IN THE SUPREME COURT OF FLORIDA

CASE NO.: SC07-2130

HOWARD STEVEN AULT

APPELLANT

VS.

STATE OF FLORIDA

APPELLEE

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

ANSWER BRIEF OF APPELLEE
(Addressed to Initial and Supplemental Initial Brief)

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PRELIMINARY STATEMENT

Appellant, Howard Steven Ault, Defendant below, will be referred to as "Ault" and Appellee, State of Florida, will be referred to as "State". Reference to the appellate record will be by "R" and supplemental materials will be designated by the symbol "S" preceding the type of record referenced, Ault's initial brief will be notated as "IB" followed by the appropriate volume and page number(s).

STATEMENT OF THE CASE AND FACTS

On November 4, 1996, eleven-year old DM and seven-year old AJ disappeared, and two days later, were found dead in Ault's attic. Subsequently, on November 20, 1996, Ault was indicted for two counts of first-degree murder, two counts of kidnapping of a child under thirteen, and two counts of sexual battery on a child under twelve for the penile and digital penetration of DM. Following a jury trial and penalty phase, Ault was convicted as charged, and sentenced to death. Ault v. State, 866 So.2d 674 (Fla. 2003). However, on November 6, 2003, this Court affirmed the convictions, but reversed for a new penalty phase based on an error committed in jury selection which impacted the jury's sentencing decision and for resentencing of the non-capital counts as the incorrect guidelines had been used. Id. at 683-88.

The new penalty phase commenced on July 30, 2007, and on August 21, 2007 the jury recommended death sentences by a vote

of nine to three for the murder of DM and by a vote of ten to two for AJ's killing. A hearing pursuant to Spencer v. State, 615 So.2d 688 (Fla. 1993) was held, and on February 24, 2007, Ault was sentenced to death for the homicides, and was given fifteen years each on Counts V - VIII for the kidnapping, sexual battery and aggravated child abuse charges. These sentences were run concurrent with each other and any sentence Ault was serving presently. (R.4 651-70).

Prior to the instant crimes, Ault had attacked several young girls and committed an aggravated battery on an off duty police officer. During the penalty phase, the State presented the victims and certified convictions for these prior violent felonies[1] and the fact he was on community control when he committed the instant crimes. (R.11 747-49; 757-59; 771-77; 783-86; 851-56; R12 994-95, 1002-03). The State also presented witnesses and evidence establishing the facts and circumstances surrounding Ault's instant convictions for which he was to be sentenced. (R.1 1-4; R.11 816, 822-25, 834-44; R.12 884-85, 887-88, 907-17, 930-31, 934-37, 956-61, 964-75, 979-82, 989-91, 995-999, 1002-03, 1025-27). Victim impact testimony was also presented. (R.11 810, 81415, 817, 823-24, 927-29). Both parties

[1] Aggravated Battery (#86-14707 CF10A); Burglary with a Battery and Attempted Sexual Battery (#88-11134 CF10A); Sexual Battery upon a child less than 12 years of age by a person in a position of familial authority (#94-4445 CF10A); and Sexual Battery upon a child and Aggravated Child Abuse (#96-21025 CF10A).

offered mental health experts to opine regarding Ault's mental condition and mitigation. (R.13 1041, 1103, 1139).

In March 1994, NG was seven-years old and had known Ault, her neighbor, for several months. (R.11 745-46). On March 14, 1994, she went with Ault to a local store. On the drive home, he exposed himself, ripped off her shorts, and touched her even though she said it hurt. He also hit her in the head to make her stop crying. When he dropped her off at home, he told her he would kill her if she reported the incident. The last time she saw Ault was when he was in police custody. (R.11 747-50).

TW testified that on December 31, 1995, she was 11 years old and met Ault who asked her to babysit for his five-month old child while he picks up his wife from work. Between 6:00 and 7:00 p.m. that evening, Ault left TW at his home with his baby. (R.11 753-55). When he returned two hours later alone, he put on a robe which he left open so TW could see he was naked, then played a porno tape and masturbated in front of TW who became frightened. Ault picked up TW and took her to the bedroom. When she started to scream, Ault hit her in the head twice and pushed down on her neck while telling her to be quiet. After the third blow, TW stopped screaming. Ault ripped off her shorts and underpants and sodomized her. (R.11 756-59) When his baby started to cry, Ault stopped his attack and told TW that when he saw her he had to have her and that what he did was

wrong. Before leaving the house with his child, Ault told TW she should report this incident. (R.11 759-60).

On May 15, 1988, ML's mother worked a double shift at a local restaurant and twelve-year old ML and her two brothers were home. That evening, Charles Ault, who ML knew, and his brother Ault, arrived at her home seeking medication for her mother who had taken ill at work. After ML gave the brothers her mother's medication, she went to bed. (R.11 770-71) Hours later, near 4:00 a.m., ML was awakened by a man, with a pillow case over his head, later revealed to be Ault, sitting on her chest. Ault told her he would hit her if she screamed. When ML screamed, he hit her near her eye with a trophy she had on a shelf. As he took off her panties, ML fought back and screamed, at which point, Ault told her he would kill her. Once he got ML pinned, Ault fondled her private parts and vagina. When she broke free, Ault removed the case from his head, and ML's brothers gave chase. (R.11 772-77).

Police Officer Mattai ("Mattai") testified about being attacked while off duty. As he was walking on the beach with a date, Ault and another man approached. Ault started slashing at Mattai with a knife. When Mattai flashed his badge and threatened to shoot, Ault fled. Mattai suffered only minor scrapes. Ault pled guilty to aggravated battery. (R.11 782-87).

Delores Skeets ("Skeets") was a park aide in John Easterlin

Park where DM, AJ, and their mother, Donna Mae Jones ("Jones") and baby sister would camp three nights per week. Daily, Jones would meet her DM and AJ at the park after school. (R.11 819-21). Skeets saw Ault in the park interacting with Jones and her children on occasion. Once Ault was walking alone with Jones' youngest child; another time she saw him with the family, looking into their car. On both occasions as Skeets started to approach, Ault left. Skeets also saw DM and AJ in Ault's truck and scolded the girls for getting into his truck. It was then she discovered Ault's identity. (R.11 822-23, 826).

Jones testified her daughters, DM and AJ, were eleven and seven-years old respectively on November 4, 1996. In November 1994, they had been living in and around Easterlin Park. (R.11 834-35, 846-47). She and her family did not know Ault well, but saw him in the park a few times before the murders. One day he introduced himself and offered her family an opportunity to shower at his apartment, and gave her a map. He also changed a filter on her car. (R.11 837-39). On the Wednesday before the murders, Ault left the park, only to return quickly, driving DM and AJ. Jones scolded her girls for getting into his truck and admonished them never to get in a stranger's car. That was the only time she saw her children in Ault's vehicle. (R.11 840).

On Monday, November 4th, Jones drove her girls to school; they were to walk back to the park that afternoon and meet Jones

at the front park benches. When the time had passed for the girls to return, Jones went to the school, but was told they had left.[2] (R.11 840). When the girls did not arrive at the park office, Jones returned to the school and called the police. She also checked with her aunt, cousin, and friend, Sherry Bright, to see if the girls had gone to their homes, but they had not. Later that night, she went to Ault's home looking for her children, but he denied knowing where they were or having seen them that day. However, he asked her not call the police as he had had troubles in the past. Subsequently, Jones went to the police station where she remained until the girls' bodies were found two days later. (R.11 841-44).

Alvertis Johnson ("Johnson"), between April and November 1996, was Ault's Community Control Officer for the 1994 convictions of Sexual Battery upon a child and False Imprisonment. (R.11 745, 851-52). They met twice weekly, once in the office and the other during a surprise home visit. Ault had to give a DNA sample, submit to a psychological evaluation, go to counseling, and have no contact with anyone under 16-years old as special conditions of community control. He was not authorized to go to the park. (R.11 852-55, 857-58).

[2] Lloyd Estates Elementary School teacher, Winifred Walters, last saw the victims on November 4, 1996, as they held hands leaving school. (R.11 815-16).

Before 8:00 p.m. on November 4, 1996, Johnson made a routine check of Ault's home. He stepped inside and did a quick look around. Ault's wife was not home, but all was quiet; the bedroom door was closed and the place was neat. The next day, Ault reported early for his weekly meeting. (R.11 855-56).

Retired Oakland Park Detective Rhodes ("Rhodes") testified that on November 5, 1996[3] he was assigned to investigate the disappearance of DM and AJ. That day, he met with Ault at the police station. Ault denied knowing where the girls were and stated he had seen them only once on October 28, 1996 when he and his wife were together. (R.12 931-34). After the interview, Rhodes contacted other withnesses who refuted Ault's account. As a result, Rhodes decided to re-interview Ault. (R.12 935-36).

On November 6, 1996, Rhodes and a Florida Department of Law Enforcement Agent, obtained a court order to have Ault removed from the jail for investigative purposes. Ault admitted the girls were dead in his home and gave Rhodes directions there. Upon arrival, and hoping the girls were alive, Rhodes received Ault's consent to forcefully enter and check for them. After breaking in through a window, Rhodes found the girls' bodies in the attic, and the scene was turned over to the Fort Lauderdale Police. (R.12 936-39).

[3] Only after the fact did Rhodes learn of Ault's arrest by a Sheriff's Deputy for TW's assault (R.11 752-65; R.12 934-35).

Because Ault would talk to Rhodes only, they went to the Oakland Park police station where Ault's upper shackles were removed, he was given cigarettes, re-Mirandized, and his videotaped statement taken. Ault confirmed he was not under the influence of any substance, had never been declared incompetent or institutionalized, and was of sound mind. He knew what he was doing; it was voluntary. (R.12 945-53).

Ault admitted recently he had started going to Easterlin Park where he had met Jones and her children. In the afternoon of October 28, 1996, Ault introduced himself to Jones who had her toddler with her. Later, DM and AJ returned to the park, after which Ault left to get his wife. Later that day, Ault and his wife returned to give Jones a map to their apartment and to offer her a place to cook for her children. (R.12 955-59).

Two or three days later, Ault picked up DM and AJ on their way to the park after school. He saw them near a convenience store and offered them a ride. The Park Ranger saw him dropping off the girls at the park. All he had to do to get the girls in his truck was to ask. It was at that time he decided to pick up the girls again and to sexually abuse them as he likes to have sex with young girls. Since then, Ault had visions of having sex with one or both girls. (R.12 959-61, 966).

On the day of the crime, Monday, November 4, 1996, Ault dropped his wife off at her Palm Beach employer, did errands,

and returned home by noon. (R.12 962-63). It was Ault's intent to sexually abuse the girls, he just had not decided on the time to do this. He left his house near 2:15 p.m. and picked up the girls near the convenience store at 2:30 p.m. As they were walking with books in hand, he asked them if they wanted a ride. By this time, Ault had decided to take the girls to his apartment. He had no difficulty in getting them in his truck because he tricked them by offering a ride home. Once at his apartment, he convinced the girls to enter with an offer of leftover Halloween candy. They offered no resistance, but entered the home readily upon Ault's ruse. (R.12 965-69).

Once inside, Ault sexually assaulted DM; he took off her shorts and panties and started by fondling her. He used his finger, then his penis to penetrate her. The assault took place on the living room floor between the front door and couch. DM resisted by screaming and fighting. She complained it was not good, she did not want to do it, and it would ruin her life. AJ was crying on the couch. In response to DM's protestations and resistance, Ault covered her mouth with his hand and tried to hold her to keep her from making noise while using his left hand to strangle her. Ault stopped having sex with DM because she was fighting and screaming. Because DM said she would tell her mother, he strangled her until she stopped breathing. AJ continued to cry on the couch. (R.12 969-73, 995-96).

After he had killed DM, Ault turned to AJ who was sitting on the couch crying and was very afraid. She asked him not to hurt her. He did not remove AJ's clothes or sexually assault her. Instead, he strangled her so there would be no one to report his crime. He choked AJ knowing he was killing her. At the time he picked up the girls by tricking them, he had intended to have sex with them. He decided to kill only after DM said she would report him and he decided to kill AJ because she witnessed her sister's killing. Ault reported that the girls were dead by 3:00 p.m. (R.12 973-75, 996-97).

Having killed, Ault was afraid of getting caught and thought about how to hide the bodies. He redressed DM and decided to put the girls in the attic. He used a ladder he had in the house to access the attic, then put the ladder outside so as not to draw attention to the attic. (R.12 976-78, 981-82). Ault left his residence near 4:00 p.m. to pick up his wife from work. He took the girls' books and other items with him and discarded them in a dumpster in Palm Beach. (R.12 978, 997-99).

Near 9:00 p.m. that night, Jones came to his door looking for her girls. Ault's wife answered and the three adults stood in the doorway. The entire time Ault knew the girls were dead in his attic. (R.12 979-80). Later that evening, the police called on Ault looking for the girls and inquiring about his whereabouts that day. He let them enter to look around, but

they did not look in the attic as it was closed off perfectly and he had put the ladder outside so no one would think to look in the attic. Nonetheless, both officers looked at the attic opening, but neither sought to enter. The police arranged for Ault to go to the station voluntarily the next day to give a statement. (R.12 981-82).

Ault said he had thoughts of having sex with young girls since his older brother, Charles, first assaulted him when he was seven years old. That sexual abuse, endured for years, was never reported to the police. (R.12 989-91) Ault reported feeling remorse for the killing of DM and AJ. (R.12 1009).

On November 6, 1996, Dr. Davis responded to Ault's apartment and looked in the attic crawl space where he saw DM and AJ near its opening. He noted the lividity and rigor of the bodies and that DM's clothing appeared disturbed. He did the autopsies the following day. (R.12 884-85, 887).

The autopsy of DM revealed she had been dead for 48 to 60 hours. Her head was swollen and there was faint bruising around the neck area. Hemorrhaging was noted in the neck tissue indicating manipulation trauma. There was also hemorrhaging around the thyroid, but DM's neck was not broken. DM had bruising within the right side of her head. Cause of death was manual strangulation and the strangulation caused blood to pool in DM's head. Generally, pressure to the neck causing

obstruction of blood and oxygen depends on the amount of pressure, but unconsciousness may occur in as little as 30 seconds to as much as five to ten minutes. (R.12 907-12). Dr. Davis noted there were vaginal tears and bleeding of DM's vaginal tissue. Her shorts had been buttoned improperly and her bra was pushed above her breasts. (R.12 908-09, 912-13).

Turning to AJ's autopsy, Dr. Davis reported she was fully clothed and the clothing appeared undisturbed. AJ's body was less deteriorated than DM's body which led Dr. Davis to conclude she had survived 18 hours longer than her sister. He saw foam around AJ's mouth which indicated she had suffered respiratory distress. Based on the hemorrhaging to her neck and foam around her mouth, Dr. Davis opined that AJ had been strangled to the point of unconsciousness, and put in the hot attic, where she expired several hours after the initial assault. The strangulation did not result in immediate death. Death was a slow process with swelling to the brain and respiratory distress. However, in all likelihood, AJ was unconscious the entire time. Dr. Davis also observed scratches along the lower part to AJ's jaw, left side of her neck, and across the front of her neck. There were small focal hemorrhages to her eyelids and whites of her eyes. Cause of death was manual strangulation; it just took longer to play out. (R.12 914-17).

As victim impact testimony, Winifred Walters testified that

she was DM's teacher and that she also knew AJ from school. DM was a very responsible, brilliant child who read constantly and participated in the schools' Safety Patrol program. She looked after her AJ in school and encouraged her to study. DM's homeless situation did not affect her school performance; she never missed a homework assignment and was destined to go far in life. DM was a very happy child interested in helping others. She is a big loss to the community. (R.11 809-10, 812-15).

Skeets also thought DM was a very smart girl. Immediately upon returning to the park from school, DM would do her homework and only after it was completed would she go to play. DM would also help her mother. Skeets believed DM was a loss to the community. DM had wanted to become something and make money to help her mother out of her situation. (R.11 823-24)

Sherry Bright offered that she met the Joneses toward the end of 1995 and their children played together. DM was a very loving, nurturing child who wanted to help people. It was clear that DM would have been something special to the community as she grew older; she would have helped others. AJ was an angel who would follow her sister around. So she could help people too, AJ announced that she wanted to be a firefighter when she grew up. Both girls were strong emotionally and played well with others. They never took a toy without asking permission. (R.12 927-30).

