IN THE SUPREME COURT OF FLORIDA

Case No. SC10-638

ROBERT SHANNON WALKER,

Appellant/Cross-Appellee,

v.

STATE OF FLORIDA,

Appellee/Cross-Appellant.
_____/

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

ANSWER BRIEF OF APPELLEE/ INITIAL BRIEF OF CROSS-APPELLANT

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STATEMENT OF THE CASE

This Court summarized the procedural and factual history on direct appeal:

> This case involves the drug-related beating, torture, kidnapping, and ultimate execution of David Hamman at the hands of Robert Shannon Walker, II. The evidence presented during Walker's trial revealed the following facts.
>
> In the late evening hours of January 26, 2003, the victim, David "Opie" Hamman, arrived at the second-floor apartment of Joel Gibson in the city of Palm Bay, located in Brevard County, Florida. Accompanying Hamman were two women, Leslie Ritter and Hamman's girlfriend, Loriann Gibson. n1 The appellant, Robert Shannon Walker, II, was waiting inside the apartment with his girlfriend, Leigh Valorie Ford, and Joel Gibson.
>
> n1 Loriann Gibson is not related to Joel Gibson.
>
> Immediately after Hamman entered Joel's apartment, Walker and Ford viciously attacked Hamman, beating him with various objects including the head of a metal Maglite flashlight, a baton type weapon, and a blackjack. Although not actively participating, Joel seemed to be supervising the attack. The attack on Hamman was drug-related. n2 About a half hour into the attack, Joel, Walker, and Ford forced Hamman to strip down to only his socks to ensure he was not wearing a wire because they suspected that Hamman was a Drug Enforcement Administration (DEA) agent. n3 They also forced Ritter and Loriann Gibson to strip down to their underwear in order to check for wires but permitted the women to redress.
>
> n2 According to Walker's statement to police, he was involved with Hamman in the manufacture and sale of methamphetamine, also referred to as "meth" or "crank." Hamman supposedly possessed the "formula" for making

meth and would give lessons for $ 2500, then receive twenty-five percent of his students' profits.

Walker indicated that Joel Gibson was also involved in drug-related activities. Walker and Ford knew Joel because they worked for him in his lawncare business.

n3 Walker's statement indicates that Hamman made him afraid that the DEA was watching him after an incident the previous day where Walker helped Hamman beat up one of Hamman's "students," Patrick Connelley. Connelley was also the roommate of Loriann Gibson and Ritter. Walker said that because Hamman scared Connelley, Connelley went to the police. After that, Hamman was afraid that the DEA would get involved and made Walker suspect that the DEA was watching him. Walker indicated that he wanted to get back at Hamman for scaring him.

In addition, Walker indicated that the women may have overhead the attack on Connelley, and Hamman began talking about killing them. Walker felt that Hamman was feeling too self-important and wanted to teach him a lesson.

After being searched, the women went to the back bedroom. They last saw Hamman lying on a bloody sheet on the living room floor, naked, with one of his eyes halfway hanging out. There was blood all over the apartment. From the back bedroom, the women heard Walker and Ford asking Hamman, "Are you ready to die?" and heard Joel saying Hamman was going to die that night. They also heard Hamman plead for his life and scream, "Please, stop, I don't want to die. Please don't kill me. It hurts."

The attack on Hamman at Joel's apartment lasted between two and three hours. Sometime around midnight, Hamman tried to escape. n4 While Walker and Ford were distracted, Hamman ran out of the apartment and made his way down the stairs, leaving a trail of blood behind him. When Walker and Ford discovered Hamman had

escaped, Ford said, "Get the bag and stuff and put them in the trunk," and "get the tarp and lay it in the trunk." Hamman made it a short distance down the road leading away from Joel's apartment before being caught by Walker and Ford. He had left drops of blood on the parking lot and the road at the point where Walker and Ford caught him, near the apartment mailboxes. n5

> n4 At some point prior to Hamman's escape, Dennis Goss, Joel's neighbor on the second floor, was disturbed by his dog barking and the sounds of someone being beaten "real hard." Joel knocked on Goss's door to apologize for the noise and explained to Goss that "somebody got too big for their britches." Goss did not call the police because he knew that Joel carried a .45 Magnum, and Walker carried a Colt .45.
>
> n5 Goss later saw people down by the mailboxes and heard someone say, "Get in the car, quick." Goss recalled that it was a man's voice but not Joel's.

Walker and Ford put the tarp in the trunk of Ford's automobile and forced Hamman to get in. Walker told Ford to find a remote spot to take Hamman. Ford 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. Protz saw that Walker had a gun. Walker asked Protz for gasoline, rope, and tape, but she only gave him tape. A few minutes later, Ford arrived, and not long after that, Joel called on Protz's phone. While talking to Joel, Walker wrapped the tape around his fingers.

Walker and Ford then left and drove to a remote area down a dirt road just outside the gates to the Tom Lawton Recreation Area, a state park. At some point between Joel Gibson's apartment and the park, Hamman's hands were bound behind his back with a plastic cable tie. Just outside the park gates, Hamman was taken out of the trunk and forced to lie down with his back on the ground. Walker then shot

Hamman six times in the face with a Llama .45 pistol. Walker left Hamman on the road and drove back to Joel Gibson's apartment. n6

> n6 According to Walker's statement, Ford left before Walker shot Hamman.

At Joel Gibson's apartment, Walker asked Ritter and Loriann Gibson to take him to Georgia. They obliged Walker, and the three drove north on Interstate 95 in Hamman's truck, with Loriann at the wheel. n7 When they reached Jacksonville, instead of continuing to head north to Georgia, Loriann turned onto Interstate 10. When they reached Live Oak, Walker had Loriann exit and pull into a gas station so he could purchase a map. When Walker exited the truck without the keys and, incidentally, his shoes, Gibson drove away. Walker was later found barefoot and crying at the gas station by a "Good Samaritan," William Davis. Mr. Davis purchased shoes for Walker and took Walker to the bus station where he gave Walker money for a bus ticket.

> n7 At some point during the ride, Loriann became upset when she saw a driver in another vehicle that reminded her of Hamman. She recalled that Walker told her that he had taken care of Hamman and that she would not be seeing him again.

In the meantime, Loriann and Ritter drove back to Interstate 10 and found Officer Bobby Boren, who was running radar for the Department of Transportation in a marked vehicle. Loriann and Ritter frantically relayed the events of the previous night and their escape from Walker that morning. Officer Boren then requested back-up from the Live Oak city police and the Suwannee County Sheriff's office. When back-up arrived, a "be on the lookout" (BOLO) was issued for a possible murder suspect matching Walker's description. The Suwannee County Sheriff's office also contacted Brevard County police to advise that they were holding possible witnesses to a murder in Brevard County the night before.

Brevard County officers were already at the crime scene when they received the call from Suwannee County. Hamman's body was discovered earlier that morning, just before 6 a.m., by Steven Roeske of the St. Johns River Water Management District on the road outside the gates to the Tom Lawton Recreation Area. Hamman was found lying face up in a pool of blood, halfway on and halfway off the road. His hands were bound behind his back, and he was totally naked with the exception of the socks on his feet. Just before noon, Brevard County Sheriff's agents Alex Herrera and Lou Heyn left for Live Oak to interview Ritter and Loriann. A few hours earlier, sometime between 9 and 10 a.m., Walker was apprehended at the Live Oak bus station by Live Oak Police Officer Charles Tompkins and Suwannee County Deputy, Corporal David Manning. n8 Walker was taken directly to the county jail. Agents Herrera and Heyn arrived in Live Oak later that afternoon and interviewed Loriann and Ritter. Sometime after 7 p.m., the agents interviewed Walker.

> n8 The officers searched Walker and found two loaded magazines for a .45 caliber pistol, a pocket knife, one live round, one spent casing, and a blackjack.

After waiving his *Miranda* n9 rights and signing a waiver-of-rights form, Walker gave a taped statement to Agents Herrera and Heyn in which he confessed to beating, kidnapping, and shooting David Hamman. Walker admitted to beating Hamman with a Maglite flashlight when Hamman arrived at Joel's apartment but claimed that they mainly argued. Walker said that he made Hamman sit on the couch and questioned Hamman about being wired and about being a "cop." He told Hamman to strip, and Hamman complied. Walker claimed that he hit Hamman only three to four more times before Hamman ran naked from the apartment. Walker explained he "just wanted to slap the piss out of [Hamman] because he scared me."

> n9 *Miranda v. Arizona*, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966).

Walker also admitted to chasing Hamman down and taking him for a ride in the trunk of Ford's car, but claimed that Hamman got in and out of the trunk on his own. Walker claimed that when they arrived outside the state park, Hamman told Walker that he knew the address of Walker's parents and was going to rape Walker's mother while he videotaped it. n10 Walker then admitted to binding Hamman's hands and shooting Hamman with the Llama .45. Walker said that Hamman's body was lying face up beside the truck at the time he was shot. Walker said that he only meant to scare Hamman and humiliate him by driving him out to a remote location and forcing him to walk back naked. He explained that he only killed Hamman after Hamman scared him by making threats to harm his family. After that, Walker confirmed that he went back to Joel Gibson's apartment and asked Ritter and Loriann Gibson to take him for a ride in Hamman's truck. When they stopped in Live Oak, the women left Walker at the gas station.

n10 Walker claimed that Ford left at this point.

Hamman's truck was impounded, photographed, and searched. Two .45 caliber semiautomatic pistols were recovered from the glove compartment. One was a Llama .45 caliber with a bullet in the chamber. 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. Also in the truck was a blue Rubbermaid container which held flex ties, a folding knife, a leather blackjack, two magazines with cartridges, a Maglite flashlight, and one loose cartridge. There were reddish-brown stains on the driver's side and armrest of the truck, and there was pattern stain all the way down the driver's side on the outside of the truck.

On February 25, 2003, Walker was indicted on three counts: (1) first-degree murder, (2) kidnapping, and (3) aggravated battery. Before trial, Walker filed various pretrial motions, including a motion to suppress his statement to the Brevard County officers and motions to

declare Florida's capital sentencing scheme unconstitutional. All of these motions were denied.

Walker's jury trial began on July 21, 2004. At trial, the jury heard the testimony of Loriann Gibson, Ritter, Goss, Protz, and the various officers involved, as well as Walker's taped statement in which he confessed to shooting Hamman. In addition, the State presented the testimony of the medical examiner, Dr. Sajid Quaiser, the firearms examiner who tested the Llama .45, and a DNA expert. n11 Dr. Quaiser testified that Hamman suffered multiple blunt-force injuries and multiple gunshot wounds. Hamman's body showed blunt-force injuries on the head, back of the hands, forearms, legs, chest, back, hip, feet, knees, and thighs. Hamman also suffered lacerations to the scalp, forehead, and eyebrows. Hamman's torso was bruised, which Dr. Quaiser attributed to the use of a baton, rod, or hard stick. In addition to these blunt-force injuries, Dr. Quaiser testified that there were six gunshot wounds to Hamman's face which caused diffuse brain hemorrhaging, and at least two of the gunshots were fired at close range. In Dr. Quaiser's opinion, Hamman's death was most likely caused by the gunshot wounds. n12

> n11 The DNA expert testified that the blood stains recovered from the lining of Ford's truck matched Hamman's blood type. Also, the blood on the barrel of the Llama .45 matched Hamman's, and Hamman could not be excluded as a donor of blood on the trigger.
>
> n12 While Dr. Quaiser testified that the cause of death was a combination of blunt force injuries and gunshot wounds to the head, he believed the gunshot wounds most likely caused Hamman's death since the loss of blood from the blunt force injuries would be mild to moderate, meaning that it would take a long time for a person to die from blunt-force injuries alone.

Dr. Quaiser also found that Hamman's body manifested multiple signs of torture. Hamman had abrasion lines under the chin around the

throat, indicating that at some point a ligature was applied and that Hamman had been strangled. Abrasions on Hamman's left thigh indicated that his body was dragged on a hard surface such as a road. Abrasions to his knees indicated that Hamman had been kneeling on a hard surface like a road, and there were also multiple abrasions to his feet. Dr. Quaiser also found defensive wounds: Hamman's upper right arm was fractured, he had multiple abrasions on his right forearm, and he had wounds on his hands, knuckles, and wrists. n13

> n13 Dr. Quaiser removed the flex ties from Hamman's wrists during the autopsy. The firearms expert testified that these flex ties were consistent with the ones recovered from the backpack and Rubbermaid container found in Hamman's truck.

In addition, the firearms expert testified that one of the six projectiles recovered from Hamman's head at the autopsy definitively matched the Llama .45, and three others had characteristics consistent with being fired from the Llama .45. n14 He also testified that the cartridges found in the black backpack and in Walker's pockets could be used in the Llama .45. He further stated that the Llama .45 requires the user to methodically target and aim the gun between each shot.

n14 The firearms expert further found that all six of the Remington Peters brand cartridge casings found on the roadway near the victim were fired from the Llama .45, and the live ammunition found in the Llama was also Remington Peters brand casings. He also testified that the serial number on the Llama .45 matched the serial number on the gun box found in Joel Gibson's apartment.

