasion and then the last time I went down to the police station he showed me a picture of this guy that was the man that we thought that I saw, and he had a blue tank top on and the right build that I saw and everything, and I told him, "That's him for sure," that was the guy that I saw.

(Deposition of S. Capers, July 8, 1986, at 27).

Capers hesitancy in making an identification is compounded by the inherently prejudicial nature of the lineup. Despite describing the man she saw as medium height, with a stocky build, and having very blonde hair that was short on top, the photos in the lineup bared no resemblance to this description.

> kind of stocky and his face kind of round and short blonde hair. I mean, as far as he was from me, I couldn't get the way his nose was or anything like that.

(Deposition of S. Capers, July 8, 1986, at 24-25).

Q. Okay. And describe the pictures that you were shown the first and second time, same pictures, what were they?

A. Of all the guys?

Q. Yeah, can you tell me how many and how many of each and so forth and so on?

A. No, I can't remember that. I just know it was just different types of walk of men, you know. People that were just, they weren't you know, just unbelievable, like old men with, you know, dark hair and beard and everything, you know. Just people, I guess, they suspected around that area, I don't know.

Q. I take it there was a wide variety of men?

A. Yeah, there wasn't just like one type. There was a lot of – because I said he was blonde headed, there was a lot of blonde headed men. So he showed me pictures of blondes and there were, like some were just tall and skinny. But that's not what I saw.

(Deposition of S. Capers, July 8, 1986, at 29-30).

Q. Well, how did these photographs differ from what you were looking for, if it wasn't in the hair coloring?

A. I was looking for a medium built, husky, heavy set looking man. You know, kind of a big neck.

Q. And they were showing you pictures of what?

A. Tall skinny men or scraggly looking men. Just somebody that was off the streets, you know. I was looking for someone husky and heavy built and had like a muscular neck and, you know.

(Deposition of S. Capers, July 8, 1986, at 38).

Of the six or seven photos Capers was shown, only one could possibly have fit the general description that she had given the

officers.

Q. How many in that first batch were at least close in terms of what you had described?

A. Just one.

*** * ***

A. And one of those five was close to the description that you had given?

A. Um hum.

Q. But you weren't sure that that guy was the guy at that time, is that correct?

A. Yes. See, the picture I remember he had a long sleeved shirt on and like a collar and it was a real close picture. It was like, you know, a polaroid. It was a real close shot of him, and he just looked, you know, he looked a lot different.

Q. So you weren't sure at that time?

A. Yeah.

Q. But did you indicate that it looked like him?

A. Oh, yeah, definitely.

Q. And that it might be him?

A. Yeah.

Q. What I am driving at, I guess, is can you remember the exact words you used to the officer?

A. At first I said, "That's him." Then, I said, "No, I'm not going to –" I said, "It looks a lot like him." When I said that's him, I thought, Well, I'm not – you know, there's little flaws I wasn't completely sure about, you know. **And that's when they told me about this character, about how, his past history of rape and other things**.

Q. Yeah.

A. They said, "We don't want to scare you, but we are

> going to tell you what happened, how this guy just got out of jail and everything," and that's when I really got scared. Because I'm thinking, you know – but this guy just, he just to me at first he didn't look like somebody like that.

(Deposition of S. Capers, July 8, 1986, at 30-32) (emphasis added).

> **Q.** When you saw this set of pictures the second time at the sheriff's office, did you remember – this was what? – about two days later – did you remember that one of them was a guy that had been in prison for rape before?
>
> **A.** Yeah.
>
> **Q.** Did the officers tell you about anybody else who was in the pictures? Any of their histories?
>
> **A.** No.

(Deposition of S. Capers, July 8, 1986, at 36).

The comments of the law enforcement officials who were conducting the lineup were completely improper and highly prejudicial. By attempting to scare Capers into identifying Mr. Barwick as the man she saw, any response Capers gave in response to this lineup has absolutely no validity and should carry no weight. Nevertheless, even in light of the improper comments of the officers, Capers was still was unable to identify any of the photographs with a level of certainty.

The third and final lineup was even more biased than the first two lineups; it was developed and shown to Capers for the sole purpose of having her identify Mr. Barwick as the man she had seen.

Q. How many pictures were you shown, though, that last time? How many separate photographs? Of him or anybody else.

A. He showed me three pictures of him. Because the one that he showed me the first time, and the last time he showed me the one that he took when he was outside in the tank top and the side view. So there was three different pictures of him. And then I would say about four other pictures [of other people].

*** * ***

Q. Were there repeat pictures of the other people of just one each?

A. No, just one each.

(Deposition of S. Capers, July 8, 1986, at 28-29) Again, Capers could not identify Mr. Barwick.

Since Capers could not identify Mr. Barwick as the man she had seen from three separate lineups, each which was designed to point at Mr. Barwick, the officers made one final attempt to get an identification from Capers. As a last resort, the officers arranged for her to see Mr. Barwick in the police station, flanked by officers. Finally, Capers identified Mr. Barwick.

Q. Did there ever come a time when the police did seem to have the goods on him, so to speak, and indicate that to you?

A. Well, the last time that he showed me the pictures, they were – they weren't telling me everything, you know, evidence they had against him, nothing like that, but **they had him up there for questioning the same day that I was up there the last time and they had me stand in the lobby of the sheriff's department, down over here across from the courthouse, and I was in the lobby and he was outside with another police officer. He was**

> **talking to him. And they had it so that I could see him the same distance that I saw him before. I said, "That's him,"** you know.

(Deposition of S. Capers, July 8, 1986, at 33) (emphasis added).

Unfortunately for Mr. Barwick, the jury never heard that on three separate occasions Capers did not conclusively identify him as the man she saw despite the great lengths to which the Sheriff's Office went. Defense counsel was ineffective for failing to inform the jury of this. To show that trial counsel was ineffective, Mr. Barwick must show deficient attorney performance and prejudice. See Strickland, 466 U.S. at 687.

Counsel briefly mentioned Capers's "identification" in his closing argument:

> . . . [S]he saw a young man walking by two or three times. And she identified this young man as the individual. [¶] She identified him here in court for you all. Now, I'm not going to go into eye witness identification because one of the things I asked you about was to not lose your common sense, sound judgment, and every day experiences when you sit on this jury. [¶] Eye witness identification, you may have gleened [sic] in your adult growing up, in your adult life, is probably worse evidence. Something gets suggested in their mind and that's it. Six years later, that's it. But she was trying to tell you as best she could recall and we have no argument with that.

