IN THE SUPREME COURT OF FLORIDA

ROBERT SHANNON WALKER, Appellant, v. STATE OF FLORIDA, Appellee.	Case No. SC04-2381

ON APPEAL FROM THE CIRCUIT COURT
OF THE EIGHTEENTH JUDICIAL CIRCUIT,
IN AND FOR BREVARD COUNTY, FLORIDA

ANSWER BRIEF OF APPELLEE

CHARLES J. CRIST, JR.
ATTORNEY GENERAL

BARBARA C. DAVIS
Assistant Attorney General
Florida Bar No. 410519
444 Seabreeze Blvd., Suite 500
Daytona Beach, Florida 32118
(386)238-4990
Fax (386) 226-0457

COUNSEL FOR APPELLEE

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STATEMENT OF THE CASE

On February 25, 2003, Walker was indicted on charges of First Degree Premeditated Murder, Kidnapping, and Aggravated Battery arising from an incident on January 27, 2003, in which David Hamman was murdered by Walker and Leigh Ford (Vol.IV, R497-498).

Walker filed various motions claiming the Florida death penalty statute and rules of procedure are unconstitutional (Vol.IV, R522-536, 537, 538-540, 541-543, 544-550, 551-553, 557-559, 560-562, 582-586, 592-593, 624-628, 633-637, 638-640, 641-650, 651-665, Vol. VI, R918-919). After a hearing on March 29, 2004, the motions were denied (Vol.I, R1-113). Appellant filed a motion to sever the co-defendant's trial (Vol.IV, R 587-588). He filed a motion to suppress statements and admissions (Vol.V, R679-684). The State filed a memorandum of law in opposition to the motion to suppress (Vol.V, R743-748). The motion was denied after a hearing (Vol.VI, R885-888). On August 7, 2003, Walker moved to discharge counsel (Vol.IV, R600-603). It appears the motion was withdrawn August 18, 2003 (Vol. IV, 604-605). Walker filed another motion to discharge counsel dated April 26, 2004 (Vol. V, R698-701). The trial judge held a *Nelson* hearing on May 11, 2004 (Supp. R 995-1004). The trial judge denied the motion

on May 24, 2004 (Vol.VI, R 895-896).

Walker was tried before a jury commencing July 19, 2004, with the jury returning verdicts of First Degree Premeditated Murder (Vol.V, R812), Kidnapping (Vol.V, R813), and Aggravated Burglary (Vol.V, R814). The penalty phase was conducted immediately, and on July 30, 2004, the jury returned a sentencing recommendation for the death penalty by a vote of seven (7) to five (5) (Vol.V, R825; Vol. XVII, TT2031). The *Spencer* hearing was held August 30, 2004 (Vol.III, R292-415). Appellant was sentenced to death on December 13, 2004 (Vol.III, R416-461). The trial judge entered a written sentencing order (Vol.V, R961-976).

The trial judge found the following aggravating circumstances:

(1) Committed during a kidnapping – great weight;

(2) Especially heinous, atrocious, or cruel – great weight;

(3) Cold calculated and premeditated – great weight;

(Vol. V, R962-68, 974).

The trial judge discussed the following non-statutory mitigating circumstances.

(1) Drug use/bi-polar personality/sleep deprivation - moderate weight;

(2) Life sentence of co-defendant Leigh Valorie Ford -

some weight;

(3) Defendant's statement to police - moderate weight;

(4) Defendant did not resist arrest – rejected as mitigating;

(5) Defendant tried to protect his co-defendant girlfriend – rejected as mitigating;

(6) Defendant is unselfish in character and did not attempt to gain any benefit by providing information – considered as part of cooperation with law enforcement as previously discussed;

(7) Defendant did not harm the Good Samaritan in Live Oak – rejected as mitigating;

(8) Defendant has remorse – slight weight;

(9) Court should show mercy – rejected as mitigating;

(10) Victim was a bad person – rejected as mitigating.

(Vol. V, R968-974, 975).

STATEMENT OF THE FACTS

According to Appellant's statement, he was involved with the victim, David Hamman, through the illicit manufacture and disposition of the controlled substance methamphetamine, sometimes referred to as "crank" (Vol. XV, TT1941) [1]. Hamman

[1] Cites to the record are by volume number followed by "R." Because the numbering for the trial/penalty phase transcripts begins anew at number "1," cites to those transcripts will be by volume number followed by "TT."

supposedly possessed the "formula" for concocting the home-brewed drug and would give lessons for $2500.00, then receive 25% of his students' profits (Vol. XV, TT1941). Appellant Walker and co-defendant Ford mowed grass for the lawn maintenance business of Joel Gibson (Vol. XII, TT1079).

On Friday, January 24, 2003, Walker and Hamman were at the house occupied by Pat Connelly, Leslie Ritter and Loriann Gibson[2] (Vol. XI, TT955). Loriann Gibson had been dating Hamman for the preceding couple of weeks (Vol. XI, TT885). Connelly was presumably a "pupil" of Hamman and had fallen into disfavor. Walker and Hamman beat up Connelly (Vol. XI, TT991). When Ms. Ritter learned of the attack on Connelly, she began to make arrangements to move out (Vol. XI, TT993).

On Sunday, January 26, 2003, Leslie Ritter took Loriann Gibson's car and drove to Titusville where she spent the day with a friend (Vol. XI, TT888, 973). She called Ms. Gibson to advise her where she was, and that evening Hamman, accompanied by Ms. Gibson, drove to Titusville and met with Ms. Ritter (Vol. XI, TT888, 973). Hamman drove Ritter in his 2003 Chevrolet pick up truck, Gibson followed in her car, and the trio returned to

[2] Loriann Gibson was not related to Joel Gibson (Vol. XI, TT892).

Palm Bay (Vol. XI, T888, 974). During this trip, Hamman made statements to Ms. Gibson that led her to believe she was going to be murdered (Vol. XI, TT930). He also told Ritter she was a “loose link” that he had to do something about (Vol. XI, TT996). Hamman had duct tape, garbage bags, metal wire and twist ties in the car (Vol. XI, TT930, 997). Ritter was afraid he was going to kill her (Vol. XI, TT998).

Ms. Gibson left her car in the Winn Dixie parking lot on U.S.1 in Palm Bay and Ms. Gibson got into the truck with Hamman and Ritter (Vol. XI, TT889-890). Hamman then drove them to Joel Gibson's apartment in Valkaria, arriving around midnight (Vol. XI, TT931).

As the three approached Joel Gibson's second floor apartment, Hamman stated that he was going to straighten out any problem, and the girls would not be harmed (Vol. XII, 1014). Hamman entered the apartment followed by Leslie Ritter and Loriann Gibson. Almost immediately, Walker attacked Hamman, striking him in the head with a MagLite flashlight (Vol. XI, TT891, 975). Walker, a.k.a. “Fidget,” and Leigh Ford, a.k.a. “Slasher,” proceeded to brutally beat Hamman over a period of three to three and one half hours (Vol. XI, TT892-93, 899, 903, 932). There was blood all over the apartment (Vol. XI, TT976).

Hamman was stripped naked (Vol. XI, TT894). He was struck

in the head and face numerous times with the flashlight or some sort of club (Vol. XI, TT934; Vol. XII, TT1016). Hamman was beaten over his entire body including his hands and arms and legs and feet. He was pleading for his life and screaming "Please, stop, I don't want to die. Please don't kill me. It hurts." (Vol. XI, TT896, 977). Walker and Ford were asking "Are you ready to die?" and Joel Gibson said Hamman was going to die that night (Vol. XI, TT951, 959). Joel was smoking something in tin foil. There were guns on the table, and Joel had access to them (Vol. XII, TT1020). Joel appeared to be directing the assault (Vol. XII, TT1022).

Dennis Goss, Joel's neighbor on the second floor, heard his dog bark just after midnight (Vol. XII, TT1060). Joel knocked on Goss' door and said "Sorry abut the noise, somebody got too big for their britches." (Vol. XII, TT1065). Goss was disturbed later by the sounds of someone being beaten "real hard." (Vol. XII, TT1065). Goss heard someone say "get in the car, quick." It was a male voice, not Joel's (Vol. XII, TT1066). Goss saw blood on the stairs and in the street (Vol. XII, TT 1072). He did not call the police because "these gentlemen were too well armed." (Vol. XII, TT1079). Joel carried a .45 Magnum, and Walker a Colt .45 (Vol. XII, TT1079).

Loriann Gibson and Leslie Ritter were present and witnessed

some portion of the attack (Vol. XI, TT893-94). At one point, they were stripped and checked for wires, then escorted to a bedroom because they were "freaking out" (Vol. XI, TT899, 938, 978; Vol. XII, TT1017-18). Ritter described Hamman lying on the floor with "blood all over him"[3] and one eye "halfway hanging out." (Vol. XI, TT979). At some point while Walker was distracted, Hamman managed to escape out the door and make his way down the stairs, across the parking lot to the street, and down the street almost to the railroad tracks (Vol. XI, TT899). Ms. Gibson heard someone say: "Get the bag and stuff and put them in the trunk." (Vol. XI, TT899) Ritter heard "Get the tarp and lay it in the trunk." (Vol. XI, TT980).

Around 3:00 a.m., Lisa Protz, Joel Gibson's girlfriend, heard a knock on her door (Vol. XIII, TT1299). Walker was driving a white truck (Vol. XIII, TT1299). He asked Protz for tape, rope and gasoline (Vol. XIII, TT1300). Protz was afraid. She said she did not have gasoline (Vol. XIII, TT 1300). She

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[3] The photographs from the apartment crime scene showed blood stains in the stairwell, the railroad tracks and street (Vol. XII, TT1158). Defense counsel objected to photos of blood stains on the road and made a motion for mistrial (Vol. XII, TT1161-69). There were also blood stains on the inside of the apartment door and on the carpet (Vol. XII, TT1173). Blood stains in front of the couch were smeared as if someone tried to clean them up (Vol. XII, TT1185).

gave Walker some tape, which he wrapped around his fingertips (Vol. XIII, TT1302). Walker had a gun (Vol. XIII, TT1303). A few minutes later, Leigh Ford knocked on the door and Joel called on the phone (Vol. XIII, TT1301).

According to Walker's statement (cited in detail herein), he and Ford then drove to Tom Lawton Park where they encountered a locked gate. Hamman was removed from the trunk, and Walker shot him six times in the face after securing his hands with a flex tie.

Walker and Ford then returned to Joel Gibson's apartment. Walker bade farewell to Ford and Joel, who gave him drugs and money. Joel had stayed at the apartment with Ritter and Ms. Gibson. He was running around naked acting crazy (Vol. XII, TT1030). Joel seemed to be in charge and telling Walker and Ford what to do (Vol. XI, TT946). Walker left with Ms. Gibson and Ritter in Hamman's white pick up truck. Ms. Gibson had represented to Walker that she had a valid driver's license, so she was told to drive (Vol. XI, TT900).

Walker had two cocked and loaded guns which he put in the glove compartment (Vol. XI, TT901). He rode in the front passenger seat, Ms. Gibson drove, and Ms. Ritter sat in the back (Vol. XI, TT902, 982). Ms. Gibson only went with Walker because "I seen him beat this man for three and a half hours. I figured

if I tell him I didn't want to go, they would kill me." (Vol. XI, TT904)

They proceeded northbound on Interstate 95 and, after traveling approximately 100 miles, passed Daytona Beach at daybreak. They made a few stops along the way for gas, restroom breaks, and for Walker to scrape stickers or decals off the truck (Vol. XI, TT 904-905). On each occasion they stopped, Walker, armed with two .45 caliber handguns, held on to the keys and kept one of the women with him (Vol. XI, TT905). At some point, Walker told Ms. Gibson that he had taken care of Hamman and she would not be seeing him again (Vol. XI, TT904)[4].

Walker wanted to travel north and leave Florida, but, when they got to Jacksonville, Gibson turned off onto Interstate 10 and headed westbound because she wanted to stay in Florida (Vol. XI, TT902). Walker was consuming drugs during the trip (Vol. XI, TT909; Vol. XII, TT1038) and did not realize they were still in Florida until they were near Live Oak. He then directed Gibson to pull off so he could get a map to determine where they were. Gibson pulled the truck off the Interstate and stopped at the

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[4] Defense counsel objected to Ms. Gibson identifying Hamman from a photograph which showed the latter as deceased (Vol. XI, TT911). Counsel also objected to a photograph of a gun in the glove compartment of the truck (Vol. XI, TT919).