On July 27, 2004, the jury returned its verdict finding Walker guilty on all three counts. Following the penalty phase, the jury recommended death by a vote of seven to five. After conducting a Spencer n15 hearing, the trial court found three aggravating factors, n16 no statutory mitigators, and four nonstatutory mitigators. n17 On

> December 13, 2004, the trial court sentenced Walker to death. This appeal followed.
>
> n15 *Spencer v. State*, 615 So. 2d 688 (Fla. 1993).
>
> n16 The aggravators are: (1) the murder was committed during the course of a felony (kidnapping)--great weight; (2) the murder was especially heinous, atrocious, or cruel (HAC)--great weight; and (3) the murder was cold, calculated, and premeditated (CCP)--great weight.
>
> n17 The nonstatutory mitigators are: (1) Walker's drug use/bipolar personality/sleep deprivation--moderate weight; (2) life sentence of codefendant Leigh Valorie Ford--some weight; (3) Walker's statement to police--moderate weight; and (4) Walker's remorse--slight weight. The trial court rejected six other nonstatutory mitigators requested by Walker. See discussion of Issue 4 infra pp. 35-46.

Walker v. State, 957 So. 2d 560, 565-569 (Fla. 2007).

This Court affirmed the conviction and sentence on May 3, 2007. There was no motion for rehearing. Mandate issued May 25, 2007. Walker did not file an acceptable petition for writ of certiorari in the United States Supreme Court.

Walker filed his Rule 3.851 motion on July 10, 2008. (V8, R1221-1326). The state filed a response on August 15, 2008. (V9, R1330-1379). On October 4, 2008, the trial judge entered an order summarily denying some claims and setting an evidentiary hearing on Claims 2A and 3. (V9, R1401-

1408). An evidentiary hearing was held April 6-8 and July 16, 2009. (V3-6).[1] On March 8, 2010, the trial judge entered a final order granting in part and denying in part the postconviction motion. (V12, R1893-2092). This order granted a new penalty phase pursuant to the arguments in Claim IIA, but denied all other claims. Walker appealed the denial of guilt phase claims. (V13, R2448). The state cross-appealed the grant of a new penalty phase. (V13, R2452).

ISSUES RAISED ON DIRECT APPEAL

Walker raised seven issues on direct appeal:

(1) Denial of motion to suppress his statement;

(2) Florida's capital sentencing scheme is unconstitutional;

(3) Denial of motion for judgment of acquittal on murder count;

(4) Weight given the aggravating and mitigating factors;

(5) Admission of photographic evidence;

(6) Denial of statement of particulars on aggravating circumstances and the State's theory of prosecution; and

(7) *Ring v. Arizona*, 536 U.S. 584 (2002).

Walker v. State, 957 So. 2d 560, 569 (Fla. 2007).

[1] Cites to the record are "V" for volume number followed by "R" for the record.

ISSUES RAISED IN RULE 3.851 MOTION TO VACATE

Walker raised 39 separate issues in his Rule 3.851 motion to vacate:

(1) Ineffective assistance of counsel – guilt phase;

(A) Motion to suppress;

(i) Arrest without probable cause;

(ii) Involuntary confession to Brevard law officers;

(iii) Involuntary statements to other officers;

(B) Photographic evidence of blood stains;

(C) Voir dire;

(D) Count 2 of indictment (kidnapping);

(E) Failure to argue defense-of-others;

(F) Argue voluntariness of confession to jury;

(G) Object to hearsay testimony;

(H) Incoherent arguments;

(I) Closing argument/concession of guilt;

(J) Evidence of brain impairment, drug use, sleep deprivation to negate premeditation;

(K) Independent DNA expert;

(L) Independent ballistics expert;

(M) Object to closure of courtroom;

(N) Involvement of DEA and confidential informant;

(O) Cumulative error;

(2) Ineffective assistance of counsel – penalty phase;

(A) Mitigation investigation and presentation;

(B) Investigate defendant's minor role in drug business;

(C) Investigate manipulation and domination of defendant by others;

(D) Investigate and present evidence of impairment by drugs and alcohol;

(E) Incompetent mental health exam;

(F) Jury Selection;

(G) Inadequate proof of kidnapping for prior-violent-felony aggravator;

(H) Suppress statements;

(i) Arrest without probable cause;

(ii) Involuntary confession to Brevard law officers;

(iii) Involuntary statements to other officers;

(I) Challenge CCP aggravator by presenting defense-of-others;

(J) Admit to prior-violent-felony aggravator;

(K) Object to state's closing argument;

(L) Potential for rehabilitation;

(M) Investigate DEA and confidential informant;

(N) Cumulative error;

(3) Shackles;

(4) Ineffective assistance of counsel – prior violent felony aggravator;

(5) Newly discovered evidence – testimony of Leigh Ford and Joel Gibson;

(6) Cumulative error.

(V8, R1221-1326).

EVIDENTIARY HEARING FACTS

Walker presented the testimony of 9 witnesses at the evidentiary hearing: Ken Studstill, trial attorney; Anita Morris, cousin; Christopher Walker, cousin; June Rebert, landlord; Gene D'Oria, friend; Dr. William Morton, psychopharmacologist; Edward Gratzick, clinical social worker; Dr. Joseph Sesta, neuropsychologist; Dr. John Tanner, M.D., neurologist; The state presented no witnesses in rebuttal.

Ken Studstill was Walker's trial counsel. Studstill had been practicing law for over forty years and had defended over twenty capital cases in the past twenty years. (V3, R238, 240, 366). He has been defending capital cases since the early 1970's. (V3, R240). His experience includes clients that have been declared incompetent or suffered from mental health issues. (V3, R366-67). Studstill had as much experience as any attorney in the county. (V3, R366). He has attended the "Life Over Death" conference every year for the past ten years. (V3, R244). He had been court-appointed to all except one of the capital cases he tried. (R3, R242).

Insofar as billing records, Studstill said he tried to keep accurate records but "I generally cheat myself." (V3, R245). Studstill met with Walker the day after he received the arrest warrant and affidavit. (V3, R259). Studstill always accepted Walker's phone calls. (V3, R260).

Studstill told Walker that the State was seeking the death penalty. (V3, R260). They discussed guilt phase and penalty phase issues, including potential mitigation. (V3, R262-63). At the initial meetings, they discussed Walker's family history, background, and friends. (V3, R263-64). Studstill "tried to amass as much information with him in preparation for the penalty phase even though I hope I never have to use it, but I start working on it right away." (V3, R264).

Studstill does not have a forensic questionnaire. (V3, R264). Walker told Studstill he had ADHD in his teens but that was no longer a problem. Studstill discussed getting the records but Walker "didn't seem to think it was all that important." (V3, R264).

During the first three months of representation, Studstill filed a "ream" of motions. (V3, R265). Studstill customarily moves to bifurcate the trial "because I haven't ever been able to get a court to give me another lawyer." (V3, R265).

Studstill encouraged Walker to give him information, and he got Beverly's phone number. (V3, R269). Studstill spoke with Walker's sister (Beverly Longendorf) twice, but "did not get much in the way of favorable information."

(V3, R268-69, 280). Beverly did not have much to say about Walker's childhood or that Walker was mistreated in any way. (V3, R270). Beverly said she did not think she could help. Studstill said "since you don't want to come, send me some letters." (V3, R270). The reason Studstill wanted letters was because Walker was reluctant to talk about his family. (V3, R269). Walker told Studstill "there's nothing they will do or can do for me." (V3, R269). Beverly did send something. (V3, R270).

Another of Walker's sisters sent Studstill "this wild thing" which he did forward to the judge. (V3, R270). It was about the CIA or Nazis being after Walker. (V3, R271).

Studstill called Live Oak (where Walker was arrested) to talk to "Nurse Vicky." (V3, R273). He also hired Dr. Bernstein to conduct a mental health evaluation. Dr. Bernstein saw Walker for the first time on June 14, 2004. (V3, R284).

Helen Walker, Defendant's mother, "was adamant about not taking the stand." (V3, R272, 285). Studstill talked to Helen twice. (V3, R275). Both parents came to the trial, but they were both adamant about not testifying. (V3, R292). June Rebert called Studstill and sent a letter. (V3, R289). She wanted to testify in support of Walker. (V3, R289).

Studstill and Walker listened to the confession tape together. Walker asked Studstill to "try to get him a number of years" and that he would agree to "forty years or something." (V3, R277, 386). Studstill approached the State but plea negotiations were rejected. (V3, R278, 390). Walker refused to plead to a life sentence. (V3, R317, 373-74). He refused to testify at trial: Walker "never wavered." (V3, R374).

Studstill said a standard mitigation investigation begins with his client. (V3, R298). The first thing was to try to determine if the defendant had a mental disorder. (V3, R299). Head injuries, accidents, and prior mental health counseling should be followed up. (V3, R299). If Studstill suspects head injuries or organic brain trauma, he requests a PET scan or gets an opinion as to "what is wrong with his brain." (V3, R299). Walker did not tell Studstill he had been seen by Dr. Radin with Circles of Care. (V3, R302). Walker felt it was none of Studstill's business. (V3, R303).

Studstill had records from Circles of Care, a mental health treatment facility in Brevard County. (V3, R293). He also had records from the Center for Brief Counseling in Fredericksburg, Virginia. (V3, R295). He retained Dr. Bernstein, psychologist, as a mental health expert. (V3, R338). He discussed the records with Dr. Bernstein to see if there was anything favorable. (V3, R352). The records from Virginia showed Walker had been in special education since second grade, had a

5th grade reading level and hated "ED." (V3, R352, 354). The fact that Walker was teased and bullied in school did not raise red flags with Studstill. (V3, R353-54). The form also said there were "no major problems" at home. (V3, R354).

Studstill had a "factual" problem proving Walker abused drugs the night of the murder because "No one actually saw him doing that." (V3, R300). He could not find a single witness besides Walker to testify about drug use at the time of the murder. The female witnesses did not see Walker take drugs before the murder, and Joel Gibson could not be found. (V3, R300). Notwithstanding, it was obvious from the case that Walker abused drugs. Both Ritter and Gibson testified about drug use after the murder. (V3, R337).

Studstill tried to explore Walker's childhood, but the only thing Walker revealed was that he had been in counseling when he was 15 years old, that he quit school and got his G.E.D., and that he was gainfully employed. (V3, R304). Walker said his school records were "terrible." (V3, R327). Everybody Studstill talked to said Walker's downfall was an addiction to methamphetamine. No one in the family would come to testify. The sisters sent letters (V3, R304), but one was totally worthless.

Studstill investigated Walker's background even though Walker said the family would not help. (V3, R317). He talked to Walker's mother and sister before trial, and to Walker's father during trial. (V3, R318). Studstill wanted Walker's

parents to be at the trial, and he called them. (V3, R320). Aside from the people Walker was with the night of the murder, Studstill knew of no other friends. (V3, R326). Studstill said it is "absolutely essential" to "humanize" his client in front of a jury. (V3, R329-30). He managed to find one friend, Ms. Russo, who was also a friend of the co-defendant, Walker's girlfriend. Russo had repeatedly warned the co-defendant "to stay away from my client because she thought he was dangerous." (V3, R322). Russo said Walker carried a big knife and 'had a threatening attitude." (V3, R322, 328). Russo was not the type of person Studstill wanted to put on the stand. (V3, R323).

Studstill did not request an investigator because he knew he would not get one. (V3, R315). However, he discussed Walker's case daily with another attorney with extensive criminal defense background. (V3, R315).

Walker gained about 150 pounds between the arrest and trial. (V3, R340). Studstill did not see scars on Walker's head. (V3, R342). Studstill was aware Walker had a schizophrenic sister. (V3, R349).

Walker refused to plead to a life sentence. (V3, R317, 373-74). He refused to testify at trial, Walker "never wavered." (V3, R374). Walker said he would rather die than spend his life in prison. (V3, R374).

Studstill and Walker communicated well with each other. Walker had a very broad vocabulary and expressed himself well. He did not appear to have any

mental capacity dysfunctions. (V3, R369). Studstill hired Dr. Bernstein to assist with attacking Walker's confession, hoping to show that Walker was under the influence of methamphetamines at the time. (V3, R370-71). The confession was devastating to Walker. (V3, R371). Walker confessed to being the shooter and supported three aggravating circumstances: HAC, CCP, and kidnapping. (V3, R371-72).

When Studstill found out about Dr. Radin he considered a motion for continuance. However, he "bowed to his (Walker) wishes" and did not do so. (V3, R362, 373, 377). Walker was adamant about not seeking a continuance. (V3, R377-78). Given what Dr. Radin told Studstill the day of the trial, had Walker agreed to let Studstill continue the case, Studstill would have "tried to find at least two or three other people to examine him to try to get some stronger testimony for the Court." (V3, R377). Dr. Bernstein did not recommend any further testing or examination for Walker. (V3, R378).

Studstill was aware that Walker was bipolar and tried to use it. (V3, R381). It is not unusual to encounter people who are bipolar while working in the criminal defense area. (V3, R382).

Anita Morris, Walker's paternal cousin, is a charge master coordinator for a hospital. (V4, R468). She and Walker[2] were very close when growing up. (V4, R467-68, 487). They lost contact with each other when they were teens. (V4, R470). Some of Walker's aunts and uncles were alcoholics. (V4, R471-473). One of his aunts may have been mildly mentally retarded. (V4, R474, 475, 484). One of his aunts was a born-again Christian. (V4, R473). Walker's father, Robert Walker Sr., was a nice man but "sort of strange." He drank a lot but was "controlled" by Walker's mother, Helen. Walker's family members were "partiers." (V4, R476). They abused drugs, marijuana, hallucinogens, and alcohol. (V4, R476). Morris attended these gatherings until she was a teenager. (V4, R501). Morris did not see Walker's parents ever fight with each other. (V4, R479).