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

It was Dr. Kramer's opinion Ault's history revealed a dysfunctional family life and sexual abuse by Charles Ault between the ages of seven and mid-teens some of which was forced through threats of violence.[4] However, the doctor admitted Ault first reported this alleged abuse by Charles after having committed the instant homicides.[5] (R.13 1047-49, 1077-78). Dr.

[4] Dr, Kramer gave a range of between 18% and 80% correlation of someone becoming an abuser after being abused (R.13 1076-77).

[5] Dr. Kramer did not read the testimony and/or statements of Ault's siblings or father regarding the allegations against Charles Ault; he read only the testimony of Ault's mother who was relating what Ault told her of the sexual abuse. Further, it was noted it was inconsistent that a mother who doted on her son as Ault's mother doted on him, would allow an alleged sexual abuse to that son to persist and report is only 20 years later.

Kramer credited Ault's self-reports of hallucinations (although the doctor was unsure if the hallucinations were real), use of alcohol and LSD on the day of the crime (as was his self-reported common practice),[6] suicide attempts, pedophilia, checkered school history with severe behavior/learning difficulties - dropping out in the eighth grade, self-reported head injuries, and suicide attempts to render his diagnosis. (R.12 1049-553, 1055-56, 1058-61, 1063-1067, 1072, 1093-94).

Using the Diagnostic and Statistical Manual ("DSM"), Dr. Kramer concluded Ault suffered from post traumatic stress disorder (PTSD), chronic major depressive recurrence with psychotic features, pedophilia, alcohol abuse/dependency, and

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(R.13 1078-79). However, Robert Buckley ("Buckley"), the defense private investigator, testified he started speaking to Ault's mother in 2005, and at some point she reported Charles was estranged from the family due to the allegations of sexual molestation; she reported knowing of the abuse, but offered such things were not discussed in those days. (R.13 1134, 1136). While Ault's mother is alive, she declined to testify because she thought it too inconvenient to come to court. (R.13 1135). Buckley stated that his investigation revealed Ault and Charles worked and hung out together in 1988; this was around the time of the sexual assault on ML, but he could not say when the brothers had a falling out. When Buckley reached out to Charles, he received a negative response (R.13 1135, 1136).

[6] Dr. Kramer did not review the crime scene video to determine if there was evidence of alcohol or substance abuse visible in Ault's home at the time of the crime. He relied upon Ault's self-report 10 years after-the-fact even though there was no prior documentation of alcohol or substance abuse by Ault. (R.13 1081-82). The weekly Community Control reports (State's exhibit #23) from April 1996 through November 1996 indicated no alcohol or drugs use during that period of time. (R.13 1083).

poly-substance abuse. Also, Ault had antisocial traits and a self-reported history of head injuries. (R.13 1070, 1083). Dr. Kramer concluded Ault was under the influence of extreme mental or emotional disturbance at the time of the crime (R.13 1060-62) and Ault's pedophilia impacted his ability to conform his behavior to the law and he cannot control himself with respect to his desire to have prepubescent girls. (R.13 1063).

Dr. Kramer rejected the contention Ault killed DM because he did not like loud noise and she was screaming. (R.13 1080). Likewise, the doctor saw no connection between Ault's multiple violations of the terms of his community control and his pedophilia or compulsions. Dr. Kramer offered no opinion on malingering, but agreed that those with antisocial personality disorders may be untruthful, use aliases, and/or malinger and that Ault's psychological tests showed malingering. (R.13 1084-87). The doctor admitted Ault may be malingering when reporting about multiple personalities and hallucination because he found Ault did not have multiple personalities and could not determine if the hallucinations were real, but he did not believe Ault was malingering about the PTSD. (R.13 1087-88, 1092-94, 1097).

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

cortices. Dysfunction in the frontal cortex and temporal cortices may result in problems with planning, especially while under stress, and problems with execution, judgment, impulse control and emotional issues. (R.13 1106-13, 1016-17). Dr. Ross concluded Ault has an abnormal brain, and that the damage may be the result of congenital or repeated head trauma. (R.13 1013, 1018). The head trauma Dr. Ross noted were the same incidents self-reported to Dr. Kramer. (R.13 1118-19, 1122-23).

However, Ault's frontal lobe injury does not mean that he cannot function and the brain injury Dr. Ross observed did not cause Ault to commit the homicides; it does not cause a person to kill. Dr. Ross could not say within a reasonable degree of medical certainty that the brain injuries he observed occurred before the murders in this case; the injuries could have occurred after the instant crimes (R.13 1123-24, 1126).

In rebuttal, the State presented Dr. Carter,[7] a licensed psychologist. Of her prior dozen capital cases, this was the only one where she testified for the State. Prior to meeting with Ault, she reviewed many pages of documentation.[8] She later

[7] Her testimony from the original trial/penalty phase was read back to the jury. Ault's counsel had no objection to finding Dr. Carter unavailable due to her illness, but objected based on Crawford v. Washington, 541 U.S. 36 (2004) confrontation grounds. (R.13 1136-38).

[8] Prior to meeting with Ault, Dr. Carter reviewed: Ault's statements, interviews by the media, psychological evaluation by

met with him three times between September 5 and 10, 1999 to conduct interviews lasting about five hours, administer psychological tests, and evaluate him. (R.13 1139, 1144-45, 1148-49, 1177). On the first day they met, Dr. Carter conducted a broad interview covering Ault's psychological/social history, discussed possible substance abuse issues, and administered IQ and MMPI tests. (R.13 1148-49, 1154-55). The second day involved additional testing, and the third day, September 10, 1999, Dr. Carter gave an additional test and conducted a more extensive psychological interview/evaluation. (R.13 1166-70).

Based on his description of his alleged hallucinations, Dr. Carter concluded they were not real. (R.13 1151). The IQ test rendered a full scale score of 80; performance score of 87; and

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Dr. Sczechowicz, depositions and/or statements of family/friends Ronald Ault (Ault's father), Charles Ault (brother), Trincia Ault (wife), Deborah Schultz, Joan Rauls, Joy Hall, Barbara Madson (Ault's mother), Timothy Allen, Audrey Gonzalez, William Wedge, Michael Lindsey, Andrew Ageasy, Seff Katland, Evertt Carter, Jeff Stevens, Daniel Ferraro, Jail records with disciplinary reports, police records regarding calls and mail to Schultz home, letters from Ault to Sabrina Miller, Juudge Gold, Jeff Volante, Ault's pro se demands for speedy trial and to dismiss counsel, reports by Detective Cursio including his time-line of Ault's life history, Detective King's report, psychiatric and psychological reports from Drs. Stock, Brannon, and Castillo, Ault's juvenile court records, Ault's Arlington School District reports/evaluations from elementary, junior high, and high school, and Ault's juvenile psychological reports prepared by Drs. Finn and Price. Additionally, Dr. Carter talked to Detective Cursio and interviewed Ault's sister, Sherry Munoz. Following her interviews and testing of Ault, Dr. Carter reviewed Dr. Eisenstein's evaluation report on Ault, watched Ault's videotaped confession to Detective Rhodes, and the interview he gave Bryant Gumble. (R.13 1146-48).

verbal score of 78. This equates to a low average to borderline score. IQ tests do not contain validity sub-tests, however, the MMPI results showed Ault was malingering on that test - his scores were "off the charts" when it came to testing for malingering. Because of his malingering, all of the tests from the second day were invalid. All tests scales, except the one showing sexual dysfunction, were up. (R.13 1158, 1160, 1163-64). The interview and tests given on the third day confirmed Ault had difficulty behaving in a socially acceptable manner. Dr. Carter explained that Ault's level of psychopathy is in the range of severe psychopathy. (R.13 1173-74)

The severe psychopathy diagnosis means Ault's ability to act appropriately in society is severely impaired, not that he cannot control his actions, because he does, but that he does not see people as people; he sees them as objects. Ault has a personality disorder, but he is not mentally ill. (R.13 1173-74).[9] A personality disorder is a chronic maladaptive pattern of

[9] Dr. Carter explained severe psychopathy to mean:

> … that his level of psychopathy, his ability to relate to others, his ability to experience emotion, his ability to control his behavior, his ability to act in an appropriate socially acceptable way is extremely impaired. In fact, it is severely impaired. It falls in the range of what we call severe psychopath, and it is indicative of an extremely dangerous person for which treatment does nothing for it except as the research studies have found makes them better psychopaths.

relating to oneself and others. (R.13 1174). Dr. Carter diagnosed Ault under the DSM-IV with pedophilia, a non-exclusive type as Ault is attracted to female children, but has sexual relations with adults too. Also, Dr. Carter diagnosed Ault with malingering based on her testing and interviews and comparing them to historical records. Ault was "faking mental illness to avoid responsibility for his behavior and also under personality disorders, in addition to being a severe psychopath, the diagnosis is, according to the DSM IV with an antisocial personality disorder." An antisocial personality disorder is a "chronic pattern of violating societal norms, engaging in criminal behavior, lying, not respecting the rights of others." (R.13 1175-76).

Dr. Carter opined that while pedophilia "is diagnosed on a

> Q … When you are using those words "severely impaired," are you indicating that this person has no control over their actions?
>
> A Oh, no. Often they have reasonable control over their actions. Often they can branch out and their behavior is fairly well. It is not a major mental illness. It is not like schizophrenia. It is not like this person is out of touch with reality. It is that they have difficulty behaving in socially acceptable ways. They have difficulty in showing signs of remorse, because they can't relate to how other people feel. They don't see other people as people. They see people as objects. They are severely personality disordered, but not mentally ill usually.

(R.13 1173-74)

scale that also measures major mental illnesses, but it is not a condition which you are out of touch with reality, or you are not rational in your thinking. It is a mental illness diagnosable in the DSM, but it is not a major mental illness like schizophrenia or a major depression." The "diagnosis of psychopathy goes way beyond an antisocial personality disorder. Those people with psychopathy don't function in the same way as we do, as relates to feeling emotion, showing remorse, engaging in socially appropriate behaviors. … it is the most severe form of an antisocial personality." (R.13 1176-77).

With respect to the hallucinations and other personalities Ault self-reported, Dr. Carter found he was inconsistent in those accounts. Likewise, he was inconsistent in his claims of alcohol and drug use on the day of the crime. To some evaluators he admitted he had not been drinking that day, but to others he reported the opposite. (R.13 1180-85)

Turning to the allegation of sexual molestation by Charles, Ault's reported recollection of the first time he was sodomized was inconsistent with what would have occurred medically. After interviewing Ault's sister, Dr. Carter found other inconsistencies in Ault's tale - Charles was not living at home at the time Ault claimed some of the assaults occurred. Ault gave so many different accounts it was impossible to know what was true. As the records reflect, Ault gave different accounts

as to the years he was assaulted, and how his parents found out (one had his mother making a connection between a Vaseline jar and the assault and the other had Ault telling his parents). Further, Ault denied having asked to live with Charles when he was having difficulties with his parents, but the juvenile records show the request was made. (R.13 1180-85)

Given that Dr. Carter was asked to discuss mitigation, she spoke to Ault about the crimes and how he was feeling at the time. (R.13 1178). Her ultimate conclusion was that he did not meet the criteria for extreme mental or emotional disturbance. When Dr. Carter spoke to Ault of the homicides, she saw no indication he was out of touch with reality. In fact, Ault admitted that because he had picked up the girls before and they had gotten into his truck easily, he knew that when he decided to take them for sex, he could get them into the truck easily. Likewise, when asked why he killed the girls, Ault admitted he knew he would get in trouble and get 20 years in prison when DM said she would report him and Ault did not want to go to prison. According to Dr. Carter, neither admission indicates a lack of touch with reality. (R.13 1189-90).

Dr. Carter noted Ault's pedophilia and antisocial personality disorder did not mean he met the criteria for "disturbance" for the statutory mitigator. Pedophilia does not cause a lack of touch with reality. Ault did not suffer from a

psychosis, but was feigning hallucinations for a secondary gain. Ault understood the consequences of his actions as he admitted that he killed to avoid returning to prison. Hiding the bodies and discarding the girls' personal items to avoid detection showed Ault knew what he did was wrong and that he knew the consequences of his actions. Likewise, because he strangled DM then stopped to have a cigarette before strangling AJ while continuing to smoke shows callousness and lack of remorse. Such goes to Ault's psychopathy, but not a major mental illness which caused him to lose touch with reality. (R.13 1190-92).

The jury recommended death by a vote of nine to three for DM's homicide and ten to two for AJ's murder. The court imposed the death penalty for each murder finding five aggravators: (1) homicide committed while on community control; (2) prior violent felony; (3A) felony murder (contemporaneous felonies); (3B) victim under 12 MERGED with felony murder; (4) avoid arrest; and (5) heinous, atrocious, or cruel (HAC), (R.4 653-57) and non-statutory mitigators: (1) dysfunctional family (little weight); (2) not adequately supervised by the Department of Corrections ("DOC) (little weight); Ault told another sexual abuse victim that what he did to her was wrong and to call the police (some weight). (R.4 658-68) Ault was sentenced to 15 years on each of the non-capital counts and they were run concurrently with each other and the other sentences he was serving. (R.4 670).

SUMMARY OF THE ARGUMENT

Issues I and V – The rejection of statutory mental health mitigation and non-statutory mitigation of brain damage are supported by substantial competent evidence. However, even if this mitigation should have been found, such is harmless beyond a reasonable doubt.

Issue II – Substantial, competent evidence supports the rejection of "adjustment to prison life" mitigator.

Issue III – There was no abuse of discretion in combining various individual mitigating circumstances into a single category and assigning it little weight.

Issue IV – The court did not abuse its discretion in assigning some weight to mitigation that Ault told prior sexual battery victim what he did was wrong and she should call police.

Issue VI – There was no error in not addressing mental health mitigation as a non-statutory factor where Ault never requested review on a non-statutory basis. However, if it were error, it was harmless beyond a reasonable doubt.

Issue VII – Ault's claim of low IQ was rejected properly as not proven. Yet, if the rejection were error, it was harmless.

Issue VIII – The mitigator of Ault's acceptance of responsibility for the murders was rejected properly.

Issue IX – Ault did not prove he was remorseful. However, even if the mitigator should have been found, the sentences

would be different.

Issue X – Pedophilia as mitigation was rejected properly. Ault admitted he killed to eliminate witnesses and avoid prison.

Issue XI – The sentences are proportional.

Issue XII – The four photographs of the victims were relevant to advise the sentencing jury of the crimes, support aggravation, and assist the medical examiner in his testimony.

Issue XIII – The court employed the proper standard in giving great weight to the jury's sentencing recommendation.

Issue XIV – Ault waived his request for a PSI and the law supports his admission that a PSI not required in this case.

Issue XV – A pretrial hearing was not conducted in Ault's absence. However, if the meeting with the court and both attorneys is deemed a conference, Ault's absence is harmless.

Issue XVI – Ault's claim he was sentenced by a biased judge is not preserved for appeal and is meritless.

Issue XVII – The Court conducted a proper Nelson hearing and Ault withdrew his request to represent himself, thus, a Faretta hearing was unnecessary.

Issue XVIII – The capital sentencing statute is constitutional.

Issue XIX - Ault's *pro se* motion to disqualify the trial court filed while represented by counsel was a nullity and denied properly.

ARGUMENT

ISSUES I AND V

MENTAL HEALTH MITIGATION WAS REJECTED PROPERLY (restated)

Ault challenges the court's rejection of mental health mitigation is this case. In **Issue I**, he asserts that according to Dr. Ross, he suffered from brain damage, and the court erred in rejecting it based on its rejection of statutory mental health mitigation. (IB 17-18). Additionally, in **Issue V**, Ault asserts that he is a pedophile and that under the unique circumstances of this case, it was error to reject the two statutory mental health mitigators that: (1) the capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of the law was substantially impaired and (2) the capital felony was committed while the defendant was under the influence of extreme mental or emotional disturbance. (IB 32-36).

The State disagrees as the analysis offered by the court in rejecting the statutory mitigation is supported by substantial, competent evidence and encompasses a rejection of the non-statutory mitigator of brain damage. However, even if any or all of the offered mitigation should have been found, the sentencing decision would not have been different; thus, any alleged error was harmless beyond a reasonable doubt.