Penn Oil truck stop. Walker got out, leaving the women behind in the truck with the keys and the two firearms (Vol. XI, TT906, 1038).

Seizing the opportunity to get away from Walker, the women drove off and left him at the truck stop (Vol. XI, TT906). They headed back eastbound on I-10 and shortly came upon Department of Transportation Officer Bobbie Boren who was running radar on the Interstate. They pulled off at approximately 9:20 – 9:30 a.m. and hysterically explained what they had witnessed in Brevard County (Vol. XI, TT907, 984; Vol. XII, TT1087). Officer Boren called for assistance, and other officers arrived shortly thereafter (Vol. XII, TT1089).

In the meantime, at approximately 5:50 a.m., the caretaker at Tom Lawton Recreation Area found Hamman's body in the middle of the dirt road outside the locked front gate to the park (Vol. XI, TT855). The Brevard County Sheriff's officers responded shortly thereafter (Vol. XI, TT864). Hamman was obviously deceased, his hands secured behind his back with flex cuffs and naked except for his socks[5] (Vol. XI, TT865).

Back in the panhandle, a Suwannee County deputy sheriff put

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[5] Defense counsel objected to photographs of the victim lying in the road (Vol. XI, TT867).

out a BOLO for Walker after checking the victim's truck and interviewing the two women (Vol. XII, TT1090). Another Suwannee County deputy contacted Brevard County in an effort to confirm the story related by Ritter and Gibson. Between 9:00 – 10:00 a.m., Sgt. Bruce Barnett of the Brevard County Sheriff's Major Crimes Division was still at the crime scene when he received the call from Suwannee County (Vol. XI, TT881).

While all this was occurring, Walker had managed to get a ride from a Good Samaritan from the Penn Oil truck stop to the bus station in Live Oak (Vol. XII, TT1098). William Davis saw Walker barefoot and crying at the Penn Oil station and took him to buy shoes and socks. Davis then took Appellant to the bus station and bought him a bus ticket because Appellant said he needed to get to some little town in Tennessee or Kentucky (Vol. XIII, TT1247, 1249). A few minutes later, the police showed up and arrested Walker (Vol. XIII, TT1248). Officers Thompkins and Manning traced Walker to the bus stop where he was detained (Vol. XII, TT1101). A search of his person at that time yielded two loaded magazines for a .45 pistol, a pocket knife, one live round, one spent casing, and a slapjack (Vol. XII, TT1101). During the brief ride from the bus station to the jail, Walker told the officer to "shoot me. Just let me run and shoot me." (Vol. XII, TT1105).

Upon receiving notice from Suwannee County that Walker was in custody, Brevard County Sheriffs Agents Alex Herrera and Lou Heyn drove to Live Oak and interviewed Ritter and Gibson (Vol. XI, TT 881; Vol. XIII, TT1260-62). They then interviewed Walker after he signed a waiver-of-rights form at approximately 7:40 p.m. (Vol. XIII, TT1269, State Exhibit #73). Defense counsel objected to admission of the statement (Vol. XIII, TT1279).

During this recorded interview, Walker related the following:

- David Hamman's nickname was "Opie." (Vol. XIV, TT1529; Vol. XIV, TT 1939);

- Hamman would teach people to make drugs for $2500 and would receive 25% of any profit (Vol. XIV, TT1531; Vol. XIV, TT1941);

- Hamman gave Walker a phone then wanted it back (Vol. XIV, TT1537; Vol. XIV, TT1948);

- Walker destroyed the phone and told Hamman he was not giving it back (Vol. XIV, TT1539; Vol. XIV, TT1949);

- Hamman called Walker and said Pat (Connelley) was "losing it." (Vol. XIV, TT1539; Vol. XIV, TT1949);

- Pat was becoming a liability and needed to be eliminated (Vol. XIV, TT1541; Vol. XIV, TT1950);

- Walker and Hamman beat Connelley because he was obnoxious. Walker claims he hit Connelley in the head a couple of time (Vol. XIV, TT1543, 1553);

- Hamman scared Connelley, who then went to the police. Hamman was afraid the DEA was getting involved (Vol. XIV, TT1547; Vol. XIV, TT1957);

- Hamman made Walker think the DEA was watching him (Vol. XIV, TT1560, 1562; Vol. XIV, TT1972);

- When Hamman went to Joel Gibson's on Sunday night, Walker "just wanted to slap the piss out of him because he scared me." (Vol. XIV, TT1549; Vol. XIV, TT1958);

- Walker hit Hamman with a Mag light. Hamman asked what was going on, and they argued (Vol. XIV, TT1550-52; Vol. XIV, TT1960);

- Walker made Hamman sit on the couch. He asked if Hamman was wired or a cop. He told him to strip (Vol. XIV, TT1552; Vol. XIV, TT 1962);

- Hamman ran naked from the apartment. Walker claimed he only hit Hamman in the head three or four times before he ran (Vol. XIV, TT1554; Vol. XIV, TT1963);

- Walker chased him down (Vol. XIV, TT1554; Vol. XIV, TT1964);

- Hamman had been talking about killing Leslie Ritter and had wire, wire clippers, duct tape, and bags (Vol. XIV, TT1558, 1572; Vol. XIV, TT1968, 1982);

- Walker put Hamman in the truck of his girlfriend's car and "took him on a ride." When they stopped, Walker opened the trunk and Hamman got out. (Vol. XIV, TT1565, 1570; Vol. XIV, TT1975, 1980);

- When Walker's girlfriend realized what was going on, she left in her car, stating, "I don't need this shit." (Vol. XIV, TT1569; Vol. XIV, TT1979);

- Hamman said he knew the address of Walker's parents and was going to rape his mother while he videotaped it (Vol. XIV, TT 1571; Vol. XIV, TT1981);

- Walker shot Hamman with the Llama .45 caliber after he bound his hands (Vol. XIV, TT1578; Vol. XIV, TT1988);

- Hamman was laying face up when Walker shot him (Vol. XIV, TT1594; Vol. XIVI, TT2016);

- Walker went back to Joel Gibson’s and asked Leslie Ritter and Loriann Gibson to take him for a ride in the truck (Vol. XIV, TT1599; Vol. XIV, TT2020);

- When they stopped to get a map, the girls left Walker (Vol. XIV, TT1600; Vol. XIVI, TT2023).

(State Exhibit #74, TT1287).

Hamman's truck was impounded, photographed and searched (Vol. XIII, TT1384-85). Two .45 caliber semiautomatic pistols were recovered from the glove compartment (Vol. XIII, TT1397). One was a Llama .45 caliber with a bullet in the chamber (Vol. XIII, TT1400). The scales of the Llama were held onto the gun by rubber bands (Vol. XIV, TT1399). The other gun was a Springfield Armory .45 semi-automatic in a holster (Vol. XIV, TT1413). It was loaded with a magazine and there was a round in the chamber (Vol. XIV, TT1415). Near the passenger seat on the floorboard of the truck was a black backpack containing flex ties, a magazine with three cartridges, loose cartridges, and a box of ammunition (Vol. XIV, TT1418, 1419, 1422-24). A blue Rubbermaid container with a flex tie inside was in the truck, as were a folding knife, leather blackjack, two magazines with cartridges, a Mag light, and one loose cartridge (Vol. XIII, TT1389; TT Vol. XIV, TT1427).

There were reddish-brown stains on the driver’s side and armrest of the truck. There was pattern stain all the way down

the driver's side of the outside of the truck (Vol. XIV, TT1429-30).

A firearms examiner tested the Springfield Armory .45 and the Llama .45 (Vol. XIV, TT1430, 1440). He examined the six Remington Peters brand cartridge casings found on the roadway near the victim (Vol. XIII, TT1143; TT Vol. XIV, TT1451, State Exhibits #43-48). All six casings from the crime scene were fired from the Llama .45 (Vol. XIV, TT1452). Some of the live ammo found in the Llama when it was seized was Remington Peters, the same brand as the casings at the crime scene (Vol. XIV, TT1463). The firearms expert also examined the projectiles recovered from the victim's head at the autopsy (Vol. XIII, TT1224, 1228, State Exhibit #68). Some of the bullets were unidentifiable, but one projectile could be matched to the Llama .45. Three others had characteristics consistent with being fired from the Llama .45 (Vol. XIV, TT1459-1460). The Llama .45 holds "seven plus one," or seven bullets in the magazine and one in the chamber (Vol. XIV, TT1463). The cartridges found in the black backpack and in Walker's pockets could be used in either the Springfield .45 or the Llama .45 (Vol. XIV, TT 1465). The serial number on the Llama .45 matched the serial number on the

gun box found in Joel Gibson's apartment[6] (Vol. XIV, TT1471). The flex tie removed from the victim and the flex ties recovered from the backpack and Rubbermaid container were consistent in make and manufacturer and consistent in all measurable characteristics (Vol. XIV, TT1472, 1476).

The maroon 1990 Grand Am driven by Leigh Ford was processed (Vol. XIII, TT 1234). The liner of the truck was removed and the floor cleaned; however, blood stains were still visible throughout the truck (Vol. XIII, TT1235). Swabbings were taken of the stains (Vol. XIII, TT1236).

The DNA expert compared Hamman's blood to two swabbings from the trunk of Ford's car (Vol. XIV, TT1486). Both swabbings matched the victim (Vol. XIV, TT 1487-1489). Blood on the barrel of the Llama.45 matched the victim, and the victim could not be excluded as a donor of blood on the trigger (Vol. XIV, TT1491). Defense counsel moved for a mistrial when the expert stated there were three profiles on the gun trigger. The motion was denied (Vol. XIV, TT1492, 1495).

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[6] There was a pamphlet, magazine and plastic box for a Llama .45 caliber gun in the apartment (Vol. XIII, TT1232). Agents also found a black metal SAP, a high impact weapon, and a homemade club in the apartment (Vol. XIII, TT 1234).

The medical examiner, Dr. Sajid Qaiser, conducted the autopsy of David Hamman, 28, on January 28, 2003 (Vol. XIII, TT1320, 1360). Hamman had suffered multiple blunt-force injuries and multiple gunshot wounds[7] (Vol. XIII, TT1320). The blunt-force injuries were on the head, back of the hands, forearms, legs, chest, back, hip, feet, knees and thighs. Hamman suffered lacerations to the scalp, forehead and eyebrows (Vol. XIII, TT 1336). Bruising to the torso showed use of a baton, rod or hard stick (Vol. XIII, TT1339). The upper right arm was fractured, and there were multiple abrasions to the right forearm (Vol. XIII, TT1340). These types of wound are called "Defense" wounds (Vol. XIII, TT1342). There were also defense wounds to the hands, knuckles, and wrists (Vol. XIII, TT1343). Hamman also had abrasion lines under the chin around the throat. These lines indicated strangulation and that a ligature was applied (Vol. XIII, TT1334). The ligature was later removed. Hamman's body manifested multiple signs of torture (Vol. XIII, TT1335). His hands had been bound behind his back with flex ties (Vol. XIII, TT1341). Abrasions on the left thigh indicated dragging of the body on a hard surface such as a road (Vol.

[7] Defense counsel objected to autopsy photographs (Vol. XIII, TT1322, 1333). The objections were overruled (Vol. XIII, TT1333).

XIII, TT1343). Abrasions to the knees indicated kneeling on a hard surface like a road. There were multiple abrasions to the feet (Vol. XIII, TT1345). Loss of blood from the injuries would be mild to moderate, and it would take a person a long time to die from the blunt-force injuries alone (Vol. XIII, TT1355).

In addition to the blunt-force injuries, there were six gunshot wounds to the face which caused diffuse brain hemorrhage (Vol. XIII, TT1321, 1346, 1352). There is no way to determine the sequence of the shots fired (Vol. XIII, TT1348). At least two of the gunshots were at close range (Vol. XIII, TT1348). The cause of death was the combination of the blunt force injuries and gunshot wounds to the head (Vol. XIII, TT1357).