Morris said Walker had no supervision. (V4, R477, 478, 498). Walker's mother believed she was a witch and could "put spells on you." She abused marijuana and hallucinogens. (V4, R480). Walker's sister Mary Jo is mentally retarded. (V4, R481, 484). His sister Beverly was a drug abuser. (V4, R482). His sister Bernita is very strange. She abuses drugs and "talks to herself." (V4, R482-83).

Walker had a temper. (V4, R488). He would get angry if someone interrupted him. (V4, R489). He did not have many friends as he did not 'fit in

[2] Morris refers to Defendant as "Shannon." Morris and Defendant are the same age, born 9 days apart. (V4, R468, 477, 502).

well." (V4, R488-89). Walker had an issue that was embarrassing: he lost control of his bowels. (V4, R490-91). He was overweight and teased. (V4, R491-92). He could be "two different people. He could be ... just as sweet and nice and respectful, and that he could not be normal, almost raging." Walker never got angry with Morris. (V4, R492). He respected her and put his "best foot forward" when he was with her. (V4, R488).

Walker grew up in a poor household. Drugs and alcohol took precedence over essentials. (V4, R493). Walker abused drugs and kept a "big pipe" in his room. (V4, R494, 495). Walker was aware of his family's drug and alcohol problems and could have told anyone about these events. (V4, R504, 505).

Morris did not see Walker much after age fourteen or fifteen, i.e., eighteen years before the murder. (V4, R502-03, 506-07). She learned from Walker's parents that he had been arrested for murder. (V4, R500, 503). They kept in touch with her and told her when "something bad happens" in the family. (V4, R504). Walker was married and lived in Virginia until he "got in trouble and started running from the law." (V4, R503). Walker went to Florida to hide out and run from the law. (V4, R506).

Christopher Walker, Anita Morris' older brother, and the Defendant "grew up together like brothers." (V4, R509). Uncles and aunts in the family had alcohol problems. (V4, R513-516). Aunt Nellie was more of a "home-cooked meal"

person. (V4, R515). The aunts and uncles were nice people, but they partied and abused alcohol. (V4, R516). Christopher only knew them from family functions. (V4, R517). Christopher had great respect for Walker's father, Robert. They were good people but they had a lot of "issues" like drugs, alcohol, and fighting. (V4, R517). Defendant had violent tendencies and a quick temper. (V4, R536, 540). While growing up, Christopher and Walker shot each other with BB guns and hit each other with hoses. (V4, R537). As a child, Defendant had a bowel control problem and was overweight. (V4, R539-40). Defendant was in special education classes. (V4, R546). Christopher said Walker got in trouble in school "on a daily basis." He bit teachers and the principle, and pulled their hair. (V4, R546-47).

There were many parties at the Walker's home. It was a very chaotic atmosphere. (V4, R523, 525, 526). Drugs were available to anyone at the party and no one supervised the children. (V4, R526, 527, 532).

Christopher was not aware of any mental retardation amongst family members. (V4, R517). Defendant's father was a "pot smoker ... and a full-blown alcoholic." Defendant's mother, Helen Walker, was "one of the scariest people" that Christopher ever knew. She thought she was "some kind of sorcerous (sic)." (V4, R519). She had voodoo dolls, cooked "funny things on the stove" and gave certain types of drugs to family members when they were not aware of it. She believed in witchcraft and spirits. (V4, R519-20). Helen abused drugs and alcohol.

(V4, R520, 530). Many times, there were physical altercations between family members. (V4, R518). Walker's parents fought with each other. (V4, R530, 542). Defendant and his father fought, as well. (V4, R541). Christopher's father bought clothing for Defendant "as often as he could." (V4, R545).

Christopher knows Defendant's three sisters. Mary Jo has mental health problems. Beverly is "a sweet person," but both she and sister Bernita abused drugs and alcohol. (V4, R521-22). Christopher and Defendant started abusing marijuana at age ten. (V4, R528, 529-30). As teenagers, Christopher and Walker experimented with hallucinogens.

Walker spent almost 3 ½ years in prison in Virginia for possession of drug paraphernalia when he was eighteen or nineteen years old. (V4, R549, 565). Walker had a friend in a biker gang called Fates Assembly. The gang did things like dealing drugs, bombing cars, and shooting at people. (V4, R550). The gang stared hanging around Walker's house. (V4, R552). Walker was also jailed for stealing airplane fuel. (V4, R572). He violated parole. (V4, R567). He was in and out of prisons since his teens. (V4, R562-63). Walker had been on the run since his early twenties. (V4, R567).

Although Christopher and Walker spoke occasionally, they had not seen each other since their mid-twenties. (V4, R567, 569). Walker moved to Florida but came back to Virginia to see Christopher once. Walker was scared and "was

running from something" but would not talk about it. (V4, R553, 555). At one point, Christopher became aware Walker was using his ID. Christopher did not give Walker permission to use the ID. (V4, R556).

June Rebert said Walker and his wife, Becky, occasionally stayed with Rebert at her home. Walker and Rebert's son, Jeff Reed[3], were friends. (V4, R571-72, 581). Reed had gone to federal prison, but when he was released he cleaned up his life. (V4, R587). Reed was trying to help Walker with his life. (V4, R587-88). When he was in Florida, Walker was healthy, respectful, and law abiding. (V4, R584). Defendant and his wife had a "very good" relationship. They married in their teens. (V4, R572). Rebert never saw any signs of violence. (V4, R575, 582). At some point after they moved to Florida, Becky returned to Virginia to be her with her ailing father. She did not return to Walker. (V4, R575).

Rebert had continuous contact with Walker for two years starting in 1998. (V4, R573, 582). She saw Walker daily and never saw him abuse drugs or alcohol. He was "very, very, polite, typical southern manners ... never saw any sign of anger or violence in him at all." (V4, R574, 582, 584). Becky told Rebert about Walker's family but Walker would not talk about them. "He's very protective of

[3] Rebert's son, Jeff Reed, was in the motorcycle gang that hung out with Walker in Virginia. (V4, R549-550, 588).

his family." (V4, R572). Becky told Rebert there was a motorcycle gang at the Walkers on weekends. (V4, R572).

Two years after Becky left, Rebert saw Walker with his new girlfriend, Leigh. Walker was "like a skeleton, his eyes were sunken in." Walker told Rebert that she had really "messed me up" because Leigh knew him by the name, "Chris." (V4, R575-76, 585). Walker was very untrusting of authority and said, "You never talk to an attorney or a judge," outsiders, or policemen. (V4, R578). Rebert spoke with Mr. Studstill after Walker was convicted. (V4, R580). Walker gave Studstill her name and Studstill called her. (V4, R580).

Gene D'Oria met Walker at a bar. (V4, R590). He knew Walker by his nickname, "Fidget." (V4, R593). Walker was hyperactive as a child and could not sit still so he got the name, "Fidget." (V4, R592).

Walker was a "very polite person, very nice man." (V4, R591-92). He drank beer and abused drugs. (V4, R592, 596). After knowing D'Oria three to four weeks, Walker said he could get D'Oria methamphetamine. (V4, R592). Walker had been employed for quite a while doing construction work and worked "under the table." (V4, R596). When Walker's tools were stolen, he started selling drugs. (V4, R597). After the drug use escalated, it was harder for Walker to work. (V4, R596). Walker was on the run from a parole violation in Virginia. (V4, R597). After Walker's drug abuse "snowballed," he started to distrust people. Walker lost

weight, his teeth went bad, and he developed "dope sores" on his body. (V4, 594-95).

Walker's girlfriend, Leigh, worked at a biker bar where the Warlocks hung out. (V4, R598). Leigh and Walker physically abused each other. (V4, R598). Leigh threw Walker out of their home, and Walker moved in with Joel Gibson. (V4, R598). Joel and Walker were hanging out with "floozies" from a strip club. (V4, R599). Walker moved back in with Leigh and ended up beating up her cousin, Jay. D'Oria told Walker to leave him alone, and Walker came at him with his fists up. (V4, R599). At that point, D'Oria ended his relationship with Walker. (V4, 600). Jay Gladu filed a battery report with the police. (V4, R600). D'Oria stopped using methamphetamine after that incident. (V4, R601).

Dr. William Morton, psychopharmacologist, testified about the effects of drug and alcohol abuse on Walker's brain. (V4, R614-15; V5, R623). Dr. Morton reviewed police reports, Walker's 1987 counseling records from Virginia, trial depositions and transcripts, and the Florida Supreme Court opinion on direct appeal. (V5, R624). He interviewed Walker as well as Gene D'Oria and June Rebert. (V5, R625).

Methamphetamine was Walker's "drug of choice." He abused it compulsively, regularly, and in tremendous amounts. (V5, R628-29). In addition to ingesting it, Walker manufactured it. (V5, R630). Dr. Morton explained that

methamphetamine increases brain chemicals, specifically dopamine. (V5, R631). It increases the way a person feels, and creates a large amount of energy. (V5, R632). Some observable psychiatric symptoms include delirium and confusion. Side effects include: mood instability, pronounced paranoia, brain damage, and psychosis. (V5, R632, 634). Methamphetamine produces classic symptoms of schizophrenia and bipolar illness. (V5, R634).

Dr. Morton said Walker was experiencing the side effects of methamphetamine at the time of the murder. He was impulsive, irritable, agitated, and aggressive. He was paranoid for days after using methamphetamine and experienced hallucinations. (V5, R636). Withdrawal effects could be mild to severe and last for days, months, or years. (V5, R637). The ability to think clearly, which utilizes the "logical executive areas of the brain," could be affected for eighteenth months after someone stops using methamphetamine. (V5, R637). Walker was fidgety and paranoid when he abused methamphetamine. He hallucinated, was impulsive, and aggressive. (V5, R638, 643-44). Although he abused alcohol, it was not primary to his drug use. (V5, R639).

Dr. Morton believed Walker's substance abuse started at eight years old and that he abused marijuana and alcohol regularly as a young teenager. In his late teen years and twenties, he abused stimulant drugs that included LSD, PCP, and Ecstasy. He started abusing Methamphetamine in his twenties. (V5, R640-41, 682).

Dr. Morton realized that Ms. Rebert described Walker as "wholesome" and "healthy" between 1998 and 2000. (V5, R683). Excessive use of methamphetamine causes weight loss, so in 2002, when Ms. Rebert saw Walker, the weight loss indicated heavy use. (V5, R685).

Dr. Morton did not conduct any testing and does not diagnose psychiatric or psychological illnesses. (V5, R642, 678). He agreed that Walker is bipolar. (V5, R642). Ingesting drugs will aggravate a bipolar disorder. (V5, R688). The behavior associated with methamphetamine use and being bipolar is "almost identical." Symptoms include unpredictability, hyperactivity, bad judgment, paranoia, and auditory hallucinations. Methamphetamine makes psychotic symptoms worse. (V5, R665). It is not unusual for a bipolar person to self-medicate with alcohol or drugs. (V5, R686).

In Dr. Morton's opinion, Walker acted impulsively when he killed David Hamman. (V5, R700). However, Dr Morton was not aware that, on several occasions, Walker had beaten and assaulted several people including his ex-wife Becky, co-defendant Leigh Ford, Patrick Connelley, and Jay Gladu. (V5, R700-01). The beating of Gladu was six to seven days before Hamman's murder and the beating of Connelley was the day before. (V5, R701). Nor was he aware of the Florida Supreme Court findings that Walker was lying in wait for Hamman or that Walker had jumped Hamman when he walked in. (V5, R697). Despite the

prolonged activities involved in Hamman's death, Dr. Morton stilled considered the crime impulsive because "murder is an impulsive act." (V5, R700). Morton was not aware Walker carried a big knife with him and hung out at a biker bar. (V5, R702). Walker was running from the law in Virginia, had arrest warrants out for him, and was running a meth lab in Florida at the time of the murder. (v5, R702). Dr. Morton relied on Walker's self-reporting of his drug use as well as interviews from others. (V5, R705-06, 707). Dr. Morton said the reliability of self-reporting of one's drug use depends on the person - - it can be under-reported, over reported, or reported accurately with relying on other sources. (V5, R709). Dr. Morton relied on Dr. Gratzick's report regarding Walker's early behavior. (V5, R704).

Edward Gratzick[4] is a clinical social worker who specializes in the diagnosis and treatment of children with emotional behavioral problems. (V5, R713, 715). In March 1987, when Walker was 15 years old, Gratzick treated him for eight months. (V5, R719, 720, 721, 730). Walker attended the therapy sessions with his parents. (V5, R721, 731). Walker had been referred to Gratzick by a juvenile court judge while Walker was on probation. (V5, R720, 730). The therapy sessions helped Walker's behavioral problems - - his anxiety and anger levels were reduced. He did not have any major problems at home. (V5, R732).

[4] Dr. Gratznick's report was Defense Exhibit 6 at the evidentiary hearing.

