IN THE SUPREME COURT OF FLORIDA

CASE NO. SC10-638

ROBERT SHANNON WALKER, II,

Appellant / Cross-Appellee

v.

STATE OF FLORIDA

Appellee / Cross-Appellant.

ON APPEAL FROM THE CIRCUIT COURT OF THE EIGHTEENTH JUDICIAL CIRCUIT IN AND FOR BREVARD COUNTY, STATE OF FLORIDA
Lower Tribunal No. 05-2003-CF-32520

INITIAL BRIEF OF THE APPELLANT

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PRELIMINARY STATEMENT

This is an appeal of a final order by the Circuit Court of the Eighteenth Judicial Circuit, in and for Brevard County (hereinafter, “post-conviction court”) denying specific guilt phase issues as laid out in Robert Shannon Walker, II’s (hereinafter “Mr. Walker”) Motion to Vacate Judgment of Conviction and Sentence pursuant to Fla. R. Crim. P. 3.851.

The record on appeal of the trial proceedings consists of eighteen [18] volumes. The record on appeal of the post-conviction proceedings consists of twenty six [26] volumes. References to the record on appeal will be cited as follows:

The record on appeal concerning the trial proceedings will be referred to as "(ROA ___)" followed by the appropriate Roman numeral volume number and then page number(s).

The post-conviction record on appeal will be referred to as "(PCROA ____)" followed by the appropriate Roman numeral volume number and then page number(s).

All other references will be self-explanatory or otherwise explained.

REQUEST FOR ORAL ARGUMENT

Mr. Walker had been sentenced to death by the trial court. The post-conviction court did grant a new penalty phase because trial counsel failed to provide effective assistance to Mr. Walker. The resolution of the issues in this appeal may eventually determine whether Mr. Walker lives or dies. This Honorable Court has allowed oral argument in other capital cases in a similar procedural posture. A full opportunity to air the issues through oral argument would be appropriate given the seriousness of the claims involved and the fact that a life is at stake. Mr. Walker accordingly requests that this Honorable Court permit oral argument.

STATEMENT OF THE CASE

(a) Statement of the case pertaining to the trial proceedings

On February 25, 2003, Mr. Walker and Leigh Valorie Ford (hereinafter "Ms. Ford") were indicated as co-defendants by a Grand Jury in Circuit Court of the Eighteenth Judicial Circuit of the State of Florida for Brevard County. (ROA Vol.IV, p.497-498). Mr. Walker and Ms. Ford were indicted with First Degree Premeditated Murder, Kidnapping, and Aggravated Battery of David Hamman (hereinafter "Mr. Hamman") that occurred on January 27, 2003. (ROA Vol.IV, p.497-498). Thereafter, an arrest warrant was issued for Mr. Walker on January 28, 2003. (ROA Vol.III, p.469-474).

Mr. Walker was later arrested on March 4, 2003, by the Brevard County Sheriff's Office. (ROA Vol.IV, p.499-501). Then, on March 5, 2003, trial counsel, Kenneth A. Studstill, Esquire (hereinafter, "trial counsel"), was appointed as conflict counsel to Mr. Walker. (ROA Vol.IV, p.504). Thereafter, on March 11, 2003, trial counsel entered a written plea of not guilty on behalf of Mr. Walker. (ROA Vol.IV, p.505). After several pre-trial motions and pleadings on behalf of Mr. Walker, this case proceeded to trial. (ROA Vol.IV, p.514-574, 582-599, & 612-672; Vol.V, p.679-684; & Vol.VI, p.889-894).

This case was tried before the Honorable Charles M. Holcomb in Brevard County (hereinafter "trial court"). (ROA Vol.VII, p.1). This case was prosecuted

by Assistant State Attorneys James Earp, Esquire, and Glen Craig, Esquire (hereinafter "the prosecutor"). (ROA Vol.VII, p.2). The voir dire proceedings of the trial commenced on July 24, 2004, and concluded the same day. (ROA Vol.VII-XI, p.1-813). The guilt phase of the trial proceedings also commenced on July 24, 2004, and concluded on July 27, 2004. (ROA Vol.XI-XV, p.813-1786). Later on July 27, 2004, the jury returned a verdict of guilty as to all counts as charged. (ROA Vol.V, p.812-814 & Vol.XV, p.1790-1791). The penalty phase evidence commenced on July 28, 2004, and concluded on the same day. (ROA Vol.XVI-XVI, p.1816-1926). On the same day, the jury returned an advisory sentence for death by a seven [7] to five [5] vote. (ROA Vol.V, p.825 & Vol.XVII, p.2030-2031).

Thereafter, the trial court conducted the *Spencer* hearing pursuant to *Spencer v. State*, 615 So.2d 688 (Fla. 1993), on August 30, 2004. (ROA Vol.VI, p.961). Then, on December 13, 2004, the trial court in a written sentencing order adjudicated Mr. Walker guilty on all counts and the trial court sentenced Mr. Walker to death on count one [1] for First Degree Premeditated Murder. (ROA Vol.VI, p.953-960 & P.961-977). Mr. Walker is currently incarcerated at Union Correctional Institution, Raiford Florida.

Mr. Walker timely filed a Notice of Appeal of judgment and sentence to the Supreme Court of Florida on December 16, 2004. (ROA Vol.VI, p.981). On May

3, 2007, the Supreme Court of Florida affirmed Mr. Walker's convictions and his death sentence. (PCROA Vol.VII, p.987-1035). *See Walker v. State*, 957 So.2d 560, 564 (Fla. 2007). A Writ of Certiorari was not filed by appellate counsel to the Supreme Court of the United States on behalf of Mr. Walker.

(b) Statement of the case pertaining to the post-conviction proceedings

The post-conviction proceedings were also conducted before the Honorable Charles M. Holcomb in Brevard County (hereinafter "the post-conviction court"). (PCROA Vol.VII, p.1058). On May 25, 2007, the Law Office of the Capital Collateral Regional Counsel – Middle Region was appointed by the Supreme Court of Florida to represent Mr. Walker in his post-conviction proceedings. On or about July 11, 2008, Mr. Walker filed his Motion to Vacate Judgments of Conviction and Sentence. (PCROA Vol.VIII, p.1221-1326). The State filed its Answer to Motion to Vacate Judgments of Conviction and Sentence on August 15, 2008. (PCROA Vol.IX, p.1330-1379).

After conducting a Case Management Conference on October 29, 2008, the post-conviction entered an Order Denying in Part Defendant's Motion to Vacate Judgments and Sentence and Granting Hearing on Claims II A[1] and III[2], on

[1] Claim II A refers to the claim of ineffective assistance of counsel during penalty phase for "Failure to Conduct a Reasonably Competent Mitigation Investigation and Failure to Present Mitigation." (PCROA Vol.VIII, p.1250-1253).

[2] Claim III refers to the following issue:

November 4, 2008. (PCROA Vol.I, p.97-180 & Vol.IX, p.1409-1441). The other claims listed in Mr. Walker's Motion to Vacate Judgments and Sentence were denied an evidentiary hearing[3]. (PCROA Vol.IX, p.1409-1441). An evidentiary

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> Mr. Walker was deprived of his due process rights and of his right to a reliable adversarial testing due to ineffective assistance of counsel when he was shackled during his trial without objection. This violated Mr. Walker's Fifth, Sixth, Eighth, and Fourteenth Amendment Rights under the United States Constitution and his corresponding rights under the Florida Constitution.

(PCROA Vol.VIII, p.53-56).

