

IN THE SUPREME COURT OF FLORIDA

CASE NO.: SC14-1551

HOWARD STEVEN AULT

APPELLANT

VS.

STATE OF FLORIDA

APPELLEE

.....
ON APPEAL FROM THE CIRCUIT COURT OF THE SEVENTEENTH JUDICIAL
CIRCUIT, IN AND FOR BROWARD COUNTY, FLORIDA,
(CRIMINAL DIVISION)
.....

ANSWER BRIEF OF APPELLEE

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PRELIMINARY STATEMENT

Appellant, Howard Steven Ault, Defendant below, will be referred to as "Ault" and Appellee, State of Florida, will be referred to as "State". Reference to the records will be:

First Direct Appeal - 2000-ROA
Direct Appeal from Resentencing - 2007-ROA
Postconviction Record - PCR

Supplemental materials will be designated by the symbol "S" preceding the type of record referenced. Each record cite will be followed by the volume number and corresponding pages(2). Ault's initial brief will be noted as "IB."

STATEMENT OF THE CASE

On November 20, 1996, Ault was indicted for the November 4, 1996 first-degree murder of eleven-year old AJ and seven-year old AJ along with two counts of kidnapping a child under thirteen and two counts of sexual battery on a child under twelve for the digital and penile penetration of DM. (2000-ROA.1 1-4). On August 11, 1999, the jury found Ault guilty as charged (2000-ROA.3 485-92) and recommended he be sentenced to death. (2000-ROA 777-88). The trial court followed the jury's recommendation and sentenced Ault to death for the double homicide and Ault appealed. (2000-ROA 901-27, 982-83). This Court affirmed the conviction on November 6, 2003, but vacated the death sentence and remanded for a new penalty phase based on

an error committed in jury selection which impacted the jury's sentencing decision. *Ault v. State*, 866 So.2d 674, 683-88 (Fla. 2003) ("*Ault I*"). Additionally, this Court remanded for resentencing of the non-capital counts as the incorrect guidelines had been used. See *Ault I*, 866 So.2d at 683-88.

Resentencing commenced on July 30, 2007, and on August 21, 2007 the jury recommended death sentences by a vote of nine to three for the murder of DM and by a vote of ten to two for AJ's killing. (2007-ROA.3 571-80, 584-85) A *Spencer*¹ hearing was held, and on February 24, 2007, Ault was sentenced to death for the double homicide. (2007-ROA.4 651-70). *Ault v. State*, 53 So.3d 175, 182-86 (Fla. 2010) ("*Ault II*"). With respect to the non-capital convictions, Ault was sentenced to fifteen years each on Counts V - VIII for the kidnapping, sexual battery and aggravated child abuse charges. These sentences were run concurrent with each other and any sentence Ault was serving presently. (2007-ROA.4 668-70). On October 3, 2011, the United States Supreme Court denied certiorari review. See *Ault v. Florida*, 132 S.Ct. 224 (2011).²

¹ *Spencer v. State*, 615 So.2d 688 (Fla. 1993).

² In his petition, Ault raise a single issue of:

Whether, contrary to the United States Constitution, in a state that weighs mitigating circumstances against aggravating circumstances, the failure to consider or properly evaluate mitigating circumstances

Following the replacement of Capital Collateral Regional Counsel from the Southern and Middle Regions, Registry Counsel Heidi Berkowitz Carpenter was appointed and on September 18, 2012, filed Ault's sworn motion for postconviction relief addressed to the resentencing. (PCR.1 195-98; PCR.2 227-77, 279-90, 291-32). On September 20, 2012, Ms. Carpenter was permitted to withdraw³ and Young Tindal was appointed. (PCR.2 333-35)

On January 17, 2013, the State's response to the initial postconviction motion was filed. (PCR.3 377-440) An amended postconviction motion was filed on July 19, 2013, which addressed both the original conviction and resentencing.⁴ (PCR.3 507-55). The State responded (PCR.4 556-624) and on October 18, 2013, the Huff Hearing/Case Management was conducted (PCR.8 1268-1321). An evidentiary hearing was granted on Claim One of the original motion and Claim Three of the amended motion related to the State reading Dr. Bourg-Carter's testimony from the original penalty phase into the record at the 2007 re-

can be found harmless merely based on aggravating circumstances without consideration of the rejected mitigating circumstances?

³ Because of a conflict between Ault and Ms. Carpenter, she too was permitted to withdraw and Young Tindall was appointed. Ault was given additional time for his new counsel to become familiar with the case and to amend the postconviction motion.

⁴ Periodically, Ault attempted to end his postconviction litigation only to withdraw the waiver of postconviction claims, however, such motions were denied. (PCR.1 71-74, 98, 149-53, 158-62, 174; PCR.3 442-51, 458-67, 474-76, PCR.6 653-75)

sentencing. (PCR.4 626) Following the January 14, 2014 evidentiary hearing, the parties filed post-hearing written closing arguments, and the trial court denied relief addressing the evidentiary and non-evidentiary claims. (PCR.5 647-786, 794-820, 821-38; PCR. 6 839-928) Ault appealed. (PCR.6 929-47)

STATEMENT OF THE FACTS

On November 4, 1996, eleven-year old DM and seven-year old AJ disappeared, and two days later, were found dead in Ault's ("Ault") attic. In the original direct appeal,⁵ this Court

⁵ In his original direct appeal, case number SC00-863, Ault raised nine issues as identified by the Florida Supreme Court:

(1) the trial court erred in denying his motion to suppress his statements to the police; (2) the trial court erred in granting the State's challenge for cause of juror Reynolds; (3) the trial court erred in denying his motion for a penalty phase mistrial based on the prosecutor's questioning of witnesses about collateral crimes; (4) the trial court erred by not allowing a defense expert to express his opinion as to the applicability of a statutory mental mitigating factor; (5) the trial court erred in permitting two penalty phase witnesses to testify about hearsay evidence; (6) the trial court erred in denying his request to discharge penalty phase counsel; (7) the aggravating circumstance that the murder was committed in the course of a specified felony is unconstitutional; (8) his death sentence violates the principles announced in *Apprendi v. New Jersey*, 530 U.S. 466, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000); and (9) the trial court erred in sentencing him under the 1995 sentencing guidelines for the noncapital offenses and in imposing a departure sentence without contemporaneous written reasons for the departure. The State addresses one issue relating to this Court's proportionality review of the death sentences on appeal. The State contends that Ault's two death

found:

Howard Steven Ault was charged with two counts of first-degree murder in the deaths of two young sisters, eleven-year-old [DM]⁶ and seven-year-old [AJ]. Ault was also charged with two counts of sexual battery on a child under twelve years old, two counts of kidnaping a child under thirteen years old, and two counts of aggravated child abuse.

The evidence and testimony presented at trial established the following facts. The two victims were living with their mother Donna Jones and their two-year-old sister in a pop-up trailer attached to the family car. When the mother could afford the camping fee, the family would camp at John Easterlin County Park in Broward County. The family had been camping at the park on and off for many months. Ault met the family at Easterlin Park a few days before the girls disappeared. He offered to let the family shower at his house, and gave Jones a hand-drawn map to his house. Ault also gave the two sisters a ride in his truck the same day and their mother scolded them for getting in his truck. A few days before the two sisters disappeared, a witness saw Ault talking to the girls and buying them snacks at a convenience store which the girls passed on their way home from school.

On Monday, November 4, 1996, the two girls left school at 2:05 p.m. Witnesses saw the girls walking home, but the girls never arrived at the park. Their mother looked for them at school and eventually went to Ault's house later in the evening. Ault stated that he had not seen the girls and asked the mother not to call the police as he had some problems with the police in the past. The mother went to her cousin's house and called the police. The police went to Ault's apartment and asked whether he had seen the girls.

sentences are proportional in light of the six aggravating factors, no statutory mitigating factors, and the weak nonstatutory mitigating factors.

Ault I, 866 So.2d at 679.

⁶ The names of the victim's have been redacted given that sexual battery was charged.

Ault stated that he had not seen the girls and allowed the officers to look around his apartment.

Ault and his wife voluntarily agreed to come to the Oakland Park Police Department to give sworn statements the next day. Detective William Rhodes, the lead officer on the case, interviewed Ault and his wife at the police department. Ault stated that he had only met the girls once a few days earlier in Easterlin Park, and that the girls had never been in his truck. Shortly after this interview, Officer Deborah Cox of the Broward County Sheriff's Department arrested Ault on an unrelated charge of attempted sexual battery of a minor that had occurred eleven months earlier. Ault was taken to the Broward County jail. In the meantime, Rhodes located witnesses who had seen the girls in Ault's truck, had seen Ault with the girls on several occasions, and had seen Ault and his vehicle at the convenience store at the approximate time that the girls were walking home from school on the day they disappeared, all of which contradicted Ault's voluntary statement.

The next day, Rhodes visited Ault at the Broward County jail and explained that his investigation of the girls' disappearance indicated that Ault had lied at the initial interview. When Ault indicated his desire to speak to Rhodes, Rhodes read Ault his *Miranda* rights and Ault waived these rights. Ault confessed that he had killed the girls within an hour after he had taken them to his apartment. Ault agreed to show Rhodes where the bodies were. Ault led the police to his apartment, confessed that the girls were in the attic, and explained that the officers who had looked around the night before had not looked in the attic. Ault signed a consent-to-search form and the police found the girls' bodies in the attic as Ault had stated.

Ault was taken to the Oakland Park Police Department and insisted that he would only speak to Rhodes. Ault then gave a taped confession in which he revealed the following details. Ault planned to sexually assault the girls when he met them in front of the convenience store about 2:30 p.m. on November 4, 1996. He offered the girls a ride, and lured them to his house with the promise of candy. He sexually assaulted eleven-year-

old [DM] with his finger and also penetrated her with his penis. When [DM] started to scream and fight, Ault strangled her until she stopped screaming. He then strangled seven-year-old [AJ] to keep her from telling anyone about the incident, but he did not sexually assault her. Ault redressed [DM] and put the bodies of both girls in his attic. Ault said that he killed the girls because he was afraid they would tell someone what he had done. Because he was already on community control for sexual assault on a child under twelve years of age, he feared that he would go to jail for at least twenty-five years. He also stated that he thought about the trauma his wife had experienced when he was previously arrested and did not want to put her through that trauma again.

The medical examiner testified that both girls died from manual strangulation, that there was bruising and hemorrhaging of [DM]'s vaginal tissue, that [DM] had been dead for approximately two days when her body was found, and that, based on the decomposition of her body, [AJ] had died twelve to eighteen hours after [DM]. Based on the lesser state of decomposition of [AJ]'s body and a white foamy substance coming from her mouth, the medical examiner stated that [AJ] appeared to have been alive, albeit comatose, at the time she was placed in the attic.

The defense rested without presenting any evidence, except for two documents: Ault's notice to invoke his rights to counsel and to remain silent in the unrelated attempted sexual battery case, and the court order acknowledging that invocation of rights. The jury found Ault guilty on all charges. At the request of defense counsel, the penalty phase proceeding was scheduled approximately six weeks after the guilt phase concluded.⁷

Ault I, 866 So.2d at 677-78.

The new penalty phase commenced on July 30, 2007, and on

⁷ The penalty phase facts and trial court's sentencing findings have been omitted given this Court's remand for a new penalty phase and sentencing. *Ault I*, 866 So.2d at 683-88.

August 21, 2007 the jury recommended death sentences by a vote of nine to three for the murder of DM and by a vote of ten to two for AJ's killing. (2007-ROA.3 571-80, 584-85. In the subsequent appeal,⁸ this Court outlined the procedural history

⁸ On direct appeal from the resentencing, Ault raised: (Point I) The trial court erred in rejecting Appellant's brain damage as a mitigating circumstance; (Point II) The trial court erred in rejecting good adjustment to life in prison as a mitigating circumstance; (Point III) The trial court erred in consolidating numerous mitigating circumstances and in giving them little weight; (Point IV) The trial court abused its discretion in evaluating mitigating circumstances of Appellant's telling the victim to turn him in; (Point V) The trial court erred in rejecting the statutory mental mitigating circumstances; (Point VI) The trial court erred in failing to evaluate the nonstatutory mitigating circumstance of emotional or mental disturbance; (Point VII) The trial court erred in rejecting Mr. Ault's low IQ as mitigation; (Point VIII) The trial court erred in rejecting Mr. Ault's cooperation and acceptance of responsibility as mitigation; (Point IX) The trial court erred in rejecting Mr. Ault's remorse as a mitigating circumstance; (Point X) The trial court erred in rejecting as a mitigating circumstance that Mr. Ault suffered from pedophilia; (Point XI) The death penalty is not proportionally warranted in this case; (Point XII) The trial court erred in admitting irrelevant and prejudicial photos into evidence over Appellant's objections; (Point XIII) The trial court erred in giving great weight to the jury's death recommendation; (Point XIV) The trial court erred in denying Appellant's motion for a presentence investigation report; (Point XV) The trial court erred in conducting a pretrial conference in Appellant's absence; (Point XVI) The trial court erred in failing to respond to Appellant's request to represent himself; (Point XVII) Florida's death penalty which does not require: findings under *Ring v. Arizona*, 122 S.Ct. 2428 (2002); the jury to be properly advised of their responsibility; a unanimous jury finding for death; a unanimous jury finding of aggravating circumstances; a finding beyond a reasonable doubt that aggravating circumstances outweigh mitigating circumstances violates the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution; (Point XIX (in Supplemental

and facts of the resentencing proceeding:

Howard Steven Ault was sentenced to death for the first-degree murders of two sisters, eleven-year-old [DM]⁹ and seven-year-old [AJ]. This is Ault's second appearance before this Court. On his previous direct appeal, we affirmed Ault's convictions but vacated his sentences and remanded to the trial court for a new penalty phase before a new jury. *Ault v. State*, 866 So.2d 674 (Fla. 2003). A new penalty phase was held, and Ault was again sentenced to death for each of the two counts of first-degree murder. Ault now appeals, raising various issues. We have jurisdiction. See art. V, § 3(b)(1), Fla. Const. For the reasons that follow, we affirm the sentences.

FACTS AND PROCEDURAL HISTORY

This Court discussed the facts surrounding Ault's offenses on his previous direct appeal. We recounted that Ault first met the victims at John Easterlin Park in Broward County, where the girls, their mother, and their two-year old sister were living in a trailer attached to the family car.

Ault, 866 So.2d at 677-78.

The guilt phase of Ault's jury trial concluded on August 11, 1999. Ault was convicted of two counts of first-degree murder, two counts of kidnapping, two counts of sexual battery on a person less than twelve years of age (both upon [DM]), and two counts of aggravated child abuse. After the penalty phase proceedings were completed, the judge followed the recommendation of the jury and imposed a sentence of death for each murder. *Id.* at 677-79.

Brief): The trial court erred in denying Appellant's motion to disqualify the trial judge.

(Initial and Supplemental Briefs on Appeal).

⁹ Again, the State removed the victims' names due to the sexual nature of the charges.

In his first direct appeal to this Court, Ault raised only one guilt phase issue. Ault argued that the trial court had erred in denying his motion to suppress the statements made to Detective Rhodes following his arrest on the unrelated sexual battery charge. We determined that the motion to suppress was properly denied and rejected Ault's claim. See *Ault*, 866 So.2d at 679-83. We also found that the evidence presented at trial was sufficient to support Ault's convictions. We therefore affirmed Ault's convictions for first-degree murder, sexual battery, kidnapping, and aggravated child abuse. See *id.* at 683. As to the sentencing phase, however, we found that the trial court had erred in granting a challenge for cause of a potential juror. We found that, although the potential juror had voiced a general opposition to the death penalty, she had also agreed that she could place her personal feelings aside and be fair and impartial when making her decisions in the case. See *id.* at 685-86. The erroneous exclusion of a potential juror is not subject to harmless error review. *Id.* at 686 (*citing Gray v. Mississippi*, 481 U.S. 648, 664-65, 107 S.Ct. 2045, 95 L.Ed.2d 622 (1987)). Accordingly, we vacated Ault's sentences of death and remanded for a new penalty phase. See *id.*

The new penalty phase was held from July 30, 2007, through August 21, 2007. The State began its case by presenting evidence of Ault's criminal history. Three witnesses testified that as young girls they were sexually assaulted by Ault, the first in 1988 when she was twelve years old, the second in 1994 when she was seven years old, and the third in 1995 when she was eleven years old. The last of these three witnesses testified that after the assault Ault told her that what he did was wrong and that she needed to call the police. The jury was also read the testimony of another witness, a police officer, who had testified at the previous trial that Ault and another man attacked him at knifepoint in 1986.