Walker attended special education classes. His emotional problems interfered with his learning. (V5, R721). Walker was teased and picked on in school. He could not control his bowels ("encopresis"). (V5, R722, 723, 733, 735). He had verbal emotional outbursts and was antagonistic toward his peers. (V5, R724, 735). Walker's parents said life was stable in their home from the time Walker was eleven years old. (V5, R724). Both Walker and his parents were cooperative during his therapy sessions. (V5, R729, 731). At one point, he held three jobs without a problem. (V5, R734). When Walker turned sixteen, he quit school and therapy. (V5, R737). Walker was able to use counseling effectively. His anger and anxiety level were much decreased. (V5, R732). Walker never had a major mental health diagnosis: he had emotional problems. The school wanted to keep him separate from the rest of his class to manage his behavior. (V5, R733). Walker was "defiant, oppositional." (V5, R734). Walker had conduct disorder. (V5, R734). He intimidated other kids in school. (V5, R735).

Dr. Sesta did not conduct "any objective or standardized psychological tests" because Walker did not like "shrinks." (V6, R790). Dr. Sesta did collect a bio-psycho-social history. (V6, R772). He also conducted a clinical mental status exam, clinical assessment, and screening exam (V6, R773-74). Dr. Sesta then turned Walker over to Dr. Ross, a doctor in training. (V6, R774). The Halstead Impairment Index was used to assess neuropsychology. (V6, R775). In Dr. Sesta's

opinion, Walker was impaired on 70% of the tests and has a mild level of impairment and brain function. (V6, R775-76). Because Walker's IQ score was 91, an average level of intelligence, Dr. Sesta did not conduct the full scale IQ test. There was no indication of mental retardation. (V6, R776). Walker performed "fairly well" on the memory tests, although his memory was moderately impaired after time had elapsed and it was re-tested. (V6, R777).

Walker performed "fairly adequately" on the frontal lobe functions test. Dr. Sesta believed Walker was "severely impaired" on the Trail Making Test, which tests for speed and accuracy on numerical and alpha sequences. Walker was also "mildly impaired" on the analogies test. (V6, R779-80). Walker's remaining scores from the executive domain were low average to average. (V6, R780). Walker scored in the "high average" range for language. There was nothing wrong with Walker's ability to understand what was said to him or for him to convey himself to others. (V6, R780). Walker does not suffer from any neurological deficits in visual perceptual abilities. Walker's ability to focus and sustain his attention was adequate and consistent with his IQ. However, there was subtle "attentional impairment" on the "most exquisitely sensitive test" from that domain. (V6, R781, 787). There was some mild impairment in Walker's processing speed. (V6, R782, 782, 787).

In Dr. Sesta's opinion, there was some impairment in the left hemisphere of Walker's brain. (V6, R783). The left hemisphere was not functioning as adequately as the right. (V6, R789). Dr. Sesta did not see a localized brain syndrome. (V6, R792). Dr. Sesta outlined several possibilities for the brain impairment: disease, drugs and alcohol, trauma, and heredity. (V6, R792-95). Dr. Sesta's educated guess was that any or all of the elements could be present. (V6, R795). To narrow the issue, Dr. Sesta would conduct an MRI. (V6, R795). Walker refused. (V6, R796). Walker self-reported various head injuries including concussions and a forklift injury. (V6, R793). Walker refused to have any brain imaging conducted. (V6, R796, 822).

Neuropsychological testing is only the starting point to determine whether there is brain injury. (V6, R800). Further testing would have allowed Dr. Sesta to come to definite conclusions. However, Walker refused further testing. (V6, R800-01). Walker's neurological deficits were subtle. (V6, R801). Walker's visual and spatial skills are good. He is not any different from the average public. (V6, R802-03).

Dr. John Tanner, M.D., neurologist, consulted with Dr. Sesta on Walker's neurological test results. (V6, R804, 805). Walker repeatedly disputed his IQ score, which Dr. Tanner found "peculiar." Walker admitted his drug use. He does not have "aphasia," which is the inability to use language appropriately. (V6, R810).

Dr. Tanner administered a neurological physical exam, cranial nerve function test, and motor exam. (V6, R810, 812). Walker showed "very subtle impairment" on the praxis test, a test which indicates one's ability of learned motor movements. (V6, R812-13). The reflex hammer test suggested some upper motor neuron impairment. (V6, R814). Walker hit his head running from police officers. (V6, R817). He went to the hospital, received stitches, and was released. (V6, R818).

Due to Walker's refusal to have an MRI conducted, Dr. Tanner was unable to attain information that might have provided information to diagnose Walker. (V6, R822, 824, 827). Dr. Tanner consulted with Dr. Sesta and the "consensus was that we have a mild impairment that has some asymmetry, left seems a little worse that his right hemisphere. " (V6, R822). This could be caused by several things, but "we could not go beyond that to get a more definitive answer as to what one thing or couple of things it could be." (V6, R822). There is some sort of neurological impairment, but the ideology is not certain. (V6, R823). Walker deprived the doctors of the ability to obtain information to make a diagnosis. (V6, R824). Walker left the doctors in the position of having to guess. (V6, R824). The instances of physical injury to the head were in 1987, 1991, 1997. (V6, R824-26). There was little data available from those events. Walker may have had Bells' Palsy in prison, but Dr. Tanner was unable to obtain those medical records, so the cause would be speculative. (V6, R827-28). Walker would not talk to Dr. Tanner

about his family and medical history. (V6, R829). Nonetheless, Dr. Tanner concluded that Walker suffers from an asymmetric mild brain impairment. (V6, R815, 822).

SUMMARY OF ARGUMENTS

Argument 1: Insofar as Walker attempts to incorporate issues and/or arguments from the lower court proceedings rather than brief them on appeal, those issues and arguments are waived. The trial judge did not err in summarily denying the photographs claim. The issue was procedurally barred and had no merit. The issue was preserved and raised on appeal. This Court rejected the issue on the merits. Thus, there is no ineffective assistance of counsel. The issue was also insufficiently pled for failure to identify the supposed witness who would support this claim. Similarly, the issue regarding arguing voluntariness of the confession to the jury is procedurally barred and has no merit. This Court rejected the voluntariness issue on direct appeal. Although Walker claimed testimony from an expert witness on this issue, no expert was identified in the Rule 3.851 motion, and this issue was insufficiently pled.

Argument 2: There is no error, individually or cumulatively. To the extent Walker attempts to incorporate issues and/or arguments from the lower court proceedings rather than brief them on appeal, those issues and arguments are waived.

Cross-appeal: The trial judge erred in granting a new penalty phase based on the inadequate investigation and presentation of mitigation evidence. The trial judge did not consider the evidence which *was* presented at the penalty phase and make a comparison to the evidence presented at the evidentiary hearing. Had the trial judge done so, he would have concluded that the "new" or "additional" evidence was cumulative, contradictory, and would not have changed the outcome of the proceeding. Walker did not meet his burden of showing counsel was deficient for failing to investigate, not did Walker show prejudice.

ARGUMENTS

ARGUMENT 1

THE TRIAL COURT DID NOT ERR BY SUMMARILY DENYING TWO GUILT PHASE CLAIMS

Waiver. Walker states at page 19 that the trial judge erred in summarily denying claims in his motion to vacate. However, he discusses only two of the claims. This Court has established that to properly raise an issue on appeal, the arguments made in the lower court cannot simply be incorporated into the appellate brief. Thus, to the extent Walker attempts to argue any issue except the two issues which are brief on appeal, those issues are waived. *See Rose v. State*, 985 So. 2d 500, 509 (Fla. 2008) ("Rose has merely stated a conclusion and referred to arguments made below. Thus, we consider the issue waived for appellate review."); *see also Coolen v. State*, 696 So. 2d 738, 742 n. 2 (Fla. 1997) (stating that a failure to fully briefed and argue points on appeal "constitutes a waiver of these claims"); *Duest v. Dugger*, 555 So. 2d 849, 852 (Fla. 1990) ("The purpose of an appellate brief is to present arguments in support of the points on appeal. Merely making reference to arguments below without further elucidation does not suffice to preserve issues, and these claims are deemed to have been waived.").

Strickland standard/*Doorbal* standard. Before ruling on the claims, the trial judge recognized *Strickland* as the standard to be used in ineffective-assistance claims and cited *Doorbal* as authority for the sufficiency of claims:

> The Defendant now claims ineffective assistance of counsel with regard to both the guilty and penalty phases of his trial In order to establish this, he must meet the two criteria of *Strickland v Washington*, 466 U S 668, 104 S Ct 2052, 80 L Ed 2d 764 (1984) In reviewing such claims, the courts "must apply a strong presumption that counsel's conduct falls within the range of reasonable professional assistance and must avoid the distorting effects of hindsight" *Schofield v State*, 681 So 2d 736 (Fla 2d DCA 1996).
>
> To establish a colorable claim of ineffective assistance of counsel, a defendant must first demonstrate that his attorney's performance was deficient, alleging specific acts or omissions Secondly, he must establish that the deficient performance prejudiced his case *Strickland, Id, Cherry v State*, 659 So 2d 1069, 1072 (Fla 1995) A court considering a claim of ineffective assistance need not make a specific ruling on performance if prejudice is not demonstrated *Kennedy v State*, 547 So 2d 912 (Fla 1989) The Defendant must show that there is a reasonably probability that, but for his counsel's errors, the results of the trial would have been different.
>
> A motion for post conviction relief filed under Rule 3.851 must meet the pleading requirements set forth in *Doorbal v State*, 938 So 2d 464 (Fla 2008) Specifically the Motion must
>
> (1) identify a specific omission or overt act upon which the claim is based, (2) demonstrate that the omission or act was a substantial deficiency which fell measurably below that of competent counsel, and (3) demonstrate that the deficiency probably affected the outcome of the proceedings If a capital defendant fails to plead in

> accordance with these criteria, the claim will not meet the threshold for facial sufficiency As a result, claims may not receive an evidentiary hearing or be considered by the trial court on the merits *Doorbal* at 483
>
> A mere conclusory allegation that the outcome would have been different is insufficient to state a claim of prejudice under Strickland, the defendant must demonstrate how, if counsel had acted otherwise, a reasonable likelihood exists that the outcome would have been different--that is, a probability sufficient to undermine confidence in the outcome *Jones v State*, 33 Fla Law Weekly S637 (Fla Sept 4, 2008)
>
> *Doorbal* dictates that defendants who make conclusory and non-specific claims may not refine their motions on a piecemeal basis to include additional factual allegations as to claims already raised Nor should they expect that specific facts and arguments need not be disclosed or presented until the evidentiary hearing *Id* at 485
>
> With these standards in mind, the Court reviews the Defendant's allegations.

(V9, R1410-11).

Standard for summary denial. Rule 3.851(e)(1)(D) requires Walker to include a detailed allegation of the factual basis for any claim for which an evidentiary hearing is sought. *Doorbal v. State/McNeil*, 983 So. 2d 464, 482-483 (Fla. 2008). The burden is on Walker to establish a legally sufficient claim. *See Nixon v. State/McDonough*, 932 So. 2d 1009, 1018 (Fla. 2006); *Freeman v. State/Singletary*, 761 So. 2d 1055, 1061 (Fla. 2000); The rule of sufficiency is equally applicable to claims of ineffective assistance of counsel. Conclusory allegations of ineffective assistance of counsel are legally and facially insufficient

to require relief under *Strickland v. Washington*, 466 U.S. 668 (1984). *Thompson v. State*, 796 So. 2d 511, 515 n.5 (Fla. 2001).

To be entitled to an evidentiary hearing on a claim of ineffective assistance, the defendant must allege specific facts that are not conclusively rebutted by the record and which demonstrate a deficiency in performance that prejudiced the defendant." *Jones v. State*, 845 So. 2d 55, 65 (Fla. 2003). "Failure to sufficiently allege both prongs results in a summary denial of the claim." *Spera v. State*, 971 So. 2d 754, 758 (Fla. 2007) (*citing Thompson v. State*, 796 So. 2d 511, 514 n.5 (Fla. 2001)); *See also Rhodes v. State*, 986 So. 2d 501 (Fla. 2008).

When a defendant alleges ineffective assistance of counsel for failure to call specific witnesses, a defendant is "required to allege what testimony defense counsel could have elicited from witnesses and how defense counsel's failure to call, interview, or present the witnesses who would have testified prejudiced the case." *Nelson v. State*, 875 So. 2d 579, 583 (Fla. 2004), cited in *Bryant v. State/Crosby*, 901 So. 2d 810, 821-22 (Fla. 2005) (concluding that a 3.851 claim of ineffective assistance was legally insufficient where the substance of the testimony was not described in the motion and the motion did not allege the specific facts to which the witness would testify). If testimony is cumulative, a defendant must specify what the precise testimony of each new witness would be, how his testimony would have differed from the experts who testified at trial, or how

counsel was deficient in selecting the witnesses who did testify. *See Booker v. State*, 969 So. 2d 186 (Fla. 2007).

The Florida Supreme Court recently cautioned defense counsel, stating:

> Counsel for Doorbal appears to operate under the incorrect assumption that conclusory, nonspecific allegations are sufficient to obtain an evidentiary hearing on claims of ineffective assistance of counsel, and specific facts and arguments need not be disclosed or presented until the evidentiary hearing. We strongly reiterate to those who represent capital defendants in postconviction proceedings that claims of ineffective assistance of counsel must comply with the pleading requirements enunciated by this Court in *Downs* at the time that the initial rule 3.851 motion is filed to be legally sufficient under the rule.

Doorbal v. State/McNeil, 983 So. 2d 464, 484 (Fla. 2008).