[3] The list of specifically the guilt phase claims denied an evidentiary are listed and titled in Mr. Walker's Motion to Vacate Judgments and Sentence as follows:

Claim I: Errors during Guilt Phase of Trial,
- A(i) Failure to Challenge Legality of Arrest,
- A(ii) Failure to Litigate Voluntariness of Confession,
- B. Failure to Object to Testimony and Photographs of Certain Possible Blood Stains,
- C. Voir Dire,
- D. Failure to Challenge the Kidnapping Count,
- E. Failure to Present Evidence of Defense of Others,
- F. Failure to Argue Involuntariness of Confession,
- G. Failure to Object to Hearsay,
- H. Failure to Present Effective Consistent Defense,
- I. Closing Argument and Admission of Guilt,
- J. Failure to Present Evidence of Brain Impairment, etc. on Issue of Premeditation,
- K. DNA Expert,
- L. Ballistics Expert,
- M. Closing of the Courtroom,
- N. DEA Involvement, and
- O. Cumulative Error.

hearing was conducted as to Claims II A and III by the post-conviction court from April 6, 2009, to April 8, 2009, and then later briefly on July 16, 2009. (PCROA Vol.III-VI, p.216-833). Thereafter, on March 8, 2010, the post-conviction court did enter a Final Order Granting in Part and Denying in Part Defendant's Post-Conviction Motion. (PCROA Vol.XI-XIV, p.1727-2447). Mr. Walker did timely file a Notice of Appeal to this Honorable Court on April 1, 2010, and in response the Office of the Attorney General filed a Notice of Cross-Appeal. (PCROA Vol.XIV, p.2448-2451 & 2452-2453).

The appeal before this Honorable Court specifically relates to the post-conviction court's final order affirming Mr. Walker's conviction for first degree premeditated murder and denying an evidentiary hearing as to the guilt phase proceedings claims. (PCROA Vol.XI, p.1741-1758). Moreover, the post-conviction court granted Mr. Walker's Motion to Vacate Judgment and Sentence "only with regard to Claim II A as it relates to mitigation." (PCROA Vol.XI, p.1767). The post-conviction court vacated Mr. Walker's sentence and granted him a new penalty phase as to count one [1] for first degree premeditated murder. (PCROA Vol.XI, p.1767). Mr. Walker respectfully requests that this Honorable Court affirm the post-conviction court's ruling vacating Mr. Walker's death sentence and granting him a new penalty phase.

(PCROA Vol.VIII, p.1221-1247).

STATEMENT OF THE FACTS

(a) Statement of the facts of the trial proceedings

The relevant factual history from the trial proceedings was summarized by this Court in *Walker v. State*, 957 So.2d 560 (Fla. 2007) and is as follows:

> In the late evening hours of January 26, 2003, the victim, David "Opie" Hamman[4], 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. The appellant, Robert Shannon Walker, II, was waiting inside the apartment with his girlfriend, Leigh Valorie Ford, and 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. 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. 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.
>
> 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."

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[4] Victim is referred to by his nickname "Opie" at times in the record on appeal.

The attack on Hamman at Joel's apartment lasted between two and three hours. Sometime around midnight, Hamman tried to escape. 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.

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.

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. 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.

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. 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.

After waiving his *Miranda* 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."

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. 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.

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. 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.

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.

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. 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.

Walker, 957 So.2d at 565-569. (footnotes omitted).

(b) Statement of the facts of the post-conviction proceedings

The appeal before this Honorable Court specifically relates to the post-conviction court's final order affirming Mr. Walker's conviction for first degree premeditated murder and denying an evidentiary hearing as to only the guilt phase proceeding claims. (PCROA Vol.XI, p.1741-1758). The post-conviction court held a case management conference on October 20, 2008, to hear argument regarding the claims laid out in Mr. Walker's Motion to Vacate Judgments of Conviction and Sentence. (PCROA Vol.I, p.97-179). Post-conviction counsel requested an evidentiary hearing for all the guilt phase proceeding claims aforementioned during the case management conference. The post-conviction court heard argument from both parties at the case management conference. (PCROA Vol.I, p.97-179).

Then, on or about October 31, 2008, the post-conviction court entered an Order Denying in Part Defendant's Motion to Vacate Judgments of Conviction and Sentence and Granting Hearing on Claims IIA[5] and III[6]. (PCROA, Vol.IX, p.1409-

[5] Mr. Walker's claim that trial counsel failed to conduct a reasonably competent mitigation investigation and that trial counsel failed to present mitigation.

1440). The post-conviction court denied an evidentiary hearing on all guilt phase claims except for Claim III. (PCROA Vol.IX, p.1440). The post-conviction reiterated its ruling and findings in the final order affirming Mr. Walker's conviction for first degree premeditated murder and denying an evidentiary hearing as to all the guilt phase proceeding claims. (PCROA Vol.XI, p.1741-1758). The facts of the evidentiary hearing that was conducted by the post-conviction are not relevant in the appellant's initial brief as the post-conviction court denied the issues discussed below at the outset. (PCROA Vol.III, p.216-415, Vol.IV, p.416-615, Vol.V, p.616-765, & Vol.VI, p.766-833).

Ultimately, the post-conviction court granted Mr. Walker's Motion to Vacate Judgments of Conviction and Sentence "only with regard to claim II A as it related to mitigation," and found that Mr. Walker was "entitled to a new penalty phase trial only on Count One, first degree premeditated murder, and the Court grant(ed) a new penalty phase trial on that Count." (PCROA Vol.XI, p.41). The post-conviction court denied "all other post-conviction claims, including all claims related to the guilt phase of the trial." PCROA Vol.XI, p.41).

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[6] Mr. Walker's claim that trial counsel deprived Mr. Walker of his due process rights and of his right to a reliable adversarial testing due to ineffective assistance of counsel when he was shackled during his trial without objection.

SUMMARY OF ARGUMENTS

ARGUMENT I: The post-conviction court erroneously denied Mr. Walker a full and fair evidentiary hearing on all the guilt phase proceeding claims raised in his Motion to Vacate Judgments of Conviction and Sentence. The two issues/claims that the post-conviction court erred in denying an evidentiary hearing are as follows:

(i) Trial counsel failed to timely object to the admissibility of prejudicial testimony and photographic evidence of purported blood stains, and

(ii) Trial counsel failed to present evidence to show that Mr. Walker's statements to Agent Alexis Herrera were not freely and voluntarily made to the jury during the guilt phase proceedings.

An evidentiary hearing should have been granted to establish that trial counsel's conduct was deficient and not sound trial tactic in accordance with *Strickland v. Washington*, 466 So.2d 668, 104 S.Ct. 2052, 80 L.Ed. 2d 674 (1984). Trial counsel's failure did prejudice Mr. Walker's case in each claim/issue as follows: (i) it allowed the introduction of non-relevant inflammatory purported blood stain evidence to be presented to the jury, and (ii) it allowed Mr. Walker's statements to law enforcement to be heard by jury without any challenge by the defense that the statements were freely and voluntarily made.

Mr. Walker's Motion to Vacate Judgments of Conviction and Sentence was pled with sufficient specificity that trial counsel failed to provide effective assistance of counsel during the guilt phase proceedings. The claims /issues were not conclusively refuted by the record. Therefore, the post-conviction court erred in denying at least an evidentiary hearing on these claims.

ARGUMENT II: The post-conviction court's failure to conduct a proper cumulative error analysis and the court's failure to consider the effects of these errors on the jury deprived Mr. Walker of his due process rights and a meaningful review of his post-conviction issues.

ARGUMENT AND CITATIONS OF AUTHORITY

ARGUMENT I

THE POST- CONVICTION COURT ERRED IN SUMMARILY DENYING ALL OF MR. WALKER'S GUILT PHASE CLAIMS THAT WERE RAISED IN HIS MOTION TO VACATE JUDGEMENTS AND SENTENCE PURSUANT TO FLORIDA RULE OF CRIMINAL PROCEDURE 3.851.