The State also presented evidence relating to the deaths of [DM] and [AJ]. The original crime scene investigator was called to identify photos of the locations in which the events surrounding the offenses took place. The medical examiner who conducted the victims' autopsies was also called to testify

regarding the causes of death. Finally, the State called William Rhodes, who recounted his role in the investigation and identified the audio recording of his interrogation of Ault, which was played to the jury. The State also called witnesses to give victim impact evidence, including the victims' mother, one of the victims' teachers, and other individuals who knew their family.

At the close of the State's case, the defense presented three witnesses to establish mitigation. The first witness, psychiatrist Dr. David Kramer, testified that he had conducted a two-hour psychiatric screening of the defendant and had reviewed mental health reports on Ault written by other doctors. Regarding Ault's family background, Dr. Kramer testified that Ault's family moved frequently when he was a child and that Ault's parents had a dysfunctional marriage. According to Dr. Kramer, Ault reported that his older brother began a pattern of forced sexual abuse when he was seven years old, and that his brother sometimes used a knife or gun. Dr. Kramer testified that such experiences would have a negative effect on a child's mental health and sexual development, and diagnosed Ault with complex posttraumatic stress disorder. Dr. Kramer also diagnosed Ault with pedophilia, which he defined as an intense persistent arousal to inappropriate stimuli, being prepubescent children in an adult, and found that Ault had a history of alcohol abuse and dependency and some history of other substance use.

The next defense witness, neurologist Dr. David Ross, testified that he conducted various tests on Ault and concluded that Ault suffered from deficiencies in the frontal and temporal lobes of his brain. Dr. Ross testified that someone with these deficiencies may have problems with the execution of complex ideas, impaired judgment, difficulties with impulse control and emotional issues, and possible hypersexuality. He also stated that these deficiencies are consistent with individuals diagnosed with pedophilia.

The final witness presented by the defense was Robert Buckley, a private investigator. Buckley testified that he spoke with Ault's mother, Barbara Madson, who told him that Ault no longer had a relationship with

his older brother Charles due to the sexual abuse that occurred when Ault was younger. According to Buckley, Madson stated that she was aware of the molestation but explained that the matter was not talked about in their family. At the end of Buckley's testimony, the defense rested.

In rebuttal, the State read to the jury the transcript testimony of Dr. Sherry Bourge Carter, a psychologist who had testified at Ault's previous trial. Dr. Carter testified that, at the time of her initial meeting with Ault, Ault reported that he had heard voices and suffered from hallucinations in the past, but that he was on medications to control these conditions. However, she found that his descriptions of his symptoms were inconsistent with each other and were also not consistent with medical knowledge regarding hallucinations. Based on interviews with Ault and a review of other records, Dr. Carter diagnosed Ault with severe psychopathy. Dr. Carter explained that this was a personality disorder rather than a mental illness. She defined a major mental illness as a condition that causes someone to be out of touch with reality or to lose control of his or her thought process. By contrast, individuals with personality disorders have reasonable control over their actions, but are impaired in their ability to relate to others, experience emotion, or behave in a socially appropriate manner. Such individuals, she explained, view others as objects rather than as people and have difficulty experiencing remorse. Overall, Dr. Carter concluded that Ault was faking mental illness in order to avoid responsibility for his actions. Dr. Carter also found that Ault was inconsistent in his reports of the sexual abuse he claimed to have suffered as a child and that, because he had given so many different versions of the events, it was difficult to evaluate whether any of his claims were truthful.

At the end of the proceedings, the jury recommended death by a vote of nine to three for the murder of [DM] and recommended death by a vote of ten to two for the murder of [AJ]. In his written sentencing order, the trial judge found six aggravating circumstances applicable to both murders: (1) Ault was previously convicted of a felony and placed on community control (significant weight); (2) Ault was previously

convicted of another capital felony or of a felony involving the use or threat of violence to another person (great weight); (3) the capital felony was committed while Ault was engaged in the commission of or an attempt to commit the crimes of sexual battery, aggravated child abuse, and kidnapping (great weight); (4) the capital felony was committed for the purpose of avoiding or preventing a lawful arrest (significant weight); (5) the victim of the crime was a person less than twelve years of age; FN2 (6) the capital felony was especially heinous, atrocious, or cruel (HAC) (maximum weight).

FN2. The trial court weighed this circumstance and the aggravated child abuse circumstance as a single aggravator, in accordance with our decision in *Lukehart v. State*, 776 So.2d 906, 925 (Fla. 2000) (holding that to weigh "aggravated child abuse" as a separate aggravator from a minor victim's age would constitute improper doubling).

The court found no statutory mitigating circumstances and three nonstatutory mitigating circumstances: (1) Ault was raised in a dysfunctional family (little weight); FN3 (2) Ault was not adequately supervised by the Department of Corrections (little weight); (3) Ault told a victim of a prior sexual assault to call the police and that what he did was wrong (some weight). The court determined that the aggravating circumstances far outweighed the mitigating circumstances, noting specifically that the single aggravator of the murders being especially heinous, atrocious, or cruel was of such a magnitude as to overwhelm the mitigators. Following the jury's recommendation, the trial judge sentenced Ault to death for each count of first-degree murder, and to fifteen years in prison for each of the remaining offenses. Ault appeals, raising numerous claims of error.

FN3. In considering this claim, the court consolidated twelve of the twenty-seven nonstatutory mitigators presented by Ault. The proposed mitigating circumstances considered together under the dysfunctional

family factor were: (1) Ault was raised in a dysfunctional family; (2) Ault has an eighth grade education; (3) Ault attempted suicide when he was fourteen years old; (4) as a child, Ault was sexually abused, molested, and raped by his older brother, Charles; (5) Ault's parents, though aware of the sexual abuse, did nothing to prevent further abuse; (6) Ault's older brother, Charles, put a gun to Ault's head to force sexual relations; (7) throughout childhood, Ault suffered a number of head injuries that were not properly treated because of the lack of health insurance; (8) Ault was raised in an unstable environment, having to constantly move and start at new schools; (9) Ault's primary school report cards demonstrate poor academic performance, learning disabilities, and behavioral problems; (10) Ault was not nurtured as a child; (11) Ault was raised without strong family bonds; (12) Ault did not receive counseling as a child for his behavior, traumatic events, or academic development.

Ault v. State, 53 So.3d 175, 182-86 (Fla. 2010) ("*Ault II*").¹⁰

During the January 14, 2014 postconviction evidentiary hearing,¹¹ Dr. Sherri Bourg-Carter ("Dr. Bourg-Carter"), reiterated that she was a clinical psychologist with a specialization in forensic psychology and reported that she had testified in the 1999 penalty phase, but not in Ault's re-sentencing. In 2007, she was having health issues. While she

¹⁰ As noted above, on April 7, 2011, Ault served his United States Supreme Court petition raising a single issue and on October 3, 2011, the Supreme Court denied certiorari review. See *Ault v. Florida*, 132 S.Ct. 224 (2011).

¹¹ Ault called three witnesses at the evidentiary hearing, Dr. Sherri Bourg-Carter, 2007 Penalty Phase counsel, Mitchell Polay, and private investigator, Don Carpenter.

may have been able to have come to court, such would have been with great difficulty and would have depended on how she was being affected by her illness on the chosen day as some days, her illness precluded her from getting out of bed. During the time of Ault's trial, Dr. Bourg-Carter could not drive and her illness caused her basically to stop her private practice as she was not reliable enough to get to court. (PCR.5 676-78). Dr. Bourg-Carter testified there were days she could come to court and testify with some breaks; it all depended on the day. (PCR.5 677). If required, Dr. Bourg-Carter would have come to court to discuss her illness, what effects it had on her, and her ability to function daily. (PCR.5 739-40, 752).

As she did during her 1999 testimony, Dr. Bourg-Carter set out the materials she reviewed, people she interviewed, tests she gave Ault, and the evaluation she conducted.¹² Not being a neuropsychologist or neurologist, Dr. Bourg-Carter explained

¹² With respect to the evaluation, testing, and resultant opinion that Dr. Bourg-Carter developed in this case, she explained that she had reviewed background materials, school records, psychological reports, corrections records, Ault's confession and media interviews, letters Ault sent to the trial court in 1999, and other written materials and reports regarding Ault. Dr. Bourg-Carter also interviewed Ault's sister and jail deputies. She conducted testing of Ault including an IQ test on which he did not give his best effort, and met with him in September 1999 as part of her evaluation. (PCR.5 687-89, 694-95, 703-05; 2000-ROA 2562). While Dr. Bourg-Carter reviewed Dr. Eisenstein's report on Ault from 1999, she did not rely upon that report in forming her opinion as Dr. Eisenstein's report showed problems with the testing conducted. (PCR.5 716).

that she was not qualified to evaluate the EEG and PET scans or the extent of brain damage/brain injury discussed by Drs. Ross and Kramer. (PCR.5 676, 741, 745-46). However, even after reading the 2007 testimony of Drs. Kramer and Ross, Dr. Bourg-Carter maintained her 1999 opinion of Ault which was that neither statutory mental health mitigator was present. (PCR.5 744-45). She also noted that the testimony of those doctors did not alter Ault's test results on the IQ or MMPI (personality profile) tests Dr. Bourg-Carter administered. (PCR.5 741, 752).

Dr. Bourg-Carter's opinion regarding the aggravation and mitigation in this case was based on the behavioral facets of Ault's actions. Those behavioral facets had nothing to do with any alleged brain damage. (PCR.5 724) In forming her opinion, Dr. Bourg-Carter considered that Ault may have brain damage given his poorly documented head injuries, however, brain damage is important only to the point that it affects a person's behavior/actions. Significant for Dr. Bourg-Carter was the fact Ault planned his crime, tested his victims' vulnerabilities, tricked his victims, raped one, killed both, and hid their bodies in his attic. (PCR.5 725, 728-29). It continued to be Dr. Bourg-Carter's opinion, based on Ault's test performance, that there was no significant organic brain damage; and from the totality of the facts, there was no evidence that organic brain damage, schizophrenia, mania, or depression played any

significant role in Ault's criminal actions. (PCR.5 748-49).

Likewise, Dr. Bourg-Carter stood by her opinion that Ault was malingering after due consideration given to the background materials provided, reports of what Ault stated to other experts, and her interview with him. (PCR.5 701, 743, 746-47). Ault has pedophilia and has an antisocial personality disorder in Dr. Bourg-Carter's expert opinion. The IQ testing revealed Ault is not mentally retarded and other testing established he was feigning mental illness. (PCR.5 743). Ault admitted to Dr. Bourg-Carter he killed the older child because fought back and would report him; killed the younger child because she was a witness, and killed because he did not want to go to prison. After killing her older sister, Ault pulled the younger child to the floor and strangled her. While Ault claimed not to have control over his behavior, Dr. Bourg-Carter found Ault understood his actions, tested the victims to see if they would get into his car, and formed a relationship with them and their mother as part of his plan. These actions, in Dr. Bourg-Carter's opinion, refuted the statutory mental health mitigators (PCR.5 749-751) This was so even in light of the opinions expressed by Drs. Kramer and Ross. (PCR.5 752).

Mitch Polay ("Polay") was Ault's counsel in the 2007 penalty phase/re-sentencing. Since 1986, he had been practicing criminal law primarily and had defended successfully six to

eight penalty phase cases, some of which were before and after Ault's case. (PCR.5 761-62, 768-69).

Also, Polay had had prior experience with Dr. Bourg-Carter and based on those interactions in other cases, Polay knew just how thorough Dr. Bourg-Carter was. (PCR.5 769) He knew she had been the State's witness in the 1999 penalty phase and he had reviewed her testimony several times from that trial. (PCR.5 762-63, 769). Knowing Dr. Bourg-Carter, her 1999 testimony, and the horrific facts of the case, Polay made the strategic choice to opt for a cold record reading of her 1999 testimony as he thought it would inure to Ault's benefit as the jury would not hear the doctor's vocal inflection and emotion. (PCR.5 764-65, 769-70). Also recalling he knew of Dr. Bourg-Carter's illness, but not recalling whether the State told him definitively that she would not be coming to court, or whether he prepared for her cross-examination, Polay knew he would have live testimony from Drs. Kramer and Ross which he thought would allow him to argue in closing that Ault was brain damaged, and brain damaged people should not be put to death. (PCR.5 767, 770)

Polay did not recall whether he spoke to Ault about the decision to allow Dr. Bourg-Carter's 1999 testimony to be read to the 2007 jury. However, Polay reiterated again that the case facts and the doctor's testimony were damaging. (PCR.5 766).

Don Carpenter, a private investigator since 1968, testified

that he found the transcript of Dr. Bourg-Carter's 1999 testimony in Polay's file. However, he did not find any notes written in the transcript. Polay's case file consisted primarily of transcripts. (PCR.5 771-74).

The trial court denied postconviction relief (PCR.5 821-838) and Ault appealed.

SUMMARY OF THE ARGUMENT

Issue I-A - Ault has failed to carry his burden of proving ineffective assistance of counsel in the guilt phase under *Strickland v. Washington*, 466 U.S. 668 (1984). The trial court's summary denial of the challenge to guilt phase counsel's representation was proper as his challenges were pled in part in legally insufficient terms. Furthermore, given the fact that Ault had made a full confession and the defense motion to suppress had been denied and the record establishes that trial counsel's argument did not concede guilt to the capital crimes, but argued against premeditation and set the ground work for the defense for both the guilt and penalty phases neither deficiency nor prejudice resulted. Likewise, as to the claim guilt phase counsel failed to cross-examine State witnesses, the claim is legally insufficient as the trial court concluded. Ault did not set out which specific witness should have been cross-examined, what questions should have been asked, and how Ault would have benefitted from that cross-examination. Hence, deficient performance has not been set forth, and especially in light of the full confession, no *Strickland* prejudice exists. This Court should affirm.

Issue I-B - Following an evidentiary hearing on penalty phase counsel's effectiveness, where defense counsel testified as to his strategy for not challenging Dr. Bourg-Carter's

availability stemming from her illness, the trial court found this strategy was reasoned and Ault failed to carry his burden under *Strickland*. The trial court's factual findings are supported by the evidence and its legal conclusions are reasoned. Additionally, the record supports the summary denial of relief of those claims challenging witness selection and evidence presentation. This Court should affirm the denial of postconviction relief.

ARGUMENT

ISSUE I

AULT HAS NOT CARRIED HIS BURDEN OF PROVING BOTH DEFICIENT PERFORMANCE AND PREJUDICE ARISING FROM THE ACTS OF HIS 1999 GUILT PHASE AND 2007 PENALTY PHASE COUNSEL (restated)

Ault asserts that he received ineffective assistance from both his 1999 guilt phase counsel and 2007 penalty phase counsel. It is Ault's position that 1999 counsel was deficient in not providing a meaningful defense given the admissions made in opening statement and the lack of cross-examination of State witnesses. Ault also challenges 2007 penalty phase counsel's representation addressed to his preparation, witness selection, and decision not to challenge whether State witness, Dr. Bourg-Carter was in fact "unavailable," thereby permitting her 1999 testimony to be read to the 2007 jury. Both the summary denial of the guilt phase claim and denial of the penalty phase issues are supported by the law and record evidence. This Court should affirm the denial of postconviction relief.

A. STANDARD OF REVIEW

1. SUMMARILY DENIED CLAIMS

"When evaluating claims that were summarily denied without a hearing, this Court will affirm "only when the claim is 'legally insufficient, should have been brought on direct appeal, or [is] positively refuted by the record.'" *Jackson v.*

State, 127 So.3d 447, 459-60 (Fla. 2013) (citations omitted).

2. DENIAL FOLLOWING AN EVIDENTIARY HEARING

Where an evidentiary hearing is held, the following standard of review is applied:

This Court accords deference to the postconviction court's factual findings following its denial of a claim after an evidentiary hearing. . . . "As long as the trial court's findings are supported by competent substantial evidence, 'this Court will not substitute its judgment for that of the trial court on questions of fact, likewise of the credibility of the witnesses as well as the weight to be given to the evidence by the trial court.'" . . . The postconviction court's legal conclusions, however, are reviewed *de novo*....