This Court in Campbell v. State, 571 So.2d 415 (Fla. 1990), established the relevant standards of review for mitigating circumstances: 1) whether a circumstance is truly mitigating in nature is a question of law and subject to *de novo* review; 2) whether a mitigator has been established is a question of fact and subject to the competent, substantial evidence test; and 3) the weight assigned to a mitigator is within the judge's discretion.[10] See Kearse v. State, 770 So.2d 1119, 1134 (Fla. 2000); Trease v. State, 768 So.2d 1050, 1055 (Fla. 2000) (receding in part from Campbell and holding an established mitigator may be assigned "little or no" weight); Mansfield v. State, 758 So.2d 636 (Fla. 2000) (explaining court may reject mitigator provided record contains competent substantial

[10] Whether a mitigator is established lies with the judge and "[r]eversal is not warranted simply because an appellant draws a different conclusion." Sireci v. State, 587 So.2d 450, 453 (Fla. 1991), cert. denied, 503 U.S. 946 (1992); Stano v. State, 460 So.2d 890, 894 (Fla. 1984). Resolution of evidentiary conflicts is the trial court's duty; "that determination should be final if supported by competent, substantial evidence." Id. Under the competent, substantial evidence standard of review, the appellate court pays overwhelming deference to the trial court's ruling, reversing only when the trial court's ruling is not supported by competent and substantial evidence. If there is any evidence to support those factual findings, the lower tribunal's findings will be affirmed. When it comes to facts, trial courts have an institutional advantage. Trial courts can observe witnesses, hear their testimony, and see and touch the physical evidence. Guzman v. State, 721 So. 2d 1155, 1159 (Fla. 1998) (sitting as fact finder, the trial judge has the superior vantage point to see and hear the witnesses and judge their credibility). An appellate court's review of questions of fact is, therefore, very limited.

evidence to support rejection); Alston v. State, 723 So.2d 148, 162 (Fla. 1998); Bonifay v. State, 680 So.2d 413, 416 (Fla. 1996); Nibert v. State, 574 So.2d 1059, 1061 (Fla. 1990)(finding judge may reject claimed mitigator if record contains competent substantial evidence to support decision).

As noted in Hoskins v. State, 965 So.2d 1, 16 (Fla. 2007).

> With respect to expert psychological evaluations, we have explained that **"expert testimony alone does not require a finding of extreme mental or emotional disturbance. Even uncontroverted opinion testimony can be rejected, especially when it is hard to reconcile with the other evidence presented in the case**." *Philmore v. State*, 820 So.2d 919, 936 (Fla. 2002) (*quoting Knight v. State*, 746 So.2d 423, 436 (Fla. 1998)). "A trial court has broad discretion in determining the applicability of a particular mitigating circumstance, and this Court will uphold the trial court's determination of the applicability of a mitigator when supported by competent substantial evidence." *Id.; see also Foster v. State*, 679 So.2d 747, 755 (Fla.1996) ("As long as the court considered all of the evidence, the trial judge's determination of lack of mitigation will stand absent a palpable abuse of discretion.").

For clarity of discussion, the Issues will be taken in reverse order. In rejecting statutory mitigation (**Issue V**), the trial court reviewed the testimony of each of the mental health experts offered at trial. Dr. Kramer's testimony was rejected in its entirety because, other than a single two hour meeting with Ault, the doctor's other sources of information were Ault's self-reports and the reports of other doctors which relied in part on Ault's self-reporting. The doctor did not review police

reports, Ault's statements contained in the documentation, his videotaped confession, or any crime documentation.[11] Conversely, Dr. Carter's directly contradicted Dr. Kramer's opinion and was based on standardized testing. The court concluded Dr. Kramer's testimony was "less than reliable" in light of Dr. Carter's standardized tests, that showed Ault was a "severe psychopath seeking to exaggerate mental illness." (R.4 659-61). Where Dr. Kramer was relying in large measure on Ault's self-reporting, and Ault has an antisocial personality disorder and is malingering, then Dr. Kramer is basing his opinions on inaccurate information which is difficult to reconcile with other trial evidence. These facts are a valid basis to reject

[11] Dr. Kramer admitted that much of what he reviewed was based on Ault's self-reporting of the alleged molestation by Charles Ault, head injuries, and alcohol/substance abuse, all of which formed the basis of his opinion that Ault suffered from PTSD, pedophilia, poly-substance/alcohol abuse, antisocial traits, and multiple head injuries. He did not review the crime evidence nor did he look at Ault's videotaped confession from the instant murders, or review the evidence/statements from Ault's other crimes. (R.13 1044-45, 1047-48, 1051, 1056-57, 1059-60, 1067, 1070, 1072-73, 1080-82, 1094) Also, Dr. Kramer admitted it was not until after the homicides that Ault reported sexual molestation by Charles. (R.13 1077-78). Similarly, Dr. Kramer merely relied upon Ault's accounting and his mother's recounting of what Ault told her 20 years after the alleged molestation. (R.13 1047-48, 1078-79). Also, Dr. Kramer did not offer a diagnosis of malingering even though he saw antisocial traits, and could find no support for Ault's self-reported multiple personalities and hallucinations. (R.13 1083, 1085, 1087-88, 1093-94). Dr. Kramer did not find that Ault's aversion for loud noises coupled with PTSD caused him to kill DM when she was screaming. (R.13 1060-61, 1080).

Ault's complaint that Dr. Kramer's opinion should be credited over Dr. Carter's (IB at 34). Also, Dr. Kramer's opinions may be rejected, as the trial court did, sitting as the fact finder resolving conflicts in the evidence, Hoskins, 965 So.2d at 16-17, because they conflict with the trial facts. Substantial, competent, evidence supports rejection of Dr. Kramer's opinions.

Dr. Carter produced test results which showed Ault was malingering and exaggerating his alleged mental condition for a secondary gain, i.e., to avoid responsibility. Further, his self-reports of sexual molestation or substance/alcohol abuse on the day of the crime could not be confirmed (R.13 1151, 1163-64, 1166-70, 1180-82, 1184-86, 1191). Together, his test result, mental health interviews, police confession, and admissions to her established that he was not under the influence of extreme mental/emotional disturbance and that he knew his actions were criminal, and took steps to avoid discovery so he did not have to return to prison. (R.13 1189-92). Dr. Carter found Ault was a psychopath and pedophile, but that he did not suffer from a major mental illness. She noted psychopathy did not mean that Ault could not control his actions. (R.13 1171-76, 1189-91). Again, this is support for the rejection of the statutory mental health mitigators based on pedophilia being an extreme mental/emotional disturbance or substantial impairment to Ault's ability to understand/conform his conduct to the law.

While Dr. Ross conducted PET and EEG scans, he did not offer an opinion about either statutory mental health mitigator. (R.13 1103-29). As such, his testimony could not support statutory mental health mitigation. According to Dr. Ross temporal lobe damage may result in a person having an abnormal response to a visual or sensory stimuli, i.e., hypersexuality or a diminished appreciation for a gory scene. Likewise, the temporal lobe injured memories of emotions are also impaired. A frontal lobe injury, on the other hand, may lead to apathy which may exhibit as a diminished appreciation for the plight of others. (R.13 1116-17). Dr. Ross acknowledged that Ault's type of brain injury did not preclude him from functioning, and did not, in and of itself, cause him to be a killer. Further, he did not know within a reasonable degree of medical certainty when the brain injury he identified had occurred. (R.13 1123, 1125-26). Hence, Dr. Ross offered nothing to support a claim that Ault's pedophilia was mitigation for the killings.

The mere fact statutory mental health mitigation was found in Rivera v. State, 561 So.2d 536 (Fla. 1990) and Irizarry v. State, 496 So.2d 822 (Fla. 1986) (IB at 34) does not undermine the rejection of it here. Ault gave specific reasons for his choosing the victims he did, and for killing them. He used planning to select his victims and reconnoitered on the consequences of his actions. There was nothing impulsive in the

selection of girls who would be willing to get in his truck or in killing them to avoid detection. In fact, Ault killed AJ after he had a cigarette and listened to her cry after watching DM's rape and strangulation. (R.12 964-75; R.13 1189-91).

Contrary to Ault's complaint, the court's observation that Ault knew right from wrong when rejecting the mitigator of the capacity to appreciate the criminality of his conduct or to conform his conduct to the requirements of the law was proper. The court focused on Ault's knowledge that his actions were criminal and his attempt to hide them from the authorities. The fact he put the girls' bodies in the attic after their death does not show impulsivity, but merely trying to avoid detection. In fact, Ault admitted removing the ladder from his apartment so no one would consider going into the attic and discarding the girls' school books and DM's crossing guard vest in Palm Beach in the hopes of evading detection. Hiding the ladder shows forethought. His demeanor, which clearly was calm on the night when he was visited by his community control officer, the victims' mother, and police, as none saw anything to rouse suspicion, also shows his ability to conform his conduct to the requirements of the law. Ault's acts refute this mitigator.

The court gave consideration to Dr. Ross's conclusions because he used objective tests, but nonetheless, found they did not support statutory mitigation as the doctor "did not provide

an opinion as to whether the Defendant was under the influence of extreme mental or emotional disturbance, or that his capacity to appreciate the criminality of his conduct, or to conform his conduct to the requirements of the law, was substantially impaired." (R.4 661-62). This lack of evidence along with the rejection of Dr. Kramer's account is substantial, competent evidence supporting rejection of statutory mental mitigation.

Further support comes from Dr. Carter's evaluation and opinions.[12] She reviewed extensive materials, spent many hours with Ault, and administered multiple tests. The results showed

[12] Dr. Carter specifically rejected a finding of either statutory mental health mitigator in part because in speaking to Ault about the homicides, she saw no indication he was out of touch with reality. In fact, Ault admitted that because he had picked up the girls before and they had gotten into his truck easily, so he knew that when he decided to get them for sex, he could get them into the truck easily. Likewise, when asked why he killed the girls, Ault admitted he knew he would get in trouble and get 20 years in prison when DM said she would tell her mother and Ault did not want to go to prison. According to Dr. Carter, neither admission indicates a lack of touch with reality. (R.13 1189-90). Similarly, Dr. Carter rejected the suggestion Ault's pedophilia and antisocial personality disorder met the criteria for "disturbance" for the statutory mitigator. She testified that nothing about pedophilia causes a lack of touch with reality. Ault did not suffer from a psychosis; he was feigning hallucinations for a secondary gain. Dr. Carter found Ault understood the consequences of his actions and pointed to his admission that he killed to avoid returning to prison. Hiding the bodies and discarding the girls' books and personal items to avoid detection showed he knew what he did was wrong and that he knew the consequences of his actions. Likewise, because he strangled DM then stopped to have a cigarette before strangling AJ while continuing to smoke shows callousness and lack of remorse. Such goes to Ault's psychopathy, but not a major mental illness. (R.13 1190-92).

Ault was malingering, exaggerating his mental condition to avoid responsibility. Ault's reported hallucinations were feigned. He was found to be a pedophile with severe psychopathy – antisocial personality disorder; Ault had a chronic pattern of violating society's norms. His full scale IQ score was 80 which is low average to borderline intelligence. Dr. Carter could not corroborate the allegation Ault was abused by his older brother. (R.13 1146-49, 1151, 1154-55, 1158-64, 1166-70, 1174-91). Further, she specifically rejected the statutory mental health mitigators. (R.13 1189-91).

Ault suggests that Dr. Carter could not be relied upon as a basis for rejecting the statutory mitigation because she had no tests to support her rejection of mental mitigation as those tests were declared invalid due to Ault's malingering. (IB 33-34). Contrary to that suggestion, malingering is a valid basis for rejecting mental mitigation. See Davis v. State, 604 So.2d 794, 799 (Fla. 1992) (finding malingering is substantial, competent evidence to support rejection of statutory mental mitigation, but remanding for new sentencing on other grounds). Cf. Bryan v. State, 753 So.2d 1244, 1248-49 (Fla. 2000) (recognizing as competent defense strategy not to present experts who would opine defendant was malingering); Ferguson v. State, 593 So.2d 508, 510 (Fla.1992) (finding decision not to put on mental health experts to be reasonable strategy where

experts had indicated defendant was malingering, a sociopath, and a very dangerous person). Clearly, the fact Ault was malingering, thus, invalidating his other tests, is not a basis for rejecting Dr. Carter's conclusions. To the contrary, it is substantial competent evidence supporting the rejection of mental mitigation.

Addressed to both **Issue I and V** - Because the rejection of the statutory mental health mitigation involved a rejection of the alleged brain damage, the court's analysis of the statutory mitigation forms the basis for its succinct rejection of the non-statutory brain damage mitigator. As the court found, Ault's alleged brain damage had no impact or causal connection to the crimes he committed; it neither compelled him to commit the murders nor precluded him from knowing-appreciating what he was doing was criminal. Dr. Carter found no emotional disturbance based in part on Ault's admitted reasons for killing the girls. Dr. Ross found "brain damage" and associated that with pedophilia. However, Dr. Carter noted that pedophilia was not an "extreme mental or emotional disturbance" which would support statutory mitigation. As fact finder, the court could rely on this to support its rejection of the mitigation.

Ault's explanation in targeting the girls showed no severe abnormal condition. He explained he chose the girls because he had picked them up before and they had gotten into his truck

readily so he knew he could get them into his truck easily again. His reason for killing the girls was based on the fact DM told him she would report the assault and Ault knew he could get 20 years in prison which he did not want to have happen. Dr. Carter found no indication Ault had lost touch with reality; there was no abnormal thinking. While Dr. Ross suggested Ault's alleged brain damage may cause him to lack emotions and have less control over his compulsion, such was rebutted by Ault's admission he considered and killed DM only after she said she would report him and then smoked while contemplating, then strangling AJ because he did not want witnessees. Likewise, while Ault is a pedophile with an antisocial personality disorder, neither disorder meets the criteria for "disturbance" nor causes a loss of touch with reality. Here again, Ault's statements establish he understood the consequences of his actions, contemplated what he should do to reach his goal, and that his frontal and temporal lobe injuries did not play a part in the killings. (R.113 1189-91). They are the basis to reject Dr. Ross' suggestion the alleged brain damage impaired Ault's analytical thinking, memory, and emotions. The court correctly rejected brain damage as a factor to support the statutory mental health mitigators, thus, the court properly rejected it as a non-statutory mitigator in terse fashion. Further elaboration was unnecessary.

This is not a case such as Crook v. State, 813 So.2d 68 (Fla. 2002) or Coday v. State, 946 So.2d 946 So.2d 988, 1001 (Fla. 2006) where the allegations of brain damage were uncontroverted. As noted above, the State's expert, Dr. Carter refuted the allegations of brain damage as related to the statutory mental health mitigation which included rejecting brain damage as a basis for Ault's actions. As noted above, the cursory re-rejection of the brain damage mitigator stems from and is supported by analysis of the statutory mitigators.

The court's treatment of this mitigation is akin to the trial court's decision in Robinson v. State, 761 So.2d 269, 277 (Fla. 1999) and distinguished in Coday, 946 So.2d at 1002. In Robinson, this Court stated:

> We find no abuse of discretion in the trial court's treatment and consideration of the mitigating circumstances. Clearly, the existence of brain damage is a factor which may be considered in mitigation. *See DeAngelo v. State*, 616 So.2d 440, 442 (Fla. 1993). Here, the experts opined that Robinson's tests results indicated the existence of brain damage. However, Dr. Lipman testified that while Robinson's particular brain deficits would interfere with his daily life, "it wouldn't be of a degree that would necessarily keep him from functioning in normal, everyday society." Further, neither expert could determine what caused the brain impairment. Although the trial court gave little weight to the existence of brain damage because of the absence of any evidence that it caused Robinson's actions on the night of the murder, the sentencing order clearly reflects that the trial court considered the evidence and weighed it accordingly. The fact that Robinson disagrees with the trial court's conclusion does not warrant reversal. See *James v. State*, 695 So.2d 1229, 1237 (Fla.) (noting

> that "[r]eversal is not warranted simply because an appellant draws a different conclusion"), *cert. denied*, 522 U.S. 1000, 118 S.Ct. 569, 139 L.Ed.2d 409 (1997).

Robinson, 761 So.2d at 277.