(A) Introduction

The post-conviction court summarily denied Mr. Walker's guilt phase claims that trial counsel failed to provide effective assistance of counsel[7]. A court can deny a claim without an evidentiary hearing "where 'the motion, files, and records in the case conclusively show that the movant is entitled to no relief.'" *Mungin v. State*, 932 So.2d 986, 995 (Fla. 2006) *quoting* Fla. R. Crim. P. 3.850(d) (footnote omitted); *see also Gaskin v. State*, 737 So.2d 509, 516 (Fla. 1999). Moreover, "[f]or all death case postconviction motions filed after October 1, 2001, Florida Rule of Criminal Procedure 3.851 requires an evidentiary hearing 'on claims listed by the defendant as requiring a factual determination.'" *Mungin*, 932 So.2d at 995, n.8 *quoting* Fla. R.Crim. P. 3.851(f)(5)(A)(i); *see also Amendments to Fla. Rules of Criminal Procedure 3.851, 3.852, & 3.993*, 802 So.2d 298, 301 (Fla. 2001).

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[7] The post-conviction court did grant an evidentiary hearing for Claim III pertaining to shackling of Mr. Walker in the presence of the prospective jurors.

(B) Standard of Review

To uphold the post-conviction court's summary denial of claims raised in a motion pursuant to Fla. R.Crim. P. 3.851, a reviewing court looks at whether the claims are either facially invalid or conclusively refuted by the record. *See McLin v. State*, 827 So.2d 948, 954 (Fla. 2002) *quoting Foster v. Moore*, 810 So.2d 910, 914 (Fla. 2002); s*ee also Mungin*, 932 So.2d at 996. In post-conviction proceedings, a defendant has the burden of establishing a legally sufficient claim. *See Mungin*, 932 So.2d at 996 *citing Freeman v. State*, 761 So.2d 1055, 1061 (Fla. 2000). If the court determines that the claim is legally sufficient, them the court "must [then] determine whether the claim is refuted by the record." *See Mungin*, 932 So.2d at 996 *citing Freeman v. State*, 761 So.2d at 1061; *see generally Lemon v. State*, 498 So.2d 923 (Fla. 1986); *see general Hoffmann v. State*, 613 So.2d 1250 (Fla. 1987); *and see general O'Callaghan v. State*, 461 So.2d 1354 (Fla. 1984). The post-conviction court must also support its summary denial by either stating the rationale or by attaching to its order of denial specific parts of the record that refute each claim presented in the motion. *See Mungin*, 932 So.2d at 995-996 *citing Anderson v. State*, 627 So.2d 1170, 1171 (Fla. 1993). It should be noted that "[t]he need for an evidentiary hearing presupposes that there are issues of fact which cannot be conclusively resolved by the record." *Holland v. State*, 503 So.2d 1250, 1252-1253 (Fla. 1987).

When a post-conviction court summarily denies post-conviction relief without conducting an evidentiary hearing, this Honorable Court must accept the defendant's "factual allegations as true to the extent they are not refuted by the record." *Rose v. State*, 774 So.2d 629, 632 (Fla. 2000) *receded from on other grounds by Guzman v. State*, 868 So.2d 498 (Fla. 2003); *see also Mungin*, 932 So.2d at 996; & *see also Hodges v. State*, 885 So.2d 338, 355 (Fla. 2004) *quoting Gaskin v. State*, 737 So.2d 509, 516 (Fla. 1999). Moreover, "[w]hen a determination has been made that a defendant is entitled to an evidentiary hearing (as in this case), denial of that right would constitute denial of all due process and could *never* be deemed harmless." *Holland*, 503 So.2d at 1253 (emphasis added). Furthermore, factual allegations as to the merits of a constitutional claim as well as to issues of diligence must be accepted as true and an evidentiary is warranted when the claims involve "disputed issues of fact." *Maharaj v. State*¸ 684 So.2d 726, 728 (Fla. 1996).

Mr. Walker is entitled to an evidentiary hearing because the claims discussed below and raised in his Motion to Vacate Judgments and Sentence are legally sufficient and not refuted by the record. Furthermore, the records attached by the post-conviction court fail to conclusively show that Mr. Walker is not entitled to any relief. (PCROA Vol.XI, p.1769-1892, Vol.XII, p.1893-2092, Vol.XIII, p.2093-2292, & Vol.XIV, p.2293-2447).

(C) Mr. Walker's trial counsel failed to provide effective assistance of counsel as governed by the Supreme Court of the United States in Strickland v. Washington, during the guilt phase proceedings

Ineffective assistance of counsel claims are governed by the Supreme Court of the United States decision in *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed. 2d 674 (1984). Such claims have two components: (1) a petitioner must show that counsel's performance was deficient, and (2) that the deficiency prejudiced the defense. *See Strickland,* 466 U.S. at 687, 104 S.Ct. at 2064. To establish deficient performance, a petitioner must establish that counsel's representation "fell below an objective standard of reasonableness" and that the deficient performance prejudiced the defense. *Id*. at 688. This requires a showing that counsel's errors were so serious as to deprive the petitioner of a fair trial whose result is reliable. *See id*. at 686-687. Furthermore, "when a defendant fails to make a showing as to one prong, it is not necessary to delve into whether he has made a showing as to the other prong." *Waterhouse v. State*, 792 So.2d 1176, 1182 (Fla. 2001).

It is established that "[t]he proper measure of attorney performance remains simply reasonableness under prevailing professional norms." *Strickland*, 466 U.S. at 688, 104 S.Ct. at 2065. The *Strickland* Court held that counsel has "a duty to bring to bear such skill and knowledge as will render the trial a reliable adversarial

testing process." *Id*. at 688. The Supreme Court of the United States also set out how to review an attorney's performance as follows:

> [j]udicial scrutiny of counsel's performance must be highly deferential and a fair assessment of attorney performance requires that every effort be made to eliminate the distorting effect of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time. Because of the difficulties inherent in making the evaluation, a court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance.

Id. at 689. Both prongs of the *Strickland* test present a mixed question of law and fact, whereby 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 Sochor v. State*, 883 So. 2d 766, 771-72 (Fla. 2004).

Mr. Walker's trial counsel's failures discussed below was deficient performance and constituted ineffective assistance of counsel pursuant to *Strickland*. The post-conviction court erred in failing to grant an evidentiary hearing on these issues/claims.

(i) Trial counsel failed to timely object to the admissibility of prejudicial testimony and photographic evidence of purported blood stains.

(ii) Trial counsel failed to present expert testimony to the jury to show that Mr. Walker's confession to Agent Alexis Herrera was not freely and voluntarily made.

(i) Trial counsel failed to timely object to the admissibility of prejudicial testimony and photographic evidence of purported blood stains.

Mr. Walker titled this claim in his Motion to Vacate Judgments of Conviction and Sentence as "Failure to File a Motion in Limine or to Object in a Timely Manner to Testimony and Photographic Evidence of Alleged Blood Stains." [8] (PCROA Vol.VIII, p.1230-1232). Mr. Walker argued that trial counsel provided ineffective assistance of counsel because he failed to move to exclude non-relevant and prejudicial evidence of gruesome photographs and evidence of purported blood stains *in a timely manner*. (PCROA Vol.VIII, p. 1230-1232). Mr. Walker requested an evidentiary hearing on this claim. (PCROA Vol.VIII, p.1224 &1230-1232). The post-conviction court heard argument from Mr. Walker and the State during the case management conference conducted on October 20, 2008. (PCROA Vol. I, p.121-122). Mr. Walker made the following argument to the post-conviction court:

> Judge, moving on to sub claim B under claim one, which is the motion in limine in objections to blood stain. Judge we are going to be requesting a hearing on this particular claim.
> Specifically, your honor, we have evidence that relates to the claim, and counsel's failure to adequately investigate this case and these particular issues that we can establish.
> And I know one of the issues when this came up at trial was the identity of some of the blood stains was there and how they got there.

[8] Numbered as Claim I B in Mr. Walker's Motion to Vacate Judgments of Conviction and Sentence.

> The State had never actually linked that to this particular issue in Mr. Hammond[9], the victim in this case, that that was actually his blood. We actually have evidence we would be presenting to show that he did not properly investigate that particular issue, and that there was a basis for him to move to show that there possibly had been other people.
>
> There was a fight at that specific location where someone was bleeding a short time before this. So, that's clearly a factual basis that the Court would need to hear, and so for that reason we would ask for a hearing as to claim B."

