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IN THE SUPREME COURT OF FLORIDA

HOWARD AULT

Appellant,

vs.

STATE OF FLORIDA,

Appellee.
_____/

FLORIDA SUPREME COURT
CASE NO: SC14-1551

L.T. CASE NO.: 96-21248 CF10A

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APPELLANTS INITIAL BRIEF

ON APPEAL FROM AN ORDER DENYING APPELLANTS MOTION FOR POST CONVICTION RELIEF AND AMENDED MOTION FOR POST CONVICTION RELIEF AFTER EVIDENTIARY HEARING

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STATEMENT OF THE CASE

On November 20, 1996, Mr. Ault was charged by Indictment with two counts of First Degree Murder, two counts of Kidnapping, and two counts of Aggravated Child Abuse. (R. 3/508).[1] During the guilt phase, Attorney Kevin J. Kulick represented Mr. Ault. (Id. at 509). During opening statement to the jury, Attorney Kulick made numerous admissions, statements and concessions, all extremely prejudicial to Mr. Ault. (2000-ROA, 1434-1480).[2] The State objected to many of the damaging statements on the basis of admissibility, and the court sustained the objections. (2000-ROA, 1464). Also, of the ten (10) State witnesses presented, Attorney Kulick cross-examined only one. (2000-ROA, 1464). At the close of the State's case, the defense rested without presenting any evidence. Ault v. State, 866 So.2d 674, 678 (Fla. 2003). On August 11, 1999, a jury found Mr. Ault guilty as charged. (R. 3/508).

During the 1999 penalty phase, Mr. Ault was represented by Attorney Melodee A. Smith. Id. This proceeding was Ms. Smith's first capital trial. (R. 4/544). Attorney Smith called the following witnesses: Dr. Hyman Eisenstein (Dr. Eisenstein), Gilbert Raiford, Dr. Ted Shaw, Edward Matson, and Barbara Matson.

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[1] References to the record on appeal are in the format (R. Volume Number/Page Number).

[2] References to the direct appeal record from the original trial and sentencing are in the format (2000-ROA, Page Number).

(2000-ROA, 2240-2534). Dr. Eisenstein, a neuropsychologist, testified that a neuropsychologist studies and assesses brain functioning and human cognitive ability. (2000-ROA, 2318).[3] He informed the jury that prior to testifying, he reviewed multiple pieces of evidence relating to Mr. Ault.[4] In addition, he conducted hours of interviews with Mr. Ault and his mother, as well as numerous tests. (2000-ROA, 2329).

Dr. Eisenstein was of the opinion that Mr. Ault showed the greatest area of impairment in his frontal lobe skills; that he lacks the ability to make decisions, particularly, complex decisions; and that he demonstrated moderate to severe organic brain damage. (Id. at 2332-33). Dr. Eisenstein also testified that in the process of making right and wrong decisions, most people have certain brain thinking capacities. Mr. Ault lacks these capacities. (Id. at 2335). The doctor gave an opinion that Mr. Ault's ability to conform his conduct to the requirements of law was substantially impaired. (Id.). He also testified that Mr. Ault does not have the capacity to make things up that would alter the tests, and that Mr. Ault did not fake the results. (Id. at 2336). It was Dr. Eisenstein's opinion that Mr. Ault showed

[3] Dr. Eisenstein is also a forensic psychologist. (Id. at 2320).

[4] Dr. Eisenstein testified that he reviewed police reports; Department of Corrections psychological and psychiatric records; reports of other doctors; materials from other doctors; records from 5th Street Counseling Service; letters from Mr. Ault's mother; Mr. Ault's statement to the police, the psychological test data of Dr. Sherri Bourge-Carter, and he interviewed Mr. Ault's mother. (Id. at 2352-2357).

poor planning in committing the crimes, that he is genuine in his response to questions and testing, and feels horrific about what happened. (Id. at 2337-2338). Dr. Eisenstein's review of materials, as well as the time he spent with Mr. Ault, was comparable to that of the State's witness, Dr. Sherrie Bourge-Carter (Dr. Carter). (Id.).

In rebuttal, the State called Dr. Carter. (2007-ROA, 1138-1212). During the direct examination of Dr. Carter by the State, she discussed, at great length, how her testing indicated Mr. Ault suffered from severe psychopathy.[5] (Id.). She further stated that psychopathy is not a major illness; that people suffering from it have reasonable control over their actions; they show no remorse; and they are not mentally ill. Id. On cross-examination, Dr. Carter testified that Mr. Ault is able to control his behavior, even with this extreme impairment. (Id.). She further testified that she does not consider Mr. Ault to have organic brain damage. (Id.).

At the conclusion of the penalty phase, the jury recommended a death sentence by a vote of 9-3. (Id. at 2928-2932) The Court sentenced the Defendant to death for the capital offenses, life without parole for the kidnappings, and a period of incarceration for the remaining charges. (Id. at 2936-2974). Mr. Ault appealed. (Id.) The Florida Supreme Court affirmed his convictions, but vacated his death

[5] Dr. Carter determined that Mr. Ault's score on a test developed for psychopathy indicated that he fell in the range of "severe psychopath, "indicative of an extremely dangerous person for which treatment does nothing for it except as research studies have found makes them better psychopaths." (Id.)

sentence, remanding for a new penalty phase. Ault, 866 So.2d at 683-88. In its opinion, the Court recited the factual background of the case at pages 677-78, as follows:

> Howard Steven Ault was charged with two counts of first-degree murder in the deaths of the two young sisters, eleven–year-old (DM) 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 kidnapping 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 the 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 convenient 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 said 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. Ault stated 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 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 Sheriff's Department, arrested Ault on the 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, 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 investigations 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 the attic. Ault said 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 he would go to jail for at

> least twenty-five years. He also stated 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 the 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 right's 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.

On remand for a new penalty phase, Attorney Mitchell Polay was appointed to represent Mr. Ault. (R. 3/513). In Mr. Ault's defense, Mr. Polay presented the testimony of Dr. David Kramer (Dr. Kramer), Dr. David Ross (Dr. Ross), and Robert Buckley, a private investigator.[6]

Dr. Kramer, a clinical psychiatrist, on direct examination, gave an opinion that at the time of the offense Mr. Ault was under the influence of extreme mental

[6] He testified that he spoke to Mr. Ault's mother, Barbara Madson. She advised him she did not want to appear to testify at the penalty phase. Ms. Madson told Mr. Buckley that she was aware of Mr. Ault's molestation by his brother, and she didn't report it because things like that were not spoken about back then. Mr. Buckley also did a background investigation with respect to Mr. Ault's family.

or emotional disturbance, and had previously received insufficient treatment for his problems (2007-ROA, 1062-65).[7]On cross-examination, the State elicited testimony from Dr. Kramer indicating that the first time he met Mr. Ault was the week before the trial, and that he met with him for a total of two hours. (Id. at 1072-1073). Dr. Kramer conceded he did not look at any records regarding the offense.[8] (Id. at 1073). He also testified that the sole basis for his opinion was what Mr. Ault reported to him, and what was reported to other doctors. (Id.)

Dr. Ross examined Mr. Ault after ordering an EEG scan and PET scan. (Id. at 1106-1127). In his medical opinion, the EEG revealed deficiencies in the frontal and temporal lobes of Mr. Ault's brain. (Id. at 1108).[9] He further indicated that the PET scan revealed reduced metabolism in the frontal and temporal cortices. (Id. at 1111). Dr. Ross testified that most people function with this type of abnormal brain injury, and the only time a breakdown occurs is under a given set of stressful circumstances. (Id. at 1126).

The State then offered the 1999 rebuttal testimony of Dr. Carter, to be read into the record. (Id. at 1137-38). At sidebar, Mr. Polay indicated he had read the

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[7] References to the direct appeal record from the resentencing are in the format (2007-ROA, Page Number).

[8] Dr. Kramer did not review any police reports, photographs, statements of witnesses, reports of Mr. Ault's family members, reports of previous offenses alleged to have been committed by Mr. Ault, or Mr. Ault's statement to the police (written or videotaped). (Id.)

[9] The frontal cortices normally control judgment and impulses, and the temporal cortices control emotion and memory. (2007-ROA, 1112-13).

transcript of Dr. Carter, and that his only objection is that "it's a violation of Crawford." (Id.). The court acknowledged Mr. Polay's objection, and responded by saying, "I mean obviously she was cross-examined. This was in trial. Things of that nature, okay." (Id.). Without further argument as to his Crawford objection, the former testimony of Dr. Carter was read into the 2007 penalty phase. (Id.). Neither the court, nor Mr. Polay, asked Mr. Ault if the procedure was acceptable to him, and if he understood Dr. Carter would not be cross-examined.

At the conclusion of the penalty phase, the jury recommended a sentence of death for each of the two capital counts of first-degree murder.[10] (R. 4/513). After a Spencer hearing, the court sentenced Mr. Ault to death on both murder charges. (Id.). When imposing its sentence, the court found six aggravating circumstances, no statutory mitigating circumstances, and three non-statutory mitigating circumstances. (R. 5/822).

Mr. Ault then appealed the 2007 sentence imposed by the trial judge. (R. 4/513). Although the Florida Supreme Court found that the trial court erred in rejecting the proposed statutory mitigating circumstances of 1) brain damage; 2) adjustment to life in prison; 3) low IQ; 4) acceptance of responsibility; 5) remorse; and 6) pedophilia, the death sentences were affirmed. Ault v. State, 53 So.3d 175 (Fla. 2011). Thereafter, Mr. Ault sought certiorari review in the United States

[10] The jury recommended death sentences by a vote of 9-3 for one murder charge, and 10-2 for the other murder charge.

Supreme Court and was denied review on October 3, 2011. Ault v. Florida, 132 S. Ct. 224 (2011).

On September 18, 2012, the Defendant filed a timely Motion to Vacate his Judgment and Sentence, pursuant to Rule 3.851.[11] (R. 2/291). An amendment to that motion was filed on July 19, 2013.[12] (R. 3/507). On October 18, 2013, the Court granted an evidentiary hearing as to claim three of Defendant's amended motion, and denied an evidentiary hearing as to claims one, two, and four.[13] (R. 4/625-26). At the evidentiary hearing, on January 14, 2014, the court heard testimony from Dr. Carter, Don Carpenter, and Attorney Polay. (R. 5/647-785).

Dr. Carter testified that she is a clinical psychologist, with a specialization in forensic psychology. (R. 5/675-761). She confirmed that she had testified during the 1999 penalty phase, but had not testified during the 2007 penalty phase. (Id.).

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[11] Defendant raised the following ineffective assistance of counsel claims in his initial 3.851 motion: (1) Trial counsel failed to effectively challenge the State's penalty phase evidence; (2) Trial counsel failed to raise or discuss non-statutory mental health mitigations; (3) Trial counsel failed to investigate Mr. Ault's low IQ; and (4) Trial counsel failed to prepare a defense witness. (R. 2/311).