Unlike the evidence in Crook, the State refuted Dr. Ross' suggestion Ault's self-reported alleged closed head trauma was the cause of the PET and EEG results. As Dr. Ross admitted, most of his information regarding head injuries was self-reported by Ault. Dr. Ross also admitted he could not say when the alleged brain injury occurred. (R.13 1122-23, 1126). When this information is coupled with Dr. Carter's documented determination that Ault was malingering to escape responsibility for these crimes, it was reasonable to reject opinions derived directly from Ault's self-reports as was done with Dr. Kramer's opinion. (R.4 659-60).

Hoskins supports the decision and compels affirmance here.

> This case is similar to *Philmore*, 820 So.2d at 936. There, a defense expert testified that the defendant suffered from a psychotic disturbance as well as a possible brain injury and posttraumatic stress disorder. *Id*. The State's expert found no credible evidence that the defendant suffered from psychosis or brain damage, but agreed that the defendant suffered from an antisocial personality disorder. *Id.* After considering the testimony, the trial court concluded that "[t]he facts and circumstances of the homicide indicate a coherent and well thought out plan.... There simply is no record evidence to suggest the defendant was under the influence of extreme mental or emotional disturbance at the time of commission of the homicide." *Id*. We upheld the rejection of the mental mitigator. *Id*. at 937; *see also Walls v. State*, 641

> So.2d 381, 391 & n. 8 (Fla. 1994) (noting that "[r]easonable persons could conclude that the facts of the murder are inconsistent with the presence of the two mental mitigators" and that "[a] debatable link between fact and opinion relevant to a mitigating factor usually means, at most, that a question exists for judge and jury to resolve"). Similarly, here, the facts show an element of planning-Hoskins placed Ms. Berger in the trunk of the car, drove approximately six hours (stopping for gas and to change a fuse), stopped at his parents' house to borrow a shovel, drove to a remote location nearby, and eventually killed Ms. Berger by manual strangulation. The defense's own expert testified that Hoskins's actions required planning. The facts of the murder are inconsistent with a claim that Hoskins was under the influence of an extreme mental or emotional disturbance.

Hoskins, 965 So.2d at 17.

However, to the extent the court should have found the brain damage mitigator, this alleged error is harmless as it would not have resulted in a life sentence for the double homicide had the mitgator been found.[13] See Lebron v. State, 982 So.2d 649, 661 (Fla. 2008) (applying harmless error test when evaluating erroneous finding of aggravation or mitigation); Morris v. State, 811 So.2d 661, 667 (Fla. 2002) (holding error surrounding court's mitigation finding was harmless beyond a

[13] See Ferrell v. State, 918 So.2d 163, 175 (Fla. 2005) (recognizing that neuropsychological testing may be a better indicator of brain damage than PET scans). The defense expert, Dr. Ross conducted and EEG and PET scan concluding there was brain damage, but did not opine regarding mental mitigation. Conversely, the State's expert, Dr. Carter administered multiple neuropsycohological tests and found malingering. She opined that there was no mental disease/disturbance which would cause Ault to lose touch with reality or support mental mitigation. (R.13 1189-91).

reasonable doubt); Barwick v. State, 660 So.2d 685, 695-96 (Fla. 1995) (applying harmless error test regarding mitigation).

First, this was a double homicide of two young sisters with very weighty aggravation including commission of murder while on community control, prior violent felony, HAC, avoid arrest, and felony murder.[14] This Court has affirmed death sentences with less aggravation and more mitigation. See Singleton v. State, 783 So.2d 970 (Fla. 2001) (upholding sentence with prior violent felony and HAC agravators and substantial mitigation, including extreme mental/emotional disturbance, impaired capacity to appreciate criminality/conform conduct to the law, age, under the influence of alcohol and possibly medication at time of offense, mild dementia, and attempted suicide); Spencer v. State, 691 So.2d 1062, 1066 (Fla. 1996) (affirming sentence with prior violent felony and HAC outweighing extreme mental/ emotional disturbance; impaired capacity to appreciate criminality/conform conduct; drug/alcohol abuse; paranoid personality; sexual abuse; honorable military record; good employment; and ability to function in structured environment).

Second, the court found the HAC aggravator alone outweighed

[14] See Offord v. State, 959 So.2d 187, 191 (Fla. 2007) (noting HAC is weighty aggravator described "as one of the most serious in the statutory sentencing scheme."); Rivera v. State, 859 So.2d 495, 505 (Fla. 2003) (finding HAC and prior violent felony aggravators are weighty); Sireci v. Moore, 825 So.2d 882, 887-88 (Fla. 2002) (affirming prior violent felony and HAC are two of the "most weighty" factors in the "sentencing calculus.")

the proven mitigation in this case (R.4 669). Hence, even adding statutory mental mitigation and brain damage,[15] both severely undermined by Ault's own statements, into the mix of the proven aggravation[16] and mitigation a life sentence would not have been achieved.[17]

Third, the allegation of brain damage was controverted as noted above, thus, even if found it would be of little weight as Ault was malingering, it did not cause him to kill because it did not interfere with his comprehension of his criminal acts nor did it cause him to lose touch with reality. He chose his victims for their ease of capture and killed them to avoid

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[15] Even if the statutory mitigators were found proven, they need not be given much if any weight, Trease, 768 So.2d at 1055 (holding established mitigator may be assigned "little or no" weight). This is true especially in light of how Dr. Carter's testimony, Ault's malingering, and admissions could not be reconciled with the opinions of the defense mental health experts or offered mitigation. See Hoskins, 965 So.2d at 16-17.

[16] Commission of murder while on community control, prior violent felony, and felony murder/victim under 12, and avoid arrest.

[17] Cf. Hitchcock v. State, 991 So.2d 337, 358 (Fla. 2008) (rejecting ineffectiveness claim based on finding "the extremely weighty aggravation in this case would outweigh the mitigation, even if Dr. Toomer had specifically opined that the statutory mental health mitigating factors were applicable. The trial court found four aggravating circumstances in this case: (1) Hitchcock committed the crime while he was under a sentence of imprisonment; (2) the crime was committed while Hitchcock was engaged in the enumerated felony of sexual battery; (3) the crime was committed for the purpose of avoiding or preventing a lawful arrest; and (4) the crime was HAC. Given this substantial aggravation, our confidence in his death sentence is not undermined by counsel's failure to solicit Dr. Toomer's opinion regarding the statutory mitigating factors.")

detection. (R.13 11160-64, 1166-67, 1170, 1189-91). This Court has affirmed the death sentence in such situations. Cf. Francis v. State, 808 So.2d 110, 140 (Fla. 2001) (distinguishing cases where trial court completely failed to consider or find uncontrovered mental mitigation from those which could be affirmed because consideration was given to mitigation, but court found the mitigator was unproved); Smith v. State, 407 So.2d 894, 902 (Fla. 1981) (declining to remand for resentencing where court considered mental mitigation, but found testimony did not compel application of mitigators).

However, if this Court rejects the State's analysis, this matter should be sent back to the trial court to clarify its sentencing order. There has been no infirmity shown for the jury recommendation, thus, a new penalty phase is not required. Moreover, due to the numerous and weighty aggravation in this case, and proper rejection of the statutory mental health mitigation, life sentences are contra-indicated.

ISSUE II

ADJUSTMENT TO PRISON WAS REJECTED PROPERLY (restated)

Ault assigns error to the rejection of his "adjustment to life in prison" mitigator. He does not cite to a place in the record where this was established. However, Dr. Carter noted she had reviewed Ault's jail records which contained disciplinary reports. The court concluded that only three non-

statutory mitigators were established, and that adjustment to prison life was not mitigating. (R.4 669). Having considered the offered mitigator and having found it unsupported and not mitigating, the court complied with Campbell and Trease.[18] Based on this, there is substantial, competent evidence supporting the rejection of this mitigator. The sentence should be affirmed.

Even if the mitigator should have been found, any error is harmless beyond a reasonable doubt for this double homicide with very weighty aggravation. Lebron, 982 So.2d at 661 (recognizing application of harmless error test when evaluating the erroneous mitigation finding). Whether Ault may adapt to prison does not tip the balance in favor of a life sentence. See State's harmless error analysis **Issues I and V**.

Should this Court find otherwise, the matter should be remanded to the sentencing judge alone for clarification of its ruling as the error alleged had no impact on the jury's recommendation. Such was done in Coday, 946 So.2d at 1003.

[18] The standard of review was announced in Campbell, wherein, this Court established that the relevant standard was: 1) whether a circumstance is truly mitigating in nature is a question of law and subject to *de novo* review; 2) whether a mitigator has been established is a question of fact and subject to the competent, substantial evidence test; and 3) the weight assigned to a mitigator is within the judge's discretion. See Kearse, 770 So.2d at 1134 (observing whether mitigator exists and weight assigned are matters within sentencing court's discretion); Trease, 768 So.2d at 1055 (receding in part from Campbell and holding an established mitigator may be assigned "little or no" weight).

ISSUE III

THERE WAS NO ERROR IN GROUPING MITIGATORS UNDER ONE HEADING AND GIVING IT LITTLE WEIGHT (restated)

Ault admits it is permissible for the court to group non-statutory mitigators into categories, however, he maintains that here, unrelated mitigators were combined and too little weight was given the group. Contrary to Ault's position, the consolidated mitigators are reasonably related to his upbringing and there was no abuse of discretion in assigning little weight to the category of "raised in a dysfunctional family".

As this Court reasoned "proposed nonstatutory circumstances should generally be dealt with as categories of related conduct rather than as individual acts." Campbell, 571 So.2d at 419-20, n.4, receded from in part, Trease, 768 So.2d at 1055. See Rogers v. State, 783 So.2d 980, 995 (Fla. 2001); Kearse v. State, 770 So.2d 1119, 1133 (Fla. 2000) (finding no abuse of discretion in court's grouping of items 6 through 39 into single category of defendant's "difficult childhood and his psychological and emotional condition because of it"); Reaves v. State, 639 So.2d 1, 5 (Fla. 1994) (finding no error where court reasonably grouped several nonstatutory factors into three).

Here, the court consolidated 12 factors[19] into the non-

[19] (1) raised in dysfunctional family; (2) eighth grade education; (3) attempted suicide at fourteen years old; (5) parents were aware of sexual abuse, but did nothing; (6) Charles

statutory mitigating category of "raised in a dysfunctional family." Each of those factors related to his childhood experiences created by or as a result of his upbringing such as the lack of parental supervision, control, or care for Ault. The family did not see that he remained in school, address his psychological condition, confront the alleged sexual abuse[20] Ault endured, secure proper medical/psychological treatment for Ault, or establish close family ties. All the factors relate to the conditions under which Ault was raised and treated during his formative years. They are reasonably related to each other and tend to show a dysfunctional family upbringing.

The weight assigned a mitigator or a category of factors lies within the court's sound discretion. "Because trial courts are in the best position to observe the unique circumstances of a case, they have broad discretion in their decisions as to how much weight to assign to a particular mitigator." Boyd v. State,

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Ault used gun to force sexual relations with Ault (7) as child Ault suffered head injuries which were not treated properly; (8) raised in unstable environment - constantly moving to new schools (9) school reports show poor academic performance, learning disabilities, and behavioral problems; (11) not nurtured as child; (12) raised without strong family bonds; and (13) did not receive counseling as child for behavior, traumatic events, or academic development (R.4 662-63).

[20] However, according to Dr. Carter, she could not corroborate the allegation that Charles sexually abused Ault. In fact, Charles was not living at home during one period Ault alleged he was assaulted, and on other occasions, Ault even asked to live with his brother. (R.13 1184-86).

910 So.2d 167, 193 (Fla. 2005). See Alston v. State, 723 So.2d 148, 162 (Fla. 1998); Cole v. State, 701 So.2d 845, 852 (Fla. 1997). Under the abuse of discretion standard, a court's ruling will be upheld unless it is "arbitrary, fanciful, or unreasonable." Trease, 768 So.2d at 1053 n. 2 (quoting Huff v. State, 569 So.2d 1247, 1249 (Fla. 1990)).

Ault cites to Sinclair v. State, 657 So.2d 1138 (Fla. 1985) and Ferrell v. State, 653 So.2d 367 (Fla. 1995) to suggest the sentencing court must set forth its reasons for the weight assignment. Such is not the state of the law. What is required is that the court set forth its mitigation findings and announce the weight it assigns to those factors found. Campbell; Trease. Ault also references Riley v. Wainwright, 517 So.2d 656 (Fla. 1987) and Thompson v. Dugger, 515 So.2d 173 (Fla. 1987) to suggest a court may not refuse to weigh mitigation. However, in Trease, this Court permitted the court to assign no weight to mitigation even if it were found proven.

Here, much of what was presented in this category was based on inconsistent, contradictory, self-reports by Ault who was known to be malingering. As such, the weight was properly diminished and no abuse of discretion has been shown. However, even if this mitigator should have been divided into more categories and assigned more weight, any alleged error is harmless beyond a reasonable doubt. See Singleton v. State, 783

So.2d 970, 977 (Fla. 2001) (finding failure to discuss offered mitigation was harmless as aggravation outweighed the overlooked mitigation). When the offered mitigation is considered against this double homicide with very weighty aggravation, this Court should find the sentencing would not be different. Lebron, 982 So.2d at 661. See harmless error analysis in **Issues I and V**.

ISSUE IV

THE COURT DID NOT ABUSE ITS DISCRETION IN WEIGHT ASSIGNED MITIGATION AULT TOLD CHILD VICTIM TO CALL POLICE AND THAT WHAT HE DID WAS WRONG (restated)

Here, Ault takes issue with the weight assigned the mitigation that he told his 1996 attempted sexual battery victim that what he did to her was wrong and she should call the police. The court credited Ault for this statement and gave it some weight, while noting it showed some "spark of humanity" and possibly "reaching out for help" even though the homicides of DM and AJ were the result of [Ault's] knowing, intentional, and morbidly logical analysis of his predicament, and not the compulsion of pedophilia." The court's findings are supported by substantial, competent evidence and the weight assigned is not an abuse of discretion.[21]

[21] The weight assigned mitigator will be sustained "absent an abuse of discretion and when the evidence supports the conclusions." Boyd, 910 So.2d at 193. See Alston, 723 So.2d at 162 (finding where sentencing order identified mitigators, weight assigned was within court's discretion). Under the abuse

The record shows Ault told his eleven year old victim, TW, that his attempted sexual battery[22] upon her was wrong and she should tell someone. The court found this showed some humanity and possibly a reaching out for help. (R.4 668). However, the record shows Ault chose DM and AJ for their ease of capture and coldly, logically assessed killing both girls after one threatened to turn him in for her rape, a fate Ault wanted to avoid, and the other witnessed the first killing. (R.12 907-11, 916-17, 964-75; R.13 1189-91). The court gave the mitigator some weight. It cannot be said that no reasonable person would have assigned this weight.

Ault challenges the court's analysis, because allegedly the court failed to find Ault was reaching out for help. Ault cites the rejection of pedophilia[23] as mitigation as proof of the

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of discretion standard, the ruling will be upheld unless it "is arbitrary, fanciful, or unreasonable." Trease.

[22] TW testified she met Ault at a store where he asked her if she would like to baby sit for his five-month old child and she agreed. The day she baby sat for Ault, he picked her up, took her to his room, and pushed down on her neck when she started to scream. Ault pushed TW down, and hit her in the head a couple of time to make her be quiet. When she quieted, he ripped off her shorts and underwear and sodomized her. When the Ault's baby started crying, he stopped his attack on TW and she rolled away from him. He then told her that what he did was wrong and she should tell someone. (R.11 753-55, 757-59).

[23] Dr. Ross admitted the brain injury he reported, and oft seen in the brains of pedophiles, did not cause Ault to kill (R.13 1108-13, 1124, 1126). Also, Dr. Carter noted Ault had the mental illness of pedophilia, but it was not a major mental

court's rejection. Ault reads too much into the finding. The court acknowledged both statements (what he did was wrong and to call the police), and that this showed a spark of humanity, thus, proving mitigation. The court noted "some would argue … [this was] a reaching out for help" (R.4 668), yet, other factors of the crime were also true, thus, the mitigator was assigned some weight. Given this, there is a reasoned basis for the weight assignment. Furthermore, even if additional weight were assigned, the resulting sentence would be no different. Lebron, 982 So.2d at 661. See the harmless error analysis in **Issues I and V**. The sentence should be affirmed.

