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

REPLY BRIEF OF THE APPELLANT AND ANSWER BRIEF OF THE CROSS-APPELLEE

RAHEELA AHMED & CAROL C. RODRIGUEZ
Florida Bar Nos. 0713457 & 0931720
Assistant CCRCs
Law Office of the Capitol Collateral Regional Counsel
Middle Region
3801 Corporex Park Drive, Suite 210
Tampa, FL 33619
(813) 740-3544

Counsels for the Appellant/Cross-Appellee
Robert Shannon Walker, II.

TABLE OF CONTENTS

Contents **Page(s)**

TABLE OF CONTENTS - *cont'd*

Contents **Page(s)**

TABLE OF AUTHORITIES

Cases **Page(s)**

TABLE OF AUTHORITIES- *cont'd*

Cases **Page(s)**

TABLE OF AUTHORITIES- *cont'd*

Cases **Page(s)**

Rules **Page(s)**

Other Authorities **Page(s)**

PRELIMINARY STATEMENT

In the first part of this document, the appellant, Robert Shannon Walker, II, (hereinafter referred to as “Mr. Walker”) relies on his Initial Brief of the Appellant for all purposes in his Reply Brief of the Appellant, and offers the replies discussed below to the Answer Brief of Appellee dated December 20, 2010, as to Arguments 1 and 2 as listed by the appellee.

Thereafter, the cross-appellee, Mr. Walker, also offers an answer to the Initial Brief of the Cross-Appellant dated December 20, 2010, as to Point I on Cross-Appeal as listed by the cross-appellant.

Consistent with the Initial Brief of the Appellant, the references to the record on appeal will once again 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.

STATEMENT OF THE CASE

(a) Statement of the case pertaining to the trial proceedings and post-conviction proceedings

Mr. Walker continues to rely on his Statement of the Case pertaining to the trial proceedings and to the post-conviction proceedings as presented in his Initial Brief of the Appellant from pages three [3] to seven [7].

STATEMENT OF THE FACTS

(a) Statement of the facts of the trial proceedings

Mr. Walker continues to rely on his Statement of Facts of the trial proceedings as presented in his Initial Brief of the Appellant from pages twelve [12] to thirteen [13] with regard to the guilt phase proceedings.

The relevant factual history from the penalty phase proceedings was also summarized by this Honorable Court in *Walker v. State*, 957 So.2d 560 (Fla. 2007), as it is relevant to the Answer Brief of the Cross-Appellee, as follows:

> 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, (June) 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. In its sentencing order, the trial court thoroughly considered each mitigator, finding that only mitigators (1), (2), (3), and (8) were established and giving each mitigator slight to moderate weight.

Walker, 957 So.2d at 583-584 (emphasis added).

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

Mr. Walker also continues to rely on his Statement of Facts of the post-conviction as presented in his Initial Brief of the Appellant from pages thirteen [13] to fourteen [14], as it is relevant to Mr. Walker's Reply Brief of the Appellant and Answer Brief of the Cross-Appellee.

(c) Statement of the facts of the evidentiary hearing

Mr. Walker presents the following statement of facts as to the evidence presented at the post-conviction evidentiary hearing conducted before the Honorable Charles M. Holcomb, Senior Circuit Judge of the Eighteenth Judicial Circuit in and for Brevard County, as it is relevant to his Answer Brief of the Cross-Appellee. An evidentiary hearing was conducted as to Claims II A[1] and III[2]

[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:

> 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

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). Only Claim II A is relevant to Mr. Walker's Answer Brief of the Cross-Appellee in response to the Initial brief of the Cross-Appellant.

On March 5, 2003, trial counsel, Kenneth A. Studstill, Esquire (hereinafter referred to as "trial counsel"), was appointed as conflict counsel to Mr. Walker. (ROA Vol.IV, p.504 & PCROA Vol.III, p.246). Trial counsel was the first witness presented by Mr. Walker at the evidentiary hearing on April 6, 2009. (PCROA Vol.III, p.238-390). Trial counsel testified that he believed that he was sworn in June of 1966, and has been continuously practicing in Titusville since then. (PCROA Vol.III, p.238-239). Trial counsel testified that his first involvement in a capital case was approximately in the late sixties or early seventies. (PCROA Vol.III, p.239). He has been involved in approximately fifteen [15], twenty [20], or so capital cases over the last twenty [20] years. (PCROA Vol.III, p.240). Trial counsel opined that he probably had as much experience in the courtrooms of Brevard County as any other lawyer in the county.[3] (PCROA Vol.III, p.366). With

---

> under the United States Constitution and his corresponding rights under the Florida Constitution.

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

[3] The appellee/cross-appellant stated under the heading, Evidentiary Hearings Facts, on page 13, that "Studstill had as much experience as any attorney in the

regard to requirements for being appointed to a capital case, trial counsel testified as follows:

> "Well, I don't think anything was required except being a lawyer for a long time, and then, then they came and got - - it came about that the Supreme Court had to make some sort of approval, had to give you a certification based upon your experience and also some sort of CLE stuff that was available to you, although a lot of that was difficult to find sometimes. And then I think - - but I think at first an independent judge could appoint someone without any kind of Supreme Court certification. I don't know what the status is now. I think somebody told me that everybody now, whether they're hired or appointed, have to have that Supreme Court certification, I don't know."

(PCROA Vol.III, p.242-243). Trial counsel recognized that the qualifications were increased because there was trouble with lawyers who were trying these cases, especially "related to the punishment phase" which "starts from the first day you interview your client." (PCROA Vol.III, p.243). Trial counsel testified that he has attended the "Life Over Death" seminar every time it was available in the past ten [10] years, but trial counsel had not attended the Continuing Legal Education seminars called "Death is Different" presented by the Florida Association of Criminal Defense Lawyers, or any other specific training related to capital cases or capital seminars. (PCROA Vol.III, p.244-245).

Trial counsel testified that he kept records of his time in Mr. Walker's case in the following manner:

---

county" without clarifying that this statement was trial counsel's opinion of his experience in the courtrooms of Brevard County.

> "Write it down. I have a pad, I still use it, and little slivers about the size of a bandage tape that you can peel off, I'd write stuff down on that, it's peeled off by my secretaries and put on another sheet to keep it all on one sheet for a given case, but that's the way I did it. . . . Oh. Well, we - - well, it's peeled off and it's put on one sheet, then my secretaries will take it and reduce it to an affidavit for on the computer. . . . I check it over generally speaking. . . . I won't say I check it like I might check something, anyway, I sign it and swear to it."

(PCROA Vol.III, p.250). Trial counsel testified that he was not "concerned about" trying to make the log of his work as accurate as he can get because he would "generally cheat" himself[4], but he tries to make it as accurate as possible. (PCROA Vol.III, p.251). Mr. Walker entered into evidence a copy of trial counsel's billing records as Defense Exhibit One [1]. (PCROA Vol.III, p.250 & Vol.XXI, p.3381-3417). Trial counsel testified in accordance with his records that he met Mr. Walker for the first time on the day after he received the affidavit and warrant in Mr. Walker's case, which was March 10, 2003. (PCROA Vol.III, p.259). This was approximately six [6] days after trial counsel was appointed, which was on March 5, 2003. (ROA Vol.IV, p.504 & PCROA Vol.III, p.246).

In one of the initial meetings, trial counsel informed Mr. Walker that the State was seeking the death penalty and he went through some of the guilt phase

[4] The appellee/cross-appellant under the heading, Evidentiary Hearings Facts, on page 14, stated that "(i)nsofar as billing records, Studstill said he tried to keep accurate records but 'I generally cheat myself'" and inadvertently cited to page 245 of Volume3 instead of page 251 of Volume 3 of the record on appeal for the post-conviction proceeding.

issues with Mr. Walker. (PCROA Vol.III, p.260-262). With regard to his goal at the initial meetings, trial counsel testified the following:

> "You know, I don't know specifically, you know, what was said, obviously I don't remember all that, but my goal, I can tell you now what my goal was, in this case was to find - - to get him to understand that he was - - ***if he went to trial the chances were he was going to get convicted and also get the death penalty***, and once you get that inculcated into his head that he would make a decision. . . . But anyway, that's, that's what I know I was doing with this man. ***I mean, you'd have to be a complete buffoon to think you were going to try this case and walk***."

(PCROA Vol.III, p.262-263) (emphasis added). Trial counsel testified that in the initial meetings he did the following in relation to penalty phase mitigation investigation:

> "I ask him (Mr. Walker) who his parents are, I get their telephone numbers. I ask him who his brothers and sisters are. I ask him if there any friends. I ask where he came from, Virginia I believe, West Virginia somewhere. . . . And I ask him about people around town, around his county. I 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."

(PCROA Vol.III, p.264-265). Then, trial counsel testified to the following with regard to the playing of Mr. Walker's taped confession on April 4, 2004:

> "I played it. (Mr. Walker) wanted to hear it, I'm sure, everybody does, I played it probably for myself even if he didn't ask because if you listen to the tape or you read the reports and all of the case, it was not consistent with what he was telling me either in substance of what was said or in the way he said it, his tone, he sounded perfectly rational and I wanted him to know and to hear the evidence that the judge was going to hear and you know, I did that, I said, you know, what do you think a judge is going to do, or anybody else. . . . ***And I didn't play***

> ***the whole tape, I played a lot of it but I distinctly remember not playing the whole tape, I told him, I said have you heard enough, he said yes and I wanted to leave the jail***, but anyway, that's what that was about."

(PCROA Vol.III, p.276-277)(emphasis added).

Trial counsel did not fill out any kind of forensic questionnaire. (PCROA Vol.III, p.264). Trial counsel testified that Mr. Walker told him that he had emotional problems. (PCROA Vol.III, p.264). Trial counsel testified he believed it was ADH or something in Mr. Walker's teen years and that Mr. Walker told him it was no longer a problem. (PCROA Vol.III, p.264). Trial counsel testified that he talked to Mr. Walker about it and asked the incarcerated Mr. Walker, "***could he get the records***." (PCROA Vol.III, p.264) (emphasis added). Trial counsel could not recall what Mr. Walker's responses to his requests. (PCROA Vol.III, p.264). Trial counsel testified that Mr. Walker, the non-attorney, "didn't seem to think it was all that important." (PCROA Vol.III, p.264).

Trial counsel filed numerous "shell" motions to protect Mr. Walker's constitutional rights that he had on a disc that is handed out at PD seminars. (PCROA Vol.III, p.265). Trial counsel testified that he ***always*** makes a motion to bifurcate the trial because he has not "ever been able to get a court to give (him) another lawyer, which (he) has asked for." (PCROA Vol.III, p.265). Trial counsel testified that he would argue that "there is some precedence for that because on appeal if the case came back and get tried with a new jury just on the punishment

phase and the judges are always very nice to (him) when they tell (him) no, ***but (he) put(s) it down because it may save a man's life some day and so (he) go(es) through it***." (PCROA Vol.III, p.265-266) (emphasis added). However, in his case, trial counsel did not make the effort to ask for another lawyer and he testified as follows:

> "I didn't in (Mr. Walker's) case, I don't think, ask for another lawyer. I have done that, but I don't think I did in his case. And the reason was by then, maybe I should have if I didn't and I don't think I did, was I just, I just knew I wouldn't get it, so."

(PCROA Vol.III, p.266).[5]

Trial counsel admitted that from the beginning of a capital case, that an attorney must make an inquiry into whether a client might have some kind of mental disorder. (PCROA Vol. III, p.299). Trial counsel stated that if there was any reason at all to suspect a problem, such as head injury, a car accident, or mental counseling, follow up testing must be completed. (PCROA Vol. III, p.299). In addition, trial counsel recognized that childhood issues such as abuse, how a person was raised, and problems with bullying would be important for mitigation. (PCROA Vol. III, p.304). Trial counsel also recognized the importance of

[5] The appellee/cross-appellant under the heading, Evidentiary Hearings Facts, on page 14, stated that, "Studstill customarily moves to bifurcate the trial 'because I haven't ever been able to get a court to give me another lawyer'" but did not clarify that trial counsel ***did not*** even request this motion in Mr. Walker's case.

humanizing his client in front of a jury and the court. (PCROA Vol. III, p.329-330).

Trial counsel testified that even though Mr. Walker was reluctant to tell him about his family, trial counsel "did have the information at that point ***from him***." (PCROA Vol.III, p.269)(emphasis added). Trial counsel testified that Mr. Walker did not think that his family could help him "down here." (PCROA Vol.III, p.269). Trial counsel testified that Mr. Walker did not think it was necessary but was not belligerent about it. (PCROA Vol.III, p.269). Moreover, trial counsel testified that despite a lot of resistance on any suggestions he made about Mr. Walker's family or anybody testifying for him, Mr. Walker ***did not*** restrict trial counsel from speaking to people or "dragging up the fact that (Mr. Walker) was nuts when (he) was fifteen." (PCROA Vol.III, p.317-318 & Vol.III, p.386-387). Furthermore, trial counsel when asked if it was Mr. Walker who contacted his parents testified that he contacted the parents, but he acknowledged that he may have had Mr. Walker make contact with them[6]. (PCROA Vol.III, p.319-320).

---

[6] The appellee/cross-appellant under the heading, Evidentiary Hearings Facts, on page 17, stated that, "Studstill wanted Walker's parents to be at the trial, and he called them." The assertion that trial counsel called the parents to be at the trial is not supported by the record, based on the following testimony elicited at the evidentiary hearing:

> "Q. And Mr. Walker is the person who actually informed his parents of when the trial was, isn't that correct?
> A. I did too.

The only request Mr. Walker had of his trial counsel was that he did not want to plea to a life sentence. (PCROA Vol.III, p.318). Mr. Walker was willing to plea to "a number of years," perhaps "forty years or something." (PCROA Vol.III, p.277 & Vol.III, p.385-386). Trial counsel never requested or received any kind of written offer from the State in this case. (PCROA Vol. III, p.390).

Using his records, trial counsel confirmed that he spoke to Mr. Walker's sister, Beverly Longendorf (hereinafter referred to as "Ms. Longendorf"), on June 19, 2003, for 0.3 of an hour, which trial counsel acknowledged meant somewhere between fifteen [15] to thirty [30] minutes. (PCROA Vol.III, p.268-269). During the phone conversation, trial counsel told Ms. Longendorf the following about lack of success in Mr. Walker's guilt and penalty phases:

> "***I informed her how bad the case was***. I didn't tell her what it says, I told her what the evidence was and, you know, I asked her general questions. I said the reasons I'm calling you is because if it goes to trial there's going to be a punishment phase and whether he is a death sentence or life sentence that depends on what we can do in the punishment phase and if we don't do anything and you have a death

---

> Q. Do you recall when you did that?
> A. No, but I know I did.
> Q. You said you didn't remember having a phone conversation with them.
> A. I may have just - - ***I may have asked him if he advised his parents when it was going to be and that may have been what happened***, but I was concerned and wanted them to be here."

(PCROA Vol.III, p.319-320)(emphasis added).

> qualified jury just having convicted somebody of first degree murder of beating him to death until his eyeballs came out and then shooting him six time, ***he's going to get death***. And I don't know if I said it that way, I probably did, but that's what I meant, that's what I knew I probably told her."

(PCROA Vol.III, p.271)(emphasis added). Trial counsel testified that Ms. Longendorf did not have much to say about Mr. Walker's childhood and she indicated that she did not think she would be helpful. (PCROA Vol.III, p.270). Trial counsel testified that the notation to send him letters indicated that he told Ms. Longendorf that if she did not want to come, to send him some letters or to send him something, which she did. (PCROA Vol.III, p.270).[7] Trial counsel also testified that he asked Ms. Longendorf about her other sisters and that he wanted to talk to Mr. Walker's parents, but trial counsel ***did not believe that he ever spoke to the parents***. (PCROA Vol.III, p.270)(emphasis added). The next call to Ms. Longendorf was on November 5, 2003, for two tenths of an hour, which is about ten [10] to fifteen [15] minutes long. (PCROA Vol.III, p.272-273).

