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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# APPELLANT'S REPLY BRIEF

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

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To prevail on a claim for ineffective assistance of counsel, a defendant must establish that: 1) defense counsel's performance was deficient[1], and 2) as a result of defense counsel's deficient performance, the defendant was prejudiced.[2] Strickland v. Washington, 466 U.S. 668, 687-88 (1984). Defendant is required to establish both prongs in order to succeed on an ineffective assistance of counsel claim. Id.

This Court's standard of review will vary depending on whether the trial court's decision was made following an evidentiary hearing, or was summarily denied. Where a claim is summarily denied, without a hearing, this Court will "affirm only where the claim is legally insufficient, should have been brought on direct appeal, or is positively refuted by the record." Jackson v. State, 127 So. 3d 447, 459-60 (Fla. 2013). Where a claim is denied following an evidentiary

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[1] 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. 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).

[2] 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.

hearing, this Court is required to give deference to a trial court's findings of fact, but review the court's legal conclusions de novo. Id.

**Mr. Kulik's assistance as counsel was ineffective because he failed to provide Mr. Ault with a meaningful, and constitutionally adequate, defense during the guilt phase, resulting in prejudice to Mr. Ault.**

The trial court summarily denied the Defendant's claim that his guilt phase counsel, Mr. Kulik, was ineffective for 1) making unnecessary admissions and concessions in the opening statement, 2) failing to cross-examine witnesses, and 3) failing to investigate defenses. Trial Court's Order Denying 3.850, Pgs. 13-14. The lower court held that Defendant's claim was legally insufficient, refuted by the record, and resulted in no prejudice to Mr. Ault. Id. This Court should reverse the trial court's ruling, because the Defendant's claim is sufficiently pled, is not refuted by the record, and did in fact result in prejudice to the Defendant.

The Defendant acknowledges that sometimes it is considered good trial strategy for defense counsel to make some halfway concessions to the truth in order to give the appearance of reasonableness and candor, and in an effort to gain credibility and jury acceptance. Griffin v. State, 866 So. 2d 1, 10 (Fla. 2003). However, the purpose of an opening statement is to provide the jury with a preview of what defense counsel believes the evidence will show. Stephen v. State, 975 So.2d 405, 420-21 (Fla. 2007). When counsel tells the jury what facts and evidence will be presented, knowing such facts and evidence will not be produced,

the Defendant risks credibility with the jury. The appearance of reasonableness and candor associated with such a strategy becomes ineffective, and is akin to a concession of guilt to the crime charged.

During opening, Mr. Kulik made statements about numerous things, and offered unnecessary admissions about evidence prejudicial to Mr. Ault that was never presented, and which counsel knew would not be presented as evidence at trial. For instance, Mr. Kulik talked, at length, about a previous interview given by Mr. Ault to a newspaper reporter (2000-ROA, 1449-64), knowing that the interview would not be admissible, and despite the State's sustained objection. Counsel 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, Mr. Kulik presented a defense of voluntary intoxication to the jury, informing the jury about evidence they would hear with regard to the Defendant's alcohol abuse, and that two doctors would testify about the effects of alcohol on a person with extreme mental problems like Mr. Ault. Neither witness was called by the defense, or testified at the trial; 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.[3]

The Defendant's argument is not legally insufficient, nor is it refuted by the record. Attorney Kulik went beyond acceptable trial strategy and any standard of professional norm during his opening statement to the jury, wherein he conceded guilt, and offered evidence he knew he could not produce. The State would have this Court believe that the Defendant's claim is legally insufficient because Mr. Ault fails to argue "what counsel should have done." Answer Brief of Appellee, Pgs. 34; 39. This is not the standard by which the Court should review this claim. "The standard in determining the issue of ineffective assistance of counsel is ***not*** (emphasis added) how present counsel would have proceeded in hindsight." Brown v. State, 846 So. 2d 1114, 1121 (Fla. 2003). The proper focus is on whether there was both deficient performance on prior counsel's part, and a reasonable possibility of a different result. Id.

