

IN THE SUPREME COURT OF FLORIDA

CASE NO. 78,070

JASON DIRK WALTON,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

ON APPEAL FROM THE SIXTH JUDICIAL CIRCUIT COURT,
IN AND FOR PINELLAS COUNTY, STATE OF FLORIDA

SUPPLEMENTAL BRIEF OF APPELLANT

PAMELA H. IZAKOWITZ
Florida Bar No. 0053856
Capital Collateral Regional Counsel -
South
303 S. Westland Avenue
P.O. Box 3294
Tampa, FL 33601
(813) 259-4424

COUNSEL FOR APPELLANT

PRELIMINARY STATEMENT

This proceeding involves the appeal of the circuit court's denial of Mr. Walton's motion for post-conviction relief. The motion was brought pursuant to Fla. R. Crim. P. 3.850. The circuit court denied Mr. Walton's claims following a limited evidentiary hearing in 1991 and again in 2000.

The following symbols will be used to designate references to the record in this instant cause:

"R" -- Record on Direct Appeal to this Court;

"R2" -- Record on Resentencing Appeal to this Court;

"PC" -- Record on 3.850 Appeal to this Court;

"PC-1" -- Record on 3.850 Appeal after remand.

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

REQUEST FOR ORAL ARGUMENT

Mr. Walton requests that oral argument be heard in this case. This Court has not hesitated to allow oral argument in other capital cases in a similar posture. A full opportunity to air the issues through oral argument would be more than appropriate in this case, given the seriousness of the claims involved and the stakes at issue.

STATEMENT OF FONT

This brief is typed in Courier 12 point not proportionately

spaced.

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STATEMENT OF THE CASE AND FACTS

Three men were found dead from shotgun wounds in the Highpoint area of Pinellas County in 1982. For several months the crime went unsolved until Robin Fridella, wife and sister of two of the victims, and another man, contacted police. They had information that one of the men who shot the victims was Terry Van Royal. As a result, Van Royal was arrested and gave information that led to the arrest of Richard Cooper. A day later, Jason Walton and Walton's younger brother, Jeff McCoy, were arrested. Mr. Walton was taken into custody at his job in Marion County. A public defender was appointed in Ocala to represent him at his first appearance. Subsequently, two Pinellas County sheriff's detectives transported Mr. Walton to Clearwater. In spite of Mr. Walton's stated desire to deal with law enforcement only through counsel, expressed in court and in writing, the officers initiated an interrogation and obtained incriminating statements.

Because of conflicting defenses and facts, the four defendants were tried separately.¹ Mr. Walton was convicted in February, 1984. At trial, the State used the statements he made to the two detectives against him. At the penalty phase,

¹Jeff McCoy, Mr. Walton's half-brother, pled guilty and received a life sentence.

the State presented the hearsay testimony of Paul Skalnik, a professional jailhouse informant, who had been in a jail cell with Cooper, but had never met Mr. Walton. The State's case was that Cooper and Van Royal shot the victims. Mr. Walton's jury recommended death. On March 14, 1984, Judge William Walker sentenced Mr. Walton to death on all three counts.

Cooper then went to trial and Judge Walker presided. After a conviction for first-degree murder, Paul Skalnik testified in Mr. Cooper's penalty phase. Cooper's defense was that he was under the control and domination of Mr. Walton, who he described as "Charlie Mason." At sentencing, Dr. Sidney Merin,² a confidential defense expert, testified at length for Mr. Cooper, placing responsibility for the crimes on Mr. Walton (Cooper Record at 396-400). The jury recommended death and Judge Walker followed.

Van Royal was tried next, this time with Judge Fred L. Bryson presiding. He was convicted of first-degree murder. At sentencing on October 19, 1984, an oral death sentence was pronounced without written findings. Notice of appeal was

²This is the same Dr. Merin who the State called at Mr. Walton's 3.850 hearing and again after the remand to testify as to his opinion regarding the dynamics of the homicide. Since Dr. Merin was privy to confidential communications with Mr. Cooper, Mr. Walton's right to confront was once again defeated. See Argument III.

filed and the record on appeal filed with this Court. It was not until April 15, 1985, that the trial court entered written findings in support of the death penalty.

Mr. Walton's case was the first to be reviewed by this Court. On appeal, the trial court's ruling refusing to suppress Mr. Walton's statements in the squad car was briefly challenged, but relief was denied. Walton v. State, 481 So. 2d 1197, 1199 (Fla. 1985). Mr. Walton's death sentence was reversed based on the State's use of hearsay accounts of Mr. Skalnik's story implicating Mr. Walton:

The record supports appellant's assertion that these confessions (through Skalnik) were the primary evidence relied on by the state in the penalty phase before the jury and that the trial judge considered the confessions in sentencing appellant to death. Appellant did not "open the door" to these confessions in this phase of the trial. The sixth amendment right of an accused to confront the witnesses against him is a fundamental right which is applicable not only in the guilt phase, but in the penalty and sentencing phases as well. Id.

In view of our holding, it is unnecessary for us to address the other penalty phase challenges raised by appellant.

For the reasons expressed, we affirm appellant's convictions, but vacate the sentences of death and remand this cause with instructions to the trial court to conduct another sentencing hearing before a new jury.

481 So. 2d at 1200-1201.

The following year, Mr. Cooper's conviction and death sentence were affirmed. Cooper v. State, 492 So. 2d 1059 (Fla. 1986). On September 18, 1986, Mr. Van Royal's conviction was affirmed but his death sentence overturned and a life sentence ordered by this Court based on the trial judge's delay in entering written findings in support of death. Van Royal v. State, 497 So. 2d 625 (Fla. 1986).

The month before the Van Royal decision, Mr. Walton had his second penalty phase. He was represented by Donald O'Leary, the same court-appointed lawyer who handled the initial trial. Judge Mark B. McGarry, Jr., presided over the second penalty phase. Because the Van Royal opinion had not yet been issued, the resentencing jury did not know of Van Royal's life sentence. Further, the jury was instructed that it "must" consider six aggravating circumstances and weigh them against the three mitigating circumstances conceded by the prosecuting attorney. Subsequently, the judge ruled only four aggravating factors could be properly considered. After considering the extra aggravating factors, the jury recommended death.

Sentencing was August 29, 1986. The State presented the trial court and Mr. Walton's lawyer with a lengthy factual and legal memorandum supporting a death sentence (R2. 150-162).

The State's memorandum presented a number of material "facts" that were not present in this record. Trial counsel did not traverse or challenge the State's memorandum in any way. The trial court orally pronounced a death sentence on August 29, 1986 but made no comment on factors in support of that sentence:

THE COURT: Jason, based upon the findings of the jury that has found you to be deserving of the death sentence, nine to three, the Court now does impose the death sentence upon you, and you will be held in prison to await the Governor's warrant until your death.

It is my duty, sir, to advise you that you have thirty days to appeal the judgment and sentence of this Court.

(R2. 873). Several weeks later, on October 16, 1986, after the Van Royal decision, the trial court entered its Findings as to Aggravating and Mitigation Circumstances in Support of the Death Penalty (R2. 196-201). This document almost completely adopted the State's memorandum and relied upon the non-record "facts" as a basis for the death sentence. The trial court found six aggravating factors and no mitigating factors, Walton v. State, 547 So. 2d 622 (Fla. 1989).

This Court affirmed the trial court, Walton v. State, 547 So. 2d 622 (Fla. 1989). The court found Eighth Amendment error in the State's use of psychiatric testimony concerning the child found unhurt at the murder scene. However, the

Court concluded the error was harmless. This Court also found "no fundamental error" in the jury instructions about the aggravating circumstances.

Mr. Walton's petition for certiorari was denied by the United States Supreme Court on January 8, 1990. Walton v. Florida, 110 S. Ct. 759 (1990). On September 24, 1990, Mr. Walton's petition for clemency was denied and a death warrant signed by Governor Bob Martinez. On October 24, 1990, this Court stayed his death warrant and ordered that post-conviction motions be filed by December 15, 1990. On December 17, 1990, the motion was filed with the trial court. The court summarily denied the motion as to all but two claims on February 5, 1991 (PC-R. 933-34). A limited evidentiary hearing on ineffective assistance of trial counsel and trial counsel's effectiveness for failing to traverse the State's sentencing memorandum was conducted before Circuit Judge Brandt C. Downey III on February 25-26, 1991. At the 1986 resentencing, trial counsel had presented three witnesses, examining them with no particular plan or strategy. He did not use a mental health expert. Substantial testimony of both statutory and non-statutory mitigation that was available but not presented in 1986 was presented five years later at the post-conviction hearing. The witnesses included one from the

1984 trial who had been available in 1986, Bruce Jenkins; a forensic psychologist who examined Mr. Walton, Dr. Pat Fleming; Mr. Walton's father, Irving McCoy II; an older and a younger sister, Lydia Musheff and Kimberly Fox; and Mr. Walton's mother, Carolyn Walton. Trial counsel also testified about his investigation and preparation.

Mr. Jenkins was a friend of Mr. Walton who testified in the 1984 trial that he heard Mr. Walton say before the offense that he must "waste" one of the murder victims. In spite of trial counsel's efforts to have him served in order to testify in 1986, authorities failed to bring him under subpoena. Mr. Jenkins testified during post-conviction that he was living in the same place in 1986, was willing to testify (PC-R. 22-23), and that a representative of the public defender's office in Fort Pierce found him in 1989 (PC-R. 23-24). Had he testified in 1986, he would have said in the context of the conversation he did not understand "waste" to mean kill (PC-R. 20-22, 27, 45). He also would have testified to Mr. Walton's extensive drug and alcohol use (PC-R. 19, 36-37, 39).

Mr. Walton's parents and siblings testified that he was the product of an unhappy marriage that ended in bitter divorce (PC-R. 315, 372-73). His mother dated other men openly during the marriage, enjoying sexual relationships with

them (PC-R. 160-62). The divorce was especially difficult for Mr. Walton and his younger sister, Ms. Fox (PC-R. 313). The family was so severely dysfunctional at times that the oldest sister, Lydia Musheff, spent a great deal of time in therapy as an adult trying to stabilize her life (PC-R. 162-64, 355). Many of Mrs. Walton's struggles with the marriage were played out in her distant and unemotional relationship with her son, who at that time bore her husband's name, Irving McCoy III (PC-R. 312). She didn't give Mr. Walton the same amount of attention and affection that she gave the other three children (PC-R. 342, 390). Conflicts between the parents were fought over Mr. Walton even after he became an adult. This was typified by his mother's role in urging him as an adult to legally change his name, from the name of his father, to his present name (PC-R. 355, 382-83).

One of his stepfathers, Porter Gates, was an alcoholic and prescription drug abuser. When Mr. Gates drank, as he often did, he became loud, noisy, stumbling, "He was grabby to any women in the room" (PC-R. 350). Mr. Gates made drugs and alcohol available to Mr. Walton and sometimes encouraged his using them (PC-R. 317-18, 374-76). During one of his drinking spells, the stepfather choked to death in front of Mr. Walton. Mr. Walton and his siblings were unable to prevent the death

that came when their mother was out of town (PC-R. 318-19, 376-78).

Mr. Walton first experimented with drugs at age 12 (PC-R. 173), the year his parents divorced. He and his sister became increasingly involved in drugs (PC-R. 380). His mother and stepfather placed them both in a controversial and coercive residential juvenile drug program called SEED that did not cure the drug addiction but further disrupted family relationships. Mr. Walton was 16 at the time (PC-R. 323). When he learned the whereabouts of his son, Mr. Walton's natural father tried to make contact but was threatened by SEED if he tried to do so (PC-R. 295). In SEED, children were encouraged to inform on each other and their parents, privacy was almost nonexistent, and parent-child communication greatly restricted. (PC-R. 320-25, 351-52, 380-82). Mr. Walton remained in the program five or six months and lost a year of high school as a result (PC-R. 323).

During post-conviction proceedings, Mr. Walton was evaluated by Dr. Pat Fleming. She interviewed family members and friends, reviewed extensive records and conducted a substantial battery of tests (PC-R. 144-48, 178-81). Her review of the records, which included references to head trauma, past hospitalizations for drug treatment, the

administration of psychoactive drugs while he was in jail, indicated the presence of several "red flags" that "would trigger the need to certainly pursue it further" (PC-R. 150-52). Dr. Fleming explained Mr. Walton's behavior in terms of three factors:

Q. What type of factors did you discover here?

A. Of course the obvious one that had to be looked at is long-term alcohol and drug abuse.

The second is severe psychological stressers that occurred in the family.

The third is the organicity that was indicated in his behavior, and the testing I completed.

(PC-R. 154-55). Dr. Fleming found an extensive history of poly-drug use and said this resulted in some organic brain damage (PC-R. 175-178).

Based on her evaluation, Dr. Fleming found two statutory mitigating factors -- extreme mental disturbance and inability to appreciate the criminality of his conduct (PC-R. 190-91). She also found a variety of non-statutory mitigation including his mother's distant and unemotional relationship with him; his parents bitter divorce when he was twelve and their conflicts extending after it; his stepfather's giving him drugs and alcohol; his stepfather's strangulation death in front of him, his substance abuse problems beginning at an early age; and his long history of drug and alcohol abuse (PC-

R. 283-84). She also found the aggravating factor of cold, calculated and premeditated was inconsistent with her findings (PC-R. 190).