(R. 493) Had counsel used the prior statements of Capers, he could have proven his argument to the jury – that the power of suggestion led to an identification in this case. He rendered deficient performance for failing to cross-examine Capers and demonstrate to the jury how her identification was entirely

unreliable. It is completely unreasonable for trial counsel to fail to attack the accuracy and validity of an eyewitness identification, the only such identification in this case, when the identification was obtained in an inherently prejudicial manner and when counsel had, or should have had, the prior statements.

Mr. Barwick was prejudiced by his counsel's deficient performance. In contrast to defense counsel mentioning Capers's testimony in passing, the State emphasized it to the jury. For instance, in closing argument, the State discussed what she saw the man doing and where she saw him walking; the State discussed the description she gave the detectives and that the detectives included Mr. Barwick's photo in a photographic lineup. (R. 531-32)

On top of counsel's failure to challenge the validity and accuracy of Capers's "identification" of the man she saw, counsel also failed to challenge Capers's description of what the man was doing. At trial, Capers swore that, while sunbathing at the apartment complex where the offense occurred, she saw a man walking around:

> And I saw him a couple of times, two or three or four times and I started getting suspicious, I never saw him come back around until later, a little while later he was walking in front where I was straight ahead of him and he stood there and he just kind of started and I thought, here I am laying out and by myself and I started getting a little worried and he just stood there and stared at me and then he started pointing, he pointed at me, he pointed like this, toward her

apartment where he was standing and he did it a few times, this [g]esture (indicating) and then I started getting suspicious, really started feeling uneasy and then he turned around and walked back toward her apartment and I was relieved that he wasn't standing there staring at me anymore.

(R. 232-33)

Contrasting Capers's testimony with her earlier statements, it is clear that the information she gave to the jury was inaccurate. On July 8, 1986, Capers gave a deposition where she recalled that on the day of the offense, while sunbathing outside, she saw a man walking around the apartment complex:

A. . . . [H]e did a gesture, I mean, not toward me but he did like this. He pointed this way to his left, then he pointed to his right, just like that.

Q. He did?

A. Yeah. It's like he didn't, like he couldn't make up his mind which way he wanted to go. And he saw that I saw him and like got embarrassed that I saw him looking at me. And so then he started going toward Russ Lake Drive.

*** * ***

Mr. Harper: Let me interrupt here just to ask a question. When he was standing there pointing one way with one finger and the other way with the other finger, was he doing that more or less to himself, in your opinion, or was he looking at you and doing it while you were watching him –

A. It was kind of like, you know how you will stand there telling you to do something to yourself, that's like what he was doing.

Mr. Harper: So it looked like he was talking to himself?

A. Yeah, talking to himself, yeah.

Mr. Harper: He wasn't making any gestures to you or for your benefit?

A. No. That's not what I saw. **He just looked like an innocent person to me**, I mean he just didn't – looked like he was just looking at a girl laying out, you know what I mean?

(Deposition of S. Capers, July 8, 1986, at 13-14) (emphasis added).

The testimony Capers gave at Mr. Barwick's original trial accords with her deposition.

> . . . I was reading and I just so happened to look up and I saw him standing there staring at me and I just looked up and, like, he might have gotten embarrassed or I caught him looking at me and he pointed like this, (Indicating), and pointed this way in two different directions.

(IR. 400-01).

Q. Was there any kind of menacing gesture or anything toward you?

A. No, sir – well, he just pointed like this, (Indicating).

Q. You didn't know what that meant?

A. No, sir. I thought it was kind of odd. You know, I thought he just stopped and looked, you know; **I didn't think nothing of it at the time**.

(IR. 404) (emphasis added) In her deposition and initial testimony, Capers said nothing about the man seeming suspicious or gesturing to her in an eerie manner. In fact, Capers's testimony in 1992 was virtually the exact opposite of her testimony and deposition in 1986. Trial counsel rendered

deficient performance in failing to challenge Capers's testimony and failing to impeach her with her 1986 statements.

Instead of the jury hearing that Capers saw "an innocent man," walking around the complex, mumbling to himself, the jury heard that Capers saw a suspicious man who was trying to indicate something to Capers or frighten her in some way. Defense counsel did not discuss, during closing argument, the gestures that Capers saw the man make. The State, however, focused on Capers's testimony.

> He sees the bathing suit clad young lady, 24 years old. Obviously decent looking, nice looking. On his way back, . . . he sees her. . . . He then plans, I'm going back there. He then goes back, goes back to the very same spot. He then eyes two women who are sunbathing as if to select his victim. [¶] Both of them in bathing suits, sunbathing. . . . [H]e could have certainly picked the unoccupied dwellings to commit a burglary if he just wanted to steal something. [¶] . . . Suzanne Capers or Rebecca Wendt. . . . [W]hat did Suzanne Capers tell you. He stared at me and I got this eerie feeling. It was spooky, it was strange, it was creepy. That's evidence you can take into consideration as to how he was staring, selecting.

(R. 560-61)[7] With this argument, the State was attempting to portray Mr. Barwick as a stalker who considered possible victims before making a final choice. This was the theme of the prosecution:

> . . . [H]e went home and drove by the house and saw her lying there in her bathing suit out front sunbathing, getting a sun tan, . . . went and stalked his victim

[7] Because Capers's testimony in the 1986 trial was largely innocuous to Mr. Barwick, the State only touched on it in closing argument. (IR. 1288, 1289, 1290).

> and, I say victims, he selected the one, Rebecca Wendt, went inside intending to rob, rape, burglarize and then killed . . ..

(R. 313)

Mr. Barwick has been prejudiced by his trial counsel's failure to subject the State's case to adversarial testing. Because of counsel's failure to cross-examine Capers and impeach her with her prior inconsistent statements, the jury was left with a picture of Mr. Barwick as being a scary, suspicious man who was lurking around the complex, staring at Capers as though considering her as his next victim. However, there is absolutely no evidence that supports this portrayal. Had trial counsel challenged Capers, the jury would have been left with a picture of a man, who Capers could not identify as Barwick, a man who was meandering around, mumbling to himself. The jury also heard that Capers was worried and frightened by the man she saw, instead of that at the time she saw the man, Capers thought "nothing of it" and thought his actions were "innocent."

