IN THE SUPREME COURT OF FLORIDA

HOWARD AULT,	)	
	)	
Appellant,	)	
	)	
vs.	)	CASE NO. SC07-2130
	)	
STATE OF FLORIDA,	)	
	)	
Appellee.	)	
	)	

INITIAL BRIEF OF APPELLANT

On Appeal from the Circuit Court
Of the Seventeenth Judicial Circuit
In and For Broward County, Florida
[Criminal Division]

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PRELIMINARY STATEMENT

Appellant was the defendant and appellee the prosecution in the Criminal Division of the Circuit Court of the Seventeenth Judicial Circuit, In and For Broward County, Florida.

The symbol "R" will denote the Record on Appeal.

The symbol "T" will denote the Trial Transcript.

The symbol "SR" will denote the Supplemental Record.

SUMMARY OF THE CASE

On November 20, 1996, Appellant Howard Steven Ault was charged by indictment with two counts of first degree murder, two counts of kidnapping, and two counts of aggravated child abuse R14. He was found guilty on all counts after a jury trial R5-6. The trial court imposed the death penalty on both murder counts, life sentences of the sexual battery counts, and sentences of a term of years on the other counts.

Mr. Ault appealed his convictions and sentences. This Court affirmed his convictions vacated his death sentences and remanded for resentencing on the non-capital offenses R36.

A penalty phase commenced on July 30, 2007 R549. The jury recommended death for the two counts of murder by votes of 9-3 and 10-2 R584-85. On October 24, 2007, the trial court resentenced Mr. Ault to death R651-77. Mr. Ault timely filed his notice of appeal R692. This appeal follows.

STATEMENT OF THE FACTS

Nicole Geany testified she was seven years old in 1994 T746. Appellant was her neighbor T746. On March 14, 1994, Appellant exposed himself and ripped Geany's shorts off T747. Appellant touched Geany T747. Appellant was later arrested T748.

Tabatha Wasson testified she was eleven years old in 1995 T753. Wasson babysat Appellant's child T754. Appellant returned and placed Wasson on a bed T758. Appellant hit Wasson to stop her from screaming T758. Appellant pulled Wasson's shorts and underwear down and put his penis in her anus T759. Later Wasson asked Appellant why he did it T759. Appellant said when he saw her he had to have her T759. Appellant said what he did was wrong and told Wasson that she needed to tell someone what had happened T759, 765.

Michelle LeMay testified that in 1988 she was twelve years old T770. Appellant was at LeMay's house T772. LeMay went to bed T772. LeMay woke up to find Appellant on top of her T8772. Appellant got her panties off and touched her vagina and all over T773-75. Appellant was chased out of the house by LeMay's brother T774.

Bryon Mattai testified on September 30, 1986, he was walking on the beach with a date T782.[1] Mattai say two figures T783. Appellant came at Mattai with a knife T784. The knife made contact with Mattai's shirt T784. Mattai suffered minor scrapes across his hands and shirt T787. Mattai identified himself as s police officer and threatened to shoot T784. Appellant ran when Mattai reached down like he had an ankle holster T785.

Donna Mae Jones testified she is the mother of Deanne Mumin and Alicea Jones T834. In November 1996 Deanne was eleven and Alicea was seven T834-35. One one occasion Appellant gave the girls a ride T840. Jones took the girls to school on November 4, 1996 T840. The girls never returned T841. Jones called police and went to Appellant's apartment and other places T842. Appellant indicated he had not seen the children T843.

Alvertis Johnson testified she is a community control officer who supervised Appellant while he was on community control from May to November of 1996 T849-51.[2] On November 4, 1996, Johnson went to Appellant's residence T856. Appellant was compliant all the time T859.

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[1] Mattai did not appear at the penalty phase. Mattai's testimony from the 2000 penalty phase was read to the jury

[2] Johnson did not appear at the penalty phase. Johnson testimony from the 2000 penalty phase was read to the jury.

Dr. Lance Davis testified he was the medical examiner for Broward County T878. Davis performed the autopsy on Deanne Mumin T888. Deanne was eleven and 4'9" and 97 lbs. T907. Decomposition had started T907. Tissue was swelling and outer skin had fallen off T907. Deanne had been dead 2 1/2 days before Davis saw her at the scene in the attic T907. She was very swollen around the head area and there was bruising around the neck area T907. An internal examination showed trauma to the neck T908. There was hemorrhaging to the vaginal area T909. The cause of death was manual strangulation T910. There was no evidence Deanne was repeatedly strangled T918. She could have lost consciousness in less than 15 seconds T921. The head was opened and bruising could be seen T921. This bruising could occur after death as Deanne was moved to the attic T922.

Davis testified that Alicea Jones was 4'6" and 53 lbs T914. Decomposition was not as bad as Deanne T914. Alicea had lived for an additional 18 hours T914. Alicea was unconscious during that time T915. Alicea had a lot of foam around her mouth T915. There were marks on her neck T915. The cause of death was strangulation T917. The strangulation did not result in death immediately T915. The swelling on the brain took several hours before she died T915. Alicea was likely unconscious during that time T915.

William Rhodes testified that in 1996 he was a detective in Oakland Park T931. In November of 1996, Rhodes investigated the disappearance of Deanne and Alicea

T932. Rhodes met with Appellant on November 5, 1996 T933. Appellant indicated he did not know where the girls were T934. On November 6, 1996, Rhodes again saw Appellant at the Broward County Jail T936. Appellant indicated the girls were dead T937. Appellant gave Rhodes consent to search his residence T987. Appellant and Rhodes went to Appellant's residence and the girls were found dead in his attic T942.

Appellant's taped statement to Rhodes was played to the jury T945.

In the statement Appellant said he met Donna Jones and her three kids on Monday, October 28, 1996 p.m. Easterlin Park. T956-957. He gave them his name and address and offered to let them come and cook. T958. He introduced his wife to her T958. He saw the girls 2 or 3 days later and gave them a ride in his truck. T959-60. He also helped Ms. Jones work on her car one day. T961. He first thought of having sex with the children when he gave them a ride in the car. T964-65. On Monday November 4, 1996 he left his apartment about 2:15 and picked up the children at about 2:30 p.m.T966. He told them that he was going to give them Halloween candy at his apartment T968.