It is not reasonable to believe, as argued by the State in its answer brief, that Mr. Kulik's statements had a "dampering effect on the evidence, and rather than conceding guilt, his opening statement was a method of arguing against the Defendant's premeditation, and was a tactic for gaining sympathy with the jury." Such reasoning would be logical had Mr. Kulik supported his argument against

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[3] In addition to these examples, Mr. Ault relies on all examples given, as outlined in his Initial Brief.

Defendant's premeditation with evidence throughout the course of trial, but he did not. In fact, defense counsel rested without presenting any evidence in Mr. Ault's defense, including failing to cross-examine all, but one, of the State's witnesses. Attorney Kulik's presentation about things he knew would never be presented removed any chance the jury might find a reasonable doubt in the State's case. While it is sometimes appropriate trial strategy to make halfway concessions to certain issues, Mr. Ault's counsel goes way beyond acceptable trial strategy in his opening statement. These acts were deficient on Mr. Kulik's part and, most certainly, are not in accordance with standards of professional norms or tactic. Had Mr. Kulik supported his opening argument, against premeditation, with evidence at trial, there is a reasonable probability that the outcome of the trial would have been different, in that Mr. Ault would have been found guilty of a lesser offense. As a result, the outcome of the 1999 guilt phase is unreliable.

**Mr. Polay's assistance as counsel was ineffective because he failed to challenge the State's penalty phase evidence, which resulted in prejudice upon Mr. Ault.**

The trial court erred, following an evidentiary hearing, when it rejected the Defendant's argument that his penalty phase counsel was ineffective for failing to challenge the State's evidence during the 2007 penalty phase; more specifically, the admission of Dr. Sherrie Bourge-Carter's (Dr. Carter) former testimony. The trial court found that Attorney Polay's decision not to contest to the read-back of

Dr. Carter's testimony, rather than to require her live testimony, was a well-reasoned strategic decision, and therefore, not subject to the confines of Strickland. Trial Court's Order Denying 3.850, Pg. 9; see also Griffin, 866 So. 2d at 10.

The facts necessary to analyze the trial courts legal conclusions are summarized as follows:

> During the 2007 penalty phase, after the defense had presented the testimony of Dr. Kramer, Dr. Ross, and Mr. Buckley, the State indicated that it intended to offer the rebuttal testimony of Dr. Sherri Bourge-Carter. (ROA-2007, 1137-38). Dr. Carter testified during the 1999 penalty phase, and had diagnosed Mr. Ault with Psychopathy and Pedophilia; opining that Mr. Ault did not suffer from a mental illness. IB, Pgs. 9-10.[4] The State informed the Court, and Attorney Polay, that Dr. Carter was suffering from a medical ailment, and would need special accommodations if forced to appear for live testimony. IB, Pgs. 33-34. Mr. Polay indicated that the only objection he had to the reading of Dr. Carter's former testimony into the record was that it would be a violation of Crawford, and not as to her availability. IB, Pgs. 34-35. This sidebar discussion, as to whether Dr. Carter would testify in person or not, was held outside the presence of the Defendant, and the court never inquired of the Defendant on the issue.[5] Dr. Carter's former testimony was then read to the 2007 penalty phase jury. Thereafter, the jury recommended a sentenced of death by a vote of 9-3 for the first victim, and 10-2 for the second victim.
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> During the January 2014 evidentiary hearing, upon claim three (3) of the Defendant's Amended 3.850 Motion, regarding the instant argument, the trial court heard the testimony of Dr. Carter, Mr. Polay, and Mr. Carpenter. Attorney Polay explained that he believed Dr.

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[4] Citation to Appellant's Initial Brief will be in the format of "IB" followed by the page number.

[5] It should be noted that at the evidentiary hearing in 2014, Mr. Polay testified that he never discussed his decision to have Dr. Carter's former testimony read with Mr. Ault.