Trial counsel was reminded through his records that it indicated that on July 22, 2003, he had spoken to Mr. Walker's mother, for two tenths of an hour, about

[7] The appellee/cross-appellant under the heading, Evidentiary Hearings Facts, on page 15, stated that, "(t)he reason Studstill wanted letters was because Walker was reluctant to talk about his family." This assertion is not supported by the trial counsel's testimony because he later testified that he told Ms. Longendorf to send him letters if she did not want to come. (PCROA Vol.III, p.269-270). Trial counsel did not testify that Mr. Walker placed any restrictions upon his ability to call Ms. Longendorf.

ten [10] to fifteen [15] minutes. (PCROA Vol.III, p.271-272). Trial counsel testified that, "(i)f (he) did talk to her, and maybe (he) did, it was a short phonecall." (PCROA Vol.III, p.272). Trial counsel could not recall Mr. Walker's mother saying much of anything. (PCROA Vol.III, p.272). Trial counsel's records indicated that the next time trial counsel spoke to Mr. Walker's mother was on March 25, 2004, for three tenths of an hour, which is about fifteen [15] to twenty [20] minutes long, about the penalty phase. (PCROA Vol.III, p.275). Trial counsel did not recall speaking to Mr. Walker's mother, but deferred to his records. (PCROA Vol.III, p.275). Trial counsel could not recall the content of their discussion either other than it dealt with the penalty phase. (PCROA Vol.III, p.275). Trial counsel was shown another entry, on July 9, 2004, when he spoke to Mr. Walker's mother for three tenths of an hour, which is about fifteen [15] to twenty [20] minutes long. (PCROA Vol.III, p.285). Trial counsel testified that he did not recall anything specific about the phone call but he wrote down that Mr. Walker's mother was "adamant about not taking the stand." (PCROA Vol.III, p.285). Therefore, trial counsel's contact with Mr. Walker's family consisted of only five [5] brief phone calls to two [2] family members, prior to trial, and nothing more. *See Ragsdale v. State*, 798 So.2d 713 (Fla. 2001), *see also State v. Larzelere*, 979 So.2d 195 (Fla. 2008); *see also State v. Lewis*, 838 So.2d 1102 (Fla.

2002); & *see also Wiggins v. State*, 539 U.S. 510, 123 S.Ct. 2527, 156 L.Ed.2d 674 (2003).

Moreover, trial counsel later testified that he recalled the following about his contact with Mr. Walker's parents[8]:

> "(Mr. Walker's) parents came, came down here for the trial, they only stayed for the first two or three days and they asked me - - I talked to them in my office and I, you know, ***I told them straight about the case, I didn't give them any hope***, and they, of course, they heard the opening statements which just confirmed what I told them and, you know, I talked to them about again - - now, ***I guess I had never really spoken to his father but his father was here*** and I talked to him and they - - again, I think I put it in one of my notes, they were just so adamant about not testifying in the punishment phase and I – anyway, they left before we got that far. ***I think they felt because they were afraid that I would call them to put them on the stand anyway***. Of course, I wouldn't have, they didn't know that. The whole thing was very strange to them the way the system was working and that sort of thing, but I just - - I just couldn't - - you know, if I failed or was ineffective, you know, if you can't get somebody's parents to testify for a son, well, whatever. Anyway, I couldn't do it."

(PCROA Vol.III, p.291-292)(emphasis added). Trial counsel's testimony regarding the availability of Mr. Walker's parents to testify is not supported by the record. Trial counsel was later shown the record on direct appeal, specifically volume seventeen [17], pages 2038 to 2039, where he had requested a visitation for Mr. Walker's parents after the verdict had been rendered. (PCROA Vol.III, p.318-319).

[8] The appellee/cross-appellant under the heading, Evidentiary Hearings Facts, on page 15, stated that, "Helen Walker, Defendant's mother, 'was adamant about not taking the stand,'" and that, "(b)oth parents came to the trial, but they were both adamant about not testifying, " without clarifying that trial counsel's recollection regarding the availability of these witnesses was inaccurate.

This refreshed trial counsel's recollection and he corrected his testimony by stating that Mr. Walker's parents did not leave after the first three [3] days, but stayed at least until the verdict was rendered. (PCROA Vol.III, p.319). Trial counsel testified that he "(stood) corrected." (PCROA Vol.III, p.319). Trial counsel testified that his impression of Mr. Walker's parents was as follows:

> "They were very flat, very - - in the first place, they physically did not look healthy, looked like they might have been - - back when I was a child people had hookworm and they looked real sour and that's what they looked like, they were pathetic looking, other than that they were very nice people. . . . They were nice people, they couldn't help the way they looked I guess."

(PCROA Vol.III, p.320). He also testified that he did not feel that Mr. Walker's parents were well-educated. (PCROA Vol.III, p.320). In spite of these observations and impressions, trial counsel did not do any follow-up on Mr. Walker's family background. (PCROA Vol.III, p.320-321).

On November 2, 2004, trial counsel received a letter from June Rebert (hereinafter referred to as "Ms. Rebert') that may have been provided to him by Mr. Walker. (PCROA Vol.III, p.289). It was Ms. Rebert who called trial counsel on December 1, 2004. (PCROA Vol.III, p.289). Trial counsel testified the following about Ms. Rebert:

> "She wanted to come to court and testify on her opinion about Mr. Walker, a favorable opinion about, you know, she didn't think he deserved the death penalty or maybe didn't deserve anything else, but I can't quite recall. She seemed to be a nice person, I recall that. You know, she wasn't some kind of loon she seemed to be a rational

> human being, I remember that much about it and -- but I don't -- actually I think she may have spoken at the sentencing."

(PCROA Vol.III, p.289-290). Although trial counsel had spoken to Ms. Rebert before the trial, her testimony was not presented to the sentencing jury that recommended a death sentence by a seven [7] to five [5] vote. She testified at the *Spencer* hearing on behalf of Mr. Walker. *See Walker*, 957 So.2d at 583. (PCROA Vol.III, p.324).

Trial counsel indicated familiarity with the names of the Supreme Court of the United States' opinions in *Wiggins v. State*, 539 U.S 510, 123 S.Ct. 2527, 156 L.Ed.2d 674 (2003), and *Williams v. State*, 529 U.S. 362, 120 S.Ct. 1495, 146 L.Ed.2d 389 (2000), dealing with capital cases. (PCROA Vol.III, p.307-309). Trial counsel testified that he is aware that these cases stated that the American Bar Association guidelines for capital defense were the prevailing norms of practice. (PCROA Vol.III, p.308-309). The American Bar Association Guidelines for Capital Defense (hereinafter referred to as "ABA Guidelines") were entered into evidence as Defense exhibit five [5]. (PCROA Vol.III, p.309-311 & Vol.XVI, p.2514-2688).

Trial counsel agreed that the ABA guidelines recommended having at least two [2] attorneys, an investigator, and a mitigation specialist. (PCROA Vol.III, p.311). Trial counsel did not have a co-counsel in Mr. Walker's case. (PCROA Vol.III, p.311). Trial counsel testified that he did not need an investigator in Mr.

Walker's case "such as to the facts of the crime." (PCROA Vol.III, p.311-312). Trial counsel testified that he could take on the responsibility of whatever investigation was required in the case. (PCROA Vol.III, p.313). Trial counsel testified that

> "(I)f I couldn't have gotten some of the information I got directly by phone up in Live Oak I might very well have hired an investigator or tried to get the judge to approve it, or in Virginia for that matter, but somehow or another I got the information that I wanted. . . . And you know, back when we could use investigators sometimes it was, talking about strange what they came back and wrote up. . . . What they would come back and write up for you, what they would give you didn't seem to be real consistent what you found later."

(PCROA Vol.III, p.311-312). Trial counsel did not hire a mitigation specialist either to help him out. (PCROA Vol.III, p.313). Trial counsel did not make an effort to do a motion to hire or request funds for an investigator or mitigation specialist because he did not think that he would get it in Mr. Walker's case based on his prior experience. (PCROA Vol.III, p.313-315). This was the same reasoning behind his not requesting a co-counsel to assist him. (PCROA Vol.III, p.315, & Vol.III, p.266).Trial counsel testified that there were no monetary limitations or caps placed upon him as an appointed conflict counsel, so long as the costs were justified. (PCROA Vol.III, p.247-249). Trial counsel chose to rely on administrative assistants and to use another criminal defense lawyer as a sounding board. (PCROA Vol.III, p.315-316).

Trial counsel acknowledged that the ABA guidelines recommended speaking to neighbors, friends, and acquaintances who knew the client and his family. (PCROA Vol.III, p.321). Trial counsel also acknowledged that the ABA guidelines also recommend contacting people like teachers, clergy, employers, coworkers, and doctors. (PCROA Vol.III, p.321). Yet, trial counsel admitted that he did not make contact with Mr. Walker's teachers, his neighbors, especially persons who knew Mr. Walker growing up in Virginia. (PCROA Vol.III, p.322-323). Trial counsel testified that he "didn't get any names from anybody." (PCROA Vol.III, p.323). Trial counsel testified that he did not file a Motion for Funds for Investigation of Penalty Phase in Mr. Walker's case requesting funds to travel to a location [namely Virginia] to obtain mitigating evidence. (PCROA Vol.III, p.81-82, Vol.XV, p.2511-2512, & Vol.XXI, p.3425-3426). A draft motion was entered into evidence as Defense Exhibit Number Three [3]. (PCROA Vol.III, p.82, Vol.XV, p.2511-2512, & Vol.XXI, p.3425-3426). Trial counsel tried to explain why he did not file the motion by testifying as follows:

> "I'm going to give you the best answer I can. I don't think he wanted me to file it. Now, that can't be the whole story, but I don't think he – I think he convinced me, or I convinced myself maybe, that it wouldn't be helpful really or financially justified in any information I might be able to get up there. So, I didn't file it."

(PCROA Vol.III, p.81). Later, trial counsel agreed that he never went to Virginia to do any investigation on his own and he testified that "(he) had it in (his) mind, maybe but (he) didn't." (PCROA Vol.III, p.331).

Trial counsel testified that he did not contact any teachers or request any school records to see if there were any teachers identified. (PCROA Vol.III, p.342-343). Trial counsel did not try to locate any school counselors to determine if Mr. Walker was subjected to any testing. (PCROA Vol.III, p.343). Trial counsel did not contact a correctional officer and he did not recall doing anything to try to find out if Mr. Walker was a good prisoner, even though Mr. Walker had told him that he had been a good prisoner. (PCROA Vol.III, p.321). Trial counsel did not recall having contact with Randy Simms, Mr. Walker's juvenile probation officer, even though his name was in the records. (PCROA Vol.III, p.321-322 & Vol.III, p.307).

Trial counsel did not have any contact with any other extended family members, cousins, nieces, or grandparents of Mr. Walker. (PCROA Vol.III, p.324-325). Trial counsel testified that he mentioned to Mr. Walker about getting photos of Mr. Walker growing up, however, he did not try to get any so he could humanize his client. (PCROA Vol.III, p.330-331). Trial counsel did not try to contact Mr. Walker's ex-wife, and testified that he cannot say why he did not. (PCROA Vol.III, p.331). *See Ragsdale,* 798 So.2d 713; *see also Larzelere*, 979 So.2d 195; & *see also Wiggins*, 539 U.S. 510, 123 S.Ct. 2527.

Trial counsel testified that it may have come up very early on that when Mr. Walker lived in Florida up to the time of the crime, that Mr. Walker was using his cousin, Christopher Walker's name. (PCROA Vol.III, p.325). Trial counsel was reminded that in the taped statement, Mr. Walker told the law enforcement officer that his real name is not Christopher Walker. (PCROA Vol.III, p.325). Trial counsel had some recollection of the cousin once told about the presence of Mr. Chris Walker's driver's license in the discovery materials. (PCROA Vol.III, p.325). Although Mr. Chris Walker was identified as a potential mitigation witness based upon a close relationship with Mr. Walker, trial counsel failed to make any contact with him. (PCROA Vol.III, p.325).

With respect to employer or coworkers, trial counsel testified that he contacted Miss Russo, a barmaid and ***a friend of Leigh Ford***, Mr. Walker's co-defendant.[9] (PCROA Vol.III, p.322)(emphasis added). Miss Russo advised that she repeatedly told Leigh Ford to stay away from Mr. Walker because she thought he was dangerous. (PCROA Vol.III, p.322). Miss Russo told trial counsel that Mr. Walker carried a big knife. (PCROA Vol.III, p.322). This was the one [1] contact trial counsel had with one of Leigh Ford's friends and was not useful for any

[9] The appellee/cross-appellant under the heading, Evidentiary Hearings Facts, on page 18, stated that trial counsel "managed to find one friend, Ms. Russo, ***who was also a friend of co-defendant***, Walker's girlfriend." (emphasis added). The post-conviction record on appeal does not support the assertion that Mr. Walker was friends with Ms. Russo, it only supports a friendship between the co-defendant Leigh Ford and Ms. Russo.

mitigation purposes for Mr. Walker. (PCROA Vol.III, p.322-323). Presenting Miss Russo, the girl at the bar who said Mr. Walker carried a big knife and had a threatening manner is not a reasonable method to use in order to create a social life history in support of mitigation for Mr. Walker. (PCROA Vol.III, p.328). Trial counsel testified the only information he has about Mr. Walker's employment was that he was working with Joel Gibson[10] who he could not find. (PCROA Vol.III, p.325-326).

In the span of about sixteen [16] months before Mr. Walker's trial, trial counsel's contact with the family consisted of the phone calls discussed above with Ms Longendorf and Mr. Walker's mother. (PCROA Vol.III, p.323-324). During the trial, trial counsel met with Mr. Walker's mother and father. (PCROA Vol.III, p.324). Trial counsel only talked to the one [1] sister, Ms. Longendorf. (PCROA Vol.III, p.324). Trial counsel did not know why he did not talk to the other siblings. (PCROA Vol.III, p.324).

It should be noted that trial counsel stated that a lack of activity on his billing sheets from May 11, 2004, to June 3, 2004, are indicative of the fact that he stopped working on the case because he thought he was off of it after the *Nelson* Hearing. (PCROA Vol.III, p.279-280). Trial counsel admitted to feeling a sense of

[10] Joel Gibson as one of the individuals who was involved in the attack on David Hamman, the victim in this case. Joel Gibson seemed to be supervising the attack on the victim. *See Walker v. State*, 957 So.2d at 565.

relief during this period until he was informed he was still on the case because the judge could not find anyone else to take it. (PCROA Vol.III, p.280). Trial counsel testified that he felt he had adequate time to work on this case and prepare it for trial. (PCROA Vol.III, p.363). Trial counsel testified that his affidavits of time indicated that he had worked approximately one hundred and seventy-five [175] hours out of court on this case (March 10, 2003 to December 13, 2004), was probably about right. (PCROA Vol.III, p.365).