ISSUE VI

AULT FAILED TO REQUEST HIS CLAIM OF EXTREME MENTAL/EMOTIONAL DISTURBANCE BE CONSIDERED UNDER NON-STATUTORY BASIS (restated)

Ault points to Cheshire v. State, 568 So.2d 908 (Fla. 1990) and Jackson v. State, 704 So.2d 500 (Fla. 1997) to suggest the court erred in not addressing mental/emotional disturbance as a non-statutory mitigator. (IB 37). This matter is unpreserved for appeal. Further, there was no error, much less fundamental error, as Ault failed to ask the Court to consider the factor as a non-statutory mitigator.

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illness and it did not cause him to commit the crimes. In fact, Ault was methodical in his thought process and decision to select his victims then eliminate them as witnesses. Dr. Carter agreed Ault knew what he was doing. There was never a time when he was out of touch with reality.

For an issue to be cognizable on appeal, it must be specific contention asserted below. Steinhorst v. State, 412 So. 2d 332, 338 (Fla. 1982) (holding except for fundamental error, an issue will not be considered on appeal unless it was presented to lower court; to be cognizable, "it must be the specific contention asserted as legal ground for the objection, exception, or motion below"). Ault did not offer this factor as non-statutory mitigation (R.4 603-05), thus, he may not complain now. Davis v. State, 2 So.3d 952, 962-63 (Fla. 2008).

In Davis, the defendant identified statutory mental health mitigation he wanted considered, but he did not ask that those factors be considered on a non-statutory basis. Davis, 2 So.3d at 962-63. Rejecting error, this Court relied upon Lucas v. State, 568 So.2d 18, 23-24 (Fla. 1990) as requiring that "a defendant must raise a proposed nonstatutory mitigating circumstance before the trial court in order to challenge on appeal the trial court's decision about that nonstatutory mitigating factor." Davis, 2 So.3d at 962-63. "[A] defendant may not manufacture a sentencing error by not requesting that the trial court specifically consider unproven statutory mitigating factors as potential nonstatutory mitigating factors." Id. See Israel v. State, 837 So.2d 381, 391-92 (Fla. 2002) (finding no error in not addressing non-statutory mitigation which defendant had not identified).

Neither Cheshire nor Jackson recedes from the requirement that the defense set forth the non-statutory mitigation to be considered. Instead, these cases recognize that the statutory mental health mitigation may be offered under a non-statutory basis, and if offered, only then must they be considered by the sentencer. A rejection of the statutory mitigator does not automatically establish rejection of the non-statutory factor.

As noted above, Ault did not include the non-statutory level of the mental/emotional disturbance mitigator in his sentencing memorandum. Hence, he did not put the court on notice that he wanted this claimed statutory mitigation considered on a non-statutory basis, i.e. under a "**non-extreme**" basis. Moreover, for the reasons the statutory mitigation was rejected, which do not go to the "extreme" qualifier, such support rejection of the non-statutory factor. These findings include the complete rejection of Dr. Kramer and the fact that Dr. Ross offered no opinion as to whether Ault met either statutory mental mitigator. In fact the record shows Dr. Ross offered no opinion on mental/emotional disturbance at all. (R.4 661-62). See Reynolds v. State, 934 So.2d 1128, 1159 (Fla. 2006) (affirming sentence where court failed to address remorse as possible mitigator, but record established remorse was not supported by evidence). However, even if such mitigation were offered and found, the result of the sentencing would not have

been different under the circumstances of this case. See the analysis and harmless error argument of **Issues I and V**. This Court should affirm.

ISSUE VII

COURT PROPERLY REJECTED IQ AS MITIGATION (restated)

Ault points to Dr. Carter's testimony as supporting mitigation.[24] Contrary to his position, Ault's 80 IQ is within the low average to borderline range. As such the court's rejection is supported by substantial, competent evidence and the death sentence should be affirmed.

Neither Drs. Ross nor Kramer offered information on Ault's IQ. Dr. Carter tested Ault's IQ and found he had a full scale score of 80, a performance IQ score of 87, and a verbal score of 77. These results establish Ault as having a low average to borderline IQ. Dr. Carter qualified these scores noting that there are no validity sub-tests in the IQ test as there are in the MMPI evaluation to determining if the subject is malingering. This Court will recall Ault, a psychopath-antisocial personality, was found to be malingering on his other

[24] The standard of review was announced in Campbell, wherein, this Court established … 1) whether a circumstance is truly mitigating in nature is a question of law and subject to *de novo* review; 2) whether a mitigator has been established is a question of fact and subject to the competent, substantial evidence test; and 3) the weight assigned to a mitigator is within the judge's discretion. See Trease, 768 So.2d at 1055 (holding a court may afford mitigator no weight).

tests. (R.13 1154-64).

In addressing this offered mitigation, the court reasoned:

> The Defendant has a low I.Q. (paragraph 10)
>
> There is no evidence supporting this statement. In fact, the only testimony regarding the Defendant's I.Q. was that of Dr. Bourge-Carter who indicated the Defendant's intellectual functioning to be low average.

(R.4 665). Dr. Carter supports the court's determination this mitigation was not established. This Court should affirm.

Even if the mitigator should have been found, the failure is harmless beyond a reasonable doubt for this double homicide. See Lebron. Whether Ault, was found to have a low IQ does not tip the balance in favor of a life sentence especially where there is weighty aggravation as discussed in the harmless error analysis of **Issues I and V** and incorporated here.

ISSUE VIII

THE RECORD SUPPORTS REJECTION OF MITIGATOR OF AULT'S ACCEPTANCE OF RESPONSIBILITY FOR MURDERS (restated)

Here, error is asserted by Ault regarding the rejection of the consolidated mitigator, "accepted responsibility for the killing of" DM and AJ. Contrary to his position, the record supports the finding that the mitigator was not established.[25]

[25] The standard of review was announced in Campbell, wherein, this Court established … 2) whether a mitigator has been established is a question of fact and subject to the competent, substantial evidence test; and 3) the weight assigned to a

Addressing this factor, the sentencing court reasoned:

> I. The Defendant accepted responsibility for the killing of [DM and AJ].
>
> . . .
>
> The Defendant argues in support of mitigation that he confessed to the murders and that he has accepted responsibility for these crimes. He also argues that he cooperated with the police, signed a consent to search form, and that, having successfully completed a prison sentence, he can adjust to prison.
>
> The Court rejects all of these arguments as mitigators.
>
> . . .
>
> **CONCLUSION**
>
> . . .
>
> The Court is reasonably convinced that three non-statutory mitigating circumstances have been established by the evidence.

(R.4 667, 669).

While Ault correctly states confessing to the crimes and cooperating with the police have been recognized as mitigators, Delgado v. State, 616 So.2d 440 (Fla. 1993) and Sinclair v. State, 657 So.2d 1138 (Fla. 1995), and that he confessed and signed a consent to search form, the record supports the court's finding that overall, Ault did not cooperate, accept responsibility for the victim's deaths, or show he could adjust to prison. Dr. Kramer was forced to admit that Ault had

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mitigator is within the judge's discretion. See Trease, 768 So.2d at 1055 (holding a court may afford mitigator no weight).

antisocial personality traits, that such people may lie or malinger, that Ault violated the terms of his community control and hid the fact from his community control officer, and that Ault could be malingering based on his test scores and unsupported claim that he had multiple personalities. (R.13 1070, 1083-87). Dr. Carter found Ault to be malingering and untruthful about multiple personalities and hallucinations. Ault went so far as to blame his self-reported hallucinations and alternate personalities were telling him to do things. (R.13 1150-51, 1160-64, 1166-70, 1180-82).

Of significance is the exchange between the prosecutor and Dr. Carter regarding her interview with Ault.

> Q. When you met with him then on September 10th, did you do a follow-up to the hallucinations and inquire whether he was still seeing them or seeing anything?
>
> A. Yes, I did. Initially on the 10th he didn't want to talk about the hallucinations anymore. He said he didn't think they were important. I explained to him that it was an important component of the evaluation for me, though, and he still indicated that he didn't want to talk about it. But upon asking him a few questions he did give me some information, yet it was inconsistent with the information he told me in the first interview.
>
> For example, when I asked him in the first interview when his hallucinations began, when he began to experience hallucinations, his first answer was on and off for years, and then his second answer was, Well, the first time was at Avon Park, when he was at a place called Avon Park. That was in 1988. I believe that he was at Avon Park for a few months.

I asked him about the voices on the 10th, and when did the voices start. In that interview I asked him the same question, and he said the voices started two to three months before his arrest.

. . .

He also reported that the voices in the interview -- for the first time that I had ever heard it, because, again, I interviewed (sic) about a thousand pages of documents, but for the first time he **indicated that the voices told him to do what he did to the girls, and they played a role in the children dying. The voices played a role**.

Q. Did you speak to him about multiple personalities?

A. Yes, I did.

Q. When did you do that?

A. That was in the third interview on the 10th I spoke to him about multiple personalities.

Q. Could you tell us about that conversation and that part of the interview?

A. Well, initially he says that the other personalities that he has aren't important. He said that he had two or three different personalities, and they were totally different. And then when I started asking more specific information about the personalities, he said that he didn't know if they was (sic) actually different personalities. He says people say he has different personalities at different times. He says he feels that he is possessed by evil spirits, but he couldn't be sure that they were actual personalities, and he also said that they didn't have names, which was inconsistent with prior records that I reviewed and other documents I had available to me.

He had made reports that he had three personalities and they actually had names. One which was Richard, and he blamed Richard for creating all the crimes, saying Steve is not responsible for the crimes, and in fact, Steve is scared of Richard. So, the report, the

> multiple personality was clearly a sign he didn't report consistent information about multiple personalities. In my personal opinion he does not have personalities.
>
> Q. What is the significance of that?
>
> A. Well, what is significant about that directly related to this case, I believe is that in many different ways throughout the evaluation Mr. Ault has attempted to take the responsibility for the murders and the sexual assault off of himself and put it onto someone or something else. For example, he blames Richard at one point in his case for creating the homicide, and the sexual assault in my evaluation, on different occasions he told me if he hadn't been drunk that this wouldn't have happened, but then he had told someone else in a prior evaluation that he wasn't drinking at all on the day of the incident.
>
> At another time in the evaluation he told me if he had been on his medication this would have happened. In prior interviews he blamed the Department of Corrections for not monitoring or supervising him well enough.
>
> When I tried to see if he accepted responsibility for the murders -- I'm sorry -- another time he blamed his brother, saying his brother had sexually abused him, and that is why this incident happened.
>
> When I asked him if he took any responsibility for it he said, sure, but he did not blame himself anymore than if he blamed his brother or the medication or being drunk, or the personalities.

(R.13 1179-83) (emphasis supplied)

The opinion Ault was malingering and placing blame on other persons or things is substantial, competent evidence supporting rejection of this mitigation. However, if such were error, it is harmless beyond a reasonable doubt. Even if Ault were found to have accepted responsibility for the killings, such would not

tip the balance in favor of a life sentence especially where there is such weighty aggravation for this double homicide. See harmless error of **Issues I and V**. This Court should affirm.

ISSUE IX

REMORSE MITGATOR WAS REJECTED PROPERLY (restated)

Here, Ault challenges the finding that remorse was not established. He credits Detective Rhodes' testimony as establishing the mitigator and correctly points out that remorse is recognized mitigation.[26] However, the State elicited evidence showing Ault was without remorse which supports for the court's rejection of the matter. This Court should affirm.

In rejecting the remorse mitigator, the court announced:

> J. The Defendant is remorseful about the criminal conduct in this case and the prior criminal acts he committed. (paragraph 23)
>
> The Court finds absolutely no credible evidence to support this claim.

(R.4 667). While the court did not set forth the specific facts it relied upon in determining the mitigator was unproven, the record substantiates that decision. Cf. Reynolds, 934 So.2d at 1159 (affirming sentence where sentencer failed to address remorse as a possible mitigator, but record established remorse was not supported by the evidence.)

[26] See Smally v. State, 546 So.2d 720 (Fla. 1989); Nibert v. State, 574 So.2d 1059 (Fla. 1990); and Songer v. State, 544 So.2d 1010 (Fla. 1989)

Dr. Carter refutes Ault's claim that he is remorseful. Her testing determined Ault had an antisocial personality disorder, severe psychopathy. (R.13 1175-76). Because severe psychopaths cannot relate to how people feel, they have difficulty in showing signs of remorse. (R.13 1174). While Ault told Dr. Carter he took responsibility for the crimes, he did not blame himself anymore than he blamed the non-proven hallucinations, "other personalities", or his brother's alleged sexual abuse. (R.13 1183). According to Dr. Carter, Ault's admission that after killing DM he stopped to smoke a cigarette while AJ was sitting on the couch crying and then strangled her with one hand while continuing to smoke with the other, shows Ault's callousness and lack of remorse. (R.13 1192). Dr. Kramer agreed someone with antisocial personality disorder does not feel remorse and that Ault sent Dr. Stock a letter dated October 29, 1997 which showed Ault had no remorse for the killing. (R.13 1083, 1095-96).

This evidence supports a rejection of the mitigator. However, even if it should have been found, any error should be considered harmless beyond a reasonable doubt. Lebron. See State's harmless error analysis **Issues I and V**.

ISSUE X

PEDOPHILIA MITIGATOR WAS REJECTED PROPERLY (restated)

It is Ault's position that the rejection of pedophilia as a

mitigator in this case was error. He argues this crime would not have taken place had he not had a pedophilia disorder. The State did not challenge the pedophilia diagnosis; it only challenged it as a mitigator. Although not expressly stated in the sentencing order, the record establishes pedophilia was not the reason Ault killed and that it is not mitigating.[27] This Court should affirm.

> The court, having heard all of the evidence, determined:
>
> F. The Defendant suffers from the mental disorder, pedophilia, [and] was denied treatment at the MDSO program while incarcerated because of lack of funding. (paragraph 19)
>
> Pedophilia, and the treatment or lack of treatment thereof, is not a mitigator for murder.

(R.4 666).[28]

Ault cites pedophilia as the cause of the homicides, but admits his condition caused him to seek out young girls to have sex with them, not to kill them. (IB 44-45). He asserts his pedophilia was created when his brother sexually molested him

[27] The standard of review was announced in Campbell: 1) whether a circumstance is truly mitigating in nature is a question of law and subject to *de novo* review; 2) whether a mitigator has been established is a question of fact and subject to the competent, substantial evidence test; and 3) the weight assigned to a mitigator is within the judge's discretion. See Trease, 768 So.2d at 1055 (holding court may afford mitigator no weight).

[28] While Ault submits that the trial court should have found the factor proven, the trial court's order could alternately be seen as finding that pedophilia has no weight in mitigating the sentence for the double homicide. Giving a mitigator no weight is permitted under Trease.

over a period of years. Ault points to TW's testimony to show his inability to control his behavior where TW acknowledged Ault told her he raped her because he had to have her, that it was wrong, and she should tell someone. (IB 45). However, the fact that Ault feels compelled to have sex with young girls even knowing it is wrong does not establish mitigation here. Ault has not cited a case where this Court has announced that pedophilia must be found as mitigation.[29]

In its penalty phase presentation, the State presented three convictions which established Ault's pattern of selecting young girls to have sex with them and that each, NG, TW, and ML, was released alive after the sex act. (R.11 747-48; 756-59; 772-74). Dr. Kramer did not link the killing of DM to her screaming in protest. (R.13 1080) Dr. Ross admitted not all pedophiles have frontal lobe injuries and that the brain injuries he observed do not cause a person to kill. Moreover, Dr. Ross could not say, with a reasonable degree of medical certainty, when the brain injury occurred. (R.13 1124, 1126). Dr. Carter rejected the notion that Ault's mental condition caused the killings. She reported he admitted that DM's murder was prompted by Ault's knowledge that what he did was wrong and

[29] In Crain v. State, 894 So.2d 59, 67 (Fla. 2004), the trial court gave some weight to uncured pedophilia. The mere fact a trial court, hearing different evidence, found pedophilia a mitigator does not establish such is mitigation here.

punishable by imprisonment for 20 years, DM's statement that she would report the attack, and that Ault did not want to be returned to prison. AJ was not sexually battered; however, she was killed because Ault did not want to go to prison. Clearly, the motivation for the killing was not the result of Ault's pedophilia, but his desire to avoid arrest and prison.[30] (R.13 1189-92). Given Ault's admissions and the doctors' accounts, there is substantial, competent evidence supporting the rejection of uncured pedophilia as mitigating in this case.