Although Capers's testimony was not the only evidence presented during the guilt phase, it was nevertheless very significant. The State emphasized her testimony thorough its closing argument. Moreover, in the penalty phase, the jury was instructed to consider all the evidence and testimony from the guilt phase. Consequently, the prejudice Capers suffered from counsel's deficiencies and omissions was not limited to the guilt phase. Trial counsel failed to challenge the State's portrayal of

Mr. Barwick as a stalking, lurking predator who evaluated possible victims before deliberately selecting one; therefore that was the only picture of Mr. Barwick that the jury had. The circuit court in its order failed to recognize this effect on the penalty phase and denied the claim without ever considering its impact on the penalty phase in Mr. Barwick's case. This was clear error.

Under Strickland v. Washington, 466 U.S. 668 (1984), ineffectiveness of counsel occurs when trial counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result. Where an adversarial testing does not occur and confidence is undermined in the outcome, relief is appropriate. Because of counsel's failure to cross-examine the only "eyewitness," Mr. Barwick's conviction must be reversed.

To the extent that the State knew, or should have known, that Capers's testimony was false, the State violated Giglio v. United States, 405 U.S. 150 (1971), and a new trial is warranted. See Argument III.

ARGUMENT III

MR. BARWICK WAS DEPRIVED OF HIS RIGHT TO A RELIABLE ADVERSARIAL TESTING DUE TO THE STATE'S FAILURE TO DISCLOSE CRITICAL EXCULPATORY EVIDENCE WHICH WAS NEVER PRESENTED TO THE JURY AND HIGHLY IMPROPER AND PREJUDICIAL PROSECUTORIAL MISCONDUCT, IN VIOLATION OF MR. BARWICK'S RIGHTS TO DUE PROCESS AND EQUAL PROTECTION UNDER THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION, AS WELL AS HIS RIGHTS UNDER THE FIFTH, SIXTH AND EIGHTH AMENDMENTS. AS A RESULT, CONFIDENCE IS UNDERMINED IN THE RELIABILITY OF THE JURY'S VERDICT OF GUILTY.

The State is obligated to disclose evidence or information in its possession that is favorable to the defense. Brady v. Maryland, 373 U.S. 83 (1963). The Brady disclosure requirement applies to impeachment evidence as well as ordinary exculpatory evidence. United States v. Bagley, 473 U.S. 667 (1985).[8] This standard includes impeachment presentable through cross-examination challenging the "thoroughness and even good faith of the [police] investigation." Kyles, 514 U.S. at 446.

Relief is warranted if the undisclosed exculpatory evidence is material. This standard is met and reversal is required once the reviewing court concludes that there exists a "reasonable probability that had the [unpresented] evidence been disclosed to the defense, the result of the proceeding would have been different." Bagley, 473 U.S. at 680. "The question is not whether the defendant would more likely than not have received a

[8] Further, knowledge of evidence in possession of all law enforcement agencies is imputed to the prosecutor. Kyles v. Whitley, 514 U.S. 419 (1995).

different verdict with the evidence, but whether in its absence he received a fair trial, understood as a trial resulting in a verdict worthy of confidence." Kyles, 514 U.S. at 434; Strickler v. Greene, 119 S. Ct. 1936, 1952 (1999). The materiality inquiry is not a "sufficiency of the evidence" test. The burden of proof for establishing materiality is less than a preponderance. Williams v. Taylor, 120 S. Ct. 1495 (2000); Kyles, 514 U.S. at 434.

In evaluating whether relief is warranted upon a claim that the State failed to disclose exculpatory evidence, the undisclosed or undiscovered information must be evaluated cumulatively to determine whether confidence is undermined in the outcome. Kyles. In the Brady context, the "prejudice" evaluation of the withheld evidence must be considered "collectively, not item-by-item." Kyles, 514 U.S. at 436.

In Mr. Barwick's case the jury never heard the considerable and compelling evidence that was exculpatory as to Mr. Barwick, both in the guilt and penalty phases. Either the prosecutor failed to disclose this significant and material evidence, or defense counsel failed to investigate and present this evidence. It cannot be disputed that the jury did not hear the evidence in question. In order "to ensure that a miscarriage of justice [did] not occur," Bagley, 473 U.S. at 675, it was essential for the jury to hear the evidence. See State v. Gunsby, 670 So. 2d 920 (Fla. 1996). Whether the State suppressed the evidence or defense

counsel unreasonably failed to present the evidence, confidence is undermined in the outcome because the jury did not hear the evidence.

Mr. Barwick was charged with attempted sexual battery. However, the State had minimal evidence to support this crime, as the medical examiner testified that his review of the body and autopsy showed no sign of sexual battery. (R. 446-47) As a result, the State based its case of attempted sexual battery on two findings: (1) a semen stain on the comforter that was wrapped around the victim and (2) the victim's bathing suit bottom was pulled down. However, postconviction counsel has obtained reports that show that the victim's bathing suit bottom was not pulled down. Def. Ex.[9] According to reports from investigators who arrived at the scene soon after the body was discovered, the victim's bathing suit top was pulled down below her breasts, but her bottoms were not pulled down. One report describes the bottoms as "in place," whereas another report states that "the bathing suit bottom was intact and in place." Id. Alton Paulk, the lead prosecutor in Mr. Barwick's case, testified at the evidentiary hearing that he could not recall ever seeing the investigative report from the medical examiner's office. EH 165. Neither had then Lieutenant McKeithan nor crime scene

[9] This Defense Exhibit was erroneously not included in the record, although it was admitted into evidence. EH 202. A motion to supplement the record will be forthcoming.

investigator Don Cioeta. EH 184, 196. Mr. Paulk acknowledged he was responsible for reviewing all the reports coming in, however, even if he had not seen the report knowledge is imputed to him. See Kyles v. Whitley, 514 U.S. 419, 437 (1995).

In order to prove a violation of Brady, a claimant must establish that the government possessed evidence that was suppressed, that the evidence was "exculpatory" or "impeachment," and that this evidence was "material." See United States v. Bagley, 473 U.S. 667 (1985); Kyles v. Whitley, 514 U.S. 419 (1995); Strickler v. Greene, 527 U.S. 263 (1999). There is no question that this evidence is exculpatory. Had Mr. Barwick's trial counsel possessed these reports, he would have been able to argue to the jury that Mr. Barwick did not attempt to rape the victim and that the State did not have evidence to prove an attempted sexual battery beyond a reasonable doubt.