> 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." IB, Pg. 14. Dr. Carter informed that court that had she been required to appear in person for testimony, she would have. IB, Pg. 10.
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> In its written decision, denying the Defendant's Amended 3.850 Motion, 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. IB, Pg. 10. The court also 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. Id.

When reviewing the trial court's decision, post evidentiary hearing, this Court is required to give deference to the lower court's findings of fact, but must review its legal conclusions de novo. Jackson, 127 So. 3d at 460. The trial court determined that because Dr. Carter was available to testify, Mr. Polay's decision to have her former testimony read into the 2007 record was one of strategy, as to avoid her live testimony with inflection and emotion. In reaching its decision, the court relied on (1) Mr. Polay's professional experience; (2) Dr. Carter's testimony that she was, in fact, available for testimony during the 2007 penalty phase, despite her illness, and (3) Dr. Carter's testimony indicating that her opinions of Mr. Ault have not changed from her testimony given in 1999. In its answer brief, Appellee agrees with the trial courts assessment, and bases its argument on Polay's

experience as a capital attorney, his awareness that Dr. Carter was ill[6], his experience with Dr. Bourg-Carter on other cases, and his reading/familiarity with her 1999 penalty phase testimony in Mr. Ault's case. It should be noted that the Appellee concedes the fact that Attorney Polay "could not recall if he prepared for her cross-examination." Appellee's Answer Brief, Pg. 62.

Contrary to what the Appellee argues, the trial court erred in its legal conclusions as it relates to both prongs of Strickland. 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's performance was deficient during the 2007 penalty phase. When asked at the evidentiary hearing whether he objected to the reading of her former testimony, he explained 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." R. 5/770.[7] So rather than object to the reading of her former testimony based upon Dr. Carter's availability, he objected

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[6] The Appellee relies on Mr. Polay's awareness of Dr. Carter's illness, as a means for supporting its argument that his decision was strategic, when he failed to object on "availability grounds." Appellee's Answer Brief, Pg. 65. Mr. Ault asserts that such reasoning is flawed. This is just the type of scenario where such "availability objections" are called for, and counsel, even counsel with less experience than Mr. Polay, performing as required by the Sixth Amendment to the United States Constitution, would know to make such an objection, if for no other reason, but to preserve the record for appeal.

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

to the reading arguing that its use was in violation of Crawford, as hearsay evidence.

As an experience trial attorney, Mr. Polay knew he could require Dr. Carter to be subjected to cross-examination upon the newly discovered evidence, and be confronted with the damaging statements she made during the 1999 penalty phase, which in his very own words, portrayed Mr. Ault as the "devil incarnate." He knew he could accomplish this by objecting based upon her availability. It is without question that Dr. Carter was suffering health issues at the time of the 2007 penalty phase, and that this was the sole reason for the State's proffer of her 1999 penalty phase testimony. The State made it clear that if the Defendant objected based upon Dr. Carter's availability she would be produced, although her appearance would require accommodation. 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 1999 penalty phase testimony was objectionable, and should not have been admitted in either penalty phase. On must wonder why Mr. Polay failed to seize upon the opportunity to confront Dr. Carter; the Defendant submits that this decision was made as a result of his lack in trial preparation, as opposed to being a well reasoned trial strategy.

To couch Attorney Polay's performance as anything but deficient is clearly an error by the trial court. Had Mr. Polay properly advocated Mr. Ault's Sixth Amendment right to confrontation, Dr. Carter would have been required to appear in person, or in the alternative, the State would have been forced to put forth a showing of a substantial reason why she was not available before her former testimony, casting Mr. Ault as the "devil incarnate," could have been used. State v. Abreu, 837 So.2d 400; 403-04 (Fla. 2003) ("A prosecutor must demonstrate a witness's unavailability, by showing a substantial reason why she not available, prior to the admission of his former testimony, as it is constitutionally required by the confrontation clause of the Sixth Amendment."); see also Florida Statute §90.804 (The Florida Evidence Code requires that, upon objection, former testimony must be excluded.); 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.); Crawford v. Washington, 541 U.S. 36 (2003).