Trial counsel bragged that he could "write a book" on mitigation investigation. (PCROA Vol.III, p.298). Trial counsel agreed that the ABA guidelines recommend to attorneys to investigate both the personal and family history of the client. (PCROA Vol.III, p.326). Trial counsel agreed about the importance of looking at a client's medical history, family and social history traumatic events in the person's life, failures of government and social organizations to intervene in a person's history, educational history, employment and training history, and prior correctional record. (PCROA Vol.III, p.326-327). Yet, trial counsel did not request any medical records for Mr. Walker. (PCROA Vol.III, p.327). Trial counsel did not request education records, school records, or things of that sort. (PCROA Vol.III, p.327). Trial counsel testified that he knew that Mr. Walker had dropped out of school, and that Mr. Walker had told him that his record was "terrible or something, or not good." (PCROA Vol.III, p.327). Trial

counsel did know that Mr. Walker received his G.E.D. (PCROA Vol.III, p.327). Trial counsel did not request Mr. Walker's correctional arrest record or things of that sort. (PCROA Vol.III, p.327-328). Trial counsel did not request any records relating to whether Mr. Walker "had ever had any kind of treatment or anything like that for drugs." (PCROA Vol.III, p.337). Trial counsel did not request Mr. Walker's criminal record that may show a history of "drug arrests or anything like that." (PCROA Vol.III, p.337-338). Trial counsel testified that "(he) did not request any specific records by requesting them from anybody other than the defendant. (He) didn't request any records from him, he told (him) some things." (PCROA Vol.III, p.344). Trial counsel did not recall requesting "social service records related to (Mr. Walker's) family or make any other assessments into the family background. (PCROA Vol.III, p.343-344). Trial counsel did not request bankruptcy record to see the family financial shape. (PCROA Vol.III, p.327). Trial counsel did not request Mr. Walker's birth records or prenatal records to show "any trauma or any complications with his birth." (PCROA Vol.III, p.343). Trial counsel's ignorance regarding the value of such evidence was communicated during his evidentiary hearing testimony. [11] Moreover, trial counsel did not recall ever requesting Mr. Walker to sign any releases in this case. (PCROA Vol.III,

[11] Trial counsel responded to the question about requesting birth records by stating, "You mean to prove that he was alive?" (PCROA Vol.III, p.343).

p.298). *See Rompilla v. Beard*, 545 U.S. 374, 125 S.Ct. 2456, 162 L.Ed.2d 360 (2005); & *see also Ragsdale*, 798 So.2d 713.

Trial counsel hired Dr. Howard Bernstein (hereinafter referred to as "Dr. Bernstein) in Mr. Walker's case. Dr. Bernstein met with Mr. Walker was on June 14, 2004, four [4] days before Mr. Walker's Motion to Suppress hearing. (PCROA Vol.III, p.283-284 & ROA Vol.II, p.192). Trial counsel testified regarding the primary purpose to hire Dr. Bernstein as follows:

> "I think probably the primary purpose (Dr. Bernstein) had was just that if he – if there was anything at all, of course, I emphasized the fact that (Mr. Walker) was under the influence of methamphetamines and lack of sleep and what I was looking for, if he could provide it, if the evidence was there after his examination. Well, he never called, he wants to talk about the evaluation all the time. After you evaluate him you think, you know, if you could testify for me on behalf to help us with the voluntary aspects of his confession and after he talked to him, blah, blah, blah, he did testify for me. . . . Characterized it rather strange so I don't know how helpful he was."

(PCROA Vol.III, p.370). Trial counsel acknowledged that his "primary focus initially with Dr. Bernstein was to try to attack the confession." (PCROA Vol.III, p.371). The confession was a damaging piece of evidence in Mr. Walker's case. (PCROA Vol.III, p.371-372). The appellee/cross-appellant incorrectly asserts under the heading, Evidentiary Hearings Facts, on page 15, that "(h)e also hired Dr. Bernstein to conduct a mental evaluation."

With regard to the record, it was Dr. Bernstein who picked up records at the jail during his visit on June 14, 2004, that trial counsel "had never seen." (PCROA

Vol.III, p.284). It was Dr. Bernstein who retrieved Mr. Walker's records from Circles of Care, a psychological and psychiatric facility in Brevard County, and provided them to trial counsel. (PCROA Vol.III, p.292-293). These records were entered into evidence as Defense Exhibit number two [2]. (PCROA Vol.III, p.293-294, Vol.XV, p.2504-2510 & Vol.XXI, p.3418-3424). Trial counsel testified that he admonished Mr. Walker for not telling him about his psychiatrist, Dr. Radin. (PCROA Vol.III, p.302-303). Trial counsel testified that Mr. Walker did not "associate it with anything that had to do with the crime or with his own head, what he associated it with was his depression and the problems he was having while he was sitting down there at the jailhouse." (PCROA Vol.III, p.302-303). Further, trial counsel testified that when he "brought it up," Mr. Walker did not understand "what business it was of" trial counsel's that he was in psychiatric counseling while in jail. (PCROA Vol.III, p.303). Trial counsel later testified that "(he) honestly (did not) think the man considered that to be of any importance with respect to his case so therefore there was no reason to bother (him) with it because (he) already had a lot of things (he) was dealing with with his case." (PCROA Vol.III, p.376-377). Trial counsel never understood the importance of this information and never requested these records from the county jail. (PCROA Vol.III, p.294). Moreover, Dr. R.V. Radin's name was clearly disclosed in Mr. Walker's Circles of Care records provided to him by Dr. Bernstein on June 15,

2004. (PCROA Vol.III, p.284 & p.292-293, Vol.XV, p.3504-3508 & Vol.XXI, p.3418-3422). Trial counsel testified that he had reviewed or seen these records prior to trial. (PCROA Vol.III, p.293). However, he had failed to follow-up or to investigate the names revealed by these records, such as Dr. Radin.

Trial counsel did not recall Mr. Walker's counseling records from the Center for Brief Counseling Inc, in Frederiksberg, Virginia. (PCROA Vol.III, p.294-295). These records were referenced in the trial court's sentencing order. (PCROA Vol.III, p.333-334). These were entered into evidence as Defense Exhibit number six [6]. (PCROA Vol.III, p.335, Vol.XVI, p.2689-2694 & Vol.XXII, p.3604-3609). Trial counsel never understood the significance of this mental health evidence. Mr. Randy Simms', Mr. Walker's juvenile probation officer, and Mr. Edward Gratzick's, Mr. Walker's social worker, names and contact information were in these records. (PCROA Vol. XVI, p.2689 & Vol.XXII, p.3604). Trial counsel never understood or chose not to contact these witnesses to present valuable mental health mitigation testimony to help save Mr. Walker's life.

Trial counsel used his lay opinion to determine that Mr. Walker did not have brain dysfunction or deficiencies in mental capacity. (PCROA Vol. III, p.369). Yet, trial counsel acknowledged that since Mr. Walker was being treated for mental problems at the jail when he made these conclusions that this says something about his "observational techniques or capabilities." (PCROA Vol. III,

p.369). Trial counsel testified that he observed and read that people with bipolar disorder can put on a good front. (PCROA Vol. III, p.380-381). Trial counsel testified he was ***probably*** aware of this when he was investigating Mr. Walker's trial. (PCROA Vol. III, p.381)(emphasis added). Trial counsel further testified as follows regarding his opinion on whether Mr. Walker was bipolar:

> "I mean, he didn't sound – I'm subjected to being—making the same value judgments anybody else makes when you're talking to somebody and I didn't have any reason to think that he had this bipolar problem, I thought it was interesting and I tried to use it."

(PCROA Vol. III, p.369).

Trial counsel testified that after he found out about Dr. Radin that he would have asked for a continuance if Mr. Walker had given him permission to continue the case to try to find at least two [2] or three [3] other people to examine Mr. Walker. (PCROA Vol. III, p.377). Trial counsel testified with respect to his feelings about requesting a continuance as follows[12]:

> "I didn't know it, I wanted time really to talk to Dr. Radin and I wanted to, you know, maybe make some more inquiries into what that was all about and what his testimony might be and my client now, he did not want a continuance. The day come for his trial, he was ready to take, you know, he was ready to go to trial. Of course, ***I could have***

[12] In response and to give context to the appellee/cross-appellant single statement under the heading, Evidentiary Hearings Facts, on page 19, that trial counsel "bowed to his (Walker) wishes" and did not ask for a continuance. (PCROA Vol. III, p.362). Trial counsel did not feel strongly that Mr. Walker would benefit from the continuance although he had done nothing to explore further Dr. Radin's report.

> ***made a continuance anyway if I felt that strongly about it***. Maybe I should have, I don't know. Everything is perfect in hindsight. But anyway, at the time I bowed to his wishes and I said, well, I got him under subpoena so he'll come. I presumed a man of his education would tell the truth."

(PCROA Vol. III, p.362)(emphasis added). Trial counsel had adequate time to prepare Mr. Walker's case. (PCROA Vol. III, p.362-363). Trial counsel reiterated his position by stating the following:

> "***I did not feel it was strong enough to me***, I did not have enough information either from Bernstein or from the other guy at all ***to override my client's desires and wishes on the fact that he wanted to finish his case. I just didn't have that***. Maybe, maybe I would never have it in any case, but I didn't. I asked if you want me to continue it I think I can get it and we can delve into this thing and get maybe something else."

(PCROA Vol. III, p.387-388)(emphasis added). Moreover, trial counsel had received this information on June 15, 2004, and the trial started on July 19, 2004. (PCROA Vol. III, p.388-389). Trial counsel had almost a month to follow-up on this evidence and to have Mr. Walker examined.

Trial counsel acknowledged that Mr. Walker reported cocaine and methamphetamine use prior to the crime. (PCROA VoIII., p.300). Dr. Bernstein testified about the effects of the drugs at the Defendant's Motion to Suppress hearing. (PCROA Vol. I, p.301-302). Trial counsel believed that addiction to methamphetamines was Mr. Walker's downfall. (PCROA Vol. III, p.304). Yet, trial counsel never requested records of prior drug treatments or of prior arrests to

assess Mr. Walker's substance history. (PCROA Vol. III, p.337-338). Furthermore, trial counsel never went to inspect the evidence seized from the truck in Live Oak for narcotics. (PCROA Vol. III, p.337). Trial counsel did not notice that Mr. Walker had gained about a hundred and fifty [150] pounds by the time of his trial. (PCROA Vol. I, p.340).

Trial counsel did not present any additional evidence at the *Spencer* hearing, that was held on August 30, 2004, a month after the verdict because "he didn't have any to put in". (PCROA Vol. III, p.346). Letters from Mr. Walker's family members and friends introduced at the *Spencer* hearing were received by the trial Court, and trial counsel agreed with the records that he had not seen them before the *Spencer* hearing. (ROA Vol. III, p.302, PCROA Vol. III, p.346-347). Trial counsel testified that he did not recall asking people to send those letters and he did not consider asking for a continuance to review the letters or to consult the letter writers. (PCROA Vol. III, p.347-348). Trial counsel did not have memory of contacting the letter writers[13]. (PCROA Vol. III, p.348-349). Trial counsel received a letter prior to trial from Mr. Walker's sister that he testified was a "wild thing." (PCROA Vol. III, p.270-271). Trial counsel testified that he believed he sent a copy to the judge of this letter that talked about the "CIA or the Nazi's or

[13] The letters introduced at the *Spencer* hearing were from Mr. Walker's sister, Bernita Lou Walker and Mr. Walker's friend Pamela Townsend. *See Walker*, 957 So.2d at 583.

somebody was after her brother and all of this." (PCROA Vol. III, p.270-271). Trial counsel later testified that he recalled that Mr. Walker had a schizophrenic sister, the author of the letter, and he had told this to the judge during the *Spencer* hearing. (PCROA Vol. III, p.349-350). Yet, trial counsel did not try to contact the sister and testified that his client told him "don't pay attention to that letter." (PCROA Vol. III, p.349-350). Even though, as trial counsel later admitted that "if you got a sister or something that's genetically wrong with her that caused her to be schizophrenic you might have some of that in you too." (PCROA Vol. III, p.350).

The next witness to testify for Mr. Walker was Toni Maloney (hereinafter referred to as "Ms. Maloney"), who testified on how a reasonably competent mitigation investigation should have been conducted in Mr. Walker's case. Ms. Maloney is a licensed private investigator in Florida who specializes in capital case investigation. (PCROA Vol.III, p.391-392). Ms. Maloney has specialized in forensic mental health and capital investigations for both the State Attorney's Office and the Public Defender's Office. (PCROA Vol.III, p.394). She was part of the group which revised the Public Defender's Manual on defending a capital case in the early 1990s, and has been involved in hundreds of capital cases in her career. (PCROA Vol.III, p.396-398). Her current work as a capital investigator involves doing a complete life history investigation of the client, helping decide on experts,

and collecting records. (PCROA Vol.III, p.399). The post-conviction court, in sustaining the state's objection, did not qualify her as an expert. (PCROA Vol.III, p.403). This was over defense's objection and Mr. Walker would argue that this was error by the post-conviction court. *See United States v. Brown*, 441 F.3d 1330 (11th Cir. 2006).

Ms. Maloney testified that mitigation investigations have been standardized according to the *Wiggins* case and the ABA guidelines. (PCROA Vol.III, p.406). She stated that a typical mitigation investigation begins with familiarizing yourself with the case and then conducting a client interview. (PCROA Vol.III, p.406). In this client interview, the mitigation specialist attempts to build a rapport with the client, get life history, and get school, medical, employment, and psychiatric history. (PCROA Vol.III, p.407). At that stage the mitigation specialist then attempts to collect as many social and life history records as possible about the client, client's family, and the client's associates. (PCROA Vol.III, p.408). Ms. Maloney then outlined the various records she collected and witnesses she interviewed, but did not testify to the content of the records or interviews due to the post-conviction court's prior rulings. (PCROA Vol.IV, p.218-223). An affidavit was subsequently filed by the defense as a proffer as to what Ms. Maloney would have testified about in regards to witness interviews if she had been allowed to by the post-conviction court. (PCROA Vol.VI, p.4-5).

Then on April 7, 2009, Mr. Walker's cousin, Anita Morris (hereinafter referred to as "Ms. Morris") came from her home in Virginia and testified at the evidentiary hearing. (PCROA Vol.IV, p.467-468). She and Mr. Walker were born nine [9] days apart. (PCROA Vol.IV, p.468). She saw him every other weekend at family gatherings, where she got to spend extensive periods of time with him and his family. (PCROA Vol.IV, p.469). This regular contact ended during her teenage years. (PCROA Vol.IV, p.469). Ms. Morris testified that her mother, Mr. Walker's paternal aunt, abused alcohol. (PCROA Vol.IV, p.471-472). Her Uncle Edward was also an alcoholic. (PCROA Vol.IV, p.472). Ms. Morris' aunts (Dorothy, Alice and Ellen) also suffered from alcohol abuse. (PCROA Vol.IV, p.474). Ms. Morris' other aunt (Jane) was known as being retarded. (PCROA Vol.IV, p.474-475).

Ms. Morris went on to describe Mr. Walker's father as being sort of strange, controlled by his wife, and a person who drank a lot. (PCROA Vol.IV, p.476). Ms. Morris described Mr. Walker's mother as a person who believed she was a witch and could put spells on people and talk to spirits. (PCROA Vol.IV, p.480). Ms. Morris witnessed Mrs. Walker use marijuana and hallucinogenic mushrooms. (PCROA Vol.IV, p.480). She did not provide much supervision to the children in the home. (PCROA Vol.IV, p.481).

Ms. Morris testified that Mr. Walker's oldest sister, Mary Jo Caldwell, is retarded. (PCROA Vol.IV, p.481). Ms. Morris also testified that Ms. Longendorf

was also a drug user. (PCROA Vol.IV, p.482). She testified that the third sister, Bernita Lou Underwood (hereinafter referred to as "Ms. Underwood"), was very strange, and had mental problems. (PCROA Vol.IV, p.483). Ms. Underwood also abused drugs. (PCROA Vol.IV, p.483). Ms. Underwood's daughter, Kayla, was also a substance abuser and she later committed suicide. (PCROA Vol.IV, p.483). Furthermore, one of their uncles also killed himself. (PCROA Vol.IV, p.484).

Ms. Morris described her cousin's family as a bunch of partiers, who abused drugs, alcohol, marijuana and hallucinogens. (PCROA Vol.IV, p.476). These parties were held at the Walker home, and the scene at the home was chaotic. (PCROA Vol.IV, p.477). The parties at the Walker house were held at least a couple of times a month, with thirty [30] or forty [40] people in attendance. (PCROA Vol.IV, p.485-486). This chaos included people lying on the floor drunk, people everywhere, and no supervision of the children. (PCROA Vol.IV, p.477). As a child Ms. Morris would ask to be taken home because she understood that this was a very bad environment. (PCROA Vol.IV, p.478). Drugs and alcohol were available for the children to access and no adults stepped in to stop this activity. (PCROA Vol.IV, p.478). Ms. Morris testified that drugs and alcohol were openly used in front of the children. (PCROA Vol.IV, p.486). She also testified that children, including Mr. Walker, were even encouraged to use drugs and alcohol,

(PCROA Vol.IV, p.486-487). It was not unusual for people to get injured during these parties. (PCROA Vol.IV, p.479).