Motion to Suppress. The motion to suppress hearing took place in three parts: May 28, June 18, and July 6, 2004. Agent Heln and Agent Herrera, Brevard County Sheriff's Department, responded to a homicide in a park near Malabar Road in January 2003 (Vol.I, R124, 151). Between 9:00 – 10:00 a.m. while the agents were at the crime scene, the Department received a call from Suwannee County regarding suspects and witnesses, so they traveled to Suwannee County (Vol.I, R128, 137). Agents Hehn and Herrera interviewed two female witnesses, then met with Walker at the Suwannee County Jail (Vol.I, R129, 155). The females,

Gibson and Ritter, said Walker forced them into Hamman's truck in Brevard County, drove up I-95 discarding evidence, then westbound on I-10. The first chance they got, the females took off in the truck, then found and notified law enforcement (Vol.I, R142). A D.O.T. officer was running radar when the two females approached him and told him they had been kidnapped (Vol.I, R143).

Agents Herrera and Heyn interviewed Walker at the jail. Agent Herrera introduced himself and asked to interview Walker. Walker stated "I think I may need a lawyer." The agents started collecting their jackets to leave, but Walker stopped Agent Herrera and said "You guys didn't get all dressed up and prettied up to come up here for nothing, let me think." Walker asked Agent Herrera if he needed legal counsel, and the agent told him they could not give that advice. Walker said he wanted to think further before an interview (Vol.I, R131, 157). Agent Herrera explained that Walker did not have to talk to them and did not have to say anything (Vol.I, R158). Herrera then read the *Miranda*[8] rights. He also told Walker that he was "99.999 percent sure" an attorney would tell Walker not to talk to

[8] *Miranda v. Arizona*, 384 U.S. 436 (U.S.).

anyone (Vol.I, R158). Walker said he thought it would be in his best interest to talk to the agents and signed the *Miranda* waiver (Vol.I, R158). Both agents had recorders, but Walker was trying to decide whether to allow recording. Neither agent recorded the *Miranda* rights (Vol.I, R134, 160).

Agent Hehn tried to record the interview with the recorder in his lap, but it did not pick up the conversation because it was under the table. Agent Hererra had a digital recorder and recorded what he could. Walker would stop the recorder and say he did not want to be recorded (Vol.I, R134, 161). Then he would stop and tell the agents they were allowed to record. This continued throughout the interview, which lasted over an hour. There were no threats or promises made (Vol.I, R135). Walker never indicated he wanted to discontinue the interview (Vol.I, R162). He would stop the recording to ask the agents if he was "doing well," or whether Heyn approved of him (Vol.I, R161-162). Walker did not appear to be under the influence of drugs at the time of the interview (Vol.I, R137). He was coherent, relaxed, and in control of his emotions (Vol.I, R147, 169). He "seemed like a man who had something on his mind and he was trying to decide if he wanted to tell his side of the story." (Vol.I, R147). Walker had been in custody for approximately eight hours

by the time Agents Hehn and Herrera interviewed him at approximately 6:00 p.m. (Vol.I, R173).

The taped statement was published to the court (Vol.I, R173, State Exhibit #1).[9]

Leslie Ritter first met Walker when she walked into Joel Gibson's apartment with David Hamman and Loriann Gibson. Walker and his girlfriend started beating Hamman with a flashlight and "beat stick." Ritter did not see Walker consume any controlled substances at the apartment (Vol.I, R182). Gibson gave Walker some cocaine and "crank" (methamphetamine) before they left for Jacksonville (Vol.I, R183). Ritter drove with Walker from Brevard County to Jacksonville, then to Suwannee County. Walker was snorting something on the way to Jacksonville (Vol.I, R184). Gibson and Ritter left Walker at a store in Suwannee County and drove away. Ritter believed Walker was "high" at the time (Vol.I, R185). After Gibson and Ritter drove away, they found an officer, told him that Walker killed Hamman, and that there were guns in the truck (Vol.I, R189-90).

The officer, Bobby Boren, was approached by Ritter and Gibson around 9:00 – 10:00 a.m. on January 27, 2003 (Vol. II,

[9] The statement was not transcribed into the record by the court reporter until the penalty phase (Vol. XVI, TT1934 to Vol. XVII, TT2029).

R196). The girls were yelling “he’s trying to kill us” and said they had been kidnapped but had gotten away (Vol. II, R197, 202). Boren called for back up and determined Walker was at the Penn Oil truck stop (Vol. II, R199). The officers put out a BOLO for Walker, who was apprehended at a bus station (Vol. II, R200).

Dr. Howard Bernstein, forensic psychologist, interviewed Walker and reviewed his jail records. The Suwannee County jail diagnosed Walker with depression and prescribed psychiatric medicine for depression, anxiety, and sleep disorder (Vol. II, R208). Walker was also diagnosed with bipolar disorder with psychotic features (Vol. II, R208). In Dr. Bernstein’s opinion, Walker was under the influence of drugs on January 27, 2003 (Vol. II, R209). This opinion was based on Walker’s statements he had been on a seven-day binge of dope with two to three hours of sleep each day. He was using methedrine, cocaine, and pills. Right before his arrest, he “had a last hit of dope.” According to Walker, he “ate me a pill, did me a line.” (Vol. II, R209). Walker was arrested between 9:00 to 10:00 a.m. (Vol. II, R210). The drugs Walker ingested are “long-lasting central nervous system stimulants,” and Walker would have been under their influence at 6:00 p.m. when the interview with the Brevard agents began (Vol. II, R211). The fact that Walker is bipolar

magnifies the effect of drugs (Vol. II, R211). Dr. Bernstein had not heard the tape recording of the interview or reviewed the transcript (Vol. II, R212). Walker told Dr. Bernstein he was beaten by Virginia law enforcement officers during a prior arrest (Vol. II, R216).

Walker, 32, testified that on the drive from Brevard to Suwannee County, he was "smoking meth, and eating pills of meth, and doing cocaine, and rolling marijuana up and smoking that." (Vol. II, R219). He had been following the same routine for about seven days. He would stay awake for a day or two then get an hour or two of sleep (Vol. II, R219). After Walker was arrested, he asked for his lawyer (Vol. II, R222). He had been in the penitentiary three years and knew not to say anything (Vol. II, R222). Walker's nickname was "Fidget" because he could never sit still (Vol. II, R224). Walker was arrested in Suwannee County for having drugs (Vol. II, R224). He claims that when Suwannee officers tried to talk to him, he again asked for a lawyer (Vol. II, R225). When Agents Hehn and Herrera came to talk to him, he again asked for a lawyer. The agents kept telling Walker it was in his best interest to talk to them and that they "didn't drive up here for nothing." (Vol. II, R226). Walker was afraid of the agents because of the beating he had received in Virginia (Vol. II, R227).

Walker remembered signing the *Miranda* waiver, but he did not know "what it was for." (Vol. II, R227). The agents never got up to walk out after Walker asked for an attorney, and Walker never made the statement about them coming all that way for nothing (Vol. II, R228). The agents were not wearing guns, but Walker felt intimidated (Vol.II, R229).

Lt. Williams, Live Oak Police Department, was present in court and identified the voice of Officer Thompkins, who testified telephonically (Vol. II, R244). Ofc. Thompkins located Walker at the bus station in Live Oak after receiving a BOLO (Vol. II, R245). Thompkins and Deputy Manning secured Walker and patted him down. They found a knife, two .45 magazines, and a blackjack on Walker's person (Vol. II, R 246). Walker would not respond when the officers asked for his name. The only thing he said was "just shoot me. I can run and you can just shoot me." (Vol. II, R246). Thompkins did not ask Walker any questions and did not advise of *Miranda* rights. Walker did not ask for a lawyer during transport (Vol. II, R247).

Lt. Williams also testified. He responded to the bus station when he heard Walker had been detained (Vol. II, R258). Williams removed Walker's wallet and found two driver's licenses (Vol. II, R258). The Virginia driver's license had the name of

Christopher Dwayne Walker, and Walker identified himself as Christopher. Appellant was "acting pretty strange, acting aggressive" and telling the officers to "just shoot me. I want out of this life." When they put Walker in the back of the patrol car, he began kicking the cage. Williams opened the door and told him to stop, and he calmed "right back down again." (Vol. II, R259). Walker "very well could have been under the influence" of some kind of drug" (Vol. II, R267). During the time Williams was at the bus station, Walker never asked for an attorney (Vol. II, R260).

Lt. Creech, Suwannee County Sheriff's Office, responded to the interstate location where Ritter and Gibson were talking with Officer Boren (Vol. II, R271). Creech obtained a description of Walker and put out the BOLO. In the meantime, Lt. Warren was talking to Brevard County regarding a possible murder (Vol. II, R272). The truck in which Ritter and Gibson were riding was towed to impound (Vol. II, R273).

Cpl. Manning, Suwannee County Sheriff's Department, also responded to the bus station (Vol. II, R276). Walker did not ask for a lawyer (Vol. II, R278). The only thing Walker said was that if he ran, he wanted the officers to shoot him (Vol. II, R279). Walker was cooperative, then would become very agitated, then would become calm (Vol. II, R279). Walker was exhibiting

the same behavior as someone who was under the influence of methamphetamines (Vol. II, R290).

Penalty Phase. The State presented only one additional witness at the penalty phase: Michelle Hamman, Hamman's sister. Michelle testified that her brother, David, had back problems from a car accident in Maryland (Vol. XIV, TT1838).

The defense presented the testimony of two mental health experts: Dr. Robert Radin, a psychiatrist, and Dr. Howard Bernstein, a forensic psychologist. Dr. Radin works with Circles of Care in Brevard County and first met Walker on March 10, 2003, at the Brevard County jail (Vol. XVI, TT1846-47). Dr. Radin was asked to see Walker because he was having mild mood swings, insomnia, and depression (Vol. XVI, TT1847). Dr. Radin diagnosed Walker as having bipolar disorder, NOS, and personality disorder traits. Walker's mood swings were "hardly observed" and were brought to light through Walker's self-report (Vol. XVI, TT 1848). Walker had never been previously diagnosed as bipolar; however, he had seen someone for therapy for eight to ten months when he was fifteen years old (Vol. XVI, TT1848). This information also came through Walker's self-reporting (Vol. XVI, TT1854). Dr. Radin did not perceive Walker's condition to be long-standing (Vol. XVI, TT1853-54). Some people with

Walker's condition might self-medicate with alcohol, marijuana, cocaine, or methamphetamines (Vol. XVI, TT1855). Consuming these types of drugs alters one's thinking capacity (Vol. XVI, TT1855). Walker was always a cooperative, nice patient (Vol. XVI, TT1857-58). People facing serious charges often manifest anxiety or depression (Vol. XVI, TT1859).

Dr. Radin admitted on cross-examination he didn't really have any evidence of bipolar disorder except what Walker told him. Even then, the condition was mild and, at most, moderate (Vol. XVI, TT1860). Dr. Radin would see thirty to forty patients a day (Vol. XVI, TT1861). When Dr. Radin first saw Walker, he had already been incarcerated for more than two months and Trazodone, a sleeping medication, had already been prescribed (Vol. XVI, TT1863). Everyone has mood swings, and it is normal for someone who is incarcerated to have mood swings (Vol. XVI, TT1867). Dr. Radin's diagnosis of "bipolar" was nothing more than his assignment of a recognized disorder to match the description Walker provided (Vol. XVI, TT1867). Walker claimed to hear voices (Vol. XVI, TT1868). There is no connection between taking methamphetamines and a psychotic episode (Vol. XVI, TT 1870).

Dr. Howard Bernstein, clinical psychologist, first met Walker on June 14, 2004 (Vol. XVI, TT1874). He also reviewed

Appellant's medical and psychiatric records from the jail (Vol. XVI, TT1874). In Dr. Bernstein's opinion, Walker has a "severe and chronic mental disorder, i.e., bipolar disorder." (Vol. XVI, TT1875-76). People who are depressed tend to self-medicate with something that is fast acting, such as crack cocaine or methamphetamines, or "speed" (Vol. XVI, TT1877). Speed is not a narcotic, but a central nervous system stimulant. If a bipolar person used speed for a few days, his condition would "most likely not be normal." The person's mental activity would likely become more hyperactive (Vol. XVI, TT1877). Ingestion of drugs would aggravate the pre-existing mood disorder (Vol. XVI, TT1879).