(PCROA Vol.I, p.121-122). The State argued that this claim was procedurally barred as trial counsel objected to the photographs and moved for a mistrial at the trial proceedings, and that the evidence to be presented was not alleged in Mr. Walker's Motion to Vacate Judgments of Conviction and Sentence. (PCROA Vol.I, p.122). Thereafter, the post-conviction court rendered two separate written orders erroneously denying an evidentiary hearing on this claim. (PCROA Vol.IX, p.1409 &1417-1419 & Vol.XI, p.1746-1748).

The post-conviction court in its Order Denying in Part Defendant's Motion to Vacate Judgments of Conviction and Sentence and later in its Final Order Granting in Part and Denying in Part Defendant's Post-Conviction Motion made the following findings and ruling:

> 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

[9] The victim's name is misspelled in the transcript of the Case Management Conference; the correct spelling is Mr. Hamman. (PCROA Vol.I, p.97-179).

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."

As to the possible blood stains on the staircase outside the apartment, defense counsel did object, as admitted on page II 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. 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. Ritter testified that she believed, based on what she heard, that the victim had run out of the apartment and been chased. Defendant admitted in his statement to Herrera that Hammon had been 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 carried 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.

(PCROA Vol.XI, p.1746-1748 & Vol.IX, p.1417-1419) (citations omitted).

The post-conviction court erroneously denied Mr. Walker an evidentiary hearing on this issue. Mr. Walker relayed to the court that he wished to present evidence at the evidentiary hearing in support of the claim that trial counsel failed to effectively exclude the gruesome photographs and testimony of purported blood stains and also to show that there was another fight at the residence where someone was bleeding. (PCROA Vol.I, p.121-122).

Trial counsel failed to file or argue a motion in liminé prior to the trial proceedings seeking to exclude the non relevant and highly prejudicial gruesome photographs and testimony about purported blood stains at the crime scenes. (ROA Vol.XVII, p.1072-1079). Moreover, trial counsel failed to make the correct objection at the appropriate time to exclude testimony about and evidence of the purported blood stains depicted in the photographs. (ROA Vol.XVII, p.1072-1079). §90.401, Fla.Stat. defines relevant evidence as "evidence tending to prove or disprove *a material fact*." (emphasis added). Furthermore, §90.403, Fla. Stat. states in part that

> *Relevant evidence is inadmissible if its probative value is substantially outweighed by the danger of unfair prejudice*, confusion or issues, misleading the jury or needless presentation of cumulative evidence.

(emphasis added). The purported blood stains was not relevant evidence because it failed to prove or disprove any material fact in Mr. Walker's case and it's admission into evidence was erroneous because any probative value was substantially outweighed by the danger of unfair prejudice.

Agent Terrence Dean Laufenberg (hereinafter, "Agent Laufenberg") assigned to the Crime Scene Unit of the Brevard County Sheriff's Department testified as to the gruesome and prejudicial photographs that were admitted into evidence.[10] (ROA Vol.XII, p.1124-1125 & p.1158-1160). The photographs depicted a stairwell leading to Joel Gibson's apartment and the roadway outside the apartment complex with purported blood stains. (ROA Vol.XII, p.1124-1125 & p.1158-1160). Agent Laufenberg speculated that the stains on the stairwell and on the roadway were apparently blood stains. (ROA Vol.XII, p.1158-1160). The relevant excerpts from the trial testimony are as follows:

> Q.[11] What did you find at 3830 Valkaria Road?
>
> A.[12] Agent Reyes directed me to *apparent blood staining* on the stairwell leading up to Apartment 2, or Unit Number 2, at

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[10] Exhibits entered into evidence as State's Exhibits 50, 51, 52, 53, and 54.
[11] Direct examination questions by Assistant State Attorney Glenn Craig during the State's case-in-chief.

3830 Valkaria Road, and also down on to the roadway and down the roadway east to the railroad tracks.

(ROA Vol.XII, p.1158) (emphasis added)

Q. Agent Laufenberg, let me show you what is marked as State's DP, and ask you if you recognize that?

A. Yes, I do.

Q. What is it?

A. That is a photograph of the stairwell leading to Unit number 2 at 3830 Valkaria Road.

Q. All right. DQ, DR, DS, and DT.
(Exhibits presented to the witness.)
Do you recognize that?

A. Yes.
Q. What do you recognize those to be?
A. These are the photographs of the *apparent blood stains* on the roadway on Valkaria Road.

(ROA Vol.XII, p.1159-1160) (emphasis added).

When the State attempted to enter these exhibits into evidence, trial counsel responded, "No objection at this time, subject to being tied in." (ROA Vol.XII, p.1160). Trial counsel failed to make a proper and timely objection. *See Pagan v. State*, 830 So.2d 792, 812 (Fla. 2002), *see also Anderson v. State*, 863 So.2d 169, 184-185 (Fla. 2003). At this juncture, it was already too late as the jury had

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[12] Responses by Agent Laufenberg during the direct examination questioning by Assistant State Attorney Glenn Craig during the State's case-in-chief.

already heard about the blood stains in the stairwell and the roadway. Agent Laufenberg's testimony painted a gruesome crime scene of blood heading from the apartment to the roadway in the jury's mind. The harm was intensified with the admission of the photographs. Trial counsel's improper objection failed to do anything to prevent the admissibility of the photographs into evidence.

It is the trial court, and not trial counsel who made the appropriate objections and arguments. (ROA Vol.XII, p.1161, 1163, 1164, 1165, 1166, & 1167-1168). The trial court made the following findings:

> The Court: Until they are shown to be blood stains of the victim, they have no relevance. I presume some testing was done to establish these were blood stains of the victim. If it is not blood stains from the victim, then it has no relevance whatsoever. . . .
>
> In fact, it would be much more prejudicial than probative because it may have nothing to do with the incident.

(ROA Vol.XII, p.1161-1162).

> The Court: But, nobody saw him bleeding outside. The girls only saw him inside. No one saw him bleeding outside. ***There's been no testimony that he was bleeding outside.***

(ROA Vol.XII, p.1163) (emphasis added).

> The Court: This is a death penalty case, but - -
>
> . . .
>
> The Court: The Florida Supreme Court will scrutinize everything we say and everything we do. The objection has been made to relevance, and I am playing devil's advocate to a certain extent to ask these questions.
>
> . . .

> The Court: Well, the rule is if it tends to prove or disprove any fact in issue, and what he's raising is that the blood splatter outside doesn't prove that it was from the victim, it's totally irrelevant.
> In fact, it would be more prejudicial than probative. That is his argument as I understand it.

(ROA Vol.XII, p.1164-1165). These arguments are too late because the jury had been tainted by the "apparent blood stain" testimony. The post-conviction is incorrect in finding that just because trial counsel objected there was no basis for the ineffective assistance of counsel claim. (PCROA Vol.IX, p.1747). It is the timing of the objection that is pertinent to establish whether trial counsel was deficient. Trial counsel was ineffective because he failed to litigate this issue in a pre-trial motion in liminé, and later he failed to object in a timely manner. Trial counsel failed to file or argue a motion in liminé seeking to exclude this testimony that could have cured this prejudice. The motion would have been litigated prior to the trial proceedings and if granted, the jury would have never seen or heard about the purported blood stains in the stairwell or outside roadway.

Additionally, trial counsel failed to raise objections to the photographs when the State provided them for him to look over. (ROA Vol.XII, p.1159). The act of competent trial counsel to exclude the photographs and prevent testimony of apparent blood stains by Agent Laufenberg was not taken by Mr. Walker's trial counsel.

Even, the trial court recognized the error of trial counsel's untimely objection and stated:

> The Court: Here's the situation. I think it maybe error to let it in. But, you've already got the testimony of two or three witnesses that they saw it. If you want to take that risk, I will let you put it in.
> . . .
>
> The Court: I think it's relevant tending to prove or disprove, but, I think Mr. Studstill is going to argue there's no evidence that's the victim's blood. He would be right in doing so.
> . . .
>
> The Court: It goes to the weight.