Ms. Morris testified that Mr. Walker treated her differently from other people. (PCROA Vol.IV, p.488). He had a temper as a child, and when he would get angry his eyes would roll back up into his head. (PCROA Vol.IV, p.488-489). She always remembers her cousin as being two [2] different people. (PCROA Vol.IV, p.489). Mr. Walker would go from being sweet, nice, and respectful to becoming almost raging. (PCROA Vol.IV, p.492). Ms. Morris testified that Mr. Walker would progress from one to the other very quickly. (PCROA Vol.IV, p.492).

Ms. Morris further testified that Mr. Walker did not fit in well, and that he did not have a lot of friends. (PCROA Vol.IV, p.490). He also had a bowel control issue, and it was not something he could be discreet about. (PCROA Vol.IV, p.490). Mr. Walker's family seemed to think this was his fault. (PCROA Vol.IV, p.490). If other children made fun of him, he would lose control physically and attack them. (PCROA Vol.IV, p.491). He also had problems with his weight as a child. (PCROA Vol.IV, p.491). Friends and family would make fun of him and tease him about this. (PCROA Vol.IV, p.492). Other children were also mean to him and teased him. (PCROA Vol.IV, p.495).

Ms. Morris stated that Mr. Walker's family appeared to be pretty poor, and that drugs and alcohol took precedence over the essentials. (PCROA Vol.IV, p.493). Ms. Morris testified that her father often bought extra clothes for her cousin to use. (PCROA Vol.IV, p.493). Even as a child she remembers Mr. Walker abusing drugs. (PCROA Vol.IV, p.494). No adult ever tried to step in to stop this. (PCROA Vol.IV, p.494). He regularly used marijuana and had a big pipe in his room. (PCROA Vol.IV, p.495). At thirteen [13] years old, Mr. Walker lived in his own detached building on the property. (PCROA Vol.IV, p.497). He had even less supervision there, and used it as his own little house with a bed and refrigerator. (PCROA Vol.IV, p.498).

Looking back, Ms. Morris does not know how anyone could have made it out of that environment. (PCROA Vol.IV, p.496). She could not imagine putting her own children through what she, her brother and her cousin have seen, and how anyone could come out if it normal. (PCROA Vol.IV, p.496). Her cousin was exposed to this environment every day. (PCROA Vol.IV, p.496).

Ms. Morris was never contacted by trial counsel after Mr. Walker was arrested. (PCROA Vol.IV, p.499). She was living at the same residence in Virginia, and heard about the case when her aunt and uncle called to inform her that her cousin had been arrested. (PCROA Vol.IV, p.499-500). She would have

been available and willing to testify to this same information if she had been asked back in 2004. (PCROA Vol.IV, p.500).

Mr. Walker's cousin, Christopher Walker (hereinafter referred to as "Mr. Chris Walker"), also came from Virginia to testify. (PCROA Vol.IV, p.509). Mr. Chris Walker and his cousin grew up together like brothers and were very close. (PCROA Vol.IV, p.509). They saw each other most every weekend and often during the week, and they would often stay at each other's homes. (PCROA Vol.IV, p.510). They saw each other regularly until the age of twenty five [25] or thirty [30]. (PCROA Vol.IV, p.510). They always lived close to one another and for a period even lived in the same neighborhood. (PCROA Vol.IV, p.511). He saw his cousin's immediate family about as much as he saw his cousin. (PCROA Vol.IV, p.511).

Mr. Chris Walker testified that his mother was an alcoholic who has passed away. (PCROA Vol.IV, p.512). Mr. Chris Walker testified that his relatives Uncle Edward, Uncle Davis, Uncle Melvin, Uncle Lewis, Aunt Dorothy, Aunt June, Aunt Allison, and Aunt Ellen also abused alcohol. (PCROA Vol.IV, p.514-516). Alcoholism ran rampant throughout their family. (PCROA Vol.IV, p.516). Mr. Chris Walker also testified that Mr. Walker's father was a pot-smoker and a full-blown alcoholic. (PCROA Vol.IV, p.518). Growing up around Mr. Walker's

family, Mr. Chris Walker remembers drugs and alcohol, partying, fighting, and always chaos. (PCROA Vol.IV, p.517).

Mr. Chris Walker testified that arguments, fighting, and physical confrontations were inevitable at these family get-togethers. (PCROA Vol.IV, p.518). Blood was routinely spilled, and the physical violence included Mr. Walker's parents. (PCROA Vol.IV, p.518-519). Emergency care was often needed as a result of these fights. (PCROA Vol.IV, p.518). These incidents included someone being thrown through a plate glass window. (PCROA Vol.IV, p.543). Mr. Chris Walker witnessed many arguments and fights between Mr. Walker's parents, too many to recall. (PCROA Vol.IV, p.530). These fights included throwing household items and beer bottles at each other. (PCROA Vol.IV, p.543). The children knew as the night progressed that things would destabilize, and knew to stay out of the way, and he and his cousin would often leave the house altogether at these times. (PCROA Vol.IV, p.531).

Mr. Chris Walker testified that Mr. Walker's mother is one of the scariest people he has ever met. (PCROA Vol.IV, p.519). She believed in witchcraft, she used voodoo dolls, she cooked funny things on the stove, and she slipped family members drugs unbeknownst to them. (PCROA Vol.IV, p.519-520). She also would put spells on people, and she often targeted Mr. Chris Walker's father with voodoo spells and threats. (PCROA Vol.IV, pp.520 & 546). Mr. Walker's mother

would drink and use LSD, cocaine, and marijuana all day, every day. (PCROA Vol.IV, pp.520 & 530). Mr. Chris Walker testified that Mr. Walker's oldest sister, Mary Jo, is mentally retarded. (PCROA Vol.IV, p.521). Ms. Longendorf and Ms. Underwood also abused marijuana, cocaine, and alcohol. (PCROA Vol.IV, p.521). All of the individuals in the household, including the sisters' spouses, aunts, uncles, and cousins, were all involved in the partying and substance abuse. (PCROA Vol.IV, p.522). Mr. Chris Walker also confirmed that Ms. Underwood's daughter, Kayla, had substance abuse problems, and that she killed herself. (PCROA Vol.IV, p.523).

Mr. Chris Walker testified that the parties at the Walker household occurred every weekend, sometimes during the week, and included more than fifty [50] people at times. (PCROA Vol.IV, p.525). The parties included people of all ages, and everyone was welcome, even people off the streets. (PCROA Vol.IV, p.525). The parties were alcohol and drug fests, including marijuana, cocaine, and LSD, amongst other drugs. (PCROA Vol.IV, p.526). The drugs and alcohol were used in front of the children and readily available to them, and nobody was keeping an eye on the children. (PCROA Vol.IV, p.526-527). Mr. Walker was exposed to all of these things and got no supervision from his parents, who never expressed an interest in the children and what they were doing. (PCROA Vol.IV, p.526-527).

Mr. Chris Walker stated that supervision by adults in the family just was not part of their lives. (PCROA Vol.IV, p.532).

At the age of ten [10] or eleven [11], Mr. Chris Walker and his cousin were smoking marijuana and drinking alcohol on a daily basis. (PCROA Vol.IV, p.528). Their actual exposure and use had begun much earlier. (PCROA Vol.IV, p.529). Ms. Underwood and Mr. Walker's mother would offer the drugs to them at a young age. (PCROA Vol.IV, p.529-530). They were provided with LSD, methamphetamines, and PCP at the age of fourteen [14] or fifteen [15]. (PCROA Vol.IV, p.549). The drug use and partying with the family continued into their twenties [20]. (PCROA Vol.IV, p.548). Mr. Walker got into trouble with the law for multiple drug related crimes, and went to prison for one of them. (PCROA Vol.IV, p.549).

Mr. Chris Walker further testified that the atmosphere of partying was all they knew as children, and it was not until he gained more freedom as a teenager that Mr. Chris Walker realized that other families did things like sit down for meals three [3] times a day, that people were required to take showers, and that children would do homework and other sorts of things. (PCROA Vol.IV, p.533-544). The Walker home was also never clean. (PCROA Vol.IV, p.544). In the Walker family, the children fended for themselves, had to search for their own meals, and did not have books or do homework. (PCROA Vol.IV, p.534). Mr. Chris Walker

ultimately concluded that “we’ve probably got the most messed up family there is in the United States.” (PCROA Vol.IV, p.534).

Mr. Chris Walker’s father hated that his children were exposed to this environment, but knew that if he showed up at the house to retrieve his children, “he’s liable to get a gun stuck in his face.” (PCROA Vol.IV, p.536). Mr. Chris Walker’s father could not give his mother money for his kids because it would go to alcohol and drugs. (PCROA Vol.IV, p.544). Mr. Chris Walker’s father would give Mr. Walker money, buy him clothes, and buy him new shoes for school. (PCROA Vol.IV, p.545). Mr. Walker did not get such things from his family, and his clothes always had holes in them. (PCROA Vol.IV, p.545).

Mr. Chris Walker further testified that for fun, he and Mr. Walker would shoot each other with BB guns, or hit each other with pieces of hose. (PCROA Vol.IV, p.537). Mr. Chris Walker remembers his cousin during these times having a bowel control problem. (PCROA Vol.IV, p.538). This problem lasted into Mr. Walker’s early teen years. (PCROA Vol.IV, p.538). They did not talk about the problem because of embarrassment issues. (PCROA Vol.IV, p.538). When the problems would happen, Mr. Walker would quietly wander off to a different place to cleanse himself. (PCROA Vol.IV, p.539). Mr. Walker was also very heavy-set as a child. (PCROA Vol.IV, p.539). His sisters were some of the cruelest people Mr. Chris Walker knew, and they would pick on Mr. Walker non-stop. (PCROA

Vol.IV, p.539-540). The adults never gave Mr. Walker any positive feedback. (PCROA Vol.IV, p.539-540).

Mr. Chris Walker remembered that Mr. Walker had a really quick temper. (PCROA Vol.IV, p.540). He once had to restrain Mr. Walker for hours because of a physical fight between Mr. Walker and his father. (PCROA Vol.IV, p.541). Confrontations between Mr. Walker and his parents were common and would often turn physical. (PCROA Vol.IV, p.542). He also remembers that Mr. Walker was in special education classes in school, never had any homework, and that he would get in trouble at school on an almost daily basis, including getting into physical confrontations with teachers and principals. (PCROA Vol.IV, p.546). Mr. Walker had no friends besides his cousin, and other kids did not want to be around him. (PCROA Vol.IV, p.547).

During their teenage years, Mr. Chris Walker met Jeffrey Reed (hereinafter referred to as "Mr. Reed"), also known as 'Cajun,' who was Mr. Walker's friend. (PCROA Vol.IV, p.549). Mr. Reed was a biker and a member of the Fates Assembly, a biker gang or fellowship. (PCROA Vol.IV, p.550). The Fates Assembly was involved in all sorts of illegal activities, including drug dealing, car bombings, and shootings. (PCROA Vol.IV, p.550). Mr. Reed was also involved in these activities. (PCROA Vol.IV, p.550). Mr. Reed took Mr. Walker under his wing and brought him into this environment. (PCROA Vol.IV, p.551). Mr. Walker

was exposed to these activities and violence as a teenager. (PCROA Vol.IV, p.551). Members of the Fates Assembly were incorporated into the parties at the Walker house, and the level of partying actually increased as this brought an increased quantity and variety of drugs to the parties, including crystal methamphetamine, PCP and cocaine. (PCROA Vol.IV, p.552). Mr. Chris Walker saw his cousin one time after he left for Florida when Mr. Walker came to stay with him for almost two weeks. (PCROA Vol.IV, p.553). He could tell something was wrong with Mr. Walker who was not sleeping and had significant amounts of crystal methamphetamine with him. (PCROA Vol.IV, p.553-554).

Around the time of Mr. Walker's trial, Mr. Chris Walker was living in Virginia, and he has always been in Maryland or Virginia where family members could contact. (PCROA Vol.IV, p.555-556). Mr. Chris Walker also became aware after the fact that Mr. Walker was using his identification without his permission. (PCROA Vol.IV, p.556). Mr. Chris Walker was available to testify to this information at the time of trial, and would have willingly appeared to do so. (PCROA Vol.IV, p.556).

Ms. Rebert also testified at the evidentiary hearing. She was a drug and alcohol counselor and knew Mr. Walker through her son, Mr. Reed. (PCROA Vol.IV, p.570-571). Mr. Reed was around thirty [30] years old and Mr. Walker was around twelve [12] or thirteen [13] when they first met and started hanging out

together. (PCROA Vol.IV, p.581). Her son served time in federal prison for racketeering and drug dealing. (PCROA Vol.IV, pp.586-587 & 589). Mr. Walker's parents wanted Mr. Walker to live with Mr. Reed after he was released from prison because they felt he would be a good influence. (PCROA Vol.IV, pp.586-587 & 589). Ms. Rebert testified that Mr. Walker and his wife stayed with her son in Melbourne. (PCROA Vol.IV, p.571). She saw him on and off for two [2] years. (PCROA Vol.IV, p.571). Mr. Walker and his wife were teenagers when they got married and neither had a lot of education. (PCROA Vol.IV, p.572).

Ms. Rebert remembered that Mr. Walker's family was not a good surrounding for anyone to grow up in. (PCROA Vol.IV, p.572). There was non-stop partying and drug use at the Walker house which included a criminal motorcycle gang, the Fates Assembly[14], in which her son was an officer. (PCROA Vol.IV, ppp.572-573, 581 & 588). As a toddler crawling around, Mr. Walker was able to reach up and take drugs and alcohol off of the table. (PCROA Vol.IV, p.573). Mr. Walker was very distrustful of authority, and was taught to never tell anything that happened with his family. (PCROA Vol.IV, p.578).

Ms. Rebert remembered that Mr. Walker as a big young man, but very polite with no signs of anger or violence, and with a seemingly good marriage. (PCROA

[14] The post-conviction court took judicial notice of *U.S. v. Fiel et al,*, 35 F.3d 997 (4th Cir. Ct. App. 1994), which detailed the violence and bombings conducted by the Fates Assembly and which involved Mr. Reed.

Vol.IV, p.574-575). She bumped into him sometime later in Palm Bay and he had lost at least fifty [50] pounds and looked like a skeleton with his eyes sunken in. (PCROA Vol.IV, p. 574-575). Based on her experience as a drug counselor, she thought it obvious he was on crack cocaine or methamphetamines. (PCROA Vol.IV, p.576).

Ms. Rebert also got to know Ms. Underwood, who lived in Florida for a time after leaving a mental health facility. (PCROA Vol.IV, p.577). Ms. Underwood was diagnosed as a paranoid schizophrenic and her daughter had committed suicide at the age of thirteen [13]. (PCROA Vol.IV, p.577). Ms. Underwood was a heavy drinker during this period of time. (PCROA Vol.IV, p.578).

Ms. Rebert was contacted after the trial was over only after Mr. Walker had asked trial counsel to call her. (PCROA Vol.IV, p.580). She spoke with trial counsel briefly for about five [5] minutes outside the courtroom before she came in to testify. (PCROA Vol.IV, p.580). She was available and willing to testify at trial if she had been contacted earlier. (PCROA Vol.IV, p.580).

Gene D'Oria (hereinafter referred to as "Mr. D'Oria") also testified at the evidentiary hearing. (PCROA Vol.IV, p.590). Mr. D'Oria met Mr. Walker at a biker bar in Malabar. (PCROA Vol.IV, p.591). Mr. D'Oria and Mr. Walker both used alcohol, methamphetamines, ecstasy and cocaine together. (PCROA Vol.IV,

pp.592 & 596). Mr. Walker attempted to shield Mr. D'Oria from his drug connections, but he met them eventually. (PCROA Vol.IV, p.593). Their drug use escalated from small amounts and staying up for twenty-four [24] to thirty-six [36] hours, to staying awake on large amounts of drugs for significantly longer periods. (PCROA Vol.IV, p.593-594). About six [6] to eight [8] months before the crime, Mr. Walker had become a changed man, becoming very distrustful of others, losing significant weight, losing teeth, and getting dope sores. (PCROA Vol.IV, p.594). Mr. Walker was ingesting drugs on a daily basis, staying awake for multiple days, and had changed into a person who was not the same man Mr. D'Oria had met a few years earlier. (PCROA Vol.IV, p.595).

