IN THE SUPREME COURT OF FLORIDA

DARRYL BARWICK,

Petitioner,

v. CASE NO. SC08-1377

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

Respondent.
_____/

RESPONSE TO PETITION FOR WRIT OF HABEAS CORPUS

COMES NOW, Respondent, by and through the undersigned Assistant Attorney General, and hereby responds to Barwick's Petition for Writ of Habeas Corpus filed in the above styled case. Respondent respectfully submits the petition should be denied.

PRELIMINARY STATEMENT

Petitioner, DARRYL BARWICK raises nine (9) claims in his petition for writ of habeas corpus. References to petitioner will be to Barwick or Petitioner, and references to respondent will be to the State or Respondent.

References to the record from Barwick's initial trial held in 1986 shall be referred to as "1TR" followed by the

appropriate volume and page number. References to the record from Barwick's appeal from his 1992 convictions and sentence to death will be referred to as "2TR" followed by the appropriate page and volume number. References to the record from Barwick's initial post-conviction proceedings will be to "PCR" followed by the appropriate volume and page number. References to the instant habeas petition will be to "Pet." followed by the appropriate page.

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

Darryl Barwick, born September 29, 1966, was 19 years and six months old when he murdered Rebecca Wendt. Barwick murdered Ms. Wendt just three months after being released from prison. Barwick had been in prison as a result of his conviction for sexual battery and burglary. The circumstances of that burglary and sexual battery were similar to the circumstances surrounding the murder of Rebecca Wendt. The relevant facts concerning the March 31, 1986 murder are recited in this Court's opinion on direct appeal:

> …On the morning of March 31, 1986, Michael Ann Wendt left her apartment in Panama City to travel to Fort Walton Beach. Rebecca Wendt, Michael Ann's sister and roommate, remained at the apartment complex and lay outside sunbathing until approximately 11:45 a.m. Another resident of the complex who was also outside sunbathing observed a man walking around the complex at about 12:30 p.m. The witness indicated that she saw the man walk toward the Wendts' apartment and

later walk from the Wendts' apartment into the woods. She subsequently identified that man as Darryl Barwick.

On the evening of March 31, Michael Ann returned to the apartment and found Rebecca's body in the bathroom wrapped in a comforter. Investigators called to the scene observed bloody footprints at various places throughout the apartment and bloody fingerprints on the victim's purse and wallet. Rebecca's bathing suit had been displaced, and she had been stabbed numerous times. An autopsy revealed that she sustained thirty-seven stab wounds on her upper body as well as a number of defensive wounds on her hands. The medical examiner concluded that the potentially life-threatening wounds were those to the neck, chest, and abdomen and that death would have occurred within three to ten minutes of the first stab wound. The examiner found no evidence of sexual contact with the victim, but a crime laboratory analyst found a semen stain on the comforter wrapped around the victim's body. After conducting tests on the semen and Barwick's blood, the analyst determined that Barwick was within two percent of the population who could have left the stain.

When initially questioned by investigators, Barwick denied any involvement in Rebecca's murder. However, following his arrest on April 15, 1986, he confessed to committing the crime. He said that after observing Rebecca sunbathing, he returned to his home, parked his car, got a knife from his house, and walked back to the apartment complex where he had previously observed Rebecca. After walking past her three times, he followed her into her apartment. Barwick claimed he only intended to steal something, but when Rebecca resisted, he lost control and stabbed her. According to Barwick, he continued to stab Rebecca as the two struggled and fell to the floor.

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

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

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

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

Barwick was once again tried and convicted of first-degree murder, armed burglary, attempted sexual battery, and armed robbery. Barwick called fourteen witnesses in mitigation, including seven mental health experts.

This time, the jury recommended Barwick be sentenced to death by a vote of 12 to 0. Once again, the trial court followed the jury's recommendation and sentenced Barwick to death.

The trial judge found the state had proven six aggravators beyond a reasonable doubt: (1) previous convictions for the violent felonies of sexual battery with force likely to cause death or great bodily harm and burglary of a dwelling with an assault; (2) the murder was committed during an attempted sexual

battery; (3) the murder was committed to avoid arrest; (4) the murder was committed for pecuniary gain; (5) the murder was especially heinous, atrocious, or cruel; and (6) the murder was committed in a cold, calculated, and premeditated manner without any pretense of moral justification. The trial court found no statutory mitigation.

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

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

As to the guilt phase, Barwick alleged: (1) the trial court erred in denying his motions to disqualify Judge Foster; (2) the prosecutor improperly used his peremptory challenges to exclude African-Americans from the jury; (3) the trial court erred in denying Barwick's motion for judgment of acquittal on the attempted sexual battery charge; (4) the trial court erred in allowing Tim Cherry, Michael Ann's boyfriend at the time of the murder, to testify as to his blood type; and (5) the trial court

erred in denying Barwick's motions for mistrial after the prosecutor, through comments made during his opening and closing statements, improperly commented on Barwick's silence. Barwick v. State, 660 So.2d 685, 690 n.8 (Fla. 1995). This Court rejected each of Barwick's guilt phase claims and affirmed his convictions. Id. at 695.

As to the penalty phase, Barwick claimed: (1) the trial court erred in finding that the murder was committed during an attempted sexual battery; (2) the trial court erred in finding that the murder was especially heinous, atrocious, or cruel; (3) the trial court erred in finding that the murder was cold, calculated, and premeditated; (4) the trial court erred in rejecting the non-statutory mitigator of abuse as a child; (5) the death sentence was not proportionate in this case; (6) the trial court inadvertently instructed the jury to consider sympathy for the victim and erroneously instructed the jurors not to consider sympathy for the defendant in evaluating the sentence; (7) the instruction for the heinous, atrocious, or cruel aggravator was unconstitutional; (8) the trial court failed to instruct the jury on the mitigating circumstance of extreme duress; and (9) the trial court erred in denying Barwick's motion to preclude the death penalty based on alleged racial bias. Barwick v. State, 660 So.2d 685, 690 n. 9 (Fla.