Upon the undisputed facts of this case, wherein the trial court has found that Dr. Carter was in fact available,[8] the State would have been unable to "make a showing of a substantial reason why she was not available," and would have been required to produce the witness for trial, or in the alternative, proceed without the

[8] Trial Court's Order Denying 3.850, Pg. 10

use of her testimony. In the event Dr. Carter appeared for cross-examination, Mr. Polay, with years of experience, could have taken the opportunity to confront Dr. Carter with the objective medical evidence of Mr. Ault's organic brain damage, as testified to by Dr. Ross. In addition, with his experience, 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, 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.

The Appellee wants this Court to believe that because Dr. Carter is not able to interpret the brain testing, which was conducted after her 1999 testimony, that her not being confronted with this evidence made no difference. Mr. Ault is not asserting that Dr. Carter could interpret the test results, but rather, that had she been confronted with the objective medical evidence, the sting of her testimony could have been dulled. Her 1999 testimony was very matter of fact, that Mr. Ault suffered no mental illness. But as the record from the evidentiary hearing shows, Dr. Carter admits that her diagnosis of Mr. Ault "could, in part, be due to if he has brain problems." For purposes of this argument, it is also important to note concessions made by Dr. Carter during the evidentiary hearing when questioned by undersigned counsel, wherein she conceded 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. R. 5/675-753. 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."[9]

Furthermore, for purposes of this argument, it is important to consider the testimony given during the 2014 evidentiary hearing, wherein Mr. Carpenter, an experience private investigator, opined as to the Attorney Polay's trial preparation with regard to Dr. Carter. 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. R. 5/771-775. 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. Id. Upon his examination, he found no

[9] 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.

notes, no highlights, nor any folded pages. Id. 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. Id. When Dr. Carter was asked if she had discussed this case with Mr. Polay prior to the 2007 penalty phase, she stated, "no, I don't see any record of having a conversation with Mr. Polay." Mr. Polay, conceded his failure to prepare, 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.

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, and when he was given the opportunity to avoid having to cross-examine her, seized on that opportunity. State v. Fitzpatrick, 118 So.3d 737, 754 (Fla. 2013) ("One of the primary duties defense counsel owes to his client is the duty to prepare himself adequately prior to trial."); see also Magill v. Dugger, 824 F.2d 879, 886 (11th Cir. 1987) (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).

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. 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. The Appellee asserts that Mr. Polay knew enough about Dr. Carter's former testimony to know it was damaging.[10] There is no way an experienced capital attorney could have found Dr. Carter's former testimony 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.

With its decision, the trial court gave no consideration to the facts strongly supporting Mr. Polay's lack of trial preparation, as testified to by all three witnesses during the evidentiary hearing. It should also be noted that the Appellee made no attempt to address Mr. Polay's failure to prepare for Dr. Carter's cross-examination in its answer brief, but asserts that his decision was one of strategy.

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[10] Mr. Ault asserts and reincorporates the arguments, and factual outline, made in his Initial Brief relating to sub-issue number two.

Strickland, 466 U.S. at 690-91 ("strategic choices, made after less than a complete investigation, are reasonable only to the extent that "reasonable professional judgment support the limitations of investigation."). There is nothing is the record to support a finding that Attorney Polay was limited, in any way, in his investigation of Dr. Carter, and the effect her former testimony would have at trial. Clearly Attorney Polay's performance was deficient in this regard.

In light of Attorney Polay's deficient performance, the Defendant strongly contends that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been entirely different. Again, had Attorney Polay objected to the reading of Dr. Carter's testimony based on her availability, the State would have had to produce her for trial, or make a substantial showing as to why she was not available to testify. Because the record reflects that Dr. Carter was, in fact, available, it is unlikely the State would have been able to make any such showing. In that event, the State would have had two options: (1) produce Dr. Carter for testimony or (2) proceed without her testimony altogether.