If this Court concludes otherwise, the rejection of this factor is harmless. Lebron. Ault's pedophilia does not tip the balance in favor of a life sentence especially where there is such weighty aggravation for this double homicide. See harmless error analysis **Issues I and V**.

ISSUE XI

THE SENTENCE IS PROPORTIONAL (restated)

Ault asserts the sentences are disproportional in this case because once the rejected/under-weighed mitigation is considered, this Court would find this case is not the least mitigated. The State disagrees.

[30] To give credence to the claim pedophilia is blanket mitigation for every homicide where the child is raped and murdered is illogical. Such would be akin to claiming kleptomania is mitigation *per se* for killing the clerk who witnessed the defendant shop lifting or pyromania is mitigation for murders which occurred as a result of arson in spite of the defendant's admission the killings were to avoid detection and prison.

Proportionality review is to consider the totality of the circumstances in a case compared with other capital cases. Urbin v. State, 714 So.2d 411 (Fla. 1998). It is not a comparison between the number of aggravators and mitigators, but is a "thoughtful, deliberate proportionality review to consider the totality of the circumstances in a case, and to compare it with other capital cases." Porter v. State, 564 So.2d 1060, 1064 (Fla. 1990). The function is not to reweigh the factors, but to accept the jury's recommendation and the judge's weighing. Bates v. State, 750 So.2d 6, 14 (Fla. 1999).

Here, the jury recommended death for each girl; voting nine to three for DM's murder and ten to two for AJ's killing. The court found five aggravators: (1) homicide committed while on community control; (2) prior violent felony; (3A) felony murder (sexual battery-aggravated child abuse-kidnapping) merged with (3B) victim under twelve; (4) avoid arrest; and (5) HAC, (R.4 653-57), no statutory mitigators, and three non-statutory mitigators: (1) dysfunctional family (little weight); (2) Ault was not adequately supervised by DOC (little weight); Ault told another sexual abuse victim what he did was wrong and to call the police (some weight). (R.4 658-68). Even assuming the court found: the mental mitigation offered, including pedophilia, brain damage and IQ score, reaching out for help and remorse, and gave more weight to Ault's dysfunctional childhood, the

sentences here for the double homicide remain proportional.

Ault points to Huckaby v. State, 343 So.2d 29 (Fla. 1977) for support. However, Huckaby received death for the rape of a child; no homicides were involved. On that point alone the matter is distinguishable. Also, Huckaby's mental illness was uncontroverted. That is not the case here as the State has outlined in Issues I through X and reincorporates here. Moreover, the existence of mental illness or mental mitigation does not automatically disqualify a defendant from the death penalty.[31] Also, Ault's motivation for the killings was to avoid arrest and prison (R.13 1189-91). These are not the thoughts of a mentally disturbed mind, but the cold "morbidly logical" conclusions of person assessing an escape from his predicament.

Contrary to Ault's claim, it is the State's position that the sentences are proportional and that less aggravated, more mitigated sentences have been found proportional by this Court.[32]

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[31] See Rodgers v. State, 3 So.3d 1127 (Fla. 2009) (upholding death sentence based on one statutory mitigator and numerous nonstatutory mitigators, including "an extensive history of mental illness," were weighed against two aggravating factors) Davis v. State, 2 So.3d 952 (Fla. 2008) (upholding death sentence as proportionate where trial court found in mitigation that Davis suffered from both brain damage and chronic mental illness, but that there was no evidence that the murder was the result of emotional disturbance or severe mental illness).

[32] See also Henyard v. State, 689 So.2d 239 (Fla. 1996) (affirming two death sentences for defendant who raped and shot one victim, who survived, in close proximity to her young children, prior to their killing, despite finding both statutory

See Belcher v. State, 851 So.2d 678, 685-86 (Fla. 2003) (finding proportionality given prior violent felony, HAC, and felony murder and 15 non-statutory mitigating factors); Smithers v. State, 826 So.2d 916 (Fla. 2002) (finding death proportional based on killing of two women and finding HAC, CCP, and prior violent felony and both statutory mental health mitigators based on brain damage and chronic mental illness, and nonstatutory mitigation, including abuse as child); Spencer v. State, 691 So.2d 1062, 1065 (Fla. 1996) (affirming death sentence based on prior violent felony and HAC with both statutory mental mitigators and several nonstatutory mitigators); Wike v. State, 698 So.2d 817, 818 (Fla. 1997) (finding sentence proportional for murder during sexual battery of eight year old girl and prior violent felony, avoid arrest, HAC, and CCP where little weight given mitigation); Schwab v. State, 636 So.2d 3, 7 (Fla.

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mental mitigators and nonstatutory mitigation involving stunted emotional level, low intelligence, impoverished upbringing, and dysfunctional family); James v. State, 695 So.2d 1229 (Fla. 1997) (finding sentence proportionate where victim strangled and there was HAC, prior violent felony (contemporaneous murder), and felony murder along with significant mitigation of ability to appreciate criminality of conduct substantially impaired, under influence of moderate mental/emotional disturbance, full cooperation with police, genuine shame/remorse, and good conduct while incarcerated); Rolling v. State, 695 So.2d 278 (Fla. 1997) (affirming sentences for multiple homicides despite significant statutory and nonstatutory mental mitigators, including family's history of mental illness and physically/mentally abusive childhood); Orme v. State, 677 So.2d 258, 263 (Fla. 1996) (finding sentence proportional for sexual battery, beating, and strangulation of victim; HAC, pecuniary gain, and sexual battery and both statutory mental mitigators).

1994) (upholding sentenced based on prior violent felony, felony murder, and HAC for kidnapping, murder, and sexual battery).

ISSUE XII

ADMISSION OF VICTIMS' PHOTOGRAPHS WAS PROPER

This case was on remand for resentencing and Ault objected on relevancy and prejudice grounds to the admission of six of the previously admitted photographs of DM and AJ; these had been admitted during the earlier guilt phase. While the court excluded two of the photographs of AJ, the balance was admitted and Ault claims that it was reversible error. The State disagrees as the photographs were relevant to the crime charged, the aggravation to be proven, and assisted the medical examiner with his testimony. The court did not abuse its discretion.

The admission of photographic evidence is within the trial court's sound discretion, and will not be overturned absent a showing of a clear abuse. Pangburn v. State, 661 So.2d 1182, 1187 (Fla. 1995); Wilson v. State, 436 So.2d 908 (Fla. 1983). Under section 921.141(1), Fla. Stat., in capital sentencing, "evidence may be presented as to any matter that the court deems relevant to the nature of the crime." Likewise "it is within the sound discretion of the trial court during resentencing proceedings to allow the jury to hear or see probative evidence which will aid it in understanding the facts of the case in order that it may render an appropriate advisory sentence."

Teffeteller v. State, 495 So.2d 744, 745 (Fla. 1986). As provided in Rose v. State, 787 So.2d 786, 794 (Fla. 2001): "relevant evidence is ordinarily admissible unless it is barred by a rule of exclusion or its admission fails a balancing test to determine whether the probative value is outweighed by its prejudicial effect. This standard is equally applicable to photographs." See Zack v. State, 753 So.2d 9, 16 (Fla. 2000).

Here, the State advised the court it needed the photographs to show the circumstances surrounding the crime and to establish the aggravation it had to prove in the case. The prosecutor noted the re-sentencing jury may need information besides Ault's confession before finding the felony murder and HAC aggravators as they did not hear the guilt phase presentation. (R.12 890-92, 902-03). Turning to the expert, the court inquired what significance the photograph of DM's bloated head had to the case. Dr. Davis, the medical examiner, replied that it shows evidence of strangulation when compared to the less blood engorged/bloated extremities and that decomposition occurs to a greater extent in areas where there are larger blood pools. In instances of strangulation, the facial and head area would have the greater bloating. (R.12 983-85). Dr. Davis revealed that State's 27 showed two things "One, the amount of time she's (DM) been there, and two, the differential showing that you got bloating of the head, but not of the rest of the body, which

indicates, again, some sort of a mechanism which caused a lot of pooling in the head, which is strangulation." The time factor was important for Dr. Davis as the evidence showed the different progress of decomposition for DM and AJ which established AJ died many hours after DM. (R.12 899-900) Turning to the photographs of AJ, the court admitted only one (E-1/State's 30). This photograph depicted the marks on AJ's neck which went to the manner of death. (R.12 896-98).

Before the jury, Dr. Davis pointed to State's 29, to establish DM's vaginal hemorrhaging and tearing. State's 27 and 28 showed that DM's clothes had been removed and replaced in an incorrect manner - buttons were out-of-place. State's 27 helped explain the interplay between strangulation and decomposition due to normal and excessive heat conditions. (R.12 909, 912-14). The photograph of AJ, State's 30, established her cause of death, strangulation, and showed the bruising and scratches associated with same. It showed less bloating of the head indicating AJ did not die immediately from the strangulation, but survived approximately 18 hrs before succumbing to respiratory distress caused by strangulation (R.12 915-16).

Given that this was a re-sentencing, it necessitated the instant jury be provided some understanding of the case and information supporting the conviction entered by a different jury. These photographs showed the injuries, sexual battery and

manual strangulation, which led to the conviction of Ault. Further, as the re-sentencing jury, it had to decide whether aggravation had been established. In part, the State was seeking felony murder based on sexual battery, victim under 12 years of age, and HAC. These photographs showed what Ault did to the girls, ages seven and eleven. He raped one, and strangled both. The evidence of vaginal bleeding and tearing helps establish the felony murder aggravator. See Mansfield v. State, 758 So.2d 636 (Fla.2000) (noting felony murder aggravator found where aggravator of murder committed during the commission of a sexual battery). The photographs showed the young age of the victim, and the evidence of strangulation helped establish HAC. As found in Wainwright v. State, 2 So.3d 948, 952 (Fla. 2008), "The trial court did not err in concluding that evidence of strangulation alone may be sufficient to support the HAC aggravator. '[T]his Court has consistently upheld the HAC aggravator in cases where a conscious victim was strangled.' Bowles v. State, 804 So.2d 1173, 1178 (Fla.2001)."

In ruling on the evidence, the trial court allowed State's 27-29 because the photographs showed "what occurred in this sequence of events" (R.12 895). What the court attempted to do was to allow these photographs that went to aggravation only (R.12 902). Ault cites Baird v. State, 572 So.2d 904 (Fla. 1990) to challenge the ruling which he claims was based on the

judge allowing "sequence of events" evidence. The court was not admitting evidence of a sequence, but merely was admitting evidence to show the jury the result of Ault's actions on the afternoon of November 4, 1996. Such is different from Baird where the evidence of Baird's criminal activity was admitted to show the basis for his arrest. Here, the judge's use of the phrase "sequence of events" was merely used to identify what happened during the criminal events. Moreover, clearly the photographs addressed the events which supported the conviction and the aggravation for the sentence.

Likewise, the suggestion that the evidence was inadmissible because it showed decomposition (IB 56) is not supported by the case law. The condition of the bodies revealed time of death, manner of death, and aggravation, all relevant issues for the jury. See Wright v. State, 250 So.2d 333 (Fla. 2d DCA 1976) (finding photos depicting wounds inflicted were relevant and admissible). None of Ault's cited cases[33] bar admission of the photographic evidence here. Likewise, Ault's suggestion and citation to Hoeffert v. State, 559 So.2d 1246, 1249 (Fla. 4th DCA 1990) (IB 56-57) for exclusion of inflammatory, prejudicial

[33] Czubak v. State, 570 So.2d 925 (Fla. 1990) (excluding eight photos showing animal damage unconnected to crime); Reddish v. State, 167 So.2d 858 (Fla. 1964) (finding autopsy photos irrelevant as cause of death established by other means); Rosa v. State, 412 So2d 891 (Fla. 3d DCA 1982) (finding inadmissible photos of deceased with emergency room equipment attached).

photographs is distinguishable. This Court should find that the photographs did not inflame the jury's passions, but were admitted properly. In Hoeffert, the photograph of the victim's head with the skin rolled away is dissimilar to the photographs of DM and AJ in that they established where the girls were found two days after their murder and showed the external wounds inflicted pre-mortem, and the cause of death. The re-sentencing jury is not required to make a recommendation in a vacuum, Preston v. State, 607 So.2d 404, 410 (Fla. 1992), but must be informed of the facts of the case which led to the defendant's conviction so that an informed sentencing recommendation may be made based on the aggravating and mitigating factors. See England v. State, 940 So.2d 389, 399-400 (Fla. 2006) (finding photographs admissible in capital resentencing which address felony murder and HAC aggravators); Rose v. State, 787 So.2d 786, 794 (Fla. 2001) (holding "autopsy photographs, even when difficult to view, are admissible to the extent that they fairly and accurately establish a material fact and are not unduly prejudicial.") Moreover, as reasoned in Henderson v. State, 463 So.2d 196, 200 (Fla. 1985), "[t]hose whose work products are murdered human beings should expect to be confronted by photographs of their accomplishments." This Court should affirm.

ISSUE XIII

THE COURT EVALUATED THE JURY RECOMMENDATION PROPERLY (restated)

Ault asserts the trial court violated the dictates of Ross v. State, 386 So.2d 1191, 1197 (Fla. 1980) when it stated: "As is its duty, the Court has given great weight to the sentencing recommendation provided by the jury, pursuant to Tedder v. State, 322 So.2d 908 (Fla. 1975)." (R.4 653) (IB 59). Contrary to Ault's reading of Ross and the sentencing order, the court followed the requirements for sentencing in a capital case.[34]

In Ross, 386 So.2d at 1197, this Court found it was error for the sentencing court to believe "it was bound by the jury's recommendation of death." This is different than giving great weight to the jury's recommendation. Under Florida law, the jury's advisory sentence is to be given great weight; see Chavez v. State, 832 So.2d 730, 766 (Fla. 2002); Grossman v. State, 525 So.2d 833, 839-40 (Fla. 1988), unless there is a basis for reducing that weight, such as in the situation where the defendant refuses to present a mitigation case. See Muhammad v. State, 782 So.2d 343, 363-64 (Fla. 2001) (noting jury's recommendation may be given less weight when defendant does not offer mitigation).

Under §912.141(3) Fla. Stat., "Notwithstanding the

[34] Questions of law, are reviewed *de novo*. Elder v. Holloway, 510 U.S. 510, 516 (1994).

recommendation of a majority of the jury, the court, after weighing the aggravating and mitigating circumstances, shall enter a sentence of life imprisonment or death, but if the court imposes a sentence of death, it shall set forth in writing its findings upon which the sentence of death is based as to the facts…." The sentencing court independently assessed and weighed the aggravation and mitigation here as is shown by its sentencing order. (R.4 653-69) This Court should affirm.

ISSUE XIV

A PSI WAS NOT REQUIRED AND AULT WAIVED HIS REQUEST FOR ONE IN THIS CASE (restated)

It is Ault's position Rule 3.710(b), Fla. R. Crim. P. requires a PSI report be prepared in his case because at one point he moved to waive the entire penalty phase and refused to participate. However, the record shows Ault presented mitigation, thus, under the law, a PSI was not required. Contrary to Ault's position, Rule 3.710(a) applies as the defense offered mitigation witnesses and argument. Under the rule, the court may seek a PSI report; hence, the abuse of discretion standard applies.[35]

Initially, it must be noted Ault has waived this issue.

[35] Under the abuse of discretion standard a court's determination will be upheld "unless the judicial action is arbitrary, fanciful, or unreasonable, which is another way of saying that discretion is abused only where no reasonable man would take the view adopted by the trial court." Canakaris v. Canakaris, 382 So. 2d 1197, 1203 (Fla. 1980).

During the September 10, 2007 hearing, defense counsel informed the court that he had done additional research on the PSI issue and while it may be strongly recommended, it was not required in this case. (SR.3 491). As such, this matter is not preserved for appeal as Ault agreed that a PSI was not required. Steinhorst, 412 So.2d at 338. Because Ault did not press his request below, but effectively abandoned it, he should not be heard to complain here.