[12] Defendant raised the following ineffective assistance of counsel claims in his amended 3.851 motion: (1) Trial counsel failed to provide a meaningful and constitutionally adequate defense; (2) Trial counsel failed to move the court to dismiss the action based on Mr. Ault's demands for speedy trial; (3) Trial counsel failed to effectively challenge the State's penalty phase evidence; (4) Trial counsel failed to raise or discuss non-statutory mental health mitigations; and (5) Trial counsel failed to investigate Mr. Ault's low IQ. (R. 5/507-55).

[13] In its Order Granting An Evidentiary Hearing, the court noted that claim three of the amended motion included, "the argument previously raised in Defendant's original sworn motion, as claim one…" (R. 4/626).

She explained that she had not testified during the 2007 penalty phase because she was having health issues at the time, but confirmed that if given accommodation as to the scheduling of her testimony, she could have been present to testify in person. (Id.). When Dr. Carter was asked if she had discussed this case with Mr. Polay prior to the 2007 penalty phase, she responded, "no, I don't see any record of having a conversation with Mr. Polay." (Id.).

During the 1999 penalty phase, Dr. Carter was of the opinion that Mr. Ault suffered from psychopathy, as well as an anti-social personality disorder. (Id.). When Dr. Carter gave her testimony in 1999 she was not privy to, nor confronted with, the objective medical evidence presented by Dr. Ross in the 2007 penalty phase, indicating that Mr. Ault suffered organic brain damage. (Id.). When questioned about the materials she reviewed prior to testifying in the 2014 evidentiary hearing, those materials included her former 1999 testimony, and the testimony of both Dr. Ross and Dr. Kramer. (Id.).

To understand the diagnosis Dr. Carter gave Mr. Ault, undersigned counsel elicited testimony from Dr. Carter relating to diagnoses listed in the DSM-IV, specifically with regard to whether organic brain damage and psychopathy are listed therein. [14] (Id.). Dr. Carter gave testimony describing organic brain damage

[14] The DSM-IV is a diagnostic and statistical manual for psychiatric and psychological disorders. (R. 5/735). Psychopathy is not a recognize diagnosis in the DSM-IV. (R. 5/735-37).

to be more of a medical condition with psychological implications, rather than a diagnosis. (Id.). When asked if she would agree that a neurologist, like Dr. Ross, would have more knowledge of what effect the organic brain damage had on Mr. Ault, than herself, she replied, "no," but then went on to admit that she is not qualified to evaluate the extent of brain damage a person may have; that is a determination made by a neuropsychologist or neurologist, such as Dr. Ross or Dr. Eisenstein. (Id.).

When asked specifically about the opinions given by Dr. Ross, regarding the PET and EEG results he interpreted, Dr. Carter testified that Dr. Ross indicated Mr. Ault suffered deficiencies in the functioning of his frontal and temporal areas. (Id.). She testified that the area where Dr. Ross opined Mr. Ault suffered deficiencies had to do with emotion. (Id.). She also indicated that those damaged areas affect analytical thinking, planning abilities, and executive functioning. (Id.). When asked if she agreed with Dr. Ross that the organic brain deficiencies Mr. Ault suffered would result in problems with judgment, impulse control, and emotions, she agreed. (Id.). Dr. Carter admitted that some of the opinions she gave about Mr. Ault could be attributable to his organic brain issues. (Id.). Dr. Carter also conceded that Dr. Ross' finding of organic brain damage confirmed the testimony of neuropsychologist, Dr. Eisenstein, in the 1999 penalty phase. (Id.).

Counsel also asked Dr. Carter if she ever diagnosed Mr. Ault with

psychopathy, and she stated she had not (*emphasis added*).[15] (Id.). She testified that psychopathy is not a diagnosis listed in the DSM-IV, and described it as being "the most severe type of anti-social disorder and more." (Id.). On cross-examination, Dr. Carter stated that the psychopathy she was speaking about during the 1999 penalty phase was the result of the various tests she had performed on Mr. Ault. (Id.). She then told the court that, "psychopathy is Mr. Ault's primary diagnosis, along with pedophilia and an anti-social personality." (Id.). When asked to explain how her findings took organic brain damage into consideration, she explained there was no evidence in any evaluation of Mr. Ault presenting any significant organic brain damage, or it would have been manifested in his presentation to her during their meetings and through the testing. (Id.).

On re-direct examination, Dr. Carter indicated that prior to giving her testimony in 1999, she was aware of certain facts.[16] (Id.). When asked by current defense counsel if a person with normal logical ability would know that they are going to be the first person looked at if something happened to these girls, Dr.

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[15] It should be noted that during the 1999 penalty phase, Dr. Carter did in fact diagnose Mr. Ault with Psychopathy. (R. 4/543-44).

[16] Such as the fact that Mr. Ault was on community control at the time of the incident; that Mr. Ault was a registered sex offender; that a park worker told the mother of the two victims they should not associate with Mr. Ault; that someone notified the police that Mr. Ault had been seen at a corner store with small children; and that the defendant had given the mother of the victims his address, all prior to the incident.

Carter answered "yes," and went on to say, "there is something wrong about his thinking….He's a psychopath. That's his primary problem." (Id.).

Attorney Mitchell Polay, Mr. Ault's 2007 penalty phase counsel, also testified at the evidentiary hearing. (R. 5/761-771). Mr. Polay stated that he has been an attorney in Florida since 1986, practicing in the area of criminal law. (Id.). He was appointed as counsel for Mr. Ault sometime in 2005 or 2006, a few years prior to the trial on the second penalty phase in 2007. (Id.). When questioned about his preparation as it related to the State's only rebuttal witness, Dr. Carter, Mr. Polay admitted knowing that Dr. Carter had been a witness in this case, and stated that he had the opportunity to go through her previous testimony. (Id.). Mr. Polay could not recall whether he ever deposed her, or whether he prepared a cross-examination for her. (Id.). He recalled speaking with Dr. Carter prior to the 2007 penalty phase, but could not be sure, stating:

> "[H]ere's the issue, I've spoken to Dr. Bourg Carter on other cases I can't remember specifically, you know, speaking with her on this case. I might have, I might not have." (*emphasis added*). (Id. at 763).

When questioned about his decision to allow Dr. Carter's former testimony to be read into the record, as opposed to having her appear for cross-examination at the 2007 penalty phase, Mr. Polay explained that, "given her testimony…coupled with the facts of the case, which were pretty horrific…my feeling was that the reading of the cold record would be something to Mr. Ault's benefit rather than

have Sherrie Bourg Carter testify with an inflection and emotion in front of the jury." (Id. at 5/761-771). Mr. Polay admitted that when the decision to read Dr. Carter's former testimony was made, he does not recall ever asking Mr. Ault what his feelings were on the issue, or if Mr. Ault preferred Dr. Carter's in person appearance for the purpose of cross-examination. (Id.).

Upon further questioning, by current counsel, as to why Mr. Polay had not objected to the reading of Dr. Carter's former testimony, the following dialogue took place:

> **Q**: Okay. Let me just…so we don't have any misunderstanding. Did you agree to her testimony being read or did you not agree with it being read?
>
> **A**: Sir, you read the record.
>
> **Q**: Other than Crawford?
>
> **A**: Sir, you read the record.
>
> **Q**: Whatever the record says it is?
>
> **A**: Did you see me object? There's an objection on the record. But I'll tell you this, if I had the opportunity to do it again, I would rather have (*emphasis added*)…I thought it would inure to Mr. Ault's benefit to have the cold record read in front of the jury rather than have Dr. Bourg Carter testify with emotion and inflection in front of the jury. (Id. at 764-65).

On cross-examination, Mr. Polay went on to say that Dr. Carter's former testimony was damaging to Mr. Ault's case. He explained that he "would rather have a cold record than have Dr. Carter, you know, testify. Because, in effect,

what she said in her testimony, if you read between the lines, is that Mr. Ault was the devil, incarnate." (Id. at 770). Mr. Polay chose not to confront Dr. Carter with the objective medical evidence presented by Mr. Ault's defense witnesses, Dr. Kramer and Dr. Ross. (Id. at 761-771).

Don Carpenter, a private investigator with nearly forty (40) years experience in criminal matters, testified that he is familiar with files managed and maintained by defense attorneys handling capital cases. (R. 5/771-775). He testified that upon being hired by current defense counsel, he was asked to review all the files maintained by the Defendant's previous attorneys, specifically, those prepared and maintained by Mr. Polay. (Id.). When asked what he found in the files to indicate Attorney Polay's preparation for the questioning of Dr. Carter, Mr. Carpenter testified that he found nothing to indicate any such preparation had taken place. (Id.). Mr. Carpenter stated that he found a copy of Dr. Carter's 1999 penalty phase testimony, but nothing more. (Id.). According to his observation, the transcript of Dr. Carter's testimony was in pristine condition, with no notes, highlights, or folded pages. (Id.).

In its Order Denying Defendant's Sworn Motion to Vacate Judgment and Sentence, and Amended Motion to Vacate Judgment and Sentence, the trial court made the following rulings: (1) Mr. Polay's failure to object to the reading of Dr. Carters testimony into the 2007 penalty phase, was a well-reasoned strategic

decision[17]; (2) There was no prejudice to the Defendant as a result of Attorney Polay failing to raise specific non-statutory mental health mitigation during the 2007 penalty phase[18]; (3) Mr. Ault's claim that counsel was ineffective for failing to investigate his low IQ is legally insufficient as plead, and refuted by the record[19]; (4) There was no deficiency on the part of Mr. Polay, and no prejudice to the Defendant, for Attorney Polay failing to prepare psychiatrist, Dr. David Kramer, for trial[20]; (5) Mr. Ault's claim that Attorney Kulick made unnecessary admission and concessions in the opening, failed to cross-examine witnesses, and failed to investigate defenses during the 1999 guilt phase, is legally insufficient, refuted by the record, and the Defendant was not prejudiced[21]; (6) Attorney Kulick's failure to pursue a dismissal of the charges, based upon the demands for speedy trial filed by the Defendant, is legally insufficient, refuted by the record, and without merit[22]; and finally (7) that Mr. Polay's failure to raise or discuss mental health mitigation did not prejudice the Defendant, because to the extent that

[17] The court noted that this is claim 1 of Defendant's initial 3.851 Motion, and is claim 3 of Defendant's amended 3.851 Motion.
[18] The court noted that this is claim 2 of Defendant's initial 3.851 Motion.
[19] The court noted that this is claim 3 of Defendant's initial 3.851 Motion, and is claim 5 of Defendant's amended 3.851 Motion.
[20] The court noted that this is claim 4 of Defendant's initial 3.851 Motion.
[21] The court noted that this is claim 1 of Defendant's amended 3.851 Motion.
[22] The court noted that this is claim 2 of Defendant's amended 3.851 Motion.

Attorney Polay could have found additional mental health witnesses, the Defendant would still not be entitled to relief on this claim.[23] (Id. at 821-838).