A claim is legally insufficient and may be summarily denied when it is either refuted by the record, procedurally barred (*see following section)* or the facts as stated do not comprise a legally viable claim. *See Connor v. State*, 979 So. 2d 852, 868 (Fla. 2007). For example, in *Overton v. State/McDonough*, 976 So. 2d 536, (Fla. 2007), a claim of ineffective assistance of counsel for failure to challenge palm prints was legally insufficient on its face where it was "baseless." *Overton* at 565.

Failure to object to photographs of blood stains. On pages 21-36, Walker argues that trial counsel was ineffective for failing to exclude photographs of blood stains. He specifically argues two separate sets of stains: (1) the blood stains on

the stairwell and roadway at Gibson's apartment (Initial Brief at 26); and (2) the blood stains inside Leigh Ford's vehicle which transported the victim from Gibson's apartment to the park where he was shot (Initial Brief at 31). The issue of photographs was raised in the lower court as Claim 1B. (V8, R1230-32). The trial court summarily denied the claim, finding:

> **B Failure to Object to Testimony and Photographs**
>
> **of Certain Possible Blood Stains**
>
> The Defendant alleges his attorney was ineffective for failing to object to testimony and photographs of certain possible blood stains Crime scene Investigation agent Laufenberg testified that he took photographs and samples of what he believed were blood stains at the apartment building where the beating took place As to the testimony and photographs of possible blood stains inside the apartment, the testimony of an eyewitness, Ritter, clearly provided a basis for admission, as she testified that Hammon had blood all over him and that there was blood "all over the place " (ROA, Vol XI, pp 979-81)
>
> As to the possible blood stains on the staircase outside the apartment, **defense counsel did object, as admitted on page 11 of the Defendant's Motion** The Court expressed some concern about their relevance, but allowed them in **The Florida Supreme Court specifically found that the Court did not abuse its discretion in allowing these specific photographs in *Walker* at 570, n 18** Where counsel objected, preserving the matter for appeal and where the issue was raised on appeal, there is no basis for a claim of ineffective assistance
>
> Additionally, the photographs were linked to the crime and thus the issue was the weight of the evidence, not its admissibility The next-door neighbor testified that the stairs in question led only to Joel Gibson's apartment He testified that he heard what sounded like

> someone being beaten He then saw the co-defendant's (Leigh Ford's) car and the victim's truck driving off He testified that when he looked out the next day, after the police had taped off the apartment, he saw blood on the stairs and in the street leading down to the tracks (ROA, Vol XII, pp 1064-74) Ritter testified that she believed, based on what she heard, that the victim had run out of the apartment and been chased (ROA, Vol XI, p 980) Defendant admitted this in his statement to Herrera that Hammon was in the trunk of Ford's car
>
> It is clear that the victim, who had been bleeding "all over the place" in the apartment, left the apartment at some point and ended up in the trunk of Ford's car, where additional blood stains were observed Hammon either walked or ran out on his own or was earned out, but in either event, he went down the stairs The testimony and photographs of possible blood stains on the stairs were relevant to an overall understanding of how the murder occurred It is not likely that further arguments or objections of counsel would have been effective in keeping them out of evidence
>
> The Defendant also fails to demonstrate sufficient prejudice to merit relief The jury also viewed photographs of the blood stains inside the apartment and of the victim, with his multiple wounds, so the Court does not find it likely that the photographs of blood on the stairs were of such a nature that their exclusion would have likely changed the outcome of the trial Relief on this ground is denied (Emphasis supplied)

(V9, R1417-19).[5]

This issue is procedurally barred. Walker conceded in his Rule 3.851 motion that trial counsel not only objected to the photographs of blood stains on the stairs

[5] These findings were repeated in the final order denying relief after the evidentiary hearing. (V11, R1746-48).

to Joel Gibson's apartment but also moved for a mistrial. (V8, R1231). The issue was raised as Claim 5 on direct appeal, and this Court found:

> We deny claim (5) because, after fully examining this record, we find that the trial court did not abuse its discretion in admitting photographic evidence marked as State's exhibits 50 through 54, 75, and 80 through 89. n18
>
> > n18 Exhibits 50 through 54 depict blood stains on the stairs of Joel Gibson's apartment and blood stains outside the apartment. Exhibits 75 and 80 through 89 depict the blunt force trauma injuries to Hamman's body.

Walker v. State, 957 So. 2d 560, 569, 570 (Fla. 2007). The issue regarding blood stains at Gibson's apartment was preserved by objection (Trial Record, V12, R1161-7), and motion for mistrial (Trial Record, V12, R1169). The issue regarding the blood stains in Leigh Ford's vehicle could have been raised on direct appeal. Both issues are procedurally barred. A procedurally-barred claim cannot be considered under the guise of ineffective assistance of counsel. *See Freeman v. State/Singletary*, 761 So. 2d 1055, 1067 (Fla. 2000) (holding that claims that could have been raised on direct appeal cannot be relitigated under the guise of ineffective assistance of counsel); *Rodriguez v. State/Crosby*, 919 So. 2d 1252, 1262 (Fla. 2005).

Further, as this Court held on direct appeal, the issue regarding blood at the apartment has no merit. Thus, counsel cannot be ineffective. *See Schoenwetter v.* State, 46 So. 3d 535, 546 (Fla. 2010), citing *Melendez v. State,* 612 So. 2d 1366,

1369 (Fla. 1992) (Where this Court has previously rejected a substantive claim on the merits, counsel cannot be deemed ineffective for failing to make a meritless argument.) Likewise, the claim regarding blood stains in Ford's vehicle is meritless. Loriann Gibson and Leslie Ritter testified about the victim's beating and placement in Ford's vehicle, the blood type matched the victim's, and Walker confessed to the facts.

Insofar as Walker argues on page 36 that his claim was sufficiently pled in the lower court, he fails to inform this Court even at this juncture of any specific evidence which could reasonably be excluded, cites to no case law, and cites to no witness who would support his claim. Thus, not only was the claim insufficiently pled in the lower court, the issue of sufficiency is insufficiently pled on appeal. The trial judge properly cited both *Strickland* and *Doorbal* to support his findings. The trial judge found no deficient performance and no prejudice. His fact findings are supported by competent substantial evidence.

Statements to Agent Herrera. This issue involves whether counsel should have argued the voluntariness of the confession to the jury. It was Claim 1F in the Rule 3.851 motion. (V8, R1237-39). The trial judge held:

> **F Failure to Argue Involuntariness of Confession**
>
> The Defendant alleges that his attorney should have more vigorously presented testimony and argument as to the voluntary nature of his confession The jury did receive an instruction to assess the voluntary nature of the confession

It is initially the responsibility of the court to determine whether a confession was voluntarily given The court's focus is on whether constitutional safeguards were met in obtaining the statements When the admission of a confession is an issue because of a factual controversy as to its voluntariness, it is the responsibility of the trial judge to first find that it was voluntary before submitting it to the jury This simply follows the rule that it is the duty of the trial judge to determine the admissibility of all evidence *Peterson v State*, 382 So 2d 701, 702 (Fla 1980) Once the confession is admitted, a defendant is entitled to argue to the finder of fact why the confession should be deemed untrustworthy *Johnson v State*, 660 So 2d 637 (Fla 1995) The real question for the jury is whether a confession is credible Voluntariness is one factor for the jury to consider in making that determination

As noted above in the discussion on the Court's denial of the motion to suppress, there was substantial evidence pointing to the voluntariness of the Defendant's statements If counsel had presented extensive testimony on the Defendant's mental health and drug abuse to the jury, the Defendant has not demonstrated there is a reasonable probability that the jury would have reached a contrary conclusion

Even had the jury concluded the Defendant's statement was less than perfectly voluntary because of the Defendant's mental problems, drug use, physical exhaustion and subjective fear of the police, they did not have an instruction to ignore it Their function would have been to assess whether the allegedly involuntary nature of the statement impacted its credibility

Reading over the transcript of the DVD played at trial of Defendant's interview with Detective Herrera, it is clear that Herrera's questions were, for the most part open¬ended and non-leading On many pages of the transcription, Herrera said little more than, "okay," or "uh-huh," or merely echoed back something the Defendant has said to him Herrera was not feeding him information to which the Defendant merely assented Had he done so, a jury might conceivably

> have concluded that a mentally impaired Defendant was bullied or confused and was simply agreeing with Herrera because he was incapable of resisting Instead, the Defendant was actively supplying details of the crime which were later corroborated by physical evidence and eyewitness testimony The Defendant has failed to demonstrate that there was any evidence or argument his attorney could have presented was likely to have had an impact on the credibility of the statement he made to Herrera, even if the jury concluded it was not entirely voluntary because of his mental state Thus no prejudice resulted Relief on this ground is denied

(V9, R1422-23).[6]

Walker cites to no case law to support his argument that an attorney is ineffective for failing to argue -- after a full hearing and a finding by the trial court that the statement was voluntary—that the statement was involuntary. Walker further fails to admit this Court upheld the trial court's finding of voluntariness on appeal, holding:

> (ii) Voluntariness of Confession
>
> Walker also claims that the trial court erred in denying his motion to suppress based on its finding that his statement to Agents Herrera and Heyn was voluntarily given. He argues that the State did not meet its burden of proving that his statement was given voluntarily in light of the evidence presented at the hearing showing that he was still under the influence of cocaine and methamphetamines which aggravated a preexisting bipolar condition.

[6] These findings are repeated in the final order after the evidentiary hearing. (V11, R1750-52).

The trial court denied Walker's claim that his statement was not voluntary under the totality of the circumstances based on the following findings:

> 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.

The trial court's findings are supported by competent, substantial evidence. Moreover, as the State correctly points out, a very similar claim was rejected in *Orme v. State*, 677 So. 2d 258 (Fla. 1996). In *Orme*, the defendant claimed that his "statements to officers should have been suppressed on grounds he was too intoxicated with drugs to

knowingly and voluntarily waive his right to silence." *Id*. at 262. In rejecting this claim, 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*, 517 U.S. 1159, 116 S. Ct. 1550, 134 L. Ed. 2d 653 (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.*

Id. at 262-63.

Similarly, while there is some evidence that Walker was under the influence of drugs, likely methamphetamine and cocaine, at the time of his arrest, the officers who actually took Walker's statement testified that Walker appeared coherent and forthcoming in his responses. Moreover, as in Orme, Walker's statement was taped and was played at the evidentiary hearing. After reviewing the recorded statement along with the other evidence presented at the hearing, the trial court concluded that the evidence supported the State's theory. Specifically, the trial court found that somewhere between eight and ten hours passed before Walker gave his statement to Agents Herrera and Heyn. n27 Moreover, Walker signed a *Miranda* waiver-of-rights form and affirmed in his taped statement that he had been read his *Miranda* rights and signed the waiver prior to giving his statement.

> n27 Walker also argues that the trial court improperly discounted the testimony of Dr. Bernstein. However, this Court defers to the trial court's "superior position 'to evaluate and weigh the testimony and evidence based upon its observation of the bearing, demeanor, and credibility of the witnesses.'" *Taylor*, 937 So. 2d at 599 (quoting) *Stephens v. State*, 748 So. 2d 1028, 1034 (Fla. 1999).
>
> Based on the foregoing, we conclude that there is competent, substantial evidence to support the trial court's conclusion that Walker made a knowing, voluntary, and intelligent decision to waive his *Miranda* rights and give his statement to police. *Orme*, 677 So. 2d at 263; *see also Traylor v. State*, 596 So. 2d 957, 966 (Fla. 1992) (finding that Florida's constitution requires the same warnings as those mandated by *Miranda*). "Because there is competent substantial evidence supporting [the trial court's] conclusion, we may not reverse it on appeal." *Orme*, 677 So. 2d at 263. Accordingly, we affirm the trial court's denial of Walker's motion to suppress.

Walker v. State, 957 So. 2d 560, 576 (Fla. 2007).

The issue regarding the voluntariness of the confession is procedurally barred, and claims that are rejected on direct appeal cannot be raised under the guise of ineffective assistance of counsel. Further, because there is no merit to the issue, counsel cannot be ineffective.

Walker's motion was also legally insufficient under *Doorbal*. Walker claimed trial counsel should have hired an expert for the suppression issue (Initial Brief at page 37) but never identified an expert who could so testify and failed to describe the testimony that would be presented. Although Walker now cites to Dr.

Bernstein as an expert (Initial Brief at 46), he was never named in the Rule 3.851 motion as a potential witness on this issue. (V8, R1239-1240). Dr. Bernstein did testify at the suppression hearing and, as the trial judge found, was not helpful. Additionally, Walker's prejudice argument in the lower court was one conclusory sentence. (V8, R1238-39). On appeal, he presents new arguments which are waived. In any case, Walker's new argument he was prejudiced because his "incriminating statements were considered by the jury." (Initial Brief at 47). This argument defies logic: the confession was admitted and this Court upheld its admission. Walker's arguments illustrates the procedural bar as all he does is re-argue the voluntariness issue which was rejected by this Court on direct appeal.

The trial court fact findings are supported by competent substantial evidence. There was no deficient performance or prejudice.