(ROA Vol.XVII, p.1166-1167). The trial court struggled with the issue of relevance and admissibility of the photographs of the purported blood stained scene because trial counsel failed to act to exclude or limit prior witnesses from testifying as to the purported blood splatter, either via a motion in liminé or by making a timely objection. The trial court further questioned the prosecutor's decision to introduce the photographs of the alleged blood stained stairwell and roadway, and stated that it "doesn't have that much evidentiary value because you've got witnesses already testifying they saw blood splatter." (ROA Vol.XVII, p.1167-1168). It is at this juncture, that the record shows that trial counsel recognized that he committed an error by failing to timely object to the testimony regarding the blood splatter from Mr. Goss and Agent Laufenberg. Trial counsel and the court had the following discussion:

Mr. Studstill: Judge, Holcomb, while we're on this part, you'll let the pictures in and there's been some testimony already from Mr. Goss and this witness that there were some blood stains around, but they're never going to be connected any better than what they've been connected at this point with the Defendant.
So, I believe - - I'm making a Motion for Mistrial at this point *because of the evidence that did come in verbally*, let alone the pictures.

The Court: Was it objected to?

Mr. Studstill: I'm sorry, Judge?

The Court: Was there an objection to the verbal testimony?

Mr. Studstill: Well, there wasn't because - -

The Court: Well, it's waived then, isn't it?

Mr. Studstill: Well, yes.

The Court: Unless, it's fundamental error.

Mr. Studstill: All right. I've made my Motion. I think - -

(ROA Vol.XVII, p.1169-1170) (emphasis added). Trial counsel by his own admission failed to make timely objections to the purported blood splatter testimony.

Despite, the aforementioned trial court's rulings and cautionary notes, trial counsel failed to make any objections to Agent Laufenberg's testimony regarding apparent blood stains found inside the 1990 Grand AM that was believed to belong to Leigh Ford. (ROA Vol.XIII, p.1235-1238). Agent Laufenberg and the prosecutor continuously referred to the purported stains in the vehicle as blood

stains with no objection or argument from trial counsel. (ROA Vol.XIII, p.1235-1238). The following is the pertinent excerpts from the direct examination of Agent Laufenberg:

> Agent Laufenberg: That is a picture of a 1990 Grand-Am, 23 maroon-colored automobile.
>
> The Prosecutor: What if any association does that have to your work?
>
> Agent Laufenberg: I processed this vehicle to attempt to collect any evidence in regards to this case that the victim was transported in the trunk of this car.
>
> The Prosecutor: Now, did you - - What observations did you make when you looked at that vehicle?
>
> Agent Laufenberg: When we searched the vehicle, the inside interior of the trunk, the liner of the trunk appeared to have been removed. You could see what appeared to be cleaning marks where somebody cleaned the floor of the trunk.
> But, I also located several *what appeared to be blood stains* throughout the trunk.
>
> The Prosecutor: Did you document some of those things photographically?
>
> Agent Laufenberg: Yes.
>
> The Prosecutor: I'm now showing you - - MR. STUDSTILL: First, let me show these to Mr. Studstill.
> (Exhibit presented to the Defense counsel and the defendant.)
>
> The Prosecutor: Showing you *Exhibits EB and EC*.
> (Exhibits presented to the witness.) EB and EC, do you recognize those?
>
> Agent Laufenberg: Yes.

The Prosecutor: What are those?

Agent Laufenberg: *Pictures of blood stains* within the trunk of the automobile.

. . .

The Prosecutor: And, one of those has a five associated with that. Was that -- what does that mean?

Agent Laufenberg: That is just the *fifth area of blood stain* that I identified within the trunk.

. . .

Agent Laufenberg: This is the packaging that contains the swab box with the swab taken from inside of the trunk of the vehicle, Number 5 of the vehicle.

The Prosecutor: Now, was that submitted to the laboratory for examination?

Agent Laufenberg: Yes.

The Prosecutor: Of all the swabs taken from out of the trunk, how many were sent to the lab?

Agent Laufenberg: *Just this one*.

. . .

The Prosecutor: And, I got ahead of myself here. I wanted to offer into evidence Exhibits EB and EC, identified as photographs of blood stains in the trunk of the vehicle that was shown in 31 and 32.

The Court: Any objections, Mr. Studstill?

Trial Counsel: *No objection*.

(Whereupon, State's Exhibits EB and EC for identification were received in evidence as State's Exhibit Seventy-one and Seventy-two.)

> The Prosecutor: I' m sorry, Judge, I misspoke. The vehicle that was shown in Exhibits 30 and 31.

(ROA Vol. XIII, p.1235-1241& Vol.XVIII, p.1061-1062) (emphasis added).

The foregoing excerpt displays that after moving for a mistrial, trial counsel permitted even more photographs of blood stains to be admitted without objection. The photographs and testimony are not relevant and only painted a gruesome crime scene of blood, with no evidence that the stains were actually blood or that the stains even belonged to the victim. The testimony and photographs failed to prove or disprove any material fact. *See* § 90.403, Fla. Stat. Florida Department of Law Enforcement crime lab analyst Ward Schwoob (hereinafter, "Analyst Schwoob") also testified that reddish-brown stains found all over the inside of Mr. Hamman's pick-up truck leading to the tail gate "looked like blood stains." (ROA Vol.XIV, p.1439-1430). This testimony of the blood inside and outside the driver's side of the pick-up truck was also admitted without any objection. (ROA Vol.XIV, p.1430-1431). None of the testimony pertaining to the apparent blood stains served to prove or disprove any material fact. Its only purpose was to ensure that the jury visualized a bloody murder/crime scene and to enhance Mr. Walker's punishment accordingly. Trial counsel failed to make effective effort to exclude the aforementioned irrelevant evidence from the jury by either a motion in liminé or a timely objection. No competent counsel would allow the State to paint such a gruesome scene without subjecting the State to their burden or establishing

relevance and presenting forensic evidence which conclusively established that it was blood.

This evidence was highly prejudicial and served to inflame the jury with bloody crime scenes to Mr. Walker's detriment. The State argued the following in closing remarks:

> But, there is blood in multiple areas of the apartment, on the door, on the floor, and all of that is consistent with a vicious, extraordinary, serious beating, and it's consistent with David Hamman being the one that was beaten in this apartment.
>
> You know, if they had only quit, if they had only quit there and David Hamman would have been able to survive or escape, I would [not] be standing here today asking you to find Robert Walker guilty because the evidence establishes beyond every reasonable doubt that he has committed an aggravated battery.
>
> . . .
>
> You know, David used his last strength, last effort in his life to try to get away, and you know, that opportunity at that point was another chance for Robert Walker just to let it go. But, you know the path he chose. He chose to chase David down, beat him some more, and imprison David in the dark trunk of Leigh Ford's car.

(ROA Vol.XV, p.1727 &1740-1741). The irrelevant purported blood stain testimony and photographs aid the State's closing remarks in painting a path taken by Mr. Hamman of desperation to save his life. The State highlighted the purported blood stain testimony and inflammatory photographs to mark a bloody path that the victim took. Without any evidence that the purported blood stain evidence in the stairwell, the roadway, the Grand AM, or in the pick-up truck was Mr.

Hamman's blood or even that these stains were blood at all. Trial counsel's deficient performance allowed the State to suggest a horrific escape by Mr. Hamman which evoked the emotion of the jury to Mr. Walker's detriment.