1995). This Court rejected all of Barwick's penalty phase claims except one.

This Court determined the evidence was insufficient to support the CCP aggravator. This Court found, however, that even after CCP was eliminated, five valid aggravators remained to be weighed against only minimal mitigating evidence. This Court concluded that, as such, there was no reasonable likelihood of a different result. This Court also found Barwick's sentence proportionate.

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

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

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

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

On the day the evidentiary hearing was due to commence, collateral counsel informed the State, as well as the trial court, he had just learned that Judge Overstreet had represented Glenn Barwick's former wife in marriage dissolution proceedings some 20 years before. Glenn Barwick is Darryl Barwick's brother. According to Barwick's collateral counsel, Glenn was scheduled to be a witness during the evidentiary hearing.

After consultation with Barwick, collateral counsel announced his intention to file a motion to disqualify Judge Overstreet. (PCR Vol. XIV 2557-2576). Over objection from the State, the judge granted the motion on May 10, 2004.[1] (PCR Vol. XIV 2592). Ultimately, a successor judge, Judge Don T. Sirmons,

[1] A new collateral judge was ultimately appointed. Glenn Barwick never testified at the evidentiary hearing that was eventually held before the new collateral judge.

was appointed to preside over Barwick's post-conviction proceedings.

On April 8, 2005, Barwick filed a second amended motion for post-conviction relief. (PCR Vol. XV 2744-2760). The motion included all of the claims previously presented in Barwick's amended motion for post-conviction relief and two additional legal claims, both under the auspices of the United States Supreme Court decision in Roper v. Simmons, 543 U.S. 551, 125 S.Ct. 1183 (2005).

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

Barwick did not request an evidentiary hearing on these two legal claims. Accordingly, the filing of the second amended motion did nothing to disturb the collateral court's previous order granting an evidentiary hearing on Claims I, II, III, and X of Barwick's amended motion for post-conviction relief.

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

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

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

On July 21, 2008, Barwick filed the instant petition. This is the State's response.

PRELIMINARY DISCUSSION OF APPLICABLE LAW

A habeas petition is the proper vehicle to raise claims of ineffective assistance of appellate counsel. *See* Rutherford v. Moore, 774 So.2d 637, 643 (Fla. 2000). The standard of review applicable to claims of ineffective assistance of appellate counsel mirrors the standard outlined in Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052 (1984) for analyzing claims of ineffective assistance of trial counsel. Valle v. Moore, 837 So.2d 905, 907 (Fla. 2002); Jones v. Moore, 794 So.2d 579, 586 (Fla. 2001).

When evaluating an ineffective assistance of appellate counsel claim raised in a petition for writ of habeas corpus, this Court must determine, (1) whether the alleged omissions are of such magnitude as to constitute a serious error or substantial deficiency falling measurably outside the range of professionally acceptable performance and (2) whether the performance deficiency compromised the appellate process to such a degree as to undermine confidence in the correctness of the result. Johnson v. Moore, 837 So.2d 343 (Fla. 2002). The petitioner bears the burden of alleging a specific and serious omission or overt act upon which the claim of ineffective assistance of counsel can be based. Freeman v. State, 761 So.2d 1055, 1069 (Fla. 2000). It is not enough to show an omission or act by appellate counsel constituted error. Rather, the "deficiency must concern an issue which is error affecting the outcome, not simply harmless error." Knight v. State, 394 So.2d 997, 1001 (Fla. 1981).

A petitioner cannot prevail on a claim of ineffective assistance of appellate counsel when the issue was not preserved for appeal. *See* Medina v. Dugger, 586 So.2d 317 (Fla. 1991). An exception is made only when appellate counsel fails to raise a claim which, although not preserved for appeal, constitutes fundamental error. Kilgore v. State, 688 So.2d 895, 898 (Fla.

1997). Fundamental error is error that "reaches down into the validity of the trial itself to the extent a verdict of guilty could not have been obtained without the assistance of the alleged error." State v. Delva, 575 So.2d 643, 644-645 (Fla. 1991)(quoting Brown v. State, 124 So.2d 481 (Fla. 1960)).

Likewise, appellate counsel is not ineffective for failing to raise a claim that likely would have been rejected on appeal. Downs v. State, 740 So.2d 506, 517 n. 18 (Fla. 1999). *Accord,* Freeman v. State, 761 So.2d 1055, 1069-1070 (Fla. 2000) (appellate counsel not ineffective for failing to raise non-meritorious issues); Rutherford v. Moore, 774 So.2d 637, 643 (Fla. 2000)(same). This Court has also ruled that appellate counsel cannot be deemed ineffective if the habeas claim, or a variant thereof, was, in fact, "raised on direct appeal." Atkins v. Dugger, 541 So.2d 1165, at 1166-67 (Fla. 1989).

Finally, a claim that has been resolved in a previous review of the case is barred as "the law of the case." See Mills v. State, 603 So.2d 482, 486 (Fla. 1992). Thus, claims properly raised and rejected in a previous rule 3.850 motion for post-conviction relief cannot be raised again on habeas. Scott v. Dugger, 604 So.2d 465, 469-470 (Fla. 1992).

RESPONSE TO SPECIFIC CLAIMS

CLAIM I

WHETHER BARWICK'S EXECUTION IS PROHIBITED BY THE UNITED STATES SUPREME COURT'S DECISION IN ROPER V. SIMMONS

In his first claim, Barwick alleges his execution is unconstitutional pursuant to the United States Supreme Court's decision in Roper v. Simmons, 543 U.S. 551, 125 S.Ct. 1183 (2005) because he is only 12 to 14 years old, emotionally. (Pet. at 2). In Roper, the United States Supreme Court drew a bright line regarding the age at which death eligibility may arise. The new rule announced in Roper is simple and narrow. A person cannot be sentenced to death for a murder he committed before the chronological age of eighteen. Roper v. Simmons, 125 S. Ct. 1183, 1197-1198 (2005) ("The age of 18 is the point where society draws the line for many purposes between childhood and adulthood. It is, we conclude, the age at which the line for death eligibility ought to rest.").