Jackson, 127 So.3d at 459-60 (citations omitted). See *Pagan v. State*, 29 So.3d 938, 949 (Fla. 2009); *Arbelaez v. State*, 898 So.2d 25, 32 (Fla. 2005); *Davis v. State*, 875 So.2d 359 (Fla. 2003).

3. INEFFECTIVE ASSISTANCE OF COUNSEL CLAIMS

To establish ineffective assistance of counsel, a defendant must prove (1) counsel's representation fell below an objective standard of reasonableness, and (2) but for the deficiency in representation, there is a reasonable probability the result of the proceeding would have been different; a reasonable probability means that confidence in the outcome is undermined. *Strickland*, 466 U.S. at 687-89. This Court reiterated:

* * * to establish a claim of ineffective assistance of trial counsel, a defendant must prove two elements:

First, the defendant must show that

counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable. Unless a defendant makes both showings, it cannot be said that the conviction or death sentence resulted from a breakdown in the adversary process that renders the result unreliable.

Valle v. State, 778 So.2d 960, 965 (Fla. 2001) (quoting *Strickland v. Washington*, 466 U.S. 668, 687 (1984)). In *Valle*, we further explained:

In evaluating whether an attorney's conduct is deficient, "there is 'a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance,'" and the defendant "bears the burden of proving that counsel's representation was unreasonable under prevailing professional norms and that the challenged action was not sound strategy." This Court has held that defense counsel's strategic choices do not constitute deficient conduct if alternate courses of action have been considered and rejected. Moreover, "[t]o establish prejudice, [a defendant] 'must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome.'"

Id. at 965-66 (citations omitted) (quoting *Brown v. State*, 775 So.2d 616, 628 (Fla. 2000), and *Williams v. Taylor*, 529 U.S. 362, 391 (2000)).

Arbelaez v. State, 898 So.2d 30, 31-32 (Fla. 2005). See *Davis*

v. State, 875 So.2d 359, 365 (Fla. 2003); *Kennedy v. State*, 547 So.2d 912, 913 (Fla. 1989). Prejudice under *Strickland* requires proof that "the deficiency in counsel's performance must be shown to have so affected the fairness and reliability of the proceedings that confidence in the outcome is undermined." *Davis*, 875 So.2d 365.

At all times, the defendant bears the burden of proving not only that counsel's representation fell below an objective standard of reasonableness and was not the result of a strategic decision, but also that actual and substantial prejudice resulted from the deficiency. See *Orme v. State*, 896 So.2d 725, 731 (Fla. 2005) (Fla. 2005) (quoting *Strickland*, 466 U.S. at 694 that "a defendant has the burden of proving that counsel's representation was unreasonable under prevailing professional norms and that the complained about conduct was not the result of a strategic decision"); *Gamble v. State*, 877 So.2d 706, 711 (Fla. 2004). When considering a claim of ineffectiveness of counsel, a court "need not make a specific ruling on the performance component of the test when it is clear that the prejudice component is not satisfied." *Maxwell v. Wainwright*, 490 So. 2d 927, 932 (Fla.), *cert. denied*, 479 U.S. 972 (1986).

With respect to performance, "judicial scrutiny must be highly deferential;" "every effort" must "be made to eliminate the distorting effects of hindsight," "reconstruct the

circumstances of counsel's challenged conduct," and "evaluate the conduct from counsel's perspective at the time." *Strickland*, 466 U.S. at 689; *Davis*, 875 So.2d 365; *Chandler v. United States*, 218 F.3d 1305, 1313 n.12 (11th Cir. 2000). "The test for ineffectiveness is not whether counsel could have done more; perfection is not required." *Id.*, at 1313 n. 12. "[A] court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance." *Strickland*, 466 U.S. at 689. The ability to create a more favorable strategy years later, does not prove deficiency. See *Patton v. State*, 784 So.2d 380 (Fla. 2000); *Cherry v. State*, 659 So. 2d 1069 (Fla. 1995).

From *Williams v. Taylor*, 529 U.S. 362 (2000), it is clear the focus is on what efforts were undertaken and why a specific strategy was chosen over another. Additionally, as noted in *Chandler*, 218 F.3d at 1318, "...counsel need not always investigate before pursuing or not pursuing a line of defense. Investigation (even a nonexhaustive, preliminary investigation) is not required for counsel reasonably to decline to investigate a line of defense thoroughly. See *Strickland*, [466 U.S. 690-91] ("Strategic choices made after less than complete investigation are reasonable precisely to the extent the reasonable professional judgments support the limitations on investigation.")"

It must be noted that under *Strickland*, it is the defendant's burden to come forward with evidence that counsel was deficient and that such prejudiced him.

The Court of Appeals was required not simply to "give [the] attorneys the benefit of the doubt," 590 F.3d, at 673, but to affirmatively entertain the range of possible "reasons Pinholster's counsel may have had for proceeding as they did," *id.*, at 692 (Kozinski, C.J., dissenting). See also *Richter*, *supra*, at 1427, 131 S.Ct., at 791 ("*Strickland* ... calls for an inquiry into the objective reasonableness of counsel's performance, not counsel's subjective state of mind").

Cullen v. Pinholster, 131 S.Ct. 1388, 1407 (2011). Moreover, "[w]hen counsel focuses on some issues to the exclusion of others, there is a strong presumption that he did so for tactical reasons rather than through sheer neglect. See *Strickland*, 466 U.S., at 690, 104 S.Ct. 2052 (counsel is "strongly presumed" to make decisions in the exercise of professional judgment)." *Yarborough v. Gentry*, 540 U.S. 1, 8 (2003). As set out in *Wong v. Belmontes*, 558 U.S. 15, 16-17, (2009), "In light of 'the variety of circumstances faced by defense counsel [and] the range of legitimate decisions regarding how best to represent a criminal defendant,' the performance inquiry necessarily turns on 'whether counsel's assistance was reasonable considering all the circumstances.'" *Id.*, at 688-689, 104 S.Ct. 2052."

With respect to *Strickland* prejudice, *Harrington v. Richter*, 131 S.Ct. 770, 787-88 (2011) provides:

It is not enough "to show that the errors had some conceivable effect on the outcome of the proceeding." *Id.*, at 693, 104 S.Ct. 2052. Counsel's errors must be "so serious as to deprive the defendant of a fair trial, a trial whose result is reliable." *Id.*, at 687, 104 S.Ct. 2052.

"Surmounting *Strickland*'s high bar is never an easy task." *Padilla v. Kentucky*, 559 U.S. ----, ----, 130 S.Ct. 1473, 1485, 176 L.Ed.2d 284 (2010). An ineffective-assistance claim can function as a way to escape rules of waiver and forfeiture and raise issues not presented at trial, and so the *Strickland* standard must be applied with scrupulous care, lest "intrusive post-trial inquiry" threaten the integrity of the very adversary process the right to counsel is meant to serve. *Strickland*, 466 U.S., at 689-690, 104 S.Ct. 2052. Even under *de novo* review, the standard for judging counsel's representation is a most deferential one. Unlike a later reviewing court, the attorney observed the relevant proceedings, knew of materials outside the record, and interacted with the client, with opposing counsel, and with the judge. It is "all too tempting" to "second-guess counsel's assistance after conviction or adverse sentence." *Id.*, at 689, 104 S.Ct. 2052; see also *Bell v. Cone*, 535 U.S. 685, 702, 122 S.Ct. 1843, 152 L.Ed.2d 914 (2002); *Lockhart v. Fretwell*, 506 U.S. 364, 372, 113 S.Ct. 838, 122 L.Ed.2d 180 (1993). The question is whether an attorney's representation amounted to incompetence under "prevailing professional norms," not whether it deviated from best practices or most common custom. *Strickland*, 466 U.S., at 690, 104 S.Ct. 2052.

Harrington v. Richter, 131 S.Ct. at 787-88.

B. GUILT PHASE COUNSEL CLAIM

With respect to the guilt phase ineffectiveness claim, Ault asserts counsel failed to provide a meaningful defense as he: (a) made improper admissions, concessions, and promises in opening statement; and (b) failed to cross-examine all but one State witness. The summary denial of relief was proper as it

was plead in legally insufficient terms and when the defense opening is read in context, counsel did not concede guilt, but in fact argued against premeditation and offered a reason to question the value of the most damaging piece of evidence, namely, Ault's complete and all encompassing confession. Similarly, the challenge to counsel's cross-examination decision was denied properly, as the matter again was pled in legally insufficient terms and no prejudice was shown. In his appellate brief, Ault does not plead prejudice with specificity, but merely asserts that such is proven, thus, rendering the claim conclusory and insufficiently briefed. This Court should affirm.

1. TRIAL COURT ORDER

The trial court denied the challenge to guilt phase counsel's representation¹³ summarily finding it was pled in legally insufficient terms, "refuted by the record, and that the Defendant was not prejudiced." (PCR.5 833-34) The trial court reasoned:

*** the evidence against Ault was overwhelming. Defense counsel knew his client had provided a detailed confession of the crime and that his motion to suppress had been denied. He knew Ault had shown law enforcement officers where he hid the bodies of the two victims in the attic of his apartment. He knew there were eye witnesses who had seen Ault with the two girls. Defense counsel also knew there was going to be medical examiner testimony as to the sexual assault on one of the girls and the brutal

¹³ This was raised as Claim 1 of the amended postconviction relief motion.

manner in which they both were killed. He was aware that Ault had provided the news media with an interview.

With the overwhelming evidence against the Defendant, trial counsel's admissions, concessions, and promises, during his opening statement, were clearly a means of addressing all of the negative testimony that was going to be heard by the jury. As argued by the State, trial counsel was not conceding guilt to the capital crimes, but rather was arguing against Ault's premeditation by pointing out Ault may not have had the requisite specific intent to commit capital murder. Other admissions about the Defendant's background were to build sympathy with the jury, and to lay the groundwork for mitigation evidence in the penalty phase.

As part of the first claim for relief, the Defendant argues that trial counsel only cross-examined one of the State witnesses and failed to investigate defenses. These arguments are legally insufficient. Ault has not set out which other witnesses should have been cross-examined, what questions should have been asked, and how he would have benefitted by additional cross-examination. Ault has also not specified what additional investigation should have been done; what would have been accomplished by additional investigation, nor what other defenses could have been developed. This Court finds that the defense arguments are legally insufficient and the Defendant was not prejudiced. Any argument as to cumulative error also fails because the individual claimed errors fail. See Griffin v. State, 866 So.2d 1, 22 (Fla. 2003).

(PCR.5 834)

2. ANALYSIS

The trial court's ruling is proper on the facts and law. Moreover, Ault's appellate claim suffers from the same pleading deficiency as his postconviction claim. Ault fails to identify what prejudice resulted from counsel's opening statement, what

evidence could have been developed from additional investigations, and what cross-examination questions/evidence should have been elicited from which witnesses. Also, Ault has not shown that counsel's tactics were deficient and prejudicial under *Strickland*. This Court should affirm the summary denial of relief.

(a) Opening statement admissions, concessions, and promises

- Ault asserts guilt phase counsel admitted the State's case and promised to produce evidence that never could have been produced at trial, thus, was ineffective. In support, Ault points to six comments and argues that counsel lost credibility and the comments tainted the defense. (IB 28-30). This claim is plead in legally insufficient terms and when the defense opening is read in context, counsel did not concede guilt, but in fact argued against premeditation and offered a reason to question the value of the most damaging piece of evidence, namely, Ault's complete and all encompassing confession.

In order to analyze this claim, it is important to recall that Ault confessed to these crimes in detail. Ault's confession was played for the jury wherein he admitted first meeting Donna Jones ("Jones") and her three children at Easterlin Park on the afternoon of October 28, 1996. Ault assumed the two eventual victims met their mother in the park after school (2000-ROA.9

1684-86). Two or three days later, Ault saw DM and AJ¹⁴ walking home from school and they accepted his offer for a ride to the park because they recalled him and his truck. (2000-ROA.9 1686) This was the first time he had thoughts about sexual intercourse with them (2000-ROA.9 1689). Ault confessed that on November 4, 1996, he decided to sexually abuse the girls so he met them in front of the convenience store about 2:30 p.m. after school and offered them a ride. (2000-ROA.9 1690). To lure the girls into his house he told them he had candy for them (2000-ROA.9 1691). Ault confessed that he sexually assaulted the older girl, first penetrating her with his finger then having intercourse with her. DM started to scream and fight; she told Ault "no" and that he would ruin her for life. As Ault was sexually assaulting DM, he had his hand around her neck to keep her from making too much noise, however, her screaming and fighting continued so he stopped the sexual assault and strangled her until she stopped breathing.

Ault said he killed DM intentionally; he knew he had to kill her because he feared she would report him; DM had said she would tell her mother. (2000-ROA.9 1692-96). Next Ault turned to the younger sister who had been sitting on the couch. Without sexually assaulting her, Ault pulled AJ to the floor as

¹⁴ Ault differentiated between the two girls based on their ages, however, the State will refer to them by their initials where possible.

she was crying and clearly in fear. Ault confessed to strangling AJ; knowingly killing her because she was present and would report him. (2000-ROA.9 1695-96). Following the killings, Ault redressed DM and put both girls' bodies into the attic and left to pick up his wife (2000-ROA.9 1698-99).

Later that night, first Jones, then a little later two officers came to Ault's home inquiring if he knew anything about the girls. Ault denied seeing the girls when asked; he let the police look around his home even knowing the girls were dead in the attic. (2000-ROA.9 1699-1701). Ault admitted that he killed the girls because he knew that if they told on him, he could go to jail for at least 25 years. (2000-ROA.9 1713).

Having had his motion to suppress the confession denied,¹⁵ facing evidence that the girls were found in his attic, and the fact the forensic evidence matched Ault's confession as to what he did to the girls, defense counsel was facing overwhelming evidence of guilt. Clear from counsel's opening statement, the defense would be one suggesting no premeditation due to a combination of voluntary intoxication linked to Ault's diagnosis of pedophilia under *State v. Bias*, 653 So. 2d 380 (Fla. 1995). Also, the opening statement reflects an attempt to elicit some

¹⁵ Ault had moved to suppress his confession, but such was denied and that ruling was affirmed on appeal. See *Ault I*, 866 So.2 at 679-83 (finding "Ault's confession to the murders of the two sisters and the other crimes was properly admitted.")

sympathy for Ault and to lay the foundation for the anticipated penalty phase. Toward this end, counsel argued that Ault became a pedophile because he had been raped repeatedly by his older brother. It was noted that Ault had never killed before, even though he had committed other sexual assaults on young girls because he was compelled to because of his pedophilia. Counsel also offered that Ault had a drinking problem, was intoxicated, and combined with his mental health issues could not form specific intent. As such, the jury should reject premeditated murder, and if anything, the facts supported second-degree murder. Moreover, counsel suggested that the confession could not been relied upon because it was not given voluntarily. (2000-ROA.8 1436-37, 1439, 1441-43, 1445-46, 1449, 1453-55, 1457, 1459-62, 1470-72, 1474-75, 1479-80).

This claim is legally insufficient. Other than the conclusory assertion that counsel's opening statement was prejudicial to Ault, no attempt was made in the motion to argue what counsel should have done and what prejudice resulted. This Court has made clear that the "purpose of an appellate brief is to present arguments in support of the points on appeal." *Doorbal v. State*, 983 So. 2d 464, 482 (Fla. 2008); *Duest v. State*, 555 So. 2d 849, 852 (Fla. 1990). Thus, this Court has required defendants to present arguments that explain why the lower court erred in its rulings. See *Shere v. State*, 742 So. 2d

215, 217 n.6 (Fla. 1999). Merely referring to the arguments presented below is a legally insufficient pleading and does not meet the burden of presenting an argument on appeal. *Doorbal*, 983 So. 2d at 482; *Duest*, 555 So. 2d at 852. Moreover, the arguments must be presented in more than a cursory fashion. *Doorbal*, 983 So. 2d at 482; *Bryant v. State*, 901 So. 2d 810, 827-28 (Fla. 2005); *Cooper v. State*, 856 So. 2d 969, 977 n.7 (Fla. 2003); *Reeves v. Crosby*, 837 So. 2d 396, 398 (Fla. 2003); *Lawrence v. State*, 831 So. 2d 121, 133 (Fla. 2002). When an issue is not sufficiently briefed, it is considered waived. *Doorbal*, 983 So. 2d at 482; *Bryant*, 901 So. 2d at 827-28; *Duest*, 555 So. 2d at 852.