In his Motion to Vacate Judgments of Conviction and Sentence, Mr. Walker pled with sufficient specificity that trial counsel's failure to file a motion in liminé or to object in a timely manner to the evidence of purported blood stains was error. These claims were legally sufficient and were not conclusively refuted by the record, and Mr. Walker was entitled to an evidentiary hearing. Mr. Walker met his burden to establish a prima facie case based upon a legally valid claim. *See Hannon v. State*, 941 So. 2d 1109, 1138 (Fla. 2006) *quoting Freeman v. State*, 761 So. 2d 1055, 1061 (Fla. 2000). He did not just make mere conclusory allegations. *See id*. Trial counsel's performance was deficient, and prejudiced the defense because it fell below an objective standard of reasonableness. *See Strickland,* 466 U.S. at 687-688. Mr. Walker requests that this Honorable Court to reverse the post-conviction court's order pertaining to this issue / claim and grant Mr. Walker an evidentiary hearing on this issue / claim.

(ii) Trial counsel failed to present evidence to show that Mr. Walker's statements to Agent Alexis Herrera were not freely and voluntarily made to the jury during the guilt phase proceedings.

Mr. Walker titled this claim in his Motion to Vacate Judgments of Conviction and Sentence as "Failure to Present Evidence that Mr. Walker's

Statement was not Freely and Voluntarily Made to the Jury." [13] (PCROA Vol.VIII, p.1237-1239). Mr. Walker argued in his motion that trial counsel rendered ineffective assistance of counsel because he failed to consult and present an expert to assess the effect of drug use, sleep deprivation, and mental illness on Mr. Walker's statements to Agent Alexis Herrera (hereinafter "Agent Herrera"). (PCROA Vol.VIII, p.1237-1239). Mr. Walker requested an evidentiary hearing on this claim. (PCROA Vol.VIII, p.1224 &1237-1239). The post-conviction court heard brief argument from Mr. Walker during the case management conference conducted on October 20, 2008. (PCROA Vol.I, p.136).

The post-conviction court denied Mr. Walker a hearing on this issue and stated the following:

> 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

[13] Numbered as Claim I F. in Mr. Walker's Motion to Vacate Judgments of Conviction and Sentence.

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.

(ROA Vol.IX, p.1422-1423 & Vol.XI, p.1750-1752).

The issue before this Honorable Court specifically relates Mr. Walker's trial counsel's failure to present any evidence during the guilt phase to the jury in order to attack the voluntariness of Mr. Walker's statements to Agent Herrera. The trial court gave the following Florida Standard Jury Instruction 3.9(e) regarding "Defendant's Statements" to the jury during the guilt phase proceedings:

> A statement claimed to have been made by the defendant outside of court has been placed before you. Such a statement should always be considered with caution and be weighed with great care to make certain it was freely and voluntarily made.
>
> Therefore, you must determine from the evidence that the defendant's alleged statement was knowingly, voluntarily, and freely made. In making this determination, you should consider the total circumstances, including but not limited to
>
> 1. whether, when the defendant made the statement, he had been threatened in order to get him to make it, and
>
> 2. whether anyone had promised [him] [her] anything in order to get him to make it.
>
> If you conclude the defendant's out of court statement was not freely and voluntarily made, you should disregard it.

Fla.Std.Jury.Instr. (Crim) 3.9(e). (ROA Vol.V, p.806). This instruction specifically directs the jury to look at the totality of circumstances surrounding the Mr. Walker's out of court statements, specifically but not limited to the recorded statements to Agent Herrera. The post-conviction court erroneously held that credibility of Mr. Walker's confession is what is at issue. (PCROA Vol.IX, p.1422-1423 & Vol.XI, p.1750-1752).

The plain meaning of the jury instruction instructs the jury to disregard Mr. Walker's statements if they found the statements to not have been freely and voluntarily made. There is no assessment of credibility required in the jury instruction. A statement can be credible on its face, but if it is not made freely and voluntarily, then it must be disregarded by the jury. The post-conviction Court incorrectly held the following:

> 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.*

(PCROA Vol.XI, p.1751) (emphasis added). The post-conviction court recognizes the possibility that Mr. Walker's mental problems, drug use, physical exhaustion and subjective fear of the police would affect the voluntariness of Mr. Walker's confession. However, the post-conviction court erroneously held that the involuntary nature only impacts upon the statement's credibility. As the jury instruction clearly states, a jury is to render the statements inadmissible if they make a finding that they are not made freely and voluntarily. A jury would assess the credibility of evidence pursuant to Fla.Std.Jury.Instr. (Crim) 3.9[14]. (ROA

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[14] Fla.Std.Jury.Instr. (Crim) 3.9 on "Weighing the Evidence" given to the jury in Mr. Walker's case stated the following:

Vol.V, p.802). Therefore, the post-conviction court's ruling focusing on credibility is erroneous.

Trial counsel failed to present any testimony during the guilt phase to attack the voluntariness of Mr. Walker's statements to Agent Herrera. Trial counsel did

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> It is up to you to decide what evidence is reliable. You should use your common sense in deciding which is the best evidence, and which evidence should not be relied upon in considering your verdict. You may find some of the evidence not reliable, or less reliable than other evidence.
> You should consider how the witness acted, as well as what they said. Some things you should consider are:
>
> 1. Did the witness seem to have an opportunity to see and know the things about which the witness testified?
>
> 2. Did the witness seem to have an accurate memory?
>
> 3. Was the witness honest and straightforward in answering the attorney's questions?
>
> 4. Did the witness have some interest in how the case should be decided?
>
> 5. Does the witness testimony agree with the other testimony and other evidence in the case?
>
> 6. Did the witness at some other time make a statement that is inconsistent with the testimony he gave in court?
>
> You may rely upon your own conclusion about the witness. A juror may believe or disbelieve all or any part of the evidence or the testimony of any witness.

(ROA Vol.V, p.802).

file and argue a pre-trial Motion to Suppress Mr. Walker's statements. (ROA Vol.V, p.679-684 & Vol.I-II, p.120-291). During the three [3] day motion to suppress hearing, trial counsel presented testimony by Howard Raymond Bernstein, Ph.D. (hereinafter "Dr. Bernstein"), a license psychologist in the State of Florida. (ROA Vol.II, p.206). Dr. Bernstein testified at the motion hearing that he had reviewed Mr. Walker's medical records and that he had interviewed Mr. Walker on two [2] occasions. (ROA Vol.II, p.207-208). Dr. Bernstein, an expert in forensic psychology, opined the following pertinent findings with regard to Mr. Walker's mental problems, drug use, physical exhaustion and subjective fear of the police:

> Q.[15] All right, based upon your experience and your view of the records that you've had supplied to you, that you picked up in Brevard County did you determine whether or not Mr. Walker has a mental problem of any kind?
>
> A. Yes, sir.
>
> Q. What's that?
>
> A. Okay, the records in Suwannee County diagnose a depression and he was medicated with psychiatric medicine for issues related to that depression, anxiety, and sleep disorder.
> The Brevard County Jail forensics unit through Circles of Care, the psychiatrist examined and has treated Mr. Walker since his detention.
> He's been diagnosed with a bipolar disorder with psychotic features. This is of course a good deal more serious then something we would call quote, depression, unquote.

[15] Direct Examination by trial counsel Kenneth Studstill.

He's being significantly medicated by what we would call psychoactive and psychotropic medication to control and stabilize such bipolar psychotic disorder.

Q. Do you have any problem though communicating with Mr. Walker?

A. No, sir. The severe and chronic mental disorder seems to be controlled and stabilized by the psychiatric medicine. He seems to be intact. I would say capacity to proceed is adequate.

Q. Based upon the information that you have about his condition on January the 27th of last year, 2003, did you find any information that he was under the influence of any kind of mind altering drugs on that day?

A. Yes, sir, from the defendant.

. . .

A. Okay, I can lead up to this. The defendant had basically told me that he was on a seven day run, or seven day binge of dope and maybe two to three hours of sleep each day.

The drugs he was using at the time would include methedrine, and that was smoked as well as oral, cocaine and quote "eating pills, snorting coke." He told me that just before his arrest quote," he had a last hit of dope." Quote, "it was right before, ate me a pill, did me a line. It was pretty strong, we didn't cut it with noting."