Mr. O'Leary testified that had he known of Mr. Walton's dysfunctional family experience, his childhood drug use, his SEED placement, he would have used them at the new penalty phase (PC-R. 55-57, 78-79). He had no strategic or tactical reason for not contacting family members about this type of mitigation and there was no reason for failing to ask the family members he did contact about these subjects (PC-R. 129). He recalled Mr. Walton's father seeking him out during the penalty phase (PC-R. 58), but he still failed to consider Mr. McCoy as a witness. He was only aware of one stepfather in Mr. Walton's life (PC-R. 125). Trial counsel overlooked references to many of these matters in the 1984 PSI that he had in his possession (PC-R.127). Mr. O'Leary also testified that there was no tactical or strategic reason for failing to use a confidential defense mental health expert, in spite of Mr. Walton's extreme and unusual anxiety at the time of the trial (PC-R. 79-81, 84-85). This was his first capital case as a defense lawyer (PC-R. 52). He said:

Q. (By Mr. McClain) Is hearsay admissible in a penalty phase?

A. No.

Q. That's your understanding?

A. Yes.

Q. Okay. Is or would that be the reason why you would not have considered actually -- actually you indicated you didn't think of contacting the prison for prison records?

A. Correct.

(PC-R. 120). He testified there was no reason why he did not seek DOC records on Mr. Walton from 1984, the year of his first conviction, through his 1986 penalty phase, which reflected his good conduct in custody while in custody (PC-R. 71-72, 121). Likewise, there was no tactical or strategic reason for his failure to use the 1984 PSI, that indicated the avoiding lawful arrest aggravating factor was not present (PC-R. 73-75).

Likewise, Mr. O'Leary became aware of the life sentence received by co-defendant and shooter Terry Van Royal, but had no strategic or tactical reason for failing to bring it to the sentencing judge's attention and argue the fact in Mr. Walton's behalf (PC-R. 82).

Trial counsel testified that he realized the significance of witness Bruce Jenkins' 1984 testimony that Mr. Walton said he must "waste" one of the victims, and that he needed to use Mr. Jenkins to explain that the word did not mean kill, but that law enforcement told him they could not locate Mr.

Jenkins to serve him (PC-R. 60-61, 75-76). Mr. O'Leary felt it was important for Mr. Walton's 1986 jury to hear Mr. Jenkins testify that he did not understand "waste" to mean kill in the context of the conversation (PC-R. 116-18).

Finally, trial counsel testified that had he known his introduction of Mr. Walton's rap sheet as evidence of his not having prior convictions would have opened the door for state evidence of collateral misconduct (See R2. 782-94) he would not have done so (PC-R. 66-70). To the extent he opened the door for the State, it was not a reasonable tactical or strategic decision (PC-R. 67). It was inadvertence that resulted from ignorance of the law.

The State's only witness was Dr. Sidney J. Merin (PC-R. 413-500). Dr. Merin had been retained as a confidential defense expert in the trial of co-defendant Richard Cooper. He evaluated Mr. Cooper and testified for him. (Cooper record at 32, 396-440). Dr. Merin was aware of the potential conflict and risk that his previous role might "contaminate my thinking" (PC-R. 417), but the trial court would not allow him to answer whether he could ethically accept appointment to evaluate two co-defendants in the same case(PC-R. 417-20). Post-conviction counsel objected to Dr. Merin's testimony as to the presence of statutory aggravating factors in Mr.

Walton's case because of his continuing interest in Mr. Cooper's welfare and consideration of facts represented to him by Mr. Cooper. Mr. Walton could not confront Mr. Cooper or Dr. Merin about the facts(PC-R. 469-75).

Judge Downey denied all of Mr. Walton's claims. In an oral order (R2. 1538-51) the court relied exclusively on this Court's decision in Blanco v. Wainwright, 507 So. 2d 1377 (Fla. 1987). The court found trial counsel's failure to use Skipper³ evidence in prison records was a "nonissue" (PC-R. 1545-46), and that trial counsel's twice opening the door to testimony of uncharged criminal activity was not ineffective (PC-R. 1546).

Mr. Walton's timely Motion for Rehearing (PC-R. 941-54) was denied on May 3, 1991 (PC-R. 957). Notice of appeal timely followed (PC-R. 958-59).

On August 5, 1992, Mr. Walton filed an Initial Brief, raising fourteen arguments. Among the arguments, Mr. Walton said he was unable to obtain the public records to which he was entitled. Two years earlier, on November 12, 1990, Mr. Walton sought public records relating to Mr. Walton's case and his three co-defendants from the Pinellas County Sheriff's Department and the State Attorney's Office. The two agencies

³Skipper v. South Carolina, 476 U.S. 1 (1986).

refused to supply the public records, arguing that Mr. Walton's requests were not a valid claim in a Rule 3.850 motion. The circuit court wrongly agreed. On May 27, 1993, this Court relinquished jurisdiction to the trial court and ordered it to allow Mr. Walton's public records requests. Walton v. Dugger, 634 So. 2d 1059 (Fla. 1993).

From November 1993 through 1998, Mr. Walton fought for public records in extensive and protracted litigation. During that time, he discovered that one crime scene technician from the Pinellas County Sheriff's Department maintained more than 20 public record reports in his bedroom (PC-1. at 2816). It also was revealed Detective Richard Poe of the Pinellas County Sheriff's office turned over public records in Mr. Walton's case on December 4, 1994 because he was unaware any earlier that the files existed in the Sheriff's Department. This was so even though counsel for Mr. Walton initially requested "any and all" public records relating to Mr. Walton in November, 1990 from all law enforcement agencies in Pinellas County (PC-1. 3112-3130). Detective Poe testified that he did not know these records existed until he talked to another member of the Sheriff's Department (PC-1. 3130).⁴

⁴Additional records were were still being turned over to Mr. Walton from the Pinellas County Sheriff's office in February, 1997. As late as June 5, 1998, the Department of Corrections was still releasing public records to Mr. Walton.

On June 11, 1995, Judge Downey held that "It appears that certain documents were not supplied to CCR in its original records request in 1990" (PC-1. 726). Those public records that were eventually turned over were Brady materials. These exculpatory and impeachment records, which were turned over from the Pinellas County law enforcement agencies, were handwritten notes that showed that Robin Fridella, the wife and sister of two of the victims, made statements that indicated that she was angry with her ex-husband over the custody of her children and may have been involved in the crimes. The disclosed records showed the police interviewed friends of Robin Fridella who told them:

Robin didn't get along with her brother Gary Peterson. If she couldn't have Christopher and Steven back, no one could have him. Told Robin is involved with MC gang connection

(PC-1. 3928; 4256)(Exhibit 10).

Had a lot of problems with Robin over the children. She said if she couldn't have them, no one would. ...Robin said she would do anything to get the kid

(PC-1. 3929)(Exhibit 11).

The handwritten notes show that police were aware that Robin and Steven Fridella were fighting over the custody of the children. One note indicated that Steve Fridella attempted to change the joint custody status and get full

custody of his children (PC-1. 3931; 4260)(Exhibit 14).

The withheld information also showed that Robin once found her husband in bed with another woman. One witness told police:

Steve burned her enough that she might have something to do with it

(PC-1. 4258)(Exhibit 12).

These withheld records also showed a June 18, 1982 report from the Pinellas County Sheriff's Department that showed that Robin Fridella voluntarily agreed to a polygraph exam and results indicated that she was "not telling the entire truth" about her knowledge of the crime and what she told investigators (PC-1. 4254)(Exhibit 8).

Based on these new records, Mr. Walton filed a Third Amended Motion to Vacate Judgments of Conviction and Sentence on November 6, 1998, alleging that Mr. Walton was entitled to an evidentiary hearing on all of his claims, including the new and previously undisclosed public records (PC-1. 1869). The circuit court conducted a hearing pursuant to Huff v. State, 622 So. 2d 982 (Fla. 1993)(PC-1. 4073). The circuit court denied a hearing on all of Mr. Walton's claims except one - that the State knowingly withheld exculpatory information from Mr. Walton, in violation of Brady (PC-1. 2051). Mr. Walton also sought to re-open the February 25-26, 1991 evidentiary

hearing by allowing the defense mental health expert, Pat Fleming, who evaluated Mr. Walton in 1990, to testify how these withheld materials would have affected her evaluation of Mr. Walton (PC-1. 2068). Mr. Walton also sought to allow the testimony of Sidney Merin, a state witnesses who testified in 1991 that Mr. Walton did not suffer from "any particular emotional disturbance," as it related to Robin Fridella and that any feelings that Mr. Walton had about her were not converted into inappropriate behavior. The circuit court allowed the 1991 hearing to be re-opened. At the re-opened hearing, Mr. Walton presented four witnesses relating to the withheld documents.

At the time that Mr. Walton's hearing was taking place, Mr. Cooper also had a post-conviction evidentiary hearing before Judge Downey at the same time. At Mr. Cooper's hearing, Mr. Van Royal was called as a witness on January 14, 2000. Co-defendant Van Royal's testimony conflicted with testimony from Mr. Walton's case. As a result, Mr. Walton, in his evidentiary hearing, called two witnesses who testified to statements they obtained from Terry Van Royal, who is serving a life sentence.

After Mr. Walton's limited evidentiary hearing, the trial court denied Mr. Walton all relief on January 11, 2001(PC-1.

2402-2421). Rehearing was denied on February 5, 2001 (PC-1. 2477). A timely notice of appeal was filed on March 1, 2001 (PC-1. 2479).

This supplemental appeal only addresses issues that arose from the withheld public records -- ineffective assistance of counsel, Brady, conflict of interest and the newly-discovered evidence of Mr. Van Royal's contradictory testimony in Mr. Cooper's case. Mr. Walton relies on his August 5, 1992 Initial Brief to address other remaining issues in his case. That brief is still pending before this Court and should be considered simultaneously by this Court.

SUMMARY OF ARGUMENT

Mr. Walton was denied the effective assistance of counsel that led to his conviction and sentence of death. Trial counsel failed to adequately know the law, investigate relevant facts, investigate Mr. Walton's background, obtain the presence of material witnesses, gain access to a confidential mental health expert, combat the State's overreaching, present the available mitigation, and insure adequate jury instructions.

The State withheld exculpatory Brady⁵ information that pertained to both the guilt and penalty phases. The Brady information was material to motive, Mr. Walton's mental state at the time of the crime, and could have provided important impeachment evidence. The Brady material also was important for the penalty phase because it could have provided an explanation for Mr. Walton's conduct.

The circuit court erred in permitting the testimony of Dr. Merin at the Rule 3.850 evidentiary hearing. Dr. Merin was the confidential mental health expert for Richard Cooper, a co-defendant of Mr. Walton. His testimony would not have been allowed at Mr. Walton's sentencing, nor should it have been allowed at the Rule 3.850 hearing. Mr. Walton was denied

⁵Brady v. Maryland, 373 U.S. 83 (1963).

the ability to confront Dr. Merin as to his conflict of interest, in violation of Mr. Walton's rights.

The trial court failed to consider newly-discovered evidence of impeachment that showed that Mr. Walton was not the mastermind behind the crime, as argued by the State throughout Mr. Walton's proceedings. The newly-discovered evidence, the testimony of co-defendant Terry Van Royal, was unknown at the time of trial and could have been admissible at trial for impeachment purposes.

ARGUMENT I

MR. WALTON WAS DENIED EFFECTIVE ASSISTANCE OF COUNSEL WHEN HIS ATTORNEY FAILED TO ADEQUATELY INVESTIGATE AND PREPARE. A FULL ADVERSARIAL TESTING DID NOT OCCUR. COUNSEL'S PERFORMANCE WAS DEFICIENT AND AS A RESULT MR. WALTON'S SENTENCE OF DEATH IS UNRELIABLE.

Trial counsel has "a duty to bring to bear such skill and knowledge as will render the trial a reliable adversarial testing process." Strickland v. Washington, 466 U.S. 668, 688 (1984) (citation omitted). "[A]n attorney does not provide effective assistance if he fails to investigate sources of evidence which may be helpful to the defense." Ragsdale v. State, 2001 WL 1241135 (Fla. Oct. 18, 2001); Davis v. Alabama, 596 F.2d 1214, 1217 (5th Cir. 1979), vacated as moot, 446 U.S. 903 (1980). Decisions limiting investigation "must flow from an informed judgment." Harris v. Dugger, 874 F.2d 756, 763 (11th Cir. 1989). "[A]n attorney has a strict duty to conduct a reasonable investigation of a defendant's background for possible mitigating evidence." Riechmann v. State, 777 So. 2d 342 (Fla. 2000)(citing Rose v. State, 675 So. 2d 567, 571 (Fla. 1996)).

Reasonably effective counsel must present "an intelligent and knowledgeable defense" on behalf of his client. Caraway v. Beto, 421 F.2d 636, 637 (5th Cir. 1970). "[D]efense

counsel must make a significant effort, based on reasonable investigation and logical argument, to ably present the defendant's fate to the jury and to focus the jury on any mitigating factors." Kubat v. Thieret, 867 F.2d 351, 369 (7th Cir. 1989). An attorney is charged with knowing the law and what constitutes relevant mitigation. Brewer v. Aiken, 935 F.2d 850 (7th Cir. 1991). Counsel also has a duty to ensure that her client receives appropriate mental health assistance. State v. Michael, 530 So. 2d 929 (Fla. 1988); Blake v. Kemp, 758 F.2d 523 (11th Cir. 1985); Mauldin v. Wainwright, 723 F.2d 799 (11th Cir. 1984). See United States v. Fessel, 531 F.2d 1275, 1279 (5th Cir. 1979). Defense counsel's failure to investigate available mitigation constitutes deficient performance. Mitchell v. State, 595 So. 2d 938 (Fla. 1992); State v. Lara, 581 So. 2d 1288 (Fla. 1991).