Throughout Mr. Barwick's capital trial, the State argued that he went in the apartment attempting to rape the victim, as shown by her bathing suit bottom being pulled down. In opening statement, the State stressed this point:

> In the bathroom, she was covered with a blanket which you will hear referred to as a comforter. When they removed the comforter, they began to see, well, first of all, her bathing suit, she was in a bikini bathing suit, two-piece bathing suit. The top was pulled down, the bottom was still basically OK here but it was pulled down from the rear and that there were multiple and numerous stab wounds.

(R. 191)

The State again discussed it in its closing statement:

> How do we know that there was a sexual battery or attempted sexual battery? When he goes in there, there are 37 wounds. Don't you know there had to be a heck of a fight and a struggle? Rebecca Wendt was not struggling to protect her property. She was struggling to protect herself . . .. That's evidence as to whether or not he was intending to rape her. [¶] What else do we know. The mind, you can't look into the mind. You have to look to the obvious, the objective facts. What else do we know? **When they find Rebecca Wendt, low and behold, what do they find. The top is pulled down to about her waist. Her bottoms are halfway intact. They're pulled back down** and her cheeks and, if all of that is not enough we find his semen on the comforter.

(R. 551) (emphasis added).

As the placement of the bathing suit was one of only two factors supporting the crime of attempted sexual battery, it is clear that the jury relied upon the bathing suit to convict Mr. Barwick of attempted sexual battery. Even on direct appeal, this Court upheld the attempted sexual battery conviction based, in part, on the evidence that "the bottom portion [of her bathing suit] had been pulled down in the back." See Barwick v. State, 660 So. 2d 685, 695 (Fla. 1995).

The jury's guilty verdict for attempted sexual battery, obtained through Brady violations, additionally prejudiced Mr. Barwick in the penalty phase, as the State argued to the jury to use that verdict to find an aggravating circumstance.

> In this case, you have found him guilt in your verdict, your guilty verdict you found him guilty of attempting to commit sexual battery with great force. He simply failed. He did not complete. It's there. It exists. It is there beyond a reasonable doubt, both of these are.

> What weight are you going to give that? . . .
> . . . [N]ot only did he murder somebody, kill somebody, his did it while he was doing another dangerous act, that was sexual battery.

(R. 915)

If the State had disclosed the reports to the defense, Mr. Barwick's attorney would have been able to present evidence refuting the allegation of attempted sexual battery, thus eliminating or decreasing the weight of this aggravator. As a result of the State's failure to disclose the exculpatory reports to the defense, Mr. Barwick deserves a new trial. See Brady v. Maryland, 373 U.S. 83 (1963).

To the extent that counsel should have been aware of the investigative reports, counsel was ineffective in failing to discover the information and utilizing it. See Strickland v. Washington, 466 U.S. 668 (1984). Don Cioeta testified at evidentiary hearing that it was possible that the bathing suit rolled down when it was being drug into the bathroom. EH 197-198. Trial counsel did not question regarding that possibility.

The prejudice Mr. Barwick suffered from the State's failure to disclose the reports to the defense was exacerbated when the State permitted Detective Frank McKeithan to testify falsely that the victim's bathing suit was not intact or in place:

> When I arrived . . . I was directed to the bathroom, it was a small apartment and there I observed the body of a white female laying in the floor of the bathroom. The body was wrapped in what appeared to be a comforter. The body had numerous stab wounds on it, there was what appeared to be blood all over the place. The top of the

> bathing suit, she had on a turquoise two-piece bathing suit. The top of the bathing suit was pulled down and the rear of the bottoms were pulled down in the back.

(R. 243)

However, the State knew, or should have known, that the victim's bathing suit bottoms were intact when she was found and that McKeithan's testimony to the contrary was false. Although McKeithan indicated at the evidentiary hearing that intact meant not torn or ripped, counsel could have and should have questioned that ad hoc reasoning. EH 188 By permitting McKeithan to testify falsely, the State violated Giglio v. United States, 405 U.S. 150 (1972), which held that due process prohibits the prosecution from knowingly presenting false testimony.

To establish a Giglio violation, the defendant must show that the State used testimony that was false, that the State knew or should have known the testimony was false, and that the testimony was material. See Williams v. Griswald, 743 F.2d 1533, 1542 (11th Cir. 1984). As described by the medical examiner's report Def. Ex. the victim's bathing suit bottom was completely "intact" and "in place" when they arrived at the scene. The State knew, or should have know about these investigative reports. As described above, throughout both the guilt and penalty phases, the State used the idea that the bathing suit bottom was pulled down to argue to the jury to convict him of attempted sexual battery and use that conviction to find an aggravating circumstance. By allowing McKeithan, the lead detective on this

case and one of the prosecution's key witnesses, to testify to falsely, the State violated Mr. Barwick's due process rights. See Giglio, 405 U.S. 150; Napue v. Illinois, 360 U.S. 264 (1959); Mooney v. Holohan, 294 U.S. 103 (1935). Unfortunately for Mr. Barwick, this is not the only instance where the State committed a Giglio violation.

The State also violated Giglio by permitting a key witness to testify falsely during the guilt phase of Mr. Barwick's capital trial. Suzanne Capers, the only "eyewitness" in the case, testified to information that was false and highly prejudicial to Mr. Barwick.

At trial, Capers swore that, while sunbathing at the apartment complex where the offense occurred, she saw a man walking around:

> OK, I was laying out, I was reading and I was into my book and I saw someone out of the corner of my eye, corner of my left eye, and I saw someone walk around the apartment complex . . .. And I saw him a couple of times, two or three or four times and I started getting suspicious, I never saw him come back around until later, a little while later he was walking in front where I was straight ahead of him and he stood there and he just kind of started and I thought, here I am laying out and by myself and I started getting a little worried and he just stood there and stared at me and then he started pointing, he pointed at me, he pointed like this, toward her apartment where he was standing and he did it a few times, this [g]esture (indicating) and then I started getting suspicious, really started feeling uneasy and then he turned around and walked back toward her apartment and I was relieved that he wasn't standing there staring at me anymore.