Surely, had the State proceeded without Dr. Carter's testimony, the jury would not have been presented with her damaging remarks, and there is a reasonable probability that the jury's sentencing recommendation would have been something less than death. Blackwood v. State, 946 So. 2d 960, 963 (Fla. 2006)

("In regard to the death penalty, it cannot be overlooked that a court's imposition of the sentence must originate in the recommendation of the jury.") Additionally, in the event she appeared, had Attorney Polay prepared for her cross-examination he would have realized the deficiencies in her former testimony, and would have appreciated the need to cross-examine her during the 2007 penalty phase, making some effort to discredit her former testimony and to confront her with the newly discovered objective medical evidence, as undersigned counsel did during the 2014 evidentiary hearing. From these facts, it is apparent that the deficiency in Attorney Polay's performance affected the fairness and reliability of the proceedings, so much so, that the confidence in the penalty phase outcome is most surely undermined.

**Mr. Polay's assistance as counsel was ineffective because he failed to prepare for the penalty phase of trial, which resulted in prejudice to Mr. Ault.**

Because this claim was summarily denied, this Court is required to affirm, only if it believes Defendant's argument is legally insufficient, should have been brought on direct appeal, or is positively refuted by the record." In its Order Denying Defendant's 3.851 Motion, the trial court rejected the 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.

Mr. Ault has made it clear what could have been done to more efficiently prepare Dr. Kramer for his 2007 penalty phase testimony. As examples, the defendant has cited the following: (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.[11] If this had been done, Dr. Kramer would not have looked as foolish before the jury, and they would have given his opinion regarding Mr. Ault's mental health more consideration.

The issue as to whether Mr. Polay properly prepared Dr. Kramer for questioning has already been decided, on numerous occasions, and all decisions have asserted Mr. Polay's deficiency. This Court, in Ault, 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." Ault v. State, 53 So. 3d 175 (Fla. 2011). It should also be noted that trial court acknowledged, in its order, that Dr. Kramer was insufficiently prepared, citing the limited time Dr. Kramer had spent with Mr. Ault, and that Dr. Kramer's "only

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

sources of information were the Defendant and the reports of other doctors."[12] This Court should also bear in mind 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 lower court has already recognized the deficiency in Mr. Polay's preparation of Dr. Kramer, supports Mr. Ault's argument that Mr. Polay failed to prepare Dr. Kramer for trial, thereby performing deficiently. 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. The record is clear, Attorney Polay failed to perform according to professional standards in this regard.

In light of Attorney Polay's deficient performance, the Defendant contends that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been entirely different. Had Attorney Polay properly prepared Dr. Kramer for trial, most surely Dr. Kramer's testimony would have been given more weight by both the jury and the trial court, and would have served to effectively counter Dr. Carter's damaging testimony. By failing to properly prepare Dr. Kramer, combined with the decision to have Dr. Carter's former testimony read back, Attorney Polay left Mr. Ault undefended against a

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[12] 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.

death sentence. Had Dr. Kramer been properly prepared, and fully apprised of the facts and evidence in this case, he most surely could have presented a strong case for mental health mitigation in Mr. Ault's defense, which reasonably could have resulted in a sentence that did not include death. Gregg v. Georgia, 428 U.S. 153, 190 (1976) (In a capital case, "accurate sentencing information is an indispensible prerequisite to a reasoned determination of whether a defendant shall live or die."); see also Blackwood, 946 So. 2d at 963 ("In regard to the death penalty, it cannot be overlooked that a court's imposition of the sentence must originate in the recommendation of the jury.").

**Mr. Polay's assistance as counsel was ineffective because he failed to prepare and to present a case of mental health mitigation during the 2007 penalty phase, which resulted in prejudice upon Mr. Ault.**

This claim was summarily denied, without an evidentiary hearing, by the trial court, wherein it found that there was no prejudice to the Defendant because the aggravating circumstances far outweighed the mitigating circumstances. When addressing Defendant's argument that Mr. Polay failed to prepare and to present a case of mental health mitigation, the lower court explained 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." The Appellee adopted this argument in its Answer Brief.