Counsel's highest duty is the duty to investigate, prepare and present the available mitigation. When counsel unreasonably fails in that duty, the defendant is denied a fair adversarial testing and the results of the proceeding are rendered unreliable. See, Rose, 675 So. 2d at 572 (counsel ineffective at penalty phase for failing to present evidence of severe mental disturbance and for failing to present evidence of defendant's alcoholism and mistreatment as a

child); Hildwin v. Dugger, 654 So. 2d 107 (Fla. 1995)(ineffective assistance where counsel failed to present evidence of defendant's mental mitigation and non-statutory mitigation); Phillips v. State, 608 So. 2d 778, 783 (Fla. 1992)(ineffective assistance of counsel where counsel presented some evidence of mitigation, but did not present a large amount of evidence about the defendant's childhood riddled with abuse); and Stevens v. State, 552 So. 2d 1082, 1087 (Fla. 1989)(counsel's failure to investigate defendant's background, failure to present mitigating evidence during the penalty phase, and failure to argue on defendant's behalf rendered his conduct at penalty phase ineffective). See also Bassett v. State, 451 So. 2d 596 (Fla. 1989); State v. Michael, 530 So. 2d 929 (Fla. 1988); Middleton v. Dugger, 849 F.2d 491 (11th Cir. 1988). See also Thomas v. Kemp, 796 F.2d 1322, 1324 (11th Cir. 1986)(little effort to obtain mitigating evidence); King v. Strickland, 748 F.2d 1462,1464 (11th Cir. 1984)(failure to present additional character witnesses was not the result of a strategic decision made after reasonable investigation); Nealy v. Cabana, 764 F.2d 1173, 1178 (5th Cir. 1985)(counsel did not pursue a strategy, but "simply failed to make the effort to investigate").

Mr. Walton's counsel failed miserably in all of these

duties. He failed to rebut the fiction that Mr. Walton was the leader in a premeditated plan to kill. He failed to fully investigate and develop crucial mitigating evidence. No tactical motive can be ascribed to an attorney whose omissions are based on lack of knowledge, see Nero v. Blackburn, 597 F.2d 991 (5th Cir. 1979), or on the failure to properly investigate and prepare. See Nealy v. Cabana; Kimmelman v. Morrison, 477 U.S. 365 (1986). Mr. Walton's capital conviction and sentence of death are the resulting prejudice. Harris v. Dugger, 874 F.2d 756 (11th Cir. 1989).

Although Mr. Walton never fired any shots, the state sought and obtained a death sentence on the theory that Mr. Walton masterminded the premeditated murder of three people. This scenario was a total fiction created by the state specifically for Mr. Walton's trial and argued the opposite at his co-defendant's trial.

The prosecutor argued in co-defendant Cooper's trial that it is "absolutely ludicrous" to say it was Mr. Walton's fault that Mr. Cooper shot the victims and that there was no evidence to back up this "incredible proposition" that Mr. Walton was dominating Mr. Cooper (Cooper's Record at 1577-78).

However, Mr. Walton's defense counsel failed to use the readily available witnesses and arguments from the Cooper

record in Mr. Walton's defense at resentencing. The State's misleading and false portrayal of Mr. Walton could have been rebutted had defense counsel prepared his case. There can be no tactical or strategic reason for failure to pursue this avenue of defense. ⁶

Trial counsel could offer no strategic reasons for not using the court records from both the Cooper and Van Royal cases. Such failure to investigate and present this evidence constituted deficient performance by trial counsel that prejudiced Mr. Walton. To the extent that this failure was at all attributable to the state, Mr. Walton maintains that his rights under Brady v. Maryland, 373 U.S. 83 (1963) and Giglio v. United States, 405 U.S. 150 (1972) were violated.

Aggravating circumstances specified in the statute are exclusive, and no other circumstances may be used to aggravate a crime for purposes of imposing death. Yet, in closing, the prosecutor urged the jury to consider that Mr. Walton was heavily involved in the drug scene in determining whether he should live or die (R2. 824-25). The state relied on entirely

⁶See, Smith v. Goose, 205 F. 3d 1045 (8th Cir. 2000), in which the Eighth Circuit found that a defendant's due process rights were violated when the State used one of a co-defendant's two factually contradictory versions of events surrounding murders to convict the defendant, then relied on another version at a later trial to convict someone else of the same murder.

unproven testimony -- that Mr. Walton had been arrested and charged in the theft of marijuana. In fact, this charge was nolle prossed because Mr. Walton was arrested on a false affidavit and the state did not have sufficient evidence for a conviction. The judge relied on this improper evidence in sentencing Mr. Walton to death (R2. 200). Trial counsel's failure to object or rebut this improper evidence was deficient performance. Counsel should have been on notice that the introduction of the "rap sheet" would allow the introduction of this evidence; he failed to provide effective assistance of counsel pursuant to Strickland v. Washington.

Mr. O'Leary testified that his introduction of Mr. Walton's rap sheet was not a tactical decision (PC-R. 67). He did not know that introducing the rap sheet "opened the door" to testimony about the nolle prossed drug charge. This was deficient performance. The use of such unsubstantiated, unreliable and inflammatory testimony to bring about a death sentence violates the "fundamental respect for humanity underlying the eighth amendment's prohibition against cruel and unusual punishment," Johnson v. Mississippi, 486 U.S. 578, 584 (1988), and is incompatible with the "need for reliability in the determination that death is the appropriate punishment," Gardner v. Florida, 430 U.S. 349, 359 (1977).

At the resentencing, the judge instructed the jury that it should consider the aggravating circumstances that he listed (R2. 852-53). This error was further compounded when the judge instructed the jury that they may consider mitigating circumstances (R2. 858). Defense counsel failed to object to the erroneous jury instructions, denying Mr. Walton effective assistance of counsel guaranteed by the sixth amendment.

Defense counsel presented three witnesses at the resentencing on behalf of Mr. Walton: a co-worker, a childhood friend, and his mother. The direct examination of co-worker, Kimberly Ann Johnson, was approximately two pages, with one entire page of introductory questions (R2. 747-749). Mr. Walton's friend, Lynn Shamber, testified that she had known Mr. Walton for 13 years, but did not know that he was living with Robin Fridella or the people he hung out with (R2. 758-772). Carolyn Walton testified that her son was a good child and soldier and only smoked marijuana (R2. 774-781). The entire defense case took up 35 pages of transcript, with much of that included the State's cross examination (R2. 746-781).

Rather than effecting a coherent strategy for the use of these witnesses, counsel questioned them vaguely and without

strategy. An incomplete picture of Mr. Walton was presented to the jury. This was deficient performance that prejudiced Mr. Walton. Cunningham v. Zant, 928 F.2d 1006, 1016 (11th Cir. 1991). The witness' testimony showed that counsel was unprepared and ill informed about the law. Trial counsel barely scratched the surface of Mr. Walton's background and history.

At the evidentiary hearing in 1991, Mr. Walton's mother, Carolyn, testified that Mr. Walton was the product of an unhappy bitter marriage that ended in a divorce. After years of mental and emotional abuse, Carolyn asked for a divorce. When the children were told about the divorce at dinner one evening, it came as a complete shock to them. This unexpected news upset Jason and he left the table in tears (PC-R. 371-72). Jason's sister, Kimberly, also recalled the news of the divorce as something unexpected that upset Jason very much (PC-R. 313-14).

The divorce proceedings and child custody plans were the source of considerable pain for both Jason and his family. His mother made no attempt to hide the hatred she felt for Jason's father, making it clear to the children that their father was not someone to be respected. The children knew that their mother hated their father. She repeatedly told

them what a bastard he was. She told them details of the custody fights and how she always had to fight to get their father to pay child support (PC-R. 315). She also told them their father was a mean person who did not love them and that they should not visit him (PC-R. 349).

At the time, Jason was named after his father, Irving McCoy III, and his mother unintentionally shunned him (PC-R. 390). This resentment was apparent to Jason's siblings (PC-R. 315). Jason's mother pressured him to change his name from McCoy to Walton (PC-R. 346, 355).

Carolyn's anger over her failed marriage and fear of raising children on her own led her into a marriage of convenience. She discovered her ex-husband had remarried and so she decided to do the same. She went to a meeting of Parents Without Partners and within two weeks, met and married a man she knew very little about. Unfortunately, in her rush into marriage, Carolyn failed to realize that her future husband, Porter Gates, was both an alcoholic and a prescription drug abuser (PC-R. 374-76). Jason now had access to drugs and alcohol.

Immediately after he moved into her home, Carolyn discovered that Mr. Gates drank himself to sleep each night. He would come home in the evening, eat dinner and then start

drinking. After his quart of alcohol, she and Jason would put him to bed. Mr. Gates also abused prescription drugs. In the top of his unlocked bedroom closet, which was accessible to anyone living in the house, were rows of prescription drugs, including Valium. Mrs. Walton was unsure what all the pills were for, but naively felt there was no problem because they were all prescription (PC-R. 343).

Mr. Gates was an unpleasant drunk. When he drank, he grabbed at women, including Carolyn's daughters. Jason witnessed this behavior. Mr. Gates also was loud and noisy when he was drinking, and would stumble around the room (PC-R. 345, 349-50). His drug and alcohol abuse was not confined to prescription drugs. On one occasion, he took Jason on a vacation to Miami. This vacation was nothing more than a big party. He encouraged Jason to drink and smoke pot and gave Jason the keys to the car, even though Jason was under the legal driving age at the time and had no license (PC-R. 316-18).

This marriage ended suddenly. One evening, Mr. Gates sat in his favorite chair in the family room, drunk as usual. He was eating a steak dinner and choked on a piece of meat. Kim and Jason were in the room, but neither of them knew what to do. Kim attempted to stick her hand down the back of Mr.

Gates throat. When this did not work, she called an ambulance. Unfortunately, the street they lived on at the time was under construction, so it took numerous phone calls to get the ambulance to the right address. During this time, Mr. Gates lay on the floor unconscious. Jason and Kim were unable to be of any help. Mr. Gates never regained consciousness and died eight days later (PC-R. 318-19).

Witnessing Mr. Gates' death had a profound effect upon Jason. After seeing Mr. Gates choke to death, Jason's drug use escalated. Because of his drug use, Jason was admitted into a radical therapy program known as SEED. Though this experimental program in no way cured Mr. Walton of his drug addiction, it had a negative effect on his life that he would feel for many years. Mr. Walton's family members were aware of this program and testified about the effect it had on him. His sister Kim also went through the program and had first-hand knowledge of how it worked.

A family who lived down the street from the Waltons placed their children into the same drug rehabilitation program. The parents told Carolyn that Jason was into drugs and he needed to go through this rehabilitation program as well. Kimberly then confessed that she, too, was taking drugs and needed to go into the program. Both Jason and Kimberly

entered the SEED program (PC-R. 320).

Inside the program, they were not permitted contact with each other. Each individual brought a small suitcase containing only the items the program organizers felt were necessary. Upon arrival, each suitcase was thoroughly searched. Then, the new arrival was assigned to the custody of another child in the program of the same sex. This was the person the individual would go home with at night. At night, the children were locked into their bedrooms. Jason's sister recalled that the girl she was staying with actually put a dresser in front of the bedroom door and took the handles off of the window so she could not escape (PC-R. 321). There was no intermingling between the girls and boys during the day. Each person was known only by their first name and the object of the program was to break the child down and take away their defenses. The instructors told the children how rotten they were and then tried to build them up into their idea of a model child. The children were not allowed to become friends with others in the group, and were assigned to the custody of a new child each week. They also were not allowed to see their reflections in a mirror, or brush their hair or teeth (Id.).

On Friday nights, family members were allowed to visit.

The children would sit on one side of the room and the parents would sit on the other side. The newest members had to stand up in front of both groups and say their name, how long they had been in the program, and what drugs they had done. The parents would then stand up and say hello to their children and the children and parents could talk small talk across the room with everyone listening. When a child had been in the program and was improving, according to their counselor, they could have semi-private meetings with their parents, which were monitored by a counselor. If the child began to talk too much about the program, the counselor would tell them to change the subject. Eventually, the children were allowed to go to their own homes at night to sleep, but had to return to the center during the day until such time as the counselors felt they could be released from the program (PC-R. 322).

Neither of Jason's parents were allowed much contact with him or the program. Anytime Carolyn asked questions, the program organizers told her "those" things were not to be discussed and should be kept in the SEED. She felt as if it was a secret organization (PC-R. 381). When Jason's father discovered that Jason had been put in this program, he tried to make contact but was told he could not talk to his son. He then asked the program organizers if he could participate in

any way and was told he could not. This angered Mr. McCoy, who felt like he should have input in such a critical program in his son's life. When he told the organizers he was going to come anyway, he was told he would be removed from the premises if he showed up (PC-R. 295).

Jason's mother was unaware of Jason's drug use until the neighbors told her about it. When she asked Jason if the allegations were true, he admitted it. She thought he was only using marijuana at that time, and even then was unaware of the extent of his drug use (PC-R. 380). But when it was Jason's turn to stand up during the SEED meeting and confess to the drugs he had used, he confessed to much more than just marijuana. Kim recalled that Jason said he used alcohol, pot, hash, PCP and Angel Dust (PC-R. 323).

Even when Jason and Kim were released from the SEED program, they did not talk about it (PC-R. 381). They were closely monitored, even after they were out of the program. Jason's other sister, Lydia, recalled that Jason seemed like a robot after he returned. He was instructed not to talk to any of his friends that he had before the program (PC-R. 351-52).