ARGUMENT 2

THERE WAS NO INDIVIDUAL OR CUMULATIVE ERROR

Without raising any specific claim of error, Walker argues there is cumulative error. This claim is insufficiently pled on appeal. *See Rose v. State*, 985 So. 2d 500, 509 (Fla. 2008) ("Rose has merely stated a conclusion and referred to arguments made below. Thus, we consider the issue waived for appellate review."); *see also Coolen v. State*, 696 So. 2d 738, 742 n. 2 (Fla. 1997) (stating that a failure to fully brief and argue points on appeal "constitutes a waiver of these claims"); *Duest v. Dugger*, 555 So. 2d 849, 852 (Fla. 1990) ("The purpose of an appellate brief is to present arguments in support of the points on appeal. Merely making reference to arguments below without further elucidation does not suffice to preserve issues, and these claims are deemed to have been waived.").

Walker has failed to demonstrate error, individually or cumulatively. Claims of cumulative error do not warrant relief where each individual claim of error is "either meritless, procedurally barred, or [does] not meet the *Strickland* standard for ineffective assistance of counsel." *Israel v. State*, 985 So. 2d 510, 520 (Fla. 2008); *see Bradley v. State*, 33 So. 3d 664 (Fla. 2010); *Reese v. State*, 14 So. 3d 913, 920 (Fla. 2009); *Parker v. State*, 904 So. 2d 370, 380 (Fla. 2005). Because each individual claim of error fails on at least one of these three grounds, there is

no claim of cumulative error. *Schoenwetter v. State*, 46 So. 3d 535, 562 (Fla. 2010).

CROSS APPEAL ARGUMENT

THE TRIAL COURT ERRED IN GRANTING RELIEF ON CLAIM IIA AND ORDERING A NEW PENALTY PHASE

Walker argued in Claim 2A of his Rule 3.851 motion that trial counsel was ineffective for failing to investigate and present mitigation. (V8, R1250-1253). The trial judge afforded an evidentiary hearing on this issue, and granted relief, stating:

> **CLAIM II A: Failure to Investigate and Present Mitigation**
>
> The Court granted a hearing on the Defendant's claim that counsel failed to adequately investigate mitigation evidence to prepare for the penalty phase of his trial. In preparing to try a death penalty case, counsel has the obligation to prepare for both the guilt and penalty phases of the trial. "[T]he obligation to investigate and prepare for the penalty portion of a capital case cannot be overstated--this is an integral part of a capital case. Although a defendant may waive mitigation, he cannot do so blindly; counsel must first investigate all avenues and advise the defendant so that the defendant reasonably understands what is being waived and its ramifications and hence is able to make an informed, intelligent decision." *State v. Lewis*, 838 So.2d 1102, 1113 (Fla. 2002) (footnotes omitted). *See also*, *Grim v. State*, 971 So. 2d 85, 99 (Fla. 2007):
>
> > We have recognized that a defendant's wavier of his right to present mitigation does not relieve trial counsel of the duty to investigate and ensure that the defendant's decision is fully informed.

Likewise, *Ferrell v. State*, 35 Fla. L. Weekly S53a (Fla. Jan. 14, 2010).

While the Florida Supreme Court has not specifically said that Florida attorneys are bound to follow the American Bar Association guidelines on death penalty mitigation, it has stated that "Wiggins [*Wiggins v. Smith*, 539 U.S. 510 (2003)] and the ABA Guidelines for Appointment and Performance of Counsel in Death Penalty Cases § 10.11 (rev.ed.2003) on counsel's duties *mandate* mitigation investigation and preparation, *even if the client objects*." *Henry v. State*, 937 So.2d 563, 572 (Fla. 2006). (Emphasis added by trial judge).

The Defendant was represented at trial by appointed conflict counsel Kenneth Studstill. Counsel presented only two witnesses at the penalty phase of the trial and they gave quite brief testimony. Dr. Robert Radon, a psychiatrist, had treated the Defendant while he was in jail awaiting trial. Radon testified that he diagnosed the Defendant with bipolar disorder but said that he did know if it was of long-standing duration. Dr. Howard Bernstein, a psychologist, evaluated the Defendant and testified that he had a severe and chronic case of bipolar disorder. He said that the Defendant's use of methamphetamine would aggravate the condition. (Exhibit A, Penalty phase transcript, July 19, 2004, pp. 1844-1886).

Nothing further was offered by defense counsel. At the subsequent Spencer hearing, the Court was presented with two letters from persons who had known the Defendant (letters mailed to the Court by their authors, not solicited by defense counsel). Counsel quickly brushed the letters off because they were a bit strange, (Exhibit B, Spencer hearing transcript, August 30, 2004, pp. 11-14). He did not present any evidence at the Spencer hearing.

The Defendant contends that there was more that could and should have been done in the way of investigating possible mitigation. The vote of the jury was 7 to 5 for death, so the change of only one vote

would have been significant in that the sentence imposed for first degree murder would have been life in prison rather than the death penalty. In assessing prejudice in a claim of an inadequate mitigation investigation, the Court must "reweigh the evidence in aggravation against the totality of the.. . mitigation presented during the postconviction evidentiary hearing to determine if [the Court's] confidence in the outcome of the penalty phase trial is undermined." *Hannon v. State*, 941 So.2d 1109, 1134 (Fla. 2006).

Defense counsel Kenneth Studstill testified at the evidentiary hearing as to what he did to prepare for the penalty phase of the trial. He is an experienced defense attorney who had said he had tried perhaps fifteen prior death penalty cases. He attended death penalty training seminars, was familiar with the ABA guidelines on preparation for mitigation and read other materials on mitigation. It seems from his testimony that he concentrated on the guilt phase of the trial, rather than the penalty phase. According to his testimony, he did not ask for any funding to pursue mitigation beyond one psychological evaluation, did not use any other attorneys or mitigation investigators and spent perhaps a total of 175 hours total time out-of-court on the entire case, both guilt and penalty phases. (Exhibit C, Post conviction hearing, April 6, 7, 8, 2009, pp. 25, 29-30, 33, 34, 97-98, 150).

The version of Rule 3.1 12, Florida Rules of Criminal Procedure in effect at the time of this trial in 2004 did not require the appointment of co-counsel in capital cases but stated that an attorney appointed to a capital case could ask for co-counsel, and "upon written application and a showing of need. . . [the court] should appoint co-counsel." While this rule did not require counsel to seek assistance, the Rule states that it would have been available to Mr. Studstill had he sought it and demonstrated the need. Mr. Studstill testified that he did not ask for help because he previously had such a request rejected. (C, p. 100).

The Defendant apparently indicated to counsel that his family would not be very helpful. Counsel did not testify that the Defendant told

him not to conduct an investigation, not to contact his family or tell him that he wanted to waive presenting mitigation evidence. Rather, counsel's testimony was that the Defendant did not seem to think his background was important and he was not very open about his past, especially any psychological problems. The attorney testified that it seemed like the Defendant was resistant to talking about his family. He said that, in looking for evidence of abuse or how the Defendant was raised, "there just didn't seem to be anything there," with the exception of a little counseling as a teenager, a conclusion apparently based solely on what the Defendant told him. (C, pp. 48-49, 54, 88-89, 102-103; 117).

The fact that the Defendant was less than forthcoming about his childhood and the fact that the two relatives who were contacted before trial were not helpful should not have ended counsel's inquiry into whether mitigation existed. As noted above, a defendant cannot make an intelligent decision about waiving mitigation until counsel has investigated all avenues, discussed them with his client and advised him on the reasonableness of waiving. And, counsel must seek mitigation information "even if his client objects." *Henry*, id.

It appears that five short phone calls to two family members were the only family investigation counsel conducted prior to trial. (C, p. 103). At the post-conviction hearing, counsel did not remember calling the Defendant's mother at all, but his records refreshed his memory. He indicated that he called the Defendant's mother three times before trial. Each conversation lasted less than 20 minutes and Mrs. Walker indicated that she would not testify at the trial. (C, pp. 53, 55-56, 60, 69). Counsel testified that she did not seem to understand the criminal process but he did not testify that he attempted to explain it to her or her role in it. Counsel never spoke to the Defendant's father until sometime during the trial, when he showed up for a couple of days. (C, p. 110). He briefly spoke to only one of the Defendant's siblings, Beverly Longendorf, twice and decided she would not be helpful. (C, pp. 51,-56, 106, 109, 110). Two other siblings were not contacted. (C, pp. 109, 138). The Defendant was married, although separated, at the

time of the murder, yet counsel never spoke to his wife, (C, p. 116). He apparently spoke to only one of the Defendant's friends in Florida, June Rebert, who had known the Defendant over several years, but he did not call her a witness at the penalty hearing and was surprised when she showed up at the sentencing hearing. (C. 113-114). He did speak to a friend of the Defendant's co-defendant and concluded that this witness would not be helpful (C, p. 113-114). He knew that the Defendant was using the identification of someone named Christopher Walker at the time of his arrest, but did not inquire into who Christopher Walker was. (C, p. 110).

Counsel did not contact the Defendant's schools in Virginia to obtain records. He had in his file a record from a grief counseling center from the Defendant's teen-age years, but never pursued that lead, He had information indicating that the Defendant had spent time on juvenile probation in Virginia but did not contact his probation officer. He never pursued medical records with regard to head injuries the Defendant had allegedly suffered nor did he seek any employment records. In short, there seems to have been many leads which were not tracked down. (C, pp. 106-116; 126-129). As for obtaining records, he apparently only suggested to the Defendant that he, the Defendant, try and get him some (C, p. 49). Where the Defendant and the two family members who were contacted were not helpful or forthcoming, counsel had a duty to look further, at least where there were available records that would have put counsel on notice of significant mitigating evidence. *Rompilla v. Beard*, 545 U.S. 374, 125 S.Ct. 2456 (2005).

At the evidentiary hearing, the defense presented a number of witnesses who presented testimony which would most likely have been mitigating at trial. The Defendant's parents, siblings and wife were not called as witnesses at this hearing, so the Court cannot judge whether counsel's failure to have them testify at the penalty hearing prejudiced the Defendant but it would have been prudent of counsel to interview them thoroughly and find out what and who they knew that could have led to useful information. However, other family members

and friends gave considerable insight into the Defendant's childhood and young adulthood.

Anita Morris and Christopher Walker, brother and sister, are the Defendant's first cousins. They both testified that they were very close in age to the Defendant, grew up in close proximity to him and spent a great deal of time at his house. The Court finds that they gave credible, consistent testimony about the Defendant.

Ms. Morris testified that she and her brother were frequently at the Defendant's home when they were children. She testified that the Defendant's parents threw large, unruly gatherings of 30-40 people at least every other weekend. Alcohol and drugs of all sorts were consumed in great quantities during these parties. Ms. Morris said that the children were left unsupervised, the drugs were left out where the children had access to them and the parties often devolved into violence. It may be assumed that the children at least sampled the drugs under those circumstances. She said that there many alcoholics in the family, including her own mother (the Defendant's aunt), as well as another aunt and two uncles. She described a third aunt as mentally retarded. She testified that the Defendant's mother regularly used hallucinogenic mushrooms and claimed to be a witch who could cast spells on people. She described the Defendant's father as a heavy drinker.

She testified that the Defendant had a bowel-control problem, encopresis, throughout his school years and his family did little to help him. Other children made fun of him because of this and because he was overweight. He had few friends. She said that when he was 13, he moved out of the family's house and into his own detached building on the family premises, giving him even less parental supervision and care from then on. Ms. Morris said that the Defendant's parents knew her whereabouts and had contacted to her tell her about their son's arrest (C. pp. 253-290).

Ms. Morris's brother, Christopher Walker, testified to much of the same information. He said that he and the Defendant were as close as brothers and they remained close into young adulthood. He said that alcoholism was rampant in the family, including most of the aunts and uncles, and the Defendant's father. He testified that one aunt was mentally retarded, one of the Defendant's sisters was diagnosed with schizophrenia and that this sister's daughter committed suicide.

Mr. Walker said there was often violence at the very frequent, drug-infused family gatherings and once someone was thrown through a plate glass window. The children were left to fend for themselves much of the time. The Defendant's parents often engaged in physical fighting. Mr. Walker described the Defendant's mother as a scary person who performed voodoo and witchcraft spells and used LSD, cocaine, marijuana and alcohol every day. He reported that he and the Defendant were smoking marijuana regularly by the age of 11 and had little or no parental supervision. He said the Defendant had encopresis and a weight problem and that the Defendant's sisters teased him mercilessly. Chris's father often attempted to help the Defendant with clothes and other needs that the Defendant's parents were not meeting but he was usually run off by threats from the Defendant's mother. He said that the children were all taught not to talk about what went on in the family and that "we've probably got the most messed up family there is in the United States."

Chris Walker also described the Defendant's teen-age years, when the Defendant was taken under the wing of a violent motorcycle gang, the Fates Assembly. The gang brought increased drug use and violence into the Walker household. Mr. Walker said that after the Defendant moved to Florida, he only saw him one more time and during that time, the Defendant was using heavy quantities of methamphetamine. At the time the Defendant committed the murder, he was found to be using Chris Walker's identification, suggesting that counsel might reasonably have inquired into who Chris Walker was. Mr. Walker said he was still living in the Virginia/Maryland area at the time and the Defendant's parents knew how to reach him. (C. pp. 293-341).