SUMMARY OF ARGUMENTS

Issue I. The trial court did not err in denying the motion to suppress Walker's statement. Walker argues that his right to counsel was not honored and his *Miranda* waiver was not voluntarily. The Suwannee County and Live Oak law enforcement officers all testified Walker did not request a lawyer during the time he was with them. The two Brevard County agents who interviewed Walker testified that Walker said he "might need a lawyer," and all questioning ceased. They got up to leave, but Walker asked them to stay. He was advised of his *Miranda* rights, signed a waiver form, and gave a voluntary statement.

Walker claims he was under the influence of drugs (8 to 10 hours after he was arrested), and the *Miranda* waiver was not voluntary. The officers who first took Walker into custody observed signs of drug consumption; however, the Brevard agents did not see signs of intoxication or impairment at the time of the interview. The trial judge made a credibility determination and believed the officers over the convoluted theory of Dr. Bernstein which was based on Walker's self-report.

Issues II and VII. The claims based on *Ring v. Arizona*, 536 U.S. 584 (2002), have no merit. The claim regarding interrogatory verdicts on aggravating circumstances was decided

adversely to Appellant's position in *Steele v. State*, 31 Fla. L. Weekly S74 (Fla. Oct. 12, 2005), which Walker acknowledges.

Issue III. The trial judge did not err in denying the motion for judgment of acquittal. This is not a circumstantial case. Walker confessed to law enforcement and to Ms. Gibson. This is a direct evidence case and, viewing the evidence in the light most favorable to the State, there is competent, substantial evidence of guilt.

Issue IV. The trial court findings on the three aggravating circumstances -- during a kidnapping, HAC, and CCP – are supported by competent, substantial evidence. The jury found Walker guilty beyond a reasonable doubt of kidnapping. As to HAC, Walker beat the victim for three hours, then when the naked victim tried to escape, Walker stuffed him in the trunk of a car, took him to a remote area, and shot him six times in the face. As to CCP, Walker was lying in wait and attacked the victim with deadly weapons as soon as he walked into the apartment. He and Ford beat the victim for three hours until he escaped. Walker then chased him down, put him in the trunk of Ford's car, took him to a remote area and shot him six times in the face.

The weight to be given mitigating circumstances is for the

trial judge to decide. The judge made detailed findings on each mitigating factor presented by Appellant. The aggravating circumstances simply outweigh the mitigating.

This case is proportional to other death sentences.

Issue V. The trial court did not abuse its discretion in admitting photos of the apartment where the victim was beaten, the road where he was shot, and the autopsy photos. The crime scene photos and location of the body were relevant to a full understanding of the sequence of events. The medical examiner explained each carefully-selected autopsy photo in describing the multiple injuries and defensive wounds on the body. None of the photos were inappropriate to a murder case.

Issue VI. The trial court did not abuse its discretion in denying the motion for a statement of particulars as to aggravating circumstances. This Court held in *Steele v. State*, 31 Fla. L. Weekly S74 (Fla. Oct. 12, 2005), that it is up to the judge's discretion whether to require the State to provide notice of aggravating circumstances.

ARGUMENT

ISSUE I

THE TRIAL COURT DID NOT ERR IN DENYING THE MOTION TO SUPPRESS STATEMENTS AND ADMISSIONS.

Walker argues the trial court erred in denying the motion to suppress his statements and admissions. Although he claims he asked for an attorney at the bus station and again during transport; the officers who testified at the suppression hearing said there was not only no invocation of the right to counsel, but also there was no interrogation. The first time there was any mention of a lawyer was when the Brevard County agents went to interview Walker and he said he "might need a lawyer." They then picked up their jackets and started to leave, but Walker stopped them. He then voluntarily waived *Miranda* rights and gave his statement. Both agents testified he did not appear to be under the influence of drugs when he gave his statement, approximately 8 hours after he was arrested. Walker claims he was under the influence of mind-altering drugs and sleep deprivation at the time of the interview, 8 to 10 hours after he was arrested.[10] Last, Walker argues the trial judge abused his

[10] Although the trial judge stated in his order that approximately

discretion by finding he initiated further conversation and in believing the testimony of law enforcement officers and in misconstruing the testimony of Dr. Bernstein. Walker equates the state of mind required for a statement to that required for a plea.

After an extensive suppression hearing, the trial judge found:

> Defendant was a suspect in a murder in Brevard County and for kidnapping and drug offenses in Suwannee County, Florida. Two young females reported a chain of events to law enforcement officers who interviewed the young females and took statements, including Agents Heyn and Herrera from Brevard County.
>
> First, Defendant claims he was unlawfully detained. This argument is without merit.
>
> Next, Defendant claims that he was denied his Fifth and Sixth Amendment right to an attorney before he made any statements. As to the Suwannee County officers, he made no statement as a result of interrogation by the police even though he was in custody. Statements he made were limited to his identification and "if I run, will you shoot me" or something similar. Defendant claims he made requests for an attorney to the Suwannee County and Live Oak

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eight to ten hours had passed between Walker's arrest and the interview, the State submits the time between last possible consumption and interview -- eleven hours -- is the relevant time period. Ritter and Gibson left Walker at the Penn Oil station around 9:00 a.m. (Vol. XI, TT907, 984). The *Miranda* waiver was signed at 7:40 p.m. (Vol. XIII, TT1269). The interview began at 7:48 p.m. (Vol. XVI, TT 1934).

officers but there in no evidence of that other than Defendant's claim. He was not interrogated by those officers in any event and the right to have an attorney present was not an issue as he was not being questioned. This claim is without merit.

Third, Defendant claims he invoked his right to have a lawyer present before talking with Agents Heyn and Herrera from Brevard County. After introducing Agent Heyn and himself, Agent Herrera informed Defendant of why they wished to talk with him. Defendant responded "I think I might want to talk to an attorney." This was an equivocal response and the Agents could have continued without violating Defendant's rights. *See State v. Owen*, 696 So. 2d 715 (Fla. 1997) and *Walker v. State*, 707 So. 2d 300 (Fla. 1994). Nonetheless, the Agents got up from the table, started to put on their jackets preparing to leave. Walker then initiated contact with the Agents and stated words to the effect, "hey, you didn't get all dressed up and pretty and drive all the way over here for just two minutes, hold on, sit down and let me think." Agent Herrera explained his rights and told him that if he had an attorney, the attorney would most likely 99.999% tell him not to say a word. Defendant questioned the detectives for their advice on an attorney and they told him they could not give him advice. He then was read his *Miranda* rights and executed a standard *Miranda* form indicating that he was aware of his rights and wished to proceed to talk to them. This claim is without merit as he initiated further conversation and waived his right to counsel and silence knowingly and intelligently under the totality of the circumstances – *See Edwards v. Arizona*, 451 U.S. 477, 1010 S.Ct. 1880, 68 L.Ed.2d 378 (1981), *reh'g denied* 452 U.S. 973, 101 S.Ct. 3128, 69 L.Ed.2d 948 (1981; *Oregon v. Bradshaw*, 462 U.S. 1039, 103 S.Ct. 2830, 77 L.Ed.2d 405 (1983), *on remand* 66 Or.App. 585, 674 P.2d 1190 (1984); *Sapp v. State*, 690 So. 2d 581 (Fla. 1997); *Lukehart v. State*, 762 So. 2d 482 (Fla. 2000); *Jennings v. State*, 718 So. 2d 144 (Fla. 1998).

Lastly, Defendant claims he was under the influence of illegal narcotic drugs to the extent that his

> statements were involuntarily made. There was testimony by the two females who drove him from Brevard County to Suwannee County that he was doing drugs all the way during the drive. Defendant asserted that he had been on a 7-day drug binge and continued using drugs during the drive. When he was detained early in the morning, 9 am – 10 am, the Suwannee County Officers observed conduct consistent with being under the influence. However, it was 8 to 10 hours after he was detained before the Brevard County Agents questioned him. He showed no sign of drug influence at that time. It was only his own testimony that indicated he was under the influence at that time. Dr. Howard Bernstein was called as a witness on Defendant's behalf and rendered a rather strange opinion. His sole basis for his opinion was what Defendant had told him. Dr. Bernstein gave an unusual self-defeating opinion actually not stating that Defendant's statements were not voluntarily given. Defendant's emotional statements and conduct during the *Mirandized* interview are not uncommon for someone just detained on a first degree murder charge. Further, there was insufficient evidence as to the exact drugs used or the amount. Based upon the totality of the circumstances, the court finds that Defendant's statements were knowingly and voluntarily made.

(Vol. VI, R885-894). The trial court's ruling on a motion to suppress is accorded great deference. *Walker v. State*, 707 So. 2d 300, 311 (Fla. 1997), *citing McNamara v. State*, 357 So. 2d 410 (Fla. 1978). Appellate courts accord a presumption of correctness to the trial court's rulings on motions to suppress with regard to the trial court's determination of historical facts, but independently review mixed questions of law and fact that ultimately determine constitutional issues arising in the

context of the Fourth and Fifth Amendment and, by extension, Article I, Section 9 of the Florida Constitution. *Anderson v. State*, 863 So. 2d 169, 182 (Fla. 2003).

In *Davis v. United States*, 512 U.S. 452, 460-61 (1994), the United States Supreme Court in held that if a suspect initially waives his or her rights, the suspect thereafter must clearly invoke those rights during the ensuing interview. Following *Davis*, this Court held in *State v. Owen*, 696 So. 2d 715, 719 (Fla. 1997), that police need not ask clarifying questions if a defendant who has received proper Miranda warnings makes only an equivocal or ambiguous request to terminate an interrogation after having validly waived his or her *Miranda* rights.

In the present case, Walker's statement was equivocal that he "might want to talk to a lawyer." Nevertheless, Agents Hehn and Herrerra were going to leave until Walker stopped them and initiated a conversation. Walker voluntarily initiated further contact or communication with the agents Walker initiated further contact with the agents by telling them to wait because they hadn't come all that way to see him for two minutes. Walker then asked for time to make his decision. The agent told him that an attorney would "99.999%" surely tell Walker not to talk to the police. Walker then voluntarily signed a written waiver

of *Miranda* rights and proceeded with the interview. Given these facts, questioning was proper.

In *Anderson v. State*, 863 So. 2d 169, 182 (Fla. 2003), the defendant stated, "I just don't . . . prefer now to wait until there's an attorney." The officers conducting the interview asked Anderson if he was requesting an attorney. Anderson's responses were still ambiguous and the police took a short break. Resuming the conversation, the officer conducting the interview told Anderson:

> I guess we just want to make sure okay that you understand your rights and and [sic] if you want a lawyer right now - then we're leaving and we're out the door. If you want to talk to us now ya know without a lawyer and answer some new questions that we have and cooperate with us in that respect we want to make sure you have the right to do that as well.

Id. Thereafter, Anderson agreed to continue talking to the officers. This Court held Anderson's rights were not violated.

Insofar as the voluntariness of the *Miranda* waiver, the trial court found the agents' testimony credible and Dr. Bernstein not credible. The trial judge is in the best position to evaluate the credibility of witnesses and his findings are entitled to great deference. *See Porter v. State*, 788 So. 2d 917 (Fla. 2001) ("We recognize and honor the trial court's superior

vantage point in assessing the credibility of witnesses and in making findings of fact.")

In *Orme v. State*, 677 So. 2d 258 (Fla. 1996), the defendant claimed he was too intoxicated with drugs to knowingly and voluntarily waive his rights. This Court stated:

> While we acknowledge there is conflicting evidence in the record on this point, we nevertheless are limited in this appeal by the applicable standard of review. Our duty on appeal is to review the record in the light most favorable to the prevailing theory and to sustain that theory if it is supported by competent substantial evidence. *Johnson v. State*, 660 So. 2d 637, 641 (Fla. 1995), *cert. denied*, No. 95-7969 (U.S. Apr. 22, 1996). Here, friends and family members supported the defense's theory that Orme was severely intoxicated at the times in question. However, the officers who actually took Orme's statements testified that he was coherent and responsive. Moreover, the statements were taped, and the trial court after reviewing these tapes concluded that the evidence supported the state's theory. Because there is competent substantial evidence supporting this conclusion, we may not reverse it on appeal.

Id. at 262-263. *See also* *Nelson v. State*, 850 So. 2d 514, 524 (Fla. 2003)(defendant did not appear intoxicated or mentally ill at the time he waived his *Miranda* rights);*Jorgenson v. State*, 714 So. 2d 423, 426 (Fla. 1998)(trial court did not err in finding defendant not intoxicated at the time he waived his Miranda rights). Walker's statement was made voluntarily, he was not under the influence of intoxicants to the extent he could not understand and voluntarily waive his rights.