So, it's my understanding that this medication was the last bit of drugs that he had before the arrest at the bus station in Live Oak.

. . .

Q. Okay, so there was a period of time there. Are you familiar with the drugs that he was under the influence of on 25 that day?

A. Yes, certainly.

Q. Well, do they last after the last hit for any length of time or did they dissipate very quickly?

A. The research from the diagnostic statistical manual will show us both the cocaine and the amphetamine are what you would call long lasting central nervous system stimulants and psychoactive stimulants. They are longer lasting typically then the other kinds of drugs. So, given the longer lasting effect plus the psychoactive influences it seems clear that he still was under the control because of the heavy load and the frequent dosing during the whole day.

Q. That would be your independent opinion, but is it consistent with what he told you?

A. Yes, sir.

Q. Taken these drugs and having been diagnosed as a bipolar -- I forgot what you said, bipolar almost psychotic or whatever it was. Would these drugs have more of an effect on a person with that condition then they would a person that did not have that condition?
A. Yes, sir. It would be what we call an aggravation effect, or potentiation effect, or an exaggeration effect. It would magnify the intensity of the illness.

Q. Okay, Doctor Bernstein, are you able to tell us based upon the information that you received for him, and based on the records that you reviewed, and based upon your practical experience and professional training whether in your opinion my client, Mr. Walker, voluntarily spoke to the officers from Brevard County?

A. I have some opinions about the whole issue from knowing, intelligent, voluntarily, uncoerced.

Q. All right, tell us what that is, that's all involved?

A. Certainly. I'm aware of only from what Mr. Walker told me. I have not read the transcript, I have not listened to anything. So, this data is only based on what I know and so I have severe questions.
The issue of the frequent dosing, the high dosing of the drugs, long lasting effect, plus the psychoactive effect of the drugs, and of the amphetamines clearly that's poor judgement.
Paranoid trends, overtly psychotic thinking, and this seems to have potentiated and exaggerated his already pre-existing, some kind of a

bipolar condition. I would say one, that I believe from speaking to Mr. Walker that he knew what he was doing in terms of knowing.
He told me very clearly why he did what he did, and he knew what he was doing at the time. I have to say due to all the drugs and the mental disorder I believe it was somewhat less than intelligent however, but it's clear that he knew he was doing.
When it comes to the voluntariness my concern here is the disinhibiting effect of all the drugs for this seven day run along with the frequent high dosing at the time shortly before the confession.
That would have been six to eight hours before – excuse me, the statement. With that I would strongly suggest, not that it was involuntary because I don't have enough data, but I believe that his behavior in giving this statement was somewhat less then voluntary, although he knew what he was doing because he was somewhat loss of control, disinhibited.
I find that when it comes to the issue of being coerced I have two issues on that. Number one, Mr. Walker seems to think in some way he was coerced by one of the officers. I wouldn't know that. That's his business and he can testify to that.
The second issue of coercion has to do with the lack of impulse control almost as if the drugs potentiating the mental disorder some how forced him because he did not have the appropriate control.
So, I would say I believe his statement was less then voluntary knowing some what uncoerced. Again, I hate to be wishy washy, and some what less than intelligent, and that's all I have because I have not listened to the tapes or read the transcripts.

Q. Doctor Bernstein, now tell me, in effect he really didn't sleep much for about a week, is that correct?

A. Yes, sir.

Q. Would sleep deprivation be a factor in determining your opinion as to whether or not this thing was voluntary?

A. Yes, sir. You have issues of lower mental stamina, the fatigue, the tiredness, and that would clearly loosen the inhibitions if you would and make the loss of impulse control more likely, or deterioration and disinhibition more likely. We call it a discontrolled syndrome, out of control or less control.

(ROA Vol.II, p.208-214).

Trial counsel failed to present any evidence to the jury that at the time Mr. Walker made the statements to Agent Herrera, he was suffering from serious mental health problems, serious drug abuse, physical exhaustion, and a serious paranoia regarding law enforcement. Had trial counsel done so through expert testimony such as Dr. Bernstein's, the jury could have deemed that Mr. Walker's statements were less than voluntary because of his mental illness that was affected by the high dosage of illicit drugs taken prior to the statements made to Agent Herrera. It should be noted that Dr. Bernstein's testimony at the motion hearing was deficient because trial counsel failed to provide him with the recordings or the transcript of Mr. Walker's interview to review as part of his opinion. (ROA Vol.II, p.213). Trial counsel failed to elicit the totality of circumstances to the jury of the circumstances surrounding Mr. Walker, when he was interviewed by Agent Herrera.

Strickland recognizes that there is a strong presumption that trial counsel's performance was not ineffective and that the defendant carries the burden to "overcome the presumption that, under the circumstances, the challenged action might be considered sound trial strategy." *See Strickland*, 466 U.S. at 689 *quoting Michel v. Louisiana*, 350 U.S. 91, 101 (1955). However, in *Occhicone v. State*, 768 So. 2d 1037, 1048 (Fla. 2000), this Court held that "strategic decisions do not

constitute ineffective assistance of counsel if alternative courses have been considered and rejected and counsel's decision was reasonable under the norms of professional conduct." In Mr. Walker's case, there was no opportunity to question trial counsel as to his reasons behind the decision not to attack the voluntariness of Mr. Walker's statements due to mental illness and drug abuse during the trial because an evidentiary hearing was denied. There is no reasonable trial strategy for failure to present expert testimony of Mr. Walker's mental problems, drug use, physical exhaustion and paranoia of law enforcement at the guilt phase proceedings to attack the voluntariness of Mr. Walker's statements.

Mr. Walker is prejudiced by trial counsel's failure to attack the voluntariness of his statements to Agent Herrera. The prejudice is that Mr. Walker's incriminating statements were considered by the jury. On January 27, 2003, Agent Herrera and Agent Louis Heyn (hereinafter "Agent Heyn") questioned Mr. Walker who was in custody at the county jail. (ROA Vol.XIII, p.1262 &Vol.XIV, p.1517, 1518). After a brief conversation, the interview of Mr. Walker was tape-recorded. (ROA Vol.XIII, p.1287). It was introduced into evidence via Agent Herrera and played during the testimony of Agent Heyn. (ROA Vol.XIII, p.1268, Vol.XIV, p.1523, & Vol.XVIII, Exhibit #74 (no page number)). The prejudice is clear when looking at the damaging and incriminating statements made by Mr. Walker during this interview. (ROA Vol.XIV p.1523-1600 & Vol.XV p.1613-1618). Mr.

Walker's final statements to the agents is evidence that clearly illustrates why trial counsel was ineffective for failing to litigate the voluntariness of Mr. Walker's statements. Mr. Walker stated the following:

> I'm not a cold killer. I may have killed him. I said it. Which there (inaudible) at this point. I didn't want to. Nobody ever wants to do anything.
> Man, I'm still scared.
> he's gone and I am still scared. I mean, I don't know how he acquired that information, because that's information that no one has. And I still do not get it.
> . . .
> I'm very - - just - - I know this is going to haunt me for the rest of my days. I dream about this. Already am.

(ROA Vol.XV, p.1618). The foregoing statements show Mr. Walker's mental state was impaired. The jury, with more information from an expert like Dr. Bernstein, could reasonably have concluded that Mr. Walker was paranoid and that as a result of his mental illness and drug abuse his statements were not voluntarily made. A properly informed jury could have disregarded the statements as permitted by Fla.Std.Jury.Instr. (Crim) 3.9(e). Due to trial counsel's ineffective assistance, Mr. Walker's jury was never able to assess the statements properly and the exclusion option was not afforded to Mr. Walker.

Furthermore, Agent Heyn was the last witness presented by the prosecutor, thus Mr. Walker's incriminating statements were close to the last words that the jury heard prior to closing remarks. (ROA Vol.XV, p.1618). This timing is significant as Mr. Walker's words are the last significant piece of evidence heard

by the jury and is unchallenged by trial counsel via expert testimony as to the voluntariness of the statements. (ROA Vol.XV, p.1618). Moreover, these statements were very important to the jury because they asked to hear them again during their penalty phase deliberations. (ROA Vol.XVI, p.1934-2000 & Vol.XVII, p.2013-2029). These statements played a very important role in the conviction of Mr. Walker.