The kids came in with him. T969. He began to have sex with the oldest child on the floor and she started to scream and fight T969. He penetrated her with his finger and briefly with his penis T971. He began to choke her to stop the noise T971. He covered her mouth with his left hand T971. He claimed he strangled her until she stopped breathing T972-73. He then went over and strangled the other girl T975. He

put the older girl's clothes back on and then put them both in the attic T977. He then left and picked his wife up from work T978-79. Appellant was afraid something like this would happen T986.

Mr. Ault stated that after he was raped by his older brother, he began having sexually deviant thoughts T990. His brother began abusing him when he was 5 and it went on for several years T990. He never thought about killing anyone until the older girl was screaming in this incident. T992, 996. Appellant has had visions of abusing girls since he was seven T1004. Mr. Ault said he had been seeing a psychologist and had been in group therapy for over a year for his sex problems T1006. He still has visions of having sex with minors. T1006-07. Appellant is sorry for what he did T1009.

Rhodes testified that Appellant also said the thoughts of sexual abuse came into his mind but he could not stop himself T1020. Appellant felt remorse but could not stop himself T1024. Appellant reiterated his problem off the tape and stated that nothing eliminates the thoughts from his mind T1025.

Dr. David Kramer testified that he is a psychiatrist who examined Appellant T1044. Dr. Kramer also reviewed psychological exams, competency exams and correctional progress reports on Appellant T1044-45. Kramer also reviewed the testimony of Sherry Bourge-Carter and Dr. Eisenstein T1046. Appellant's parents had a very dysfunctional and rocky marriage with multiple separations and conflicts

T1047. When Appellant was fifteen his parents divorced T1047. When Appellant was six his thirteen year old brother began a pattern of forced sexual abuse on Appellant T1047. This included forced anal and oral sex T1047. At times Appellant was threatened with a weapon T1047. Appellant had a fear of dogs T1053. The brother would back him a closet and tell him a dog was waiting inside or outside waiting T1053. This was real trauma and not mere teasing T1053. Appellant's brother was sent to a residential treatment center T1047. The Appellant's mother was aware of the abuse T1048.

Dr. Kramer testified that when a person is traumatized by family members they develop anxiety believing, if a family member could abuse them, anyone could abuse them T1049. They also develop a core belief that there must be something wrong with them because this abuse doesn't happen to other people T1049. The result is depression and low self-esteem T1049. The abuse victim may link fear, intimidation with sexual arousal T1049. Dr. Kramer believes this is consistent with Appellant's situation T1056. When Appellant was 12 he began fondling his sisters while they were sleeping T1050. Appellant began to have sexual attractions to prepubescent females T1050. This was attributable to Appellant's experience of being molested and abused T1050.

Appellant suffers from pedophilia T1050. Pedophilia is an intense persistent arousal to inappropriate stimuli T1057. This can be an extremely powerful

compulsion T1051. A big part of Appellant's psychology is that he knew what he did was wrong but could not help himself T1051.Appellant suffered from post traumatic stress disorder T1051. This is a major mental illness T1052. Abused children will end up with psychiatric disorders such as bipolar or borderline or borderline T1052. Appellant exhibited signs of clinical depression T1054.

In 1996 Appellant was incarcerated and assessed to have significant psychiatric problems T1055. Appellant has been treated with antipsychotic medications T1053. Appellant had a compulsion to have sexual activity with age-inappropriate partners T1058. Even though Appellant knew it is against the law he would still do it due to post-traumatic stress disorder and pedophilia that developed from his early victimization T1059.

At the age of 12 Appellant fell and received a blow to the temple resulting in a loss of consciousness T1061. At the age of 14 Appellant was in a fight resulting the loss of consciousness T1061. At the age of 18 Appellant was in a car rollover causing a blow to the head T1061.

Dr. Kramer opined that at the time of the offense Appellant was under the influence of extreme mental or emotional disturbance T1062-63. Appellant cannot control his desires to have sex with prepubescent females T1063. Appellant has received insufficient treatment for his problems T1065. Appellant dropped out of school in the eighth grade with a very checkered school history including learning

problems and behavioral difficulties T1067. People who have been sexually abused have problems inhibiting their behavior compared to the rest of the population T1068. They also tend to have antisocial conduct T1068. When Appellant was a teenager he was hospitalized for a suicide attempt T1071. In 2003 Appellant ingested 10, 000 milligrams of seroguel in a suicide attempt and was taken to the intensive care unit in Jacksonville T1071. Appellant had two other suicide attempts T1071.

Dr. David Ross is a neurologist T1103. Dr. Ross examined Appellant and had a PET scan and a EEG done T1106. The EEG showed that Appellant had deficiencies in the frontal lobe and temporal lobe areas of his brain T1108. The PET scan showed reduced metabolism in the frontal and temporal cortices T1111. The frontal areas controls judgment and impulses T1112-1113. The temporal area controls emotions and memory T1112. People with pedophilia have the same pattern of brain waves as Appellant T1115. People can function with frontal lobe problems but under the right circumstances dysfunctions can occur T1115. Under the right circumstances compulsion can be triggered and can be stopped T1115. The brain does not go through the logical sequence of the consequences T1115.

Because of the temporal damage one's emotional controls may be wrong and one may be excited about something one should not be excited about T1116. Frontal lobe damage usually can lead to apathy and thus one doesn't have the proper controls T1117. The amount of control depends on the compulsion of obsession T1118.

Appellant's brain abnormalities could have resulted from head trauma T1118.

Dr. Sherry Carter testified she is a clinical psychologist T1139. She interviewed Mr. Ault and reviewed records. T1146-1149. He was on Thorazine, an anti-psychotic, and Sinequan, an anti-depressant. T1150. Thorazine is normally prescribed for people who are delusional and not in touch with reality. T1150. Mr. Ault reported auditory hallucinations in the past. T1152-53. Dr. Carter stated that she was suspicious of this report. T1152-54. Dr. Carter gave Mr. Ault an IQ test and he scored 80 with a verbal IQ of 77 T1158. She also felt that Mr. Ault was malingering due to the results of certain psychological tests. T1162-70, 1176. She stated that her tests show:

> ....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.

T1173. She stated that he had a severe personality disorder, but did not have a major mental illness. T1176. She felt that he suffered from pedophilia, anti-social personality disorder, and malingering T1175-76. She testified that he was reporting hallucinations and multiple personalities. T1180-81.

Appellant indicated he had been sexually abused by his brother at the age of five when his brother pinned him down, took his pants down, and had anal sex with him T1183. The abuse would be repeated at home and during camping trips T1184. The abuse was once or twice a week and continued until Appellant was eight T1184.