Barwick does not dispute that he was over 18 at the time of the murder. Instead, in support of his claim, Barwick points to Dr. Eisenstein's testimony at Barwick's post-conviction evidentiary hearing that, in Eisenstein's opinion, Barwick

functions linguistically and emotionally at a 12-14 year old range. (Pet. at page 2).

Even accepting Dr. Eisenstein's opinion as grounded in reality, this Court has rejected any notion that a person with an emotional age or developmental age under 18 is ineligible for the death penalty. In Hill v. State, 921 So.2d 579 (Fla. 2006), this Court rejected a similar claim, ruling that "Roper does not apply to Hill. Hill was twenty-three years old when he committed the crimes at issue. Roper only prohibits the execution of those defendants whose chronological age is below eighteen." Hill v. State, 921 So.2d at 584. *See also* Bevel v. State, 983 So. 2d 505, 525 (Fla. 2008) (noting that this Court has consistently held that Roper only prohibits the execution of defendants "whose chronological age is below eighteen" at the time of the crime); Kearse v. State, 969 So. 2d 976 (Fla. 2007) (rejecting similar Roper claim when defendant was 18 years and 3 months old at the time of the crime).

Like Clarence Hill, Barwick was over the age of 18 at the time he murdered Rebecca Wendt. Like Clarence Hill, Barwick is, and was, at the time of his capital trial, eligible for the death penalty. In accord with this Court's decision in Hill this Court should deny this claim.

CLAIM II

WHETHER BARWICK'S CONSTITUTIONAL RIGHTS WERE VIOLATED WHEN THE STATE INTRODUCED, IN AGGRAVATION, BARWICK'S PRIOR CONVICTION FOR SEXUAL BATTERY

In his second claim, Barwick raises another Roper claim. Barwick alleges his execution is prohibited because the State introduced, and the court considered, Barwick's prior violent felony convictions for sexual battery and burglary committed when he was a juvenile. (Pet at pages 7-9).

In presenting this argument, Barwick attempts to persuade this Court that Roper stands for the proposition the Eighth Amendment precludes reliance on criminal acts committed before the age of 18 as a basis for imposition of the death penalty.[2]

However, this Court has already rejected the same claim that Barwick raises here.

In England v. State, 940 So. 2d 389 (Fla. 2006), the defendant claimed that Roper prevented the application of the death penalty in his case because the trial judge based two

[2] In December 1983, at the age of 17, Barwick was convicted of two counts of sexual battery and burglary. The offenses were committed on August 18-19, 1983. He was charged and convicted as an adult and sentenced to concurrent five year sentences for the sexual battery convictions and to ten years for the burglary conviction. At the time he committed these offenses, Barwick was 16 years and 10 months old.

aggravating factors on felony convictions for crimes that occurred before England was eighteen years of age.

This Court denied relief. This Court noted the United States Supreme Court, in Roper, provided a bright line rule (age 18) for the imposition of the death penalty itself, but "nowhere did the Supreme Court extend this rule to prohibit the use of prior felonies committed when the defendant was a minor as an aggravating circumstance during the penalty phase." England, 940 So.2d at 407. Accordingly, this Court found that England's claim has "no merit." Id.

Barwick was not sentenced to death for a murder committed before he was 18. Nor was Barwick sentenced to death for a sexual battery and burglary committed before the age of 18. Instead, Barwick was sentenced to death for a murder committed when he was 19 years and 6 months old. Under Roper, Barwick was unquestionably death eligible upon his conviction for the first degree murder of Rebecca Wendt. In accord with this Court's decision in England, Barwick's claim should be denied.

CLAIM III

WHETHER APPELLATE COUNSEL WAS INEFFECTIVE FOR FAILING TO ARGUE AGAINST THE AVOID ARREST AGGRAVATOR AND FAILING TO APPEAL THE JURY RECEIVING INSTRUCTINS ON THE AVOID ARREST AGGRAVATOR

In this claim, Barwick alleges appellate counsel was ineffective for failing to appeal the trial judge's finding, in aggravation, that the murder was committed to avoid arrest. Barwick also avers appellate counsel was ineffective for failing to challenge the trial judge's instruction to the jury on the avoid arrest aggravator. Barwick claims appellate counsel should have challenged the aggravator and its instruction because the evidence was insufficient to support the avoid arrest aggravator. (Pet. at page 10).

Although he does not directly say so, Barwick's claim turns on the notion there was no competent, substantial evidence to support the avoid arrest aggravator. Barwick is mistaken.[3]

[3] Had counsel raised this issue on appeal, this Court would have reviewed the claim under a competent, substantial evidence standard. Buzia v. State, 926 So.2d 1203, 1209 (Fla. 2006)(the correct question is whether competent, substantial evidence supports the trial court's finding that Buzia murdered Mr. Kersch to avoid arrest.).

In his petition, Barwick points out that this Court has upheld the avoid arrest aggravator when there was evidence the defendant stated his wish to eliminate witnesses. Barwick avers, however, the record in his case required this Court to "assume Barwick's motive", an assumption this Court is not permitted to make. (Pet. at page 11). In making this

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

The aggravator may be proven by direct evidence. Direct evidence of intent is not required, however. The avoid arrest

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allegation, Barwick simply ignores the evidence supporting the aggravator and its instruction.

aggravator may also be proven by circumstantial evidence from which the motivation for the murder may be inferred. Parker v. State, 873 So.2d 270, 289 (Fla. 2004).

In the instant case, there was both direct and circumstantial evidence that Barwick's motive for murdering Rebecca Wendt was to eliminate her as a witness. During the penalty phase of Barwick's trial, the State presented two witnesses in support of the avoid arrest aggravator.[4] The first was Melissa Dom (formerly Melissa Hoole).

Ms. Dom testified that she was 21 years old when Darryl Barwick raped her after breaking into her apartment. Ms. Dom told the jury what happened. Ms. Dom testified that around noon on August 18, 1983, she was at home cleaning the house. She had to be at work by 4:00 p.m. at the Western Steer Family Steak House. (2TR Vol. XXII 611).