Mr. Walker’s tape-recorded statements were a pertinent part of the prosecution’s case. The prosecutor in opening statements referred to Mr. Walker’s statements by stating the following:

> That statement was recorded on a digital recorder and that recording was copied to a disk. We anticipate that we will offer that recording and play that recording for you of the Defendant's words in his statement explaining and describing the events of the time period that I have talked with you about.

(ROA Vol.XI, p.850). Then, in closing remarks the prosecutor referred to Mr. Walker’s statements as follows:

> Folks, you know, among other things, Robert Walker did admit during the course of the conversation he had with the police he hit David Hamman with the flashlight.

(ROA Vol.XV, p.1728).

> When Robert Walker made his statement to the police, there hasn't even been a hint that the police told him what the case was about before they interviewed him.
> It is clear on the - - we all want to call it a tape, but technology has gone beyond that, and now it's a digital recording -- but, the information on that tape came from Robert Walker, and if what he

> told the police were different from the physical evidence, if it were different from the testimony of the witnesses, that would really be troubling to you. But, even his side of it is consistent with the rest of the witnesses.

(ROA Vol.XV, p.1728-1739).

> We also know that David was killed laying on his back with his hands tied behind his back. We know because Robert Walker told us that David was alive and conscious while he was laying on the ground out there.
> Remember; he told us – Robert Walker told us through his statement to the police, or claimed that David was making some threats against Robert Walker's family.

(ROA Vol.XV, p.1734-1735).

> In the end, Robert Walker does admit to shooting David Hamman. Mr. Studstill says he didn't really admit it, but, ladies and gentlemen, when you think back to what you heard on that, all he really says is he doesn't remember how many times he shot him.

(ROA Vol.XV, p.1738-1739).

> Now, you know from the Defendant's statement that at that point they decided that they had to put these flex ties around him to cuff his hands. They didn't have to do that. That was a decision they made so that when Robert Walker was able to finally kill David, he had no opportunity whatsoever to help himself.

(ROA Vol.XV, p.1743).

The aforementioned remarks indicate how important Mr. Walker's statements were to the prosecution, as it bolstered the testimony of other witnesses and their position that the killing was premeditated. The best trial counsel did was to remark that there were inconsistencies between some of the witnesses about

what happened and to warn the jury to consider Mr. Walker's statements with caution during closing remarks in the guilt phase proceedings. (ROA Vol.XV, p.1705). Trial counsel never challenged the statements as to Mr. Walker's voluntariness. At the very least trial counsel could have educated the jury as to Mr. Walker's mental illness, drug addiction, physical exhaustion and paranoia at the time he made the incriminating statements.

In his Motion to Vacate Judgments of Conviction and Sentence, Mr. Walker was pled with sufficient specificity for the post-conviction court to have granted an evidentiary hearing on the claim / issue. The claim / issue was not conclusively refuted by the record and Mr. Walker met his burden to establish a prima facie case based upon a legally valid claim. *See Hannon*, 941 So. 2d at 1138 *quoting Freeman v. State*, 761 So. 2d at 1061 (Fla. 2000). Mr. Walker is entitled to an evidentiary hearing. No testimony exists to support trial counsel's failure to challenge the voluntariness of the statements made by Mr. Walker as strategic or reasonable. *See Strickland*, 466 U.S. at 689 *quoting Michel v. Louisiana*, 350 U.S. 91, 101 (1955). Mr. Walker was deprived of a fair trial because trial counsel failed to challenge damaging statements, which could have been disregarded by the jury. *See Strickland*, 466 U.S. at 686-687. Mr. Walker requests that this Honorable Court reverse the post-conviction court's order pertaining to this issue / claim and grant Mr. Walker an evidentiary hearing on this issue / claim.

ARGUMENT II

THE POSTCONVICTION COURT ERRED IN DENYING THE CLAIM THAT, CUMULATIVELY, THE COMBINATION OF PROCEDURAL AND SUBSTANTIVE ERRORS DEPRIVED APPELLANT OF A FUNDAMENTALLY FAIR TRIAL GUARANTEED UNDER THE FOURTH, FIFTH, SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND THE CORRESPONDING PROVISIONS OF THE FLORIDA CONSTITUTION.

Mr. Walker was denied a fundamentally fair trial pursuant to his rights under the Fourth, Fifth, Sixth, Eighth and Fourteenth Amendments of the United States Constitution. *See Heath v. Jones*, 841 F.2d 1126 (11th Cir. 1991). The post-conviction court first erroneously denied this claim in its Order Denying in Part Defendant's Motion to Vacate Judgments of Conviction and Sentence. (PCROA Vol.IX, p.1437). The post-conviction reiterated its ruling in its Final Order Granting in Part and Denying in Part Defendant's Post-Conviction Motion and erroneously held that "[a] general claim of cumulative error is insufficient to warrant a hearing and relief" (PCROA Vol. XI, p.1765).

There were repeated instances of ineffective assistance of counsel that produced an unconstitutional process that significantly tainted and prejudiced Mr. Walker's capital proceedings. The verdict in Mr. Walker's jury trial was unreliable because of the errors that occurred during the trial. Specifically, trial counsel failed to timely object to the admissibility of the prejudicial testimony and photographic

evidence of apparent blood stains, and trial counsel failed to present evidence that Mr. Walker's testimony was not freely and voluntarily made to the jury during guilt phase proceedings. The post-conviction court found trial counsel's performance to be so deficient during the penalty phase proceedings that it vacated Mr. Walker's death sentence [by a single deciding vote] and granted him a new penalty phase. The cumulative effect of those errors and the aforementioned guilt phase errors denied Mr. Walker his fundamental rights under the Constitution of the United States and the Florida Constitution. *See State v. DiGuilio*, 491 So.2d 1129 (Fla. 1986); & *see also Ray v. State*, 403 So.2d 956 (Fla. 1981). Therefore, Mr. Walker requests that this Honorable Court reverse the post-conviction court's order pertaining to this issue / claim and grant Mr. Walker Mr. Walker requests that this Honorable Court reverse the post-conviction court's order pertaining to this issue / claim and either grant Mr. Walker a new guilt phase proceedings or an evidentiary hearing on this issue / claim.

CONCLUSION

Based on the foregoing and the record, the post-conviction court improperly denied Mr. Walker post-conviction relief. Specifically, the post-conviction court improperly denied Mr. Walker an evidentiary hearing on his guilt phase claims and improperly denied the vacation of Mr. Walker's convictions and granting him a new guilt phase proceeding. Mr. Walker respectfully requests that this Honorable Court reverse the post-conviction court's order pertaining to the guilt phase issues and either grant Mr. Walker a new guilt phase proceeding, or grant Mr. Walker an evidentiary hearing on the outstanding guilt phase claims, or grant such other relief as this Court deems just and proper.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing Initial Brief of the Appellant has been furnished by United States Mail to Barbara C. Davis, Assistant Attorney General, Office of the Attorney General, 444 Seabreeze Blvd, 5th Floor, Daytona Beach, FL 32118-3951 and to Robert Shannon Walker II, DOC# 126605, Union Correctional Institution, 7819 NW 228th Street, Raiford, FL 32026 on this 4th day of October, 2010.

I HEREBY CERTIFY that, in compliance with this Honorable Court's Administrative Order *In Re: Mandatory Submission of Electronic Copies of Documents*, AOSC04-84, dated September 13, 2004, a copy of the Microsoft Word document of the foregoing brief has been transmitted in an electronic format to this Court's electronic mail at e-file@flcourts.org on this 4th day of October.

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CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY, pursuant to Fla.R.App.P. 9.210, that the foregoing was generated in Times New Roman 14 point font.

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