[23] The court noted that this is claim 4 of Defendant's amended 3.851 Motion, and is substantially that same argument of claim 2 of Defendant's initial 3.851 Motion.

SUMMARY OF ARGUMENT

Pursuant to the laws of the United States, defendants to a criminal proceeding are entitled to effective assistance of counsel at all crucial stages of a criminal proceeding, and to due process under the law. U.S. Const. amend VI; U.S. Const. amend XIV. Where the defendant feels his right to effective assistance of counsel has been impeded, he must show that: (1) defense counsel's performance fell below an objective standard of reasonableness and (2) counsel's deficient performance prejudiced the defendant. Strickland v. Washington, 466 U.S. 668, 694 (1984). In order to prevail on an ineffective assistance of counsel claim, a defendant must prove both prongs.[24] Id.

Embodied within the laws, guaranteeing effective assistance of counsel, are professional norms, and standards, that all attorneys are required to meet. Id. When considering professional norms in a criminal matter, this Court has emphasized the importance of trial preparation, holding that "one of the primary duties defense counsel owes to his client is the duty to prepare himself adequately prior to trial." State v. Fitzpatrick, 118 So.3d 737, 752 (Fla. 2013).

[24] When adjudicating a claim of ineffective assistance of counsel, the focus is to be placed upon the fundamental fairness of the proceeding. In such cases, a court should concern itself with whether the result of the particular proceeding is unreliable because of a breakdown in the adversarial process. Strickland, 466 U.S. at 694.

Because ineffective assistance of counsel claims present a mixed question of law and fact, these claims are subject to plenary review. Strickland, 466 U.S. at 698; Stephens v. State, 748 So.2d 1028, 1032 (Fla. 1999). As a result, this Court is required to give deference to the lower courts finding of fact, but to review all legal conclusions de novo. Alcorn v. State, 121 So.3d 419, 425 (Fla. 2013). When considering the facts in the instant case, as evidenced by the trial court and the record on appeal, it is clear that the legal conclusions arrived at by the trial judge are erroneous.

In the case at bar, Mr. Ault asserts that his convictions and sentences are unreliable, and in violation of the Fifth, Sixth, Eight, and Fourteenth amendments to the United States Constitution, because he was denied effective assistance of trial counsel. Mr. Ault argues that the performances of his trial counsel fell far below any objective standard of reasonableness because: (1) during the 1999 guilt phase, Attorney Kevin Kulick failed to provide Mr. Ault with a meaningful and constitutionally adequate defense; and (2) during the 2007 penalty phase, Attorney Mitchell Polay failed to challenge the State's penalty phase evidence; failed to prepare for trial; failed to prepare and to present a case of mental health mitigation; failed to raise or discuss non-statutory mental health mitigation before the trial court at sentencing; and failed to investigate Mr. Ault's low IQ. These acts and omissions of Mr. Ault's defense counsel evidence how deficient their performance

was, and substantiates Mr. Ault's claim that there was a breakdown in the adversarial testing process.

Furthermore, Mr. Ault asserts that he was prejudiced by his defense counsel's deficient performance, during both phases of trial. Had Mr. Kulick made an attempt to uncover and offer evidence in Mr. Ault's defense, or had he made an attempt to put together a meaningful defense during the 1999 guilt phase, there is a reasonable probability that the jury would have reached a different conclusion as to guilt; found Mr. Ault guilty of a lesser offense; or would have recommended life sentences as opposed to a sentences of death. Moreover, had Mr. Polay, at the retrial of the penalty phase, effectively challenged the State's penalty phase evidence; prepared for trial; prepared and presented a case of mental health mitigation; raised or discussed non-statutory mental health mitigation before the trial court at sentencing; and investigated Mr. Ault's low IQ, there is a reasonable probability that the jury would have recommended life sentences as opposed to sentences of death.

The record is replete with evidence indicating that the 1999 verdict, and 2007 death sentences, are unreliable as a result of the breakdown in the adversarial process, stemming from the ineffective assistance Attorney Kulick rendered to Mr. Ault during the 1999 guilt phase, and the ineffective assistance Attorney Polay

rendered to Mr. Ault during the 2007 penalty phase. Our system of justice demands that Mr. Ault's case be remanded to the trial court for a new trial.

STANDARD OF APPELLATE REVIEW

Ineffective assistance of counsel claims present a mixed question of law and fact, subject to plenary review. Strickland, 466 U.S. at 698; see also Stephens, 748 So.2d at 1032; Alcorn, 121 So.3d at 425. On appeal, this Court is required to defer to the trial court's findings of fact, but must review the trial court's legal conclusions de novo. Alcorn, 121 So.3d at 426 (In reviewing a trial court's ruling after an evidentiary hearing on an ineffective assistance of counsel claim, this Court defers to the factual findings of the trial court to the extent that they are supported by competent, substantial evidence, but reviews de novo the application of the law to those facts.); citing Mungin v. State, 932 So.2d 986, 998 (Fla. 2006); see also Strickland 466 U.S. at 698; Henry v. State, 948 So.2d 609, 616 (Fla. 2006); Cave v. State, 899 So.2d 1042, 1052 (Fla. 2005); Bruno v. State, 807 So.2d 55, 62 (Fla. 2001).

ARGUMENT

I. WHETHER MR. AULT WAS DENIED EFFECTIVE ASSISTANCE OF COUNSEL WHEN DURING THE 1999 GUILT PHASE, TRIAL COUNSEL FAILED TO PRESENT A DEFENSE, AND DURING THE 2007 PENALTY PHASE, TRIAL COUNSEL FAILED TO CHALLENGE THE STATE'S PENALTY PHASE EVIDENCE; FAILED TO PREPARE FOR TRIAL; FAILED TO PREPARE AND PRESENT A CASE OF MENTAL HEALTH MITIGATION; FAILED TO RAISE OR DISCUSS NONSTATUTORY MENTAL HEALTH MITIGATION; AND, FAILED TO INVESTIGATE MR. AULT'S LOW IQ, THEREBY RESULTING IN PREJUDICE UPON THE DEFENDANT.

The Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution, as well as, Article 1, Sections 9 and 16 of the Florida Constitution, guarantee, to the accused, a right to the effective assistance of counsel. "The right to counsel plays a crucial role in the adversarial system…as defense counsel assumes the role of ensuring that the accused is given a fair trial." Strickland, 466 U.S. at 685-86. In that regard, an attorney's skill and knowledge are tools used to advance the ability of our adversarial system to produce just results. Id. For these reasons, courts have recognized that "the right to counsel is the right to effective assistance of counsel." Id.; Stephens, 748 So.2d at 1033-34.

The standard for determining claims of ineffective assistance of counsel was set forth by the United States Supreme Court in Strickland. To prevail on a claim for ineffective assistance of counsel, a defendant must establish that: 1) defense

counsel's performance was deficient[25], and 2) as a result of defense counsel's deficient performance, the defendant was prejudiced[26]. Strickland, 466 U.S. at 687-88. Defendant is required to establish both prongs in order to succeed on an ineffective assistance of counsel claim. Id.

Our laws make it abundantly clear that Mr. Ault was entitled to effective assistance of counsel throughout the entire adversarial process, as attorneys have a "duty to bring to bear such skill and knowledge as will render the trial a reliable adversarial testing process." Id. at 688. The Defendant's fundamental right to competent counsel is so etched in our system of justice, that even a single error can amount to ineffective assistance of counsel. Kimmelman v. Morrison, 477 U.S. 365, 383 (1986) (Where the basis of the error is of a constitutional dimension, a single error can amount to ineffective assistance of counsel.); see also Nero v. Blackburn, 597 F.2d 991, 994 (5th Cir. 1979).

a. DEFENSE COUNSEL'S PERFORMANCE WAS DEFICIENT.

The performance of Mr. Ault's guilt phase, and penalty phase, counsel was so deficient, it is clear that they were not functioning as the "counsel" guaranteed

[25] Performance is deficient where it falls below an objective standard of reasonableness, defined by case law and professional norms. Strickland, 466 U.S. at 688.

[26] Where there is a reasonable probability that but for counsel's unprofessional errors the outcome of the proceedings would have been different, the defendant has met the requirements of the second prong. A reasonable probability is a probability sufficient to undermine confidence in the outcome. Strickland, 466 U.S. at 694.

by the United States Constitution. To establish the first prong under the Strickland test, defendant is required to show that counsel's representation fell below an objective standard of reasonableness. Strickland, 466 U.S. at 688. This first prong is directly linked to the practice and expectations of the legal community, and requires the defendant to overcome a strong presumption that, under the circumstances, the challenged action(s) might be considered sound strategy. Id.; see also Padilla v. Kentucky, 559 U.S. 356, 366-67 (2010). The following acts and omissions of Mr. Ault's defense counsel evidence how deficient his performance was, and substantiates Mr. Ault's claim that there was a breakdown in the adversarial testing process during his 1999 guilt phase, and 2007 penalty phase.

1. Mr. Kulick's Peformance Was Deficient Because He Failed To Provide Mr. Ault With A Meaningful And Constitutionally Adequate Defense.

The United States Supreme Court has determined that counsel has " a duty to bring to bear such skill and knowledge as will render the trial a reliable testing process." Strickland, 466 U.S. at 688. Strickland requires a defendant to plead and demonstrate (1) reasonable attorney performance, and (2) prejudice. Id. at 687. Mr. Ault pleads both in this appeal. The United States Supreme Court has reaffirmed the right of a capital defendant to the effective assistance of counsel. In Wiggins, the Court emphasized the principles set forth in Strickland when it stated:

> We established the legal principles that govern claims of ineffective assistance of counsel in Strickland v. Washington, 466 U.S. 668

> (1984). An ineffective assistance claim has two components: A petitioner must show that counsel's performance was deficient, and that the deficiency prejudiced the defense. Id. at 687. To establish deficient performance, a petitioner must demonstrate that counsel's representation "fell below an objective standard of reasonableness." Wiggins v. Smith, 539 U.S. 510, 521 (2003).

Mr. Ault can establish both deficient performance and prejudice undermining the adversarial testing process at trial. Even if counsel provided effective assistance at trial in some areas, the defendant is entitled to relief if counsel provides ineffective assistance through any portion of the trial. Washington v Watkins, 655 F.2d 1346, 1355 (5th Cir. 1981); see also Kimmelman, 477 U.S. at 365. Even a single error by counsel may be sufficient to warrant relief. Nelson v Estelle, 626 F.2d 903, 906 (5th Cir. 1981). Counsel may be held ineffective due to a single error where the basis for the error is of constitutional dimension. Nero, 597 F.2d at 994 (The Court stated "[S]ometimes a single error is so substantial that it alone causes the attorney's assistance to fall below the Sixth Amendment standard."); see also Strickland, 466 U.S. 668; Kimmelman, 477 U.S. 365. Mr. Ault had the right to the effective assistance during the entire trial.