During the housecleaning, she went outside to hang her clothes on the line. When Ms. Dom came back inside her apartment, she sat down for a minute to watch some television. She heard a noise in her kitchen. (2TR Vol. XXII 612).

[4] The State also called Lovey Barwick who gave a statement before trial that her brother told her he killed Ms. Wendt because she saw his face. At trial she testified that she now did not know whether he said that or not and that she might have assumed that's what he meant by what he said. (2TR Vol. XXII 624, 626).

She went to investigate and saw Barwick standing in her kitchen with a butcher knife in his hand.[5] He wore a ski mask and gloves. He was dressed only in shorts and tennis shoes.

Barwick backed Ms. Dom up against the wall and put a knife to her throat. He told her to cooperate and she would not get hurt. Barwick backed Ms. Dom into her bedroom and onto the bed. He got on top of her. (2TR Vol. XXII 613).

Barwick kept trying to kiss her. Ms. Dom asked Barwick to put the knife down. He did so. (2TR Vol. XXII 613).

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

Barwick then took the mask off at her request. He tried to penetrate her vaginally and could not. Barwick tried to roll her over on top of him but she would not budge. (2TR Vol. XXII 614).

Barwick then got up and sat on Ms. Dom's chest. He tried to force her to do oral sex on him and commanded her to "suck it." Ms. Dom refused. (2TR Vol. XXII 614).

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

Barwick asked Ms. Dom if she lived alone. She lied to him and told him no. Barwick asked her when her husband got home. Ms. Dom told Barwick that he normally got home at five but sometimes would get home earlier. (2TR Vol. XXII 615).

Barwick got a little anxious. He finally penetrated her vaginally. After he ejaculated, Barwick noticed that Ms. Dom was shaking. He asked her if it was the knife and she said yes. (2TR Vol. XXII 615).

Barwick proposed that they get dressed and go put the knife up. They got dressed and went into the kitchen. She discovered the knife he had used was one of hers. (2TR Vol. XXII 615). He had taken it from her kitchen drawer. (2TR Vol. XXII 616).

She saw Barwick's buck knife on the counter. Barwick told her that it was always better to use the other person's. (2TR Vol. XXII 615).

Barwick then told Ms. Dom that they "have a problem." Barwick's problem was that his victim had "seen [his] face. (2TR Vol. XXII 616).

Ms. Dom told Barwick she had not seen his face and this never happened. Barwick told her not to call the police. If she did, Barwick would come and get her. (2TR Vol. XXII 616).

Barwick asked Ms. Dom what she would do if she saw him on the street. She told him she would look the other way and hoped he would do the same. (2TR Vol. XXII 617).

Barwick left. Ms. Dom locked the door and called her mother. (2TR Vol. XXII 618). Her mother and her mother's boss came immediately to her apartment.

Her mother's boss called the police. Ms. Dom identified Barwick as her assailant from a photographic line-up. (2TR Vol. XXII 618-619).

In addition to Ms. Dom's testimony, the State presented direct evidence that Barwick's motive was to eliminate Ms. Wendt as a witness and to avoid arrest. This evidence was Barwick's own confession that he killed Ms. Wendt because she saw his face and he did not want to go back to prison.[6]

William Barwick, Darryl Barwick's brother, told the jury that Barwick confessed to him that he killed Rebecca Wendt. William testified Barwick told him he killed Rebecca because "when he was struggling with her and she took his mask off, when

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

he seen her, when she seen his identity he didn't want to go back to where he came from, from prison, from… that's why he said he did it." (2TR Vol. XXII 630, 634).

Ms. Dom fooled Barwick once. He would not be fooled again. The circumstances of Barwick's prior violent sexual assault on another young woman under nearly identical circumstances, his stint in prison because of it, and Barwick's statement to his brother that he killed Ms. Wendt because she had seen his face and he did not want to go back to prison provided competent substantial evidence that Barwick murdered Ms. Wendt to avoid arrest. Schoenwetter v. State, 931 So. 2d 857, 874 (Fla. 2006); Nelson v. State, 850 So. 2d 514, 526-527 (Fla. 2003) (Nelson's admissions to police, including statement that he killed the victim because he thought she could identify him would, alone, support his intentional elimination of a witness); Derrick v. State, 641 So. 2d 378, 380 (Fla. 1994) ("In a statement to the [police], [the defendant] indicated that the victim recognized him and that he killed the victim to 'shut him up.'").

Because there was competent substantial evidence to support the avoid arrest aggravator, appellate counsel cannot be ineffective for failing to challenge the trial judge's decision to instruct the jury on the aggravator. The state was entitled to the instruction. Floyd v. State, 850 So. 2d 383, 405 n. 33

(Fla. 2002) (where competent substantial evidence exists to support an aggravator it is not error for the trial judge to instruct the jury on the aggravator).

Likewise, because there was competent substantial evidence to support the trial judge's conclusion the murder was committed to avoid arrest, appellate counsel is not ineffective for raising a claim that would have been rejected on appeal. Freeman v. State, 761 So.2d 1055, 1069-1070 (Fla. 2000) (appellate counsel not ineffective for failing to raise non-meritorious issues); Rutherford v. Moore, 774 So.2d 637, 643 (Fla. 2000) (same). This claim should be denied.

CLAIM IV

WHETHER APPELLATE COUNSEL WAS INEFFECTIVE FOR FAILING TO ENSURE A COMPLETE RECORD WAS PREPARED FOR APPEAL[7]

In this claim, Barwick alleges he was deprived of a complete record on appeal because a "large" portion of the charge conference, several bench conferences, and the general jury qualification procedures were not transcribed. (Pet. at page 13). This claim is without merit.

Barwick failed to identify any errors that occurred during the untranscribed portions of the proceedings. Accordingly,

[7] Barwick attempts to raise a substantive claim that he was denied a proper direct appeal because portions of the record were missing. This claim is procedurally barred. Sochor v. State, 883 So.2d 766, 789 n. 27 (Fla. 2004).

