IN THE SUPREME COURT OF FLORIDA

Case No. SC10-638

ROBERT SHANNON WALKER,

Appellant/Cross-Appellee,

v.

STATE OF FLORIDA,

Appellee/Cross-Appellant.
_____/

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

REPLY BRIEF OF CROSS-APPELLANT

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Cross-appeal: The trial judge erred in granting a new penalty phase based on inadequate investigation and presentation of mitigation evidence. The trial judge did not consider the evidence which *was* presented at the penalty phase and make a comparison to the evidence presented at the evidentiary hearing. Had the trial judge done so, he would have concluded that the "new" or "additional" evidence was cumulative, contradictory, and would not have changed the outcome of the proceeding. Walker did not meet his burden of showing counsel was deficient for failing to investigate, nor did Walker show prejudice.

Recent decisions from the United States Supreme Court clarify the review process for claims of ineffective assistance of counsel. These decisions illustrate that the trial judge improperly applied *Strickland*.

CROSS APPEAL ARGUMENT

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

The United States Supreme Court recently clarified the review standards of *Strickland:*

> In *Strickland*, this Court made clear that "the purpose of the effective assistance guarantee of the Sixth Amendment is not to improve the quality of legal representation ... [but] simply to ensure that criminal defendants receive a fair trial." 466 U.S., at 689, 104 S.Ct. 2052. Thus, "[t]he benchmark for judging any claim of ineffectiveness must be whether counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result." *Id.*, at 686, 104 S.Ct. 2052 (emphasis added). The Court acknowledged that "[t]here are countless ways to provide effective assistance in any given case," and that "[e]ven the best criminal defense attorneys would not defend a particular client in the same way." *Id.*, at 689, 104 S.Ct. 2052.
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> Recognizing the "tempt[ation] for a defendant to second-guess counsel's assistance after conviction or adverse sentence," *ibid*., the Court established that counsel should be "strongly presumed to have rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment," *Id.*, at 690, 104 S.Ct. 2052 . To overcome that presumption, a defendant must show that counsel failed to act "reasonabl[y] considering all the circumstances." *Id.*, at 688, 104 S.Ct. 2052. The Court cautioned that "[t]he availability of intrusive post-trial inquiry into attorney performance or of detailed guidelines for its evaluation would encourage the proliferation of ineffectiveness challenges." *Id.*, at 690, 104 S.Ct. 2052.
>
> The Court also required that defendants prove prejudice. *Id.*, at 691–692, 104 S.Ct. 2052. "The defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the

> result of the proceeding would have been different." *Id.*, at 694, 104 S.Ct. 2052. "A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Ibid.* That requires a "substantial," not just "conceivable," likelihood of a different result. *Richter*, 562 U.S., at ——, 131 S.Ct., at 791.

Cullen v. Pinholster, 2011 WL 1225705, 12 (Apr. 4, 2011).

This analysis solidifies the deference standard that must be applied when considering whether counsel rendered effective assistance. The trial court failed to follow *Strickland v. Washington*, 466 U.S. 668 (1984), and this Court's *de novo* review should correct that failure. *See Schoenwetter v. State*, 46 So. 3d 535, 546 (Fla. 2010)(review of legal conclusions on claims of ineffective assistance is *de novo)*. The lower court misapplied *Strickland* and overlooked "the constitutionally protected independence of counsel and ... the wide latitude counsel must have in making tactical decisions." *Strickland*, 466 U.S., at 689. Beyond the general requirement of reasonableness, "specific guidelines are not appropriate." *Strickland* at 688. "No particular set of detailed rules for counsel's conduct can satisfactorily take account of the variety of circumstances faced by defense counsel or the range of legitimate decisions ...." *Strickland* at 688–689. In fact, *Strickland* itself rejected the notion that the same investigation will be required in every case. *Strickland* at 691. It is "[r]are" that constitutionally competent representation will require "any one technique or approach." *Harrington v. Richter*, 562 U.S. ——, 131 S.Ct. 770, 779, 178 L.Ed.2d 624 (2011). The question is whether an attorney's

representation amounted to incompetence under "prevailing professional norms," not whether it deviated from best practices or most common custom. *Harrington v. Richter*, ___U.S. ___, 131 S.Ct. 770, 788 (2011) *citing Strickland*, 466 U.S., at 690.