Even if the trial court erred in admitting the confession, any error was harmless beyond a reasonable doubt. *See Almeida v. State*, 748 So. 2d 922, 931 (Fla. 1999) (applying harmless error test to the erroneous introduction of defendant's taped confession). There were two eye witnesses to the beating. Ritter and Gibson also heard the kidnapping, and Walker told Gibson he had gotten rid of Walker. The gun in the victim's truck which Walker used to intimidate Ritter and Gibson was the same gun that shot the victim. The victim's blood was on the gun. The flex ties binding the victim's hands were the same type as those in the truck.

ISSUES II and VII

THE FLORIDA DEATH PENALTY STATUTE IS NOT UNCONSTITUTIONAL IN VIOLATION OF *RING V. ARIZONA.*

Issues II and VII are combined since they both involve issues raised pursuant to *Ring v. Arizona*, 536 U.S. 584 (2002). Walker claims the trial court erred by denying his pre-trial motion for interrogatory verdicts on the aggravating circumstances and in not requiring that the jury find the aggravating circumstances. Walker acknowledges the adverse authority of *Steele v. State*, 31 Fla. L. Weekly S74 (Fla. Oct. 12, 2005), which holds that a trial judge departs from the essential requirements of law by required interrogatory verdict forms. Walker also acknowledges *King v. Moore*, 831 So. 2d 143 (Fla. 2002) and *Bottoson v. Moore*, 833 So. 2d 693 (Fla. 2002).

The State adds to the above cases the fact that the murder was committed during the course of a felony, and that the jury found Walker guilty of kidnapping beyond a reasonable doubt. *See, e.g.*, *Gamble v. State*, 877 So. 2d 706, 719 (Fla. 2004) (finding death sentence was not invalid where jury found defendant guilty of first-degree murder and the felony of armed robbery); *Grim v. State*, 841 So. 2d 455, 465 (Fla. 2003) (explaining that defendant was not entitled to relief under *Ring*

where aggravating circumstances of multiple convictions for prior violent felonies and contemporaneous felony of sexual battery were unanimously found by jury); *Kormondy v. State*, 845 So. 2d 41, 54 n.3 (Fla. 2003) (explaining that defendant was also convicted by jury of violent felonies of robbery and sexual battery, that murder was committed during course of burglary, and that death sentence could be imposed based on these convictions by the same jury); see also *Lugo v. State*, 845 So. 2d 74, 119 n.79 (Fla. 2003) (attributing denial of relief on *Apprendi/Ring* claim to rejection of claims in other postconviction appeals, unanimous guilty verdicts on other felonies, and "existence of prior violent felonies"); *Doorbal v. State*, 837 So. 2d 940, 963 (Fla. 2003) (stating that prior violent felony aggravator based on contemporaneous crimes charged by indictment and on which defendant was found guilty by unanimous jury "clearly satisfies the mandates of the United States and Florida Constitutions"). *See also Zack v. State*, 911 So. 2d 1190 (Fla. 2005).

ISSUE III

THE TRIAL COURT DID NOT ERR IN DENYING THE MOTION FOR JUDGMENT OF ACQUITTAL

Walker claims this was a circumstantial evidence case and that Joel Gibson could have killed David Hamman. This is a direct evidence case, not a circumstantial evidence case. Both Leslie Ritter and Loriann Gibson saw Appellant beating the victim and ask him if he was ready to die. They heard the victim escape and conversations about him being put in the trunk of a car. Appellant told Gibson he had "taken care of" the victim and she would not be seeing him again. This confession to Gibson is not circumstantial evidence. Additionally, Appellant made a full confession to the police. Therefore, the standard of review is that of a direct evidence case. This Court has stated:

> On appeal of a denial of a motion for judgment of acquittal where the State submitted direct evidence, the trial court's determination will be affirmed if the record contains competent and substantial evidence in support of the ruling. *LaMarca v. State*, 785 So. 2d 1209, 1215 (Fla. 2001). Because the State presented direct evidence in the form of [Defendant's] confession, this Court need not apply the special standard of review applicable to circumstantial evidence cases. *See Pagan v. State*, 830 So. 2d 792, 803-04 (Fla. 2002).

Conde v. State, 860 So.2d 930, 943 (Fla. 2003).

In addition to the direct evidence of guilt, the State

presented the testimony that appellant was involved with the victim in a methamphetamine distribution scheme. Loriann Gibson and Leslie Ritter saw the initial beating at Joel Gibson's house. Dennis Goss, a neighbor, heard the commotion and heard someone being beaten. Goss saw blood on the stairs and the street. Lisa Protz described Appellant coming by her house for tape, rope and gasoline. When Appellant was apprehended in Live Oak, he had two loaded magazines for a .45 pistol in his pocket. Two .45 pistols were in the victim's truck that Appellant took in order to drive to the panhandle. The casings at the crime scene matched the Llama .45. One of the bullets retrieved from the victim at the autopsy matched the Llama .45. The others were too distorted to obtain markings. DNA from the blood found in Leigh Ford's car matched the victim. Blood on the barrel of the Llama .45 matched the victim.

Because there is competent, substantial evidence of appellant's premeditation, the trial court properly denied the motion for judgment of acquittal. *See Lamarca v. State*, 785 So. 2d 1209, 1215 (Fla. 2001) (record contains competent and substantial evidence of premeditation based on direct evidence); *Norton v. State*, 709 So. 2d 87, 92 (Fla. 1997); *Orme v. State*, 677 So. 2d 258, 262 (Fla. 1996). *See also Meyers v. State*, 704

So. 2d 1368, 1370 (Fla. 1997) ("Because confessions are direct evidence, the circumstantial evidence standard does not apply.”); *Hardwick v. State*, 521 So. 2d 1071, 1075 (Fla. 1988) ("We disagree that the case was circumstantial, since Hyzer and others testified that Hardwick had confessed to the murder or told others of his plans in advance of the killing. A confession of committing a crime is direct, not circumstantial, evidence of that crime.").

ISSUE IV

THE TRIAL COURT DID NOT ERR IN FINDING AND WEIGHING THE AGGRAVATING AND MITIGATING CIRCUMSTANCES.

Walker claims the trial judge erred in finding any aggravating circumstance and erred in the weight given to mitigating circumstances. The trial court found the aggravating circumstances of (1) during-a-kidnapping; (2) heinous, atrocious and cruel ("HAC"); and (3) cold, calculated and premeditated ("CCP").

On appeal, this Court does not reweigh the evidence to determine whether the State proved each aggravating circumstance beyond a reasonable doubt -- that is the trial court's job. Rather, this Court reviews the record to determine whether the trial court applied the right rule of law for each aggravating circumstance and, if so, whether competent, substantial evidence supports its finding. *Alston v. State*, 723 So. 2d 148, 160 (Fla. 1998).

First, the jury found unanimously and beyond a reasonable doubt that Walker kidnapped the victim. Section 921.141(5)(d), Florida Statutes, provides that it is an aggravating circumstance if "the capital felony was committed while the defendant was engaged in, or was an accomplice, in the

commission of . . . any . . . kidnapping." To establish the "during the commission of a kidnapping" aggravating circumstance, the State must prove beyond a reasonable doubt each of the elements of kidnapping. *Anderson v. State*, 841 So. 2d 390, 404 (Fla.), *cert. denied*, 540 U.S. 956, 157 L. Ed. 2d 292, 124 S. Ct. 408 (2003).

The trial court found:

> 1. The capital felony was committed while the Defendant was engaged in the commission of a kidnapping.
>
> In the late evening hours of January 26, 2003, David Hamman, the victim, arrived at the apartment residence of Joel Gibson. The Defendant, the Defendant's girlfriend, Leigh Valorie Ford and Joel Gibson were inside the apartment. Immediately after being invited into the apartment, Hamman was viciously attacked by Walker and Ford. Walker first struck him in the head with a metal magiite flashlight. For the following two or three hours, he was viciously attacked by Defendant and Ford. Hamman was repeatedly struck by several objects, including a baton type weapon, a slap jack and other objects. At some point, the attackers were distracted and Hamman tried to escape. He made it outside, down a flight of stairs and traversed a short distance down the road leading to U.S. Highway 1. When Walker and Ford discovered that Hamman had escaped, they immediately gave chase and caught him a short distance away. They then placed him in the trunk of Ford's automobile. Ford drove her car with Hamman in the trunk and Walker drove Hamman's pickup truck. They drove Hamman to a remote area where he was later shot and killed by Walker.

> The crime of kidnapping is an enumerated crime in Section 921.141(5)(d), Florida Statutes. Defendant was charged in a separate count with kidnapping and the jury found him guilty of kidnapping. It is not rational to believe that Hamman was free to leave while being beaten for two or three hours by Walker and Ford.
>
> He was being held against his will. His attempted escape clearly proves he was not allowed to leave as they chased him down and placed him in the trunk of Ford's automobile to drive him to a remote area. Walker, in his sentencing memorandum, concludes that this aggravator was proved but argues that the Court should not give it great weight because the jury may have viewed it as a felony murder issue. Clearly, that is not the case. The acts of the Defendant of confinement or imprisonment were with the intent to inflict bodily harm upon Hamman and to terrorize and humiliate him.
>
> The State has proved this aggravating factor beyond a reasonable doubt. *See Schwab v. State,* 636 So. 2d 3 (Fla. 1994); *Sochor v. State,* 619 So. 2d 285 (Fla. 1993); *Bedford v. State,* 589 So. 2d 245 (Fla. 1991).

(R 962-963). These findings are supported by competent substantial evidence.

Second, the evidence was uncontroverted that Walker beat the victim repeatedly, stripped him naked and beat him until there was blood all over the apartment and the victim’s eye was practically dislodged. He then chased the naked victim who tried to escape, and placed him in the trunk of Ford’s car, bleeding

and with a fractured arm, defensive wounds, and multiple injuries. They drove to Lisa Protz's house with the victim in the truck, then to a remote area where the victim was removed from the trunk. According to Walker, the victim then started threatening his family. The victim was alive and considered a potential threat despite his extensive injuries because Walker bound his hands with flex ties. Walker then shot the victim six times in the face.

Walker argues he did not intend to torture the victim or cause suffering. Even though case law clearly establishes that it is not the intent of the defendant which is the issue, in this case the only conclusion is that Walker did intend to torture and cause suffering. The victim was beaten within an inch of his life for approximately three hours. Even though he was stripped naked, he managed to escape only to be caught. The neighbor heard the victim being beaten in the street. The victim was placed into a car trunk and transported about the town while Walker searched for more instruments of torture, i.e., gasoline and rope. When Protz did not provide these items, the victim was then driven down a dirt road, removed from the trunk, bound, and shot in the face six times. The sentencing order in this case discusses in great detail the facts that support this aggravating circumstance:

2. The capital felony was especially heinous, atrocious, or cruel.

Was the murder of Hamman a torturous one evincing extreme and a high degree of pain or utter indifference to or enjoyment of the suffering of others? Was the murder a conscienceless or pitiless crime and unnecessarily torturous to the victim? The evidence clearly establishes that the answer to the questions is "yes".

Immediately upon being invited into Joel Gibson's apartment, Hamman was attacked by Walker and Ford, being struck all over his body by a maglite flashlight, a baton of some sort, a slap jack and other objects. He was covered with blood and at some point forced to strip naked except for his socks. According to Walker, he wanted to humiliate him as well as beat him. Hamman begged his assailants not to kill him and to spare his life throughout the two or three hour beating. At least one of the group present, Joel Gibson, kept telling Hamman that he was going to die. Hamman's beaten and bloody body was also viewed by the two females who accompanied Hamman to the apartment, Leslie Ritter and Loriann Gibson (no relation to Joel Gibson).

At some point, the aggressors were distracted and Hamman attempted to flee. He made it down the stairs from the second story apartment, and down the road toward U.S. Highway 1 before Walker and Ford chased him down and caught him. He left a blood trail down the stairs and was dripping blood on the parking lot and on the road up to the point where he was caught by Walker and Ford. When he was stopped, Walker continued to strike and beat Hamman before forcing him to get into the trunk of Ford's car. The occupant of the apartment next door to Joel Gibson's apartment heard the loud slapping sounds of the beating from some distance

before the victim was placed in the trunk.