Jason and Kim were in the SEED program during the summer and school year. Kim was in the program five to six months and Jason was in it for an even longer period of time. Jason

missed a lot of school as a result of this program. Because he was not a good student to begin with, he had trouble catching up, and was held back in school (PC-R. 324-253, 382). Jason finally dropped out of school in eleventh grade before he received his diploma, and joined the Army (PC-R. 382).

While in the Army, his drug use escalated. When he was honorably discharged, he returned home and his drug use continued. In the six months before his arrest, he smoked marijuana daily, before and after work, and snorted cocaine three to four times a week. His drug of choice was LSD, which he used 20 to 30 times in a four-five month time period (PC-R. 20, 31-32, 35-36). Dr. Sidney Merin, the mental health expert called by the state at the evidentiary hearing, conceded that Mr. Walton had a substantial history of drug and alcohol abuse (PC-R. 494).⁷ Jason also smoked marijuana and drank beer on the evening of the homicides (PC-R. 192-93).

Even though Mr. Walton was addicted to drugs and alcohol

⁷Even the State expert, Dr. Merin, conceded the existence of mitigating evidence, which was not presented at the penalty phase. See also, Ragsdale v. State, 2001 WL 1241135 (Fla. Oct. 18, 2001) ("Dr. Merin offered no opinion as to the applicability of the statutory mental mitigators. Dr. Merin did, however, testify as to the existence of mitigating evidence which was not presented at the penalty phase of Ragsdale's trial.....Thus, the conclusion is inescapable that there was available evidence from experts which would have supported substantial mitigation, but which was not presented during the penalty phase").

from a young age, he was never known to be violent to family or friends (PC-R. 46, 250, 296-97). Those who knew him thought he was a coward and a person who would not fight or harm others (PC-R. 46, 395). He was known as good person who would do anything for a friend if he was able (PC-R. 18). He also was known as a person who was advanced in art (PC-R. 435, 477).

Mr. Jenkins was a friend of Mr. Walton who testified in the 1984 trial that he heard Mr. Walton say before the offense that he must "waste" one of the murder victims. In spite of trial counsel's efforts to have him served in order to testify in 1986, authorities did not bring him under subpoena. Mr. Jenkins testified during post-conviction that he was living in the same place in 1986, was willing to testify (PC-R. 22-23), and that a member of the Fort Pierce's Public Defender's office found him in 1989 (PC-R. 23-24). Had he testified, he would have said that he did not understand "waste" to mean kill (PC-R. 20-22, 27, 45). He also would have testified to Mr. Walton's extensive drug and alcohol use (PC-R. 19, 36-37, 39).

At the 1991 evidentiary hearing, Mr. O'Leary testified that he was unaware of Mr. Walton's background and had he known of Mr. Walton's dysfunctional family experience, his

childhood drug use, his SEED placement, he would have used the information at the resentencing. (PC-R. 55-57, 78-79). He had no strategic or tactical reason for not contacting family members about this type of mitigation and there was no reason for his failing to ask the family members he did contact about these subjects (PC-R. 129).

Mr. O'Leary testified that Mr. Walton's sisters "did not seek me out," and he made no effort to contact them (PC-R. 58; 125).

He recalled Mr. Walton's father seeking him out during the penalty phase (PC-R. 58), but he failed to consider Mr. McCoy as a mitigation witness. He was only aware of one stepfather in Mr. Walton's life (PC-R. 125). Trial counsel overlooked references to many of these matters in the 1984 PSI, which he had in his possession (PC-R. 127).⁸

Mr. O'Leary failed to obtain any of Mr. Walton's school records (PC-R. 76); failed to investigate whether Mr. Walton suffered from any head injuries or was involved in any car

⁸The United States Supreme Court found that counsel's failure to investigate a defendant's background in preparation for the penalty phase of a capital trial was ineffective assistance of counsel, even when counsel presented an alternative argument, highlighting the defendant's remorse and cooperation with police. Williams v. Taylor, 529 U.S. 362, 396 (2000)(citing 1 ABA Standards for Criminal Justice 4-4.1, commentary, p. 4-44 (2d ed 1980)).

accidents (PC-R. 77); and failed to inquire if Mr. Walton was seen a mental health expert or psychiatrist earlier in his life (PC-R. 77). The majority of the information Mr. O'Leary learned about his client came from Mr. Walton and his mother, Carolyn (PC-R. 77).⁹

Mr. O'Leary testified that his knowledge of Mr. Walton's drug use came from Mr. Walton himself. He said he knew that Mr. Walton smoked marijuana and drank beer. "...the picture I got was that's just what young boys, his peers in Marion County do on weekends, I guess" (PC-R. 128). He said he never heard the word "addiction" from Mr. Walton or his mother (PC-R. 129).

Further, Mr. O'Leary testified that there was no tactical or strategic reason for failing to use a confidential defense mental health expert, in spite of Mr. Walton's extreme and unusual anxiety at the time of the trial (PC-R. 79-81, 84-85). This was his first capital case as a defense lawyer (PC-R.

⁹In granting relief on a claim of ineffective assistance of counsel for failure to investigate, the Seventh Circuit Court of Appeals said, "Telling a client, who is in custody awaiting trial, to produce his own witnesses falls painfully short of conducting a reasonable investigation, especially given that [the witnesses] did not have a telephone. Perhaps Washington could have dispatched a pigeon from his prison cell with a message for the Browns, but short of this, it is wholly unreasonable for a lawyer to instruct his incarcerated client to get in touch with people who don't have a phone." Washington v. Smith, 219 F. 3d 620, 631 (7th Cir. 2000).

52). He said:

Q. (By Mr. McClain) Is hearsay admissible in a penalty phase?

A. No.

Q. That's your understanding?

A. Yes.

Q. Okay. Is or would that be the reason why you would not have considered actually -- actually you indicated you didn't think of contacting the prison for prison records?

A. Correct.

(PC-R. 120). Trial counsel testified there was no reason why he did not seek Department of Corrections records on Mr. Walton from 1984, the year of his first conviction, through his 1986 penalty phase, which reflected his good conduct while in custody (PC-R. 71-72, 121). Likewise, there was no tactical or strategic reason for his failure to use the 1984 PSI that showed the avoiding lawful arrest aggravating factor was not present (PC-R. 73-75).

Mr. O'Leary testified that he realized the significance of witness Bruce Jenkins' 1984 testimony that Mr. Walton said he must "waste" one of the victims, and that he needed to use Mr. Jenkins to explain that the word did not mean kill, but that law enforcement told him they could not locate Mr. Jenkins to serve him (PC-R. 60-61, 75-76). Trial counsel felt

it was important for Mr. Walton's 1986 jury to hear Mr. Jenkins testify that he did not understand "waste" to mean kill in the context of the conversation (PC-R. 116-18). When he was told that this man could not be found, Mr. O'Leary said he had no reason to believe that he was being misled (PC-R. 60).¹⁰

Finally, trial counsel testified that had he known introducing Mr. Walton's rap sheet as evidence of lack of prior convictions would have opened the door for state evidence of collateral misconduct (See R2. 782-94) he would not have done so (PC-R. 66-70). To the extent he opened the door to the state, it was not a reasonable tactical or strategic decision but ignorance of the law (PC-R. 67).

Mr. O'Leary made no attempt to obtain or present Mr. Walton's prison records at the resentencing because it never occurred to him (PC-R. 120-21). Had he obtained these records

¹⁰At the 1991 evidentiary hearing, Mr. Jenkins testified that he and Mr. Walton were partying, smoking and drinking when Mr. Walton mentioned the word "waste." In the context of how it was said, Mr. Jenkins testified that he never took that word to mean that Mr. Walton was going to kill anyone. "I knew he had trouble with these guys, you know. And we talked about it a couple of times, but you know, I knew he was - he might consider, you know, doing the same thing to them as they were doing to him....They were stealing stuff from him. They'd go in his house when he was gone. They'd hound him every chance they got." He testified that he never expected Mr. Walton to kill anyone (PC-R. 21-22).

and spoken with the guards at the prison, he would have discovered that Mr. Walton was a model inmate who never received any disciplinary reports while on death row (PC-R. 10-11).

Mr. Walton's also received an oral death sentence at the sentencing hearing on August 14, 1986. One month later, on September 18, 1986, this Court decided Van Royal v. State, 497 So. 2d 625 (Fla. 1986), which reduced the death sentence of co-perpetrator Terry Van Royal, who was a shooter, to life. The prosecutor made note of this in his Additional Sentencing Memorandum, filed October 1, 1986 (R2. 163-64). The trial court did not issue its Court's Findings as to Aggravating and Mitigating Circumstances in support of the death penalty until October 16, 1986 (R2. 196-201). Mr. O'Leary testified that he had no tactical reason for failing to raise this argument about disparate treatment(PC-R. 82-82).

Trial counsel further neglected to obtain the services of a confidential mental health expert. There was no tactical or strategic reason for this failure (PC-R. 79-81, 84-85). Had defense counsel retained a competent mental health expert who he provided background materials relevant to Mr. Walton, substantial mental health mitigation would have been identified. Background materials were easily accessible to

Mr. Walton's defense counsel or could have been easily obtained had even a preliminary investigation been completed. Having evaluated Mr. Walton and studied his background, a mental health expert would have been able to testify at an evidentiary hearing to the existence of an abundance of non-statutory mitigation, such as Mr. Walton's caring nature, his non-violent nature, and his long history of drug and alcohol abuse.

Expert testimony was available had counsel simply sought it out. In post-conviction, Dr. Pat Fleming conducted neuropsychological and psychological tests on Mr. Walton. She was given background materials on him and interviewed family members and others who knew Mr. Walton.

At the 1991 evidentiary hearing, Dr. Fleming testified that the Walton family appeared stable on the outside, but in reality, was not stable at all. Mrs. Walton was gone a great deal, and while on the surface she appeared to be a caring mother, in fact, she was not the primary mother caretaker, the eldest sister was.

Dr. Fleming learned that while married to Mr. Walton's father, Mrs. Walton was involved in numerous affairs. She asked for a divorce when Jason was 12, which was traumatic to him. Dr. Fleming described Mrs. Walton as a "dad basher," who

told her children that their real father not only did not care about them, but abandoned them. Dr. Fleming described this as significant in Mr. Walton's overall development (PC-R. at 161-162).

Dr. Fleming testified that the eldest sister was aware of the mother's extramarital affairs and the mother spoke to her explicitly about sexual matters. The eldest sister felt as if she was the mother.

Mrs. Walton was unaware the impact her lifestyle had on Jason and had no insight into her own behavior. She was unaware of his drug and alcohol abuse. She did not know that her second husband, Porter Gates, was an alcoholic and prescription drug abuser until later in the relationship. She knew he was an alcoholic, but did not realize he was providing drugs and alcohol to Jason. She also did not know that Mr. Gates was making sexual advances toward her daughter. "She was described as self-centered, egocentric woman who just did her own thing. And as Mr. Walton said that after the divorce at 12 she had to do her own thing. She found herself and was gone a great deal. The children were - were alone a lot" (PC-R. 164-165).

Dr. Fleming testified that Jason's life fell apart when he was 12. His father left. His mother made him change his

name. His mother had to find work outside the home, and Lydia, his eldest sister, assumed more responsibility. On his twelfth birthday, a neighbor gave Jason marijuana, which started his drug and alcohol abuse. Mrs. Walton married again within six months. The stepfather supplied Jason with alcohol and access to drugs. While he was not physically abusive, he had an alcohol problem. The weekend before he died, he gave Jason a credit card and the car keys and told him to do what he wanted. Dr. Fleming said there was a permissiveness about the family (PC-R 172).

Dr. Fleming called Mr. Gates' death significant in Jason's life:

A Well, the stepfather's death just in a way is significant but Mr. Walton is sitting there with him. The significant part is that the younger sister was there and it was she that tried to get the meat out, call 911, and Mr. Walton just -- just didn't react. He was unable to function in that stressful situation. They couldn't find the police. They couldn't find the ambulance and they were frantically trying to do this, and he just simply didn't participate. He just said he was unable to. He just kind of watched it all. I found that typical of his behavior in times of stress when he just -- he goes over and he just kind of checks out.

(PC-R. 172-176).

At age 12, Jason began using alcohol and marijuana. He graduated to heroin when he was in the Army in Germany. He used, injected and snorted every known drug. Up until the time

of the crime, he used marijuana on a regular basis, three times a day. He drank beer and whiskey. But his drug of choice was LSD. (PC-R. 175). Dr. Fleming testified that the drugs "significantly disrupted his lifestyle" (PC-R. 175).

Dr. Fleming said that even when Jason was in the SEED Program when he was 16, he was off drugs for that period of time, but started drugs again when he was released (PC-R. at 176).

Dr. Fleming noted numerous "red flags" should have alerted trial counsel to the need for mental health testing. Mr. Walton suffered numerous head injuries before the homicide: he fell from a tree; had two bicycle accidents, one of which caused unconsciousness, and was in a serious car accident. (PC-R. 149). Mr. Walton also suffered from a collapsed lung on two occasions. The fact that Mr. Walton had been in drug rehabilitation and had been administered psychoactive medicine while in jail was an indication of drug problems that needed to be investigated further (PC-R. 151). Dr. Fleming said that records that showed that Mr. Walton had been to a psychologist or psychiatrist while in high school indicate that there might have been mental health problems (PC-R. 151).

Dr. Fleming also looked at school records and found that

Mr. Walton was an average student for his first six years of school, but his grades began to drop in junior high and finally, in high school, he dropped out completely (PC-R. 152).