(R. 232-33)

This testimony, which the State elicited improperly, is in stark contrast to the description Capers gave during her earlier statements she told the State that the man she saw was talking to himself, gesturing to himself in an innocent manner.

On July 8, 1986, Capers gave a deposition where she recalled that on the day of the offense, while sunbathing outside, she saw a man walking around the apartment complex. (Deposition of S. Capers, July 8, 1986, at 11-12).

A. . . . [H]e did a gesture, I mean, not toward me but he did like this. He pointed this way to his left, then he pointed to his right, just like that.

Q. He did?

A. Yeah. It's like he didn't, like he couldn't make up his mind which way he wanted to go. And he saw that I saw him and like got embarrassed that I saw him looking at me. And so then he started going toward Russ Lake Drive.

*** * ***

Mr. Harper: Let me interrupt here just to ask a question. When he was standing there pointing one way with one finger and the other way with the other finger, was he doing that more or less to himself, in your opinion, or was he looking at you and doing it while you were watching him –

A. It was kind of like, you know how you will stand there telling you to do something to yourself, that's like what he was doing.

Mr. Harper: So it looked like he was talking to himself?

A. Yeah, talking to himself, yeah.

Mr. Harper: He wasn't making any gestures to you or for

your benefit?

A. No. That's not what I saw. **He just looked like an innocent person to me**, I mean he just didn't – looked like he was just looking at a girl laying out, you know what I mean?

(Deposition of S. Capers, July 8, 1986, at 13-14) (emphasis added).

The testimony Capers gave at Mr. Barwick's original trial accords with her deposition:

> . . . I was reading and I just so happened to look up and I saw him standing there staring at me and I just looked up and, like, he might have gotten embarrassed or I caught him looking at me and he pointed like this, (Indicating), and pointed this way in two different directions.

(IR. 400-01).

Q. Was there any kind of menacing gesture or anything toward you?

A. No, sir – well, he just pointed like this, (Indicating).

Q. You didn't know what that meant?

A. No, sir. I thought it was kind of odd. You know, I thought he just stopped and looked, you know; **I didn't think nothing of it at the time**.

(IR. 404) (emphasis added). In her deposition and initial testimony, Capers said nothing about the man seeming suspicious or gesturing to her in an eerie manner. In fact, Capers's testimony in 1992 was virtually the exact opposite of her testimony and deposition in 1986.

The testimony Capers gave at Mr. Barwick's 1992 trial was

not only incorrect but also highly prejudicial. Instead of the jury hearing that Capers saw “an innocent man,” walking around the complex, mumbling to himself, the jury heard that Capers saw a suspicious man who was trying to indicate something to Capers or frighten her in some way. By allowing Suzanne Capers to testify as she did while possessing her earlier statements, the prosecution violated Giglio v. United States, 405 U.S. 150 (1972). At the evidentiary hearing, the prosecutor acknowledged the changing versions of Ms. Capers testimony, although he characterized it as dealing with time issues. EH 158.

Due process prohibits the prosecution from knowingly presenting false testimony. See Giglio, 405 U.S. 150; Napue v. Illinois, 360 U.S. 264 (1959); Mooney v. Holohan, 294 U.S. 103 (1935). "This rule applies equally when the state, although not soliciting perjured testimony, allows it to go uncorrected after learning of its falsity." Williams v. Griswald, 743 F.2d 1533, 1541 (11th Cir. 1984). In order to establish a Giglio violation, a claimant must establish that the testimony was used by the State, that the testimony was false, that the State knew or should have known that it was false, and that it was "material to the guilt or innocence of the defendant." See Williams, 743 F.2d at 1542. The "materiality" standard for a Giglio violation is whether the false testimony "could . . . in any reasonable likelihood have affected the judgment of the jury." See Williams, 743 F.2d at 1543 (quoting Giglio, 405 U.S. at 154). The standard

for establishing a Giglio violation is less onerous than for a Brady violation. See United States v. Agurs, 427 U.S. 97 (1976).

Clearly the State was aware of the errors in Capers's testimony, as the State possessed the earlier statements where Capers described the man she saw in a vastly different manner than the description she gave the jury. In addition to eliciting misinformation, the State emphasized Capers's incorrect statements and new story to the jury.

> **Q:** Where was it that you first saw the individual that made you feel funny when he was pointing at you and then pointing . . .

(R. 234) The State knew from Capers's deposition that the man was not gesturing to Capers or signaling to her and that any of his gestures or movements were not directed towards her. Nonetheless, the State clung to Capers's mischaracterization in closing argument:

> He then eyes two women who are sunbathing as if to select his victim. [¶] Both of them in bathing suits, sunbathing. . . . [H]e could have certainly picked the unoccupied dwellings to commit a burglary if he just wanted to steal something. [¶] . . . Suzanne Capers or Rebecca Wendt. . . . [W]hat did Suzanne Capers tell you. He stared at me and I got this eerie feeling. It was spooky, it was strange, it was creepy. That's evidence you can take into consideration as to how he was staring, selecting.

(R. 560-61)[10]

The State knew that the first time Capers made such

[10] Because Capers's testimony in the 1986 trial was largely innocuous to Mr. Barwick, the State only touched on it in closing argument. (IR. 1288, 1289, 1290).

statements was at trial and that in her previous statements she had said that she was not scared by the man and that he seemed innocent to her. For the State to elicit this testimony from Capers or to even allow her testimony to go uncorrected, the State violated Giglio. See Giglio, 405 U.S. 150. To the extent that defense counsel was ineffective for failing to cross-examine Capers and for failing to object to the State's argument regarding Capers's testimony, see Strickland v. Washington, 466 U.S. 668 (1984) and Argument II.

In addition to the State's improper conduct regarding the testimony of Suzanne Capers and Det. Frank McKeithan, the State also acted improperly in regards to a confidential defense expert. The State's prosecutorial misconduct was extraordinarily prejudicial to Mr. Barwick and hindered his preparation of mitigation evidence. On June 5, 1992, defense counsel moved the court to appoint Dr. Ralph Walker, II, a psychiatrist, to assist the defense as a confidential expert. (R. 1151) The court granted the motion and appointed Dr. Walker as a confidential defense expert. (R. 1153) Despite Dr. Walker's role in this case as a confidential expert, the State violated the confidential boundaries of Dr. Walker's capacity.