The abuse stopped for a couple of years but started again when Appellant was ten T1184. She did not know whether the allegations that Mr. Ault was sexually abused by his brother are true or not. T1186. She did not feel that he met the criteria for the two statutory mental mitigators. T1189.

SUMMARY OF THE ARGUMENT

1. The undisputed, unrefuted objective evidence showed Appellant suffered brain damage to the temporal and frontal lobes. These areas control judgment and impulses. It was reversible error to reject brain damage as mitigating evidence in deciding whether Appellant should spend his life in prison or whether he should be put to death.

2. When deciding whether one should spend their life in prison, or whether one should be put to death, good adjustment to life in prison is an important mitigating circumstance. It was reversible error for the trial court to categorically reject this undisputed mitigating circumstance.

3. The trial court improperly consolidated 12 mitigating circumstances into a single mitigator. Many of the circumstances had independent significance. Improperly lumping the circumstances creates the danger that the trial court failed to recognized the independent significance of the mitigators and thus failed to give to substantial weight to the mitigation as it should have done.

After the improper consolidation, the trial court gave little weight to the mitigation. The trial court failed to give any explanation or reason for doing so. The mitigation was significant. The trial court abused its discretion under the circumstances of this case.

4. Mr. Ault had asked a victim to turn him in because what he did was wrong. Mr. Ault was reaching out for help to stop abusing young girls. His compulsion would not let him stop the abuse. This mitigation is important because it shows (1) humanity and more importantly shows that (2) Mr. Ault wanted his compulsive behavior to be stopped. The trial court gave it little weight as it showed a spark of humanity. However, the trial court refused to give Mr. Ault's reaching out for help any weight. This was the most important aspect of the mitigator presented. The trial court abused its discretion for failing to give Mr. Ault's reach for help any mitigating weight.

5. The trial court erred in rejecting the statutory mental mitigating circumstances. There was no substantial, competent evidence presented that rebutted the defense experts. Incorrect legal standards were used by a witness and the trial court to reject these mitigators. It was reversible error to reject these mental mitigators.

6. The trial court erred in failing to evaluate the nonstaturory mitigating circumstance of emotional or mental disturbance.

7. The trial court erred in rejecting Mr. Ault's low IQ as mitigation.

8. The trial court erred in rejecting Mr. Ault's cooperation and acceptance of responsibility as mitigation.

9. The trial court erred in rejecting Mr. Ault's remorse as mitigation.

10. It was undisputed that Appellant suffers from pedophilia. Appellant control over his pedophilia is impaired. But for Appellant's pedophilia the events involving the young girls would not have occurred. The trial court erred in rejecting this mitigation under the circumstance of this case.

11. Proportionality requires that the death penalty is reserved for only both the most aggravated and least mitigated of cases. This case is not one of the least mitigated. The death penalty is not proportionally warranted in this case.

12. The trial court erred in admitting irrelevant and prejudicial photos into evidence over Appellant's objections.

13. The trial court erred in giving great weight to the jury's recommendation.

14. The trial court denied Appellant's request for a presentence investigation (PSI) because there was nothing further it could learn about Appellant. Appellant did not participate in presenting mitigation and had moved to waive his entire penalty phase. It was reversible error to deny the request for a PSI.

15. The trial court erred in conducting a pretrial conference in Appellant's absence. The error was not harmless where damaging information about Appellant was being passed to the trial court in Appellant's absence.

16. Appellant was denied due process and a fair sentencing where he was sentenced by a biased judge.

17. The trial court erred in failing to respond to Appellant's request to represent himself.

18. Florida's death penalty which does not require: the findings under Ring v. Arizona, 122 S. Ct. 2428 (2002); the jury to be properly advised of their responsibility; a unanimous jury finding for death; a unanimous jury finding of aggravating circumstances; a finding beyond a reasonable doubt that aggravating circumstances outweigh mitigating circumstances violates the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution.

ARGUMENT

POINT I

THE TRIAL COURT ERRED IN REJECTING APPELLANT'S BRAIN DAMAGE AS A MITIGATING CIRCUMSTANCE.

The undisputed, objective evidence showed Appellant suffered brain damage. Dr. Ross, a neurologist, testified that PET scan and EEG tests showed deficiencies to the frontal lobe and temporal lobe areas of Appellant's brain T1108, 1111. The trial court recognized this important evidence in its sentencing order:

> The neurologist, Dr. Ross, concluded that the Defendant had problems affecting his brain. This doctor conducted two examinations on the Defendant, an electroencephalogram (EEG) test and a positions emission tomography (PET) scan.
>
> Based on these tests, Dr. Ross concluded that the Defendant suffered **deficits** at several sites of his brain, mainly, the right **frontal area** and the **temporal lobes.** The frontal area is the analytical portion of the brain while the temporal lobes relate to the integration of memory and emotion. Dr. Ross concluded that the defendant has an **abnormal brain** and that studies have shown that people with pedophilia have these sorts of damage.

R659-60. (emphasis added).

However, the trial court rejected brain damage as a mitigating circumstance because it had already rejected the statutory mental mitigation:

C. The Defendant suffers from brain damage.

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> Having already addressed this issue as a statutory mitigator, the court has no basis to consider this matter as a non-statutory mitigating circumstance.

R6605. The trial court erred in rejecting the unrefuted evidence of brain damage as mitigating evidence.

"Whether a particular circumstance is truly mitigating in nature is a question of law and subject to de novo review by this Court." Ford v. State, 802 So. 2d 1121, 1135 (Fla. 2001) quoting Blanco v. State, 706 So. 2d 7, 10 (Fla. 1997).

If the evidence supports a mitigating circumstance it must be found. See Coday v. State, 946 So. 2d 988, 1001 (Fla. 2006). The trial court can only reject such mitigation if there is substantial, competent evidence to support its rejection. Coday at 1001. A trial judge must find brain damage as a mitigating circumstance if it is established. Coday at 1002. (noting that in Crook v. State 813 So. 2d 68 (Fla. 2002) it was error to reject brain damage which "was substantiated by objective testing").

In this case the objective evidence of brain damage to Mr. Ault's frontal lobes and temporal lobes was not refuted or disputed. Such brain damage has been recognized as impacting the ability to control behavior. In Crook v. State, 813 So. 2d 68, 71 (Fla. 2002) an expert explained that people with frontal lobe damage "often

lose control over their own behavior" and "attacks on frontal lobe works as a braking mechanism for human behavior."