Dr. Fleming testified that she found two statutory mitigating factors: the defendant acted under the influence of extreme mental disturbance and the capacity of the defendant to conform his conduct to the requirements of the law was substantially impaired. She also testified to many non-statutory mitigating factors, including: his mother was distant and unemotional towards him; his parents had a messy divorce when he was twelve; his stepfather gave him alcohol and drugs; his stepfather died in front of him; he started abusing drugs and alcohol at an early age; and he suffered from severe drug and alcohol abuse throughout his life (PC-R. 283-84).

In October 1999, Dr. Fleming was contacted again and given the withheld public record information turned over by the State to determine if it was important to better understand Mr. Walton and if it was relevant to her initial evaluation and testimony (PC-1. 4116-4117).

In 1999, in addition to reviewing her notes and reports from 1990, she also conducted telephone interviews with Julia

Walsh and Teresa Napp, friends of Robin Fridella; Mr. Walton's sister, Kim Fox; Caroline Walton, Mr. Walton's mother, and Lydia Horn, Mr. Walton's sister. Because Dr. Fleming was in Wyoming and unavailable to physically reevaluate Mr. Walton in Florida, she conducted telephone interviews with Dr. Faye Sultan, a clinical psychologist, who was able to evaluate Mr. Walton in person (PC-1. 4118-4119).

At the 1999 evidentiary hearing, Dr. Fleming testified that withheld information was "critical" and would have impacted on her evaluation. The withheld materials filled in the missing blanks from her 1990 evaluation. For example, Dr. Fleming explained that the crime was inconsistent with Mr. Walton's previous history and non-violent behavior. In 1990, Mr. Walton was unable to provide her with information about his mother's abandonment and his relationship with Robin Fridella.

The withheld information, according to Dr. Fleming, identified significant facts that affected Mr. Walton in his relationships and personal responsibility. Dr. Fleming described Mr. Walton's severe dysfunction that came from the psychological abandonment of both parents and an early addiction to alcohol and drugs that continued until his incarceration. Mr. Walton had a history of avoidance of close

personal relationships because of his fear of criticism and rejection. He had low esteem and a poor self image (PC-1. 4122).

Based on the new information she reviewed in 1999, Dr. Fleming testified that Mr. Walton was a prime candidate to be controlled and manipulated by Robin Fridella. Based on interviews she conducted, Dr. Fleming said that Robin selected Jason when they were associated with the same group of friends. Mr. Walton felt tall, skinny and undesirable. Robin Fridella was outgoing and aggressive. Mr. Walton was shy and passive. Robin filled his need for love while he filled her needs for drugs. After Gary Peterson, Robin's brother, stole drugs from Mr. Walton, Robin told Jason that Gary was going to get a new shipment of marijuana and that Jason could get it back. Mr. Walton has repeatedly denied that he planned a murder (PC-1 4142).

Dr. Fleming testified that the withheld information, including the results of a deceptive polygraph of Robin Fridella and a domestic violence report between Steven and Robin Fridella, provided new insight into the role of Robin in this crime.

Dr. Fleming testified that Mr. Walton met Robin Fridella after he was released from the service in 1980. She told Mr.

Walton that she was divorced from Steve Fridella, but it was not until later that he learned that she lied and was not divorced. The couple lived together for three months before the crime. But at the time of the crime, they were not living together. According to the evaluations conducted by Dr. Sultan, Robin did not talk about her children with Mr. Walton and appeared to have a separate life away from him. The experts learned that when Robin Fridella and Mr. Walton were not living together, Robin would bring her children to Mr. Walton's house for him to babysit while she went out with other men. Robin Fridella did everything she could to keep her husband from the children. Robin was controlling and became enraged at Steven Fridella if he withdrew from her and did not act according to her wishes. Dr. Fleming found that her threats about children appeared to be control issues about Steve Fridella, rather than genuine concern about her children (PC-1. 4132).

Dr. Fleming testified she reviewed a civil trespass incident that occurred between Robin and Steven Fridella. Robin was enraged by Steven's unfaithfulness, even though the couple was separated and in the process of a divorce.

Dr. Fleming also found Robin's polygraph exam was important information that would have impacted on her

evaluation and opinion of Mr. Walton. The author's report indicated that Robin was deceptive. This deception raised questions about her involvement in the crime that was never investigated. It also went to Mr. Walton's motivation and mental state at the time of the crime. On cross examination, the State asked Dr. Fleming if she was aware that the polygraphist more than ten years later changed his opinion about Robin Fridella's deception. She said she was not aware of it, but it did not make a difference because Robin had a history of deception and was not simply deceptive in one area, but in many areas (PC-1. 4156).

Dr. Fleming testified that based on the withheld materials, Mr. Walton's behavior and personality before the crime was not violent nor aggressive. Based on Dr. Sultan's evaluation, Dr. Fleming found Mr. Walton a self-doubting man with poor self image controlled and manipulated by Robin Fridella. His significant alcohol and drug addiction began when he was 12. He was not given the love and attention during his developmental years. He was vulnerable and chose unwisely with little awareness of the problems of his relationship with Robin Fridella.

She testified that Mr. Walton was "obsessed" with Robin Fridella (PC-1. 4122), "Mr. Walton has a long history of low

self-esteem and isolation and was a shy man, shy as a child" (PC-1. 4122). His involvement with Robin Fridella as an "important happening in his life." Id.

Dr. Fleming also reported that based on her interviews in addition to the withheld documents showed that Robin Fridella was an angry woman who threatened that if she could not have her children, no one could (PC-1. 4132). Although Robin's statements appeared to be about caring for her children, her behavior indicated that she had difficulty maintaining the love and stability that the children needed.

Dr. Fleming testified that although some of the facts of Mr. Walton's traumatic background and drug and alcohol problems were raised during previous hearings, there was insufficient information available in 1991 to tie this behavior into the dysfunctional relationship between Mr. Walton and Robin Fridella. Because of the lack of information, Robin Fridella's relationship with Mr. Walton and her motivation to manipulate and control Mr. Walton was never explored in depth. The withheld information showed Dr. Fleming that Mr. Walton and Robin had a much closer relationship than she knew about initially (PC-1. 4120; 4140).

Dr. Fleming said that the State painted a picture of Mr. Walton as a very controlling and aggressive man (PC-1. 4141),

but the withheld information rebutted that argument and explained the effect that Mrs. Walton's abandonment had on Jason, why he was a passive follower and that Robin was a controller and "...she was an angry woman" (PC-1. 4141).

Dr. Fleming testified that while her initial interview of Mr. Walton in 1990 was accurate, it was incomplete (PC-1. 4135). At that time, she simply viewed Robin Fridella as a girlfriend and she did not realize the control she exercised over Mr. Walton. In 1991, Mr. Walton was unaware that his mother's neglect and Robin's manipulation went hand in hand to move his behavior at the time of the crime. Had the withheld information been available in 1990, Dr. Fleming said it would have opened a new line of questioning and examination. Had this information been available to her, she would have urged Mr. Walton's attorneys to investigate Robin Fridella's background and dominance over Mr. Walton (PC-1. 4134; 4156).

Dr. Faye Sultan, a clinical psychologist, testified that she was asked to evaluate Mr. Walton at Union Correctional Institution because Dr. Fleming was physically unable to do so.¹¹ She saw Mr. Walton for eight hours on November 16-17,

¹¹No record citations are included here because Dr. Sultan's testimony has not been transcribed. Mr. Walton has requested that the record on appeal be supplemented with this testimony.

1999. She reviewed background materials on Mr. Walton, including the withheld information that was only recently turned over to the defense. She also reviewed Dr. Fleming's testing data from 1990. All this information served as the basis for her opinion and that opinion was given to Dr. Fleming in several telephone conversations.

Dr. Sultan opinion was consistent with Dr. Fleming's findings. She found that Mr. Walton was the product of a highly dysfunctional, chaotic and neglectful family life. His father, Irving Johnson McCoy, Jr. was abusive to his wife and neglected his children. He was remote and showed no affection or warmth. Caroline McCoy, Mr. Walton's mother, also was neglectful and emotionally unavailable to her son. Mr. Walton was left without parental guidance or support. His mother often was absent from the home and Mrs. Walton's eldest sister, Lydia, was his caretaker.

Dr. Sultan testified that because he was abandoned by his parents, Mr. Walton perceived himself to be inadequate and inferior. He was shy and introverted. He had low self-esteem and saw himself as unappealing and undesirable. He never could understand why any woman would find him

Mr. Walton relies on the affidavit written by Dr. Sultan and submitted into evidence (PC-1. 2164-2169).

attractive. Dr. Sultan testified that these personality traits persisted into adulthood. Mr. Walton was dependent and passive in relationships, easily manipulated, susceptible to control by others and desperate for attention and approval. Mr. Walton also was seriously involved in substance abuse. By the age of 12 or 13, Mr. Walton was a regular abuser of alcohol, marijuana and other illegal substances. After joining the Army at age 17, Mr. Walton continued his drug use. He injected heroin and used LSD, marijuana, alcohol, amphetamines, cocaine, hash and psychedelic mushrooms. Mr. Walton was able to perform in the Army while he was intoxicated because his job was routine and repetitive.

Dr. Sultan found that the quantity and type of drugs Mr. Walton used in the days and weeks leading to his arrest kept him in a chronic, inebriated state. He typically smoked six marijuana joints and drank 12 beers each day. He worked at Pall Neumatics in Ocala, a company that provided him with routine and repetitive work. Mr. Walton also drank a liter of bourbon on the weekends and took hallucinogens when he could buy them. Dr. Sultan diagnosed Mr. Walton as having polysubstance dependence with physiological dependence.

Based on the neuropsychological tests performed by Dr. Fleming in 1990, Dr. Sultan said Mr. Walton's sustained drug

abuse resulted in symptoms consistent with an organic personality disorder. He showed difficulty with tasks requiring the ability to sustain attention and concentration. Any performance that required abstract and conceptual thinking was impaired.

Dr. Sultan testified that Robin Fridella initiated the relationship with Mr. Walton and completely controlled its course. Robin Fridella told Mr. Walton when he was allowed to spend time with her and when he needed to stay away. She lied to him about her marital status and at first, hid from him the fact that she had two children. Mr. Walton wanted so much to maintain a relationship with Robin Fridella that despite her frequent episodes of infidelity, he ignored any indication that she was dishonest and just using him to supply her with drugs.¹² Even after he was arrested and realized that Robin Fridella was responsible for his arrest, Mr. Walton continued to express his need, desperation, love and devotion in his many letters to her. He remained very dependent on her and

¹²Counsel recalls that Judge Downey asked Dr. Sultan whether she was aware that the polygraphist who gave Robin Fridella a polygraph exam changed his opinion years after the fact. Dr. Sultan said she was aware of it, but it was irrelevant because Robin Fridella was deceptive in so many other areas - lying about her marital status and the fact that she had children. Dr. Sultan said she was unpersuaded by the polygraphist's change of opinion. Counsel requested that the transcript of this testimony be transcribed.

was unable to imagine life without her. This relates directly to abandonment issues from his childhood.

Dr. Sultan testified that Mr. Walton did not fit the anti-social label. Those with anti-social disorders are unable to form relationships and bonds with people. Dr. Sultan testified that Mr. Walton has long-term relationships with friends and lawyers. He was not aggressive, not a planner and not violent. Dr. Sultan found Mr. Walton to be a leader and not a follower.

Sidney Merin, a licensed psychologist who evaluated Mr. Walton for the State in 1990, testified that the withheld materials would have had no impact whatsoever on his evaluation. Dr. Merin did not re-evaluate Mr. Walton in light of the withheld materials. He did not interview or speak to anyone about the relationship between Mr. Walton and Robin Fridella. Dr. Merin did nothing to reassess his earlier opinion of Mr. Walton (PC-1. 4158-4185).

Instead of relying on the mental health experts who were completely familiar with Mr. Walton's background and witnesses, the trial court adopted the opinion of State expert, Dr. Merin (PC-1. 2410-2411). Dr. Merin was the only expert who had not spoken with any of the witnesses or evaluated Mr. Walton as doctors Sultan and Fleming. He was

the only witness who testified that this information would not have affected his opinion. In sum, Dr. Merin's opinion was completely devoid of corroboration. To rely on his opinion in this case is contrary to the weight of the evidence adduced at the evidentiary hearing. In 1999, Mr. O'Leary testified that the withheld material was not made available to him at trial and was Brady (PC-1. 3949), but he would not have sought additional investigation based on the material. Mr. O'Leary testified that the withheld information would not have given him reason to attack the aggravating factors presented by the State. He also said he would not use the information to investigate possible mitigating evidence (PC-1. 3912-3951).¹³

At trial, the State argued and the judge found the aggravating factors that (1) the murders were committed during the commission of a robbery and burglary; (2) the murders were committed for pecuniary gain; (3) the murders were committed in an especially heinous, atrocious or cruel fashion; (4) the murders were committed in a cold, calculated and premeditated manner; and (5) the murders were committed for the purpose of avoiding a lawful arrest. The trial court found no mitigating circumstances. Walton v. State, 547 So. 2d 622, 624 (Fla.

¹³Mr. O'Leary's 1999 testimony is incomplete and inaccurate. Undersigned counsel has sought to have the court reporter review her notes to determine the accuracy of the transcript.

1989).

Mr. O'Leary testified that the withheld information was inconsistent with his theory of defense (PC-1. 3933). When asked what his theory of defense was, he responded that it was a planned robbery gone bad (PC-1. 3930) and that this information had no relevance. He said he would not have bothered to investigate the information and found it "insulting" to the jury to argue in mitigation that Mr. Walton may have been blinded by love or controlled by a woman (PC-1. 3949-3951).