Furthermore, the record reveals Ault presented mitigation witnesses, two mental health experts and a private investigator. Hence, he did not waive his mitigation case as was done in Muhammad, 782 So.2d at 363, and a PSI is discretionary. See Rule 3.710(a); Brooks v. State, 918 So.2d 181, 210-11 (Fla. 2005) (noting there is "nothing in existing case law that would require the trial court to" order a PSI in those cases where the defendant presents mitigation; "Muhammad simply requires trial courts presiding over cases in which the defendant waives mitigating evidence to 'require the preparation of a PSI [presentence investigation],' and permits the court to call witnesses in mitigation to the extent the PSI "alert[s] the trial court to the probability of significant mitigation.' *Id.* at 363-64."); Fitzpatrick v. State, 900 So.2d 495, 524 (Fla. 2005) (reaffirming "Court requires 'the preparation of a PSI in every case where the defendant is not challenging the imposition

of the death penalty and refuses to present mitigation evidence.' Muhammad, 782 So.2d at 363."). Moreover, any error should be considered harmless as the court had a PSI from Ault's initial capital sentencing, and Ault has not offered what mitigation information the court did not have. (SR.3 492). The sentence should be affirmed.

ISSUE XV

THE MEETING DEFENSE COUNSEL REQUESTED WITH THE COURT AND STATE TO DISCUSS A COLLATERAL ISSUE WAS NOT A PRETRIAL CONFERENCE AT WHICH AULT'S PRESENCE WAS REQUIRED, HOWEVER, IF IT WAS A PRETRIAL CONFERENCE, AULT'S ABSENCE WAS HARMLESS ERROR (restated)

At the conclusion of a pre-trial hearing held on Ault's claims and in Ault's presence, defense counsel was granted leave to discuss a matter with the court and prosecutor alone. At that meeting, defense counsel informed the court that he had received a letter from Ault which made additional allegations against counsel, that a federal section 1983 action had been filed by Ault, and if Ault files another bar complaint, which would be a public record to which the State would have access, counsel may be put in the position of having to answer that complaint by divulging information normally considered attorney client privileged which may hurt Ault. (SR.1 185-86). The meeting was for informational purposes only; there was no request for action by the court. In reply, the court stated, "I just don't know what to say", and indicated it looked forward to

hearing about the issue. Ault claims that his absence from this meeting was a violation of Rule 3.180[36] which could not be deemed harmless.[37] The State disagrees.

The instant meeting does not qualify as a pretrial conference. Neither prosecution nor defense motions were presented or discussed; the focus of the matter involved the status of collateral cases pending before the Florida Bar and federal court. The trial judge was not asked to consider or rule on any matter. However, if this Court finds otherwise, the meeting was harmless beyond a reasonable doubt.

At the meeting, defense counsel, Mitchell Polay ("Polay"), merely noted he had responded to a bar complaint Ault had filed and that he was able to respond without divulging any harmful attorney/client information. Polay also informed the court that Ault had filed a federal civil rights action against him and named the prosecutor. Also revealed was Polay's receipt of a

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[36] While a violation of Rule 3.180 is constitutional in nature, it will be reviewed under a harmless error standard and reversal will be required only where "fundamental fairness has been thwarted." Kearse v. State, 770 So.2d 1119, 1124 (Fla. 2000) (quoting Pomeranz v. State, 703 So.2d 465, 471 (Fla. 1997).

[37] Ault cites to Francis v. State, 413 So.2d 1175 (Fla. 1982); Turner v. State, 530 So.2d 45 (Fla. 1987); Butler v. State, 676 So.2d 1034 (Fla. 1st DCA 1996); Snyder v. Massachusetts, 291 U.S. 97 (1934) which address a defendant's presence during jury selection and a critical stages of the case. These cases are not directly on point as this meeting which was conducted before the trial and the issues discussed were merely collaterally related to the instant matter in that they dealt with the attorney/client relationship in general.

letter from Ault which had the potential to develop into another bar complaint, and depending on the charges leveled, he may be forced to disclose information hurtful to Ault in that litigation. Polay did not disclose the complaints or his potential defenses and he did not seek a court ruling. The court took no action except to indicate he would await further information. (SR.1 185-87).

Ault's suggestion that this was some sort of attack on his character by counsel is making too much of the cryptic disclosure. Moreover, the fact that Ault had filed a bar complaint was discussed in counsel's motion to withdraw (SR.1 184-85) The fact Ault may be difficult to deal with was made painfully clear from his multiple requests to remove counsel, and complaints about his jail experience replete in the record.

The record is equally clear that nothing was decided by the court in Ault's absence and Ault's input would have been neither helpful nor enlightening. This Court has found any error harmless beyond a reasonable doubt in situations where the court did not rule on the matter or where the defendant's input would not have been of assistance. See Kearse, 770 So.2d at 1124 (finding Kearse's absence did not thwart fundamental fairness where court took venue issue under advisement at hearing where defendant was absent); Coney v. State, 653 So.2d 1009, 1012-13 (Fla. 1995) (finding harmless defendant's absence from pretrial

conference where court and counsel discussed the court's calendar, courtroom availability, scheduling of witnesses and the prosecutor summarized the crime, its penalty phase evidence, and the hearsay evidence he would seek to admit); Roberts v. State, 510 So.2d 885 (Fla. 1987) (finding harmless defendant's absence from pretrial hearings where adverse rulings were entered on defense evidentiary because even if the defendant were present he could not have assisted counsel in arguing motions). This court should likewise affirm here.

ISSUE XVI

AULT'S CLAIM HE WAS SENTENCED BY A BIASED JUDGE IS NOT PRESERVED FOR APPEAL AND IS MERITLESS (restated)

It is Ault's position that he was sentenced by a biased judge. For support he points to: (1) the court's November 2006 re-appointment of Mitch Polay as Ault's counsel in spite of the request for appointment of Melody Smith; (2) Polay's August, 2005 "leaking of damaging" information about Ault to the court (Issue XV); and (3) the fact that Judge Gold did not request a new PSI in 2007 (Issue XIV). This matter is not preserved for appeal as Ault did not seek to disqualify the trial court on these grounds. Further, the incidents offered do not establish judicial bias. Fundamental error had not been established, thus, the sentence should be affirmed.

For an issue to be cognizable on appeal, it must be

specific contention asserted below. Steinhorst v. State, 412 So. 2d 332, 338 (Fla. 1982). Ault, neither through counsel nor while he was representing himself,[38] did not move to disqualify the trial court on the grounds cited above. As such, this issue is not preserved for appeal. See Overton v. State, 976 So.2d 536, 546-47 (Fla. 2007) (finding claim that judge engaged in improper conduct was procedurally barred on appeal where no objection was raised and no motion to disqualify was filed during the evidentiary hearing). Cf. Mansfield v. State, 911 So.2d 1160, 1179 (Fla. 2005) (reasoning claim of judicial bias would have been procedurally barred on direct appeal as counsel had not moved to disqualify the trial court); Schwab v. State, 814 So.2d 402, 407 (Fla. 2002) (concluding judicial bias claim was barred due to defendant's failure to file a motion to disqualify based upon the reasoning that "where the grounds for a judicial bias claim are known at the time of the original trial, yet are not raised, such claims are waived and cannot be raised in a postconviction appeal").

Fundamental error has not been shown. Ault points to an adverse ruling involving the re-appointment of Polay as Ault's

[38] As addressed in Issue XIX (Supplemental Initial Brief), Ault *pro se*, but while represented by counsel, moved to disqualify the court on the grounds of alleged comments made by the trial judge and his alleged forgetfulness/illness.

counsel,[39] an incident where defense counsel noted Ault had filed suit against him, and a decision not to order a new PSI which the defense counsel agreed was not required under the law. It is well settled that an indigent defendant is entitled to appointment of competent counsel, but not counsel of his choosing. Faretta v. California, 422 U.S. 806 (1975); Hardwick v. State, 521 So.2d 1071, 1074-75 (Fla. 1988); Lowe v. State, 650 So.2d 969, 975 (Fla. 1994); Jones v. State, 449 So.2d 253, 258 (Fla. 1984); Nelson v. State, 274 So.2d 256 (Fla. 4th DCA 1973). Numerous Nelson-Faretta hearings were held, but Ault has not offered here that any were improper. As such, the mere denial of the request does not form a valid basis to discharge the judge. "The general rule is that an indigent defendant has no right to choose a particular court-appointed attorney. … Thus, if a trial court decides that court-appointed counsel is providing adequate representation, the court does not violate an

[39] The re-appointment of Polay arose following the Court's September 15, 2006 granting of Ault's request to represent himself and the Court's ruling that while Polay was no longer counsel of record and was not stand-by counsel, he would be required to attend each hearing so he would be prepared to be re-appointed should Ault request counsel once again. (R.3 452, 523; SR.2 356-59). Hence, Ault was on notice that, unless he could establish that Polay was rendering ineffective assistance, Polay would be his attorney as Ault was merely entitled to competent court-appointed counsel, not counsel of his choosing. See Faretta v. California, 422 U.S. 806 (1975); Hardwick v. State, 521 So.2d 1071, 1074-75 (Fla. 1988); Lowe v. State, 650 So.2d 969, 975 (Fla. 1994); Jones v. State, 449 So.2d 253, 258 (Fla. 1984); Nelson v. State, 274 So.2d 256 (Fla. 4th DCA 1973).

indigent defendant's Sixth Amendment rights if it requires him to keep the original court-appointed lawyer or represent himself." Weaver v. State, 894 So.2d 178, 187-88 (Fla. 2004) (citations omitted). "The fact that a judge has previously made adverse rulings is not an adequate ground for recusal. Nor is the mere fact that a judge has previously heard the evidence a legally sufficient basis for recusal. Mansfield, 911 So.2d at 1171 (citations omitted).

With respect to the other incidents Ault cites as indicating judicial bias, the State reincorporates its argument for Issues XIV and XV. There was no error in the trial court receiving information that suits were filed by Ault against his counsel. No substantive information was offered and the court was not asked to take any action. Moreover, the mere fact the court hears potentially negative information about the defendant does not rise to the level of establishing a basis for disqualification. Trial courts are often placed in the position of hearing damaging information, yet are considered capable of setting aside that information and being an impartial jurist. For example trial judges conduct suppression hearing, plea hearing, and rule on evidentiary matters such as hearsay objections without being deemed biased. Likewise, there was no error in the court rejecting an initial request to have another PSI produce. The rules do not require it, and defense counsel

admitted, and the court had the PSI from the initial trial and the benefit of a full penalty phase hearing. Mansfield, 911 So.2d at 1171 (recognizing adverse rulings or hearing evidence previously does not in and of itself establish a claim of judicial bias) Ault has not carried his burden of proving bias, let alone fundamental error. Relief must be denied.

ISSUE XVII

A FARETTA HEARING WAS UNNECESSAY WHERE A PROPER NELSON HEARING WAS CONDUCTED AND AULT WITHDREW HIS REQUEST TO REPRESENT HIMSELF (restated)

Ault claims he requested to represent himself, and the trial court erred by not conducting a Faretta hearing. (IB 67). While this allegation was supported based on the record at the time the initial brief was filed, the court reporters' latest review of their notes has established that this issue is without merit. Initially, Ault had requested to represent himself, however, before the hearing he filed a motion to replace counsel. On June 4, 2007, a Nelson hearing was completed on Ault's challenge to Polay's competency. The trial court's determination that Polay was not ineffective is supported by the record, and likewise supporting the denial of appointment of new counsel. The Faretta hearing was rendered unnecessary as Ault refused to state unequivocally that he wished to represent himself, instead admitting he had withdrawn that request. This Court should affirm.

The sufficiency of the court's Nelson and Faretta inquiries is reviewed for abuse of discretion. Weaver, 894 So.2d at 190-91; Kearse v. State, 605 So.2d 534, 536 (Fla. 1st DCA 1992).

On November 6, 2003, this Court issued its mandate in Ault v. State, 866 So.2d 674 (Fla. 2003) remanding the case for resentencing. On April 14, 2004, Ault filed his first motion to discharge counsel and to represent himself (R.1 41). Over the next three-and-one-half years he filed 23 motions and/or letters raising similar complaints or asking for stand-by or new counsel.[40] Alternately he would withdraw the motion having resolved his differences with counsel or the motions were denied because ineffectiveness of counsel was not shown. On one occasion, September 15, 2006, Ault's motion to represent himself was granted only to have him request appointment of counsel just three months later. (R.3 452, 523; SR.2 356-59). His final motions on this matter were filed on April 19, 2007, May 16,

[40]August 5, 2004 (R.1 48-54); September 4, 2004 (R.2 240-41); September 27, 2004 (R.2 240-41); October 12, 2004 (R.2 244-45); November 17, 2004 (R.2 246-51); August 15, 2005 (R.2 288-99); October 6, 2005 (R.2 343-45); November 8, 2005 (R.2 361-63); November 29, 2005 (R.2 366-69); January 28, 2006 (R.2 370-73); April 13, 2006 (R.3 400-01); April 18, 2004 (R.3 407-11); June 1, 2006 (R.3 414-23); July 10, 2006 (R.3 435-36); July 12, 2006 (R.3 437-38); September 7, 2006 (R.3 450-51); October 5, 2006 (R.3 461-63); October 26, 2006 (R.3 474-77); ; October 27, 2006 (R.3 491-94); February 22, 2007 (R.3 524-25); April 19, 2007 (R.3 530-31); May 24, 2007 (R.3 532-33); May 21, 2007 (R.3 534-38). "The right of self-representation is not a license to abuse the dignity of the courtroom. Neither is it a license not to comply with relevant rules of procedural and substantive law." Faretta, 422 U.S. at 834, 95 S.Ct. 2525.

2007 seeking to discharge Polay and to precede *pro se*, which were withdrawn on May 24, 2007 with the filing of his pro se motion to dismiss counsel and to appoint new counsel. (R.3 530-38; SR.5 568, 570).

With respect to these last motions, during the April 20, 2007 status hearing, the court noted that it had not had an opportunity to read the motions to precede *pro se* and the matter was re-set for the next week. (SR.3 474-75). On April 25, 2007 Ault's *pro se* motion to represent himself was to be addressed. However, before the court reached the merits, Ault indicated that Polay wished to address Ault's difficulty with the side effects of his medication. Ault then informed the court that he chose not to take his medication. Although Ault sounded perfectly coherent to the court and there did not appear to be a competency issue, the court ordered Polay to present the jail records to determine if the decision to stop the medication was voluntary. The court re-set the matter for May 14, 2007 (SR.3 478-81), but it appears not to have been held (SR.4 512).

On May 16, 2007, Ault filed another *pro se* Motion for Leave to Proceed as Self Counsel with Appointment of Standby Counsel (R.3 532-33). During the May 21, 2007 hearing, Polay reminded Ault they were in court on his motion to represent himself. Ault noted that "we addressed that on Monday, the medication. I'm supposed to be on medication." (SR.4 514). Ault indicated

he did not want to handle the motion to precede *pro se* because he was "not fine" and was having trouble with his medication. (SR.4 514-15). As a result, the trial court set off the issue until either 11:45 a.m. or 1:45 p.m. that day depending on defense counsel's ability. (SR.516-19).

However, on May 24, 2007, Ault filed another *pro se* Motion to Dismiss Court Appointed Counsel and Motion for Appointment of New Counsel (dated May 21, 2007 and referred to by Ault as the May 21, 2007 motion) (R.3 534-35; SR.5 570) referencing the September 18, 2006 dismissal of Polay as counsel and his subsequent reappointment several months later. (R.3 452, 461-65, 523). In this motion, Ault sought a Nelson hearing and appointment of new counsel. This matter was addressed during the next hearing.