In this case Dr. Ross testified that the frontal lobe area controls judgment and impulses T1112-1113. Compulsions can be triggered and can be stopped T1115. The brain does not go through the logical sequences of the consequences T1115. Also, temporal damage can cause one to become excited over something one should not be excited about T1116. The bottom line is that the evidence of brain damage is a mitigating circumstance and it was error for the trial court to totally reject it.

The error cannot be deemed harmless. The trial court totally rejected any evidence related to mental health. This distorts the weighing process of mitigators against aggravators. Evidence of brain damage is important mitigation. Three jurors recommended life in this case most likely due in part to the evidence of brain damage. The trial court did state that EHAC outweighed the mitigation. This makes the error more prejudicial because the mitigation in the trial court's weighing equation did **not** include the brain damage. Appellant was denied his rights under the Fifth, Sixth, Eighth, and Fourteenth Amendments to the U.S. Constitution and Article I Sections 2, 9, 16, 17 of the Florida Constitution. This cause must be reversed and remanded for resentencing

POINT II

THE TRIAL COURT ERRED IN REJECTING GOOD ADJUSTMENT TO LIFE IN PRISON AS A MITIGATING CIRCUMSTANCE.

The trial court rejected Appellant's good adjustment to prison as a mitigating circumstance as follows:

> L. The Defendant having successfully completed a prior sentence can adjust to life in prison (paragraph 27).
>
> The Court does not consider this ability to be a mitigator for murder.

R668. This was error.

It was not disputed factually that Mr. Ault can successfully adjust to prison. Yet, the trial court categorically rejected this as a mitigating circumstance. However, this has been noted as extremely important mitigation. Skipper v. South Carolina, 106 S.Ct. 1669, 1671 (1986) ("a defendant's disposition to make a well – behaved and peaceful adjustment to life in prison" may be a basis for life in prison); Cooper v. Duger, 526 So. 2d 900 (Fla. 1988). The rejection of this mitigation denied Mr. Ault his rights under the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution and Article I, Sections 2, 9, 16 and 17 of the Florida Constitution. This cause must be reversed.

POINT III

THE TRIAL COURT ERRED IN CONSOLIDATING NUMEROUS MITIGATING CIRCUMSTANCES AND IN GIVING THEM LITTLE WEIGHT.

The trial court ruled that it was reasonably convinced the 12 following mitigating circumstances exist and thus considered them:

1. The Defendant was raised in a dysfunctional family.
2. The Defendant has eighth (8^{th}) grade education.
3. The Defendant attempted suicide when he was fourteen (14) years old. When the Defendant was in his formative years, he was sexually abused, molested and raped by his older brother, Charles.
4. The Defendant's parents, though aware of the sexual abuse, did nothing to prevent further abuse.
5. The Defendant's older brother, Charles, put a gun to the Defendant's head to force sexual relations.
6. Throughout his childhood, the Defendant suffered a number of head injuries that were not properly treated because of the lack of health insurance.
7. The Defendant was raised in an unstable environment, having to constantly move and start at new schools.
8. The Defendant's primary school report cards demonstrate poor academic performance, learning disabilities, and behavioral problems.
9. The Defendant was not nurtured as a child.
10. The Defendant was raised without strong family bonds.
11. The Defendant did not receive counseling as a child for his behavior, traumatic events, or academic development.

R662-663, 664. The trial court then consolidated the 12 mitigators and gave them little weight as a single mitigator R664. This was error.

Appellant recognizes that a trial court may consolidate mitigation – but only where the mitigation covers the same territory and does not have independent

significance. For example, in this case the 12 mitigators represent at a minimum 3 separate areas of mitigation which have independent significance – (1) trauma experienced by Mr. Ault as a child;[3] (2) lack of aid or support by his family;[4] (3) poor academics and educational opportunity.[5] The two remaining mitigators don't fit neatly into any category but are the result of the trauma Mr. Ault suffered as a child. Improperly consolidating the mitigation creates a danger of not recognizing the significance of all the mitigation. The trial court erred in lumping the 12 mitigators together into a single mitigator.

More important than the improper consolidation, the trial court, **without discussion or reason**, arbitrarily decided to give the mitigation little weight. On its face being raped during one's formative years by an older brother, without any

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3 When the Defendant was in his formative years, he was sexually abused, molested and raped by his older brother, Charles.

The Defendant's older brother, Charles, put a gun to the Defendant's head to force sexual relations.

4 The Defendant's parents, though aware of the sexual abuse, did nothing to prevent further abuse.

The Defendant was not nurtured as a child.

The Defendant was raised without strong family bonds.

5 The Defendant was raised in an unstable environment, having to constantly move and start at new schools.

The Defendant's primary school report cards demonstrate poor academic performance, learning disabilities, and behavioral problems.

The Defendant did not receive counseling as a child for his behavior, traumatic events, or academic development.

resulting family support, is very substantial mitigation. How did the trial court decide this deserved little weight? Was it decided by coin flip? No one knows because the trial court totally failed to give any explanation why the mitigation deserved little weight.

As explained in Point IV, although the trial court has discretion as to how to weigh mitigation that discretion is not unbridled and can be abused.

Mitigation has been found to be extremely significant by this Court even where the trial court had failed to exercise discretion by merely giving it little weight. Sinclair v. State, 657 So. 2d 1138, 1140, 1142 (Fla. 1985) (trial court gave little weight to the mitigation, but the emotional disturbance 'had substantial weight").

This Court has stressed the importance of issuing specific written findings of fact in support of mitigation in capital cases. Van Royal v. State, 497 So. 2d 625 (Fla. 1986); State v. Dixon, 283 So. 2d 1 (Fla. 1973). The sentencing order must reflect that the determination as to which mitigating circumstances apply under the facts of a particular case is the result of "a reasoned judgment" by the trial court. State v. Dixon, supra at 10. Florida law requires the judge to lay out written reasons for finding mitigating factors, then to personally weigh each one in order to arrive at a reasoned judgment as to the appropriate sentence to impose. Lucas v. State, 417 So. 2d 250, 251 (Fla. 1982). The record must be clear that the trial judge "fulfilled that responsibility." Id.