The Eight Amendment recognizes the need for increased scrutiny in the review of capital verdicts and sentences. Beck v Alabama, 477 U.S. 625 (1980). The United States Supreme Court noted that, in the context of ineffective assistance of counsel, the correct focus is on the fundamental fairness of the proceeding:

> A number of practical considerations are important for the application of the standards we have outlined. Most important, in adjudicating a claim of actual ineffectiveness of counsel, a court should keep in mind that the principles we have stated do not establish mechanical rules. Although those principles should guide the process of decision, the *ultimate focus of inquiry must be on the fundamental fairness of the proceeding whose result is being challenged*. In every case the court should be concerned with whether, despite the strong presumption of reliability, the result of the particular proceeding is unreliable because of the breakdown in the adversarial process that our system counts on to produce just results.

Strickland, 466 U.S. at 696. The evidence presented in this claim demonstrates that Mr. Ault's convictions and sentencing are unreliable.

The ineffectiveness of counsel for Mr. Ault began in the opening statement to the jury where counsel makes numerous admissions, statements and concessions extremely prejudicial to Mr. Ault. (2000-ROA, 1434-1480). These statements concede evidentiary points to the State that are never proven at trial, as well as, advised the jury that evidence of certain defenses will be presented, when counsel knew that there was no such evidence that could be presented to the jury. In effect, Mr. Ault's counsel gave away any defense he might have had in his opening statement.[27] While it is sometimes appropriate trial strategy to concede certain issues to the opposition, Mr. Ault's counsel goes way beyond acceptable trial strategy in his opening statement, and throughout the trial. Following are some of

[27] Although Mr. Ault's counsel contends a lot of what the State says will be disputed by the defense (2000-ROA, 1434), he does the opposite, and not only admits the State's case, but makes statements about evidence the defense will produce that was never, and could never, be admitted at the trial.

the examples of the unnecessary admissions and prejudicial statements made in opening for the defense:

- Although his counsel knows from the beginning that Mr. Ault is not going to testify at the trial, he tells the jury, "A lot of the evidence is going to come directly to you from the mouth of Mr. Ault," and refers to things the jury will hear from Mr. Ault. (2000-ROA, 1444).
- Counsel told the jury about prior criminal acts by Mr. Ault, and that he was on house arrest for rape and sexual battery on a child at the time the crime was committed in this case. He refers to sexual attacks on young people when discussing Mr. Ault's situation. (2000-ROA, 1443).
- He tells the jury about Mr. Ault previously attacking a 12-year-old girl a year before this crime (2000-ROA, 1446), and that Mr. Ault has a prison record. (2000-ROA, 1454).
- Mr. Ault's counsel talks to the jury at length about a previous interview given by Mr. Ault to a newspaper reporter (2000-ROA, 1449 -1464), knowing that the interview would not be admissible, particularly since the reporter was never called as a witness, and there was never an intent to have Mr. Ault take the witness stand. The statements are about Mr. Ault committing the crimes in this case, molesting children at other times and why he does it. Toward the end of these extremely damaging statements, the

State Attorney objects, pointing out that all these statements are inadmissible (2000-ROA, 1464). Even though the Court sustains the objection unless Mr. Ault is going to testify, Attorney Kulick continued his opening with further statements about the interview.

- Mr. Kulick told the jury there would be evidence of Mr. Ault being borderline retarded, even though no such evidence was introduced at the trial or available to the defense. (2000-ROA, 1448).
- During opening argument, counsel presented a defense of voluntary intoxication to the jury. (2000-ROA, 1435) During a sidebar with the Court, counsel stated that the effect of alcohol on a mentally ill person is going to be a main feature of his defense. He talks to the jury about evidence they will hear with regard to the Defendant's alcohol abuse, such as " six months prior to the offense, he began drinking pretty heavily, " and drank " a fifth or a quart of vodka every day, and a gallon of rum on the weekend." He further told the jury that Dr. Edward Sczechowitz and Dr. Carol Wartenberg would testify about the effects of alcohol on a person with extreme mental problems like Mr. Ault. (2000-ROA, 1436). Neither witness was called by the defense, or testified at the trial, and there was little or no evidence introduced about the Defendant's use of alcohol, and none about his intoxication on the day of the offense. Finally, counsel told the jury they

would be instructed on the defense of voluntary intoxication, and that instruction was not given. (2000-ROA, 1472).

The purpose of an opening statement is to provide the jury with a preview of what you believe the evidence will show. During opening Mr. Ault's attorney made statements about numerous things that were never introduced, or presented, as evidence in the trial. He offered unnecessary admissions about evidence prejudicial to Mr. Ault that was never presented, nor could have been presented. He told the jury about defenses that were never presented. One of the purposes of opening statement is to gain credibility with the jury. For this reason, it is sometimes good strategy to admit certain things to the jury. Attorney Kulick went way beyond acceptable trial strategy, and should have let things be proven by the evidence. When you tell the jury facts and evidence will be presented, and it never comes, they tend not to believe you about anything. Mr. Kulick's presentation about things not to come tainted Mr. Ault's defense. Many social scientists believe that a case is won or lost by the time the opening statement is made. By the time the State had made their opening and it was verified, and even embellished by the defense, Mr. Ault had no chance for anything but a verdict of guilty as charged.

In addition, Attorney Kulick was ineffective in failing to cross-exam the State's witnesses. Of the ten (10) witnesses presented during the State's case, only

one was cross-examined by the defense, Detective William Rhodes.[28] There are times when it is "good trial strategy" not to question a witness,[29] particularly when they do not damage your case. However, counsel for Mr. Ault abandoned any opportunity to bring into question the testimony of all but one of the state's witnesses by his lack of cross-examination. His deficient performance contributed to the jury's inability to find a reasonable doubt as to the guilt of Mr. Ault.[30]

The defense provided Mr. Ault during the guilt phase of the 1999 trial was no defense at all, and amounted to nothing more that a "slow guilty plea." The combination of admissions made by counsel in opening statement, failure to cross-examine state's witnesses, and failure to investigate possible defenses fell far below the standard required by Strickland, and prejudiced Mr. Ault's ability to put forth a constitutionally adequate defense. Had counsel prepared and presented the case as an advocate for Mr. Ault, rather than succumbing to the prosecutions charges, Mr. Ault may have obtained a verdict of something less than guilty as charged on all offenses.

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[28] In the 1999 trial the following ten (10) witnesses were presented by the state during the guilt phase: (1) Samuel Scales; (2) Winnifred Walters; (3) James Marrazzzo; (4) Larry Joe Jackson; (5) Delois Skeete; (6) Sherry Karam; (7) Donna Jones; (8) Joy Hill; (9) William Rhodes; and (10) Dr. Lance Davis.

[29] Counsel performing according to professional norms understands that during the course of a trial, there may be a few witnesses where there is no need for a question on cross-examination.

[30] It should be noted that the defense rested, without presenting any evidence, at the close of the State's case.

2. Mr. Polay Performance Was Deficient Because He Failed To Challenge The State's Penalty Phase Evidence.

The Florida Evidence Code requires that, upon objection, former testimony must be excluded. Florida Statute §90.804. This Court has held that "the use of prior testimony is allowed only where (1) the testimony was taken in the course of a judicial proceeding; (2) the party against whom the evidence is being offered was a party to the former proceeding; (3) the issues in the case are similar to those in the case at hand; and (4) a substantial reason is shown why the original witness is not available." Holland v. State, 773 So.2d 1065, 1074 (Fla. 2000); see also State v. Abreu, 837 So.2d 400 (Fla. 2003) ("A showing of a substantial reason why an original witness is not available is a requirement to the use of former testimony.").

Furthermore, the Sixth Amendment of the United States Constitution demands that in all criminal prosecutions, the accused shall enjoy the right to be confronted with witnesses against him. Abreu, 837 So.2d at 403-04 ("A prosecutor must demonstrate a witness's unavailability prior to the admission of his former testimony, as it is constitutionally required by the confrontation clause of the Sixth Amendment."); see also Crawford v. Washington, 541 U.S. 36 (2003).

In the case at bar, Mr. Polay allowed the State to introduce Dr. Carter's former testimony, even though the State did not contend she was unavailable.[31] However, he did make a Crawford objection as to the Defendant's right to confront witnesses against him. During the 2007 penalty phase, after the defense had presented the testimony of Dr. Kramer, Dr. Ross, and Mr. Buckley, the following dialogue took place:

> **THE COURT**: I believe the State has some rebuttal.
>
> **MR. DONNELLY:** Yes, your honor. We have the transcript to read in of Dr. Sherri Bourge Carter, I'll go get the person on the stand to do that.
>
> **THE COURT**: Let me have the lawyers up here just a minute.
>
> (Thereupon, the following side bar was had outside the hearing of the jury:)
>
> **THE COURT**: You've reviewed the transcript?
>
> **MR. POLAY**: Yes, sir.
>
> **TH COURT**: There's no question as to the transcript?
>
> **MR. POLAY:** Judge, again, my only objection is that it's a violation of Crawford. It's the same objection I made before.
>
> **THE COURT:** Okay. Just for the record. I mean obviously she was cross-examined. This was in trial. Things of that nature, okay.
>
> **MR. DONNELLY:** I understand the objection's not to the

[31] The evidence in the instant case makes it clear that Dr. Carter was not unavailable to testify in the 2007 penalty phase, as required by Florida Statute Section 90.804.

unavailability of the witness, but just that its hearsay under Crawford?

MR. POLAY: Correct.

THE COURT: Okay.

MR. POLAY: Judge, I can't be – I'm aware of the health of Dr. Bourge 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.

THE COURT: The Court's aware of that, too. (ROA-2007, 1137-38).

The discussion between counsel and the court, as to whether Dr. Carter would testify in person or not, was held at sidebar, outside the presence of the Defendant. Not only was the Defendant not privy to the discussion of this important decision, the court never inquired of the Defendant on the issue. In addition, at the evidentiary hearing in 2014, Mr. Polay testified that he never discussed it with Mr. Ault.

Thereafter, during the evidentiary hearing in 2014, the following dialogue took place between the undersigned counsel and Mr. Polay:

Q: Okay. Let me just…so we don't have any misunderstanding. Did you agree to her testimony being read or did you not agree with it being read?

A: Sir, you read the record.

Q: Other than Crawford?

A: Sir, you read the record.

Q: Whatever the record says it is?

> **A**: Did you see me object? There's an objection on the record. But I'll tell you this, if I had the opportunity to do it again, I would rather have (*emphasis added*)…I thought it would inure to Mr. Ault's benefit to have the cold record read in front of the jury rather than have Dr. Bourg Carter testify with emotion and inflection in front of the jury.
>
> (R. 5/764-765).

On the one hand, Mr. Polay makes a Crawford objection, saying he has the right to confront and cross-examine the witness, but then he fails to take that opportunity by not requiring the State to call her. Had Mr. Polay reinforced Mr. Ault's right to confront the witness, Dr. Carter would have been required to appear and would have been confronted with the objective medical evidence of Mr. Ault's organic brain damage, as testified to by Dr. Ross. In addition, some of her 1999 testimony would have been kept from the jury, and the remaining testimony would have been partially discredited, as evidenced at the evidentiary hearing.