Mr. D'Oria testified that Mr. Walker had a job working for a building company, but as he got more into the drugs and was not sleeping, it became harder for him to do this job. (PCROA Vol.IV, p.596). He was hanging out with other drug users and his hand tools got stolen and he could not do that job anymore, so he turned to selling drugs. (PCROA Vol.IV, p.597). He also hung out a lot at the bar where Mr. D'Oria's girlfriend worked. (PCROA Vol.IV, p.598). This was a place where many bikers hung out and Mr. Walker slowly relapsed back into his previous lifestyle. (PCROA Vol.IV, p.598). He remained friends with Mr. Walker until about six [6] or seven [7] days before the homicide, when Mr. Walker "lost it" and attacked one of Mr. D'Oria's friends. (PCROA Vol.IV, p.599). Mr. D'Oria

was never contacted by anyone connected to this case, and would have been willing to provide this information if contacted prior to trial. (PCROA Vol.IV, p.600).

On April 8, 2009, Dr. Alexander Morton (hereinafter referred to as "Dr. Morton") was presented by Mr. Walker to testify at the evidentiary hearing. (PCROA Vol.IV, p.613). Dr. Morton is a psychopharmacologist and he is board certified in psychiatric pharmacy practice. (PCROA Vol.IV, p.613-615). The main point of Dr. Morton's presentation was that the substances Mr. Walker was using had an incredible effect on his brain and behavior. (PCROA Vol.V, p.623-624). Dr. Morton testified how illicit substances like those in this case can affect parts of the brain as far as judgment, movement, how one perceives things, and how one integrates information. (PCROA Vol.V, p.627-629).

Dr. Morton corroborated Mr. Walker's lifetime of substance abuse, including use of marijuana and alcohol, starting at age eight [8]. (PCROA Vol.V, p.640). Regular use of these drugs began by age of twelve [12] or thirteen [13], and he discovered stimulant drugs sometime in his twenties [20]. (PCROA Vol.V, p.640). His drug use in his teens and twenties also included LSD, ecstasy, PCP, and cocaine. (PCROA Vol.V, p.641). Overall, Mr. Walker's use of drugs should be characterized as quite extensive, and especially his later use of stimulant drugs due to the large amounts he had available to him. (PCROA Vol.V, p.642).

Dr. Morton learned that methamphetamine was Mr. Walker's drug of choice and that it essentially captured his reward system, and that beginning in his twenties [20s] he used it compulsively, regularly, and in tremendous amounts by the year 2000. (PCROA Vol.V, p.628-629). Methamphetamines are now widely available and cheap, and are a hazard to those who use them and those who do not use them. (PCROA Vol.V, p.629). Mr. Walker was involved in the manufacture of methamphetamine, thus he had unlimited amounts available and he used very large amounts on a daily basis either by ingestion or inhalation. (PCROA Vol.V, p.629-630).

Methamphetamine is a powerful stimulant, a cousin to cocaine, whose effects are generally felt over hours. (PCROA Vol.V, p.631). The main brain chemical it affects is dopamine and it can be used to get a large amount of energy, and even short-term repeated use causes side effects. (PCROA Vol.V, p.631-632). Some documented side effects resulting from use of methamphetamine include mood instability, pronounced paranoia, brain damage, and psychosis, all due to the flooding of the brain with chemicals. (PCROA Vol.V, p.632). This results in symptoms such as thinking that people are reading your mind, controlling your actions, and hearing, seeing and feeling things that are not real or present. (PCROA Vol.V, p.634). The brain in turn then does not respond to normal chemicals. (PCROA Vol.V, p.632).

Based on the information Dr. Morton reviewed and gathered, he concluded that Mr. Walker was experiencing these side effects of methamphetamine use. (PCROA Vol.V, p.636). These side effects included acting impulsively, being irritable and aggressive, not thinking clearly and having distorted perceptions, having high anxiety, being persistently paranoid, and having some hallucinations. (PCROA Vol.V, pp.636 & 671). This paranoia was a florid one, where Mr. Walker was continuously paranoid about other people. (PCROA Vol.V, p.664). Another side effect for Mr. Walker would have been psycho-motor agitation, which corresponds directly with his nickname of Fidget. (PCROA Vol.V, p.637). Dr. Morton's investigation revealed that this nickname was related to his substance abuse and not a product of his childhood. (PCROA Vol.V, p.705). Residual side effects would have made some other problems worse for Mr. Walker, and have been documented as long as eighteen [18] months after the cessation of use in the logical executive areas of the brain. (PCROA Vol.V, p.636-637). The methamphetamine use would have also accounted for the significant changes in Mr. Walker's appearance as well as and his significant weight gain after his arrest. (PCROA Vol.V, p.674-675).

Dr. Morton also found that Mr. Walker was using alcohol throughout the day along with the methamphetamine, which might have taken the edge off of some of the methamphetamine's stimulating effects, but which has also been

documented to cause irritation, agitation, violence, and a loss of inhibitions. (PCROA Vol.V, p.639). Some of the residual effects of the alcohol use, like the methamphetamine use, would be a difficulty with thinking clearly, planning, and making sense. (PCROA Vol.V, p.640).

Individuals suffering from bipolar disorder often self-medicate with illicit substances to try to treat symptoms and also because the effects can be felt within seconds. (PCROA Vol.V, p.643). They do not have the perspective to see that their disorder gets worse because of the self-medicating. (PCROA Vol.V, p.643). Mr. Walker's substance abuse worsened his psychiatric symptoms, especially his aggression and impulsivity. (PCROA Vol.V, p.644). Auditory hallucinations would be common with both bipolar disorder and the substance abuse. (PCROA Vol.V, p.665). It is also important to understand that this drug use, and its effects, is not a logical process and that addiction is a medical disorder, where use of the substances becomes one that is not voluntary. (PCROA Vol.V, p.646-647).

Cocaine and methamphetamine are very predictable in what they cause. (PCROA Vol.V, p.648). This addiction is similar to other physical disorders and diseases in that it has a genetic component, has a predictable course, and that people can respond to treatment. (PCROA Vol.V, p.651). People who stop using these substances will become different people. (PCROA Vol.V, p.648). But these people literally cannot stop biologically because the drugs have taken over the

reward systems in their brains. (PCROA Vol.V, pp.649 & 653). Once they start, they will only stop by killing themselves, being incarcerated or being hospitalized. (PCROA Vol.V, p.650).

Looking at Mr. Walker's addiction, Dr. Morton concluded that there was definitely a genetic factor based upon the extensive cross-generational addiction history within his family. (PCROA Vol.V, p.659). He also had environmental factors, including the early availability of drugs, the family party atmosphere, and the motorcycle gang presence in his life and home. (PCROA Vol.V, p.659-660). The lack of parental guidance, personality issues such as his learning disabilities and rejection by peers, and his bowel control problems, are also all important factors. (PCROA Vol.V, p.660-661). Mr. Walker continued to use substances due to his unlimited supply, lack of employment concerns, and the fact that he did not have anyone in his life putting consequences on his continued use or trying to get him to stop. (PCROA Vol.V, p.662-663).

Dr. Morton's ultimate opinion was that Mr. Walker's substance abuse made him psychotic, aggressive, paranoid, irritable, unable to think clearly about his behaviors, and very agitated. (PCROA Vol.V, p.675). This substance abuse made Mr. Walker's bipolar disorder symptoms worse and caused him to experience direct toxic effects. (PCROA Vol.V, p.676).

Then, Edward Gratzick (hereinafter referred to as "Mr. Gratzick") testified at the evidentiary hearing on behalf of Mr. Walker. (PCROA Vol.V, p.712). He is a licensed and board certified social worker in Virginia, who treated Mr. Walker. (PCROA Vol.V, p.713-716). He was accepted as an expert in social work and treating children with emotional behavioral problems. (PCROA Vol.V, p.716). His initial contact with Mr. Walker was on March 22, 1987, when Mr. Walker was fifteen [15] and was referred to him for therapy by the juvenile court system. (PCROA Vol.V, p.719). Mr. Gratzick also learned of Mr. Walker's bowel problems, or encopresis; he noted that parents and children have trouble dealing with these issues, and it was still something Mr. Walker discussed at age fifteen [15]. (PCROA Vol.V, p.722-723). In addition, Mr. Gratzick testified that Mr. Walker's parents admitted to having exposed Mr. Walker to family violence in the past for a number of years. (PCROA Vol.V, p.724).

Mr. Gratzick learned that Mr. Walker had problems in school beginning in kindergarten, had started receiving special education in second grade and did not wish to go to school. (PCROA Vol.V, p.721). Initially, Mr. Walker was diagnosed as having an emotional disability, but during his time in therapy it was discovered that he had emotional problems, neurological problems, and a learning disability. (PCROA Vol.V, pp.721-722 & 726). Mr. Walker was diagnosed as learning disabled by the school system. (PCROA Vol.V, pp.721-722 & 726). Mr. Walker

was three [3] grade levels behind in his reading ability and could not read aloud. (PCROA Vol.V, p.726-727). Mr. Walker did not like being in the special education classes, where he was particularly teased. (PCROA Vol.V, p.722).

Mr. Gratzick testified that an effort had been made to "mainstream" Mr. Walker by putting him in a regular class or two [2] with other children, but this was not successful and caused Mr. Walker to have emotional verbal outbursts. (PCROA Vol.V, p.723-724). These outbursts and anxiety were observed by Mr. Gratzick in therapy as well. (PCROA Vol.V, p.724). Mr. Gratzick observed that Mr. Walker used verbal outbursts to try and intimidate other kids so that they would leave him alone, as opposed to being physically violent. (PCROA Vol.V, p.735). Mr. Walker's relationship with his peers was an antagonistic one. (PCROA Vol.V, p.724).

Mr. Gratzick was very concerned about Mr. Walker and so he worked with teachers, the probation office, the juvenile court judge, and the director of special education to come up with a plan for Mr. Walker's entry into high school. (PCROA Vol.V, p.725). The plan was to have Mr. Walker self-contained as learning disabled but to have emotionally disturbed resources, such as counseling on a regular basis, while the school worked on his reading and other problems. (PCROA Vol.V, p.726). However, the plan and package were never put into action, despite the support of the special education director and staff and school

psychologist, because of a principal who insisted he still be labeled as emotionally disturbed. (PCROA Vol.V, p.725-726). Prior to this dispute, Mr. Gratzick had achieved stabilizing Mr. Walker emotionally. (PCROA Vol.V, p.727-729). Mr. Walker was cooperative with therapy. (PCROA Vol.V, p.727-729). After the plan fell apart, Mr. Walker did not want to return to school, and a crisis situation developed. (PCROA Vol.V, p.726). Mr. Gratzick was so upset that he wanted to sue the school and he suggested that a state department of education advocate come down to help with the situation. (PCROA Vol.V, p.727). Unfortunately, no action was ever taken. (PCROA Vol.V, p.727). In addition, no vocational or similar assessment was ever done by the school. (PCROA Vol.V, p.727).

Mr. Gratzick was contacted at some point and asked to send records to Florida in regards to this case. (PCROA Vol.V, p.717). He sent his entire record to Florida to the attorney representing Mr. Walker, namely trial counsel. (PCROA Vol.V, p.717). Mr. Gratzick had requested for his records back, but they were never returned. (PCROA Vol.V, p.717). This file included his clinical notes and correspondence with the juvenile court in Virginia, and was admitted as Defendant's Exhibit Number 6. (PCROA Vol.V, p.718, Vol.XVI, p.2689-2694, & Vol.XXII, p.3604-3609). Mr. Gratzick was never contacted after that initial request for his records. (PCROA Vol.V, p.719). Furthermore, trial counsel admitted that he did not follow-up on the Center for Brief Counseling records from Mr. Gratzick

that were mentioned at the *Spencer* hearing, and that he did not take note of the fact that the records indicated that Mr. Walker was in special education classes beginning in second grade. (PCROA Vol.III, p.350-353). He also did not act upon the information that Mr. Walker did not understand why other people did not like him, was embarrassed that he could not read out loud, and had major resentment of other individuals at school. (PCROA Vol.III, p.354-355).

Then, Dr. Joseph Sesta (hereinafter referred to as "Dr. Sesta"), an expert in forensic neuropsychology who is double board certified, testified about his neuropsychological evaluation of Mr. Walker at the evidentiary hearing. (PCROA Vol.V, p.739-741). In addition to a clinical assessment and testing, Dr. Sesta reviewed and relied upon a number of records, including but not limited to Mr. Walker's medical records from two [2] Virginia hospitals (entered as Defendant's Exhibits number 19 and 20), school records for Mr. Walker (entered as Defendant's Exhibit number18), and a Stafford County Emotional Disturbance worksheet (entered as Defendant's Exhibit number 21). (PCROA Vol.V, p.744-746, Vol.VI, p.771-772 & Vol.XXIII, p.3705-3747). Dr. Sesta's evaluation included a bio-psycho-social history, a medical history, a psychiatric history, a social history, and a forensic history. (PCROA Vol.V, p.746-748 & Vol.VI, p. 772-773). His testing included a clinical mental status exam, frontal systems exam, physical probe and screening exam, cranial nerves and sensory perception exam,

motor and coordination exam, and deep tendon reflexes exam. (PCROA Vol.V, p.747-748 & Vol.VI, p.773-774).

At this juncture, Dr. Sesta's testimony was suspended, so that the State could have Dr. Sesta provide his raw materials to Dr. Danziger[15] in Winter Haven, so that the State could have Dr. Danziger evaluate Mr. Walker, and the so that the State could depose Dr. Sesta and reset the hearing. (PCROA Vol.V, p.534-549). On July 16, 2009, the evidentiary hearing was continued. Mr. Walker continued Dr. Sesta's testimony and presented Dr. John Tanner's (hereinafter referred to as "Dr. Tanner") testimony. (PCROA Vol.VI, p.6 & p.38). The State did not present Dr. Danziger or any witnesses in rebuttal. (PCROA Vol.VI, p.66).

Dr. Sesta testified that his assistant conducted a neuropsychological battery of tests, the results of which were summarized in a Neuropsychological Assessment Data Summary Sheet (entered as Defendant's Exhibit number 17). (PCROA Vol.VI, p.774-775 & Vol.XXIII, p.3704). The battery of tests included the Halstead Impairment Index, which is roughly the equivalent of the full scale IQ score on an intelligences test, is the most commonly administered neuropsychological test battery in the country. (PCROA Vol.VI, p.775). Based on the testing done on Mr. Walker, he showed a seventy percent [70%] impairment on the index and had a T-score of thirty-two [32], which means he presents as an

[15] Dr. Danziger's name is misspelled in the post-conviction record on appeal as "Dr. Dansiger."

individual with a mild level of impairment of brain function. (PCROA Vol.VI, p.775-777). Looking at specific tests, Mr. Walker showed moderate impairment on some memory testing, impairment on recall of verbal information, severe impairment on a trial making test (which is often used as a screener for brain impairment by general practitioners as it relates to the speed and accuracy of the brain processing information), impairment on an analogies test dealing with analytic reasoning, and showed some impairment in the functioning of the left hemisphere of his brain. (PCROA Vol.VI, p.777-778). All three [3] indices for malingering indicated that Mr. Walker was putting forth an adequate effort and there were no signs he was exaggerating or fabricating his inabilities or problems. (PCROA Vol.VI, p.784).