Weighing the aggravating mitigating circumstances is not a matter of merely listing conclusions. Nor do the written findings of fact merely serve to memorialize the trial court's decision. Van Royal, supra at 628. Specific findings of fact are crucial to this Court's meaningful review of death sentences, without which adequate reason review is impossible. Unless the written findings are supported by specific facts, this Court cannot be assured that the trial court imposed the death sentence on a "well-reasoned application" of the aggravating and mitigating circumstances. Id., Rhodes v. State, 547 So. 2d 1201, 1208 (Fla. 1989). In Ferrell v. State, 653 So. 2d 367 (Fla. 1995) this Court explained that the "weighing process must be detailed in the written sentencing order" in order for an opportunity for a meaningful review:

> Once established, the mitigator is weighed against any aggravating circumstance. It is within the sentencing judge's discretion to determine the relative weight given to each established mitigator; however, some weight must be given to all established mitigators. The result of this **weighing process must be detailed in the written sentencing order** and supported by sufficient competent evidence in the record. The absence of any of the enumerated requirements deprives this Court of the opportunity for meaningful review.

653 So. 2d at 371 (emphasis added).

The review of the exercise of discretion in death penalty cases is at least entitled to the formality requirements made in other areas of the law (such as civil divorce

cases[6]). For example, orders granting motions for new trial must articulate reasons for so doing to allow appellate courts to fulfill their duty of reviewing by determining whether judicial discretion has been abused. Thompson v. Williams, 253 So. 2d 897 (Fla. 3d DCA 1971); White v. Martinez, 359 So. 2d 7 (Fla. 3d DCA 1978).

In dealing with mitigating circumstances, the trial court has found that a mitigating circumstance exists, but has arbitrarily given it little weight. This violates the principle of individual decision making that is required in death penalty cases.

In a line of cases commencing with Lockett v. Ohio, 438 U.S. 586 (1978), the United States Supreme Court held that a trial court may not refuse to consider, or be precluded from considering, any relevant mitigating evidence offered by a defendant.

While the Lockett doctrine is clearly violated by the explicit refusal to consider mitigating evidence, it is no less subverted when the same result is achieved tacitly, as in this case. By refusing to give Appellant's uncontroverted, mitigating evidence any real weight, the trial court has vaulted this state's capital jurisprudence back to the unconstitutional days prior to Hitchcock v. Dugger, 481 U.S. 393 (1987).

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[6] Exercise of discretion requires some reasonable findings upon which appellate review can be based. Kennedy v. Kennedy, 622 So. 2d 1033 (Fla. 5th DCA 1993); Wiederhold v. Wiederhold, 696 So. 2d 923 (Fla. 4th DCA 1997) (trial court cannot arbitrarily reject unrebutted testimony – it must be after a reasonable explanation for doing so).

Prior to Hitchcock, this Court adopted a "mere presentation" standard wherein a defendant's death sentence would be upheld where the trial court permitted the defendant to present and argue a variety of nonstatutory mitigating evidence. Hitchcock v. State, 432 So. 2d 42, 44 (Fla. 1983). The United States Supreme Court rejected this "mere presentation" standard, and held that the sentencer not only must hear, but also must not refuse to weigh or be precluded from weighing the mitigating evidence presented. Hitchcock v. Dugger, supra. Since Hitchcock, this Court has repeatedly reversed death sentences imposed under the "mere presentation" standard where the explicit evidence that consideration of mitigating factors was restricted. E.g., Riley v. Wainwright, 517 So. 2d 656 (Fla. 1987); Thompson v. Dugger, 515 So. 2d 173 (Fla. 1987).

Arbitrarily attaching no real weight to uncontested mitigating evidence results in a *de facto* return to the "mere presentation" practice condemned in Hitchcock v. Dugger.

By giving "little weight" to valid, substantial mitigation, trial judges can effectively ignore Lockett, supra, and the constitutional requirement that capital sentencings must be individualized. The trial court's refusal to give any significant weight to valid mitigating evidence calls into question the constitutionality of Florida's death penalty scheme. Amends. V, VI, VIII and XIV, U.S. Const.; Art. I, §§ 9, 16 and 17 Fla. Const. Appellant was denied due process and a fair reliable

sentencing. Fifth, Sixth, Eighth and Fourteenth Amend., U.S. Const., Art. I, §§ 2, 9, 16, 17, Fla. Const. This cause must be reversed.

POINT IV

THE TRIAL COURT ABUSED ITS DISCRECTION IN EVALUATING MITIGATING CIRCUMSTANCES OF APPELLANT TELLING THE VICTIM TO TURN HIM IN.

In capital cases, it is well-settled that heightened standards of due process apply that require reliability of sentencing decisions. See Elledge v. State, 346 So. 2d 998, 1002 (Fla. 1977) ("special scope of review ... in death cases"). In the present case the trial court failed to observe the safeguards of due process by failing to exercise a reasonable discretion in weighing the mitigating circumstances. Appellant's was denied his rights under the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution and Article I, Sections 2, 9, 16 and 17 of the Florida Constitution.

Determination of the weight to be given a mitigating circumstance is within the trial court's discretion if supported by competent substantial evidence. State v. Bolender, 503 So. 2d 1247, 1249 (Fla. 1987); Bryan v. State, 533 So. 2d 744, 749 (Fla. 1988). Of course, the power to exercise "judicial discretion" does not imply that a court may act according to mere whim or caprice. Carolina Portland Cement Co. v. Baumgartner, 99 Fla. 987, 128 So. 241, 247 (1930). As explained in Parce v. Byrd, 533 So. 2d 812 (Fla. 5th DCA) rev. denied, 542 So. 2d 988 (Fla. 1989) the valid exercise of discretion requires that there be a valid reason to support the choice between alternatives:

> [Judicial discretion] is **not a naked right** to choose between alternatives. There must be a sound and logical **valid reason for the choice made.** If a trial court's exercise of discretion is upheld whichever choice is made merely because it is not shown to be wrong, **and there is no valid reason to support the choice made,** then the choice made may just as well have been decided by a toss of a coin. In such case there would be no certainty in the law and no guidance to bench or bar.

533 So. 2d at 814 (emphasis added). See also Thomason v. State, 594 So. 2d 310, 317 (Fla. 4th DCA 1992) (Farmer dissenting) quashed 620 So. 2d 1234 (Fla. 1993) ("Judicial discretion is not the raw power to choose between alternatives", nor is it "unreviewable simply because the trial judge chose an alternative that was theoretically available to him").