As evidenced by the State's comments during a conference in the penalty phase of trial, the State conferred with Dr. Walker during the time that he was a confidential expert for the defense.

Mr. Adams: With regard to this penalty phase, I respectfully move at some time this morning for a recess until Dr. Walker is available, Dr. Ralph Walker of Marianna. I was advised by car phone on my way down this morning . . . that Mr[s]. Walker had called indicating that the doctor went back in intensive care last evening. . . .

The Court: Okay, you have . . . Have you deposed Dr. Walker?

Mr. Adams: No, sir.

The Court: Have you talked to Dr. Walker?

Mr. Adams: Yes, sir.

The Court: What do you anticipate establishing by Dr. Walker?

Mr. Adams: Let me say this, Your Honor. Dr. Walker is the only one of these so-called experts that I had appointed. And you will recall that we, the court and I took Dr. Blau off the hook because he is in Tampa. . . . [¶] What I anticipate Dr. Walker . . . I intended, I say this in absolute good faith, to call him last. He was going to be my last clean-up witness. He's going to describe, and I'm almost at a loss . . . I have some notes out there on it. This . . . I want to use the right phrase. Some kind of a reaction that this guy, the defendant suffers from. And I honestly . . . It's out there, I can't think of the term that he used.

Mr. Paulk: Suffers from impulsive disorder.

Mr. Adams: You talked to him as well? Doesn't matter. I know Dr. Walker. He was, in his experience, a lawyer, a medical doctor, not just a psychologist and a psychiatrist. And in good faith I can tell the court and have told the court that I intended to use him as my last witness because in conversations with him on this and other cases I believe he will be of great benefit to the defendant.

Now, I realize the problem this presents. But it is not of the lawyers' making nor any of our

making. It is one of those things that happened so that my motion is for a recess until Dr. Walker is either available or Mr. Paulk and I can depose him and perhaps agree to read that sworn testimony.

Although I certainly would be willing, I think probably proceed up to that point. And I realize the point this puts the court in. The only alternative would be to declare a mistrial with regard to the penalty phase and reschedule the penalty phase, as I see it.

So, my motion is in the alternative. Either to recess until we can at least get the deposition of Walker or start the penalty phase over by way of mistrial regarding the penalty phase.

Mr. Paulk: I see two alternatives. Number one, he would call him as the last witness. Let's proceed on further because I brought a witness in from way out of town and I certainly don't want to continue the penalty phase of this.

So, I would be willing to stipulate . . . I talked to Dr. Walker. Let me give you the first alternative or option . . .

Mr. Adams: I'm not stipulating to his testimony.

*** * ***

Mr. Paulk: Dr. Walker . . .

Mr. Adams: He was appointed before we were trying the guilt phase.

Mr. Paulk: He was appointed before but he examined him during. Because I called him like on a . . .

Mr. Adams: Examined him before we started. He came down here and examined him, then checked with him again.

*** * ***

Mr. Paulk: Examined him during the trial. I talked to him during the trial to find out what he would testify to. And he . . . his testimony was this.

> That he was not insane at the time of the commission of the offense which is good for me. And I would like to have him. But he says, yes, he is suffering from a mental defect or disease which would significantly impair his ability to control his conduct. . . . [¶] Okay, I will stipulate that he would testify to that. . . . [¶] And I would either stipulate to this, that Dr. Walker would even testify to the fact, and I never asked him this, that he was at the time operating under a severe and substantial emotional distress, I think is the way . . .
>
> * * *
>
> **Mr. Paulk:** So, he's got three [mental health experts] that says extreme stress. The same three will testify that, yes, he was operating under a mental disease of disorder. . . . [¶] In other words, Dr. Walker is simply cumulative.

(R. 666-73) (emphasis added). It is clear from defense counsel's surprised reaction that he did not anticipate or consent to the State consulting the defense's confidential expert.

The State conferred with Dr. Walker, outside of the presence of defense counsel and without the permission of defense counsel. The State acted in blatant disregard of Dr. Walker's role as a confidential expert in a manner that constitutes prosecutorial misconduct. Mr. Paulk testified that he was not sure if he called trial counsel first. EH 152. By depriving Mr. Barwick access to a confidential mental health professional, Mr. Barwick's trial attorney was hindered in his preparation for and presentation of penalty phase mitigation. In a case such as Mr. Barwick's, where the penalty phase consists largely of complicated and complex mental health issues, it is essential for the defense to have a

confidential expert who examines the defendant and with whom the defense attorney can confer. Although Mr. Barwick asserts that the State engaged in unethical and improper conduct, to the extent that defense counsel failed to object to the prosecutorial misconduct, move for a new confidential expert, or move for a mistrial, counsel was ineffective. See Arguments I & II.

Due to the State's violations of Giglio, the State's prosecutorial misconduct, as well as counsel's ineffectiveness in challenging the false testimony of Capers and McKeithan and counsel's failure to contest the State's improperly consulting with the Dr. Walker, this Court must reverse Mr. Barwick's conviction and remand this case for a new trial. If considering the claims cumulatively results in a loss of confidence in the reliability of the outcome, relief is warranted. See, e.g., Young v. State, 739 So. 2d 553 (Fla. 1999); Kyles v. Whitley; 115 S. Ct. 1555 (1995).

ARGUMENT IV

MR. BARWICK'S TRIAL COURT PROCEEDINGS WERE FRAUGHT WITH PROCEDURAL AND SUBSTANTIVE ERRORS WHICH CANNOT BE HARMLESS WHEN VIEWED AS A WHOLE SINCE THE COMBINATION OF ERRORS DEPRIVED HIM OF THE FUNDAMENTALLY FAIR TRIAL GUARANTEED UNDER THE SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS.

Mr. Barwick did not receive the fundamentally fair trial to which he was entitled under the Eighth and Fourteenth Amendments. See Heath v. Jones, 941 F.2d 1126 (11th Cir. 1991); Derden v. McNeel, 938 F.2d 605 (5th Cir. 1991). This failure was due to the

sheer number and types of errors involved in his trial. When these are considered as a whole, these errors virtually dictated the sentence that he would receive. See State v. Gunsby, 670 So. 2d 920 (Fla. 1996).