In making a clinical assessment, Dr. Sesta looks at four [4] methods of inference. (PCROA Vol.VI, p.786). The first is level of performance, which shows that Mr. Walker's is significantly below that of individuals who share his characteristics and is at least suggestive of brain impairment. (PCROA Vol.VI, p.787). The second method is pattern of performance, and Mr. Walker shows what is referred to as cognitive dulling and problems with the cognitive triad, and thus Mr. Walker shows mild to severe impairment in this area. (PCROA Vol.VI, p.787). Mr. Walker's results then are common to several neurological diseases and neuropsychiatric disorders. (PCROA Vol.VI, p.787-788). The third method of

inference is pathognomonic signs, which were not present with Mr. Walker. (PCROA Vol.VI, p.788). The fourth method of inference is sensory, motor and reflex differences between the sides of the body, and Mr. Walker's brain shows evidence of not functioning as adequately in the left hemisphere as in the right. (PCROA Vol.VI, p.788-789). These methods of inference led Dr. Sesta to conclude that there is impairment in the functional integrity of Mr. Walker's brain. (PCROA Vol.VI, p.789).

Dr. Sesta believes that Mr. Walker's evaluation and testing shows evidence of brain impairment, and that it is in the mild to moderate range. (PCROA Vol.VI, p.790). There is evidence that this impairment is lateralized in the left hemisphere, and there is some subtle evidence of anterior compromise, based upon the impairments shown in executive functioning. (PCROA Vol.VI, p.792). The possible reasons for this impairment are hereditary or cognitive abnormalities, acquired trauma to the brain, neuropsychiatric disease, drug and alcohol abuse, and neurological disease. (PCROA Vol.VI, p.792-796). Dr. Sesta found evidence of all these possibilities in Mr. Walker's school records, the police and hospital records showing two [2] serious head injuries, the results of the testing completed, Mr. Walker's use of nearly every illicit substance known to man, and his multiple episodes of Bell's Palsy. (PCROA Vol.VI, p.790-795).

Ultimately, Mr. Walker's mild to moderate brain impairment and problems with the cognitive triad would manifest themselves in an inability to maintain employment, trouble remaining on task, slow completion of tasks, and problems with executive functioning. (PCROA Vol.VI, p.797-798). These problems with executive functioning would affect Mr. Walker's reasoning, his judgment, his ability to make good decisions, and his ability to anticipate the consequences of his behavior. (PCROA Vol.VI, p.798).

The final witness for Mr. Walker was Dr. Tanner, an expert and board certified neurologist, testified about his evaluation of Mr. Walker. (PCROA Vol.VI, p.803-804). In his evaluation and testing of Mr. Walker, Dr. Tanner noted Mr. Walker's extensive use of drugs, his problems with optic grasp testing (indicating frontal lobe issues), problems with praxis testing (indicating impairment), and brisk reflexes that were not asymmetric. (PCROA Vol.VI, p.810-814). Dr. Tanner's physical examination of Mr. Walker also identified several scars in his scalp and skin that appeared to be from old head injuries. (PCROA Vol.VI, p.814).

These examination and test results indicated to Dr. Tanner a problem in Mr. Walker's left hemisphere, and when combined with Dr. Sesta's data, are indicative of mild brain impairment or a mild brain injury. (PCROA Vol.VI, p.815). Mr. Walker's history of Bell's Palsy (reported while he was incarcerated on death row)

also indicated that Multiple Sclerosis might be a possible diagnosis. (PCROA Vol.VI, p.815-816 & p.827). Based on his work, Dr. Tanner believed that the serious head injury documented in police and hospital records, with loss of consciousness, would explain the kind of findings he and Dr. Sesta had, and that damage from substance abuse is also a potential cause. (PCROA Vol.VI, p.817-818). While the exact source has not been determined, Mr. Walker definitely has neurological impairment. (PCROA Vol.VI, p.822-823).

SUMMARY OF THE ARGUMENTS

(a) SUMMARY OF ARGUMENTS IN REPLY BRIEF OF THE APPELLANT

(i) SUMMARY OF ARGUMENTS OF THE REPLY BRIEF IN RESPONSE TO ARGUMENT 1 OF THE APPELLEE'S ANSWER BRIEF.

Mr. Walker is not procedurally barred as his Motion to Vacate Judgment and Sentence and Initial Brief focused on trial counsel's failure with regard to the two specific guilt phase issues/claims raised and briefed in his Initial Brief. At post-conviction proceedings, an ineffectiveness claim, even if the same underlying facts also supported, or could have supported, a claim of error on direct appeal.

Trial counsel had failed to timely object to the introduction of prejudicial and gruesome photographs of purported blood stains and trial counsel failed to present any evidence to challenge the voluntaries of Mr. Walker's confession to the jury. These issues/claims were sufficiently pled and not refuted by the record. An

evidentiary hearing should have been granted to allow Mr. Walker to present evidence 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).

(ii) ARGUMENT OF THE REPLY BRIEF IN RESPONSE TO ARGUMENT 2 OF THE APPELLEE'S ANSWER BRIEF

Mr. Walker did sufficiently plead in his Initial Brief that the post-conviction court failed to conduct a proper cumulative error analysis of the guilt phase issues/claims. The effect of the errors deprived Mr. Walker of his due process rights.

(b) SUMMARY OF ARGUMENTS IN ANSWER BRIEF OF THE CROSS-APPELLEE.

The post-conviction's did not err if finding that Mr. Walker's trial counsel provided ineffective assistance of counsel to Mr. Walker in violation of *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, and *Wiggins v. State*, 539 U.S. 510, 123 S.Ct. 2052. This Court will find that the post-conviction court's factual findings are supported by competent substantial evidence presented at the evidentiary hearing and in the record on appeal. Trial counsel failures include but are not limited to failure to investigate Mr. Walker's background, failure to follow-up or interview available family and friends, failure to obtain records about Mr. Walker's background, failure to follow-up on records obtained by his expert, Dr.

Bernstein, and failure to look into Mr. Walker's substance abuse history. A *de novo* review of the post-conviction's legal conclusions will also be supported by the court's findings. The post-conviction considered both the evidence presented at the penalty phase proceedings versus what was presented at the evidentiary hearing. The post-conviction court correctly did not have confidence in Mr. Walker's penalty phase proceedings.

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." 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. 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.

REPLY BRIEF ARGUMENT AND CITATIONS OF AUTHORITY

(i) ARGUMENTS OF THE REPLY BRIEF IN RESPONSE TO ARGUMENT 1OF THE APPELLEE'S ANSWER BRIEF

In response to the appellee's argument on pages 36 of its Answer Brief, the appellant, Mr. Walker specifically stated and argued two [2] specific claims in his Initial Brief and is pursuing those claims. Mr. Walker is not making any attempt to argue any issues outside its Initial Brief, except for those in its Answer Brief of the Cross-Appellee presented below. Mr. Walker limited his issues/claims that he

believed to be non-frivolous before this Court. As stated on page 21of his Initial Brief, Mr. Walker continues to argue that he 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.

First and foremost, neither of the foregoing issues/claims are procedurally barred as asserted by the appellee on pages 42 and 49 of his Answer Brief. The appellee asserts that a procedurally barred claim cannot be considered under the guise of ineffective assistance of counsel. Both issues/claims were presented in Mr. Walker's Motion to Vacate Judgment and Sentence as ineffective assistance of counsel claims, where trial counsel failed to (1) *timely object* to prejudicial testimony and photographic evidence of purported blood stains, and where trial counsel (2) 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. This Court has held the following with regard to procedural bar arguments:

> Whereas the main question on direct appeal is whether the trial court erred, the main question in a *Strickland* claim is whether trial counsel was ineffective. Both claims may arise from the same underlying facts, but the claims themselves are distinct and-of necessity-have different remedies: A claim of trial court error generally can be raised on direct appeal but not in a rule 3.850 motion, and a claim of

> ineffectiveness generally can be raised in a rule 3.850 motion but not on direct appeal. A defendant thus has little choice: As a rule, he or she can only raise an ineffectiveness claim via a rule 3.850 motion, even if the same underlying facts also supported, or could have supported, a claim of error on direct appeal.

Duest v. State¸12 So.3d 734, 750 (Fla. 2009) *citing Bruno v. State,* 807 So.2d 55, 63 (Fla. 2001) (footnotes and emphasis omitted in original). Therefore, Mr. Walker is not procedurally barred as his Motion to Vacate Judgment and Sentence and Initial Brief focused on trial counsel's failure with regard to the foregoing guilt phase issues/claims as raised in his Initial Brief.

With respect to the issue/claim regarding the failure of time trial counsel to *timely object* to the admissibility of the prejudicial and photographic evidence of the purported blood stains, the argument is specifically that when trial counsel objected and asked for a mistrial, it was too late and his objection was not timely. (ROA Vol.XVII, p.1072-1079). This issue is not procedurally barred because trial counsel at a later point objected and asked for a mistrial. Trial counsel's objection was not simultaneous, in fact, when the photographs were being entered by the prosecutor at the trial through Agent Terrence Dean Laufenberg, trial counsel responded, "No objection at this time, subject to being tied in." (ROA Vol.XII, p.1160). Therefore, the late objection and request for mistrial by trial counsel does not cure it, as 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). Moreover, 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). It is clear from the record that the objection and request for a mistrial were not timely.

In response to the appellee's argument that there is no witness to support his claim, Mr. Walker, through post-conviction counsel at the case management conference, 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 non-relevant 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). The post-conviction court should have given Mr. Walker an evidentiary hearing on this issue to present this evidence and thereby make a decision based on the evidence presented at the evidentiary hearing. Mr. Walker met his burden to establish a *prima facie* case based upon a legally valid issue/claim as pled in Mr. Walker's Motion to Vacate Judgment and Sentence and should have been granted at least an evidentiary hearing. *See Hannon v. State*, 941 So. 2d 1109, 1138 (Fla. 2006) *quoting Freeman v. State*, 761 So. 2d 1055, 1061 (Fla. 2000).

With respect to the appellee's assertion on page 46 that trial counsel was not ineffective after a full hearing and a finding by the trial court that the statement was voluntary. This was later affirmed by this Court in *Walker v.* State, 957 So.2d at 576. The appellant's argument in his Initial Brief is not that there was a *Strickland* violation by trial counsel during the Motion to Suppress hearing, where the trial court found the confession to be voluntary. The appellant's argument is limited to the failure by trial counsel to present evidence that the confession was involuntary for the jury's assessment in accordance with Florida Standard Jury Instruction 3.9(e) regarding "Defendant's Statements" to the jury during the guilt phase proceedings. (ROA Vol.V, p.806). This was specifically argued in Mr. Walker's Motion to Vacate Judgment and Sentence. (PCROA Vol.VIII, p.1237-1239).

Mr. Walker argued in part in his Motion to Vacate Judgment and Sentence that trial counsel "failed to call the expert he has used in litigating this issue through a motion to suppress." (PCROA Vol.VIII, p.1238). Moreover, 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 or to cross-examine on 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. *See Strickland,* 466 U.S. at 689 *quoting Michel v. State of La.*, 350 U.S. 9, 76 S.Ct. 158, 100 L.Ed. 83(1955).

Finally, even though the confession was admitted before the jury, this confession in accordance with Florida Standard Jury Instruction 3.9(e) can be rejected. The jury in this case was specifically instructed, "If you conclude the defendant's out of court statement was not freely and voluntarily made, you should disregard it." (ROA Vol.V, p.806). Therefore, trial counsel's failure to present evidence of involuntariness or to cross-examine on the voluntariness of the confession prejudiced Mr. Walker, as the jury heard the incriminating statements without any challenge as to its voluntariness afforded by Florida Standard Jury Instruction 3.9(e). Moreover, Mr. Walker's incriminating statements were highlighted in the prosecutor's opening and closing remarks and their voluntariness unchallenged, in the face of evidence of Mr. Walker's mental problems, drug use, physical exhaustion and paranoia of law enforcement. (ROA Vol.XI, p.850 & ROA Vol.XV, p.1728-1739 & p.1743).

(ii) ARGUMENT OF THE REPLY BRIEF IN RESPONSE TO ARGUMENT 2 OF THE APPELLEE'S ANSWER BRIEF

The Initial Brief of the Appellant is sufficiently pled as presented on pages 52 to 53. The appellee cites to *Rose v. State*, 985 So.2d 500, 509 (Fla. 2008) in making this assertion. In *Rose*, the court's findings were follows:

> In Issues V-VII, Rose challenges the constitutionality of Florida's death penalty. Rose's entire argument excerpted in full reads:
>
> > Claims V, VI and VII challenge the constitutionality of Rose's death penalty based on a lack of any requirement that a jury determine aggravating circumstances and a lack of any requirement that the facts constituting aggravating circumstances be charged in the indictment, resulting in a necessity that Rose be sentenced to life imprisonment. Rose incorporates his arguments below in this regard based on his federal rights under the Sixth, Eighth and Fourteenth Amendments.
>
> Rose has merely stated a conclusion and referred to arguments made below. Thus, we consider the issue waived for appellate review. *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."); *see also Simmons v. State*, 934 So.2d 1100, 1111 n. 12 (Fla.2006); *Cooper v. State*, 856 So.2d 969, 977 n. 7 (Fla.2003); *Randolph v. State,* 853 So.2d 1051, 1063 n. 12 (Fla.2003).

Rose v. State, 985 So.2d at 509. Mr. Walker specifically alleged that 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. Moreover, Mr. Walker argued that 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).

ANSWER BRIEF OF THE CROSS-APPELLEE ARGUMENT AND CITATIONS OF AUTHORITY

THE POST-CONVICTION COURT DID NOT ERR IN VACATING MR. WALKER'S DEATH SENTENCE AND GRANTING HIM A NEW PENALTY PHASE PURSUANT OT HIS MOTION TO VACATE JUDGEMENTS AND SENTENCE PURSUANT TO FLORIDA RULE OF CRIMINAL PROCEDURE 3.851

(a) Introduction

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). The post-conviction court entered detailed Final Order Granting in Part and Denying in Part Defendant's Post-Conviction Motion dated March 8, 2010 (hereinafter referred to as "Final Order"). (PCROA Vol.XI-XIV, p.1727-2447). This Final Order is quoted from pages 53 to 64, in the Initial Brief of the Cross-Appellant.

(b) Standard of Review

To uphold a post-conviction court's decision of a *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, claim pursuant to the Florida Rule of Criminal Procedure 3.852, this Court applies the following standard of review as laid out in *Sochor v. State*, 883 So.2d 766 (Fla. 2004):

> When we review a circuit court's resolution of a *Strickland* claim, as we do here, we apply a mixed standard of review because both the performance and the prejudice prongs of the *Strickland* test present mixed questions of law and fact.

Sochor, 883 So.2d at 771-772 *citing Strickland*, 466 U.S. 668, 698 ("Ineffectiveness is ... a mixed question of law and fact.") & *citing Stephens v. State*, 748 So.2d 1028, 1033 (Fla. 1999), *see also Schoenwetter v. State*, 46 So.3d 535, 546 (Fla. 2010) ("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 also Larzelere*, 979 So.2d 195.

This Court defers to the circuit court's factual findings, but reviews *de novo* the circuit court's legal conclusions. *See Sochor*, 883 So.2d 772 *citing Stephens*, 748 So.2d at 1033 ("Thus, under *Strickland*, both the performance and prejudice prongs are mixed questions of law and fact, with deference to be given only to the lower court's factual findings."). Moreover, "(a)s long as the trial

court's findings are supported by competent substantial evidence, 'this Court will not "substitute its judgment for that of the trial court on questions of fact, likewise of the credibility of the witnesses as well as the weight to be given to the evidence by the trial court."'" *Blanco v. State*, 702 So.2d 1250, 1252 (Fla. 1997) *quoting Demps v. State*, 462 So.2d 1074, 1075 (Fla. 1984) *quoting Goldfarb v. Robertson*, 82 So.2d 504, 506 (Fla. 1955). This Court recognizes and honors "the trial court's superior vantage point in assessing the credibility of witnesses and in making findings of fact. The deference that appellate courts afford findings of fact based on competent, substantial evidence is an important principle of appellate review. In many instances, the trial court is in a superior position 'to evaluate and weigh the testimony and evidence based upon its observation of the bearing, demeanor, and credibility of the witnesses.'" *Stephens*, 748 So.2d 1034 *quoting Shaw v. Shaw*, 334 So.2d 13, 16 (Fla.1976); *see also Ragsdale v. State*, 798 So.2d 713 (Fla. 2001). Furthermore, "(w)hen sitting as the trier of fact, the trial judge has the 'superior vantage point to see and hear the witnesses and judge their credibility.'" *Stephens*, 748 So.2d 1034 *quoting Guzman v. State*, 721 So.2d 1155, 1159 (Fla. 1998), *cert. denied*, 526 U.S. 1102, 119 S.Ct. 1583, 143 L.Ed.2d 677 (1999). The "Appellate courts do not have this same opportunity." *Stephens*, 748 So.2d 1034.