Barwick cannot show he was prejudiced by the lack of a record of these proceedings. Sochor v. State, 883 So.2d 766, 789 (Fla. 2004)(rejecting Sochor's claim his appellate counsel was ineffective for failing to ensure a complete appellate record because Sochor has not pointed to any errors that occurred during the un-transcribed portions of the proceedings and therefore has not established the necessary element of prejudice). *See also* Thompson v. State, 759 So. 2d 650, 660 (Fla. 2000).

Although Barwick points to Mr. Adams' comment that "we have had a preliminary discussion and I do object to the deletion of those mitigating instructions", Barwick fails to point to any error made by the trial court during the "off the record" discussion. Moreover, contrary to Barwick's implication that this Court cannot determine what Mr. Adams was talking about, the record reflects that Mr. Adams' objections pertained to the trial judge's refusal to instruct the jury that, at the time of the murder, the defendant was acting under extreme duress. (TR Vol. XXV 903). Mr. Adams also raised an objection to both the avoid arrest aggravator and HAC. (TR Vol. XXV 904).[8]

[8] On appeal, Barwick alleged the trial court erred in failing to give the mitigating instruction on duress. This Court considered Barwick's claim on the merits but rejected it. Barwick v. State, 660 So. 2d 685, 690 (Fla. 1995).

In failing to identify any reversible error made during any alleged un-transcribed portion of the record, Barwick has failed to show an entitlement to habeas relief. His claim should be denied.

CLAIM V

WHETHER BARWICK'S JURY WAS MISLED BY COMMENTS AND INSTRUCTIONS WHICH UNCONSTITUTIONALLY DILUTED ITS SENSE OF RESPONSIBILITY FOR SENTENCING AND WHETHER APPELLATE COUNSEL WAS INEFFECTIVE FOR FAILING TO RAISE A CLAIM ON DIRECT APPEAL THE JURY WAS MISLED BY THESE INSTRUCTIONS

In this claim, Barwick alleges the trial judge's instructions to the jury, combined with the prosecutor's "repeated" comments that the jury's role was to recommend a sentence, served to unconstitutionally dilute the jury's sense of responsibility for the awesome capital sentencing task the law requires it to perform. (Pet. at page 17).[9] Barwick raises

[9] Barwick alleges that the prosecutor told the jury that the judge wanted them to recommend death. He acknowledges no objection was made. Barwick faults trial counsel for failing to object. In making this allegation, Barwick implies the prosecutor attempted to mislead the jury into believing that the judge wanted them to recommend death. This is simply not the case. In context, it is clear the prosecutor did not tell the jury the judge wanted them to recommend death. Instead, the record reflects, reading his remarks in context, that the prosecutor is discussing the recording of the vote and noting that in case of a death recommendation, the judge has to ensure that more than six jurors actually recommended death. (2TR Vol. XXV 909-910).

this claim as both a substantive claim of error and an allegation of ineffective assistance of appellate counsel.[10]

In presenting his claim, Barwick has failed to show the judge's instructions or the prosecutor's comments were anything but consistent with Florida's statutory scheme in which the jury renders an advisory sentence to the court and the trial court, notwithstanding the recommendation of a majority of the jury, sentences the defendant. Teffeteller v. Dugger, 734 So.2d 1009, 1024 (Fla. 1999). This Court has consistently held that the standard penalty phase jury instructions fully advise the jury of the importance of its role, correctly state the law, do not denigrate the role of the jury, and do not violate Caldwell v. Mississippi, 472 U.S. 320, 105 S. Ct. 2633, 86 L. Ed. 2d 231 (1985). *See* Brown v. State, 721 So. 2d 274, 283 (Fla. 1998); Miller v. State 926 So. 2d 1243, 1257 (Fla. 2006); Perez v. State, 919 So. 2d 347, 368 (Fla. 2005); Card v. State, 803 So. 2d 613, 628 (Fla. 2001). This Court has also rejected the notion that appellate counsel is ineffective for failing to present a Caldwell claim on direct appeal. Peede v. State, 955 So. 2d 480, 503 (Fla. 2007) (appellate counsel not ineffective

[10] Barwick's substantive claim is procedurally barred as it could have been raised on direct appeal. Dufour v. State, 905 So. 2d 42, 67 (Fla. 2005).

for raising a meritless Caldwell claim); Johnson v. State, 921 So. 2d 490, 511 (Fla. 2005) (same).

At trial, the prosecutor told the jury that the trial judge was required to give its recommendation great weight. (2TR Vol. XXV 910). The trial judge instructed the jury, among other things, that "[t]he fact that the determination of whether you recommend a sentence of death or sentence of life imprisonment in this case can be reached by a single ballot should not influence you to act hastily or without due regard to the gravity of these proceedings." (2TR Vol. XXXV 959). The Court also instructed the jury that it should carefully "weigh, sift, and consider the evidence and all of it realizing that a human life is at stake and bring to bear your best judgment in reaching your advisory sentence." (2TR Vol. XXV 959).

The standard penalty phase jury instructions given to Barwick's jury properly characterized its role under Florida's capital punishment procedures. Globe v. State, 877 So. 2d 663, 674 (Fla. 2004) (ruling that Florida's standard penalty phase jury instructions fully advise the jury of the importance of its role, correctly states the law, does not denigrate the role of the jury, and are in compliance with Caldwell). Accordingly, this Court should deny Barwick's fifth habeas claim.

CLAIM VI

WHETHER APPELLATE COUNSEL WAS INEFFECTIVE FOR FAILING TO RAISE A CLAIM ON DIRECT APPEAL OF PROSECUTORIAL MISCONDUCT DURING THE GUILT AND PENALTY PHASE OF BARWICK's CAPITAL TRIAL

Barwick next avers appellate counsel was ineffective in failing to present, on direct appeal, a claim of error regarding several instances of alleged improper prosecutorial argument during the guilt phase and penalty phase of Barwick's capital trial. Barwick acknowledges that no objection was raised at trial.