Walker told Ford to find some remote spot to take the victim. She knew of a remote area in Palm Bay which was adjacent to a state park. She drove her car with Hamman in the trunk and Walker drove Hamman's pickup truck. On the way, they stopped at the house of Joel Gibson's girlfriend, Lisa Protz, in the early morning hours. Walker asked her for gasoline, rope and tape. She gave him tape but not any rope or gasoline. Walker wrapped tape around all his fingers. They then left and drove to the remote area. All this time, Hamman remained in the dark trunk of Ford's car, severely injured.

When the attackers arrived at the remote spot, they got Hamman out of the car. They tied his hands behind his back with a cable tie which operates by sliding the end into a slot which allows the tie to be tightened but not released. Walker stated that Ford drove away before Hamman was shot. Hamman was totally naked and helpless and his right arm had been broken. He was then placed on the ground on his back with his hands still tied behind him. The Defendant, Robert Shannon Walker II, then executed him by shooting him in the face six times with a forty-five caliber pistol. Three of the shots were fired from a distance of only six inches to two feet. Walker then left the victim on the road and drove back to Joel Gibson's apartment where he picked up the two girls and started driving on Interstate 95 to flee the state.

Walker could have initially shot the victim and killed him quickly. Instead, the victim was forced to endure fear, emotional strain, terror, torture and pain for several hours before death.

The evidence established that Hamman suffered from multiple blunt-force injuries

and multiple gunshot wounds. Most blunt-force injuries were to the head, some on the back of his hands, forearms, legs, chest, back, hips, feet, knees and thighs. All the gunshot wounds were to the face. Some of the projectiles were still in the cranium at the time of autopsy.

Hamman was found to have a deep furrow in his neck, under his chin. It appeared he had been strangled because of the deep throat between the lines. The Medical Examiner testified that a ligature of some type was applied but released before Hamman died from strangulation. The Medical Examiner is of the opinion that the body manifests multiple signs of torture including the application of a ligature around the neck. Imagine the terror of being strangled and the ligature released for more torture before death.

The right upper arm had been fractured by the beating and the victim could not use it as a result. There were deep furrow marks on the wrists of the victim where he had been tied with the plastic cable tie. He had abrasions on his thigh and knees consistent with being dragged on a hard surface and like being tied and made to kneel on a paved road.

Hamman had numerous contusions on his arms and hands from trying to ward off blows or hits, classified as defensive wounds.

The gunshot wounds destroyed his lower jaw and damaged facial bones. Several teeth were broken out and found beside the body. While Hamman likely died instantly from the gunshot wounds, the manner in which they were inflicted are consistent with the utter brutality of this crime. None of the other wounds, abrasions and contusions would render a person unconscious according to the Medical Examiner. The person would be able to walk and be aware of what was happening

> to him. The wounds suffered, however, would leave a bloody trail.
>
> The cause of death given by the Medical Examiner was a combination of multiple blunt-force injuries and multiple gunshot wounds. The Medical Examiner testified that had the victim not been shot, the trauma from the torture and beating could have caused death.
>
> The physical evidence established that Hamman died in fear, extreme anxiety and horror as a result of slow torture, humiliation and intense pain, all of which were unnecessary. The acts causing the emotions and physical pain stated above were inflicted upon a conscious victim in the dark hours of early morning in a confined environment. The ride in the dark trunk and the sensation of being strangled by a ligature of some kind before being shot although remaining conscious is enough to create horror in any human.
>
> There can be no doubt that the murder was conscienceless, pitiless and unnecessarily torturous to the victim with a foreknowledge of death and indeed, heinous, atrocious and cruel.
>
> This aggravating circumstance has been proved beyond all reasonable doubt. See *Evans v. State*, 800 So. 2d 182 (Fla. 2001).

(R 963-966). These findings are supported by competent substantial evidence, and the HAC aggravating circumstance was properly found in this case. Not only was the victim beat to a pulp with his eye hanging out, but he tried to escape with only

his socks on, was forced into the truck of a car, driven to a remote area and shot in the head. He went through the torture of the beating and the mental anguish of knowing he was about to die as he was being driven to the final crime scene. He was then shot in the fact six times.

Walker's argument regarding intent is misplaced. "The intention of the killer to inflict pain . . . is not a necessary element of the [HAC] aggravator." *Francis v. State*, 808 So. 2d 110, 135 (Fla. 2001); (*quoting Guzman v. State*, 721 So. 2d 1155, 1160 (Fla. 1998)). "[The HAC aggravator] focuses on the means and manner in which death is inflicted and the immediate circumstances surrounding the death . . . ." *Barnhill v. State*, 834 So. 2d 836, 849-50 (Fla. 2002); *see also Brown v. State*, 721 So. 2d 274, 277 (Fla. 1998). " The focus should be upon the victim's perceptions of the circumstances." *Lynch v. State*, 841 So. 2d 362, 369 (Fla. 2003) (emphasis added) (*citing Farina*, 801 So. 2d at 53); *see also Hitchcock v. State*, 578 So. 2d 685, 692 (Fla. 1990) ("That [the defendant] might not have meant the killing to be unnecessarily torturous does not mean that it . . . was not unnecessarily torturous and, therefore, not [HAC]."). None of Walker's arguments regarding intent have any merit.

This Court has upheld the HAC aggravator in numerous cases

involving beatings, much less the kidnapping during when Hamman was in terror and the 6 shots to the face. *Lawrence v. State*, 698 So. 2d 1219, 1221-22 (Fla. 1997) ("We have consistently upheld HAC in beating deaths."); *see also Colina v. State*, 634 So. 2d 1077, 1081 (Fla. 1994) (holding that the HAC aggravator applied where one of the defendants hit the victim, who fell to the ground, and when that victim attempted to get to his feet, the other defendant hit him several times in the back of the head with a tire iron); *Owen v. State*, 596 So. 2d 985, 990 (Fla. 1992) (upholding the HAC aggravator where the sleeping victim was struck on the head and face with five hammer blows); *Lamb v. State*, 532 So. 2d 1051, 1053 (Fla. 1988) (upholding the HAC aggravator where the defendant struck the victim six times in the head with a claw hammer, pulled his feet out from under him, and kicked him in the face); *Heiney v. State*, 447 So. 2d 210, 216 (Fla. 1984) (upholding the HAC aggravator where seven severe hammer blows were inflicted on the victim's head).

Awareness of impending death is also significant in the HAC analysis. *See Cox v. State*, 819 So. 2d 705, 720 (Fla. 2002) (noting that "a victim's suffering and awareness of his or her impending death . . . supports the . . . [HAC] aggravating circumstance where there is a merciless attack and beating");

see also Colina, 634 So. 2d at 1081 (upholding the HAC aggravator where one of the victims moaned, and the defendant dealt her several more blows); *Owen*, 596 So. 2d at 990 (upholding the HAC aggravator where, after being struck on the head with a hammer, the sleeping victim awoke screaming and struggling and endured several more blows); *Lamb*, 532 So. 2d at 1053 (upholding the HAC aggravator where, after being struck six times in the head with a claw hammer, the victim did not die instantaneously but fell to his knees and to the floor and moaned, and the defendant kicked him in the face).. *See also Rolling v. State*, 695 So. 2d 278, 296 (Fla. 1997).

Third, Walker lay in wait with a weapon for the victim to enter Gibson's apartment. He beat him for three hours. When the victim managed to escape, Walker chased him down, placed him in the trunk of Ford's car, and drove him to a remote area where he shot him six times in the head. To establish the CCP aggravator, the State must prove beyond a reasonable doubt that (1) "the killing was the product of cool and calm reflection and not an act prompted by emotional frenzy, panic or a fit of rage (cold)"; (2) "the defendant had a careful plan or prearranged design to commit murder before the fatal incident (calculated)"; and (3) "the defendant exhibited heightened premeditation

(premeditated)". *Jackson v. State*, 648 So. 2d 85, 89 (Fla. 1994).

The trial court found:

> 3. The Capital Felony was a homicide and was committed in a cold, calculated and premeditated manner without any pretense of moral or legal justification.
>
> The evidence is that the victim, Walker and Joel Gibson were involved together in a circle of drug manufacture and sales. Gibson would teach others how to "cook" or manufacture methamphetamines in their own kitchen for an instructor fee of $2,500 and 25% of the sale profits. Apparently, it was believed by Walker and Gibson that Hamman was "getting too big for his boots' and was taking on too much authority. They were all paranoid about DEA agents wearing wires to record their conversations concerning the manufacture and sale of methamphetamines. There were discussions of a plan to kill the two females, Leslie Ritter and Loriann Gibson, because they were suspected of being DEA agents.
>
> Hamman's visit to Joel Gibson's apartment with the females was planned. Walker and Ford were laying in wait for him and attacked him immediately after he entered the apartment. They beat him for two or three hours without mercy. Hamman pleaded for his life during this time. At least one of those present told him they were going to kill him. They made him strip naked except for his socks to see if he was wearing a wire, suspecting him also of being a DEA agent, and to humiliate him. Walker was offended by Hamman because Hamman had hurt his feelings by intentionally making him think that the DEA was watching him. This tormented him mentally. At the remote area,

after Ford had left in her car, Walker stated that Hamman told him Walker's parents' address and talked about raping his mother in front of a camera and sending the video to his father. Walker claimed this freaked him out. This part of his statement is not credible and is only an attempt to justify the murder after Defendant was caught. It is logical that a person severely beaten, with a broken arm, bloody and hurting, would not make defiant or threatening statements to the person who attacked him and was about to kill him. Additionally, the evidence establishes that Loriann Gibson heard Walker ask Hamman in the apartment several times while beating him, "Are you ready to die? While on the bloody sheet on the floor with one of his eyes "messed up" and halfway hanging out, Hamman told Loriann Gibson "I'm sorry." Accordingly , Walker expressed the intent to murder Hamman long before arriving at the murder scene.

The evidence establishes that Hamman did not offer any resistance to the beating or the shooting. The only thing the victim attempted to do was escape. Walker and Ford had expected him to come to the apartment and waited for him so they could attack him. It is obvious by Defendant's statement and Hamman's pleas for his life that Defendant planned to kill him.

After Hamman had been recaptured after fleeing, he was placed in the dark trunk of a car in the dark early morning hours, to be transported to a remote spot to be killed. Walker even stopped on the way at the house of Joel Gibson's girlfriend trying to get rope and gasoline. While the evidence does not explicitly describe the reasons for the need for rope and gasoline, it is logical to believe under the totality of the circumstances that the rope was to be used to bind the victim and the gasoline to burn

> him to the extent to make identification difficult. Not being able to obtain rope or gasoline from Ms. Protz, Walker and Ford left herhouse and proceeded to the remote area. At that point, the victim was bound by securing his hands behind his back with a plastic cable tie and, by the testimony of the medical examiner, a garrot or garrot type device, was applied to the victim's throat with force likely to suffocate him but was released before it caused death. The victim's knees and thighs had abrasions consistent with being dragged and kneeling on concrete or asphalt. He was placed on his back, hands bound behind him, and was shot in the face six times with a big bore handgun, execution style.
>
> Hamman's murder had been planned in advance and the beating and execution style shooting were cold and calculated. The victim was subjected to several hours of beating, threats, and torture before the cold execution style shooting. The premeditation was heightened and deliberately ruthless. There was no pretense of legal or moral justification shown by the evidence. The reasons for the treatment of the victim that Walker gave in his statement do not provide any moral or legal justification. See *Lynch v. State*, 841 So. 2d 362 (Fla. 2003); *Jent v. State*, 408 So. 2d 1024 (Fla. 1982); *Hill v. State*, 688 So. 2d 901 (Fla. 1996); *Pearce v. State*, 880 S.2d 561 (Fla. 2004); *Fennie v. State*, 648 So. 2d 95 (Fla. 1994).
>
> This aggravating factor has been proved beyond all reasonable doubt.

(R 966-968). These findings are supported by competent substantial evidence.