June Rebert testified at the post-conviction hearing. She is a retired drug and alcohol counselor who had known the Defendant and his wife off and on for several years because the Defendant had been friends with her son. She testified that the Defendant's wife told her about the non-stop partying and heavy drug and alcohol abuse of the Defendant's parents. She had met the Defendant's schizophrenic sister Bernita and knew about the suicide of Bernita's daughter. After not seeing the Defendant for a couple of years, she ran into the Defendant by chance not too long before the murder and said that he was physically a changed man, a thin skeleton where he had once been a large man. Based on her professional experience, she concluded he was probably on crack cocaine. She was contacted by defense counsel but she said it was not until after the trial and she spoke to Mr. Studstill only about five minutes. She did testify at the sentencing hearing. (C, pp. 3 55-366).

A friend of the Defendant, Gene D'Oria, testified at the post-conviction hearing that he and the Defendant met at a bar and often used drugs together. He saw the Defendant's meth use escalate to the point where the Defendant lost large amounts of weight, stayed awake for days and turned to dealing in meth to earn a living. He said he remained friends with the Defendant until about a week before the murder, when the Defendant became violent and attacked a friend of his. He also said he was available but never contacted by defense counsel. (C, pp. 3 75-385).

Mr. Studstill testified that he had tried to find someone who could testify that the Defendant was using meth the day of the murder. While neither Chris Walker, Ms. Rebart or Mr. D'Oria saw the Defendant that day, they saw him in the period leading up to the crime and were aware of or suspected his heavy meth use. Their testimony could have been very significant in establishing that the Defendant was a meth addict. This might have been mitigating, especially had counsel also called an expert witness to describe the effects of meth addiction.

At the post-conviction hearing, defense called Dr. Alexander Morton, who was qualified as an expert in psychopharmacology. He testified that he reviewed available medical, psychiatric, counseling and police records, as well as the depositions and testimony of the trial witnesses; he also interviewed the Defendant. The information the Defendant gave him about his exposure to and involvement with drugs from an early age dove-tailed with the testimony of the Defendant's cousins. Dr. Morton explained how the early and constant exposure to alcohol and drug abuse of the adults in this family was a significant factor in leading to the Defendant's own long-standing substance abuse, along with possible genetic predispositions He said meth had come to be the Defendant's drug of choice.

Dr. Morton offered extensive testimony about the effect of various drugs on the brain, particularly methamphetamine. He said that meth abuse can cause symptoms of schizophrenia, bipolar illness, paranoia, aggression and hallucinations. He said that the Defendant remained paranoid throughout his interview with him, and was suspicious of cooperating with the interview.

Dr. Morton also testified about the physical and psychological components of meth addiction and the difficulty of escaping it when it was both readily available and the source of one's income, as was the case with the Defendant. It seems clear that an expert on the impact of early exposure to family drug use and the Defendant's own substance abuse would likely have been useful to the Defendant when coupled with the testimony of his cousins and friends, It is at the very least an avenue that would have been prudent to explore after learning about the Defendant's childhood environment. (C. pp. 398-462).

A social worker from Virginia, Edward Gratzick, testified at the evidentiary hearing. He was accepted as an expert in social work and treating children with emotional and behavioral problems. He had worked with the Defendant as a teenager in attempting to resolve school and personal problems. He said he was contacted by someone from Florida about the Defendant, although he did not remember who;

he sent his records but heard nothing further. The records contained information about the Defendant's participation in special education classes since the second grade, his juvenile probation, his involvement in grief counseling as a teenager and other information about the Defendant. Mr. Gratzick testified that the Defendant was diagnosed with emotional problems, neurological problems and a learning disability. He was far behind in reading ability and disliked attending school, where he was severely teased. He handled the teasing by becoming aggressive. Mr. Gratzick had provided therapy to stabilize the Defendant's behavior and worked with him to develop a plan to mainstream him into regular classes but when the plan fell apart, the Defendant dropped out of school. Mr. Gratzick had a very clear memory of working hard to help the troubled teenager and was quite distressed when the school system failed to follow through with the plan. This witness said he was available and would have testified at trial if asked. (C, pp. 497-5 14).

At the post-conviction hearing, Mr.Studstill did not remember receiving any records from Mr. Graztick but they were found in his file. He did not follow through on the information provided. (C, p. 79, 136-138)

While family/friend/school/work information is not a statutory mitigator, it is commonly used, as Mr. Studstill noted, to humanize a defendant to the jury. Counsel may be found ineffective for failing to seek out and interview family members who might provide useful mitigation. *Slate v. Pearce*, 994 So.2d 1094 (Fla. 2008). The cousins' testimony concerning the rampant alcohol and substance abuse to which the Defendant was exposed as a child, the family violence and parental neglect, and the mental health problems in the family history, including schizophrenia, retardation and suicide, all could likely have been relatively strong mitigators in the penalty phase of the trial Evidence relating to a defendant's own long-standing substance abuse and addiction has been found to be an important nonstatutory mitigator as well. *Clark v. State*, 609 So.2d 513 (Fla. 1992); *Mahn v. State*, 714 So.2d 391 (Fla. 1998).

The Court allowed testimony as to whether counsel should have sought mitigation because of the Defendant's alleged brain damage. Dr. Joseph Sesta, an expert in forensic neuropsychology, testified at the hearing. He reviewed available medical, counseling and school records, did some testing of the Defendant and reviewed testing done by Dr. John Tanner. He concluded that the Defendant has mild to moderate brain impairment in a particular region of the brain that would impact his ability to remain on task, make sound judgments arid anticipate the consequences of his behavior. (Exhibit D, Continuation of evidentiary hearing, July 19, 2009, pp. 6-33). Dr.Tanner, an expert in neurology, interviewed the Defendant and conducted several tests on him; he testified that the Defendant has a mild brain impairment or injury that might have resulted from head injuries or drug abuse. (D, pp. 38-58). The Court had entered an order allowing for the Defendant to receive an MRI brain scan in preparation for the evidentiary hearing, but the Defendant refused to leave his cell to be transported to the location of the MRI. Without the Defendant's cooperation in this matter, the Court finds the Defendant failed to carry his burden of proof that further investigation on the subject of brain injury would have resulted in significant mitigation evidence.

As stated above, in assessing prejudice in a claim of an inadequate mitigation investigation, the Court must "reweigh the evidence in aggravation against the totality of the... mitigation presented during the postconviction evidentiary hearing to determine if [the Court's] confidence in the outcome of the penalty phase trial is undermined." *Hannon*, id.

The murder in this case was particularly violent. The victim was severely beaten over an extended period of time, thrown in the trunk of a car and driven to a remote area where he was dropped on the ground, had his hands and neck bound by electrical ties and was repeatedly shot in the head. While the Court has no intention of minimizing the seriousness of this crime, it was clear from the testimony at trial that the victim and the Defendant were meth dealers

and the death resulted from their involvement in the meth business. Mr. Studstill, in fact, admitted that part of his strategy at the penalty phase was to focus on the victim as a violent person who had threatened other people (C, p. 90).

Even given the grisly details of the victim's death, the jury voted only 7 to 5 for the death penalty. Based on Mr. Studstill's testimony about what little he did to develop a mitigation case and how little time he spent on mitigation, and further based on the testimony of the family, friends and experts who testified at the post-conviction hearing, the Court cannot say with any confidence that, had defense counsel adequately investigated and presented further mitigation evidence, the vote of at least one additional juror would not have been for life to make it a 6 to 6 vote which would have resulted in a sentence of life rather than death.

The Court also finds that the Defendant did not make a knowing and intelligent waiver of mitigation evidence. He could not do so prior to his attorney's thorough investigation of what mitigation might be possible and his clear understanding of what he was waiving. *Lewis*, id. There was not sufficient investigation in this case to reach the point where the Defendant could have made a knowing waiver. His reluctance to talk about his family background makes sense in light of his cousin's testimony that as children, they were taught not to talk about these private matters. Nonetheless, his attorney had a duty to seek out mitigation even without his client's cooperation and to explain its importance to the Defendant regardless of that reluctance. Only then would it have been the Defendant's choice to present the available mitigation at trial or not.

Therefore the Court grants relief with regard to Claim II A by granting Defendant a new penalty phase trial.

(V11, R1728-1740).

The trial court erred in finding ineffective assistance of counsel. Because both prongs of the *Strickland* test present mixed questions of law and fact, this Court employs a mixed standard of review, deferring to the circuit court's factual findings that are supported by competent, substantial evidence, but reviewing the circuit court's legal conclusions *de novo*. *See Schoenwetter v. State*, 46 So. 3d 535, 546 (Fla. 2010); *Sochor v. State*, 883 So. 2d 766, 771-72 (Fla. 2004). The trial court findings are not supported by competent substantial evidence, and a *de novo* review will show that counsel was not deficient nor was there prejudice under *Strickland*.

The trial court erred by failing to consider the evidence which was presented by Mr. Studstill. The findings of the Florida Supreme Court regarding mitigating factors included:

> Walker presented the following mitigation evidence at the penalty phase, the Spencer hearing, and at sentencing. At the penalty phase, the defense presented the testimony of two mental health experts: Dr. Robert Radin, a psychiatrist who began treating Walker in March 2003, and Dr. Howard Bernstein, the clinical psychologist who testified at Walker's hearing on his motion to suppress. Both Dr. Radin and Dr. Bernstein diagnosed Walker as having bipolar disorder. Dr. Radin admitted that he "hardly observed" Walker's mood swings and did not really have evidence of bipolar disorder apart from Walker's self-reporting. Walker had never been previously diagnosed as bipolar. Although Walker reported that he had seen someone for therapy for eight to ten months when he was fifteen years old, Dr. Radin did not perceive Walker's condition as being longstanding.

Dr. Radin also testified that people facing serious charges often manifest anxiety or depression and that some people with Walker's bipolar condition might self-medicate with alcohol, marijuana, cocaine, or methamphetamines. He testified that consumption of these types of drugs alters one's thinking capacity. Dr. Bernstein also testified that people who are depressed tend to self-medicate with something that is fast acting, such as crack cocaine, methamphetamines, or "speed." He further testified that speed is not a narcotic but a central nervous system stimulant, and if a bipolar person used speed for a few days, the person's mental activity would likely become more hyperactive. He further testified that ingestion of drugs would aggravate the bipolar disorder.

At the *Spencer* hearing, the victim's sister, Michelle Hamman, gave a statement. The trial court also received letters from Walker's sister, Bernita Lou Walker, and Walker's friend, Pamela Townsend, which requested that the court show mercy on Walker. At the sentencing hearing, Walker's friend, Jean Rebert, testified on Walker's behalf. She had a counseling background and knew of his drug problems. She testified that she had a "grandmotherly" relationship with Walker and that he would talk to her about his problems, and he would do kind things for her like scrub her carpets or help take care of her animals. She testified that he was not a scary man but was always "very outgoing and well-spoken." She felt that his addiction to drugs caused him to be violent and that he does not deserve the death penalty.

Based on this evidence, Walker proposed nine nonstatutory mitigators: (1) on the day of the murder, Walker suffered from bipolar disorder and was under the influence of drugs and sleep deprivation; (2) Walker's codefendant, Ford, will not get the death penalty; (3) Walker gave his statement to the police; (4) Walker did not resist arrest; (5) Walker tried to protect his codefendant girlfriend; (6) Walker is unselfish in character as he did not attempt to gain any benefit by providing information; (7) Walker did not harm the Good Samaritan in Live Oak; (8) Walker was remorseful; and (9) the court should have mercy and sentence Walker to life in prison. The trial

> court also considered a tenth nonstatutory mitigator, that the victim was a bad person.

Walker v. State, 957 So. 2d 560, 583-584 (Fla. 2007).

The trial court failed to conduct a *Strickland* analysis considering the totality of the evidence: he considered the evidence presented at the evidentiary hearing as if no evidence at all had been presented at the penalty phase. The trial judge ignored the fact that trial counsel did present, and this Court found, substantial mitigation. The testimony at the evidentiary hearing was cumulative, speculative, and painted Walker in a negative light rather than "humanize" him. Mr. Studstill spoke with 5 family members. Information regarding friends, family, and other contacts could have been produced by Walker, but he did not provide information to counsel. In fact, Walker withheld information from counsel, such as the fact he had been seeing Dr. Radin for over a year. A defendant cannot complain that his counsel performed ineffectively in failing to pursue additional mitigation if that defendant will not cooperate or assist his counsel. *Peede v. State/McDonough*, 955 So. 2d 480, 493 (Fla. 2007). *See also Cherry v. State*, 781 So.2d 1040, 1050 (Fla. 2000) (By failing to provide trial counsel with the names of witnesses who could assist in presenting mitigating evidence, Cherry may not now complain that trial counsel's failure to pursue such mitigation was unreasonable.)

The trial judge faulted trial counsel for failing to contact his father; however, no testimony from the father was presented at the evidentiary hearing, so there can be no prejudice assessment and Mr. Studstill cannot be deficient for failing to produce a witness who was unavailable. Mr. Studstill testified that both the mother and father were adamant that they would not testify. Likewise, the trial judge faults counsel for failing to talk to his wife, Rebecca. Rebecca did not testify at the evidentiary hearing, so there can be no *Strickland* assessment of prejudice. Mr. Studstill did contact family and friends. They simply were detrimental to Walker or would not testify. For instance, Ms. Russo characterized Walker as "dangerous" and said she kept telling Leigh Ford to get away from him. The mother and father would not testify. Walker's sister Bernita wrote a "crazy" letter. Sister Beverly simply said she couldn't help Mr. Studstill. Pamela Townsend sent a letter straight to the judge, but Walker never advised Mr. Studstill he knew of the Townsend letter.