Generally, appellate counsel cannot be ineffective for failing to present claims which were not preserved due to trial counsel's failure to object. *See, e.g.* Johnson v. Singletary, 695 So. 2d 263, 266 (Fla. 1996) ("[A]ppellate counsel cannot be ineffective for failing to raise claims which were not preserved due to trial counsel's failure to object."); Ferguson v. Singletary, 632 So. 2d 53, 58 (Fla. 1993) (same). One exception to this general rule is where the un-objected to comments rise to the level of fundamental error. *See* Owen v. Crosby, 854 So. 2d 182, 188 (Fla. 2003).

Fundamental error is error that reaches "down into the validity of the trial itself to the extent that a verdict of guilty [or death recommendation] could not have been obtained

without the assistance of the alleged error." Spencer v. State, 842 So. 2d 52, 74 (Fla. 2003) (quoting Brown v. State, 124 So. 2d 481, 484 (Fla. 1960)). To constitute fundamental error, improper comments "must be so prejudicial as to taint the jury's recommended sentence." Fennie v. State, 855 So. 2d 597, 609 (Fla. 2003) (quoting Thomas v. State, 748 So. 2d 970, 985 n.10 (Fla. 1999)).

A. Guilt phase

Barwick alleges that appellate counsel was ineffective when he failed to argue on appeal that the prosecutor's comments during guilt phase closing argument constituted fundamental error. Barwick points to the prosecutor's arguments that Barwick "stared at" and then selected Ms. Wendt as his victim. (Pet. at page 31).[11] Barwick avers this tactic was designed to scare the jury into convicting Barwick and sentencing him to death. No objection was made. (2TR Vol. XXI 550)

The argument about which Barwick complains came during the prosecutor's argument in support of the attempted sexual battery charge. The prosecutor noted that Barwick had seen Ms. Wendt sunbathing and then gone to lunch at Church's Chicken. (2TR

[11] There is a typographical error in the citation provided by Barwick in his petition. (Petition at page 31, citing to pages 560-561 of the trial transcript). The comment about which Barwick complains is actually found at TR Vol. XXI 550-551.

Vol. XXI 550). The prosecutor also noted that, after lunch, Barwick returned to where Ms. Wendt was sunbathing and found another young woman (Ms. Capers) sunbathing as well. The prosecutor told the jury that in examining Barwick's intent, it could consider that Barwick watched both women, then ultimately entered Ms. Wendt's apartment and assaulted her. (2TR Vol. XXI 550). Given that Barwick told the police his intent was to simply burglarize Ms. Wendt's apartment, it was not impermissible for the prosecutor to argue that Barwick's actions pointed to a more sinister intent, in particular, to sexually batter Ms. Wendt.

Nothing in the prosecutor's comments could reasonably be taken as an attempt to "scare" the jury into convicting Barwick of murder. Rather the arguments were fair comment on the evidence and the reasonable inferences the jury could draw from that evidence. Barwick has failed to show the comments constituted error, let alone fundamental error. Miller v. State, 926 So.2d 1243 (Fla. 2006) (a prosecutor is allowed to argue reasonable inferences from the evidence or any other relevant issue so long as the argument is based on the evidence).

B. **Penalty Phase**

Barwick avers that two comments during the prosecutor's penalty phase closing arguments rose to the level of fundamental error. No objection was lodged to either comment. (2TR Vol. XXV 919-922, 933-935).

The first comment about which Barwick complains occurred when the prosecutor discussed the heinous, atrocious, or cruel (HAC) aggravator with the jury. Contrary to Barwick's allegation, the State did not ask the jury to consider the aggravator through the lens of sympathy for the victim. Nor did the prosecutor ask the jury to show sympathy for the victim and ignore it for the defendant. Indeed the prosecutor told the jury that his argument was not about sympathy for the victim. (2TR Vol. XXV 919). The prosecutor went on explain the elements of the HAC aggravator and to argue how the evidence supported the aggravator.

Barwick points to nothing in the prosecutor's argument that strayed from the elements necessary to sustain the State's burden to show the murder was especially heinous, atrocious or cruel. The jury was instructed on the HAC aggravator and the trial court found the aggravator had been established. Moreover, this Court found the evidence supported the court's finding the murder was especially heinous, atrocious, or cruel.

Barwick v. State, 660 So.2d 685, 696 (Fla. 1995) (we conclude that the court properly found that the murder was HAC as Rebecca Wendt was stabbed thirty-seven times and suffered numerous defensive wounds. We have consistently upheld the finding of this aggravator where the victim was repeatedly stabbed).

Barwick has failed to show this comment constituted error let alone fundamental error. Accordingly, his claim should be denied.

The second comment about which Barwick complains came when the prosecutor urged the jury not to allow sympathy to persuade them to recommend life. (2TR Vol. XXV 933-934). Barwick asserts that by telling the jury not to consider sympathy for the victim or the defendant, the prosecutor was actually telling the jury to consider sympathy for the victim but not for the defendant. (Pet. at page 29).

Contrary to Barwick's assertions, the prosecutor did not ask the jury to show sympathy for Ms. Wendt and show none to the defendant. Instead, the prosecutor told the jury that neither sympathy for the victim nor sympathy for the defendant should play a role in their deliberations. (2TR Vol. XXV 933).

During the argument, the prosecutor showed the jury a picture of the victim that had been properly admitted into evidence. The prosecutor told the jury that his purpose in

showing a photograph of the victim was, not to evoke sympathy, but to show the murder was especially heinous, atrocious, or cruel. (2TR Vol. XXV 933).

The prosecutor also argued that while Barwick would like the jury to sympathize with him, that it was the jury's duty to follow the law. He told jurors that if in their minds and hearts, after considering the aggravating factors and the mitigating factors, they believed death was appropriate, they should recommend death. If, on the other hand, they felt in their minds and hearts, after considering and weighing the aggravating factors and mitigating factors, that the judge should impose life, they should recommend life. (2TR Vol. XXV 935). While he did ask jurors to recommend death, there is not a single place in his argument where he asks the jury to show sympathy for the victim but disregard it for the defendant. (2TR Vol. XXV 933-935).