This Court has held that execution-style killing is by its

very nature a "cold" crime. *See Lynch v. State*, 841 So. 2d 362, 372 (Fla. 2003); *Walls v. State*, 641 So. 2d 381, 388 (Fla. 1994). As to the "calculated" element of CCP, this Court has held that where a defendant arms himself in advance, kills execution-style, and has time to coldly and calmly decide to kill, the element of calculated is supported. *See Hertz v. State*, 803 So. 2d 629, 650 (Fla. 2001); *Knight v. State*, 746 So. 2d 423, 436 (Fla. 1998). This Court has "previously found the heightened premeditation required to sustain this aggravator where a defendant has the opportunity to leave the crime scene and not commit the murder but, instead, commits the murder." *Alston v. State*, 723 So. 2d at 162; *see also Lynch*, 841 So. 2d at 372 (noting that defendant had five- to seven-minute opportunity to withdraw from the scene or seek help for victim, but instead calculated to shoot her again, execution-style); *Pearce v. State*, 880 So. 2d 561, 576-577 (Fla. 2004).

Last, Walker argues the trial court failed in assigning the proper weight to the mitigating circumstances. The trial court addressed the mitigating circumstances as follows:

> B. MITIGATING FACTORS
>
> STATUORY MITIGATING FACTORS
>
> The Defendant did not request that the jury be instructed on any statutory mitigating factor, nor did he present any evidence or argument before this Court

at the separate sentencing hearing to suggest any statutory mitigating factor. This Court has reviewed each statutory mitigating factor and now finds that no evidence has been presented to support any statutory mitigating factor, and none is found to exist.

NON-STATUTORY MITIGATING FACTORS

The Court asked the Defendant to prepare a memorandum suggesting all non-statutory mitigation factors he believed had been presented to either the jury or the Court at the separate sentencing hearing. A memorandum was prepared. Each suggestion of non-statutory mitigation will be addressed, using similar terminology of that used by the Defendant.

1. On the day of the murder the Defendant was a bipolar personality having a mental illness.

Dr. Robert Radin, a psychiatrist employed by Circles of Care, saw Defendant at the jail over a period of 15 months after Defendant's arrest for first degree murder, kidnapping and aggravated battery. He was not aware of what crimes had been filed against Defendant until he was contacted to appear as a witness in the trial shortly before the trial was scheduled to begin.

Dr. Radin diagnosed Walker as having a bipolar disorder, not otherwise specified, and personality disorder traits. Bipolar (formerly called manic depressive disorder) has to do with mood swings such as from a high mania type of swing to a very low depressed swing. Most are not very dramatic and the incidents that Walker described to him were hardly observed by the Doctor. He had to rely solely upon what Walker told him. Walker had counseling when he was 15 years of age for some reason Walker could not recall. Dr. Radin did not perceive the bi-polar illness to be of long standing in Mr. Walker. Episodes, if they actually occur, could affect interpersonal relationships.

Dr. Radin reported that many people afflicted with a bi-polar disorder tend to self medicate with alcohol, cocaine or methamphetamines. Walker related to Dr. Radin that he had used those substances daily for a

long time. Walker's statement to the police and the doctor is the only evidence in the record that he was using cocaine or methamphetamines PRIOR to the shooting of David Hamman. There is no other evidence that the Defendant was under the influence of drugs at the time of the murder and Dr. Radin testified that the use of those controlled substances over a period of time will not cause a person to have bipolar manifestations. Dr. Radin stated that he found no evidence of a bipolar disorder other than what Walker told him. If he is bipolar, the doctor concluded, it is mild or at most moderate as to symptoms. The Doctor also testified that a bipolar person understands what they are doing but do not stop doing it and that bipolar people are likely to project onto others the responsibility for their actions.

Dr. Howard R. Bernstein is a clinical psychologist who performed an evaluation of Defendant prior to trial, not a treating psychologist. He opined that based upon his interview with Walker, that he could render a psychiatric diagnosis at the time of the offense. He opined, based only upon Walker's statements to him and the jail records of Dr. Radin, that the bipolar condition of Defendant at the time of the crime was severe. Dr. Bernstein generally agreed with Dr. Radin as to the description of a bipolar condition, the attempt by some of those afflicted to self medicate with illegal drugs or alcohol and that methamphetamine is a stimulant, often referred to as "speed". He also opined that use of drugs potentiate the condition and make it worse.

All that said, Dr. Bernstein did not venture an opinion that the bipolar condition would cause Defendant not to know what he was doing or understand the ramifications of his actions. Dr. Radin was a treating psychiatrist (medical doctor) and saw Defendant over a period of fifteen months. His testimony is more credible considering the totality of the facts of diagnosis as between the doctors. Dr. Bernstein knew the crimes with which the Defendant was charged at the time of the evaluation. Dr. Radin did not know until close to the time of trial.

Over time, it is possible and likely that Defendant

enhanced his statements to Dr. Bernstein, knowing that his evaluation was for trial purposes, not treatment. The Court concludes that if Defendant did suffer from bipolar disorder at the time of the murder, it was a mild case or at the most, moderate. Dr. Radin did not believe the condition had existed for a long time and all he knew upon which to base his diagnosis was the statements of the Defendant. Walker's mental impairment, he actually had one, did not impede his ability to appreciate the criminality of his actions. See *Evans v. State,* 800 So. 2d 182 (Fla. 2001).

Defendant argues that "on the day of the murder the Defendant was a bipolar personality with psychotic features indulging in consistent and constant' smoking on a trip from Brevard County, Florida to Suwannee County, Florida which would take over four (4) hours." See Defendant's Sentencing Memorandum, page 7. This statement is somewhat supported by the evidence in the testimony of Loriann Gibson and Leslie Ritter. However, this drug use was after the murder had been committed. The only evidence of drug use and alleged sleep deprivation at the time of the murder was from Defendant's statement to the police in Live Oak, Florida, the day the victim's body was discovered. The Court has previously found upon the evidence presented that Defendant appeared normal at time of apprehension in Live Oak and fully understood what he was doing when he gave a voluntary statement to the police. The statement was placed in evidence. The possibility of drug use, bipolar conditions and sleep deprivation have been sufficiently shown by the record to consider the combination as a mitigator deserving some weight. However, the Court finds that Defendant knew and understood what he was doing when Hamman was severely beaten and shot and that Defendant did not kill in a rage but did so pursuant to a plan and premeditation. He fully understood the criminality of his actions.

2. Co-Defendant will not get death penalty

While only mentioned in passing on page 8 of Defendant's sentencing memorandum, it was argued at the Spencer hearing that the State is not seeking the death penalty against co-defendant, Leigh Valorie

Ford.

It appears according to the evidence that Leigh Valorie Ford was not as culpable as Defendant Walker. In his own statement to the police, he stated that when he got Hamman out of the trunk at the scene of the shooting and bound his hands behind his back with a cable tie, that Ford drove away in her car, saying "I don't need this shit," or similar words. By his statement, she did not participate in the actual shooting. However, even if Ford had been present when the trigger was pulled, Walker was clearly the dominating force in shooting Hamman. Nonetheless, due to Ford's participation in the crimes the Court finds this factor as a mitigator and will give it some weight since the medical examiner testified that the injuries received in the beating could lead to death.

3. Defendant's statement to the police

The Defendant admits that his statement to the police was freely and voluntarily given after being fully advised of his constitutional rights. The evidence does not establish that his statement assisted with solving other crimes, but it did assist the police in processing the crimes of which the Defendant was convicted. Portions of the statement appear to be fabricated to show a motive to kill and that he was in a rage. Those portions of the statement are not credible. However, the basic admissions did assist the police. The Court will give some weight to this mitigator.

4. Defendant did not resist arrest

Defendant argues that he was armed at the time of arrest with a blackjack and big knife and did not attack the police officers or resist and this factor should be a mitigator. One does not have the right to resist arrest and to do so is a separate crime. In addition, the evidence establishes that the police were armed with pistols and resistance would be futile. This factor is not a mitigating factor.

5. The Defendant tried to protect his co-defendant girlfriend

Defendant elected not to testify at the trial. The only statement he made about his girlfriend was the one he gave to the Brevard County Agents in Live Oak. In that statement, he fully implicated his girlfriend who participated fully up until the time she knew the shooting was about to occur and left the scene before it happened, according to Walker. It is only Walker's word but may be true. Ford did not report the incident to the police. This factor is rejected as a mitigating circumstance.

Defendant also argues that he did not implicate Joel Gibson either. Joel Gibson did not report the incident but by competent evidence was present during the kidnapping and aggravated battery and, in the view one of the females, seemed to be directing the beating. He has since disappeared according to his former girlfriend, Lisa Protz. Attempting to protect co-defendants does nothing to mitigate the Defendant's actions in this case and the Court declines to consider it as mitigating.

6. Defendant is unselfish in character as he did not attempt to gain any benefit by providing information

When the Defendant gave his statement to the police, he was only a suspect in a homicide in Brevard County, Florida. He was in no position to bargain with the police and they could not promise him anything for his statement and indicated that to him. He made a voluntary decision to talk about it. This factor is rejected as an independent mitigator. It is part of the mitigation factor of "Defendant's Statement to the Police." The Court has assigned some weight to his cooperation with the police and this factor is a part of that mitigator.

7. Defendant did not harm the Good Samaritan in Live Oak.

Defendant argues that even though he was armed with a blackjack and knife, he did not harm the man who bought him shoes, took him to the bus station and bought him a bus ticket to the place he said he wanted to go. This factor is rejected as a mitigator. What

possible motive would he have to harm a person helping him to further his flight from justice? This conduct mitigates nothing.

8. The Defendant has remorse

The Defendant's statements do not clearly indicate remorse but could be interpreted to indicate remorse. He wrote words in his letter to the court, Docket entry 173, that are in the nature of remorse. Therefore the Court will treat this factor as a mitigator and give it some weight.

9. Court should show mercy and sentence to life imprisonment

Defendant argues that the advice and recommendation of the jury of a 7 to 5 vote for death is not an "overwhelming" one. Defendant argues in his letter to the Court, that life in prison without possibility of parole would be a harsher sentence than death. He argues that for the benefit of the victim's family and everyone else, the court should impose life in prison rather than the death penalty. This argument is specious.

The law is clear that a jury's advisory opinion is usually entitled to great weight, reflecting as it does the opinion of the community. It should not be disregarded except for some defect in the advisors opinion or unless there is no reasonable basis for it. Although mercy and compassion are integral parts of the sentencing process, the Court rejects the notion that mercy, blindly applied to achieve a desired result, can be a substitute for the meticulous weighing process which has been so clearly and repeatedly articulated by the Supreme Court. This argument is rejected as a mitigating factor.

10. Victim was a bad person

Although not specifically argued as a mitigator, Defendant refers to the victim as a bad person, involved in manufacture and sale of methamphetamines, acts of violence, intending to commit murder and as an oppressor of Defendant. Even if all of these

allegations were true, they are no justification and provide no moral or legal pretense to commit kidnapping, aggravated battery or to murder the helpless victim in cold blood. This factor though not argued, is rejected by the Court as a mitigator.

C. Weighing Process

1. Aggravating Factors-Statutory

(a) The capital felony was committed while the Defendant was engaged in the commission of a kidnapping. The Court gives great weight to this aggravating factor.

(b) The capital felony was especially heinous, atrocious, or cruel. The Court gives great weight to this aggravating factor.

(c) The capital felony was a homicide and was committed in a cold. calculated and premeditated manner without any pretense of moral or legal justification. The Court gives great weight to this aggravating factor.

2. Statutory Mitigating Factors

None were presented in evidence, no jury instruction requested and none argued.

3. Non-statutory Mitigating Factors

(a) On the day of the murder the Defendant was a bipolar personality having a mental illness and was under the influence of drugs and sleep deprivation. This mitigating circumstance is established and given moderate weight.

(b) Co-Defendant will not get death penalty. This mitigating circumstance is established and given slight weight.

(c) Defendant's statements to the police. This mitigating circumstance is established and given moderate weight.

(d) Defendant did not resist arrest. This factor is rejected as a mitigator.

(e) The Defendant tried to protect his co-defendant

girlfriend. This factor is rejected as a mitigator.

(f) Defendant is unselfish in character as he did not attempt to gain any benefit by providing information. This factor is rejected as an independent mitigator.

(g) Defendant did not harm the Good Samaritan in Live Oak. This factor is rejected as a mitigator.

(h) The Defendant has remorse. This mitigating circumstance is established and given slight weight.

(i) Court should have mercy and sentence to life imprisonment. This factor is rejected as a mitigator.