Ault has not shown that but for counsel's opening statement the result of the guilt phase would have been different, meaning, that confidence in the verdict is undermined. See *Wyatt v. State*, 78 So.3d 512, 521 n.6 (Fla. 2011) (denying claims as insufficiently pled in part because counsel failed to specifically address what was allegedly erroneous or what counsel should have done instead); *Ragsdale*, 720 So.2d at 207 (stating that although courts are encouraged to conduct evidentiary hearings, a summary/conclusory claim "is insufficient to allow the trial court to examine the specific allegations against the record"); *Kennedy*, 547 So. 2d at 913 (opining "defendant may not simply file a motion for post-

conviction relief containing conclusory allegations that his or her trial counsel was ineffective and then expect to receive an evidentiary hearing"). This Court should find the claim as argued below was insufficiently pled as found by the trial court and that it is insufficiently pled here and affirm the denial of postconviction relief.

Turning to Ault's allegations of deficient performance, here, he complains about the comment that evidence is going to come directly "from the mouth of Mr. Ault." (IB 28; 2000-ROA.8 1444). However, as the record shows, counsel knew of Ault's videotaped confession and that it would be coming into evidence as the motion to suppress was denied. Clearly, that is evidence directly from Ault. Counsel advised the jury of Ault's prior criminal history (2000-ROA.8 1443, 1446). However, it is well reasoned strategy to discuss those facts, especially the more negative ones, that counsel knows will become evidence, in order to dampen some of the negative effect, and in this case, weave it into the over arching defense of lack of premeditation and the compulsion of a pedophilia.

Looking at counsel's argument where he discussed Ault's interview with the reporter, counsel placed before the jury Ault's alleged remorse, inability to control himself, and wish that he had been stopped by the authorities sooner, and that he confessed to having suicidal thoughts (IB 28; 2000-ROA.8 1449-

54, 1456, 1460-61, 1463). Counsel also quoted from the interview and informed the jury of Ault's alleged mental conditions, how he came to be a pedophile following the repeated sexual assaults he suffered at the hands of his older brother, and his pleas for help with his pedophilia. (2000-ROA.8 1454-55, 1462). Counsel quoted Ault as denying planning to kill the girls, thus, showing there was no premeditation. (2000-ROA.8 1459).

While the State objected to counsel's persistent quoting from the news reporter's interview, the trial court permitted defense counsel to continue as it was merely opening statement, the appropriate witnesses may be called to discuss the interview, and it may be an important point. (2000-ROA.8 1466-67). The fact Ault chose not to testify days later, does not render counsel's opening statement deficient or prejudicial. *Cf. Mendoza v. State*, 87 So.3d 644, 656 (Fla. 2011) (finding counsel not ineffective even though he did not follow through with opening statement promise to call witness). *Strickland* prejudice cannot be proven given Ault's confession.

To the extent that Ault's claim is one where he is suggesting counsel conceded guilt, relief should be denied under *Florida v. Nixon*, 543 U.S. 175 (2004) and *Harvey v. Warden, Union Correctional Institution*, 629 F.3d 1228 (11th Cir. 2011); *Harvey v. State*, 946 So.2d 937, 940 (Fla. 2006). First, as the record outlined above reveals, counsel did not concede guilt.

Rather, he tried to present Ault as a more sympathetic person as he had been sexually abused as a child himself which resulted in his becoming a pedophile and one who could not control his actions. Further, counsel suggested that premeditation would not be proven by the State as voluntary intoxication was involved and Ault was compelled to act as he did because of his pedophilia. Ault, the jury was told, could not control himself, and when the girls started screaming, which was different than any other girl had responded to Ault's attacks previously, he killed the girls. As a result, counsel argued the facts added up to something less than first-degree murder. Additionally, counsel posited that Ault's confession to the police was not voluntary. (2000-ROA.8 1436-39, 1441-43, 1445-46, 1449, 1453-55, 1457, 1459-62, 1470-72, 1474-75, 1479-80).

In *Nixon*, the United States Supreme Court rejected a *per se* finding of ineffectiveness even where counsel conceded guilt in opening statement without obtaining her clients agreement.

*** in a capital case, counsel must consider in conjunction both the guilt and penalty phases in determining how best to proceed. When counsel informs the defendant of the strategy counsel believes to be in the defendant's best interest and the defendant is unresponsive, counsel's strategic choice is not impeded by any blanket rule demanding the defendant's explicit consent. Instead, if counsel's strategy, given the evidence bearing on the defendant's guilt, satisfies the *Strickland* standard, that is the end of the matter; no tenable claim of ineffective assistance would remain.

Nixon, 543 U.S. at 192. Likewise, in *Harvey*, this Court relied on *Nixon* in determining *Strickland* prejudice was not established. The Court reasoned that given the defendant's detailed confession which included insight into the reason the defendant killed the victims and that the confession would be presented to the jury, there was no reasonable probability that had counsel not made the concessions he did in opening that the result of the trial would have been different. *Harvey*, 946 So.2d at 943-44. Where it is clear that *Strickland* prejudice cannot be established, there is no need for an evidentiary hearing. "A court considering a claim of ineffectiveness of counsel need not make a specific ruling on the performance component of the test when it is clear that the prejudice component is not satisfied." *Maxwell v. Wainwright*, 490 So. 2d 927, 932 (Fla.), cert. denied, 479 U.S. 972 (1986).

Ault has not set forth a basis to reject the trial court's determination that in light of the record no *Strickland* prejudice could be shown. In fact, as noted above, Ault has not shown that prejudice, in fact, resulted from counsel's opening. Ault has not identified what could have been found, presented, and argued to the jury that would negate the full, comprehensive confession given in this case. Relief was denied properly and should be affirmed.

(b) Failure to cross-examine witnesses except Detective

Rhodes - In alleging ineffectiveness, Ault listed the witnesses called by the State, noted that none were cross-examined by counsel, save for Detective Rhodes ("Rhodes"), and acknowledged there are times when it is "good trial strategy" not to cross examine certain witnesses when they do not damage your case. The sum total of Ault's claim is that his counsel "abandoned any opportunity to bring into question the testimony of all but one of the state's witnesses by his lack of cross examination" and this "contributed to the jury's inability to find reasonable doubt as to the guilt of Mr. Ault." (IB 31) This claim is legally insufficient and because of Ault's confession, the claim is meritless as no prejudice can be established.

The claim is insufficiently pled on appeal,¹⁶ as well as in the postconviction motion as Ault does not identify which witnesses should have been cross-examined, what areas of inquiry should have been developed, what impeachment or favorable testimony should have been elicited, and how failure to delve into these areas and elicit favorable responses prejudiced him.

A defendant may not simply allege ineffective assistance.

¹⁶ This Court has made clear that the "purpose of an appellate brief is to present arguments in support of the points on appeal." *Doorbal*, 983 So.2d at 482; *Duest*, 555 So.2d at 852. This Court has required defendants to present arguments that explain why the lower court erred in its rulings. See *Shere*, 742 So.2d at 217 n.6. The arguments must be presented in more than a cursory fashion. *Doorbal*, 983 So. 2d at 482; *Bryant*, 901 So.2d at 827-28. When an issue is not sufficiently briefed, it is considered waived. *Doorbal*, 983 So.2d at 482.

See *Jennings v. State*, 123 So.3d 1101, 1122-23 (Fla. 2013) (findings claim of ineffectiveness for not cross-examining a witness to be legally insufficient as pled because defendant failed to allege specifically what inconsistencies should have been developed on cross-examination or "what information trial counsel should have been aware of or used as impeachment evidence" and "what testimony would have been offered or what information would have been discovered through a more thorough investigation and questioning of the State witnesses'" and summary denial was proper); *Ponticelli v. State*, 941 So.2d 1073, 1104 (Fla. 2006) (finding claim of ineffective assistance for failing to effectively cross examine a witness to be legally insufficient as the defendant did "not alleged how he was prejudiced by each of these deficiencies."); *Patton v. State*, 878 So.2d 368, 380 (Fla.2004) (holding that conclusory allegations are insufficient for appellate purposes).

As the Eleventh Circuit Court of Appeals has noted:

The decision as to whether to cross-examine a witness is "a tactical one well within the discretion of a defense attorney." *Messer v. Kemp*, 760 F.2d 1080, 1090 (11th Cir. 1985). Absent a showing of "a single specific instance where cross-examination arguably could have affected the outcome of either the guilt or sentencing phase of the trial," the petitioner is unable to show prejudice necessary to satisfy the second prong of *Strickland*. *Id.* We have found ineffective assistance where counsel failed to impeach the key prosecution witness with prior inconsistent testimony where the earlier testimony was much more favorable to the defendant. See *Nixon v. Newsome*, 888

F.2d 112, 115-16 (11th Cir. 1989); *Smith v. Wainwright*, 799 F.2d 1442, 1443-44 (11th Cir. 1986) (per curiam). Ineffective assistance, however, will not be found merely because "'other testimony might have been elicited from those who testified.'" *Waters*, 46 F.3d at 1514 (quoting *Foster v. Dugger*, 823 F.2d 402, 406 (11th Cir. 1987)).

Fugate v. Head, 261 F.3d 1206, 1219-20 (11th Cir. 2001)

Here, Ault gave a confession as set forth above, addressing when he targeted the girls for kidnapping and sexual assault, how he lured them to his home, how he sexually assaulted DM, and then strangled DM and AJ because he did not want to go to prison, put both bodies in his attic, and deceived the girls' mother and police when they inquired of the girls. (2000-ROA.9 1684-1713) For the most part, the witnesses that counsel did not cross-examine set forth how Ault came in contact with the girls and their mother, the various contacts he had with them before the abductions, and the forensic evidence developed after their bodies were discovered. Ault's confession, which was corroborated by the forensic evidence, overshadows any unspecified impeachment or other evidence cross-examination may have developed. Ault has failed to show where the trial court erred in denying relief. Equally important, Ault has not shown that counsel's decisions were deficient and that but for the lack of cross-examination, there is a reasonable probability the result of his trial would have been different. Ault has not shown that confidence in the verdict has been undermined.

Strickland prejudice has not been shown and relief was denied properly.

(c) Alleged failure to investigate/present a defense; offered a "slow guilty plea" - In his summation, Ault claims counsel offered no defense, but only a "slow guilty plea." (IB 31) It is Ault's position that had counsel represented him differently, he "may have obtained" a guilty verdict for a lesser offense. Again, Ault fails to present a legally sufficient claim. He fails to say what investigation was required, but not conducted, what that investigation should have uncovered, and what defense could have been mounted that was not mounted especially in light of Ault's confession. This Court should find the claim is pled here and below to be legally insufficient. See *Doorbal*, 983 So.2d at 482; *Shere*, 742 So.2d at 217 n.6. *Duest*, 555 So.2d at 852.

With respect to the claim defense counsel gave a "slow plea," apparently a reference to an alleged concession of guilt, the State relies on its argument above and points to *Nixon*, 543 U.S. 175; *Harvey*, 946 So.2d at 940. Postconviction relief was denied properly and should be affirmed.

C. PENALTY PHASE COUNSEL CLAIM

Here, Ault posits that 2007 penalty phase counsel was ineffective. He challenges counsel's decisions regarding (1) allowing Dr. Bourg-Carter's 1999 testimony to be read to 2007

jury resulting in her testimony going unchallenged as the original cross-examination was deficient and the jury did not have the benefit of Dr. Eisenstein's 1999 testimony (IB 33-48, 53-60); (2) failing to prepare Dr. Kramer for the 2007 penalty phase and using him instead of Dr. Eisenstein (IB 48-60); (3) not calling Barbara Madsen, Ault's mother, for mitigation (IB 61); (4) to request the non-statutory mental health mitigators (IB 63-64); (5) to investigate Ault's low IQ (IB 64-65). Ault received an evidentiary hearing on the issues involving the reading of Dr. Bourge-Carter's 1999 testimony into the 2007 penalty phase. The other claims were denied summarily. The record supports the denial of postconviction relief; the trial court's factual findings are supported by competent substantial evidence and the law was applied properly. This Court should affirm.

1. TRIAL COURT ORDER

(a) Decisions regarding Dr. Bourge-Carter's prior testimony.

Following an evidentiary hearing, the trial court found:

* * * Attorney Mitchell Polay's decision not to contest the read-back of Dr. Bourge-Carter's¹⁷ 1999 trial testimony, rather than to require her live testimony, was a well-reasoned strategic decision. * *
* Mr. Polay is a qualified and experienced attorney handling criminal matters and death penalty cases. Mr. Polay was aware of how powerful Dr. Bourge-Carter

¹⁷ The transcript provides that the doctor's name is spelled Bourge-Carter, (PCR.9 1373) thus, the State will use that spelling throughout its brief.

is when appearing live before a jury. This Court has also observed Dr. Bourge-Carter's testimony at this evidentiary hearing and at the 1999 trial. Dr. Bourge-Carter is extremely professional and influential. Her presentation clearly supported defense counsel's conclusion that her live testimony at the 2007 trial would have been more damaging to the defense than having her prior testimony read to the jury. Dr. Bourge-Carter admitted that she was not qualified to interpret the new medical tests, but even now being aware of the medical testimony, her opinions expressed to the jury in 1999 would not have changed had she testified in 2007.

This Court finds no deficiency on the part of 2007 penalty phase counsel in failing to object, based on the issue of Dr. Bourge-Carter's availability, to the read-back of her previous trial testimony. The evidence indicated that, if counsel had objected on this ground, the doctor would have appeared and provided live testimony. This is also apparent from the record because the State did not argue that Dr. Bourge-Carter's (sic) was unavailable, but only that she would need special accommodations in order to testify. Dr. Bourge-Carter's availability was not an issue. There was also no prejudice to the Defendant. The testimony would not have changed her 1999 trial testimony. The evidence heard at the evidentiary hearing did not reveal any meaningful benefit the Defendant would have received if Dr. Bourge-Carter's (sic) had testified live. Dr. Bourge-Carter's testimony was not discredited at the evidentiary hearing.

(PCR.5 829-30)

(b) Preparation of Dr. Kramer for the 2007 penalty phase.

Here the trial court found the claim legally insufficient as pled as Ault had "not indicated what additional documents, other than details of the crime, should have been provided to Dr. Kramer nor what else should have been done to better prepare him to testify." (PCR.5 833). Also, the trial court found the

claim "speculative" as "even if Dr. Kramer had been provided with the additional documentation, it has not been demonstrated that the doctor would have drawn conclusions favorable to the Defendant." The trial court reasoned:

With the limited amount of time the doctor spent with the Defendant, and the limited information he reviewed, at least he provided favorable testimony that statutory mitigation, extreme mental or emotional disturbance, was present. Additional information, *** may well have resulted in Dr. Kramer finding that Ault suffers from Antisocial Personality Disorder, which is not mitigating.

(PCR.5 833) Neither deficiency nor prejudice was found.

(c) Failure to request the non-statutory mental health mitigators. The trial court concluded Ault had not established prejudice arising from counsel's representation as "there was reasonable basis to conclude that consideration of this mitigation, together with all of the Defendant's other mitigation arguments, would result in a different sentence." (PCR.5 831). Quoting this Court's opinion on direct appeal of the re-sentencing, the trial court concurred that it "determined tha the aggravating circumstances far outweighed the mitigating circumstances *** and that the single aggravator of the murders being especially heinous, atrocious, or cruel was of such a magnitude as to overwhelm the mitgators.' Ault, 53 So.3d at 196." (PCR.5 831) Continuing, the trial court rejected Strickland prejudice finding it had:

Fully considered and rejected the two statutory mental health mitigators and would have found the evidence also failed to support any more than the minimal weight to the non-statutory mitigators. In light of the weight accorded to the aggravators in this case, as set out in the sentencing order, there is no likelihood that arguments by penalty phase counsel to consider this non-statutory mitigation would have resulted in a lesser sentence.

(PCR.5 831)

(d) Not presenting Ault's low IQ. The trial court found the claim legally insufficient and refuted by the record reasoning:

The Defendant's motion does not argue any facts that could be established regarding the Defendant's intelligence that would differ in any way from the evidence admitted through Dr. Bourge-Carter's testimony. It is clear from the record that evidence was presented establishing that the Defendant had an overall IQ of 80 and that he was of below average intelligence. It has not been demonstrated that additional evidence of low intelligence would have had any meaningful effect beyond that which was admitted into evidence. Therefore, this Court finds that second penalty phase trial counsel was not deficient and that the Defendant was not prejudiced by the lack of additional evidence of his low IQ.