The trial court gave some weight to the fact that Mr. Ault told a victim (Tabitha Wasson) to turn him in because it showed a "spark of humanity":

> K. The Defendant told Tabitha Wasson a victim of prior sexual assault, to call the police," and that "what I did was wrong." (paragraph 24).
>
> At the penalty phase, Tabitha Wasson, the victim in case number 96-21025 CF 10 testified regarding her being the victim of an attempted sexual battery by the Defendant on December 31, 1995. She stated that after she stopped the Defendant from attacking, the Defendant told her to "call the police" and further stated that "what I did was wrong". To this Court, these statements by the Defendant are significant in that they represent a spark of humanity. Some would argue that the statements represent an acknowledgement by the Defendant of his sexual problems, a reaching out for help. While this may be true, it is patently true that the murder of Deanne Mu'min and that of Alicia Jones was the result of the Defendant's knowing, intentional, and morbidly logical analysis of his predicament, and not the compulsion of pedophilia. Still, that spark of

> humanity must be recognized, and this Court did give some weight in determining the appropriate sentence in this matter.

R668. However, as can be seen from the trial court's order, the trial court would **not** give this mitigation any weight as to "reaching out for help" R668. The trial court reached this conclusion because the reaching out for help for Mr. Ault's compulsion was not related to the killings. The trial court's analysis is flawed and amounts to a total rejection of reaching out for help which is the most powerful aspect of this mitigation.

Reaching out for help, through the victim like Mr. Ault did, demonstrates that Mr. Ault knew what he was doing was wrong, could not control himself, but still wanted to be stopped. Thus, reaching out for help to stop the compulsion to abuse young girls is mitigating in itself.

In addition, it is incorrect to believe Mr. Ault's reaching out for help for his compulsion was wholly unrelated to the capital offense. It is undisputed that Mr. Ault did not search out young girls to kill them. But for his compulsion, Mr. Ault would never have abducted the girls and the killings would not have resulted capital offenses. This capital offense was a felony murder involving kidnapping and sexual battery. Reaching out to stop the triggering event (the compulsion) is strong mitigation. It was an abuse of discretion not to give this particular mitigation any weight. Mr. Ault was denied his rights under the Fifth, Sixth, Eighth and Fourteenth Amendments to the

United States Constitution and Article I, Sections 2, 9, 16 and 17 of the Florida Constitution. This cause must be reversed.

POINT V

THE TRIAL COURT ERRED IN REJECTING THE STATUTORY MENTAL MITIGATING CIRCUMSTANCES.

The murders were the by product of Mr. Ault's compulsion and pedophilia. The evidence was undisputed and unrefuted that Mr. Ault's ability to control his impulses to have sex with children was substantially impaired. All the experts were in unanimous agreement as to the pedophilia. Under the unique circumstances of this case it was error to reject the mental mitigation.

In determining whether to consider the two statutory mental mitigating circumstances[7] in the weighing equation the trial court combined them because they both "rely on the same source of information" R659. The trial court compared the testimony of psychologist, Dr. Carter, with the psychiatrist, Dr. Kramer, and determined that Carter's findings were more reliable and thus rejected the mental health mitigation R661.

Dr. Kramer's testimony supported the statutory mental mitigators. Dr. Kramer's opinion was based on a history of family sexual abuse and a resulting psychological disorder T1047-63. Dr. Ross did not opine one way or another

[7] §921.141 (7)(b)&(f) - " The capital felony was committed while the defendant was under the influence of extreme mental or emotional disturbance" and " The Capacity of the defendant to appreciate the criminality of his or her conduct or to conform his other conduct to the requirements of law was substantially impaired."

regarding the statutory mental mitigators.[8] Dr. Ross testified to Mr. Ault's brain damage to the frontal and temporal lobes which is corroborative of Dr. Kramer's opinion as to the mental mitigators. Thus, there was evidence to support the statutory mental mitigating circumstances.

The trial court rejected the mental mitigation based on the testimony of Dr. Carter. R660. A trial court may reject mental mitigation supported by a defense expert if there is substantial, competent evidence to support such rejection. Coday v. State, 946 So. 2d 988, 1001 (Fla. 2006).

In this case Dr. Carter's testimony did not constitute substantial, competent evidence rebutting Dr. Kramer and Dr. Ross. Dr. Carter testified she gave Mr. Ault psychological tests and stated her tests showed:

> …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.

T1173. However, despite these test results Dr. Carter refused to find mental mitigation – because the tests were of no value as they showed malingering T1162-70, 1176. Thus, Dr. Carter's could not find the mitigation where she had no reliable testing to form an opinion. Taken in context, Dr. Carter's test results do not refute Dr.

[8] Dr. Kramer opined at the time of the offense Appellant was under influence of extreme mental or emotional disturbance T1062-63. Appellant cannot control his desires to have sex with prepubescent females. T1063. Dr. Ross explained that the

Kramer or Dr. Ross. Dr. Carter was not testifying that her testing proved Mr. Ault was not suffering from the statutory mental mitigators. Instead, Dr. Carter was testifying that her results showed Mr. Ault's ability to control his behaviors was impaired, but the results were not reliable.

Also, Dr. Carter testified she was rejecting the mental mitigators because legally they refer to someone who is so severely mentally ill that he is "not in touch with reality" T1189-90, 1198. Dr. Carter used the wrong standard to reject the mitigators. One does **not** have to be so mentally ill so as to be out of touch with reality for the statutory mitigators to apply. See e.g. Rivera v. State, 561 So. 2d 536, 538, 540 (Fla. 1990) (trial court found extreme mental or emotional disturbance where psychologist testified Rivera had a borderline personality characterized by impulsivity); Irizarry v. State, 496 So. 2d 822, 824 (Fla. 1986) (impaired capacity mitigator existed because crime was result of "passionate obsession"). Dr. Carter's testimony is not substantial, competent evidence rebutting the testimony of Dr. Kramer or Dr. Ross. This cause must be reversed.

The trial court also used the wrong standard in rejecting the mental mitigation. In rejecting the mental mitigators the trial court gave the broad meaningless observation that nothing in the planning or execution of the murders showed any

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temporal and frontal lobes control judgment, impulses, and damage can interrupt the processing of consequences T1112-13, 1115.

mental mitigation.[9] However, the trial court focused on Appellant's sanity in rejecting the mental mitigators:

> His action clearly demonstrate that **he knew right from wrong**. The same holds true for the issue of whether the Defendant was under the influence of extreme mental or emotional disturbance.