If the trial judge had truly conducted a comparison between the penalty phase and the evidence presented at the evidentiary hearing, he would have found Walker did not meet his burden on deficiency or prejudice. The evidentiary hearing

witnesses did little or nothing to add to the mitigation. The sentencing order[7] addressed:

- Bipolar disorder
- Personality disorders
- Counseling at age 15
- Self medication with alcohol, cocaine, methamphetamines
- Daily use of the above substances
- Testimony of Dr. Radin, psychiatrist
- Testimony of Dr. Bernstein, clinical psychologist
- Sleep deprivation
- Life sentence of co-defendant
- Cooperation with police/confession
- Did not resist arrest
- Tried to protect Leigh Ford
- Unselfish character/did not attempt to gain from information
- Did not harm good Samaritan in Live Oak
- Remorse
- Victim was involved in drug manufacturing

[7] This Court takes automatic judicial notice of the record on direct appeal. Fla. R. App. P. 9.142 (a)(1)(C). The order is attached as Exhibit "A" for this Court's convenience.

The evidentiary hearing testimony did not add any further mitigation to that already considered and was cumulative. This Court has held that even if alternate witnesses could provide more detailed testimony, trial counsel is not ineffective for failing to present cumulative evidence. *See Gudinas v. State*, 816 So. 2d 1095, 1106 (Fla. 2002); *Sweet v. State*, 810 So. 2d 854, 863-64 (Fla. 2002). Trial counsel is not ineffective for failing to call a witness to present evidence which was generally presented by others. *See Darling v. State/McDonough*, 966 So. 2d 366, 377 (Fla. 2007).

A review of the witnesses who did testify at the evidentiary hearing illustrates that Walker failed to meet the *Strickland* standard. Ms. Rebert did testify at sentencing and her testimony at the evidentiary hearing was cumulative to that at sentencing. Christopher Walker did testify at the evidentiary hearing; however, his testimony was less than helpful. He portrayed Walker as a violent, juvenile delinquent who used drugs, hung out with bikers, was in and out of prison since his teens and was a fugitive since his early 20's. This was hardly the "humanizing" testimony Mr. Studstill was looking for. Anita Morris testified, but she had not seen Walker for 18 years and her testimony was cumulative to Christopher's. Gene D'Oria was likewise counterproductive, relaying testimony that Walker was a fugitive who worked illegally, abused drugs, and beat people up.

The only thing the evidentiary hearing made clear was that Walker was a lost cause, contrary to Mr. Studstill's strategy to "humanize." Walker's unruly behavior began in school where he bit teachers and entered the juvenile justice system. He was referred to counseling and was able to progress; however, he chose to leave school and hang out with a biker gang. His criminal career began at age 15 and escalated consistently until he committed murder. He manufactured drugs and beat up those he needed to control: his ex-wife, his drug dealing associates, and the co-defendant.

Dr. Morton said Walker was bi-polar and abused drugs, cumulative to the testimony at the penalty phase. Dr. Morton's opinion, consistent with the evidence from the penalty phase, was that Walker's problems arose from substance abuse, This squarely contradicts the newly- proposed defense theory from Drs. Sesta and Tanner that Walker has a brain impairment. Drs. Sesta and Tanner would ignore the bi-polar diagnosis for some speculative brain impairment which was not confirmed by either standardized psychological testing or an MRI. Why? Because Walker refused to cooperate with the doctors just like he would not cooperate with Mr. Studstill. As Ms. Rebert testified, Walker did not trust anyone. As Dr. Sesta testified, Walker did not like "shrinks." Walker's alleged brain injury occurred in either 1987 or 1991 or 1997. However, Ms. Rebert testified that Walker was a

healthy, wholesome young man in 1998 through 2000. It was when Walker began the heavy drug use that his behavior changed.

Both Dr. Radin[8] and Dr. Bernstein testified at the penalty phase that Walker was bipolar and the substance abuse aggravated that disorder. Walker would now abandon bipolar disorder in favor of some nebulous claim of impairment. This Court has recognized that bipolar disorder is a serious disorder. *See Orme v. State,* 896 So. 2d 725, 736 (Fla. 2005) ("There is no dispute that bipolar disorder is a serious and significant diagnosis.") This Court has established that defense counsel is entitled to rely on the evaluations conducted by qualified mental health experts, even if, in retrospect, those evaluations may not have been as complete as others may desire. *See Reese v. State,* 14 So. 3d 913, 918 (Fla. 2009), citing *Darling v. State*, 966 So. 2d 366, 377 (Fla. 2007); *Lynch v. State/McNeil*, 2 So. 3d 47, 73 -74 (Fla. 2008).

The penalty phase testimony shows that Walker was seen before trial by two mental health experts. Dr. Radin diagnosed Walker as having bipolar disorder, NOS, and personality disorder traits. (Trial record, V16, TT 1848). Walker said he had seen someone for therapy for eight to ten months when he was fifteen years old. (Trial record, V16, TT1848). Some people with Walker's condition self-medicate with alcohol, marijuana, cocaine, or methamphetamines. (Trial record,

[8] Dr. Radin's reports were Defense Exhibit 1 at the penalty phase.

V16, TT1855). Consuming these types of drugs alters one's thinking capacity. (Trial record, V16, TT1855). Walker was always a cooperative, nice patient. (Trial record, V16, TT1857-58). Walker claimed to hear voices. (Trial record, V16, TT1868). Dr. Howard Bernstein, clinical psychologist, reviewed Appellant's medical and psychiatric records from the jail. (Trial record, V16, TT1874). In Dr. Bernstein's opinion, Walker has a "severe and chronic mental disorder, i.e., bipolar disorder." (Trial record, V16, TT1875-76). People who are depressed tend to self-medicate with something that is fast acting, such as crack cocaine or methamphetamines, or "speed." (Trial record, V16, 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. (Trial record, V16, TT1877). Ingestion of drugs would aggravate the pre-existing mood disorder. (Trial record, V16, TT1879).

Defense Exhibit #1 at the penalty phase was Walker's psychiatric records of Dr. Radin between March 10, 2003 and June 28, 2004. (Trial record, V18, R1005-1020). Those records showed that Walker abused illegal drugs and consumed marijuana, cocaine and methamphetamines on a daily basis for years until he was arrested for the murder (Trial record, V18, R1019). Walker participated in a drug or alcohol treatment program in Virginia in 1994 (age 14). He experienced a head

trauma from a fall in 1997. He only completed through grade 9, and was in special education classes for "emotionally/LD/hyper." (Trial record, V18, R1019). Dr. Radin's report showed that Walker's niece committed suicide (Trial record, V18 R1018). His initial diagnosis on March 10, 2003 was Bipolar Disorder NOS and Personality Disorder Traits. (Trial record, V18, R1017). Dr. Radin's report discusses Walker's first mental health evaluation when he was 15, with 6 months therapy to follow. Dr. Radin reports that Walker got a GED and worked construction. Walker has four sisters, and one is schizophrenic. Walker reports using PCP, cocaine, and methamphetamines. (Trial record, V18, R1016). Dr. Radin's April 7, 2003, relates a diagnosis of Bipolar Disorder NOS and Personality Disorder NOS with Antisocial traits. (Trial record, V18, R1015). That diagnosis continues during the monthly exams with the addition of Bipolar Disorder NOS with Psychotic Features reported on September 26, 2003, due to Walker hearing voices in the night and reporting hallucinatory experiences. (Trial record, V18, R1014-1011). That diagnosis is consistent through June 28, 2004. (Trial record, V18, R1010-1005).

The fact that Walker was using alcohol and drugs the day of the murder was something Walker reported to Mr. Studstill and was the subject of the suppression hearing.[9] The evidence at trial was that Walker was involved in a meth lab ring and

[9] The testimony at the suppression hearing was that:

used methamphetamines. In Appellant's statement to police officers, he said he was involved with the victim through the illicit manufacture and disposition of the controlled substance methamphetamine, sometimes referred to as "crank." (Trial

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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 (Trial record, V2, R208). Walker was also diagnosed with bipolar disorder with psychotic features (Trial record, V2, R208). In Dr. Bernstein's opinion, Walker was under the influence of drugs on January 27, 2003 (Trial record, V2, 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." (Trial record, V2, R209). Walker was arrested between 9:00 to 10:00 a.m. (Trial record, V2, 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 (Trial record, V2, R211). The fact that Walker is bipolar magnifies the effect of drugs (Trial record, V2, R211). Dr. Bernstein had not heard the tape recording of the interview or reviewed the transcript (Trial record, V2, R212). Walker told Dr. Bernstein he was beaten by Virginia law enforcement officers during a prior arrest (Trial record, V2, 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." (Trial record, V2, 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 (Trial record, V2, R219). After Walker was arrested, he asked for his lawyer (Trial record, V2, R222). He had been in the penitentiary three years and knew not to say anything (Trial record, V2, R222). Walker's nickname was "Fidget" because he could never sit still (Trial record, V2, R224). Walker was arrested in Suwannee County for having drugs (Trial record, V2, R224).

record V15, TT1941).[10] Dr. Morton's testimony regarding the effects of methamphetamine, although interesting, were quite apparent in Walker's persona. Thus, expert testimony was hardly necessary to explain the effects of meth as a heavy-duty stimulant. The jury knew Walker's nickname was "Fidget" because Lori Ann Gibson testified to this during the trial, and Walker was continuously referred to as "Fidget." (Vol. 11, TT903, 904 , 908, 909, 932, 939-40, 943, 944, 948, 949, 950, 951, 957, 958). The fact Walker self-reported substance abuse to Dr. Morton is unremarkable. Walker self-reported drug use to the trial experts, and the fact that bipolar people self-medicate was known at the penalty phase. Whether Dr. Morton gives a more detailed description of the effects of certain drugs is immaterial. The fact that an expert can explain an issue with more detail does not make trial counsel deficient. *Darling v. State/McDonough*, 966 So. 2d 366, 377 (Fla. 2007).

Walker prevented Mr. Studstill from gathering further information from Dr. Radin because he would not agree to a continuance. Mr. Studstill presented the diagnosis of bipolar disorder, had Dr. Radin's records, and had Mr. Gratzick's records from Circles of Care. Further, this information is all listed in this Court's sentencing order.

[10] Cites to the record on direct appeal are by Volume number, followed by "R" to cites from the record and "TT" for Trial Transcript.

Mr. Studstill testified that his strategy was to humanize Walker. Strategic decisions made in furtherance of that theory are virtually unassailable. *See Anderson v. State/McNeil,* 18 So. 3d 501 (Fla. 2009) (strategic decision not to present evidence of Anderson's prior drug use because it would be inconsistent with the penalty phase strategy of trying to humanize him and paint him as a good person); *Rutherford v. State*, 727 So. 2d 216, 223 (Fla. 1998) (strategic decision to focus on the "humanization"of Rutherford through lay testimony); *Bryan v. Dugger*, 641 So. 2d 61, 64 (Fla.1994) (mitigation strategy was to "humanize" the defendant and trial counsel made a tactical decision not to call mental health expert). Counsel is not ineffective for foregoing negative mitigation. *See Willacy v. State/McDonough*, 967 So. 2d 131, 144 (Fla. 2007).

Insofar as Mr. Studstill being ineffective because he did not request co-counsel. This Court has never created a rule of *per se* ineffectiveness simply because there is no co-counsel. In *Evans v. State/McDonough*,[11] 946 So. 2d 1, 12 (Fla. 2006), this Court stated:

> ….Second, even if counsel was deficient, the trial court determined that Evans had not demonstrated how counsel's solo representation prejudiced Evans. As the trial court correctly stated, "[t]he mere fact that a Defendant has been represented by one attorney alone is insufficient to establish a claim of ineffective assistance of counsel." *See Cole v. State*, 841 So. 2d 409, 428 (Fla. 2003) ("The general allegation that mitigating evidence could have been better presented

[11] Mr. Studstill was Evans' attorney.

> [had co-counsel been requested and appointed] is an insufficient allegation of prejudice."); *State v. Riechmann*, 777 So. 2d 342, 359 (Fla. 2000) (denying claim of ineffective assistance for failure to request co-counsel where defendant failed to specifically demonstrate how counsel's solo representation affected outcome of trial).

Walker failed to meet his burden of showing deficient performance or prejudice which would have been cured by the existence of co-counsel.

The trial judge erred in finding trial counsel deficient in his investigation and presentation of mitigation, particularly considering the fact Walker hampered the investigation. The trial judge also erred in finding prejudice. The evidence from the evidentiary hearing was cumulative and/or contradictory to that presented and to the theory of humanization. Walker did not meet his burden on either prong of *Strickland* and this Court should reverse the grant of relief on Claim 2A.

CONCLUSION

WHEREFORE, based upon the foregoing, the State respectfully requests that this Honorable Court (1) affirm the trial court's order on Arguments 1 and 2 herein; and (2) reverse the trial court's order granting a new penalty phase. Walker's convictions and death sentence should be affirmed in all respects.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing was furnished to Raheela Ahmed and Carol c. Rodriguez, CCRC-Middle, 3801 Corporex Park Drive, Suite 210, Tampa FL 33619, this _____ day of December, 2010.

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CERTIFICATE OF FONT

I hereby certify that a true and correct copy of the foregoing Answer Brief was generated in Times New Roman, 14 point font, pursuant to Fla. R. App. 9.210.

_____

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