At the evidentiary hearing, Mr. Polay explained that he believed Dr. Carter's former testimony was extremely damaging to Mr. Ault's case, and his decision to have her testimony read was based on the fact that he "would rather have a cold record read than have Dr. Carter, you know…testify. Because, in effect, what she said in her testimony, if you read between the lines, is that Mr. Ault was the devil, incarnate." Mr. Polay's rationale was that having a cold record read, "inured a benefit upon the defense," as opposed to confronting a damaging State rebuttal witness with objective medical evidence she had not previously been privy to. The

court agrees with Mr. Polay, and determined that his decision to have her testimony read was a well-reasoned strategic decision.

In explaining its decision, the trial court found that Dr. Carter's availability was not at issue in this matter, as the testimony showed that if the reading of her testimony was objected to on hearsay grounds, Dr. Carter would have appeared to testify in person. The court also found Dr. Carter to be a strong witness, and determined that had she testified in 2007, her testimony would not have changed from her 1999 trial testimony, and would have been damaging to the defense. The trial court erred in its legal conclusion as it relates to both regards.

As it relates to Dr. Carter's availability, the question is not whether Dr. Carter would have appeared had Mr. Polay objected to the reading of her former testimony on hearsay grounds, but rather, whether Mr. Polay's actions and omissions, in his failure to object on hearsay grounds, caused his performance as defense counsel to be deficient. Furthermore, the appellant disagrees with the trial courts legal conclusion that Dr. Carter was a strong witness, and that her live testimony was damaging to the defense. During the cross-examination of Dr. Carter, at the 2014 evidentiary hearing, undersigned counsel was able to elicit testimony from her demonstrating that the objective medical test results, introduced during the 2007 penalty phase did, in fact, have an impact on her

former testimony, wherein she stated, "the opinions I gave about him, his diagnosis could, in part, be due to if he has brain problems…" (R. 5/724-736).

This Court is required to give deference to the lower courts findings of fact, but to review all legal conclusions de novo. When considering all the facts, as evidenced by the trial court and the record on appeal, it is clear that the legal conclusions arrived at by the trial judge were erroneous. The court determined that because the record is clear that Dr. Carter was in fact available to testify, Mr. Polay's decision to have her former testimony read into the 2007 record was one of strategy. In reaching its decision, the court relied on (1) Mr. Polay's professional experience; (2) Dr. Carter's testimony indicating that her opinions of Mr. Ault have not changed from her testimony given in 1999, even after having considered the objective medical evidence presented during the 2007 penalty phase; and (3) the overall credibility of Dr. Carter as a State rebuttal witness.

The defense asserts that Mr. Polay's failure to object to the reading of Dr. Carter's 1999 penalty phase testimony, based upon her availability, supports Mr. Ault's argument that Mr. Polay failed to provide effective assistance of counsel during the 2007 penalty phase. Mr. Polay knew he could require Dr. Carter to appear and be cross-examined. Considering Mr. Polay believed Dr. Carter's former testimony to be extremely damaging, one would think an experienced attorney would do whatever he could to challenge the testimony; especially when much of

her original testimony was objectionable, and should not have been admitted in either penalty phase.

In addition, it is more likely, than not, that Dr. Carter's testimony would not have been as effective as it was in the first penalty phase. If Dr. Carter was not feeling well, and her testimony had to be broken up because of a then existing medical condition, it is doubtful that she would have been as much of a zealous advocate against Mr. Ault as she was in the first penalty phase. Furthermore, the record is clear that Dr. Carter's opinions of Mr. Ault did, in fact, change after having considered the objective medical evidence presented during the 2007 penalty phase. All of these things could have easily affected Dr. Carter's credibility. The defense argues that Mr. Polay's actions are an indication of his lack in preparation to confront Dr. Carter, as opposed to the result of a well-reasoned trial strategy. The defense further argues that the trial court erred in its legal conclusion as it relates to this issue.

3. Mr. Polay's Performance Was Deficient Because He Failed to Prepare For Trial.

The Florida Supreme Court has emphasized the importance of trial preparation, holding that "one of the primary duties defense counsel owes to his client is the duty to prepare himself adequately prior to trial." Fitzpatrick, 118 So.3d at 754. Trial preparation is considered the most critical stage of a lawyer's preparation, as it provides a basis upon which most of the defense case must rest.

Magill v. Dugger, 824 F.2d 879, 886 (11th Cir. 1987); see also Fitzpatrick, 118 So.3d at 753 ("Even before Strickland became the measuring stick for counsel's effectiveness, courts across the country emphasized that a prerequisite to counsels presentation of an intelligent and knowledgeable defense is the requirement that counsel consult, investigate, and prepare for trial.").

In the instant case, at the January 14, 2014 evidentiary hearing, Don Carpenter was called as a defense witness. On direct examination, Mr. Carpenter testified that he has been a private investigator since 1968, and has worked hundreds of criminal cases, including 50 Capital cases. He was hired in this case to review eight boxes of materials on this case, maintained by Mr. Polay. While reviewing the boxes, Mr. Carpenter came across the transcript of Dr. Carter's testimony from the 1999 penalty phase. Upon his examination, he found no notes, no highlights, nor any folded pages. He indicated that "it was a pristine transcript" when he saw it. Mr. Carpenter went on to testify that there were no other documents in the file that dealt with Dr. Carter.

During questioning at the evidentiary hearing, Dr. Carter was asked if she had discussed this case with Mr. Polay prior to the 2007 penalty phase. Dr. Carter stated, "no, I don't see any record of having a conversation with Mr. Polay." Mr. Polay, on the other hand, being very vague about every answer to counsel's questions stated:

> "[H]ere's the issue, I've spoken to Dr. Bourg Carter on other cases I can't remember specifically, you know, speaking with her on this case. I might have, I might not have." (*emphasis added*).

In its order, the court opines that Mr. Polay agreed to the reading of Dr. Carter's testimony as a method of strategy, as Mr. Polay was aware of how powerful Dr. Carter is when appearing before a live jury, and how damaging her live testimony would have been to the defense. While this is an advantageous conclusion at this time, it is obvious that rather than well-reasoned strategy, Mr. Polay's decision was the result of his failure to prepare for the cross-examination of the State's only rebuttal witness. Mr. Polay appeared to have no previous knowledge that Dr. Carter was not going to appear, and when he was given the opportunity to avoid having to cross-examine her, seized on that opportunity.

The testimony of Mr. Carpenter, an experienced private investigator, overwhelmingly supports Mr. Ault's contention that little, if anything, was done by Mr. Polay to prepare for the cross-examination of Dr. Carter, one of the State's most damaging witnesses.[32] Surely an experienced capital defense attorney would remember if he had prepared questions, or spoke with a key State witness in preparation for trial. Mr. Polay's own statements supports his deficiency in trial preparation, and supports a successful outcome as to the first prong of Strickland.

With its decision, the trial court gave no consideration to the facts strongly

[32] It should also be noted that Dr. Carter was the State's only rebuttal witness.

supporting Mr. Polay's lack of trial preparation, as testified to by all three witnesses during the evidentiary hearing. As stated in Strickland, strategic choices, made after less than a complete investigation, are reasonable only to the extent that "reasonable professional judgment support the limitations of investigation." Strickland, 466 U.S. at 690-91; see also Wiggins, 539 U.S. at 521. The Court went on to explain that, "in assessing the reasonableness of an attorney's investigation, the court must consider, not only the quantum of evidence already known to counsel, but also whether the known evidence would lead a reasonable attorney to investigate further. Strickland, 466 U.S. at 527. In other words, counsel must conduct a complete investigation, to know what evidence is available, before a reasonable decision can be made as to whether or not to present it to the jury.

An experienced trial attorney with practice in death penalty cases should have realized the ineffectiveness of the 1999 cross-examination of Dr. Carter, conducted by former counsel, Melodee A. Smith. This proceeding was Ms. Smith's first capital trial. During the direct examination of Dr. Carter by the State in 1999, she discussed, at great length, how her testing indicated Mr. Ault suffered from severe psychopathy. The following damaging testimony, without objection from the defense, was adduced during direct examination in 1999:

> Q: What is psychopathy?
>
> A: Psychopathy is, what psychologist consider, the most dangerous form of personality that someone can have, the most dangerous

> personality to society. They tend to be very callous, they engage unusually in a lot of antisocial or criminal behavior. It is very dangerous personality disorder, the most dangerous personality disorder.

In discussing Mr. Ault's score on a test developed for the unrecognized diagnosis of psychopathy, the following testimony was elicited:

> Q: What is the significance of the score of thirty-two out of forty?
>
> A: It falls in the range of what we call a severe psychopath and is indicative of an extremely dangerous person for which treatment does nothing for it except as research studies have found makes them better psychopaths.

Dr. Carter further stated that psychopathy is not a major illness; that people suffering from it have reasonable control over their actions; they show no remorse; and they are not mentally ill. It is clear, from these statements alone, that Dr. Carter left the 1999 penalty phase jury with the impression that she had diagnosed Mr. Ault with severe psychopathy, a diagnosis not recognized, or sanctioned, by the DSM-IV of the American Psychiatric Association (APA).[33]

On cross-examination, Attorney Smith did more harm than good, eliciting further damaging testimony from Dr. Carter. When asked if Mr. Ault was able to control his behavior with this extreme impairment, Dr. Carter testified:

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[33] After being confronted at the evidentiary hearing with the fact that psychopathy is not a recognized diagnosis by the American Psychiatric Association, Dr. Carter declined to acknowledge that she "diagnosed" Mr. Ault with psychopathy. (R. 5/724-736). However, on cross-examination by the State, when asked a series of questions about psychopathy she stated, in regard to severe psychopathy, "that's the primary diagnosis." (Id.)

> A: Of course he makes choices, and Mr. Ault is a person who makes choices. Psychopaths do what they want and take what they want and do what they please without the slightest sense of guilt. They make choices. Now, their choices aren't always good choices, and they are not always socially appropriate choices, but he has the ability to control his behavior and plan his behavior out.
>
> Q: And that is accurate even if you consider his organic brain damage?
>
> A: I don't consider he has organic brain damage…
>
> (2000-ROA, 2656-57).

This was the extent of questioning regarding organic brain damage, and a diagnosis of psychopathy, done by Attorney Smith in 1999. It is apparent from the record that Ms. Smith lacked the requisite experience and knowledge to effectively question and confront Dr. Carter with her testimony given on direct examination. This is especially true where said testimony included numerous inflammatory and highly prejudicial statements concerning her opinion of Mr. Ault, and her diagnosis of psychopathy. Moreover, at the time of questioning, Ms. Smith had access to Dr. Eisenstein's reports, as did Dr. Carter. At no time did Ms. Smith attempt to discredit Dr. Carter's testimony using the opinions of Dr. Eisenstein, a doctor whose testimony was in direct contradiction to Dr. Carter's opinions about many issues including, but not limited to, the effect of organic brain damage and malingering. In addition, at not time did Ms. Smith address the issue of psychopathy not being recognized by the APA.