A thorough review of the available evidence in Mr. Ault's case would have alerted Mr. Polay to deficiencies in the 1999 cross-examination of Dr. Carter with regard to mental health mitigation. 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 newly discovered objective evidence, as undersigned counsel did during the evidentiary hearing, he could have effectively deduced the same comments wherein Dr. Carter conceded that Dr. Eisenstein's opinions[13] 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. Clearly this is an example of "how the state's evidence could have been better challenged."

In addition, the Defendant reminds the Court that on appeal from the trial court's omission to evaluate whether Mr. Ault's mental health evidence qualified as non-statutory mental health mitigation, this Court held that, "any emotional disturbance relevant to the crime must be considered and weighed by the sentencer...Here, Ault did not raise non-statutory mental health mitigation before the trial court." Ault, 53 So. 3d at 191. In its answer, the Appellee misstates Mr.

[13] Dr. Eisenstein's opinions were in direct contradiction to the opinions of Dr. Carter, although the trial court gave his testimony very little credibility.

Ault's argument, in that it assumes he views the courts holding as a finding of deficiency on Mr. Polay's part. Appellee's Answer Breif, pg. 85. This is not so.

What Mr. Ault seeks to assert is that Mr. Polay had information available to him that strongly indicated a possibility that Mr. Ault suffered mental health problems. This information ranged from physical evidence/reports, to the testimony of Dr. Carter and the Defendant's very own witnesses.[14] Despite this readily available information, indicating the potential for mental health problems, Mr. Polay failed to seek and present a competent mental health evaluation of Mr. Ault, in an effort to defend against the death penalty. Arbelaez v. State, 898 So. 2d 25, 29 (Fla. 2005) ("When available information indicates that a defendant could have significant mental health problems, a mental health evaluation is fundamental in defending against the death penalty for mitigation purposes. This remains true even when the mental health problems do not appear to rise quite to the level of mental retardation."). By virtue of this Court's finding in Ault, 53 So. 3d at 191, that "Ault did not raise non-statutory mental health mitigation before the trial court," it is apparent from the record that Mr. Polay failed to pursue a mental

[14] Dr. Ross testified to Mr. Ault's objective medical evidence as it related to the Defendant's brain damage. The lower court found his testimony to be lacking in that he failed give an opinion as to the statutory mitigators. Dr. Kramer was used in a attempt to counter Dr. Carter's damaging testimony; however, as discussed thoroughly in Mr. Ault's initial brief, and herein, Mr. Polay failed to properly prepare Dr. Kramer for trial, resulting in a defense witness that was less than effective.

health investigation for mitigation purposes. Wiggins v. Smith, 539 U.S. 521, 527 (2003) 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.").

Appellee suggests this Court find that because Mr. Polay used Dr. Carter's testimony to argue a case supporting mitigation, an independent investigation would prove irrelevant, and would only amount to cumulative evidence. Appellee's Answer Brief, Pg. 94. In fact, the Appellee goes as far as to argue that "allowing the State to make the defense's case for it may be seen as good strategy." Appellee's Answer Brief, Pg. 94. However, as the State acknowledged on its own accord, an expert, independent of the state, offering beneficial evidence on behalf of the defense would surely carry more weight with the jury. Id.

Defense counsels' failure to investigate, and raise non-statutory mental health mitigation in the trial court deprived Mr. Ault of a reliable penalty phase proceeding. Had Mr. Ault's counsel raised non-statutory mental health mitigation before the trial court, considering the basis of his trial strategy hinged on Mr. Ault's emotional and mental health issue, together with all of the Defendant's other mitigation arguments, there is a reasonable probability that the outcome of the proceeding would have resulted in a life sentence, as opposed to a sentence of

death by vote of the penalty phase jury. Blackwood, 946 So. 2d at 963 ("In regard to the death penalty, it cannot be overlooked that a court's imposition of the sentence must originate in the recommendation of the jury."); see also Williams v. Taylor, 529 U.S. 362, 393 (2000) (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.); Gregg, 428 U.S. at 190 (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.").