Even if the prosecutor's comments came close to an appeal to the juror's emotions, there is no reasonable probability this argument reached down into the validity of the trial itself to the extent that a recommendation of death could not have been obtained without the assistance of this portion of the prosecutor's closing argument. The prosecutor did not ask the jury to imagine Ms. Wendt's pain. The prosecutor did not ask

the jury to show the same mercy to the defendant as he showed Ms. Wendt. The prosecutor did not create an imaginary script from facts not in evidence. The prosecutor did not appeal to juror's community conscience or duty to protect the public. The prosecutor did not tell the jury that the law did not permit it to show mercy and recommend life if they found the aggravators outweighed the mitigators. In short, the prosecutor made none of the arguments that this Court has condemned in cases such as Urbin v. State, 714 So.2d 411, 418-422 (Fla. 1998) and Brooks v. State, 762 So.2d 879, 898 (Fla. 2000).

In this case, the jury vote was not even a close call. Barwick's jury recommended he be sentenced to death by a vote of 12-0. Five valid aggravators were found to exist to be weighed against minimal mitigation.

Barwick has failed to show the prosecutor's comments constituted fundamental error. This Court should deny Barwick's claim.

CLAIM VII

WHETHER 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 IN THE COURSE OF A FELONY AND WHETHER APPELLATE COUNSEL WAS INEFFECTIVE FOR FAILING TO RAISE THIS ISSUE ON APPEAL

In this claim, Barwick alleges that it was unconstitutional to find, in aggravation, that Barwick committed the murder in the course of a felony because the finding was duplicative of the jury's finding, during the guilt phase, that Barwick was guilty of an enumerated felony.[12] Barwick also complains the aggravator is unconstitutional because it acts as an automatic aggravator and fails to channel and narrow the sentencer's discretion. (Pet at pages 36-37). Barwick's claims are contrary to long established Florida jurisprudence.

First, Barwick alleges that the "in the course of a felony" aggravator fails to guide the sentencer's discretion and does not genuinely narrow the class of persons eligible for the death penalty. Barwick alleges that, as such, the underlying felonies

[12] Barwick alleges that because this Court struck the CCP aggravator on direct appeal, the State did not prove Barwick guilty of first degree murder under a premeditated murder theory. (Pet. at page 36). Barwick provides no authority for this assertion. This Court affirmed Barwick's conviction for first degree murder on direct appeal. Barwick v. State, 660 So.2d 685 (Fla. 1995).

for which he was convicted cannot be used in aggravation. In Blanco v. State, 706 So.2d 7, 12 (Fla. 1997), this Court rejected a similar constitutional attack on the "in the course of a felony aggravator."

In Blanco, this Court determined that Florida's sentencing scheme does narrow the class of death-eligible defendants because a person can commit felony murder yet still be ineligible for this particular aggravating circumstance. This Court noted that because the list of enumerated felonies in the provision defining felony murder is larger than the list of enumerated felonies in the provision defining the aggravating circumstance of commission during the course of an enumerated felony, the "in the course of a felony" aggravator passes constitutional muster. Id. *See also* Miller v. State, 926 So.2d 1243, 1260 (Fla. 2006)(rejecting the argument that Florida's capital sentencing scheme is unconstitutional because it provides for an automatic aggravating circumstance and neither "narrows the class of persons eligible for the death penalty" nor "reasonably justifies the imposition of a more severe sentence on the defendant compared to others found guilty of murder."); Freeman v. State, 761 So.2d 1055, 1067 (Fla. 2000) (finding no merit to the argument that an underlying felony cannot be used as an aggravating factor).

Next, Barwick alleges the "in the course of felony" aggravator is unconstitutional because this Court has held this aggravator to be insufficient, standing alone, to justify the death penalty. Barwick argues the jury is required to be given a limiting instruction that informs it that this aggravating factor, standing alone, is insufficient to warrant imposition of the death penalty. (Pet. at page 40).[13] Barwick claims the failure to give the instruction was especially prejudicial because the jury was instructed on this aggravating factor and "told that it was sufficient for a recommendation of death" unless the mitigating circumstances outweighed the aggravating circumstances. (Pet. at page 41). Barwick's argument must fail for two reasons.

First, the "in the course of a felony" aggravator was not the only aggravating factor found to exist beyond a reasonable doubt. The jury was instructed on, and the trial judge found four additional valid aggravators, including prior violent felony, pecuniary gain, avoid arrest, and HAC. Barwick v. State,

[13] Even if this holding was absolute, a person is unquestionably death eligible under Florida's death penalty statute if the only aggravator present is a "murder in the course of an enumerated felony." While this Court may disapprove a death sentence in such cases on proportionality grounds, proportionality is not a matter for the jury's consideration.

660 So. 2d 685, 689-690 (Fla. 1995). Accordingly, no limiting instruction was required.

Second, Barwick's claim must fail because it is simply not true that Barwick's jury was told the "in the course of a felony" aggravator was sufficient for a recommendation of death. Instead, the trial judge instructed the jury on five separate aggravators. At no time did the court instruct the jury that one, or even all five of them were "sufficient for a recommendation of death." (TR Vol. XXV 955-957).

The jury was actually instructed that "should (emphasis mine) you find sufficient aggravating factors do exist, it will be then your duty to determine whether mitigating circumstances exist that outweigh the aggravating circumstances." (2TR Vol. XXV 957). The trial judge also instructed the jury that aggravating factors must be found beyond a reasonable doubt and that "if you find the aggravating circumstances do not justify the death penalty your advisory sentence should be one of life imprisonment without the possibility of parole for twenty-five years." (2TR Vol. XXV 957-958). Barwick's claim the jury was instructed the "in the course of a felony aggravator" was sufficient to warrant a death sentence is refuted by the record.

Lastly, Barwick alleges, albeit it indirectly, that the "in the course of a felony" aggravator is unconstitutionally vague.