(c) Argument of the Answer Brief of the Cross-Appellee

The post-conviction's did not err if finding that Mr. Walker's trial counsel provided ineffective assistance of counsel to Mr. Walker in violation of *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, and *Wiggins v. State*, 539 U.S. 510, 123 S.Ct. 2052. This Court will find that the post-conviction court's factual findings are supported by competent substantial evidence presented at the evidentiary hearing and in the record on appeal. Furthermore, a *de novo* review of the post-conviction's legal conclusions will also be supported by the court's findings. The cross-appellant does not address trial counsel's deficient investigation directly, but does imply that it was sufficient in that he contacted numerous friends and family members, that some of the people he failed to contact did not testify at the evidentiary hearing, and that Mr. Walker prevented and hindered trial counsel's investigation. *See Ragsdale v. State*, 798 So.2d 713 (Fla. 2001).

The cross-appellant asserts on page 65 of its Initial Brief that "(t)he trial court erred by failing to consider the evidence which was presented by Mr. Studstill," and went on to cite the findings of this Court regarding the penalty phase proceedings in *Walker v. State*, 957 So.2d at 583-584. This assertion is refuted by the post-conviction court's Final Order, whereby the post-conviction

court refers to the evidence presented by Dr. Radin and Dr. Bernstein at the penalty phase and stated as follows:

> "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. . . . Nothing further was offered by defense counsel."

(PCROA Vol. XI, p.1729). The post-conviction court also attached as Exhibit A, a copy of the Penalty phase transcript from July 19, 2004, pp. 1844-1886. (PCROA Vol.XI, p.1729 & p.1769-1811). Moreover, the post-conviction court also looked at the presentation at the *Spencer* hearing and found the following:

> "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. . . . He did not present any evidence at the Spencer hearing."

(PCROA Vol.XI, p.1729). The post-conviction court also attached as Exhibit B, a copy of the *Spencer* hearing transcript from August 30, 2004, pp. 11-14. (PCROA Vol.XI, p.1729 & p.1812-1811-1815). The Final Order shows that the post-conviction not only looked at the evidence presented at the penalty phase but also at the evidence presented at the evidentiary hearing. Furthermore, the post-

conviction court wrote the following regarding the totality of the evidence (referenced on page 67 of the Initial Brief of the Cross-Appellant):

> "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)."

(PCROA Vol.XI, p.1730)(emphasis added), *see also Strickland*, 466 U.S. at 692 & 687. The post-conviction court did not look at the failures of trial counsel in a vacuum; the post-conviction performed the appropriate *Strickland* analysis.

The cross-appellant asserts on page 67 of its Initial Brief that "(i)nformation 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." This assertion is refuted by the post-conviction court and is supported by competent and substantial evidence via trial counsel's testimony at the evidentiary hearing. The post-conviction court made the following factual findings as to this issue:

> "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."

(PCROA Vol.XI, p.1731). *Ragsdale*, 798 So.2d at 719-720.The post-conviction also attached as Exhibit C the evidentiary hearing testimony of trial counsel on pages pp. 48-49, 54, 88-89, 102-103 &117. (PCROA Vol.XI, p.1731 & p.1816).

The evidentiary hearing testimony by trial counsel supports the post-conviction court's findings. Trial counsel testified that even though Mr. Walker was reluctant to tell him about his family, trial counsel "did have the information at that point ***from him***." (PCROA Vol.III, p.269)(emphasis added). Moreover, trial counsel testified that despite a lot of resistance on any suggestions he made about Mr. Walker's family or anybody testifying for him, Mr. Walker did not restrict trial counsel from speaking to people or "dragging up the fact that (Mr. Walker) was nuts when (he) was fifteen." (PCROA Vol.III, p.317-318 & Vol.III, p.386-387). Furthermore, trial counsel acknowledged when asked if it was Mr. Walker who contacted his parents, that he recalled that he contacted the parents or he may have had Mr. Walker contact them. (PCROA Vol.III, p.319-320). Also, with respect to Dr. Radin, trial counsel testified that he admonished Mr. Walker for not telling him about Dr. Radin, however, trial counsel acknowledged that Mr. Walker did not

"associate it with anything that had to do with the crime or with his own head, what he associated it with was his depression and the problems he was having while he was sitting down there at the jailhouse." (PCROA Vol.III, p.302-303). Furthermore, trial counsel later testified that "(he) honestly (did not) think the man considered that to be of any importance with respect to his case so therefore there was no reason to bother (him) with it because (he) already had a lot of things (he) was dealing with with his case." (PCROA Vol.III, p.376-377). Moreover, Dr. R.V. Radin's name was clearly disclosed in Mr. Walker's Circles of Care records and made available to trial counsel by Dr. Bernstein on June 15, 2004. (PCROA Vol.III, p.284 & p.292-293, Vol.XV, p.3504-3508 & Vol.XXI, p.3418-3422). Also, Mr. Randy Simms' and Mr. Edward Gratzick's names and contact information were in Mr. Walker's counseling records from the Center for Brief Counseling Inc. available to trial counsel. (PCROA Vol. XVI, p.2689 & Vol.XXII, p.3604).

Mr. Walker is not the attorney in his capital case, it is trial counsel Studstill. Mr. Walker did not withhold information from his trial counsel as asserted by the cross-appellant; he just did not understand its importance. (PCROA Vol.III, p.376-377). The post-conviction court was correct in making the following legal conclusions and findings:

> "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).[16]

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). . . .

(PCROA Vol.XI, p.1728-1729)(emphasis in original).

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*."

[16] The current citation is *Ferrell* v. *State*, 29 So.3d 959 (Fla. 2010).

(PCROA Vol.XI, p.1731)(emphasis added); *see also State v. Larzelere*, 979 So.2d 195 *citing to State v. Lewis*, 838 So.2d 1102 (Fla. 2002); *see Wiggins*, 539 U.S. at 522-523; *see also Ragsdale*, 798 So.2d at 716-719. This Court in *Lewis*, "explained that '(a)lthough 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 and intelligent decision.'" *Larzelere*, 979 So.2d at 204 *quoting Lewis*, 838 So.2d at 1113 (emphasis added). Mr. Walker did cooperate with his trial counsel and assisted trial counsel when he was asked to, and did not knowingly withhold information from his trial counsel.

With regard to the forgoing issue, the cross-appellant cites to *Peede v. State*, 955 So.2d 480, 493 (Fla. 2007) and *Cherry v. State*, 781 So.2d 1040, 1050 (Fla. 2000). However, the facts of *Peede* and *Cherry* are distinguishable from Mr. Walker's case. In *Peede*, the appellant would not talk to his attorney about the murder because he did not want to think about it and it hurt too much.[17] *See Peede*,

[17] The Court asked the appellant during the competency hearing the following questions about why he would not talk to his attorney:

> Court: Mr. Peede, why won't you talk to your lawyer about these things?
> Mr. Peede: Truth is, it hurts too much. So, I'm not thinking about it, and I don't want to talk about it.
> Court: So, it's just a decision. You decided not to talk about these things with your attorney because it's too painful for you; is that what you're saying? Emotionally painful for you? Did you hear my question, Mr. Peede?

955 So.2d 480, 488. In *Cherry*, the appellant told the trial court upon commencement of the penalty phase that he did not have any witnesses for mitigation.[18] *See Cherry*, 781 So.2d 1040, 1050; *see in contrast to Ragsdale v. State*, 798 So.2d 713, 719-720.

The post-conviction court recognized that Mr. Walker's parents did not testify at the evidentiary hearing and stated that "the Court cannot judge whether counsel's failure to have them testify at the penalty hearing prejudiced the Defendant." (PCROA Vol.XI, p.1733). However, the post-conviction court found that "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." (PCROA Vol.XI, p.1733). The post-conviction court also found that "(i)t appears that five short phone calls to two family members were the only family investigation counsel conducted before trial." (PCROA Vol.XI, p.1731). The cross-appellant on page 68 of its Initial Brief, fault the parents for not wanting to testify. However, the post-conviction court correctly finds that "(c)ounsel testified that ***she did not seem***

> Peede: Sir, I just told you. I don't think about it. I don't talk about it. That's the end of it. If you want to kill me, kill me. That's it. I'm through with it. *Peede*, 955 So.2d at 488.

[18] Trial counsel at the evidentiary hearing testified that "Cherry did not provide with names of any witnesses who could have provided mitigating evidence." *Cherry*, 781 So.2d at 1050. Furthermore, trial counsel asked Cherry in open court whether he knew 'of anyone who would be able to come in and substantiate mitigating grounds that the Court has enumerated here' and Cherry responded in the negative. *Id*. at 1050 (quotations in original).

to understand the criminal process but he did not testify that he attempted to explain it to her or her role in it," and that "(c)ounsel never spoke to the Defendant's father until sometime during the trial, when he showed up for a couple of days." (PCROA Vol.XI, p.1731-1732)(emphasis added). The post-conviction court's finding is supported by trial counsel's testimony of the parents' fear as follows:

> "I told them straight about the case, I didn't give them any hope, and they, of course, they heard the opening statements which just confirmed what I told them and, you know, I talked to them about again - - now, I guess I had never really spoken to his father but his father was here and I talked to him . . . they were just so adamant about not testifying in the punishment phase and I – anyway, they left before we got that far. I think they felt because they were afraid that I would call them to put them on the stand anyway."

(PCROA Vol.III, p. p.291-292). Furthermore, the post-conviction court found that trial counsel only spoke briefly to Ms. Longendorf and failed to contact the two other siblings. (PCROA Vol.XI, p.1732). The post-conviction court also found that trial counsel never spoke to Mr. Walker's wife when he knew Mr. Walker was married. (PCROA Vol.XI, p.1732). *See Ragsdale*, 798 So.2d at 719.

The cross-appellant argues that "(i)f 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 of prejudice. . .The evidentiary hearing did not add any further mitigation to that already considered and was cumulative." The cross-appellant

quotes this Court's opinion on direct appeal which identified nine different mitigators proposed by Mr. Walker's trial counsel and to the court's sentencing order that addressed sixteen [16] issues.[19] However, contrary to the State's assertions, in the sentencing order, the trial Court specifically held that the aggravating circumstances presented outweighed "the relatively insignificant non-statutory mitigating circumstances established by this record."[20] (ROA Vol.VI, p.976). Likewise, out of the nine mitigators proposed by trial counsel, and the sixteen issues addressed by the sentencing order, the trial Court found no statutory mitigators to exist, and found that only "four non-statutory mitigating circumstances have been established by the record." (ROA Vol.VI, p.976). Two of those four mitigating circumstances, that the co-defendant would not receive the death penalty and the Defendant has remorse, were only given slight weight. (ROA Vol.VI, p.975). A third mitigator, that Mr. Walker cooperated with the police in giving a statement which aided in their investigation, was given moderate weight.

The only remaining mitigating circumstance which was found by the trial Court, and the only one which had anything to do with Mr. Walker, his background, his life history, his mental health, and related circumstances, was the

[19] It should be noted that a number of these issues, such as Tried to Protect Leigh Ford, Unselfish Character, and Did Not Harm Good Samaritan were rejected by the Court as mitigating circumstances, and that others such as "Daily Use of Substances" were found by the Court *not to be supported by the evidence*.

mitigating circumstance that Mr. Walker had a mental illness (bipolar disorder) and was under the influence of drugs and sleep deprivation on the day of the crime.[21] In analyzing this mitigating circumstance, it is important to note that the trial court found that there was no evidence besides Mr. Walker's statement that he used cocaine or methamphetamines prior to the homicide, and no evidence that Mr. Walker was under the influence of drugs at the time of the homicide. (ROA Vol. VI, p.969). The trial court further emphasized that there was no evidence of bipolar disorder other than Mr. Walker's self-reports. (ROA Vol. VI, p.970). Ultimately, the trial court even questioned whether Mr. Walker had a mental impairment at all by stating that "Walker's mental impairment, if he actually had one . . ." (ROA Vol. VI, p.970-971). Because of this paucity of evidence of drug use and mental illness, the Court held that Mr. Walker "knew and understood what he was doing" and that he "fully understood the criminality of his actions." (ROA Vol. VI, p.971). Of the four [4] non-statutory mitigators that were found, only one dealt at all with Mr. Walker and his life history, and only to the extent of his condition on the day of the murder, which the trial court found was questionable and had little to no effect on his actions that day. The mitigating evidence presented by trial counsel

[21] However, the Court only mentioned that a report about Mr. Walker's counseling at age 15 was reviewed by the Court, and at no time is this information, or anything about Mr. Walker's childhood, actually addressed, considered or discussed in the sentencing order.

cannot be termed by any stretch of the imagination as substantial, but must instead be identified for what it was – extremely limited, unsupported and insignificant.

The post-conviction court in its written order goes through each witness' testimony painstakingly. (PCROA Vol.XI, p.1733-1739). The cross-appellant from pages 70 to 71 in its Initial Brief, argues that the testimony of Mr. Chris Walker, Ms. Morris and Mr. D'Oria was not helpful to Mr. Walker and portrayed him as "a lost cause contrary to Mr. Studstill's strategy to 'humanize.'" This argument is refuted by looking at the entire testimony of these witnesses and not just parts of it. First, the post-conviction court found and details in its Final Order that Ms. Morris and Mr. Chris Walker "gave credible, consistent testimony about the Defendant." (PCROA Vol.XI, p.1733). Ms. Morris and Mr. Chris Walker gave testimony about Mr. Walker's childhood, the substance abuse that engulfed Mr. Walker's household, the violence that existed in Mr. Walker's household, and about Mr. Walker's exposure to violence and drug use when he was taken under the wing of the Fates Assembly and Jeffrey Reed, as a teenager. (PCROA Vol.XI, p.1733-1735 & PCROA Vol.IV, p.467-556). Mr. Chris Walker had knowledge that something was wrong with Mr. Walker who was not sleeping and had significant amounts of crystal methamphetamine with him. (PCROA Vol.IV, p.553-554). Furthermore, the post-conviction found that Mr. D'Oria had first-hand knowledge testimony that Mr. Walker and he used to abuse drugs and that he saw Mr. Walker extent of Mr.

Walker's abuse of Methamphetamines, where he lost large amounts of weight, stayed awake for days, and turned to dealing in drugs. (PCROA Vol.XI, p.1736 & PCROA Vol.IV, p.590-600). Mr. D'Oria testified that Mr. Walker had become a changed man, becoming very distrustful of others, losing significant weight, losing teeth, and getting dope sores. (PCROA Vol.IV, p.594). Mr. Walker was ingesting drugs on a daily basis, staying awake for multiple days, and had changed into a person who was not the same man Mr. D'Oria had met a few years earlier. (PCROA Vol.IV, p.595). Ms. Morris, Mr. Chris Walker, and Mr. D'Oria were all available to testify at the penalty phase and were never contacted by trial counsel. The post-conviction court correctly finds that trial counsel "knew that the Defendant was using the identification of someone named Christopher Walker at the time of the arrest, but did not inquire into who Christopher Walker was." (PCROA Vol.XI, p.1732).