This statement demonstrates ineffectiveness of counsel of the most basic kind. Mr. O'Leary clearly did not understand that Robin Fridella's statements could have been mitigating to Mr. Walton. Mr. O'Leary said that her statements were contrary to his theory of defense. However, by the time the penalty phase has arrived, Mr. O'Leary's theory was already lost. He had no theory going into the penalty phase. The defense theory that Mr. Walton was just an accomplice had already been rejected by the jury in the guilt phase. To continue to use that as an excuse for not using the Fridella information was disingenuous.¹⁴

¹⁴It must be remembered that Mr. O'Leary also did not use the fact that the State had argued an inconsistent theory in the Cooper and Van Royal trials and did not use that fact as a

Contrary to Mr. O'Leary's and the trial court's opinion, Robin Fridella's statements would have been admissible in penalty phase. They could have come in through mental health experts who said these statements were valuable to their opinions and relied on them to form their opinions. The trial court ignored the testimony of the only mental health experts who had evaluated Mr. Walton and reviewed the materials.

This withheld information could have been effective in both guilt and penalty phases to explain the alleged robbery, why Mr. Walton was so devoted to Robin Fridella that he would have done anything to be with her. This information would have opened the door to further investigation into Mr. Walton's background and relationships, but trial counsel did not know how to use it.

Mr. O'Leary's statement that he would not have conducted further investigation based on this information illustrates his lack of understanding of capital trial litigation. See, Strickland v. Washington, 466 U.S. 688 (1984) and Williams v. Taylor, 120 S. Ct. 1495 (2000)(counsel was ineffective for failing to adequately investigate and present mitigating evidence and the defendant was prejudiced by counsel's ineffectiveness).

mitigating factor.

"[A]n attorney does not provide effective assistance if he fails to investigate sources of evidence which may be helpful to the defense." Davis v. Alabama, 596 F. 2d 1214, 1217 (5th Cir. 1979), vacated as moot, 466 U.S. 903 (1980); see also Goodwin v. Balkcom, 684 F. 2d 794, 805 (11th Cir. 1982), cert. denied, 460 U.S. 1098 (1983)("At the heart of effective representation is the independent duty to investigate and prepare").

Substantial and compelling mitigating evidence was easily available and accessible to trial counsel, but was not investigated and prepared for presentation to either the jury or the judge. As a result, Mr. Walton was sentenced to death by a judge and jury who heard none of the available mitigation that was essential to an individualized capital sentencing determination. Lee v. United States, 939 F.2d 503 (7th Cir. 1991); Kubat v. Thieret. Here, as in Jones v. Thigpen, "[d]efense counsel neglected [and] ignored critical matters of mitigation at the point when the jury was to decide whether to sentence [James Walton] to death," 788 F.2d 1101, 1103 (5th Cir. 1986). See also Brewer v. Aiken.

The following non-statutory mitigating factors, each of which has been separately found by a Florida court to be mitigating evidence in a capital case, were available to be

presented to Mr. Walton's judge and jury for consideration:

- 1) Disparate sentence with accomplices
- 2) Relative involvement
- 3) Questions regarding roles of defendant and codefendant.
- 4) Drug abuse problem
- 5) Under the influence of drugs at the time of the crime
- 6) Drinking the night the homicide was committed
- 7) Had seen psychologist concerning drug and emotional problems
- 8) Was gainfully employed
- 9) Co-workers thought highly of him
- 10) Grew up without father, raised by absentee mother
- 11) Difficult early childhood
- 12) Emotional disturbance due to divorce
- 13) Childhood trauma
- 14) Character as testified to by members of his family
- 15) Good son and brother
- 16) Family loves him
- 17) Positive traits, rehabilitation potential
- 18) Friendly, helpful, good with animals and children before offense
- 19) Not known, prior to this case, to be a violent person
- 20) Defendant's behavior at resentencing
- 21) No disciplinary reports while on death row
- 22) Adjusted well to life imprisonment
- 23) Honorable discharge from the military
- 24) Capable of kindness
- 25) Difficulty in dealing with stress conditions
- 26) Impulsive person with memory problems and impaired social judgment
- 27) The non-applicability of the aggravating circumstances not found
- 28) Developed and cultivated artistic talents

This list illustrates the tremendous amount of non-statutory mitigation available to defense counsel. "The [sentencer] must be able to consider and give effect to any

mitigating evidence relevant to a criminal defendant's background, character, or the circumstances of the crime." Penry v. Lynaugh, 109 S. Ct. 2934, 2952 (1989)(emphasis added); see Parker v. Dugger, 111 S. Ct. 731 (1991). A mitigating factor cannot be rejected unless there is "competent substantial evidence refuting the existence of the factor." Maxwell v. State, 603 So. 2d 490 (Fla. 1992). The prejudice to Mr. Walton resulting from counsel's deficient performance is clear. A myriad of mitigating factors existed and could have been presented.

There was no tactical or strategic reason for not presenting complete mental health mitigation. Brewer v. Aiken. Counsel failed to make a timely, adequate investigation. No tactical motive can be ascribed for failure to present any mental health mitigation. Nixon v. Newsome, 888 F.2d 112 (11th Cir. 1989). Additional mitigation to support a judicial override of the 9-3 death recommendation could have been presented at the resentencing. Counsel, however, failed to investigate for additional mitigation.¹⁵ This is prejudicially deficient performance. The fact that

¹⁵In denying relief, the circuit court relied entirely upon this Court's decision in Blanco v. Wainwright, 507 So. 2d 1377 (Fla. 1987). That decision has since been repudiated by the Eleventh Circuit. Blanco v. Singletary, 943 F.2d 1477 (11th Cir. 1991).

some testimony was presented does not establish effective assistance where further investigation into additional mitigation was warranted. Cunningham v. Zant, 928 F.2d 1006 (11th Cir. 1991). Counsel was ineffective. Loyd v. Smith, 899 F.2d 1416 (5th Cir. 1990).

No reliable adversarial testing occurred. Confidence in the outcome is undermined, and the results of the penalty phase are unreliable. A resentencing must be granted, and relief is proper.

ARGUMENT II

THE STATE WITHHELD EXCULPATORY AND IMPEACHMENT EVIDENCE, IN VIOLATION OF BRADY V. MARYLAND. THIS WITHHELD INFORMATION IMPACTED ON BOTH GUILT AND PENALTY PHASES OF MR. WALTON'S PROCEEDINGS.

To prove a violation of Brady, Mr. Walton must establish that the government possessed evidence that was suppressed, that the evidence was "exculpatory" or "impeachment," and that the evidence was "material." United States v. Bagley, 473 U.S. 667 (1985); Kyles v. Whitley, 514 U.S. 419 (1995); Strickler v. Greene, 527 U.S. 263 (1999). Evidence is "material" and a new trial or sentencing is warranted "if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different." Kyles, 514 U.S. at 433-34; Young v. State, 739 So. 2d 553 (Fla. 1999); Lightbourne v. State, 742 So. 2d 238 (Fla. 1999); Rogers v. State, 782 So. 2d 373 (Fla. 2001); Hoffman v. State, 2001 WL 747399 (Fla. 2001). To the extent that counsel was or should have been aware of this information, counsel was ineffective in failing to discover it and impeaching the State witnesses with it. The issue of materiality is subject to de novo review, although this Court gives deference to findings of fact supported by competent and substantial evidence.

A proper materiality analysis under Brady also must address the cumulative effect of all suppressed information. The suppressed evidence must be viewed in the context of other evidence that was presented at trial. Hoffman. Further, the materiality inquiry is not a "sufficiency of the evidence" test. Id. at 434. The burden of proof for establishing materiality is less than a preponderance. Williams v. Taylor, 120 S.Ct. 1495 (2000); Kyles, 514 U.S. at 434.

Mr. Walton pled this claim as Brady and newly-discovered evidence in the Third Amended Motion to Vacate Judgment and Conviction (PC-1. 1921-1936).

At the 1999-2000 evidentiary hearing, it was proven that the State withheld key exculpatory materials from the defense. Handwritten notes from police interviews show that Robin Fridella, Mr. Walton's girlfriend and sister and wife of two of the victims, did not get along with her brother, Gary Peterson. A person who knew Robin told police "If she couldn't have Christopher and Steven back, no one would have him" (PC-1. 4256)(Exhibit 10). The notes also reveal that Robin Fridella was not truthful when she was given a lie detector test and asked about her involvement in the crime (PC-1. 4254)(Exhibit 8). The evidence showed that Robin Fridella may have been involved in the crime and had undue

influence over Mr. Walton. This information pertains to both the guilt and penalty phases of trial.

Robin Fridella's involvement in the crime was never an issue before because key materials were not been disclosed by the State. None of this information was given to the defense at trial or resentencing. Under Kyles, knowledge of exculpatory information is imputed to the prosecutor, whether or not the prosecutor has actual knowledge. The individual prosecutor has a duty to know of any favorable evidence known to others acting on the government's behalf, including the police and sheriff. Kyles.

The withheld information was material to motive; Mr. Walton's mental state at the time of the crime; and the State's ability to prove the aggravating factors against Mr. Walton. It could have provided impeachment evidence and offered an alternative theory of the crime than that forwarded by the State. The information also was material to the penalty phase, for it could have provided an explanation for Mr. Walton's conduct.

Donald O'Leary, Mr. Walton's trial attorney, testified that he had been practicing law for 29 years and was a former prosecutor (PC-1. 3912). He was appointed to represent Mr. Walton at trial and again at resentencing (PC-1. 3913). This

was his first murder case as a defense attorney (PC-1. 3920). He testified that he sought discovery from the State before trial. On January 26, 1983, he requested discovery and the request specifically mentioned Brady (PC-1. 3914; 4247)(Exhibit 1).

Mr. O'Leary filed a motion to compel discovery that was filed on May 10, 1983, which was to compel release of all police reports (PC-1. 3914-3915; 4248)(Exhibit 2). A third motion for discovery was filed on June 7, 1983, seeking any promises or agreements between the state and other witnesses who may have been given immunity or convicted of a crime (PC-1. 3916-3917; 4249)(Exhibit 3).

A fourth motion, production of police reports, was filed on June 7, 1983, seeking all police reports that might contain evidence or lead to evidence that would be relevant to the case (PC-1. 3917; 4250)(Exhibit 4). A fifth motion was filed on June 7, 1983 demanding exculpatory information (PC-1. 3918; 4252)(Exhibit 5).

By filing these motions, Mr. O'Leary testified that he expected to receive all relevant discovery. Mr. O'Leary's motion to compel discovery was granted by the trial court (PC-1. 3919; 4253)(Exhibit 6). Mr. O'Leary testified that he "assumed that I was getting everything I was entitled to" (PC-

1. 3920). He did not file any additional motions at resentencing because he believed that he had all the materials to which he was entitled (PC-1. 3919).

At the 1999 evidentiary hearing, Mr. O'Leary was shown the materials withheld by the State. He identified a police report that showed a civil trespass violation against Robin Fridella filed by Steven Fridella involving the couple's son. Mr. O'Leary testified that he did not have this information at trial (PC-1. 3922; 4253)(Exhibit 7).

Mr. O'Leary identified a Pinellas County Sheriff's Office supplemental report dated June 18, 1982 that showed that Robin Fridella was administered a polygraph, about three days after the homicide. The polygraphist concluded that Robin Fridella was not telling the entire truth and was deceptive in her answers.¹⁶ Mr. O'Leary specifically recalled not having access to this report or its information at trial or resentencing (PC-1. 3923-24; 4254)(Exhibit 8), but was something that he expected to receive in his discovery requests (PC-1. 3925; 3926).

At the 1999 evidentiary hearing, the State produced a

¹⁶Detective Poe apparently changed his mind about Robin Fridella's polygraph exam eleven (11) years after the fact and immediately before he was to testify for the State about his results in an evidentiary hearing in post-conviction. (PC-1 4243).

1983 deposition of Detective Richard Poe, who administered the polygraph exam to Robin Fridella. Mr. O'Leary was not present nor did he conduct the deposition. When Detective Poe was asked about whether there was deception by Robin Fridella, the prosecutor objected:

A Mr. Geesey: Okay. I'm going to voice an objection at this time as to the questions of the results of the polygraph. I don't think they're admissible.

Q Mr. Crider: Are you refusing to answer the question?

A Mr. Geesey: I'm going to object and ask to have that question certified and request that the witness not answer that question unless ordered by a judge.

(PC-1. 4242). For the State to argue that the information was available in 1983 is wrong. The State withheld this information from 1983 until it was finally released sometime in 1996-1997.

Mr. O'Leary also identified information from handwritten police field notes that said, "Robin didn't get along with her brother Gary Peterson. If she couldn't have Christopher and Steven back, no one could have him. Told Robin is involved with MC gang connection" (PC-1. 3928; 4256)(Exhibit 10).

Mr. O'Leary identified police handwritten notes that said, "Had a lot of problems with Robin over the children. She said if she couldn't have them, no one would. ...Robin

said she would do anything to get the kid" (PC-1. 3929)(Exhibit 11). Several of the handwritten notes from the police indicate that the police interviewed people who knew Robin and Steve Fridella and knew that they fought over custody of the children. One note indicated that Steve Fridella attempted to change the joint custody status and get full custody of his children (PC-1. 3931; 4260)(Exhibit 14). The withheld information also showed that Robin once found her husband in bed with another woman. One witness told police, "Steve burned her enough that she might have something to do with it" (PC-1. 4258)(Exhibit 12).