Mr. Ault is aware that this court found the HAC aggravating factor to be so overwhelming, that it outweighed the mitigating evidence presented.[15] However, the Defendant would assert that had Mr. Polay prepared a case of mitigation, and properly presented it to the jury, there is a reasonable probability that the outcome of the sentencing phase would have been different. Crook v. State, 908 So. 2d 350, 352 (Fla. 2005) (Finding that the aggravating circumstances, though substantial, did not outweigh the combination of unrefuted and overwhelming mitigation that the Court had determined, in other cases, required a life sentence. While the Crook Court noted the importance of an abusive childhood, and age as mitigating circumstances, it particularly emphasized extensive mental health mitigation in its

[15] The trial court found no statutory mitigating circumstances, and three non-statutory mitigating circumstances. R. 5/822-23.

analysis.).

**Mr. Polay assistance as counsel was ineffective because he failed to investigate Mr. Ault's low IQ, which resulted in prejudice upon Mr. Ault.**

Upon summary denial, the trial court found that Defendant's claim regarding Attorney Polay's failure to investigate Mr. Ault's low IQ was legally insufficient, refuted by the record, and that the Defendant was not prejudiced by the lack of additional IQ evidence. Trial Court's Order Denying 3.850, Pg. 12. The Defendant re-asserts his argument as set for in his initial brief with regard to this claim for relief, and submits that his claim is not legally insufficient, nor is it refuted by the record, as alleged by the Appellee in its Answer brief.

The evidence and information available to Mr. Polay, from the first penalty phase, in addition to the objective medical tests he planned to present, was more than enough to alert Attorney Polay to the need for further IQ investigation. Arbelaez, 898 So. 2d at 29 ("When available information indicates that a defendant could have significant mental health problems, a mental health evaluation is fundamental in defending against the death penalty for mitigation purposes."). Appellee would have this court believe that Mr. Polay's use of Dr. Carter's testimony to argue a case for mitigation, imputed a benefit upon the defense, in that "allowing the State to make the defense's case for it may be seen as good strategy." Appellee's Answer Brief, Pg. 94. However, as the State acknowledged

on its own accord, an expert, independent of the state, offering beneficial evidence on behalf of the defense would surely carry more weight with the jury. Id.

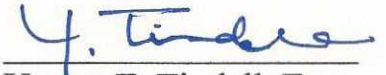
While the Appellee makes an attempt to construe Mr. Polay's decision to use Dr. Carter's testimony as the basis for his mitigating arguments, as one of strategy, the defense urges this Court to see Mr. Polay's deficient performance for what it is, a lack in his constitutionally required trial preparation. 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.").

There is no sound basis for defense counsel to have failed to investigate and present mitigation evidence of the defendant's borderline intelligence. Because this mitigation was not properly investigated, and made available for the jury, or presented to the trial court, to consider before the death sentences were imposed in 2007, confidence in the imposition of the death penalty in this case is undermined. Blackwood, 946 So. 2d at 963 ("In regard to the death penalty, it cannot be overlooked that a court's imposition of the sentence must originate in the recommendation of the jury.").

## 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, because the trial court erred, as argued above, calling into question the reliability and outcome of the trials court's proceedings.

Respectfully submitted,



Young T. Tindall, Esq.
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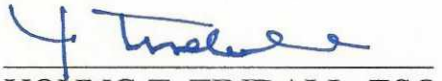
Counsel for Appellant

## CERTIFICATE OF SERVICE

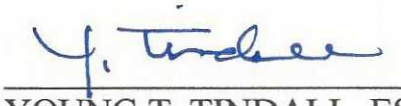
I HEREBY CERTIFY, that a true and correct copy of the foregoing has been e-filed with the clerk of court for the seventeenth judicial circuit, and has been furnished to Joel Silverstein, Esq., Assistant State Attorney, Office of the State Attorney; and to Leslie Campbell, Esq., Assistant State Attorney General; by e-filing this 3rd day of September, 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.



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