(Pet. at page 41). In making this claim, Barwick does not identify any particular infirmity in the instruction. Rather, Barwick claims only that the instruction is vague. (Pet. at page 41).

This Court has already rejected any notion the "in the course of a felony" aggravator is unconstitutionally vague. Additionally, this Court has found that appellate counsel is not ineffective for failing to challenge this aggravator on vagueness grounds. Thompson v. State, 759 So.2d 650, 656, 666 (Fla. 2000) (ruling that appellate counsel was not ineffective for failing to raise the meritless claim that the murder in the course of a sexual battery instruction was unconstitutionally vague).

As all of Barwick's underlying claims regarding the "in the course of a felony" aggravator are without merit, appellate counsel cannot be deemed ineffective. Freeman v. State, 761 So.2d 1055, 1070 (Fla. 2000) (ruling that appellate counsel cannot be ineffective for failing to raise an issue which is without merit). This Court should deny this claim.

CLAIM VIII

WHETHER BARWICK'S SENTENCE VIOLATES HIS FIFTH, SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION, BECAUSE THE PENALTY PHASE INSTRUCTIONS INCORRECTLY SHIFTED THE BURDEN TO SHOW THAT DEATH WAS INAPPROPRIATE AND CREATED A PRESUMPTION OF DEATH AND WHETHER APPELLATE COUNSEL WAS INEFFECTIVE FOR FAILING TO RAISE THIS ISSUE ON APPEAL[14]

In this claim, Barwick alleges that his sentence to death is unconstitutional because the standard jury instructions shift the burden to the defendant to prove death is inappropriate. (Pet. at page 43). Barwick also alleges the standard jury instructions create a presumption of death. Finally, Barwick alleges his sentence to death is unconstitutional because his jury was "effectively" instructed that once the aggravating circumstances were established, it need not consider mitigating circumstances unless those mitigating circumstances were sufficient to outweigh the aggravating circumstances. Barwick alleges this instruction violates the dictates of Hitchcock v. Dugger, 481 U.S. 393 (1987). (Pet. at page 47).

[14] To the extent Barwick attempts to raise his claims as substantive claims of error, they are procedurally barred because the claims could have been raised on direct appeal. Thompson v. State, 759 So. 2d 650, 665 (Fla. 2000) (stating that substantive challenges to jury instructions are procedurally barred in postconviction challenges because the claims can and therefore should be raised on direct appeal).

As to Barwick's burden shifting argument, this Court has consistently rejected the claim. Rodriguez v. State, 919 So. 2d 1252, 1280 (Fla. 2005)(rejecting claim that the standard jury instruction impermissibly shifts the burden to the defense to prove that death is not the appropriate sentence). *See also* San Martin v. State, 705 So. 2d 1337, 1350 n.5 (Fla. 1997) (concluding that weighing provisions in Florida's death penalty statute requiring the jury to determine "[w]hether sufficient mitigating circumstances exist which outweigh the aggravating circumstances found to exist" and the standard jury instruction thereon did not unconstitutionally shift the burden to the defendant to prove why he should not be given a death sentence). Accordingly, Barwick's burden shifting argument is without merit.

Likewise, this Court has repeatedly rejected claims that Florida's death penalty statute presumes death is the appropriate sentence. Walton v. State, 847 So.2d 438 (Fla. 2003)("Walton's claims relating to the constitutionality of Florida's death penalty scheme - that Florida's death penalty statute shifts the burden to the capital defendant during the penalty phase and presumes that death is the appropriate punishment are entirely devoid of merit."). Finally, this Court has rejected any notion that Florida's standard jury

instructions improperly lead the jury to believe that it need not consider mitigating factors unless they outweigh the aggravating factors. Israel v. State, 985 So. 2d 510 (Fla. 2008).

Appellate counsel is not ineffective for failing to raise meritless claims such as the ones Barwick presents in his eighth claim. Israel v. State, 985 So. 2d 510 (Fla. 2008) (appellate counsel not ineffective for failing to raise issues that this Court has consistently found to be without merit). This Court should deny this claim.

CLAIM IX

WHETHER THIS COURT ERRED IN FAILING TO REMAND FOR RESENTENCING WHEN THIS COURT STRUCK THE CCP AGGRAVATOR

In his final claim, Barwick alleges this Court erred in failing to remand for resentencing when it struck the CCP aggravator. Barwick fails to cite to any law in support of this claim. This is so, perhaps, because this Court has made clear that a death sentence may be affirmed when an aggravator is stricken as long as this Court is convinced that the error was harmless, as was the case here. Hamblen v. Dugger, 546 So. 2d 1039, 1041 (Fla. 1989) (noting appropriateness of harmless error analysis where aggravators are stricken). *See also* Williams v. State, 967 So. 2d 735, 765 (Fla. 2007)(noting that when this

Court strikes an aggravating factor on appeal, the harmless error test is applied to determine whether there is no reasonable possibility that the error affected the sentence); Jennings v. State, 782 So. 2d 853, 863 n.9 (Fla. 2001); Douglas v. State, 878 So. 2d 1246, 1268 (Fla. 2004) ("Striking [an] aggravator necessitates a harmless error analysis."); Ferguson v. Singletary, 632 So. 2d 53, 58 (Fla. 1993)(same).

In raising this as a substantive claim of error, Barwick, in effect, asks this court to "rehear" its ruling rendered some eleven years ago. This Court should demur. Barwick has presented no reason, let alone a compelling reason, for this Court to revisit this issue. Barwick's claim should be denied.

CONCLUSION

Barwick has failed to demonstrate entitlement to relief. The Petition for Writ of Habeas Corpus should be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing RESPONSE TO PETITION FOR WRIT OF HABEAS CORPUS has been furnished by U.S. Mail to D. Todd Doss, 725 Southeast Baya Drive, Suite 102, Lake City, Florida 32025, this 21st day of October 2008.

_____
Meredith Charbula
Assistant Attorney General

CERTIFICATE OF FONT AND TYPE SIZE

Counsel certifies that this pleading was typed using 12 point Courier New.

_____
Meredith Charbula