On June 4, 2007, the court went through each "complaint" Ault had with Polay and those complaints he leveled against the prosecutor. When completed, the court determined that Ault's complaints[41] did not establish ineffectiveness. First, counsel was taking Ault's call (they spoke twice weekly). Second the

[41] Ault claimed counsel was ineffective because a PET scan had not been conducted yet (SR.5 553); they could not agree on defense expert witnesses (SR.5 554); Polay was selected illegally as the court did not use the "wheel (SR.5 555); problems with the jail giving him the right medication and type of food (SR.5 558); Polay did not return some documents Ault loaned to him (SR.5 559); the prosecutor constantly complains about Ault's tactics in dismissing counsel to delay (SR.5 560).

experts to be called fell within the purview of counsel and counsel had stated that he did not believe one of the experts would assist the defense. Third, Polay was not appointed via the "wheel" because it did not exist when he was first appointed and Polay was never released from the case completely during the time Ault was *pro se*. Fourth, it was agreed that Polay would determine which documents Ault was missing and get them to him is prompt fashion. Fifth, the court reported that it had never found Polay incompetent. (SR.5 554-57). Given the court's findings, it denied the motion to dismiss counsel and the motion to appoint new counsel (R.3 539; SR.5 567-68). The court then inquired of Ault whether he wanted to represent himself. Ault stated: "The same time I had withdrawn the motion to represent myself and filed this motion on the exact same date. It was the 21st of last month that I filed this motion." (R.3 534-38; SR.5 570). When asked if he had anything else to discuss, Ault responded in the negative, and the Court concluded Ault had not asked to represent himself. (SR.5 570-71).

Based upon the totality of the situation, the filing of a motion for appointment of counsel after he had filed a motion to represent himself indicates, as Ault affirmed, he had withdrawn the earlier motion and was seeking representation from an appointed counsel (R.3 534-538; SR.5 570). Where there has been no unequivocal request for self-representation, a Faretta

hearing is not required. Bowden v. State, 588 So.2d 225, 229 (Fla. 1991) (finding where request for self-representation was equivocal at best, Faretta hearing was not required); Hardwick, 521 So.2d at 1074. Only "when there is an unequivocal request for self-representation, a trial court is obligated to hold a Faretta hearing to determine if the request for self-representation is knowing and intelligent." Tennis v. State, 997 So.2d 375, 380 (Fla.2008). The hearing held on Ault's motions satisfied Nelson and Ault having failed to unequivocally request to represent himself, a Faretta hearing was not required. This Court should affirm.

ISSUE XVIII

FLORIDA CAPITAL SENTENCING IS CONSITUTIONAL (restated)

Ault challenges the constitutionality of Florida's capital sentencing under Ring v. Arizona, 536 U.S. 584 (2002) and Caldwell v. Mississippi, 472 U.S. 320 (1985). This Court has rejected these challenges repeatedly.[42] Ault has offered nothing to undermine those decisions especially where he has contemporaneous and prior violent felony convictions. This Court should affirm.

Caldwell v. Mississippi – This Court has rejected challenges to the statute under Caldwell. A Caldwell error is

[42] Questions of law, are reviewed *de novo*. Elder v. Holloway, 510 U.S. 510, 516 (1994).

committed when a jury is misled regarding its sentencing duty so as to diminish its sense of responsibility for the decision. "To establish a Caldwell violation, a defendant necessarily must show that the remarks to the jury improperly described the role assigned to the jury by local law." Dugger v. Adams, 489 U.S. 401, 407 (1989). This Court has recognized the jury's sentencing role is merely advisory, and the standard instructions adequately and constitutionally advise the jury of its responsibility; "the standard jury instruction fully advises the jury of the importance of its role, correctly states the law, [] and does not denigrate the role of the jury." Brown v. State, 721 So. 2d 274, 283 (Fla. 1998) (citation omitted). See Burns v. State, 699 So. 2d 646, 654 (Fla. 1997) (holding instruction correctly states law and advises jury of importance of its sentencing role), cert. denied, 522 U.S. 1121 (1998); Turner v. Dugger, 614 So. 2d 1075, 1079 (Fla. 1992) (finding Caldwell does not control Florida law on capital sentencing); Combs v. State, 525 So. 2d 853, 855-58 (Fla. 1988) (rejecting claim standard jury instruction is unconstitutional under Caldwell or applicable to Florida death cases). The jury was instructed adequately and in compliance with constitutional dictates. The statute is not implicated by Ring or Caldwell. The Court should affirm.

Ring v. Arizona - It is well settled tdeath is the

statutory maximum sentence, death eligibility occurs at time of conviction, Mills v. Moore, 786 So.2d 532, 537 (Fla. 2001), and the constitutionally required narrowing occurs in penalty phase where the sentencing selection factors are applied to determine the appropriate sentence. All of Ault's challenges under Ring have been rejected. See Davis v. State, 2 So.3d 952, 966 (Fla. 2008); Perez v. State, 919 So.2d 347, 377 (Fla. 2005); Parker v. State, 904 So.2d 370, 383 (Fla. 2005); Jones v. State, 845 So.2d 55, 74 (Fla. 2003); Porter v. Crosby, 840 So.2d 981 (Fla. 2003). Moreover, he has prior violent felony convictions,[43] and the contemporaneous murders of DM and AJ along with the convictions on two counts of sexual battery upon DM; two counts of kidnapping; and two counts of aggravated child abuse. This Court has rejected challenges under Ring where the defendant has prior violent felony or contemporaneous felony convictions. See Robinson v. State, 865 So.2d 1259, 1265 (Fla. 2004) ("prior violent felony involve[s] facts that were already submitted to a jury during trial and, hence, [is] in compliance with Ring"); Banks v. State, 842 So.2d 788, 793 (Fla. 2003) (same). Relief must be denied and the sentences affirmed.

Further, the challenges to the instructions regarding the standard of proof for mitigation and the balancing of the

[43] Ault has convictions from 1986 aggravated battery; 1986 burglary and attempted sexual battery; 1994 sexual battery on a child; 1996 attempted sexual battery and aggravated child abuse.

aggravation and mitigation have been rejected. In Williams, this Court stated:

> ...this Court has repeatedly rejected the argument that the standard penalty phase jury instructions impermissibly shift the burden to the defense to prove that death is not the appropriate sentence. *See, e.g., Elledge v. State*, 911 So.2d 57, 79 (Fla. 2005); *Sweet v. Moore*, 822 So.2d 1269, 1274 (Fla.2002). This Court in *Sweet* further rejected a claim of error where a trial court failed to instruct the jury that "it was required to find beyond a reasonable doubt that the aggravators outweighed the mitigators before recommending a sentence of death." *Id*. at 1275. Finally, in *Bogle v. State*, 655 So.2d 1103, 1108 (Fla. 1995), we rejected the claim that a jury instruction which provides that a mitigator may be considered if the jury is reasonably convinced of its existence erroneously restricts the evidence that a jury may consider in mitigation. Accordingly, we reject these claims.

Williams, 967 So.2d at 761. Ault has offered nothing requiring reconsideration of this settled matter.

ISSUE XIX (SUPPLEMENTAL BRIEF)

AULT'S PRO SE MOTION TO DISQUALIFY THE TRIAL JUDGE WAS DENIED PROPERLY (restated)

Likening his motion to replace counsel, Ault asserts that the court erred in denying his motion to disqualify the trial judge which was filed *pro se*, but while he was represented by counsel. It is the State's position that the *pro se* motion was a nullity as Ault was represented by counsel at the time it was filed, thus, when counsel refused to adopt the motion, the court properly denied the request.

Recently, this Court opined:

> A motion to disqualify is governed substantively by section 38.10, Florida Statutes, and procedurally by Florida Rule of Judicial Administration 2.330. *See Cave v. State*, 660 So.2d 705, 707 (Fla. 1995); In re Amendments to Fla. Rules of Jud. Admin., 939 So.2d 966, 1003 (Fla. 2006). The rule provides that a motion to disqualify shall show that "the party fears that he or she will not receive a fair trial or hearing because of specifically described prejudice or bias of the judge"; or that the judge is either an interested party to the matter, related to an interested party, related to counsel, or "is a material witness for or against one of the parties to the cause." Fla. R. Jud. Admin. 2.330(d). In *Arbelaez v. State*, 898 So.2d 25 (Fla. 2005), we addressed the standard of review applicable to a denial of a motion to disqualify:
>
> > Whether a motion to disqualify the judge is legally sufficient is a question of law we review *de nov*o. *See, e.g., Chamberlain v. State*, 881 So.2d 1087 (Fla.2004); *Barnhill v. State*, 834 So.2d 836, 842 (Fla.2002). Such a motion will be deemed legally insufficient if it fails to establish a "well-grounded fear on the part of the movant that he will not receive a fair hearing." *Arbelaez [v. State]*, 775 So.2d [909] at 916 [(Fla. 2000)] (*citing Correll v. State*, 698 So.2d 522, 524 (Fla.1997)). A mere "subjective fear[ ]" of bias will not be legally sufficient; rather, the fear must be objectively reasonable. *Fischer v. Knuck*, 497 So.2d 240, 242 (Fla. 1986). The primary consideration is whether the facts alleged, if true, would place a reasonably prudent person in fear of not receiving a fair and impartial trial. *Id.*
>
> *Arbelaez*, 898 So.2d at 41.

Lynch v. State, 2 So.3d 47, 78 (Fla. 2008). See Stein v. State, 995 So.2d 329, 334 (Fla. 2008); Gore v. State, 964 So.2d 1257, 1268 (Fla. 2007).

While represented by counsel, on October 6, 2005, Ault

filed a motion to disqualify the trial court raising three grounds. (R.2 331-41). Ault claimed he feared not receiving a fair hearing because the court: (1) threatened him by asking him to remember where he was; (2) was predisposed against Ault by noting he would spend the rest of his life in prison; and (3) was forgetful and/or ill.[44] During the hearing on the motion, defense counsel, in response to the court's inquiry, informed the tribunal that he would not adopt Ault's motion. Based on this, the court concluded that the motion was a nullity, and struck the motion. (SR.1 190).

Ault suggests there are exceptions to the general rule that a motion filed *pro se* is a nullity when represented by counsel, namely, motions to discharge counsel or to proceed *pro se*. He asserts that because this is a capital case and that he had asked to represent himself, his motion should have been considered irrespective of whether counsel adopted it or not. For support, he points to Knarich v. State, 866 So.2d 165, 167 (Fla. 2d DCA 2004) and Turner v. State, 598 So.2d 187 Fla. 1st DCA 1992). Ault's reliance upon these cases is misplaced because in both, the defendant was deemed co-counsel for the purposes of the motion and the judges commented on the truthfulness of the allegations. Here, the court did not

[44] Ault has abandoned that basis here.

comment upon the motion[45] and Ault was not deemed co-counsel, in fact, at that hearing Ault claimed he was not on his medication, thus, a Faretta hearing could not be concluded. (SR.1195-96). In fact, in Turner, the District Court noted:

> The appellant acknowledges that his motion failed to meet the requirements of Rule 3.230, Florida Rules of Criminal Procedure. It was not accompanied by the affidavits required by 3.230(b), and it was untimely under 3.230(c). The judge might have denied the motion as legally insufficient for either of these reasons. He might have simply declined to entertain the motion because the appellant was represented by counsel. *See Davis v. State*, 586 So.2d 1038, 1041 (Fla. 1991) ("A criminal defendant does not simultaneously enjoy a right to assistance of counsel and the right to represent himself.... When the accused is represented by counsel, the privilege of addressing the court is a matter for the court's discretion."). *See also State v. Tait*, 387 So.2d 338 (Fla. 1980). Overlooking all of these threshold procedural problems, the judge entertained the motion and decided it upon the merits.

Turner, 598 So.2d at 186-87.

As the court in Turner recognized, a motion filed *pro se* while represented by counsel may be stricken as a nullity. See

[45] In Taylor v. State, 557 So.2d 138 (Fla. 1990), overruled on other grounds, Heuss v. State, 687 So.2d 823, 824 (Fla. 1996), this Court addressed a motion to disqualify, originally filed *pro se* while represented by counsel. The opinion is silent as to whether Taylor was allowed to act as co-counsel for purposes of the motion, however, as in Turner, the judge commented on the veracity of the allegations when denying the motion for recusal. It was the fact the court commented on the motion which was deemed error necessitating reversal. Such distinguishes this matter from the instant case. Here, the court merely noted that Ault's motion was a nullity and struck the pleading. Nothing in Taylor requires that the defendant be granted co-counsel status, nor does it demand that the motion be considered irrespective of counsel's decision to adopt the motion.

Davis v. State, 586 So.2d 1038, 1041 (Fla. 1991) (opining "criminal defendant does not simultaneously enjoy a right to assistance of counsel and the right to represent himself.... When the accused is represented by counsel, the privilege of addressing the court is a matter for the court's discretion."), vacated on other grounds, Davis v. Florida, 505 U.S. 1216 (1992) (remanding for consideration in light of Espinosa v. Florida, 505 U.S. 1079 (1992)). Mora v. State, 814 So.2d 322, 328 (Fla.) (recognizing "there is no constitutional right for hybrid representation at trial."), cert. denied, 537 U.S. 1050 (2002); State v. Tait, 387 So.2d 338 (Fla.1980) (same). "Only when a *pro se* criminal defendant is affirmatively seeking to discharge his or her court-appointed attorney have the courts of this state not viewed the *pro se* pleading in which the request to discharge is made as unauthorized and a "nullity." Logan v. State, 846 So.2d 472, 476 (Fla. 2003). Ault has not offered a reasoned basis for receding from this well settled law.

Additionally, Ault submits that his motion to discharge counsel should have been heard first. However, under well settled law, the court was required to hear the motion for disqualification first. Pursuant to Fla. R. Jud. Admin., Rule 2.330, "[t]he judge shall rule on a motion to disqualify immediately, but no later than 30 days after the service of the motion as set forth in subdivision (c)." See Stimpson Computing

Scale Co., Inc. a Div. of Globe Slicing Mach. Co., Inc. v. Knuck, 508 So.2d 482, 484 (Fla. 3d DCA 1987); Barnett Bank of St. Lucie County v. Garrett, 468 So.2d 467 (Fla. 4th DCA 1985). Hence, there is no merit to Ault's complaint regarding the order his motions were resolved.

Furthermore, even if the motion was considered and the lack of counsel's adoption and affidavit supporting[46] the motion for disqualification were overlooked, the motion was legally insufficient. The allegations made by Ault would not put a reasonable person in fear of not receiving a fair trial. Ault alleged that after being disruptive and disrespectful to the court,[47] he was threatened by the judge to recall where he was and where he would spend the rest of his life. No reasonable person, who had just disparaged the court, would fear that he would not receive a fair hearing where he was reminded by the judge to remember he was in court, i.e., to maintain decorum in

[46] Failure to include an affidavit from counsel and/or his certification "that the motion and the client's statements are made in good faith" renders the motion legally insufficient. See Polanco v. State, 993 So.2d 566 (Fla. 4th DCA 2008) (finding unsigned motion to recuse trial judge which lacked supporting affidavit/certificate asserting the motion was brought in good faith was legally insufficient).

[47] According to Ault's allegations, during the August 27, 2005 hearing (SR.1 160-88), he called the judge an "incompetent ass" and "made some very disparaging to and about said Judge." (R.2 337). In response, the judge is alleged to have told Ault to "remember where your at" (sic) and "[t]hat's where you will spend the rest of your life." (R.1 338).

the courtroom. See Oates v. State, 619 So.2d 23 (Fla. 4th DCA 1993) (affirming that defendant did not have a well founded fear of not receiving a fair trial even after he had a series of outbursts during the trial and the judge stated to the press that the defendant was “being an obstinate jerk.”); Nassetta v. Kaplan, 557 So.2d 919, 921 (Fla. 4th DCA 1990) (noting that "[a] judge's remarks that he is not impressed with a lawyer's, or his client's behavior are not, without more, grounds for recusal.").

Likewise, Ault had been convicted of a double homicide and that conviction was affirmed on appeal. By statute, he faced one of two sentences, life imprisonment or death. See § 775.082(1), Fla. Stat.; §921.141(1), Fla. Stat. As such, no reasonable person in Ault’s position would fear bias where the court noted Ault will spend the rest of his life in prison. (R.2 338). Based on the foregoing, this Court should affirm.

CONCLUSION

Based upon the foregoing, the State requests respectfully this Court affirm Ault's death sentences.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. mail to: Jeffrey L. Anderson, Esq., Office of the Public Defender, 421 Third Street, West Palm Beach, FL 33401 this 14th day of September, 2009.

CERTIFICATE OF FONT COMPLIANCE

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

Respectfully submitted,

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