Apparently Mr. Polay knew enough about Dr. Carter's former testimony to know it was damaging. There is no way an experienced capital attorney could have found Ms. Smith's cross-examination acceptable. It is very likely that the jury would not have seen Mr. Ault at the "devil incarnate," to use Mr. Polay's words, if Dr. Carter had been questioned effectively.

In its order, the trial court addresses this issue by relying on Dr. Carter assertions, and that her opinions as to the diagnosis of Mr. Ault, had not changed now having considered the testimony presented by Dr. Ross and Dr. Kramer. In fact, the court opined that Dr. Carter's testimony had not been discredited in any way. The trial courts finding are slanted to support the judgment and sentence; however, those finding are not supported by the record.

During the cross-examination of Dr. Carter, at the 2014 evidentiary hearing, counsel was able to elicit testimony from her demonstrating that the 2006 EKG and PET test results could, in fact, impact her testimony with regard to her opinion of Mr. Ault and any illness he may have been suffering at the time of the crime. Testimony was elicited as follows:

> Q: …you gave an opinion about Mr. Ault, correct?
>
> A: I give a lot of opinions of Mr. Ault.
>
> Q: And some of those opinions could be attributable to his organic brain damage?

A: The opinions I gave about him, his diagnosis could, in part, be due to if he has brain problems…

Q: You're not a person that is qualified to evaluate the extent of a brain damage or brain injury condition that a person has?

A: No, I'm not a neuropsychologist and I'm not a neurologist.

Q: Those two neuropsychologist like Dr. Eisenstein or a neurologist like Dr. Ross?

A: That's their specialty.

(R. 5/724-736).

While current counsel attempted to demonstrate what an effective cross-examination of Dr. Carter may have been like, so as to give the Court a reference point to consider whether Dr. Carter was effectively cross-examined in 1999, counsel was limited by the restraints set forth in Occhionne, where the Court explained that ineffectiveness of counsel cannot be established simply because current counsel disagrees with the strategies of trial counsel. Occhicone v. State, 768 So.2d 1037, 1048 (Fla. 2000). The purpose of current counsel's questioning was to show how crucial it was for Mr. Polay to attempt to discredit Dr. Carter's testimony. By not doing this, he left the jury with the ineffective cross-examination done by Ms. Smith. Leaving the 1999 testimony, as-is, was inexcusable.

While there are times when it is better to have a "cold record," rather than a live witness, counsel performing according to the standards of professional norms would have known that this was not one of those times. The testimony in 1999

was damaging and objectionable. At the very least, Mr. Ault should have been given a choice in the matter. Competent counsel would have reasoned that 1) Dr. Carter's testimony was devastating in 1999, wherein she made a number of statements that should have been kept from the jury, and 2) Dr. Carter wasn't properly cross-examined. Counsel performing according to objective standards of reasonableness would have said, "Mr. Ault, I can do better, what do you want?" Unfortunately, Mr. Polay wasn't prepared to do that.

Despite the limitations of Occhionne, and current counsel's inability show all areas in which Ms. Smith was ineffective, counsel was able to elicit testimony calling into question the effectiveness of Ms. Smith's 1999 cross-examination. This was accomplished by getting Dr. Carter to admit that 1) Mr. Ault does, in fact, suffer brain damage of his frontal and temporal lobes; 2) the areas where Mr. Ault suffers brain damage affects his analytical abilities, planning abilities, and executive functions; 3) based on the deficiencies in Mr. Ault's brain, he would have problems with judgment, impulse control, and emotions; 4) and that the testimony Dr. Ross gave concerning the physiological test were consistent with the results of Dr. Eisenstein's testing, that is, Mr. Ault suffers brain damage. These admissions are critical, in that they are in direct conflict with much of what Dr. Carter testified to during the 1999 penalty phase, and are also in direct conflict with the legal conclusion the trial court has reached, that Dr. Carter's testimony

"was not discredited."[34] Considering the effectiveness of undersigned counsel's ability to discredit Dr. Carter, with limited latitude given by the court, is striking evidence supporting defendant's argument that Mr. Polay's decision to not cross-examine Dr. Carter fell below the professional norm of what any experienced capital defense attorney would have done.

It is unclear what Mr. Polay would have done had Dr. Carter appeared, but her non-appearance was certainly fortuitous since he was not prepared to question her. He knew how damaging Dr. Carter's former testimony was,[35] and an attorney performing within reasonable and objective professional norms would have fought to either have the witness be present in person to testify, or in the alternative, have the former testimony excluded and not allowed it to be presented to the jury verbatim. In the instant case, had the witness been effectively cross-examined in 1999, and had there been no new evidence to ask the witness about, Mr. Polay's decision might well have been one that could be classified as strategic. But those are not the facts of this case. Rather, the facts indicate that Mr. Polay knew how damaging Dr. Carter's former testimony was, and also knew that she had not been confronted with the objective medical evidence favoring Mr. Ault.

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[34] It is also important to note that multiple times throughout the evidentiary hearing, Dr. Carter waivered with regard to the testimony she gave concerning a diagnosis of psychopathy, saying at times it was Mr. Ault's primary diagnosis, and saying at other times that she had not given Mr. Ault such a diagnosis.

[35] Mr. Polay opined that Dr. Carter's former testimony portrayed Mr. Ault as the "devil incarnate."

Based on the testimony and facts as established, the court reached the incorrect legal conclusion when labeling Mr. Polay's decision as well reasoned trial strategy. Had Dr. Carter been required to testify at the 2007 penalty phase, she would not have been permitted to make a number of damaging statements that were not in response to questions, and were not based on an objective evaluation of Mr. Ault. It is clear from a thorough review of her 1999 testimony, that she took on the role of an advocate, making sure that Mr. Ault was punished for these horrible crimes. It is a stretch of logic to consider Mr. Polay's decision, to avoid questioning her, good lawyering.

In addition to failing to prepare for Dr. Carter's cross-examination, it should also be noted that Mr. Polay failed, as found by the trial court, to prepare Dr. Kramer for his testimony during the 2007 penalty phase. It is considered common practice, or in the alternative, effective legal representation, for a lawyer to ensure that his witness is familiar with all aspects of their client's case. From the record on appeal, it was found that Dr. Kramer was not prepared to testify on the defendant's behalf. In fact, this Court, in Ault, 53 So.3d at 12-13, stated that Dr. Kramer's insufficient preparation was questioned by the trial court, noting that "Dr. Kramer had only conducted a single two-hour interview with Ault, and that, aside from this meeting, his only sources of information came from reports of other doctors." Yet, in its order denying defendant's 3.851 motion, the trial court

rejected the defendant's argument that Mr. Polay was ineffective in failing to prepare psychiatrist Dr. David Kramer for trial. The court arrived at this legal conclusion finding that the claim was legally insufficient, as the Defendant failed to indicate what could have been done to better prepare Dr. Kramer for trial. This court is required to give deference to the facts as determined by the trial court, but to review all legal conclusions de novo. The legal conclusion reached by the trial court in this regard is counterintuitive.

On one hand the court finds that Dr. Kramer was insufficiently prepared, citing the limited time Dr. Kramer had spent with Mr. Ault, and that Dr. Kramer's "only sources of information were the Defendant and the reports of other doctors[36]," yet on the other hand, the trial court questions what more could have been done by Mr. Polay to prepare Dr. Kramer. What could have been done was: (1) for Dr. Kramer to spend as much time with Mr. Ault as Dr. Carter, and (2) for Dr. Kramer to be provided with all the information that Dr. Carter reviewed.[37] If this had been done, Dr. Kramer would not have looked as foolish before the jury, and they would have given his opinion more consideration. It should also be noted that Dr. Kramer first saw Mr. Ault two weeks before the trial, even though Mr. Polay had been on Mr. Ault's case for about two (2) years. The mere fact that the

[36] The court also found it significant that Dr. Kramer had not reviewed any police reports, any statements made by the Defendant, Mr. Ault's videotaped confession, or any other documentation of the crime.

[37] More than 1,000 pages of information, according to Dr. Carter's testimony.

court has, itself, has recognized the deficiency in Mr. Polay's preparation of Dr. Kramer supports the legal conclusion that Mr. Polay failed to prepare his witness for trial, thereby performing deficiently.

4. Mr. Polay Performance Was Deficient Because He Failed To Prepare And To Present A Case of Mental Health Mitigation.

Attorneys are guided by rules of professional conduct, set forth by the American Bar Association. When addressing performance of counsel in death penalty cases, the ABA has pronounced, in pertinent part, that, "investigations into mitigating evidence should comprise efforts to discover all reasonably available mitigating evidence…" ABA Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases 11.4.1, p. 93 (1989). Furthermore, the United States Supreme Court has emphasized the importance of focusing the sentencer's attention on the particularized characteristics of the individual defendant. Roberts v. Louisana, 428 U.S. 325, 333 (1976); Woodson v. North Carolina, 428 U.S. 280, 297 (1976). Defendants have a constitutionally protected right to have the jury provided with mitigating evidence that his trial counsel failed to discover or failed to offer. Williams v. Taylor, 529 U.S. 362, 393 (2000).

The applicable professional standards are set forth in the American Bar Association Standards of Criminal Justice, as Wiggins makes clear:

> Counsel's conduct . . . fell short of the standards for capital defense work articulated by the American Bar Association (ABA) standards to which we have long referred as guides to determining what is

> reasonable...The ABA Guidelines provide that investigations into mitigating evidence " should comprise efforts to discover **all reasonably available mitigating evidence** . . . " (ABA Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases 11.4.1, p. 93 (1989). Wiggin*s*, 539 U.S. at 524. (emphasis added)

Defense counsel must discharge significant constitutional responsibilities at the sentencing phase of a capital trial. In a capital case, "accurate sentencing information is an indispensible prerequisite to a reasoned determination of whether a defendant shall live or die, made by a jury of people who may have never made a sentencing decision." Gregg v. Georgia, 428 U.S. 153, 190 (1976). Mr. Ault had a "right – indeed a constitutionally protected right – to provide the jury with mitigating evidence that his trial counsel failed to discover or failed to offer." Williams, 529 U.S. at 393. "Events that result in a person succumbing to the passions or frailties inherent in the human condition necessarily constitute valid mitigation under the Constitution and must be considered by the sentencing court." Cheshire v. State, 568 So. 2d 908, 912 (Fla. 1990), citing Lockett v. Ohio, 438 U.S. 586 (1978). In Mr. Ault's capital penalty phase proceeding, mitigating evidence was available, and in fact, had been presented at his previous penalty phase proceeding, yet it was not presented for consideration by this sentencing jury or the court.