(PCR.5 832)

2. ANALYSIS

A review of the trial record in conjunction with the January 14, 2014 evidentiary hearing testimony and exhibits reveals that Ault has failed to meet his burden of proving ineffective assistance of re-sentencing counsel under *Strickland*. Counsel made the strategic decision for the 2007

penalty phase to permit the State to read into evidence the 1999 penalty phase testimony of Dr. Bourg-Carter in lieu of her live testimony given her known health issues at the time and powerful courtroom presence. In return, Polay reasoned that such decision gave him the ability to argue in support of new defense mental health experts' testimony of brain damage against a cold record of Dr. Bourg-Carter's testimony. Additionally, no *Strickland* prejudice arose from that reasoned decision as Dr. Bourg-Carter did not alter her opinion even in light of the additional information from defense mental health experts, Drs. Kramer and Ross. Likewise, penalty phase counsel's other decisions regarding Dr. Kramer, Dr. Eisenstein, Ault's mother and Ault's IQ are not deficient nor prejudicial. The sum and substance of the aggravation and mitigation offered to the jury has not changed, thus, Ault is unable to prove that there is a reasonable probability that but for counsel's decisions the result of the sentencing would have yielded in a life sentence; he has not shown that confidence in the sentencing outcome has been undermined.

(a) Decisions regarding Dr. Bourg-Carter's prior testimony

- In order to resolve the postconviction claim, a review of the 2007 penalty phase is necessary. That record establishes that the State informed this Court that Dr. Bourg-Carter had been sick for the past two or three years which periodically caused

her to be unable to get out of bed. (2007-ROA.13 1037, 1137-39). With respect to Ault's case, in a conversation with the prosecutor, which was relayed in open court, Dr. Bourg-Carter said she did not think she was medically able to come into court, but if required, she would need to take long breaks in her testimony. (2007-ROA.13 1037). The prosecutor offered to read into the record Dr. Bourg-Carter's 1999 trial testimony, but noted that he was not stating that she was "technically unavailable per the statute" and that he would not offer the prior testimony if the defense objected. (2007-ROA.13 1037). In response, defense counsel, Mitch Polay ("Polay"), stated he would not have an objection. (2007-ROA.13 1037).

When it came time for the State's rebuttal case and the offer of Dr. Bourg-Carter, the trial court again addressed the issue. Polay informed the trial court that he had reviewed the transcript and did not question its accuracy. (2007-ROA.13 1137-38). His only objection was that the transcript was hearsay under *Crawford v. Washington*, 541 U.S. 36 (2004).¹⁸ Polay reiterated that he was not questioning "unavailability." (2007-ROA.13 1137-38). In fact, Polay stated that "I'm aware of the

¹⁸ To the extent that Ault argues it was deficient performance to forego live cross-examination in violation of *Crawford*, he has not pointed to a case which forecloses a defendant from waiving cross-examination or where it has been held that it is a constitutional infirmity to present former testimony as was permitted in this case.

health of Dr. Bourg-Carter, and I'm aware of that because I personally have used her firm as an expert in other cases, and I know she is not well." (2007-ROA.13 1137-38). In 2007, this Court also acknowledged its awareness of Dr. Bourg-Carter's condition. (2007-ROA.13 1137-38). The State was permitted to read to the jury Dr. Bourg-Carter's prior penalty phase testimony. (2007-ROA.13 1137-38)

During the 2007 penalty phase Ault presented Dr. Kramer, a psychiatrist, and Dr. Ross, a neurologist. Dr. Kramer met with Ault for two hours and reviewed records pertaining to Ault's personal history, some psychosexual/mental health records, and some history about the offense. (2007-ROA.13 1044-46, 1072-73). However, Dr. Kramer did not look at any records or confessions related to the instant crimes or of Ault's prior sexual felonies. Many of the reports he did review relied upon Ault's self-reports. Dr. Kramer did not review Ault's videotaped confession to the instant crimes, but he did read the letter Ault sent to Dr. Stock dated October 29, 1997 which indicated he had no remorse for the killings. (2007-ROA.13 1073, 1078-80, 1094, 1096).

It was Dr. Kramer's opinion Ault's history revealed a dysfunctional family life and sexual abuse by Charles Ault between the ages of seven and mid-teens some of which was forced

through threats of violence.¹⁹ (2007-ROA.13 1047-49, 1077-78). Dr. Kramer credited Ault's self-reports of hallucinations, use of alcohol and LSD on the day of the crime,²⁰ suicide attempts, pedophilia, checkered school history with severe behavior/learning difficulties, dropping out in the eighth grade, self-reported head injuries, and suicide attempts to render his diagnosis. (2007-ROA.12 1049-56, 1058-61, 1063-1067, 1072, 1093-94).

Dr. Kramer also opined that Ault suffered from post traumatic stress disorder (PTSD), chronic major depressive recurrence with psychotic features, pedophilia, alcohol abuse/dependency, and poly-substance abuse. Also, Ault had antisocial traits and a self-reported history of head injuries. (2007-ROA.13 1070, 1083). Dr. Kramer testified Ault was under the influence of extreme mental or emotional disturbance at the time of the crime (2007-ROA.13 1060-62) and Ault's pedophilia

¹⁹ Dr. Kramer gave a range of between 18% and 80% correlation of someone becoming an abuser after being abused (2007-ROA.13 1076-77). Dr. Kramer admitted Ault first reported this alleged abuse by Charles after having committed the instant homicides. Dr. Kramer did not read the testimony and/or statements of Ault's siblings or father regarding the allegations against Charles; he read only the testimony of Ault's mother who was relating what Ault told her of the sexual abuse. (2007-ROA.13 1078-79).

²⁰ Dr. Kramer relied upon Ault's self-report 10 years after-the-fact even though there was no prior documentation of alcohol or substance abuse by Ault. (2007-ROA.13 1081-82). The weekly Community Control reports (State's Penalty Phase Exhibit #23) from April 1996 through November 1996 indicated no alcohol or drug use during that period of time. (2007-ROA.13 1083).

impacted his ability to conform his behavior to the law and he cannot control himself with respect to his desire to have prepubescent girls. (2007-ROA.13 1063).

Dr. Kramer **rejected** the contention Ault killed DM because he did not like loud noise and she was screaming. (2007-ROA.13 1080). Likewise, Dr. Kramer saw **no connection** between Ault's multiple violations of the terms of his community control and his pedophilia or compulsions. Dr. Kramer offered no opinion on malingering, but agreed that those with antisocial personality disorders may be untruthful and/or malinger and that Ault's psychological tests showed malingering. (2007-ROA.13 1084-87). The doctor admitted Ault may be malingering when reporting multiple personalities and hallucination because he found Ault did not have multiple personalities and could not determine if the hallucinations were real. (2007-ROA.13 1087-88, 1092-94, 1097). The trial court found **Dr. Kramer's testimony was "less than reliable"** in light of Dr. Bourg-Carter's standardized tests that showed Ault was a "severe psychopath seeking to exaggerate mental illness." (2007-ROA.4 659-61).

Dr. Ross administered PET and EEG brain scans. The EEG revealed deficiencies in Ault's frontal and left temporal areas. The PET scan showed reduced metabolism in the front parietal cortex, pre-frontal, frontal, middle frontal and middle temporal cortices. Dysfunction in the frontal cortex and temporal

cortices may result in problems with planning, especially while under stress, and problems with execution, judgment, impulse control and emotional issues. (2007-ROA.13 1106-13, 1016-17). Dr. Ross concluded Ault has an abnormal brain possibly due to the self-reported head trauma. (2007-ROA.13 1013, 1018, 1118-19, 1122-23). However, Dr. Ross noted Ault's brain injury did not mean Ault could not function and testified that the alleged brain injury did not cause Ault to commit the homicides. Dr. Ross could not say within a reasonable degree of medical certainty that the brain injuries he observed occurred before the murders in this case (2007-ROA.13 1123-24, 1126). Dr. Ross **did not opine** regarding either statutory mental mitigator.

In rebuttal, the State presented Dr. Bourg-Carter, a licensed psychologist. Of her previous 12 capital cases, this was the only one where she testified for the State. Prior to meeting with Ault, she reviewed many pages of documentation.²¹

²¹ Prior to meeting with Ault, Dr. Bourg-Carter reviewed: Ault's statements, interviews by the media, psychological evaluation by Dr. Sczechowicz, depositions and/or statements of family/friends Ronald Ault (Ault's father), Charles Ault (brother), Trincia Ault (wife), Deborah Schultz, Joan Rauls, Joy Hall, Barbara Madson (Ault's mother), Timothy Allen, Audrey Gonzalez, William Wedge, Michael Lindsey, Andrew Ageasy, Seff Katland, Evertt Carter, Jeff Stevens, Daniel Ferraro, Jail records with disciplinary reports, police records regarding calls and mail to Schultz home, letters from Ault to Sabrina Miller, Judge Gold, Jeff Volante, Ault's pro se demands for speedy trial and to dismiss counsel, reports by Detective Cursio including his timeline of Ault's life history, Detective King's report, psychiatric and psychological reports from Drs. Stock, Brannon,

She later met with Ault three times between September 5 and 10, 1999 to conduct interviews lasting about five hours, to administer psychological tests, and to evaluate him. (2007-ROA.13 1139, 1144-45, 1148-49, 1154-55, 1166-70, 1177).

Based on Ault's description of his alleged hallucinations, Dr. Bourg-Carter concluded the hallucinations were not real. (2007-ROA.13 1151). The IQ test rendered a full scale score of 80; performance score of 87; and verbal score of 78. This equates to a low average to borderline score. IQ tests do not contain validity sub-tests, however, the MMPI results showed Ault was malingering on that test; his scores were "off the charts" when it came to testing for malingering. Because of his malingering, all of the tests from the second day were invalid. (2007-ROA.13 1158, 1160, 1163-64). The interview and tests given on the third day confirmed Ault had difficulty behaving in a socially acceptable manner. Dr. Bourg-Carter opined that Ault's level of psychopathy is in the severe range;²² such is a

and Castillo, Ault's juvenile court records, Ault's Arlington School District reports/evaluations from elementary, junior high, and high school, and Ault's juvenile psychological reports prepared by Drs. Finn and Price. Additionally, Dr. Carter talked to Detective Cursio and interviewed Ault's sister, Sherry Munoz. Following her interviews and testing of Ault, Dr. Carter reviewed Dr. Eisenstein's evaluation report on Ault, watched Ault's videotaped confession to Detective Rhodes, and the interview he gave Bryant Gumble. (2007-ROA.13 1146-48).

²² The severe psychopathy diagnosis means Ault's ability to act appropriately in society is severely impaired; not because he

chronic maladaptive pattern of relating to oneself and others. (2007-ROA.13 1173-74).

Dr. Bourg-Carter diagnosed Ault under the DSM-IV with pedophilia,²³ a non-exclusive type as Ault is attracted to female children, but has sexual relations with adults too. Also, Dr. Bourg-Carter diagnosed Ault with malingering based on her testing and interviews and comparing them to historical records. She found Ault was "faking mental illness to avoid responsibility for his behavior and also under personality disorders, in addition to being a severe psychopath, the diagnosis is, according to the DSM-IV with an antisocial personality disorder." An antisocial personality disorder is a "chronic pattern of violating societal norms, engaging in criminal behavior, lying, not respecting the rights of others." (2007-ROA.13 1175-76). With respect to the hallucinations and Ault's other self-reports,²⁴ Dr. Bourg-Carter found he was

cannot control his actions, because he does control his actions, but because he does not see people as people, but as objects. Ault has a personality disorder, but he is not mentally ill. (R.13 1173-74).

²³ Dr. Bourg-Carter opined that pedophilia "is diagnosed on a scale that also measures major mental illnesses, but it is not a condition which you are out of touch with reality, or you are not rational in your thinking. It is a mental illness . . . , but it is not a major mental illness like schizophrenia or a major depression." (2007-ROA.13 1176-77).

²⁴ Turning to the allegation of sexual molestation by Charles, Ault's reported recollection of the first time he was sodomized

inconsistent in those accounts. Likewise, he was inconsistent in his claims of alcohol and drug use on the day of the crime. To some evaluators he admitted he had not been drinking, but to others he reported the opposite. (2007-ROA.13 1180-85)

Dr. Bourg-Carter spoke to Ault about the crimes and how he was feeling at the time. (2007-ROA.13 1178). Her ultimate conclusion, based on the materials she reviewed, the tests she gave, and her interviews with Ault, was that he did not meet the criteria for extreme mental or emotional disturbance. When Dr. Bourg-Carter spoke to Ault of the homicides, she saw no indication he was out of touch with reality. In fact, Ault admitted that because he had picked up the girls before and they had gotten into his truck easily, he knew that when he decided to take them for sex, he could get them into the truck easily. Likewise, when asked why he killed the girls, Ault admitted he knew he would get in trouble and get 20 years in prison when DM said she would report him and Ault did not want to go to prison.

was inconsistent with what would have occurred medically. After interviewing Ault's sister, Dr. Bourg-Carter found other inconsistencies in Ault's tale - Charles was not living at home at the time Ault claimed some of the assaults occurred. Ault gave so many different accounts it was impossible to know what was true. As the records reflect, Ault gave different accounts as to the years he was assaulted, and how his parents found out (one had his mother making a connection between a Vaseline jar and the assault and the other had Ault telling his parents). Further, Ault denied having asked to live with Charles when he was having difficulties with his parents, but the juvenile records show the request was made. (2007-ROA.13 1180-85)

According to Dr. Bourg-Carter, neither admission indicates a lack of touch with reality. (2007-ROA.13 1189-90).

Also, Dr. Bourg-Carter noted Ault's pedophilia and antisocial personality disorder did not mean he met the criteria for "disturbance" for the statutory mitigator. Pedophilia does not cause a lack of touch with reality. Ault did not suffer from a psychosis, but was feigning hallucinations for a secondary gain. Ault understood the consequences of his actions as he admitted that he killed to avoid returning to prison. Hiding the bodies and discarding the girls' personal items to avoid detection showed Ault knew what he did was wrong and that he knew the consequences of his actions. Likewise, because he strangled DM then stopped to have a cigarette before strangling AJ while continuing to smoke shows callousness and lack of remorse. It was Dr. Bourg-Carter's opinion that such goes to Ault's psychopathy, but not a major mental illness which caused him to lose touch with reality. (2007-ROA.13 1190-92).

It was against that backdrop that the trial court reviewed the evidentiary hearing testimony and that this Court must bear in mind when considering that ruling. During the January 14, 2014 evidentiary hearing, Dr. Bourg-Carter reiterated that she was a clinical psychologist with a specialization in forensic psychology and that she had testified in the 1999 penalty phase, but not in Ault's re-sentencing. In 2007, she was having health

issues and although she may have been able to have come to court, such would have been with great difficulty and would have depended on how her illness was affecting her on the chosen day. Some days she could not get out of bed and on others she could testify with some breaks. During the time of Ault's trial, she could not drive and her unreliability as a result of her illness caused her to suspend her private practice. (PCR.9 1374-76). (PCR.9 1375). If required, Dr. Bourg-Carter would have come to court to discuss her illness, what effect it had on her, and her ability to function daily. (PCR.9 1437-38, 1450).

As she did during her 1999 testimony, Dr. Bourg-Carter again set out the materials she reviewed, people she interviewed, testing she administered Ault, and the evaluation she conducted.²⁵ Turning to the 2006 EEG and PET Scans conducted by Dr. Ross as well as the opinions of Drs. Ross and Kramer, Dr. Bourg-Carter admitted she was not qualified to evaluate the

²⁵ With respect to the evaluation, testing, and resultant opinion that Dr. Bourg-Carter developed in this case, she explained that she had reviewed background materials, school records, psychological reports, corrections records, Ault's confession and media interviews, letters Ault sent to the trial court in 1999, and other written materials and reports regarding Ault. Dr. Bourg-Carter also interviewed Ault's sister and jail deputies. She conducted testing of Ault including an IQ test on which he did not give his best effort, and met with him in September 1999 as part of her evaluation. (PCR.9 1385-87, 1392-93, 1401-03; 2000-ROA 2562). While Dr. Bourg-Carter reviewed Dr. Eisenstein's report on Ault from 1999, she did not rely upon that report in forming her opinion because Dr. Eisenstein's report shows problems with the testing he conducted. (PCR.9 1414).

extent of brain damage/brain injury because she is a psychologist, not a neuropsychologist or neurologist.²⁶ It is not within Dr. Bourg-Carter's professional field to read or interpret EEG or PET scans. (PCR.1 95, 99). However, even after reading the 2007 testimony of Drs. Kramer and Ross, Dr. Bourg-Carter maintained her 1999 opinion of Ault and that neither statutory mental health mitigator had been established. (PCR.1 98-99). Furthermore, the testimony of those doctors did not alter the test results on the IQ or MMPI tests he administered. (PCR.1 95, 106).