Mr. Barwick has alleged that his trial counsel was ineffective at both the penalty and guilt phases of his trial. See Argument I, II. Mr. Barwick also has alleged that the State engaged in misconduct by violating Giglio v. United States, 405 U.S. 150 (1972) and Brady v. Maryland, 373 U.S. 83 (1963). See Argument III.

Here, the lower court evaluated each claim of ineffectiveness, Brady, and Giglio separately, item-by-item. The United States Supreme Court has explained that the "prejudice" component of a Brady standard, the same standard as the one used for ineffective assistance of counsel claims, requires evaluation of the evidence that the jury did not hear "collectively, not item-by-item." Kyles v. Whitley, 514 U.S. 419, 436 (1995). A proper cumulative analysis of the prejudice was not undertaken. When the prejudice to Mr. Barwick is evaluated cumulatively, as opposed to item-by-item, confidence is undermined in the outcome of the trial.

ARGUMENT V

THE GENERAL JURY QUALIFICATION PROCEDURE EMPLOYED BY THE BAY COUNTY CIRCUIT COURT DEPRIVED MR. BARWICK OF HIS RIGHTS UNDER THE FIFTH, SIXTH, EIGHTH, AND

FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND CORRESPONDING PROVISIONS OF FLORIDA LAW. THIS PROCEDURE CONSTITUTES FUNDAMENTAL ERROR, AND COUNSEL WAS INEFFECTIVE FOR FAILING TO LITIGATE THIS ISSUE.

The Bay County Circuit Court's general jury qualification procedure is unconstitutional: it is held outside the presence of both the defendant and his attorney; the State is allowed to participate in the proceeding; and the proceeding is unrecorded. While it is true that the Florida Supreme Court has held that general jury qualification is not a critical stage of the proceedings requiring presence of the defendant,[11] that holding is not dispositive here due to the unique circumstances of Mr. Barwick's case. Three facts distinguish Mr. Barwick's case from each of the cases holding that the defendant's presence is not required at general jury qualification: (1) Neither Mr. Barwick **nor his attorney** was present during the proceeding; (2) An assistant state attorney may have been present, with an opportunity to object to the release of various venirepersons and not objecting to others; and (3) **No transcript exists** from which it can be ascertained whether the State's participation in the proceeding prejudiced Mr. Barwick.[12]

---

[11] See Wright v. State, 688 So. 2d 298 (Fla. 1996); Bates v. State, 750 So. 2d 6 (Fla. 1999). Mr. Barwick acknowledges this Court has consistently denied this claim and includes it for federal habeas exhaustion purposes.

[12] Because no record was made and all documentation relating to the jury pool was destroyed before Mr. Barwick's conviction became final, precise details of the general jury qualification

In Mr. Barwick's case, his attorney was not present during the proceeding, nor was the proceeding transcribed. At the beginning of the week in which Mr. Barwick's trial and resentencing occurred, a venire comprising prospective jurors for several trials was assembled in a courtroom. They were then voir dired by a Bay County judge **outside the presence of Mr. Barwick and his counsel.** At this point certain prospective jurors were excused, and the remainder were dispatched to the courtrooms in which jury trials were scheduled to commence. The presiding judge therefore had unbridled latitude as to whom to excuse altogether, and as to which panel members were to be sent to which trial.

The prosecutor testified at evidentiary hearing that he did not remember who was present at the jury qualification. EH 160. Neither counsel for Mr. Barwick nor Mr. Barwick was present. This proceeding was ostensibly for "jury qualification" purposes. Prospective jurors were asked by the court if they had a "hardship" that would interfere with their ability to serve. Based on the individual response, the assistant state attorney could object to disqualification for some venirepersons and not object to the release of others. The court would then decide if the venireperson should be disqualified after considering that individual's response and the State's position.

Equally problematic is the fact that **no transcript or**

---

proceeding cannot be known.

questionnaires exist to record the reason for disqualifying. No record exists to show the race, ethnicity, social class, income level, religion or gender of the veniremen released or retained. Thus, the state attorney acts with impunity in advising the court which venirepersons ought to be released and which ought to be retained. Defense counsel was not present to challenge the State's action, nor is a transcript available which might serve as a post hoc check on the fairness of the proceeding.

Not only was no record made of this critical stage of jury selection; Mr. Barwick labors under the additional burden that all records relating to the jury pool were destroyed before his conviction became final, thus rendering such records unavailable to collateral counsel. The lack of any documentation of this proceeding is an omission in the record which denied Mr. Barwick the right to a proper appeal. See Claim XII. Under similar circumstances, this Court has in the past required that the cause be remanded for a new trial. See Delap v. State, 350 So. 2d 462 (Fla. 1977); see also, Blalock v. Rice, 707 So. 2d 738 (Fla. 2d DCA 1997) (holding that lack of record of a contempt hearing required vacating plea and conviction).

ARGUMENT VI

TRIAL COUNSEL WAS INEFFECTIVE FOR FAILING TO ARGUE AGAINST THE AVOID ARREST AGGRAVATING FACTOR AND FAILING TO OBJECT TO THE JURY RECEIVING INSTRUCTIONS ON THIS INAPPLICABLE AGGRAVATOR.

To the extent that Mr. Barwick's counsel failed to adequately object to the jury instruction at issue, Mr. Barwick did not receive effective assistance of counsel under the Sixth Amendment to the United States Constitution.[13] Trial counsel had the obligation to know the law, and failure to know the law regarding proper objections concerning jury instructions in capital cases falls below reasonably professional standards of representation. See Starr v. Lockhart, 23 F.3d 1280 (8th Cir. 1994); Strickland v. Washington, 466 U.S. 668 (1984).

ARGUMENT VII

MR. BARWICK WAS DENIED A PROPER DIRECT APPEAL FROM HIS JUDGMENTS OF CONVICTION AND SENTENCES OF DEATH IN VIOLATION OF THE SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION, ART. 5, SEC. 3(b)(1) OF THE FLORIDA CONSTITUTION, AND SECTION 921.141(4) OF FLORIDA STATUTES, DUE TO OMISSIONS IN THE RECORD. MR. BARWICK WAS DENIED EFFECTIVE ASSISTANCE OF POSTCONVICTION COUNSEL BECAUSE THE RECORD IS INCOMPLETE.