The Florida Supreme Court has long recognized that trial counsel has a duty to conduct an adequate and reasonable investigation of available mitigation

evidence which negates aggravation. State v Riechmann, 777 So. 2d 342, 350 (Fla. 2000), quoting Rose v. State, 675 So.2d 567, 571 (Fla. 1996). The conclusions in Wiggins are based on the principles elucidated in Strickland, that strategic choices made after less than complete investigation are reasonable only to the extent that "reasonable professional judgments support the limitations of investigation." Wiggins, 539 U.S. 521, quoting Strickland, 466 U.S. 690-91. "In assessing the reasonableness of an attorney's investigation, a court must consider not only the quantum of evidence already known to counsel, but also whether the known evidence would lead a reasonable attorney to investigate further." Id. at 527. In other words, counsel must conduct a complete investigation to know what evidence is available before a reasonable decision can be made on whether or not to present it.

Under the ABA Guidelines, there are specific requirements that must be met, from the initial appointment on the case through its conclusion. The duty to investigate exists regardless of the expressed desires of the client. Guideline 10.7 (A)(2) states that the investigation for preparation of the sentencing phase should be conducted regardless of any statement by the client that evidence bearing upon penalty is not to be collected or presented. ABA Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases (Rev. Feb 2003); see also Blanco v Singletary, 943 F.2d. 1477, 1501-03 (11th Cir. 1991) (Where counsel

was ineffective for accepting his client's wish not to call penalty phase witnesses, and failing to conduct an investigation sufficient to allow his client to make an informed decision to waive mitigation.).

The fact that trial counsel presents some witnesses does not preclude a finding of deficient performance. Parker v State, 3 So.3d 974, 983-85 (Fla. 2009). In Parker, the Florida Supreme Court made clear that where trial counsel presents a "bare bones" rendition of some areas of mitigation, despite the existence of much more and better quality mitigating evidence, counsel's performance falls below the established ABA guidelines. The "bones" in this case were about as "bare" as they could be.

A thorough review of the available evidence in Mr. Ault's case would have alerted Mr. Polay to the deficiency in Ms. Smith's 1999 cross-examination of Dr. Carter with regard to mental health mitigation. As noted above, Dr. Carter conceded that Dr. Einsenstein's opinions coincided with the objective medical findings of Dr. Ross. Considering Mr. Polay's assertions that the crux of his defense during the 2007 penalty phase was that "Mr. Ault was brain damaged, and you shouldn't kill somebody that has brain damage," had he taken the opportunity to question Dr. Carter with the objective evidence, as undersigned counsel did during the evidentiary hearing, he could have effectively deduced the same

comments wherein Dr. Carter conceded that Dr. Einsenstien's opinions[38] were supported by the objective medical tests conducted by Dr. Ross. The objective medical test results strengthened Mr. Polay's theory of defense and served to counter Dr. Carter's testimony portraying Mr. Ault as a liar, who suffers no mental illness.

Rather than confront Dr. Carter with this critical evidence, in an effort to understand how Mr. Ault's brain damage affected his psychological functioning at the time of the incident, Mr. Polay thought it better "trial strategy" to allow cold, hard, damaging testimony to be read into the record, without so much as a request to strike some of Dr. Carter's most damaging testimony; testimony that should have been objected to in 1999 by Ms. Smith. It is undeniable, as set forth in the facts as established, that Mr. Polay's representation fell far below any objective standard of reasonableness, and as a result of his deficient performance, the defendant was prejudiced, rendering the results of the 2007 penalty phase unreliable. When addressing Mr. Polay's failure to prepare and to present a case of mental health mitigation, the court concluded that, "[t]he defendant has not provided details of what other mitigation could have been presented nor how the State's evidence could have been better challenged." A review of the testimony

[38] Dr. Eisenstein's opinions were in direct contradiction to the opinions of Dr. Carter.

given at the evidentiary hearing, and the argument as stated above, is proof that the trial judge reached the wrong legal conclusion.

This Court must first recognize that during the 2014 evidentiary hearing, Dr. Carter conceded that Dr. Eisenstein's testimony was supported by the objective medical test conducted by Dr. Ross. To understand the importance of this concession, we must review testimony given in prior proceedings. During the first 1999 penalty phase, Mr. Ault's then counsel called the following witnesses: Dr. Hyman Eisenstein, (2000-ROA, 2315-2410) a neuropsychologist, Gilbert Raiford, a social worker (2000-ROA, 2412), Dr. Ted Shaw, a psychologist (2000-ROA, 2470), Edward Matson, Mr. Ault's stepfather (2000-ROA, 2534) and Barbara Matson, Mr. Ault's mother (2000-ROA, 2240). During the first 2007 penalty phase, Mr. Ault's counsel called three witnesses: Dr. Kramer, Dr. Ross, and Robert

As explained above, in 1999, Dr. Hyman Eisenstein, a licensed neuropsychologist, testified as a defense witness. He explained that his profession requires him to study and assess brain functioning and human cognitive ability, as neuropsychology, by definition, is the study of the brain, including its functioning and capacity. To assess Mr. Ault, Dr. Eisenstein reviewed substantial amounts of

evidence, and spent significant amounts of hours interviewing Mr. Ault, and conducting tests.[39]

In his medical opinion, Dr. Eisenstein concluded that Mr. Ault showed the greatest area of impairment in his frontal lobe, where Mr. Ault had suffered frontal temporal lobe damage. As a result of the damage, Dr. Eisenstein explained that Mr. Ault lacks the ability to make complex decisions, and demonstrates moderate to severe organic brain damage. Dr. Eisenstein further concluded that Mr. Ault lacks the capacity to make things up in an effort to alter tests and fake results. Dr. Eisenstein testified that most people have the brain thinking capacity to go through the process of making right and wrong decisions, but Mr. Ault does not. Based on his review of Mr. Ault, Dr. Eisenstein opined that Mr. Ault's ability to conform his conduct to the requirements of law was substantially impaired.

Dr. Eisenstein's testimony effectively contradicts the testimony of Dr. Carter, and is significant proof for how Mr. Polay could have better challenged the State's evidence. Furthermore, Dr. Eisenstein's 1999 testimony coincides perfectly

[39] At the 1999 penalty phase proceeding, Dr. Eisenstein told the jury that prior to testifying he reviewed police reports; the reports of Detective John Curcio and Detective King; Department of Corrections psychological and psychiatric records reports of other doctors, (2000-ROA, 2352); material from Dr. Carol Watenberg (2000-ROA, 2354); records from 5th Street Counseling service; reports of Dr. Rambo who had been treating Mr. Ault; letters from Mr. Ault's mother (2000-ROA, 2357); Mr. Ault's statement to the police; the psychological test data of Dr. Sherri Bourge Carter; and he interviewed Mr. Ault's mother. In addition to hours of interviews, Dr. Eisenstein conducted a multitude of tests taking about ten hours (2000-ROA, 2329).

with the testimony of neurologist, Dr. David Ross, who testified as a defense witness at the 2007 penalty phase for the sole purpose of rendering an opinion regarding the medical findings of the physiological testing, specifically Mr. Ault's EEG and PET. Dr. Ross testified that based on those findings, Mr. Ault suffers problems in the memory and emotional parts of his brain, leading to problems with planning, problems with execution of complex ideas, problems with judgment, and problems with impulse control. Had they both been called in 2007 it would have provided the jury with a true picture of Mr. Ault's organic brain condition.

In Mr. Ault's 2007 capital penalty phase proceeding, mitigating evidence was available, and in fact, had been presented at his 1999 penalty phase proceeding, yet it was not presented for consideration by the 2007 sentencing jury or the court. Instead, Mr. Polay called Dr. Kramer, a clinical psychiatrist, who had spent only two hours with Mr. Ault the week before trial, and had reviewed very little evidence and information in the case. The Florida Supreme Court has made it clear that where trial counsel presents a "bare bones" rendition of some areas of mitigation, despite the existence of much more, and better quality, mitigating evidence, counsel's performance falls below the established ABA guidelines relating to specific requirements which must be met from the initial appointment on the case through its conclusions. Parker, 3 So.3d at 983-85. It is inexplicable why Mr. Polay failed to call Dr. Eisenstein, a clinical and forensic

neuropsychologist who refuted Dr. Carter's testimony, and had also spent comparable time with Mr. Ault. Had Dr. Eisenstein been called, rather than the unprepared Dr. Kramer, Dr. Eisenstein could have effectively contradicted Dr. Carter's testimony.

The record contains numerous facts indicating how Mr. Polay's representation fell below the standards for effective representation outlined in Strickland. It was his obligation to present medical testimony that would prove statutory mitigators; to call available witnesses that would prove those mitigators; and to insure that the witnesses he called were properly prepared to testify. Counsel should have known that the prosecutor would question Dr. Kramer concerning the background information he reviewed in preparation for his testimony. As a result, Mr. Ault was prejudiced when the jury heard inadequate penalty phase testimony concerning mitigation evidence. Since Mr. Polay knew how damaging Dr. Carter's testimony was, live or read, he had a duty to present and prepare a witness that would effectively counter what Dr. Carter was expected to say. Who better than Dr. Eisenstein?

Dr. Eisenstein testified that Mr. Ault demonstrated moderate to severe organic brain damage. (2000-ROA, 2333). He opined that in the process of making right and wrong decisions, most people have that brain thinking capacity; Mr. Ault does not. (2000-ROA, 2335). He informed the jury, and the court, that Mr. Ault's

ability to conform his conduct to the requirement of law was substantially impaired. (2000-ROA, 2335). He also testified that Mr. Ault does not have the capacity to make things up that would alter the tests, and that he did not fake the results (*emphasis added*). (2000-ROA, 2336). He testified that Mr. Ault showed poor planning in committing the crimes in this case. (2000-ROA, 2337), that he is genuine and feels horrific about what happened. (2000-ROA, 2338).

It is undeniable that Dr. Eisenstein's testimony successfully contradicts the testimony of Dr. Carter, not only as to those points argued above, but also with respect to the results of the test results, and whether or not Mr. Ault was malingering. To reiterate, his testimony also coincided perfectly with the testimony of the neurologist, Dr. Ross. There is nothing in the record to indicate that Dr. Eisenstein was unavailable to testify in the 2007 penalty phase. It is inexplicable why Mr. Ault's counsel failed to call him, and instead, chose to call a completely unprepared Dr. Kramer, a doctor who reviewed very few documents, and spent very little time with the defendant, prior to his testimony.

For purposes of this argument, it is important to note that the Florida Supreme Court stated that Dr. Kramer's insufficient testimony is one of the reasons Mr. Ault's statutory mitigators were rejected by the trial court. The trial court rejected Dr. Kramer's testimony based on the limited time Dr. Kramer spent with Mr. Ault; that the doctor's "only sources of information were the Defendant and

the reports of other doctors;" and the fact that Dr. Kramer "did not review any police reports," "statements of the Defendant," "Mr. Ault's videotaped confession, or any other documentation of the crime. (2007-ROA, 659).