R661 (emphasis added). This Court has recognized it is reversible error to reject the statutory mental mitigators on the basis of utilization of a wrong standard. See Mines v. State, 390 So. 2d 332, 337 (Fla. 1980) (Trial court improperly used "sanity" standard in rejecting mental mitigator of being under extreme mental or emotional disturbance); Campbell v. State, 571 So. 2d 415, 418-19 (Fla. 1990) (trial court improperly used "sanity" standard in rejecting "impaired capacity" as a mitigator); Ferguson v. State, 417 So. 2d 639, 644-45 (Fla. 1982).

Use of the right from wrong standard created improper hurdles to clear. Appellant was not required to prove he was insane for mental mitigation to be recognized.[10] If Appellant did not know right from wrong he would not have been

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[9] This observation implies a well-planned orchestration to murder. However, the evidence showed a compulsion to have sex with young girls – placing two bodies in an attic is hardly the product of a well planned plot to murder and conceal the crime. It would only be a short period of time before Appellant's family would notice the smell from the attic. Hardly a plan – more of a reaction or panic – or a stressed mind.

[10] It need not even be shown that ability to conform conduct be totally eliminated – only that it be impaired.

guilty in the first place. It was error to reject the mitigation on the basis of a sanity standard.

It is undisputed that the capital offenses were triggered by Appellant's compulsion to have sex with young girls. The impaired capacity mitigator has been generally recognized to exist when a defendant's obsession or compulsion has been triggered. See Irizarry v. State, 496 So. 2d 822, 824 (Fla. 1986) impaired capacity mitigator existed because crime result in "passionate obsession." Irizarry was "obsessed" that his ex-wife had jilted him, causing impairment of capacity to appreciate criminality of his conduct); Kampff v. State, 371 So. 2d 1007 (Fla. 1979) impaired capacity, were Kampff had "obsessive desire to regain former status as husband").

The trial court erred in rejecting the mitigation. Appellant's was denied his rights under the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution and Article I, §§2, 9, 16 and 17 of the Florida Constitution. This cause must be reversed and remanded.

POINT VI

THE TRIAL COURT ERRED IN FAILING TO EVALUATE THE NONSTATUTROY MITIGATING CIRUMSTANCE OF EMOTIONAL OR MENTAL DISTURBANCE.

In Chesire v. State, 568 So. 2d 908, 912 (Fla. 1990) this Court held it was error to restrict the mitigating circumstance of emotional or mental disturbance by use of a modifier such as "extreme" despite its presence in the statutory language:

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

568 So. 2d at 912.

In Jackson v. State, 704 So. 2d 500 (Fla. 1997), this Court further explained that because the trial court rejected the statutory mental mitigating circumstances its "order should explain why the evidence offered by the experts does not amount to nonstatutory mental mitigation." 704 So. 2d at 507.

In the present case the trial court rejected extreme emotional or mental disturbance. However, the trial court never addressed the evidence as nonstatutory mental mitigation as he is required to do as exemplified by Jackson. The trial court's order denied Appellant's rights under the Fifth, Sixth, Eighth and Fourteenth

Amendments to the United States Constitution and Article I Sections 2, 9, 16 and 17 of the Florida Constitution.

This cause must be remanded for resentencing.

POINT VII

THE TRIAL COURT ERRED IN REJECTING MR. AULT'S LOW IQ AS MITIGATION.

The trial court rejected Mr. Ault's low IQ as mitigation:

> B. 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. Bourg – Carter who indicated the Defendant's intellectual functioning to below average.

R665. It was error to reject this mitigation.

It goes without saying that a low IQ is a mitigating circumstance. The trial court totally rejected low IQ on the basis there was no evidentiary support – i.e. although Mr. Ault's IQ was low it was not low enough. However, Dr. Carter testified Mr. Ault's IQ was 80 with a verbal IQ of 77 T1158. An IQ between 70 and 84 is considered as borderline intellectual functioning. See American Psychiatric Association, Diagnostic and Statistical Manual) (text rev. 4th ed. 2000) at 48 ("Borderline Intellectual Functioning (see p. 740) describes an IQ range that is higher than that for Mental retardation (generally 71-84)."), at 740 ("This category [Borderline Intellectual Functioning] can be used when the focus of clinical attention is associated with borderline intellectual functioning, that is, an IQ in the 71-84 range.").

Indeed, this Court, after summarizing an expert's testimony in this area, said

'[b]orderline intellectual functioning is defined as a score between 70 and 84…" Johnston v. State, 960 So. 2d 757, 759 (Fla. 2006); see also Burger v. Kemp, 483 U.S. 776, 779 (1987) (noting that petitioner "had an IQ of 82"). See also Wiggins v. Smith, 539 U.S. 510, 535 (2003) (noting that where the defendant had an IQ of 79, "his diminished mental capacities… augment his mitigation case"). The evidence that Appellant suffered from borderline intellectual functioning was unrefuted. The trial court erred in rejecting this mitigation. Appellant's was denied his rights under the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution and Article I, Sections 2, 9, 16 and 17 of the Florida Constitution. This cause must be reversed.

POINT VIII

THE TRIAL COURT ERRED IN REJECTING MR. AULT'S COOPERATION AND ACCEPTANCE OF RESPONSIBILITY AS MITIGATION.

The trial court rejected Mr. Ault's cooperation and acceptance of responsibility as mitigation as follows:

> I. The Defendant accepted responsibility for the killing of Deanne and Alicia.
>
> The Court consolidates paragraphs 22, 25 and 256 in consideration of this matter.
> 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 consent to search form, and that, having successfully completed a prison sentence, he can adjust to life in prison.
> The Court rejects all of these arguments as mitigators.

R667.[11] This was error.

The trial courts declaration that it was rejecting these as mitigating circumstances is contrary to law. Mitigating evidence is any evidence one may use in weighing life without parole against death. Confessing to the killing has been found

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11 Paragraphs 22, 25, and 26 to which the court refers are as follows:

> 22. The Defendant accepted responsibility for the killing of Deanne and Alicia.
> 25. The Defendant confessed to the crimes he committed.
> 26. The Defendant cooperated with the police and signed a Consent to Search form.

R664.

to be a mitigating circumstance. See Delgado v. State, 616 So. 2d 440 (Fla. 1993). Likewise, cooperation with police has been recognized as a mitigating circumstance. E.g., Sinclair v. State, 657 So. 2d 1138 (Fla. 1995). The trial court erred in categorically rejecting this mitigation. Appellant was denied his rights under the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution and Article I, Sections 2, 9, 16 and 17 of the Florida Constitution. This cause must be reversed.