The cross-appellant in its Initial Brief on page 70 asserts that Ms. Rebert's testimony is cumulative at the evidentiary hearing because she testified at the sentencing hearing. The post-conviction court made the finding that trial counsel only spoke to one of Mr. Walker's friend, Ms. Rebert, but failed to call her as a witness at the penalty phase and later was surprised when she showed up to the sentencing hearing. (PCROA Vol.XI, p.1732). It is important to note that Ms. Rebert did not testify at the penalty phase or at the *Spencer* hearing, and that her

letter and testimony came at such a late stage of the proceedings that the trial court had to make a hand-written note of such on the already completed sentencing order. (ROA Vol.VI, p.962). Ms. Rebert was contacted after the trial was over only after Mr. Walker had asked trial counsel to call her. (PCROA Vol.IV, p.580). Trial counsel did not fully develop the witness' testimony and only spoke to her for about five [5] minutes outside the courtroom before she testified. (PCROA Vol.IV, p.580). A review of Ms. Rebert's testimony belies the argument that it is cumulative as it reveals the new mitigating evidence which was available for presentation but not put forth to the jury. This includes that she knew Mr. Walker through her son, Jeffrey Reed. (PCROA Vol.IV, p.570-571). Jeffrey Reed was around thirty [30] and Mr. Walker was twelve [12] or thirteen [13] when they first met and started hanging out together. (PCROA Vol.IV, p.581). Her son served time in federal prison for racketeering and drug dealing, and Mr. Walker's parents wanted Mr. Walker to come live with Mr. Reed after he was released because they felt he would be a good influence. (PCROA Vol.IV, p.586-589). Furthermore, Ms. Rebert testified that Mr. Walker's family was not a good surrounding for anyone to grow up in. (PCROA Vol.IV, p.572). There was nonstop partying and drug use at the Walker house which included a criminal motorcycle gang, the Fates Assembly, which her son was involved with. (PCROA Vol.IV, p.572-573, p.581 & p.588). She also testified that as a toddler crawling around, Mr. Walker was able to reach

up and take drugs and alcohol off of the table. (PCROA Vol.IV, p.573). He was very untrusting of authority, and was taught to never tell anything that happened with his family. (PCROA Vol.IV, p.578). Ms. Rebert testified that based on her experience as a drug counselor, she thought it obvious Mr. Walker was on crack cocaine or meth when she last saw him. (PCROA Vol.IV, p.576). Ms. Rebert even knew Ms. Underwood, Mr. Walker's sister, who lived in Florida for a time after leaving a mental health facility. (PCROA Vol.IV, p.577). Ms. Underwood was diagnosed as a paranoid schizophrenic, and her daughter had committed suicide at age thirteen. (PCROA Vol.IV, p.577). Ms. Underwood was a heavy drinker during this period of time. (PCROA Vol.IV, p.578). Her testimony clearly established the lack of investigation and diligent preparation by trial counsel and is not cumulative.

The testimony presented by Ms. Morris, Mr. Chris Walker, Ms Rebert, and Mr. D'Oria provide substantial and competent evidence to support the post-conviction court's factual findings and legal conclusions as follows:

> "While family/friend/schoolwork 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. *State* 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)."

(PCROA Vol.XI, p.1738). *See Ragsdale*, 798 So.2d 713. Furthermore, the post-conviction court found that "(t)heir 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 effect of the meth addiction." (PCROA Vol.XI, p.1736).

The cross-appellant again on page 71 of its Initial Brief asserts that Dr. Morton's testimony is cumulative. Dr. Morton did not diagnose Mr. Walker as bipolar, but instead, as per the Court's order, focused on the issue of substance abuse. As regards the issue of substance abuse, as discussed above, trial counsel only presented mitigation on the fact that Mr. Walker was under the influence at the time of the homicide, and the trial court stated in its sentencing order that there was no evidence about Mr. Walker using drugs prior to the homicide. (ROA Vol.VI, p.969). The trial court did not find evidence that Mr. Walker's drug use would have affected his actions or his ability to understand them and the criminality of his actions. (ROA Vol.VI, p.971). In contrast, the main point of Dr. Morton's presentation was that the substances Mr. Walker was using had an incredible effect on his brain and behavior, and that illicit substances like those at issue can affect parts of the brain as far as judgment, movement, how one

perceives things, and how one integrates information. (PCROA Vol.V, p.623 & p.628).

The post-conviction court recognized the following new information presented by Dr. Morton:

> "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 predisposition. 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."

(PCROA Vol.XI, p.1736-1737). Once again the drug abuse evidence may have been "mitigating, especially had counsel also called an expert witness to describe the effects of the meth addiction." (PCROA Vol.XI, p.1736).

As to the evidence presented by Dr. Sesta and Dr. Tanner, as to the presence of brain damage, the post-conviction court after analyzing their testimony, found that "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." (PCROA Vol.XI, p.1738-1739). This is because Mr. Walker refused to leave his cell to be transported for an MRI. (PCROA Vol.XI, p.1739).

Finally, the cross-appellant never addressed some of the most potent testimony presented at the evidentiary hearing, by Mr. Gratzick who treated Mr. Walker as a teenager. The post-conviction court did however look at Mr. Gratzick's testimony. (PCROA Vol.XI, p.1737-1738). Mr. Gratzick testified to substantial mitigation, such as Mr. Walker's medical issues, schooling issues, emotional disabilities, learning disabilities, placement in special education classes, witnessing of family violence, being the subject of teasing and bullying by other children, and the failure of social and government organizations to properly address his problems and act when needed. All of these concerns are accepted mitigating circumstances, and were un-rebutted by the State's evidence. The

post-conviction made the following factual findings as to Mr. Gratzick's testimony:

> "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. 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."

(PCROA Vol.XI, p.1737-1738)(internal cites omitted).

The cross-appellant from pages 67 to 71 of its Initial Brief puts forth the assertion that the testimony presented at the evidentiary hearing was "cumulative, speculative, and painted Mr. Walker in a negative light rather than "humanize" him." Later on page 77 of the Initial Brief, the cross-appellant states that trial

counsel's trial strategy was to humanize Mr. Walker. However, the foregoing evidence presented at the evidentiary hearing and discussed above supports the post-conviction court's findings that there was additional evidence that trial counsel failed to investigate to humanize Mr. Walker and that trial counsel's strategy was to "demonize" the victim and not humanize Mr. Walker. (PCROA Vol.XI, p.1739-1740); *see Larzelere*, 979 So.2d at 207 ("The State argues that we should not find that Larzelere was prejudiced because this 'mitigation' evidence would have been more harmful than helpful to her case. . . . While we agree the State could have presented rebuttal evidence during the penalty phase, this does not change our conclusion that Larzelere was prejudiced by counsel's penalty-phase performance."); *see also Sears v. Upton*, 130 S.Ct. 3259, 3264, 177 L.Ed.2d 1025 (2010) ("the fact that along with this new mitigation evidence there was also some adverse evidence is unsurprising, . . . given that counsel's initial mitigation investigation was constitutionally inadequate. Competent counsel should have been able to turn some of the adverse evidence into a positive-perhaps in support of a cognitive deficiency mitigation theory. . . This evidence might not have made Sears any more likable to the jury, but it might well have helped the jury understand Sears, and his horrendous acts-especially in light of his purportedly stable upbringing. Because they failed to conduct an adequate mitigation investigation, ***none*** of this evidence was known to Sears' trial counsel. It emerged

only during state postconviction relief." (internal cites omitted and emphasis in original))

The following is in reference to assertions made on page 68 of the Initial Brief of the Cross-Appellant. First and foremost, Miss Russo was not a friend of Mr. Walker, in fact the record supports that she was a friend of Mr. Walker's co-defendant, Leigh Ford. (PCROA Vol.III, p.322). Then, Mr. Walker's sister, Ms. Longendorf did not know how she could help trial counsel, but she sent a letter as requested by trial counsel. (PCROA Vol.III, p.270-271). Trial counsel also told her how bad Mr. Walker's case was. (PCROA Vol.III, p.271). The letter by the paranoid schizophrenic sister was a flag that trial counsel also failed to follow-up by contacting her. (PCROA Vol.III, p.349-350). Finally, the cross-appellant blames Mr. Walker for "never advising" trial counsel about Pamela Townsend's letter sent to the judge, but fails to establish that Mr. Walker even knew that she had sent such a letter prior to the *Spencer* hearing.

The post-conviction court also correctly found that trial counsel failed to obtain several records presented at the evidentiary on behalf of his client. (PCROA Vol.XI, p.1732). The post-conviction court wrote the following:

> "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. As for obtaining records, he apparently only suggested to the Defendant that he, the Defendant, try and get him some."

(PCROA Vol.XI, p.1732). The post-conviction made a sound legal conclusion is finding that "(w)here 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," and citing to *Rompilla v. Beard*, 545 U.S. 374, 125 S.Ct. 2456, 162 L.Ed.2d 360 (2005). *See also Ragsdale*, 798 So.2d 713. In *Rompilla*, the United States Supreme Court held that counsel rendered deficient performance and cited counsel's failure to review Rompilla's prior conviction, failure to obtain school records, failure to obtain records of Rompilla's prior incarcerations, and failure to gather evidence of a history of substance abuse. *See Rompilla*, 545 at 2463. The *Rompilla* Court found that "this is not a case in which defense counsel simply ignored their obligation to find mitigating evidence, and their workload as busy public defenders did not keep them from making a number of efforts." *Id*. at 2462.

The post-conviction court correctly found that trial counsel rendered deficient performance by failing to investigate and present important mitigating evidence when it was available and trial counsel's strategy was not to humanize

Mr. Walker but "to focus on the victim as a violent person who had threatened other people." (PCROA Vol.XI, p.1739-1740). *See Haliym v. Mitchell*, 492 F.3d 680, 718 (6th Cir. 2007) (Trial counsel rendered deficient performance where they "failed to discover important mitigating information that was reasonably available and suggested by information already within their possession."); *see also Wiggins*, 539 U.S. at 528 *quoting Strickland*, 466 U.S. at 690-691 ("(S)trategic choices made after less than complete investigation are reasonable precisely to the extent that reasonable professional judgments support the limitation on investigations."). No tactical motive can be ascribed to an attorney whose omissions are based on ignorance, or on the failure to properly investigate or prepare. *See Brewer v. Aiken*, 935 F.2d 850 (7th Cir. 1991); *see also Kenley v. Armontrout*, 937 F.2d 1298 (8th Cir. 1991); *see also Kimmelman v. Morrison*, 477 U.S. 365, 106 S.Ct. 2574, 91 L.Ed.2d 305 (1986).

The evidentiary hearing clearly shows all the evidence that was available and that was not investigated or presented by trial counsel to the jury at the penalty phase proceedings. Furthermore, the post-conviction court correctly recognized that trial counsel failed to humanize his client or he failed to investigate or to follow-up on available and mitigating evidence and that trial counsel was ineffective to Mr. Walker's detriment. The post-conviction court's legal conclusions and findings based are sound and based on substantial and competent

evidence and should not be disturbed. The post-conviction came to the following correct conclusions after properly weighing the 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.*[22]
>
> 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.
>
> 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.

[22] The post-conviction court is citing to *Hannon v. State*, 941 So.2d 1109, 1134 (Fla. 2006) to assess if the court's confidence is undermined in the outcome of the penalty phase trial. (PCROA Vol.XI, p.1730).

> 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*.[23]
>
> 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."

(PCROA Vol.XI, p.1739-1740).

There was a tremendous amount of non-cumulative, relevant, and mitigating evidence presented at the evidentiary hearing to substantiate the post-conviction's finding that trial counsel was ineffective in his mitigation investigation and presentation at the penalty phase. A reasonable strategic decision is based on an informed judgment. "[T]he principal concern . . . is not whether counsel should have presented a mitigation case. Rather, [the] focus [should be] on whether the ***investigation supporting counsel's decision to not introduce mitigating evidence . . . was itself reasonable***." *See Wiggins*, 539 U.S. at 523 (emphasis added). In making this assessment, a court "***must consider not only the quantum of evidence***

[23] The post-conviction court is citing to *State v. Lewis*, 838 So.2d 1102 (Fla. 2002) for the issue that knowing and intelligent waiver of mitigation cannot be done prior to an attorney's thorough investigation into mitigating evidence.

already known to counsel, but also whether the known evidence would lead a reasonable attorney to investigate further." *Id*. at 527 (emphasis added). The post-conviction court made the correct legal findings based on competent and substantial evidence. Furthermore, this ineffectiveness prejudices Mr. Walker as it undermines the court's confidence in the outcome of the penalty phase. *See Sears*, 130 S.Ct. at 3267 ("A proper analysis of prejudice under *Strickland* would have taken into account the newly discovered evidence of Sears' 'significant' mental and psychological impairments, along with the mitigation evidence introduced during Sears' penalty phase trial, to assess whether there is a reasonable probability that Sears would have received a different sentence after a constitutionally sufficient mitigation investigation. . . It is for the state court – and not for either this Court . . . to undertake this reweighing in the first instance."(internal cites omitted)); *see Hannon v. State*, 941 So.2d 1109, 1134 (Fla. 2006); *see Strickland*, 466 U.S.at 694; *see Wiggins*, 539 U.S. at 528; *see also Larzelere*, 919 So.2d 202-207.

The post-conviction did not err in granting Mr. Walker's Motion to Vacate Judgment and Sentence "with regard to Claim II A as it relates to mitigation." (PCROA Vol.XI, p.1767). The post-conviction court did not err in vacating Mr. Walker's sentence and in granting him a new penalty phase as to count one [1] for first degree premeditated murder. (PCROA Vol.XI, p.1767). Therefore, Mr.

Walker respectfully requests that this Court not disturb the post-conviction's court findings and rulings with regard to the penalty phase proceedings.

CONCLUSION

Based on the foregoing and the record, 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.

Moreover based on the foregoing and the record, 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. The post-conviction court's rulings were based on competent and substantial evidence and its legal conclusions were correct.

Respectfully submitted,

Signed/ Raheela Ahmed
Raheela Ahmed
Florida Bar Number 0713457
Assistant CCRC
Email: ahmed@ccmr.state.fl.us

Signed/ Carol C. Rodriguez
Carol C. Rodriguez
Florida Bar No. 0931720
Assistant CCRC
Email: rodriguez_cc@ccmr.state.fl.us
Law Office of the Capital Collateral
Regional Counsel- Middle Region
3801 Corporex Park Dr. - Suite 210
Tampa, FL 33169-1136
Telephone (813) 740-3544
Fax No. (813) 740-3554

Counsels for
ROBERT SHANNON WALKER, II.

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, Florida 32118-3951, to **Robert Wayne Holmes**, Assistant State Attorney, Office of the State Attorney, 2725 Judge Fran Jamieson Parkway, Building D, Viera, Florida 32940, and to **Robert Shannon Walker II**, DOC# 126605, Union Correctional Institution, 7819 NW 228th Street, Raiford, Florida 32026 on this 15th day of March, 2011.

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 15th day of March, 2011.

Respectfully submitted,

Signed/ Raheela Ahmed
Raheela Ahmed
Florida Bar Number 0713457
Assistant CCRC
Email: ahmed@ccmr.state.fl.us

Signed/ Carol C. Rodriguez
Carol C. Rodriguez
Florida Bar No. 0931720
Assistant CCRC
Email: rodriguez_cc@ccmr.state.fl.us
Law Office of the Capital Collateral
Regional Counsel- Middle Region
3801 Corporex Park Dr. - Suite 210
Tampa, FL 33169-1136
Telephone (813) 740-3544
Fax No. (813) 740-3554

Counsels for
ROBERT SHANNON WALKER, II.

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.

Respectfully submitted,

Signed/ Raheela Ahmed
Raheela Ahmed
Florida Bar Number 0713457
Assistant CCRC
Email: ahmed@ccmr.state.fl.us

Signed/ Carol C. Rodriguez
Carol C. Rodriguez
Florida Bar No. 0931720
Assistant CCRC
Email: rodriguez_cc@ccmr.state.fl.us
Law Office of the Capital Collateral
Regional Counsel- Middle Region
3801 Corporex Park Dr. - Suite 210
Tampa, FL 33169-1136
Telephone (813) 740-3544
Fax No. (813) 740-3554

Counsels for
ROBERT SHANNON WALKER, II.