CONCLUSION

The Court finds that the State has established, beyond and to the exclusion of every reasonable doubt, the existence of three aggravating circumstances.

The Court finds that no statutory mitigating circumstances exist.

The Court is reasonably convinced that four non-statutory mitigating circumstances have been established by the evidence.

In weighing the aggravating factors against the mitigating factors the Court understands that the process is not simply an arithmetic one. It is not enough to weigh the number of aggravators against the number of mitigators but rather the process is more qualitative than quantitative. The Court must and does look to the nature and quality of the aggravators and mitigators which it has found to exist.

This Court finds that the aggravating circumstances in this case far outweigh the mitigating circumstances. The aggravating circumstances in this case are appalling and greatly outweigh the relatively insignificant non-statutory mitigating circumstances established by this record.

> Even if only one of the aggravators were considered, that one would still seriously outweigh the existing mitigation factors.

(R 968-976).

At the outset, it is important to note *Kearse v. State,* 770 So. 2d 1119 (Fla. 2000), wherein this Court held:

> Deciding the weight to be given a mitigating circumstance is within the trial court's discretion, and its decision is subject to the abuse-of-discretion standard.... [T]he trial judge is in the best position to judge ... and this Court will not second-guess the judge's decision ....

Id. at 1133. Additionally, "there are circumstances where a mitigating circumstance may be found to be supported by the record, but given no weight." *Trease v. State,* 768 So. 2d 1050, 1055 (Fla. 2000).

Appellant argues that the trial court assigned the improper weight to certain mitigating circumstances. The trial court here acted well within the bounds of its discretion in considering the proffered mitigators and assigning slight or no weight to certain of them. A "mere disagreement with the force to be given [mitigating evidence] is an insufficient basis for challenging a sentence.@ *Porter v. State,* 429 So. 2d 293, 296 (Fla. 1983) (*quoting Quince v. State,* 414 So. 2d 185, 187 (Fla. 1982)). The trial court's holdings regarding certain of the appellant's

proffered mitigators resulted from an abundance of evidence contained in the record supporting the notion that the cited mitigators are relevant to the defendant in the instant case. As the record "contains competent, substantial evidence to support the trial court's rejection of these mitigating circumstances," *Kight v. State,* 512 So. 2d 922, 933 (Fla. 1987), the trial court's refusal to grant any weight to certain mitigating evidence was not improper. *Cox v. State,* 819 So. 2d 705, 722-723 (Fla. 2002).

The present case is proportional to other death penalty cases. Hamman was beaten, experienced terror and mental anguish after he tried to escape and was stuffed into the trunk of a car, then shot in the face. The trial judge found the following aggravating circumstances:

> (1) Committed during a kidnapping – great weight;
>
> (2) Especially heinous, atrocious, or cruel – great weight;
>
> (3) Cold calculated and premeditated – great weight;

(Vol. V, R962-68, 974).

The trial judge discussed the following non-statutory mitigating circumstances.

> (1) Drug use/bi-polar personality/sleep deprivation - moderate weight;
>
> (2) Life sentence of co-defendant Leigh Valorie Ford -

some weight;

(3) Defendant's statement to police - moderate weight;

(4) Defendant did not resist arrest – rejected as mitigating;

(5) Defendant tried to protect his co-defendant girlfriend – rejected as mitigating;

(6) Defendant is unselfish in character and did not attempt to gain any benefit by providing information – considered as part of cooperation with law enforcement as previously discussed;

(7) Defendant did not harm the Good Samaritan in Live Oak – rejected as mitigating;

(8) Defendant has remorse – slight weight;

(9) Court should show mercy – rejected as mitigating;

(10) Victim was a bad person – rejected as mitigating.

This case is proportional to other similarly-situated death-sentenced defendants. *See Ibar v. State*, 31 Fla. L. Weekly S149 (Fla. March 9, 2006)(beat victim, then shot him, aggravating circumstances of under sentence of imprisonment, prior violent felony, during a robbery and kidnapping, avoid arrest, HAC and CCP; five nonstatutory mitigators); *Walls v. State*, 641 So.2d 381, 386 (Fla. 1994) (wife experienced mental anguish while seeing husband killed; mitigating circumstances of (1) no significant criminal history (2) age of nineteen; (3) emotionally handicapped; (4) apparent brain dysfunction and

brain damage; (5) a low IQ so that he functioned intellectually at about the age of twelve or thirteen; (6) confessed and cooperated with law enforcement officers; (7) loving relationship with parents and disabled sibling; (8) good worker (9) kindness toward weak, crippled, or helpless persons and animals.); *Smithers v. State*, 826 So.2d 916, 931 (Fla. 2002)(aggravating circumstances of prior violent felony, HAC, CCP; statutory mitigators of extreme emotional disturbance and unable to conform conduct to requirements of law plus non-statutory mitigators of good husband and father, close relationship with siblings, physical and emotional abuse as a child, regularly attended church, model inmate, contributions to community, confessed to crime); *Pagan v. State*, 830 So.2d 792, 815-17 (Fla. 2002)(aggravators of prior violent felony, during an armed robbery, CCP; numerous mitigating factors); *Pope v. State*, 679 S9.2d 710, 716 (Fla. 1996)(committed for pecuniary gain and prior violent felony outweighed statutory mitigators of extreme emotional disturbance and impaired capacity to appreciate criminality of conduct and several non-statutory mitigating circumstances); *Floyd v. State*, 913 So.2d 564 (Fla. 2005)(victim beaten then shot execution style); *Singleton v. State,* 783 So.2d 970, 979 (Fla.2001)(two aggravators outweighed three statutory

mitigators of age, impaired capacity, extreme emotional disturbance and several non-statutory mitigators including mild dementia); *Lucas v. State*, 613 So.2d 408, 411 (Fla. 1992)(beat victim severely then shot in forehead); *Bruno v. State*, 574 So.2d 76, 82-83 (Fla. 1991)(victim savagely beaten during robbery then shot in head; murder was HAC and CCP); *Orme v. State*, 677 So.2d 258, 263 (Fla. 1996)(aggravating circumstances of HAC, pecuniary gain, and during a sexual battery, statutory mitigation of extreme emotional disturbance and substantial impairment); *Johnston v. State*, 841 So.2d 349, 361 (Fla. 2002)(aggravators of prior violent felony, committed during sexual battery and kidnapping, pecuniary gain, and HAC weighed against one statutory mitigator and non-statutory mitigation); *Geralds v. State*, 674 So.2d 96, 104 (Fla. 1996)(aggravators of HAC and during robbery or burglary weighed against statutory and non-statutory mitigation).

ISSUE V

THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN ADMITTING PHOTOGRAPHS.

Walker claims the trial court abused its discretion in admitting State Exhibits 49 to 54 (body of victim lying in road, blood stains on the apartment stairs and street, racks, and the victim lying in the road), and 75 to 89[11] (autopsy photos).

The medical examiner went through each photo and described the areas with injuries (Vol. 13, TT1329). The medical examiner stated that the each of the photos would assist him in explaining his findings to the jury (Vol. 13, TT1332). The medical examiner then went through each photo and described the injuries in that photo (Vol. 13, TT1333-50).

Hamman had suffered multiple blunt-force injuries and multiple gunshot wounds (Vol. XIII, TT1320). The blunt-force injuries were on the head, back of the hands, forearms, legs, chest, back, hip, feet, knees and thighs. Hamman suffered lacerations to the scalp, forehead and eyebrows (Vol. XIII, TT 1336). Bruising to the torso showed use of a baton, rod or hard

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[11] On page 62 of the Initial Brief this issue is raised as challenging State Exhibits 50 to 54 and 75 to 89. On page 63 of the brief, the issue is raised as challenging State Exhibits 49-54, 75, and 80-89. The State will assume a challenge to State Exhibits 49-54 and 75 to 89.

stick (Vol. XIII, TT1339). The upper right arm was fractured, and there were multiple abrasions to the right forearm (Vol. XIII, TT1340). These types of wound are called “Defense” wounds (Vol. XIII, TT1342). There were also defense wounds to the hands, knuckles, and wrists (Vol. XIII, TT1343). Hamman also had abrasion lines under the chin around the throat. These lines indicated strangulation and that a ligature was applied (Vol. XIII, TT1334). The ligature was later removed. Hamman’s body manifested multiple signs of torture (Vol. XIII, TT1335). His hands had been bound behind his back with flex ties (Vol. XIII, TT1341). Abrasions on the left thigh indicated dragging of the body on a hard surface such as a road (Vol. XIII, TT1343). Abrasions to the knees indicated kneeling on a hard surface like a road. There were multiple abrasions to the feet (Vol. XIII, TT1345). Loss of blood from the injuries would be mild to moderate, and it would take a person a long time to die from the blunt-force injuries alone (Vol. XIII, TT1355).

In addition to the blunt-force injuries, there were six gunshot wounds to the face which caused diffuse brain hemorrhage (Vol. XIII, TT1321, 1346, 1352).

The test for the admissibility of photographic evidence is relevance, not necessity. See *Mansfield v. State,* 758 So. 2d 636

(Fla. 2000) (photographs depicting the mutilation of the victim's genitalia and an autopsy photograph of the victim's brain); *Gudinas v. State,* 693 So. 2d 953*,* 963 (Fla. 1997). A trial court's ruling on the admission of photographic evidence will not be disturbed absent a clear showing of an abuse of discretion. *Id; Mansfield v. State,* 758 So. 2d 636, 648 (Fla. 2000). Photographic evidence is admissible if it is relevant to a material fact in dispute. Thus, "autopsy photographs, even when difficult to view, are admissible to the extent that they fairly and accurately establish a material fact and are not unduly prejudicial." *Rose v. State,* 787 So. 2d 786, 794 (Fla. 2001). This Court has repeatedly upheld the admission of photographs when they are necessary to explain a medical examiner's testimony, the manner of death, or the location of the wounds. *See, e.g., Boyd v. State,* 910 So. 2d 167 (Fla. 2005); *Davis v. State,* 859 So. 2d 465, 477 (Fla. 2003); *Floyd v. State,* 808 So. 2d 175, 184 (Fla. 2002); *Pope v. State,* 679 So. 2d 710, 7 13-14 (Fla. 1996). As this Court recognized in *Teffeteller v. State,* 495 So. 2d 744, 745 (F1a. 1986): "those whose work products are murdered human beings should expect to be confronted by photographs of their accomplishments." (quoting *Henderson v. State,* 463 So. 2d 196, 200 (Fla. 1985)).

ISSUE VI

THE TRIAL COURT DID NOT ABUSE ITS DISCRETION BY DENYING THE MOTION FOR STATEMENT OF PARTICULARS AS TO AGGRAVATING CIRCUMSTANCES.

The hearing on pre-trial motions was held March 29, 2004 (Vol. 1, R1-114). The trial in this case was held July 21-28, 2004. Appellant was sentenced to death on December 13, 2004. *State v. Steele*, 31 Fla. L. Weekly S74 (Fla. Oct. 12, 2005), was decided October 12, 2005.

In *Steele*, this Court held:

> Because of the expansion in available aggravating circumstances, as well as the absence of any express prohibition on requiring advance notice of aggravators, we conclude that a trial court does not violate a clearly established principle of law in requiring the State to provide such notice. Whether to require the State to provide notice of alleged aggravators is within the trial court's discretion.

Id. at S76.

At the time the trial judge ruled on this motion, there was no authority for the State providing a list of potential aggravating circumstances. Even after *Steele*, the decision is up to the judge, and he does not abuse his discretion either way he rules. Therefore, this claim has no merit.

CONCLUSION

Based on the arguments and authorities herein, Appellee respectfully requests that this Honorable Court affirm the convictions and sentences.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. mail to **Denise O. Simpson**, Esq., 1717 K Street NW, Suite 600, Washington, D.C. 20036 this day of March, 2006.

CERTIFICATE OF FONT COMPLIANCE

I HEREBY CERTIFY that the size and style of type used in this brief is 12-point Courier New, in compliance with Fla. R. App. P. 9.210(a)(2).

Respectfully submitted,

CHARLES J. CRIST, JR.
ATTORNEY GENERAL

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BARBARA C. DAVIS
Assistant Attorney General
Florida Bar No. 410519
444 Seabreeze Blvd., Suite 500
Daytona Beach, Florida 32118
(386)238-4990
Fax (386) 226-0457

COUNSEL FOR APPELLEE