Dr. Bourg-Carter explained that her opinion regarding the aggravation and mitigation in this case was based on the behavioral facets of Ault's actions. Those facets had nothing to do with any alleged brain damage. (PCR.1 78) In forming her opinion, Dr. Bourg-Carter considered that Ault may have brain damage given his poorly documented head injuries, however, brain damage to her was important only to the point it affects a person's behavior/actions. Dr. Bourg-Carter acknowledged that

²⁶ Ault has alleged in part that counsel's failure to object to the reading of Dr. Bourg-Carter's testimony deprived him of the opportunity to have her consider the EEG and PET scans. Yet, if she is unable to read such scans, and the reports of Drs. Ross and Kramer do not alter her opinion which was based on her own testing, evaluation, interview of Ault, and review of Ault's background materials, then whether she testified live or had her 1999 testimony read to the jury, does not establish, as the trial court concluded, *Strickland* prejudice; confidence in the sentencing decision is not undermined.

Dr. Ross had reported some problems with Ault's brain functioning in a broad sense, and even assuming Ault has brain damage/mental disease, the issue for her was Ault's actions, behavior patterns, and emotions at the time of the crime. She looked at what Ault was able to do with his alleged brain disorders. Significant for Dr. Bourg-Carter was the fact Ault planned his crimes, tested his victims' vulnerabilities, tricked his victims, raped one and killed both, and hid their bodies in his attic. (PCR.1 79, 82-83). It continued to be Dr. Bourg-Carter's opinion, based on Ault's test performance, that there was no significant organic brain damage and from the totality of the facts, there was no evidence that organic brain damage, schizophrenia, mania, or depression played any significant role in Ault's criminal actions. (PCR.1 102-03).

Likewise, Dr. Bourg-Carter stood by her opinion that Ault was malingering given her review of background materials, reports of what Ault stated to other experts, and her interview with him. (PCR.1 55, 97, 100-01). Ault has pedophilia and has an antisocial personality disorder in Dr. Bourg-Carter's expert opinion. The IQ testing revealed Ault is not mentally retarded/intellectually disabled and other testing established that he was feigning mental illness. (PCR.1 97).

Ault told Dr. Bourg-Carter why he committed the murders, i.e., the older child victim was crying/screaming, fighting back

and informing Ault she would tell her mother what happened. Ault did not want to go to prison and Ault did not want a witness to the sexual assault so he killed the older child. Also, Ault did not was a witness to his acts against the older girl, so he killed the younger child; he pulled the younger sister to the floor and strangled her. While Ault claimed not to have control over his behavior, the evidence in Dr. Bourg-Carter's opinion showed Ault understood his actions, tested the victims to see if they would get into his car, and formed a relationship with the victims' and their mother as part of his plan. Dr. Bourg-Carter opined that Ault had control over his actions or he would have raped the girls when they got into his car the first time. These actions, in Dr. Bourg-Carter's opinion, refute the statutory mental health mitigators. (PCR.1 103-05) Furthermore, regardless of what condition Ault may have, Dr. Bourg-Carter testified that the focus must be on his behavior/actions to determine whether statutory mitigation applies. In this case, Ault's actions cut against statutory mental mitigation. (PCR.1 105) This was so even in light of the opinions expressed by Drs. Kramer and Ross. (PCR.1 106).

Polay was an experienced capital attorney by the time of Ault's 2007 penalty phase. (PCR.1 115-16, 122-23) Also, he had experience with Dr. Bourg-Carter from other cases and knew how thorough she was. (PCR.1 123). He knew she had been the State's

witness in the 1999 penalty phase and had reviewed that testimony several times.²⁷ He also was aware of her illness. (PCR.1 116-17, 121, 123). With that information in mind, Polay made the strategic choice to opt for a cold record reading of her 1999 testimony; Polay would rather have a cold record than the doctor's live testimony. (PCR.1 123-24) Polay explained his "thought process" was that given her 1999 testimony and the horrific facts of this case, Dr. Bourg-Carter's testimony hurt Ault, but a reading of her testimony as a cold record would inure to Ault's benefit. The cold reading was preferable to live testimony before the jury where Dr. Bourg-Carter's vocal inflections and emotion heard and seen. (PCR.1 118-19). Polay did not recall whether he spoke to Ault about the decision to allow Dr. Bourg-Carter's 1999 testimony to be read to the 2007 jury. (PCR.1 120).

It was Polay's recollection that the State never told him definitively that Dr. Bourg-Carter would not be coming to court, but he could not recall if he prepared for her cross-examination. (PCR.1 121). However, in opposition to Dr. Bourg-Carter re-read testimony, Polay knew he would have live testimony from Drs. Kramer and Ross which allowed him to argue

²⁷ Don Carpenter, a private investigator since 1968, testified that he found the transcript of Dr. Bourg-Carter's 1999 testimony in Polay's file. However, he did not find any notes written in the transcript. Polay's case file consisted primarily of transcripts. (PCR.1 125-28)

in closing that Ault was brain damaged, and brain damaged people should not be put to death. (PCR.1 124)

Based on the foregoing 2007 penalty phase record and evidentiary hearing testimony, Ault has failed to prove ineffective assistance of counsel. Polay testified that he was well aware of Dr. Bourg-Carter's illness and intimately familiar with her 1999 penalty phase testimony in Ault's case. Additionally, he was aware of how formidable Dr. Bourg-Carter was on the stand when the jury could see how thoroughly prepared she would be and experience her emotion and voice inflection as she testified live. Polay believed Ault would benefit from a cold reading of Dr. Bourg-Carter's testimony rather than seeing her live. For these reasons, he did not seek to have the State prove Dr. Bourg-Carter's unavailability before her 1999 testimony was read into the 2007 record. In his opinion, Dr. Bourg-Carter's live testimony would have been more harmful to Ault than reading a cold record to the jury.

Further, a reading of Dr. Bourg-Carter's testimony allowed Polay to argue the un-rebutted live testimony he presented from Drs. Kramer and Ross. (PCR.1116-19, 121, 123-25). As this Court observed Dr. Bourg-Carter testify live in 1999 and again in the 2014 evidentiary hearing, it is clear she is a well qualified expert, with an extraordinary command of the facts of the case, the materials reviewed, Ault's test results, and the discussions

she had with Ault. Furthermore, Dr. Bourg-Carter's thorough preparation and courtroom presence made her a strong witness for the State. As Polay strategized, he preferred a cold reading of Dr. Bourg-Carter's testimony over her live testimony. (PCR.1 123-24). Such is the epitome of a strategic, constitutionally professional decision.

It is well settled that "strategic choices made after thorough investigation of law and facts relevant to plausible options are virtually unchallengeable; and strategic choices made after less than complete investigation are reasonable precisely to the extent that reasonable professional judgments support the limitations on investigation." *Strickland*, 466 U.S. at 690-691. Moreover, "[t]here is a strong presumption that trial counsel's performance [is] not deficient." *Johnston v. State*, 63 So.3d 730, 737 (Fla. 2011). Also, "strategic decisions do not constitute ineffective assistance of counsel if alternative courses have been considered and rejected and counsel's decision was reasonable under the norms of professional conduct." *Occhicone v. State*, 768 So.2d 1037, 1048 (Fla. 2000). Also, there is "a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance."

The defendant bears the burden of proving that the representation was unreasonable under the prevailing

professional norms and that it was not reasoned strategy. *Strickland*, 466 U.S. at 688-89. Here, Polay decided not to object on "availability" grounds given his knowledge of Dr. Bourg-Carter's health condition and his belief that a cold record of her testimony would be to Ault's benefit over having Dr. Bourg-Carter testify live. Polay chose to have the testimony read into the record over live testimony given his knowledge of how Dr. Bourg-Carter had testified previously and how her emotion and voice inflection would play before the jury. Such is a reasoned strategy developed based on counsel's experience with the witness and consideration of the facts of the case. *Strickland* deficiency has not been shown.

Part of Ault's complaint is that the cross-examination by 1999 defense counsel, Melodee Smith ("Smith"),²⁸ was so poor this was another basis for finding Polay deficient in agreeing to the re-back of Dr. Bourg-Carter's testimony. However, Polay having reviewed Dr. Bourg-Carter's testimony several times, testified that he did not believe the cross-examination conducted Smith

²⁸ To the extent that Ault challenges here can be read as asserting that Smith rendered ineffective assistance in her cross-examination, that claim should be found not cognizable, insufficiently pled, and conclusory. Ault has not explained how he is able to raise a claim of ineffective assistance of prior counsel from a proceeding which was merely read into the record in a subsequent trial. The focus must be on current counsel who agreed to the reading of that testimony. Hence, that portion of the claim directed at Smith's representation alone should be found not cognizable here.

was ineffective and Ault has failed to outline Polay's deficiency. Ault has not offered what sustainable objection(s) could have been raised in 2007 challenging Smith's cross-examination, which specific questions/answers should have drawn the objection(s), and what information was inadmissible. Moreover, Dr. Bourg-Carter's testimony, along with prior defense counsel's allegedly in artful questions or other failing, either was admissible or it was not. Subsequent counsel is not permitted to change the questions and answers for testimony read back into the record. Polay testified as to his reasons for not challenging Dr. Bourg-Carter's read-back of testimony on "availability" grounds. Clearly that was a reasoned strategic decision based on his knowledge of Dr. Bourg-Carter and her testimony in the case. Ault has not shown that counsel was ineffective in his representation here.

Similarly, Polay did not render deficient performance in not moving to strike some of Dr. Bourg-Carter's 1999 testimony. First of all, Ault does not inform this Court which portions of the doctor's testimony should have been stricken or what the sustainable objection should have been. Such a pleading deficiency precludes this Court from assessing the validity of the alleged objection or the impact a successful objection would have had on the outcome of the penalty phase. This portion of the claim should be found conclusory and denied.

Ault also has asserted that had counsel objected to the doctor's testimony on availability grounds, Dr. Bourg-Carter's testimony would have been found inadmissible. However, he has failed to prove that allegation. As the prosecutor explained during the 2007 penalty phase, Dr. Bourg-Carter said she did not think she was medically able to come into court, but if required, she would need to take long breaks in her testimony. (2007-ROA.13 1037). The prosecutor offered to read into the record Dr. Bourg-Carter's 1999 trial testimony, but noted that he was not stating that she was "technically unavailable per the statute" and that he would not offer the prior testimony if the defense objected. (2007-ROA.13 1037). At the instant evidentiary hearing, Dr. Bourg-Carter testified that she was having medical issues in 2007 which caused her to be unable to get out of bed some days. However, if required, she would have come to court to explain her medical decision and/or testified regarding her evaluation of Ault reiterating her 1999 findings (PCR.9 1374-75, 1437-38). From this, it is clear that had counsel objected to the reading of Dr. Bourg-Carter's testimony, she would have come to court and testified before the 2007 jury. This supports the trial court's findings and conclusions of law.

Moreover, even if Polay's decision was "professionally unreasonable," Ault must prove prejudice arose from that decision. Given the facts of this case, Ault has not made such

a showing. Dr. Bourg-Carter testified at the evidentiary hearing that she could not read EEG and PET scans. Her opinion was based on her review of background materials, Ault's test results,²⁹ and her interviews with him. However, even taking into consideration the opinions of Drs. Kramer and Ross, Dr. Bourg-Carter reaffirmed her opinion from 1999 and stated that it was unchanged³⁰ regarding her diagnosis that Ault is a pedophile with an antisocial personality disorder and that neither statutory mental mitigator applied. (PCR.1 95, 97-99).

From a totality of the evidence, Dr. Bourg-Carter reiterated that there is no evidence of any significant brain damage; there is no evidence that brain damage, mental

²⁹ Those test results showed that Ault had a "low average to borderline IQ," that he was malingering, was a "severe psychopath" with an antisocial personality disorder, and that he was a pedophile. (2007-ROA.13 1145-77)

³⁰ Ault claims that had counsel not agreed to the read-back, Dr. Bourg-Carter would have been available for cross-examination on whether the EEG and PET scans altered her opinion. The evidentiary hearing testimony reveals that Dr. Bourg-Carter cannot read such scans and her opinion is unchanged by the testimony of Drs. Kramer and Ross. However, Dr. Ross, who is a neurologist, and having reviewed those exams, did not opine regarding the statutory mental health mitigators of (1) the capacity of the defendant to appreciate the criminality of his conduct or conform his conduct to the requirements of the law was substantially impaired See §921.141(6)(f); and (2) the capital felony was committed while the defendant was under the influence of an extreme mental or emotional disturbance. See §921.141(6)(b). He merely concluded Ault had an abnormal brain and that those with pedophilia have exhibited similar evidence of brain damage. (2007-ROA.13 1114).

disease/disorder,³¹ or depression played any significant role in Ault's actions in kidnapping, sexually molesting, or killing the victims in this case. (PCR.1 101-05). From this it is clear that Dr. Bourg-Carter's testimony stands and whether she testified live having reviewed the testimony of Drs. Kramer and Ross or through a re-back of her 1999 testimony, her opinion is unchanged respecting Ault's malingering, antisocial nature, and lack of statutory mitigation. As such, the aggravating and mitigating evidence remains the same.³²

Moreover, the trial court found aggravation of: (1) homicide committed while on community control; (2) prior violent

³¹ Dr. Bourg-Carter's opinion rejecting the claim Ault suffered from Post Traumatic Stress Disorder ("PTSD") was based on her face-to-face interview with Ault. During that interview, Ault did not display any manifestations of PTSD nor did he report any characteristics of the disorder.

³² In sentencing Ault, the trial court based its rejection of both statutory mitigators on Ault's criminal actions before, during, and after the murders finding:

Nothing that the Defendant did in terms of the planning or execution of the crimes leading up to the murders of [DM] and [AJ] suggests that the Defendant's capacity to appreciate the criminality of his conduct, or to conform his conduct to the requirements of the law was substantially impaired. His actions clearly demonstrate that he knew right from wrong. The same holds true for the issue of whether the Defendant was under the influence of extreme mental or emotional disturbance.

(2007-ROA.4 661). This Court affirmed the rejection of these statutory mitigators. See *Ault v. State*, 53 So.3d 175 (Fla. 2010)

felony; (3A) committed during a felony (contemporaneous felonies); (3B) victim under 12 MERGED with committed during a felony; (4) avoid arrest; and (5) heinous, atrocious, or cruel (HAC). (2007-ROA.4 653-57, 669). Further, the trial court found: "that the aggravating circumstances far outweigh the mitigating circumstances. In fact, the single aggravator of the murders being especially heinous, atrocious, or cruel, is of such a magnitude as to overwhelm the mitigators." (2007-ROA.4 669). This Court recognized that fact when it found harmless the trial court's failure to consider, analyze, or find certain non-statutory mitigating facts. *Ault II*, 53 So.3d at 195-96. Ault has not shown what cross-examination of Dr. Bourg-Carter would have undermined confidence in the sentence. The trial court's rejection of the challenge to Polay's approach and decisions arising from Dr. Bourg-Carter's 1999 testimony was proper especially in light of the aggravation in this case. This Court should affirm.