Mr. O'Leary testified that this information was something he expected to receive from the State in discovery, but did not do so. He believed that he was entitled to this information (PC-1. 3930). Mr. O'Leary testified that this information was something he would have wanted to know back in 1983 and is what he expected to receive in his discovery requests (PC-1. 3931).

Mr. O'Leary testified that while this information was not known to him at trial and it was information that he expected to receive from the State, he did not consider the information to be Brady because it would not have made a difference in his defense. When asked if he would have sought additional

investigation based on this information, Mr. O'Leary said no (PC-1. 3949).

Mr. O'Leary did not know what Brady material was. He failed to understand that the "withheld information, even if not itself admissible, can be material under Brady if its disclosure would lead to admissible substantive or impeachment evidence." Rogers v. State, 782 So. 2d 373, 383 n.11 (Fla. 2001).

Mr. O'Leary's flawed definition of Brady was "you're entitled to all relevant information that would tend to indicate - well, it would tend to indicate guilt or innocence" (PC-1. 3928). Contrary to Mr. O'Leary's understanding of Brady, the material withheld by the State clearly fell within the parameters of Brady.¹⁷ The evidence was favorable to Mr. Walton because it was exculpatory and impeaching. Mr. O'Leary simply did not know how to use it. The information cast doubt on Mr. Walton's role in the crime. The withheld information could have been used to attack the State's theory of the case - that the murders were the result of a robbery and that Mr. Walton was the "mastermind" who had control over three, young

¹⁷See, e.g. White v. Helling, 194 F. 3d 937, 946 (8th Cir. 1999) (withheld information, although not necessarily admissible at trial, was nonetheless material under Brady because it "would surely have been the basis for further investigation"); Sellers v. Estelle, 651 F. 2d 1074, 1077 n.6 (5th Cir. 1981) ("the evidence here suppressed was material to the preparation of petitioner's defense, regardless of whether it was intended to be admitted into evidence or not").

boys. The new information shows that the "mastermind" may have been the person who would do anything to keep her children. The withheld information showed that Robin Fridella was not to be believed; may have been involved in the murders; and may have had a strong influence over Jason Walton that was not known by the jury. Nothing could have been more masterful than seducing an inexperienced and naive boyfriend with the purpose of having him kill the only obstacle to keeping her children -- Steve Fridella. No one had a better motive. With this information, competent counsel with even an elementary understanding of Brady would have known how to use it.

The polygraph results and Ms. Fridella's complete statements should have been disclosed in discovery and should have been introduced at the penalty phase. Defense counsel never investigated the possibility of presenting this evidence at the penalty phase.

While polygraph evidence is generally inadmissible at the guilt phase, Ms. Walton submits that it is admissible at the penalty phase. See Fla. Stat. § 921.141 (1) (1992). The Eighth and Fourteenth Amendments to the United States Constitution also forbid the per se exclusion of relevant evidence at a capital penalty phase. Lockett v. Ohio, 438 U.S. 586, 604 (1978); Skipper v. South Carolina, 476 U.S. 1 (1986); Green v. Georgia, 442 U.S. 95, 97 (1979).

The Ninth Circuit has concluded that the refusal to permit evidence that the State's key witness had failed a lie detector test resulted in a violation of a defendant's due process right to present relevant mitigating circumstances of the crime. Rupe v. Wood, 93 F. 3d 1434, 1441 (9th Cir. 1996), cert. denied, 519 U.S. 1142 (1997). Accord Paxton v. Ward, 199 F. 3d 1197 (10th Cir. 1999)Mr.¹⁸ Walton was similarly deprived of his right to present relevant mitigating evidence. Robin Fridella's failed polygraph would have been compelling mitigation on behalf of Mr. Walton, and the State improperly withheld that information from the defense.

There is no question that the withheld information was suppressed by the State. Trial counsel testified that he had not seen this information or the contents of these reports despite his repeated requests for discovery. Had this information been disclosed, the State's theory of Mr. Walton's motive could have been destroyed. Suspicion would have fallen

¹⁸The Supreme Court decision in United States v. Scheffer, 523 U.S. 303 (1998) held that a defendant's attempt in a court-martial proceeding to present polygraph results to support his testimony that he had not used drugs violated his right to present a defense. Scheffer, however, does not apply to a capital defendant's constitutional right to present mitigation. Paxton, 199 F. 3d at 1215. The Scheffer Court noted that its holding did not apply to situations where the exclusion of polygraph evidence "has infringed upon a weighty interest of the accused" or "implicate[s] a sufficiently weighty interest of the defendant to raise a constitutional concern under our precedents." Scheffer, 523 U.S. at 303-09. Thus, Scheffer supports Mr. Walton's argument.

on the most likely suspect - Robin Fridella - creating a reasonable doubt in the minds of the jurors as to who was behind the crime. The police obviously were suspicious of Robin Fridella or would not have gone to the trouble to polygraph her.

This information also could have been effective at the penalty phase to explain why Mr. Walton was so devoted to Robin Fridella that he would have done anything to be with her. At the least, this information would have opened the door to further investigation into Mr. Walton's background and relationships. Therefore, this information was favorable to the defense. This was Brady material and trial counsel was ineffective for failing to understand how it could have been used effectively in Mr. Walton's defense.

In its order denying relief, the trial court erroneously said that this information could have been discovered before through the exercise of due diligence (PC-1. 2410). The trial court made this finding because Mr. Walton knew that Robin Fridella had a substantial influence on him. And because he knew this, any evidence of Robin Fridella's domination of Mr. Walton was known to the defense. This was incorrect.

The trial court overlooked binding legal precedent establishing that diligence is not an element of a Brady claim. Strickler v.

Greene, 527 U.S. 263, 281-82 (1999); Kyles v. Whitley, 514 U.S. 419 (1995). See also Occhicone v. State, 768 So. 2d 1037, 1042 (Fla. 2000) (noting that "`due diligence' requirement is absent from Supreme Court's most recent formulation of the Brady test"); Banks v. Reynolds, 54 F. 3d 1508, 1517 (10th Cir. 1995) (prosecution's obligation to turn over evidence "stands independent of the defendant's knowledge").¹⁹

"Diligence" is measured by reasonableness, not perfection. Williams v. Taylor, 529 U.S. 420, 435 (2000) ("Diligence . . . depends on whether the prisoner made a reasonable attempt, in light of the information available at the time, to investigate.... [I]t does not depend . . . upon whether those efforts could have been successful").

The presumption, well established by tradition and experience, that prosecutors have fully discharged their official duties, is inconsistent with the novel suggestion that conscientious defense counsel have a procedural obligation to assert constitutional error on the basis of mere speculation that some prosecutorial misstep may have occurred." Strickler, 527 U.S. at 286-287.

¹⁹The reason for no such requirement is that, under the law, it is the prosecutor that has the "duty to learn" of exculpatory evidence. Kyles v. Whitley, 514 U.S. 419, 437 (1995). See also Hoffman v. State, ___ So. 2d ___ (Fla. 2001) (slip op. at 9-10) (rejecting State's argument that defense counsel lacked diligence in failing to discover exculpatory evidence; "[t]his argument is flawed in light of Strickler and Kyles, which squarely place the burden on the state to disclose to the defendant all information in its possession that is exculpatory").

The trial court's ruling was wrong.

Moreover, if the trial court's position was true, then any mentally-deficient or brain-damaged client would be deemed to have the responsibility of making sure his attorney knew everything mitigating in his character, even though, he, as a layman, would have no way of knowing what mitigation was. Mr. O'Leary's obligation was to conduct a thorough investigation. His discovery requests specially and repeatedly asked for this type of information. Mr. O'Leary testified that he expected to find out such information as Robin Fridella's relationship with her ex-husband, and her child custody problems through discovery. He did not because the State withheld it.

Mr. O'Leary testified that he knew Mr. Walton and Ms. Fridella were in a relationship. What Mr. O'Leary did not know was that the police suspected Robin Fridella and knew that she made statements to the police that she would do "anything" to keep her children. Mr. Walton had no way of knowing she made those statements nor did he know what aspects of his character or relationships Mr. O'Leary needed because he did not ask. It is the attorney's responsibility to investigate because he is the one with the legal training. Mr. Walton, a brain-damaged indigent defendant, is not, under the law, expected to know the intricacies of mitigating

evidence that even Mr. O'Leary did not understand. See, Washington v. Smith, 219 F.3d 620, 631 (7th Cir. 2000)(Telling a client who is in jail awaiting trial to produce his own witnesses falls short of conducting a reasonable investigation). During O'Leary's testimony, it was clear that he thought Brady violations only occurred when exculpatory information was withheld. He did not know that Brady means any evidence that is favorable to the defense should be disclosed. See, Kyles v. Whitley. That means any evidence that would have been favorable to Mr. Walton's mental health expects.

Mr. Walton is entitled to a resentencing.

ARGUMENT III

MR. WALTON WAS DENIED HIS FUNDAMENTAL RIGHTS TO CONFRONTATION, TO DUE PROCESS, AND TO A RELIABLE AND INDIVIDUALIZED HEARING WHEN THE DEFENSE MENTAL HEALTH EXPERT FROM THE CO-DEFENDANT'S CASE WAS ALLOWED TO TESTIFY AT HIS EVIDENTIARY HEARING AND HE WAS UNABLE TO PROPERLY CROSS EXAMINE HIM AS TO HIS CONFLICT OF INTEREST.

During the 1991 evidentiary hearing, Sidney Merin, Ph.D., was called as a State witness to testify against Mr. Walton. Dr. Merin was the same confidential psychologist who examined Mr. Walton's co-defendant, Richard Cooper, before his trial and who testified at Mr. Cooper's sentencing hearing. Mr. Walton's counsel objected to Dr. Merin's testimony on the basis that the doctor would not have been available to testify at Mr. Walton's trial because he was the confidential mental health expert for Mr. Cooper (PC-R. 418). Counsel objected that this would have caused a conflict of interest and Dr. Merin's testimony could not have been considered at trial (PC-R. 418-19).

Dr. Merin had access to statements made by Richard Cooper. This Court reversed Mr. Walton's first penalty phase proceeding because the State called a witness to testify regarding statements made by Richard Cooper. Walton I. However at the 3.850 hearing, the court ruled that whether or not Dr. Merin would have been able to accept an appointment

pretrial to do both confidential evaluations or would have been permitted to testify at the sentencing was irrelevant, and overruled the objection, "allow[ing] Dr. Merin to testify for purposes of th[e] hearing on behalf of the state" (PC-R. 420). The court's refusal to sustain the objection and its admission of Dr. Merin's testimony deprived Mr. Walton of his rights to confrontation, to due process, and to a full and fair hearing on the issues.

Dr. Merin was the confidential expert for Richard Cooper, Mr. Walton's co-defendant (Cooper Record at 412). His evaluation of Mr. Cooper was based solely on personal interviews with Mr. Cooper and a copy of Mr. Cooper's interview with Detective Ron Beymer and Detective J.M. Halliday (Id. at 399, 414, 433). Based on this limited information from and about Mr. Cooper, Dr. Merin arrived at an opinion of Mr. Walton's personality. He determined that Mr. Walton was a skilled manipulator who feigned being distressed or even hysterical (Id. at 418). In fact, Dr. Merin testified that his conclusion that Mr. Walton was a dominating personality was arrived at by determining that Mr. Cooper's personality was such that he would respond to a very powerful authoritative personality. Thus, Mr. Walton had to have such a personality (Id. at 433). Dr. Merin testified to this at

the sentencing phase of Mr. Cooper's trial and even through rigorous cross-examination, stuck by his conclusions about Mr. Walton's personality. However, these conclusions were premised upon Mr. Cooper's out-of-court statements to Dr. Merin.

When Dr. Merin began his evaluation of Mr. Walton before Mr. Walton's evidentiary hearing, he had pre-determined the issues he was to decide. In evaluating the mental condition of a defendant, the professional has an obligation to make a thorough assessment based on sound evaluative methods and to reach an objective opinion. See ABA Criminal Justice Mental Health Standard 7-1.1. Dr. Merin could not be objective in his evaluation of Mr. Walton due to his previous loyalties to Mr. Cooper and his pre-conceived opinion of Mr. Walton's personality and mental state based upon Mr. Cooper's statements to him. Dr. Merin would have been ethically prohibited from testifying for the state at Mr. Walton's resentencing after testifying on behalf of Mr. Cooper at his sentencing.

Furthermore, in evaluating Mr. Cooper, Dr. Merin was privy to Mr. Cooper's personal version of the events of May 11, 1982, and to Mr. Cooper's statement to police taken after his arrest. Had Dr. Merin testified at Mr. Walton's

resentencing, Mr. Walton would have been subjected to a sentencing proceeding at which his co-defendant's uncontroverted statements were used to sentence Mr. Walton to death. This Court reversed in Walton I for precisely the same error. This simply cannot be squared with the Due Process Clause, the Confrontation clause, or the Eighth Amendment.

In 1999, Dr. Merin was given the withheld public records from Mr. Walton's case that showed that Robin Fridella was a liar and witnesses, including the police, believed she may have had something to do with the murders. Dr. Merin was asked whether those materials would have impacted on his initial evaluation.