The trial judge failed to apply the deferential standard of *Strickland* and second-guessed counsel. Rather than considering the evidence presented at the penalty phase, the trial judge substituted the evidence presented at the evidentiary hearing and failed to recognize that much of that evidence was cumulative or unavailable. The trial judge focused only on what counsel did *not* do rather than what he *did* do, thus shifting the burden from the defense to prove counsel was ineffective to the State to prove he was not.

In finding deficient performance, the lower court was persuaded by Walker's argument that instead of the "humanizing" defense presented by defense counsel, the mitigation counsel should have presented a drug-addicted, violent defendant. The lower court's order suggests that counsel's decision to go with a "good guy" presentation was unreasonable as a matter of law and a result of counsel doing nothing, without considering what was done, how it compared to the evidence presented, and how it undermined confidence in the outcome on balance with the facts of the crime. It is well recognized that the presentation of "good guy"

mitigation is a reasonable strategy. *Accord*, *Stephens v. State*, 975 So. 2d 405, 415 (Fla. 2007); *Rutherford v. State*, 727 So. 2d 216, 223 (Fla. 1998).

More importantly, the ruling ignores the investigation and presentation done on behalf of the defendant. Much of the evidence presented at the evidentiary hearing was cumulative. Accordingly, Walker's claim should have been denied. *cf. Sliney v. State*, 944 So. 2d 270, 285 (Fla. 2006) (denying relief where mitigation evidence "should have" presented could not have reasonably resulted in a different verdict); *Pietri v. State*, 885 So. 2d 245, 264 (Fla. 2004) ("Strickland mandates that we look at the evidence that was actually presented compared to that presented at the postconviction evidentiary hearing.")

After reviewing the known evidence, counsel made reasonable strategic decisions to present their client in the most favorable light. "Counsel cannot be deemed ineffective merely because current counsel disagrees with trial counsel's strategic decisions. Moreover, strategic decisions do not constitute ineffective assistance of counsel if alternative courses have been considered and rejected and counsel's decision was reasonable under the norms of professional conduct." *Pace v. State*, 854 So. 2d 167, 172 (Fla. 2003), *quoting*, *Occhicone v. State*, 768 So. 2d 1037, 1048 (Fla. 2000). "Along with examining what evidence was not investigated and presented, we also look at counsel's reasons for not doing so." *Grim v. State*, 971 So. 2d 85, 99-100 (Fla. 2007), *quoting Sliney v. State*, 944 So.

2d 270, 281-82 (Fla. 2006). The focus is on whether the investigation supporting counsel's decision was itself reasonable under prevailing professional norms, which includes a context - dependent consideration of the challenged conduct as seen "from counsel's perspective at the time." *Sliney*, 944 So. 2d at 282, *quoting Wiggins v. Smith*, 539 U.S. 510, 522-23 (2003) (citations omitted), *quoting Strickland*, 466 U.S. at 688-89, 691. Walker failed to establish that trial counsel was ineffective for seeking to avoid the death penalty by failing to present clearly prejudicial evidence. The fact that a strategy was not successful is not the test for determining prejudice. If that were so, then every death sentenced defendant could establish prejudice. *Wong v. Belmontes*, __ U.S. __, 130 S. Ct. 383, 390-91 (2009) (*Strickland* does not require the State to "rule out" a sentence of life in prison to prevail. Rather, *Strickland* places the burden on the defendant, not the State, to show a "reasonable probability" that the result would have been different.) *See also, Sireci v. State*, 469 So. 2d 119, 120 (Fla. 1985) (The fact that counsel's strategy was unsuccessful does not mean that representation was inadequate.)

CONCLUSION

WHEREFORE, based upon the foregoing, the State respectfully requests that this Honorable Court reverse the trial court's order granting a new penalty phase and reinstate the death sentence.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing was furnished to Raheela Ahmed and Carol C. Rodriguez, CCRC-Middle, 3801 Corporex Park Drive, Suite 210, Tampa FL 33619, this _____ day of April, 2011.

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CERTIFICATE OF FONT

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

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