(b) Decisions regarding Dr. Eisenstein's testimony - Ault points to Dr. Eisenstein's 1999 testimony to challenge the denial of postconviction relief and to assert such could have been used to counter Dr. Bourg-Carter's testimony and would have been more beneficial than Dr. Kramer's testimony. It is his assertion that Polay deficiently declined to present Dr. Eisenstein resulting in Dr. Bourg-Carter's testimony being

unrebutted. However, Ault has failed to show deficiency and prejudice arising from that decision. Judge Gold heard Dr. Eisenstein's original trial testimony in 1999, was the judge who presided over Ault's re-sentencing, and was the judge who considered the instant postconviction claims. As this Court will recall, Judge Gold rejected Dr. Eisenstein's testimony and made credibility findings. After detailing Dr. Eisenstein's 1990 testimony in the sentencing order (2000-ROA.3 586-88), Judge Gold concluded:

The Court assigns very little credibility to the findings of this witness. It is worth noting that this determination was made by the Court without any consideration of the State's rebuttal witness [Dr. Bourg-Carter]. The Court has detailed the findings of this Doctor in this Order so that it is clear why this Court finds his testimony so lacking in credibility.

(2000-ROA.3 588).

It is this very same doctor that Ault suggests should have been recalled and would have undercut Dr. Bourg-Carter's testimony. Ault makes this argument without alleging Dr. Eisenstein has reviewed additional materials, has additional support for his findings, and that such will overcome the taint of his prior testimony which was so lacking in credibility. Surely not calling a witness in the resentencing presided over by the same judge who had found the witness not credible is not deficient performance and does not undermine confidence in the sentencing. This is not a case where Polay called no mental

health experts. Instead of calling Dr. Eisenstein, Polay offered Dr. Kramer, a psychiatrist, and Dr. Ross, a neurologist who conducted EEG and PET scans.

To the extent that Ault has not made specific allegations of deficiency and prejudice arising from Polay's decision not to call Dr. Eisenstein, he has not set forth a legally sufficient claim. *Kennedy*, 547 So. 2d at 913 (opining "defendant may not simply file a motion for post-conviction relief containing conclusory allegations that his or her trial counsel was ineffective and then expect to receive an evidentiary hearing"). Likewise, he has not, nor is he able to show factual or legal error in the denial of postconviction relief. Moreover, prejudice cannot be established given the aggravation³³ in this case, the previous rejection of Dr. Eisenstein's opinion, and the lack of an allegation that the statutory mental mitigation Dr. Eisenstein had offered in 1999 would be supported now. Ault has not carried his burden of proving *Strickland* prejudice.

(c) Preparation of Dr. Kramer - It is Ault's premise that penalty phase counsel was deficient for not preparing Dr. Kramer

³³ (1) homicide committed while on community control; (2) prior violent felony; (3A) committed during a felony (contemporaneous felonies); (3B) victim under 12 MERGED with committed during a felony; (4) avoid arrest; and (5) heinous, atrocious, or cruel (HAC). (2007-ROA.4 653-57, 669). Further, the trial court found "that the aggravating circumstances far outweigh the mitigating circumstances. In fact, the single aggravator of the murders being especially heinous, atrocious, or cruel, is of such a magnitude as to overwhelm the mitigators." (2007-ROA.4 669).

with documentation of the crime and had such documentation been provided, the jury and trial court would have given more credence to that testimony and a life sentence would have resulted. The trial court found the claim legally insufficient and that Strickland prejudice had not been established. Ault has offered nothing to call that ruling into question. Ault did plead in his motion what information should have been reviewed and here he suggests Dr. Kramer should have reviewed the documents considered by Dr. Bourg-Carter. Although this is more than was offered below, fatal to the claim is the fact that it is mere speculation what Dr. Kramer's testimony would have been had a different evaluation been done. Ault does not set forth what Dr. Kramer's testimony would have been or what mitigation would have been proven had such documentation been supplied.³⁴

³⁴ Below, Ault failed to set forth which documents should have been supplied to Dr. Kramer. Other than stating "documentation of the crime" Ault did not elaborate on what materials were withheld by counsel deficiently nor did he identify for the trial court which documents should have been provided. Hence, the claim was pled in legally insufficient terms as the trial court so concluded. Furthermore, Ault did not state which mitigating factors would have been found by the sentencer arising from Dr. Kramer's testimony had the doctor been given the unspecified documentation. Again, the claim was pled in legally insufficient terms and was denied properly. See *Freeman*, 761 So. 2d at 1061 (opining "[the] defendant bears the burden of establishing a prima facie case based upon a legally valid claim. Mere conclusory allegations are not sufficient to meet this burden."); *Ragsdale*, 720 So.2d at 207 (stating that although courts are encouraged to conduct evidentiary hearings, a summary/conclusory claim "is insufficient to allow the trial court to examine the specific allegations against the record");

Additionally, the claim is meritless as the record shows that had the doctor been provided with what Dr. Bourg-Carter reviewed including police reports, the statements of the family members regarding Ault's alleged sexual abuse by his brother, the monthly community control reports from April 1996 through October 1996, and Ault's videotaped police confession, there would have been further support for the rejection of the mitigation offered by Dr. Kramer, not more. Because there would have been additional reasons to reject the statutory mental mitigators and the non-statutory mitigation of PTSD, and poly-substance abuse as well as more support for Dr. Kramer's opinion that Ault had an antisocial personality disorder, Ault is unable to carry his burden and prove *Strickland* deficiency and prejudice. There is no reasonable probability that the sentencing decision would be different; confidence in the sentencing outcome has not been undermined.

In the penalty phase, Ault presented Dr. Kramer who opined that Ault had a dysfunctional family life and was sexually abused by Charles Ault between the ages of seven and mid-teens some of which was forced through threats of violence, however, this was not suggested by Ault until after the instant murders.

Kennedy, 547 So. 2d at 913 (opining "defendant may not simply file a motion for post-conviction relief containing conclusory allegations that his or her trial counsel was ineffective and then expect to receive an evidentiary hearing").

Dr. Kramer reported Ault suffered from: (1) PTSD, (2) chronic major depressive recurrence with psychotic features, (3) pedophilia, (4) alcohol/poly-substance abuse (5) had suffered head injuries, and (6) was probably anti-social. Dr. Kramer concluded Ault was under the influence of extreme mental or emotional disturbance at the time of the crime and Ault's pedophilia impacted his ability to conform his behavior to the law and he cannot control himself with respect to his desire to have prepubescent girls. The doctor admitted Ault may be malingering when reporting about multiple personalities/hallucinations. (2007-ROA.13 1044-56, 1058-1068, 1070-73, 1077-80, 1083, 1087-88, 1092-97). The State reincorporates its outline of Dr. Kramer's testimony set forth in the Evidentiary Hearing argument above.

In the 2007 penalty phase, Robert Buckley ("Buckley"), the defense private investigator, testified he started speaking to Ault's mother in 2005, and at some point she reported Charles was estranged from the family due to the allegations of sexual molestation; she reported knowing of the abuse, but offered such things were not discussed in those days. (2007-ROA.13 1134, 1136). While Ault's mother is alive, she declined to testify because she thought it too inconvenient to come to court. (2007-ROA.13 1135). Buckley stated that his investigation revealed Ault and Charles worked and hung out together in 1988; this was

around the time of the sexual assault on ML, an earlier under-age female victim, but he could not say when the brothers had a falling out. When Buckley reached out to Charles, he received a negative response (2007-ROA.13 1135, 1136). Had Dr. Kramer read the accounts of the family witnesses and considered that the first time Ault alleged he was abused sexually was after the murders, the finding of PTSD would likely fall and further undermine Dr. Kramer's suggestion that the statutory mitigation of "extreme mental or emotional disturbance" existed.³⁵ As such, the record contains competent, substantial evidence supporting the trial court's factual and legal conclusion that the claim was speculative and refuted by the record. Ault failed to show Strickland deficiency or prejudice arising from counsel's alleged failure to provide additional records to its expert.

Also, Dr. Kramer did not review the crime scene video to determine if evidence of alcohol or substance abuse was visible in Ault's home at the time of the crime. He relied upon Ault's self-report 10 years after-the-fact even though there was no prior documentation of alcohol or substance abuse by Ault.

³⁵ The trial court's main basis for rejecting this mitigator was the facts that the crimes were methodically planned, executed, and covered up. Ault had offered his reasons for committing the murders and hiding the bodies afterward, thus showing he was not suffering from a mental or emotional disturbance. Likewise, such undercut the suggestion Ault could not appreciate the criminality of his conduct or could not conform his conduct to the requirements of the law. (2007-ROA.4 659-661)

(2007-ROA.13 1081-82). On cross-examination, Dr. Kramer was forced to consider the monthly Community Control reports (State's exhibit #23; 2007-ROA.13 1082-83) from April 1996 through October 1996 which he had to admit indicated no alcohol or drug use during that period of time, i.e., the period of time leading up to the double homicide in this case. (2007-ROA.13 1083). Had Dr. Kramer had these reports, the alleged mitigation of alcohol/poly-substance abuse would have fallen. Hence, again, Ault failed to show that but for counsel's alleged failure, mitigation would have been found, and a different sentencing decision made. This Court should find that confidence in the sentence has not been undermined.

On direct examination, Dr. Kramer opined that Ault had "probable" antisocial personality disorder (2007-EOA.13 1071), however, on cross-examination, the doctor was forced to conclude that such a disorder did in fact exist based on Ault's prior criminal history and the facts of this crime. (2007-ROA.13 1089-93). Clearly, had added documentation of the crimes been given to Dr. Kramer, he would have had further evidence of antisocial personality disorder. That disorder has been recognized by this Court as non-mitigating, and characterized as an "unfavorable psychiatric condition" which most jurors look upon with disfavor. See *Hurst v. State*, 18 So.3d 975, 1015 (Fla. 2009) (equating mental health doctor's diagnosis of antisocial

personality disorder to other "unfavorable psychiatric condition[s]"); *Jones v. State*, 998 So.2d 573, 585 (Fla. 2008) (noting "this Court has acknowledged that antisocial personality disorder 'is a trait most jurors tend to look disfavorably upon.'" (quoting *Freeman v. State*, 858 So.2d 319, 327 (Fla. 2003))). Contrary to Ault's position on postconviction, had additional documentation of the crime been given to Dr. Kramer, the result would have been less mitigation, not more. Prejudice has not been established and confidence in the sentence has not been undermined. The summary denial of relief was correct and should be affirmed.

(d) Failure to call Barbara Madsen. Ault's allegation here is that counsel "failed to call other penalty phase witnesses," who testified at the first trial including Ault's mother, Barbara Madsen, who in spite of having "some reluctance" in appearing at the 2007 penalty phase," "could have been convinced or required to testify." (IB 61) Although the trial court did not make a specific ruling on this allegation, a review of the rule 3.851 motion establishes its legal insufficiency. Even here, the claim is legally insufficient as there is no allegation Madsen was available and willing to testify, thus, rendering the claim speculative at best.³⁶ Likewise, he does not

³⁶ See *Booker v. State*, 969 So.2d 186, 196 (Fla. 2007):

set out that his mother³⁷ or which other witnesses from the 1999 trial were available in 2007, what they would have said at the 2007 penalty phase, what mitigation their testimony would have established, and how the 2007 sentencing decision was undermined by counsel not calling Madsen or other unidentified witnesses. Those pleading deficiencies rendered Ault's claim legally insufficient. See *Nelson v. State*, 875 So.2d 579, 583 (Fla. 2004) (noting for a claim of ineffectiveness of counsel for failure to call a witness to be legally sufficient, the defendant must include in his pleading that the witness would

To establish a claim of ineffective assistance of trial counsel for failing to call certain witnesses, a defendant must allege in the motion "what testimony defense counsel could have elicited from [the] witnesses and how defense counsel's failure to call, interview, or present the witnesses who would have so testified prejudiced the case." *Nelson v. State*, 875 So.2d 579, 583 (Fla. 2004). If the claim is insufficiently pled, a defendant should be given leave to amend his claim; however, if the claim is not amended, then the denial may be with prejudice. See 875 So.2d at 583-84.

(footnote omitted)

³⁷ As defense investigator Buckley testified during the 2007 re-sentencing, while Ault's mother was alive for the 2007 penalty phase, she declined to testify because she thought it too inconvenient to come to court. (2007-ROA.13 1135). Ault has not offered what Polay could have said to convince Ault's mother to testify in her son's penalty phase where he faced the death penalty, if the mere fact Ault faced the death penalty were not enough. Furthermore, having a reluctant witness testify may have been detrimental to Ault's case especially were she to deny Ault suffered any sexual abuse.

have been available to testify and what the testimony would have been). In the instant brief, Ault has not set out a claim of ineffectiveness addressed to both deficient performance by counsel and resulting prejudice. This Court should find the claim legally insufficient. *Kennedy*, 547 So. 2d at 913 (opining "defendant may not simply file a motion for post-conviction relief containing conclusory allegations that his or her trial counsel was ineffective and then expect to receive an evidentiary hearing").

Also, this Court should note that a death recommendation and death sentence were obtained in the 1999 trial where Madsen and other penalty phase witnesses testified. Hence, even if the witnesses maintained their 1999 testimony, Ault cannot show that confidence in the outcome has been undermined. The decision not to call the 1999 witnesses, even if error, was not "so serious as to deprive the defendant of a fair trial, a trial whose result is reliable." *Strickland*, 466 U.S. at 687. Furthermore, given the findings of aggravation, in particular the HAC finding which alone outweighed the mitigation, there is no reasonable probability of a life sentence; Ault has not shown that the sentencing decision is undermined. Postconviction relief should be denied.

(e) Failure to request consideration of the statutory mental health mitigators on a non-statutory basis. Ault

challenges the denial of his claim of ineffective assistance for not seeking consideration of the statutory mental health mitigation on a non-statutory basis. The record reflects that Polay argued in support of the statutory mitigator of the murders being committed while under the influence of extreme mental or emotional disturbance as well as the statutory mitigator that Ault's capacity to appreciate the criminality of his conduct or to conform his conduct to the requirements of the law was substantially impaired. The trial court's rejection of this claim is supported by the record.

First, Ault's challenge to the mitigator on "capacity to conform his conduct" was not pled in the postconviction motion.³⁸

³⁸ In the original motion, Ault asserted:

Defense counsel's failure to raise nonstatutory mental health mitigation in the trial court was particularly egregious in this capital case, depriving Mr. Ault of a reliable penalty phase proceedings, as his emotional and mental health disturbance were at the heart of his defense.

Had Ault's trial counsel raised nonstatutory mental health mitigation before the trial court concerning emotional or mental disturbance, there remains a reasonable probability the outcome of the proceeding would be different. There remains a reasonable probability that, had defense counsel raised this nonstatutory mitigator, the trial court would have considered it and given it weight in determining Mr. Ault's fate.

(9/20/12 Motion at 35) (emphasis supplied). At no time did Ault mention or make argument with respect to the mitigator of "capacity to appreciate the criminality of his conduct, or to

Second, even had the statutory mental mitigators been offered under a non-stutory theory, prejudice has not been shown. The trial court in sentence Ault found that the single aggravator of HAC outweighed the mitigation offered. No prejudice can be shown even though Polay did not request that statutory mental mitigation be considered under the non-statutory level in light of this Court's analysis on direct appeal. Under a *Strickland* analysis, even if deficiency is assumed, confidence in the sentencing has not been undermined; there is no reasonable probability that a life sentence would have been imposed had counsel offered the rejected statutory mental health mitigation as non-statutory mental health mitigation.

Initially it must be noted that on appeal, Ault's claim is conclusory and does not set forth both deficiency and prejudice. This claim is legally insufficient. Other than the conclusory assertion that counsel failed to request consideration of the mental health mitigation on a non-statutory basis's as such was prejudicial, Ault makes no attempt to address the aggravation found in this case. This Court has made clear that the "purpose of an appellate brief is to present arguments in support of the points on appeal." *Doorbal v. State*, 983 So. 2d 464, 482 (Fla.

conform his conduct to the requirements of the law." Nonetheless, the trial court took into consideration both mental health mitigators. (PCR.5 830-31)

2008). Having failed to offer a full argument, the claim should be found waived.

Ault suggests that this Court's finding that counsel failed to make the offer of non-statutory mitigation is a finding that counsel's performance "fell measurably below the standard of reasonably effective assistance of counsel." (IB 63) Ault's claim fails on both the allegation that the statutory mitigation should have been considered under non-statutory as well as that deficient performance was found by the Florida Supreme Court. Postconviction relief was denied properly.