Dr. Merin conceded that his time with Mr. Walton in 1991 was limited to three hours and testing was done by an assistant, and not Dr. Merin (PC-1. 4160-4161). In light of the withheld information, Dr. Merin did not seek to re-evaluate Mr. Walton. He did not speak to any of Mr. Walton's family members. He did not see the letters Mr. Walton wrote to Robin Fridella. He did not speak to Carolyn Walton about Mr. Walton's relationship with Ms. Fridella. He did not speak to Lydia Horn or Kim Fox about Mr. Walton's relationship with Ms. Fridella. He did not speak to Teresa Knapp or Julia Walsh about Mr. Walton's background, drug addiction or relationship

with Robin Fridella. He did not know about Ms. Fridella's lifestyle, the type of mother she was, or if she had any drug problems (PC-1.- 4163). In fact, Dr. Merin testified that he did not know about "the essence of the relationship" (PC-1. 4164).

When counsel for Mr. Walton attempted to ask Dr. Merin if Mr. Cooper's statements impacted his opinion on Mr. Walton, the State objected and the trial court held that no conflict existed and it should have been raised earlier (PC-1. 4173). However, Mr. Walton had raised it earlier. The trial court either confused the two cases or forgot. The conflict existed in 1991 and the same conflict continued until today. In 1991, Dr. Merin testified that he was able to keep both evaluations separate and there was a passage of time between both cases so as to negate any conflict (PC-R. 418-420). However, in 1999, Dr. Merin was at it again. He had been asked to review materials for Mr. Walton and was asked by the State to review materials for Mr. Cooper's case within a few weeks of each other. Both Mr. Cooper and Mr. Walton's cases were proceeding in post-conviction at the same time and in front of the same judge. Portions of the evidentiary hearing were heard on the same day, confusing the facts and interfering with Mr. Walton's ability to confront Dr. Merin's

testimony.²⁰

In Sanders v. State, 707 So. 2d 664 (Fla. 1998), Dr. Merin was involved in another conflict of interest that resulted in a new penalty phase based in part on this conflict. In that case, the trial court erred in allowing Dr. Merin to testify on behalf of the State, even though he had been appointed as a confidential defense expert. The defense provided Dr. Merin with background materials about the case. Dr. Merin said because of an office problem, he took no action on the case. A year later, the State listed Dr. Merin as a witness. The defense attempted to strike Dr. Merin as a witness, but the motion was denied. *Id.* at 668.

Dr. Merin testified that he "felt uncomfortable about being called by both sides" *Id.* at 669, and only after he was reassured by the State that he could testify, did Dr. Merin assist the State. This Court held it was error to allow Dr. Merin to testify on behalf of the State because the defendant did not waive the attorney-client privilege. *Id.* at 669.

In Mr. Walton's case, Dr. Merin had no apparent

²⁰In fact, at his December 7, 1999 deposition in Mr. Walton's case, collateral counsel for Mr. Cooper was present. He indicated that Dr. Merin was mentioned as a possible State witness for Mr. Cooper's post-conviction proceedings that were occurring at the same time as the proceedings in Mr. Walton's case (PC-1. 2133).

discomfort in obtaining confidential information from Mr. Cooper and using it against his co-defendant, Mr. Walton. He had no problem testifying against Mr. Walton within days of reviewing his notes on Mr. Cooper. This conflict is even more egregious than the conflict in Sanders.

Mr. Walton could not have required Mr. Cooper to waive his constitutional right to remain silent and force him to make himself available for cross-examination at Mr. Walton's resentencing or in post-conviction. See Engle v. State, 483 So. 2d 803 (Fla. 1983). The State would have been unable to introduce Mr. Cooper's testimony or statement to the police at Mr. Walton's hearing. To allow Dr. Merin to testify based on conclusions formed from such information would allow the same inadmissible evidence in through the back door.

Mr. Walton is entitled to an "individualized determination" of whether he should be executed, taking into account the "character of the individual and the circumstances of the crime." Zant v. Stephens, 462 U.S. 862, 879 (1983). See Parker v. Dugger, 111 S. Ct. 731 (1991). In imposing death, the sentencer must consider only those factors that directly pertain to the defendant's "personal responsibility and moral guilt." Enmund v. Florida, 458 U.S. 782,801 (1982). A contrary approach creates the risk that the death penalty

will be imposed because of considerations that are "constitutionally impermissible or totally irrelevant to the sentencing process." Zant v. Stephens, 462 U.S. at 885.

The trial court's admission of Dr. Merin's testimony deprived Mr. Walton of his rights to confrontation, to due process, and to a full and fair hearing. This error was compounded when the circuit court denied Mr. Walton his right to fully cross-examine Dr. Merin about these matters. Since the circuit court considered and exclusively relied upon Dr. Merin in denying relief, a new evidentiary hearing is warranted.

ARGUMENT IV

**THE TRIAL COURT FAILED TO CONSIDER NEWLY-
DISCOVERED EVIDENCE OF IMPEACHMENT THAT WOULD
HAVE SHOWN THAT MR. WALTON WAS NOT THE RING
LEADER OR THE MASTERMIND BEHIND THE MURDERS,
AS ARGUED BY THE STATE.**

On January 14, 2000, during an evidentiary hearing of Richard Cooper's case, the defense called co-defendant Terry Van Royal to testify. Mr. Cooper's hearing was before Circuit Court Judge Downey, the same judge who was presiding over Mr. Walton's evidentiary hearing. At that time, Mr. Van Royal disavowed an affidavit he signed in 1995, in which he said Mr. Walton was the "mastermind" behind the murders. In 2000, he testified that the affidavit was untrue and said he signed it thinking that he could help himself and Mr. Cooper.

At Mr. Cooper's 2000 hearing, Mr. Van Royal testified that he, Cooper and Jeff McCoy looked up to Mr. Walton and idolized him. They did not want to disappoint him and they did what they were asked. Mr. Van Royal testified that Mr. Cooper left before the last shot was fired. Mr. Van Royal said he did not fire the last shot and that he had a 30-30. He said that Cooper and Walton had shot guns and that Mr. Walton also had a shotgun. On the trip to Clearwater, Mr. Van Royal said they were under the influence of drugs.

In January 2000, Mr. Van Royal testified that Mr. Cooper

shot one victim, but he did not know which one. He said he shot no one. He said Mr. Walton shot one or two of the victims, and at least one of them. When the last shot was fired, he said both Cooper and Van Royal were outside.

While counsel was present for Mr. Cooper's hearing, she was not a party to it. At the next hearing in Mr. Walton's case, counsel mentioned that Mr. Walton's previous post-conviction attorneys had information about Mr. Van Royal that directly refuted his latest testimony from Mr. Cooper's case and sought to present the attorney's testimony either through affidavit or testimony. The information that Mr. Walton was not the mastermind was newly-discovered; was unknown at the time of the trial and such evidence would have been admissible at trial, if only for impeachment. Such evidence, when considered in conjunction with other evidence would have probably produced a different result at sentencing. Mills v. State, 788 So. 2d 249 (Fla. 2001). Judge Downey allowed the two attorneys to testify.

I think that while, you know, it appears that we're a little convoluted here, the fact remains that Mr. Van Royal testified one way, he then came in here and testified another way and then apparently in-between those two times, in talking with the CCR attorneys for Mr. Walton, he made a third statement.

Certainly if for nothing else it brings his credibility into issue as to, you know, which time

is true. And I think that that could, you know, have a hearing on both the Walton and Cooper matter because at one time he was saying, you know, it was all Cooper, and another time he was saying it was all Walton.

(PC-1. 3825-3826).

While the court properly ruled that this information was valid as to Mr. Walton's case, he erred when, over defense objection, he allowed Mr. Cooper's attorneys to cross examine Mr. Walton's witnesses during a Walton hearing. The judge did not allow Mr. Walton that opportunity at the Cooper hearing (PC-1. 3829). This violated Teffteller v. Dugger, 676 So. 2d 369 (Fla. 1996), which held that defendants in post-conviction should have their claims considered on an individual basis rather than a consolidated hearing. The court also violated Brown v. Wainwright, 392 So. 2d 1327 (Fla. 1981), which held there was no authority to join or consolidate death row cases. The trial court erred in allowing Mr. Cooper to intervene in Mr. Walton's case, without the authority to do so. The two cases have never been tried together. And, in an earlier proceeding when counsel for Mr. Walton attempted to question Dr. Merin about his involvement in both Mr. Cooper and Mr. Walton's cases, the trial court refused to allow such questioning.

Ken Driggs, an attorney who began representing Mr. Walton

in 1990, testified that on December 7, 1990, he and attorney Beth Wells, drove to Florida State Prison to meet and interview Terry Van Royal. At that time, both Mr. Driggs and Ms. Wells represented Mr. Walton in post-conviction proceedings. Mr. Driggs described Mr. Van Royal as frightened and who looked "like a little kid" (PC-1. 3831).

Mr. Van Royal initially was very nervous and Mr. Driggs did not take notes. Mr. Van Royal told the lawyers that no one intended to cause harm to anyone. He and Mr. Cooper were armed with shotguns and as they prepared to leave, Jeff McCoy was outside in the car. The three victims were on the floor and as they were backing out the door, Mr. Cooper began to yell.

Mr. Van Royal told them:

It wasn't even so much a word, it was just a noise and opened up and began to shoot the shotgun at the victims; that Mr. Van Royal began to shoot himself, that he was just sort of shocked and didn't know what had triggered this, that he began to shoot; that Mr. Walton was with them at the door, to, and he was also very surprised by this and that the shooting wasn't a result of a command or anything like that; and that the room filled up with smoke and the smell of gunpowder and they ran out.

(PC-1. 3834-3835).

Mr. Van Royal told the lawyers that Mr. Walton did not

shoot anyone nor did he command anyone to shoot, and the shooting was initiated by Mr. Cooper. He said that he and Mr. Cooper were the shooters. (PC-1. 3835).

Both the State and Mr. Cooper's attorney then had an opportunity to cross examine Mr. Driggs (PC-1. 3837; 3852).

Attorney Elizabeth Wells, who represented Mr. Walton in 1990, had a similar recollection as to what Mr. Van Royal told them. She said that Mr. Van Royal was present when Mr. Walton and Mr. Cooper were discussing robbing Steven Fridella before the actual robbery, but that it was just talk. Mr. Van Royal said during these discussions that there was no mention of any plan to harm anyone and Mr. Walton specifically told him that no one was to be hurt.

The men went through the house. The three men were tied up and the boy was put in the bathroom (PC-1. 3864). Mr. McCoy was outside. As they were about to leave, Mr. Cooper started screaming and shooting. Mr. Walton and Mr. Van Royal immediately ran out the door and it was raining, and ran into a fence and both fell in the mud. The shooting stopped and both men returned to the house. One man was barely still alive, and Mr. Van Royal shot him. Mr. Van Royal said that Mr. Walton did not shoot anyone (PC-1. 3866).

In denying Mr. Walton relief, the trial court completely

ignored the testimony of the two attorneys and ignored the fact that Mr. Van Royal had changed his story. In denying relief, the trial court only addressed whether there was a consolidation of two death penalty cases and did not address the fact that Mr. Van Royal had repeatedly lied under oath in an effort to help himself and hurt Mr. Walton (PC-1. 2419-2420).

This case involved critically important facts that were unavailable to either the judge or the jury in determining Mr. Walton's fate. It was never alleged that Mr. Walton was a triggerman, or that he was the one who actually did the killing. In fact, the State argued in the Cooper and Van Royal trial's that Mr. Walton was not the mastermind.

On the other hand, Mr. Van Royal, who received a life sentence, clearly was a triggerman. It cannot be argued that Mr. Walton is more culpable of the two. To allow Mr. Walton's death sentence to stand would be disproportionate, disparate, and invalid. This error is particularly egregious in this case where three jurors voted for life, even without this information.

Mr. Van Royal was sentenced after the trial court announced Mr. Walton's death sentence. This Court did not consider the issue on direct appeal. To the extent that trial

counsel or appellate counsel should have raised or argued the issue before the respective courts, Mr. Walton received ineffective assistance of counsel. See Strickland v. Washington, 466 U.S. 668 (1984). As it is, no sentencer has been provided a "vehicle" for considering the codefendant's life sentence. See Penry v. Lynaugh, 109 S. Ct. 2934, 2951 (1989) (capital sentencer "must be allowed to consider and give effect to mitigating evidence relevant to a defendant's character or record or the circumstances of the offense"). Mr. Walton respectfully requests that this Court, on proportionality, disparity, and fundamental fairness grounds, set aside this invalid death sentence and enter in its place a sentence of life imprisonment. At the least, a proper resentencing is required, at which time, Mr. Van Royal's life sentence may be taken into account. Mr. Walton is entitled to relief.

CONCLUSION

On the basis of the arguments presented here and in his Initial Brief, Mr. Walton respectfully submits that he is entitled to an evidentiary hearing, a new guilt phase and a new penalty phase in the trial court. Mr. Walton respectfully urges that this Honorable Court remand to the trial court for

such proceedings, and that the Court set aside his unconstitutional conviction and death sentence.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing motion has been furnished by United States Mail, first-class postage prepaid, to Carol Dittmar, Assistant Attorney General, 2002 N. Lois Avenue, Suite 700, Tampa, FL 33607 this October 24th, 2001.

PAMELA H. IZAKOWITZ
Florida Bar No. 0053856
CAPITAL COLLATERAL REGIONAL COUNSEL-
SOUTH
303 S. Westland Avenue
P.O. Box 3294
Tampa, FL 33601-3294
(813) 259-4424

Attorney for Mr. Walton

CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that the Initial brief satisfies the
Fla. R. App. P. 9.100 (1) and 9.210(a)(2).

PAMELA H. IZAKOWITZ
Florida Bar No. 0053856
CAPITAL COLLATERAL REGIONAL COUNSEL-
SOUTH
303 S. Westland Avenue
P.O. Box 3294
Tampa, FL 33601-3294
(813) 259-4424