The circuit court is required to certify the record on appeal in capital cases, Fla. Stat. § 921.141(4), Fla. Const. art. 5, sec. 3(b)(1).[14] When errors or omissions appear, re-

[13] This claim is also made in Mr. Barwick's habeas petition and is incorporated as if argued herein.

[14] This claim is also made in Mr. Barwick's habeas petition

examination of the complete record in the lower tribunal is required. See Delap, 350 So. 2d at 463. Counsel rendered ineffective assistance in failing to assure that a proper record was provided to the Court. (R. 17, 56, 299, 598, 903, 937)

ARGUMENT VIII

MR. BARWICK'S SENTENCING 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.

Mr. Barwick's trial attorney rendered deficient performance by failing to object to the State as well as the court's comments that diminished the jury's sense of responsibility. Even worse, trial counsel was ineffective by his own references to the jury's sentence as a "recommendation." (R. 938, 941, 942, 944, 946, 953) Consequently, the jurors received inaccurate descriptions of their duty from all the key players at trial – the judge, the prosecutor, and the defense attorney.

---

and is incorporated as if argued herein.

ARGUMENT IX

MR. BARWICK WAS DENIED A FAIR TRIAL AND A FAIR, RELIABLE AND INDIVIDUALIZED CAPITAL SENTENCING DETERMINATION IN VIOLATION OF THE FIFTH, SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS, BECAUSE THE PROSECUTOR'S ARGUMENTS PRESENTED IMPERMISSIBLE CONSIDERATIONS TO THE JURY. DEFENSE COUNSEL WAS RENDERED INEFFECTIVE BY THE STATE'S IMPROPER ARGUMENT AND THE TRIAL COURT'S FAILURE TO SUSTAIN DEFENSE OBJECTIONS. DEFENSE COUNSEL'S FAILURE TO RAISE PROPER OBJECTIONS WAS DEFICIENT PERFORMANCE WHICH DENIED MR. BARWICK EFFECTIVE ASSISTANCE OF COUNSEL.

The adversarial process in Mr. Barwick's trial broke down when defense counsel failed to object to blatantly improper arguments by the State.[15] First, defense counsel was prejudicially deficient by allowing the jury to consider factors outside the scope of their deliberations. Second, by failing to object to it and ask for a curative instruction, counsel allowed the jury to consider these factors as if they were proper and relevant to the issue of Mr. Barwick's sentence. Counsel's inability to effectively litigate this issue was prejudicially deficient performance under Strickland v. Washington, 466 U.S. 668 (1984).[16] Had defense counsel performed effectively

[15] This claim is also made in Mr. Barwick's habeas petition and is incorporated as if argued herein.

[16] Counsel have been found to be prejudicially ineffective for failing to function as the government's adversary. See Osborn v. Shillinger, 861 F.2d 612, 625 (10th Cir. 1988) (quoting United States v. Cronic, 466 U.S. 648, 666 (1984)); for failing to raise objections, to move to strike, or to seek limiting instruction regarding inadmissible, prejudicial testimony, Vela v. Estelle, 708 F.2d 954, 961-66 (5th Cir. 1983); for failing to prevent introduction of evidence of other unrelated crimes, Pinnel v.

Mr. Barwick would be entitled to relief. Even if not successful at trial, the objection would have preserved the issue for review.

ARGUMENT X

MR. BARWICK WAS DENIED HIS RIGHTS UNDER THE FOURTH, FIFTH, SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION, AND THE CORRESPONDING PROVISIONS OF THE FLORIDA CONSTITUTION, WHEN THE COURT FOUND ONE OF THE AGGRAVATING FACTORS IN SUPPORT OF A DEATH SENTENCE TO BE THAT THE MURDER OCCURRED DURING THE COMMISSION OF A FELONY. THAT FINDING WAS DUPLICATIVE OF THE BASIS FOR THE DEATH PENALTY, I.E., FELONY-MURDER, AND THIS WAS AN AUTOMATIC AGGRAVATING FACTOR.

Mr. Barwick's trial counsel did not properly object to the automatic aggravating circumstance or propose an alternative instruction; he rendered prejudicially deficient performance. See Strickland v. Washington, 466 U.S. 668 (1984).[17]

Cauthron, 540 F.2d 938 (8th Cir. 1976), for taking actions which result in the introduction of evidence of other unrelated crimes committed by the defendant, United States v. Bosch, 584 F.2d 1113 (1st Cir. 1978); for failing to object to improper questions, Goodwin v. Balkcom, 684 F.2d 794, 816-817 (11th Cir. 1982); and for failing to object to improper prosecutorial jury argument, Vela, 708 F.2d at 963.

[17] This claim is also made in Mr. Barwick's habeas petition and is incorporated as if argued herein.

ARGUMENT XI

MR. BARWICK'S SENTENCE OF DEATH VIOLATES THE FIFTH, SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS BECAUSE THE PENALTY PHASE JURY INSTRUCTIONS WERE INCORRECT UNDER FLORIDA LAW AND SHIFTED THE BURDEN TO MR. BARWICK TO PROVE THAT DEATH WAS INAPPROPRIATE AND BECAUSE THE TRIAL COURT EMPLOYED A PRESUMPTION OF DEATH IN SENTENCING MR. BARWICK. TRIAL COUNSEL WAS INEFFECTIVE FOR NOT OBJECTING TO THESE ERRORS.

Mr. Barwick's trial counsel did not properly object to the burden shifting or propose an alternative instruction; he rendered prejudicially deficient performance. See Strickland v. Washington, 466 U.S. 668 (1984).[18]

CONCLUSION AND RELIEF SOUGHT

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

[18] This claim is also made in Mr. Barwick's habeas petition and is incorporated as if argued herein.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing motion has been furnished by United States Mail, first class postage prepaid, to all counsel of record on July 18, 2008.

CERTIFICATE OF COMPLIANCE

The undersigned counsel hereby certifies that this brief complies with the font requirements of rule 9.210(a)(2), Fla. R. App. P.

_____
D. Todd Doss
Attorney for Mr. Barwick
Florida Bar No. 0910384
725 Southeast Baya Drive
Suite 102
Lake City, Florida 32025
Telephone: 386-755-9119
Facsimile: 386-755-3181

Copies furnished to:

Meredith Charbula
Assistant Attorney General
The Capitol - PL-01
Tallahassee, Florida 32399