Taking this Court's decision on preservation first, it is clear that such was not a finding of deficiency. On direct appeal from the resentencing, Ault argued that the trial court erred in not considering *sua sponte* the statutory mental mitigator of "extreme mental or emotional disturbance" as non-statutory mitigation. (Initial Brief in the 2007 Appeal, Points V and VI). The fact that the Florida Supreme Court recognized that counsel had not offered the mental mitigation under alternate theories of statutory and non-statutory mitigation does not equate to a finding of deficient performance, much less, ineffectiveness under *Strickland*. When this Court's opinion is read in context, it is clear there was no finding, explicit or implicit, of deficiency, thus, there is no "law of the case" precluding a *Strickland* analysis.

However, the analysis conducted on appeal supports the rejection of this ineffectiveness claim. First, this Court concluded:

Ault argues that even though the trial court determined that he did not qualify for statutory mental health mitigation, the court should have evaluated whether the evidence qualified as non-statutory mental health mitigation. We have previously explained that

Florida's capital sentencing statute does in fact require that emotional disturbance be "extreme." However, it clearly would be unconstitutional for the state to restrict the trial court's consideration solely to "extreme" emotional disturbances. Under the case law, any emotional disturbance relevant to the crime must be considered and weighed by the sentencer, no matter what the statutes say. Any other rule would render Florida's death penalty statute unconstitutional.

Cheshire v. State, 568 So.2d 908, 912 (Fla. 1990) (citations omitted).

However, in *Davis v. State*, 2 So.3d 952, 962-63 (Fla. 2008), cert. denied, --- U.S. ----, 129 S.Ct. 2872, 174 L.Ed.2d 585 (2009), we rejected a challenge to a trial court's failure to consider nonstatutory mental health mitigation where the defendant's "impaired capacity" had not been proposed as a nonstatutory factor. We held that "a defendant must raise a proposed nonstatutory mitigating circumstance before the trial court in order to challenge on appeal the trial court's decision about that nonstatutory mitigating factor." *Id.* at 962 (citing *Lucas v. State*, 568 So.2d 18, 23-24 (Fla. 1990)). Here, Ault did not raise nonstatutory mental health mitigation before the trial court. Accordingly, we find that the court did not err in failing to address this mitigating circumstance.

Ault II, 53 So.3d at 191 (emphasis supplied). Clearly, this

Court was not making any finding as to defense counsel's effectiveness. It merely was commenting that the matter had not been presented to the trial court and, thus, there was no trial court error.

Second, the record facts establish that the fact not offering the mental mitigators for non-statutory review turning to the claim of counsel's effectiveness, was not deficient or prejudicial given the conflicts between defense experts as well as Dr. Bourg-Carter's testimony and the overwhelming aggravation here. The record supports the fact that counsel did not request that the two statutory mental mitigators offered be considered alternately as non-statutory mitigation. However, Ault has pointed to no facts beyond those already a matter of record in support of the statutory mental mitigation and the record supports that rejection. See *Ault II*, 53 So.3d at 187-96. The resolution of this claim revolves around the legal determination of prejudice and the trial court's assessment of how it would have treated the mental mitigation had it been offered as the non-statutory mitigation of "mental or emotional disturbance" or "capacity to appreciate/ability to conform conduct." Stated another way, irrespective of whether counsel's decision was strategic or deficient performance, *Strickland* prejudice cannot be shown given the record in this case as well as this Court's harmless

error analysis discussing other non-statutory mitigation that the sentencing court erroneously failed to consider or find.

The record establishes that Ault was pointing to his mental health experts, Drs. Kramer and Ross to support the statutory mental mitigator of "extreme mental or emotional disturbance" and that his "capacity to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was substantially impaired." Polay asked the trial court to analyze those experts in assessing those statutory mental mitigators. The trial court also reviewed Dr. Bourg-Carter's testimony as part of its analysis. The alleged underlying mental conditions discussed included Dr. Kramer's testimony about PTSD, a mood disorder reflecting signs of depression, pedophilia, and substance abuse. Dr. Ross was credited with finding brain damage. (2007-ROA.4 659-60). Although Ault did not identify for the trial court which underlying mental condition on which he relied for the statutory mental mitigation requested or how that condition supported the non-statutory versions of those mitigators, the State will assume it is the same as that upon which Ault relied at trial.

In the 2007 sentencing order, Dr. Kramer's testimony was rejected as "less than reliable" given the doctor's limited contact with Ault, reliance on Ault's account without looking at supporting documentation other than reports of other experts,

and the fact that Dr. Kramer did not review Ault's confession or other evidence of the crime. (2007-ROA.4 659, 661). Also, as the sentencing court noted, other than reporting his finding of brain damage, Dr. Ross did not give an opinion as to whether the statutory mental mitigators applied. (2007-ROA.4 661-62)

The record reveals that six aggravators, merged into five, were found and that the HAC aggravator alone overwhelmed the mitigation. (2007-ROA.4 653-58, 669). This Court pointed to this fact when it reasoned that the erroneously handled mitigation, including "brain damage" and "pedophilia" was harmless beyond a reasonable doubt. *Ault II*, 53 So.3d at 195-96. To the extent that Ault's appellate claim may be read as pointing to these alleged mental conditions to support the non-statutory versions of the "mental or emotional disturbance" mitigator, this Court should find that Ault is unable to prove *Strickland* prejudice. Even had counsel offered this as non-statutory mitigation, Ault has not established that the factors would have been found, or would have changed the sentencing decision. See *Maxwell*, 490 So.2d at 932 (noting when considering a claim of ineffectiveness of counsel, a court "need not make a specific ruling on the performance component of the test when it is clear that the prejudice component is not satisfied.")).

Similarly, should Ault be pointing to his alleged PTSD condition, the record supports the trial court's rejection of

Dr. Kramer, and acceptance of Dr. Bourg-Carter's opinion that Ault did not suffer from PTSD. Add this to the fact that the HAC aggravator alone overwhelms the mitigation, prejudice has not been established. (2007-ROA.4 660-61). Even if PTSD is presumed established and supportive of non-statutory mental mitigation, confidence in the sentencing has not been undermined as minimal weight would have been assigned by the trial court and the aggravation was overwhelming. (PCR.5 831).

Likewise, even where Ault's pedophilia, alleged brain damage, and PTSD offered in support of the non-statutory version of the "capacity to appreciate or control criminal behavior," the trial court has announced at best such would have been given minimal weight. Clearly, Ault's deliberate actions of planning, testing his victims' willingness to get into his vehicle, executing the kidnapping, sexual assault, and murder of the victims, and hiding the evidence of the commission of these crimes undercuts any offered proof of either the statutory or non-statutory version that Ault could not appreciate his criminal nature of the crime or conform his behavior to the law.

Moreover, Dr. Ross offered no opinion on the statutory or non-statutory mental health mitigation. As such, Polay was not deficient in not seeking the non-statutory version of the mental health mitigators based on Dr. Ross. Nonetheless, Polay requested consideration of non-statutory mental health

mitigation in the form of: (a) suicide attempt at age 14; (b) head injuries in childhood; (c) poor academic performance; (d) low IQ; (e) brain damage; (f) neurological impairments; (g) had been prescribed psychotropic medication; (h) has mental disorder of pedophilia; and (i) mental disorder treated inadequately. From this, it is clear that any alleged failure to seek the non-statutory version of the mental health mitigators was neither deficient nor prejudicial. Confidence in the sentencing result has not been undermined especially in light of the determination that the HAC aggravator alone outweighed the mitigation presented.

Furthermore, this Court's analysis of harmless error on direct appeal is instructive and supports denial of relief here. This Court reasoned:

In the present case, the trial court found five aggravators, each of which was assigned either great weight, significant weight, or, as to HAC, maximum weight. The trial court determined that the aggravating circumstances far outweighed the mitigating circumstances. The court further determined that the single aggravator of the murders being especially heinous, atrocious, or cruel was of such a magnitude as to overwhelm the mitigators. In this context, even if each of the rejected factors had been found by the trial court (and it is not certain that the court would have found some of those factors even if it had conducted the proper analysis), we find no reasonable possibility that Ault would have received a different sentence. See *DiGuilio*, 491 So.2d at 1138. In light of the extensive aggravating circumstances in this case, we find that any error was harmless beyond a reasonable doubt.

Ault II, 53 So.3d at 196 (emphasis supplied).

Equally important is the fact that this is a double homicide of two young children, one of which was sexually assaulted prior to the murder and the other had to watch that assault and strangulation before she was killed to eliminate a witness. Neither defense expert supported statutory mental mitigation. *Ault II*, 53 So.3d at 187-88. Even if the non-statutory "mental or emotional disturbance" and "capacity to appreciate criminality of conduct or to conform conduct to the law" mitigators should have been offered and found, the other four aggravators would outweigh such mitigation and support the death sentences and confidence in the sentence would not be undermined. See *Eaglin v. State*, 19 So.3d 935, 950 (Fla. 2009) (noting "under sentence of imprisonment to be weighty aggravator"); *Rivera v. State*, 859 So.2d 495, 505 (Fla. 2003) (finding HAC and prior violent felony aggravators are weighty factors); *Sireci v. Moore*, 825 So.2d 882, 887-88 (Fla. 2002) (affirming that prior violent felony conviction and HAC aggravators are "two of the most weighty in Florida's sentencing calculus.").

This Court has found that such crimes with less aggravation support death sentences and establish that counsel was not ineffective in the mitigation presentation made. See, *Butler v. State*, 100 So.3d 638, 666 (Fla. 2012) (agreeing that ineffective

assistance of penalty phase counsel not proven based in part of the fact the defense experts did not connect defendant's mental deficiencies to the crime itself or explain how the deficiencies would have affected the defendant's actions at the time of the murder"); *Rodgers v. State*, 3 So.3d 1127 (Fla. 2009) (upholding death sentence based on one statutory mitigator and numerous non-statutory mitigators, including "an extensive history of mental illness," were weighed against two aggravating factors); *Davis v. State*, 2 So.3d 952 (Fla. 2008) (upholding death sentence as proportionate where trial court found in mitigation that Davis suffered from both brain damage and chronic mental illness, but that there was no evidence that the murder was the result of emotional disturbance or severe mental illness) *Rutherford v. State*, 727 So.2d 216, 224 (Fla. 1998) (finding mental health testimony to be of limited mitigating value where experts failed to connect the defendant's deficiencies to the murder). Under these circumstances, the additional non-statutory mitigation Ault suggests counsel should have offered in no manner undermines confidence in the death sentences imposed and summary denial of relief is appropriate.

(f) Failure to present defense evidence of low IQ independent of the State's expert. Ault maintains that penalty phase counsel should have presented evidence of Ault's low IQ independent of Dr. Bourg-Carter's testimony presented by the

State which reported Ault's full scale IQ score of 80 which fell within the "low average to borderline range." He suggests that having failed to present evidence of low IQ to the jury through Dr. Eisenstein,³⁹ confidence in the sentence is undermined. Inexplicably, Ault asserts that counsel should have investigated Ault's IQ to prove exactly what the State's expert reported, i.e., low average/borderline IQ, and what this Court determined should have been found by the trial court as proven mitigation. (IB 65). This claim was pled in legally insufficient terms below and on appeal fails to set forth trial court error or anything more than a conclusory claim. See *Doorbal*, 983 So.2d at 482; *Duest*, 555 So.2d at 852; *Shere*, 742 So.2d at 217 n.6 (requiring appellate to present arguments explaining why trial court erred).

As the trial court found, the claim was pled in legally insufficient terms as Ault did not inform the trial court what IQ results his defense expert would have reported. Other than saying there is information, Ault did not identify how that information quantitatively or qualitatively differed from that provided by Dr. Bourg-Carter. It is well settled that counsel does not render ineffective assistance by not placing before the

³⁹ Although below, Ault pointed to Dr. Krop as having information of IQ and suggested he may be intellectually disabled, Ault has not pointed to that doctor or intellectual disability here. As such, those allegations should be considered abandoned.

jury cumulative evidence such as Ault attempted to do here, i.e., get a defense expert to confirm what Dr. Bourg-Carter found. See *Rutherford v. State*, 727 So. 2d 216, 225 (Fla. 1998) (finding additional evidence offered on postconviction was cumulative to that presented during penalty phase, thus, ineffective assistance claim was denied properly); *Van Poyck v. State*, 694 So.2d 686 692-94 (Fla. 1997) (finding defendant failed to prove ineffectiveness where mitigation argued for on postconviction was, in large measure, presented to the jury); *Woods v. State*, 531 So.2d 79, 82 (Fla. 1988) (reasoning "jury, however, heard about Woods' [psychological] problems, and the testimony now advanced, while possibly more detailed than that presented at sentencing, is, essentially, just cumulative to the prior testimony. More is not necessarily better."); *Card v. State*, 497 So.2d 1169, 1176-77 (Fla. 1986) (holding counsel not ineffective for failure to present cumulative evidence).

Deficient performance has not be shown because penalty phase counsel was aware of Dr. Bourg-Carter's testimony (2007-ROA at 1037, 1137-38) and used that testimony in support of mitigation. (2007-ROA.4 604). Polay was not deficient merely because the trial court rejected the low IQ as mitigation. Likewise, Polay should not be declared deficient merely because he was resourceful and able to use the State's witness to

support a mitigating factor.⁴⁰

No *Strickland* prejudice has been shown to arise from Polay's performance. As this Court provided:

With respect to those claims alleging ineffective assistance of counsel specifically during the penalty phase, penalty-phase prejudice under the *Strickland* standard is measured by "whether the error of trial counsel undermines this Court's confidence in the sentence of death when viewed in the context of the penalty phase evidence and the mitigators and aggravators found by the trial court." *Hurst*, 18 So.3d at 1013. Under this standard, a defendant is not required "to show 'that counsel's deficient conduct more likely than not altered the outcome' of his penalty proceeding, but rather that he establish 'a probability sufficient to undermine confidence in [that] outcome.'" *Porter v. McCollum*, 558 U.S. 30, 44, 130 S.Ct. 447, 175 L.Ed.2d 398 (2009) (quoting *Strickland*, 466 U.S. at 693-94, 104 S.Ct. 2052). "To assess that probability, [the Court] consider[s] 'the totality of the available mitigation evidence ...' and 'reweigh[s] it against the evidence in aggravation.'" *Id.* at 41, 130 S.Ct. 447 (quoting *Williams v. Taylor*, 529 U.S. 362, 397-98, 120 S.Ct. 1495, 146 L.Ed.2d 389 (2000)).

Wheeler v. State, 124 So.3d 865, 873 (Fla. 2013) Based on this Court's determination on direct appeal that the sentencing court's rejection of the low IQ mitigator was harmless error, *Strickland* prejudice cannot be shown. Confidence in the sentence is not undermined where that erroneously rejected mitigator has been reviewed previously and determined beyond a reasonable

⁴⁰ It might be argued that an expert, independent of the defense, offering defense beneficial evidence may carry more weight with the jury. As such, allowing the State's expert to supply mitigation cannot be seen as ineffective assistance. Quite the contrary, allowing the State to make the defense's case for it may be seen as good strategy.

doubt that its rejection did not contribute to the death sentence.

As quoted previously:

The court further determined that the single aggravator of the murders being especially heinous, atrocious, or cruel was of such a magnitude as to overwhelm the mitigators. In this context, even if each of the rejected factors had been found by the trial court (and it is not certain that the court would have found some of those factors even if it had conducted the proper analysis), we find no reasonable possibility that Ault would have received a different sentence. See *DiGuilio*, 491 So.2d at 1138. In light of the extensive aggravating circumstances in this case, we find that any error was harmless beyond a reasonable doubt.

Ault II, 53 So.3d at 196. Confidence in the sentence has not been undermined as the rejected low IQ mitigator was found not to have contributed to the death sentence.⁴¹ This Court should find that neither *Strickland* deficiency nor prejudice have been established and deny relief summarily.

⁴¹ Moreover, given the pleading deficiencies, the findings by the trial court that Dr. Eisenstein lacked credibility, and this Court's treatment of the IQ issue from the 2007 resentencing, Ault has failed to prove that counsel was deficient in not pursuing further IQ testing.

CONCLUSION

Based upon the foregoing, the State requests respectfully this Court affirm the denial of postconviction relief.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by electronic mail through the e-portal to: Young T. Tindal, Esq., at yttnlaw@gmail.com this 8th day of June, 2015.

CERTIFICATE OF FONT COMPLIANCE

I HEREBY CERTIFY that the size and style of type used in this brief is 12-point Courier New, in compliance with Fla. R. App. P. 9.210(a)(2).

Respectfully submitted,

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