Mr. Polay's failure to call Dr. Eisenstein, to instead to call a clearly unprepared Dr. Kramer, and then to stipulate to the damaging former testimony of Dr. Carter fell well below the standards outlined in Strickland and Wiggins. As a result of these deficiencies, Mr. Ault was prejudiced by Mr. Polay's inadequate penalty phase presentation to the jury. Dr. Carter may not have testified if Mr. Polay objected to her former testimony. If she did testify, counsel could have done a far superior cross-examination of her based of the evidence acquired since 1999. In addition, it is clear that Dr. Eisenstein was prepared just as well as Dr. Carter before he testified, and that his testimony could have effectively contradicted her testimony. Dr. Kramer, on the other hand, had not been provided with sufficient documentation by defense counsel. Counsel should have known that the prosecutor would question the doctor concerning all the background information he reviewed, and time spent with the Mr. Ault. Had defense counsel adequately prepared Dr. Kramer, or called a witness that was prepared, there is a reasonable probability that the jury and the sentencing judge would have given more consideration to the medical testimony resulting in a recommendation and sentence of life, rather than death.

In addition to the foregoing, the Court should also be made aware that Mr. Polay failed to call other penalty phase witnesses that testified at the first trial, including Barbara Madsen, Mr. Ault's mother. While she had some reluctance in appearing at the 2007 penalty phase, she could have been convinced or required to testify. Instead of having her appear, for some inexplicable reason, Mr. Ault's counsel called his investigator, Mr. Buckley and asked him why Mr. Ault's mother wasn't there. His response to the question was that, "[s]he found it to be inconvenient to be here. She felt it would be too much trouble." (2007-ROA, 1135). This left the 2007 penalty phase jury with the impression that Defendant's own mother didn't care enough to help him avoid the death penalty.

In Fitzpatrick, the court emphasized the importance of pre-trail preparation. "One of the primary duties defense counsel owes to his client is the duty to prepare himself adequately prior to trial. Fitzpatrick, 118 So.3d at 753 ("Even before Strickland became the measuring stick for counsel's effectiveness, courts across the country emphasized that an essential prerequisite to counsel's presentation of an intelligent and knowledgeable defense is the requirement that counsel consult, investigate, and prepare for trial."); see also Caraway v. Beto, 421 F. 2d 636, 637-38 (5th Cir. 1970) ("Our adversary system is designed to serve the ends of justice; it cannot do that unless [defense] counsel presents an intelligent and knowledgeable defense. Such defense requires investigation and preparation."); Magill v Dugger,

824 F.2d at 886; House v. Balkcom, 725 F.2d 608, 618 (11th Cir. 1984). Pretrial preparation, principally because it provides a basis upon which most of the defense case must rest, is perhaps the most critical stage of a lawyer's preparation." Fitzpatrick, 118 So.3d at 753.

Furthermore, in Peele v State, 748 So.2d 253, 258-259 (Fla. 1999), this Court stressed the importance of pretrial preparation where defense counsel failed to prepare a mental health expert with his pretrial evaluation of the defendant, and failed to provide the doctor with important background information. This Court found that that in conducting his evaluation, "the expert did not have available or review any hospital or medical records," and the expert's "evaluation of the defendant was inadequate and consisted solely of an interview…lasting two hours and ten minutes, and that counsel should have questioned the adequacy of this examination." Id. A very similar fact pattern, to the Peele case, in before this Court.

In this case, counsel's investigation and preparation fell far short of the professional requirements the Strickland Court spoke of in its opinion. It is clear that counsel failed to provide Mr. Ault with a constitutionally adequate defense, and quite frankly, it is a stretch to couch counsels performance as a "strategic decision," unless the strategy was to give up on what Mr. Polay believed was a lost cause. Mr. Polay did little more than "mailing in" a defense on Mr. Ault's behalf.

5. Mr. Polay Performance Was Deficient Because He Failed To Raise Or Discuss Non-Statutory Mental Health Mitigation Before The Trial Court At Sentencing.

On appeal from the Court's omission to evaluate whether Mr. Ault's mental health evidence qualified as nonstatutory mental health mitigation, the Florida Supreme Court held:

> Under the case law, any emotional disturbance relevant to the crime must be considered and weighed by the sentence, no matter what statutes say. Any other rule would render Florida's death penalty statute unconstitutional. Chersire, 568 So.2d at 912. Here, Ault did not raise nonstatutory mental health mitigation before the trial court. Accordingly, we find the court did not err in failing to address this mitigating circumstance. Ault, 53 So.3d at 191.

It is thus the law of the case that Mr. Ault's defense counsel failed to raise nonstatutory mental health mitigation of emotional or mental disturbance in the trial court, thus foreclosing its consideration in both the trial and appellate courts. Counsel deficient performance deprived Mr. Ault of his constitutional protections, and fell measurably below the standard of reasonably effective assistance of counsel. All questions of law which have been decided by the highest appellate court become the law of the case, which, except in extraordinary circumstances, must be followed in subsequent proceedings. Brunner Enterprises, Inc. v. Dept. of Revenue, 452 So. 2d 550 (Fla. 1984).

Defense counsels' 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 proceeding, as his emotional and mental health issues were a main feature of the defense. Had Mr. Ault's counsel raised nonstatutory mental health mitigation before the trial court, there is a reasonable probability that the outcome of the proceeding would have been different. The trial court would have been required to consider it, and give it the appropriate weight.

6. Mr. Polay Performance Was Deficient Because He Failed To Investigate Mr. Ault's Low IQ.

In its opinion on appeal from Mr. Ault's 2007 penalty phase proceeding and resentencing, the Florida Supreme Court noted as follows:

> In evaluating Ault's low IQ as a proposed nonstatutory mitigating circumstance, the trial court's sentencing order stated there was no evidence supporting a low IQ. *The trail court further stated that the only evidence regarding the Defendant's IQ was that of Dr. Bourge-Carter,* who indicated that Ault's intellectual functioning was below average. Ault v State, 53 So.3d 175, 191-192 (Fla. 2011) (*emphasis added*).

Mr. Ault's defense counsel put forth little or no effort to investigate his IQ, although this information was available through Dr. Eisenstein. This failure to investigate Mr. Ault's low IQ was aggravated by the uncontested introduction of Dr. Carter's testimony. Defense counsel's failure to investigate Mr. Ault's IQ was deficient when compared to "an attorney's strict duty to conduct a reasonable investigation of the defendant's background for possible mitigating evidence," Reichmann, 777 So.2d at 342; see also Blackwood v State, 946 So.2d 960 (Fla. 2006) ("investigations into mitigating evidence " should comprise efforts to

discover all reasonably available mitigating evidence."); Hurst v State, 18 So.3d 975, 1011-1015 (Fla. 2009) (Finding that reasonable investigation by counsel, based on information suggesting that the capital defendant had a low IQ, would likely have disclosed, just as the psychologist testified at the trial, that the defendant had an IQ somewhere between 70 and 78.).

The evidence and information available to defense counsel from the first penalty phase, alone, was more than enough to alert Attorney Polay to the need for further IQ investigation.[40] In this case, no sound basis appears for defense counsel to have failed to investigate and present mitigation evidence of the defendant's borderline intelligence. As in Hurst, had Mr. Polay performed a reasonable investigation, he would have been aware of the objective medical evidence suggesting Mr. Ault had a low IQ, as testified to by Dr. Eisenstein during the 1999 penalty phase. Because this mitigation was not made available for the jury or the trial judge to consider before the death sentences were imposed in 2007, confidence in the imposition of the death penalty in this case is undermined.

b. DEFENSE COUNSEL'S PERFORMANCE RESULTED IN A PREJUDICE UPON THE DEFENDANT.

To establish the second prong under the Strickland test, the defendant is required to show that defense counsel's actions prejudiced him. Strickland, 466

[40] For instance, the medical evidence demonstrating Mr. Ault's organic brain damage, as well as Dr. Eisenstein's and Dr. Carter's former IQ testimony

U.S. at 687. In other words, Appellant must show that there is a "reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been entirely different." Id. at 694 (A reasonable probability is a probability sufficient to undermine confidence in the outcome.); see also Padilla 559 U.S. at 357.

In the case at bar, Mr. Ault has shown sufficient evidence to obtain a reversal of his conviction and death sentence on grounds of ineffective assistance of counsel. It is clear that the acts and omissions of both Attorney Kulick, and Attorney Polay, were deficient and outside the wide range of professionally competent assistance. The record couldn't more clearly demonstrate that their performance fell below all norms of professional conduct. During the 2014 evidentiary hearing, and on direct examination by current defense counsel, Mr. Polay failed to give a definitive answer to any question asked of him. One would wonder if he did any preparation, or had any recollection of his representation of Mr. Ault. Had Mr. Polay prepared for the cross-examination of Dr. Carter, he would have realized the deficiencies in Ms. Smith's questioning and would have appreciated the need to cross-examine her during the 2007 penalty phase, rather than agreeing to the reading of her former testimony. Mr. Polay allowed the former testimony of the State's most damaging witness to be read into the record, without so much as an objection to the most inflammatory portions of her former

testimony, or even an attempt to effectively cross-examine her and raise issues which could have lead the jury, and the court, to question the reliability of her testimony. In addition, had Mr. Polay properly prepared for the witnesses he did call during the 2007 penalty phase, or had he taken the time to prepare and to present effective mitigation evidence, there is a reasonable probability that the jury would have recommended life sentences as opposed to a sentence of death.

The testimony given by all three witnesses at the evidentiary hearing, on the defendant's amended 3.851 motion, strongly supports the fact that both trial counsels performances were deficient. Without question, Attorney Kulick's and Attorney Polay's deficiencies contributed to the jury's determination of death, and resulted in the Defendant being denied a fair adversarial testing process. Upon these facts, and conclusions of law made by the trial court, the results of the 2007 penalty phase proceeding are unreliable.

CONCLUSION

Based on the forgoing arguments and authorities, the Appellant requests that this Honorable Court vacate his conviction, and remand the case for a new trial.

Respectfully submitted,

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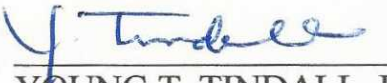
Counsel for Appellant

CERTIFICATE OF SERVICE

I HEREBY CERTIFY, that a true and correct copy of the foregoing has been e-filed with the clerk of court for the seventeenth judicial circuit, and has been furnished to Joel Silverstein, Esq., Assistant State Attorney, Office of the State Attorney; and to Leslie Campbell, Esq., Assistant State Attorney General; by e-filing this 24th day of March, 2015.



YOUNG T. TINDALL, ESQ.

CERTIFICATE OF FONT COMPLIANCE

I hereby certify this brief was prepared using Times New Roman 14-point font, and complies with the font requirements of Rule 9.210(a)(2) of the Florida Rules of Appellate Procedure.

YOUNG T. TINDALL, ESQ.