POINT IX

THE TRIAL COURT ERRED IN REJECTING MR. AULT'S REMORSE AS A MITIGATING CIRCUMSTANCE.

The trial court erred in rejecting Mr. Ault's proposed mitigation of remorse for his criminal conduct as follows:

> 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.

R667. It was error to reject remorse as a mitigator.

It is well-settled that remorse constitutes a mitigating circumstance. E.g., Smally v. State, 546 So. 2d 720, 723 (Fla. 1989); Nibert v. State, 574 So. 2d 1059 (Fla. 1990); Songer v. State, 544 So. 2d 1010, 1011-12 (Fla. 1989).

The trial court rejected remorse because it was not supported by evidence. However, Detective Rhodes testified that when he took Mr. Ault's statement Mr. Ault was remorseful T1024. The trial court never stated it had any qualms about Detective Rhodes credibility. In fact, the detective is a disinterested witness or, at worst, a biased witness against Mr. Ault – yet he provided testimony that Mr. Ault was remorseful. Thus, the trial court was mistaken – this was evidence to support the remorse mitigator. The trial court erred in rejected this mitigation.

POINT X

THE TRIAL COURT ERRED IN REJECTING AS A MITIGATING CIRCUMSTANCE THAT MR. AULT SUFFERED FROM PEDOPHILIA.

The trial court rejected Appellant's mental disorder of pedophilia as a mitigating circumstance as follows:

> 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).

R666. This was error.

It was undisputed in the court below that Appellant suffers from pedophilia and that he never received the needed treatment for this disorder. Dr. Kramer testified about how Mr. Ault's control over his desires to have sex with prepubescent females is impaired T1063, and how Mr. Ault has not received treatment for these problems T1065. Dr. Ross testified as to how the objective evidence (PET scans and EEGs) showed damage to the frontal and temporal lobes and how people with pedophilia have the same pattern of brain waves as Mr. Ault T1108, 1111, 1153. Even Dr. Carter believed Mr. Ault suffered from pedophilia. T1175.

The true issue is whether Mr. Ault's untreated pedophila is mitigating. The answer is simple – but for Mr. Ault's pedophilia disorder the tragic events involving the young girls would not have occurred. Mr. Ault does not contact young girls to kill them. Instead, due to his pedophilia disorder, Mr. Ault sought out the young girls for

sex. It cannot be claimed that Mr. Ault's pedohilia disorder was not mitigating under the circumstances of this case.

The prosecution introduced Mr. Ault's statements to Detective Rhodes which explained that after being continuously raped by his brother Mr. Ault began having deviant thoughts about abusing girls T990, 1004. Even after therapy Mr. Ault still had visions of having sex with minors T1004-1007. When thoughts of sexual abuse came into his mind Mr. Ault could not stop himself T 1020, 1024. This is confirmed by Tabatha Wasson who testified that after Mr. Ault raped her she asked him why he did it T759. Mr. Ault told Wasson that when he saw her he had to have her T759. Mr. Ault told Wasson what he did was wrong and she needed to tell someone what had happened T759, 765. In other words, Appellant was trying to be stopped by Wasson – even though he could not stop himself. He tried therapy and used a psychologist but was unsuccessful T1006. Appellant was trying to avoid something bad happening but he couldn't T986.

Again, the facts that Mr. Ault knew abusing children was wrong does not remove his pedophilia disorder as a mitigating circumstance. Mr. Ault could not control his desire. Mr. Ault wanted to be stopped. This mitigation is extremely important in deciding between life and death and should not have been rejected out of hand. The rejection of this mitigating evidence deprived Appellant his rights under the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution

and Article I, Sections 2, 9, 16 and 17 of the Florida Constitution. This cause must be reversed.

POINT XI

THE DEATH PENALTY IS NOT PROPORTIONALLY WARRANTED IN THIS CASE.

"Any review of the proportionally of the death penalty in a particular case must begin with the premise that death is different." Fitzpatrick v. State, 527 So. 2d 809, 811 (Fla. 1988). This Court summarized proportionality review as a consideration of the "totality of circumstances in a case," and due to the finality and uniqueness of death as a punishment "its application is reserved only for those cases where the most aggravating and least mitigating circumstances exist." Terry v. State, 668 So. 2d 954, 956 (Fla. 1996).

In Dixon v. State, 283 So. 2d 1 (Fla. 1973) made it clear that similar results would be reach for similar circumstances and results would not vary based on discretion:

> Review by this Court guarantees that the reasons present in one case will reach a similar result to that reached under similar circumstances in another case. No longer will one man die and another live on the basis of race, or a woman live and a man die on the basis of sex. If a defendant is sentenced to die this Court can review that case in light of the other decisions and determine whether or not the punishment is too great. Thus, the discretion charged in *Furman v. Georgia*, *Supra*, can be controlled and channeled until the sentencing process becomes a matter of reasoned judgment **rather than an exercise in discretion at all.**

283 So. 2d at 10 (Emphasis added). See also Proffitt v. Florida, 428 U. S. 242, 250 & 252-53 (1976). In other words, proportionality is not left to the individual tastes of the

judges but this Court reviews each case to ensure that similar individuals are treated similarly.

Under this Court's proportionality analysis, the death penalty is reserved for the "most aggravated" and "least mitigated" of murders. Cooper v. State, 739 So. 2d 82, 85 (Fla. 1999); Almeida v. State, 748 So. 2d 922, 943 (Fla. 1999):

> [O]ur inquiry when conducting proportionality review is two-pronged: We compare the case under review to others to determine if the crime falls within the category of **both** (1) the most aggravated, **and** (2) the least mitigated of murders.

Almeida, at 943 (emphasis added)(footnote omitted); Cooper v. State, 739 So. 2d at 85; see also, e.g., Besaraba v. State, 656 So. 2d 441, 446 (Fla. 1995) ("'Long ago we stressed that the death penalty was to be reserved for the least mitigated and most aggravated of murders.'") (Quoting Songer v. State, 544 So. 2d 1010, 1011 (Fla. 1989)); State v. Dixon, 283 So. 2d 1 (Fla. 1973).

In Crook v. State, 30 Fla. L. Weekly S560 (Fla. July 5, 2005), this Court found that the first prong (whether the crime was the most aggravated) had been met by 3 aggravating circumstances. However, this Court held that the substantial mitigation took the case out of the category of "least mitigated" crimes and thus the death penalty was not proportionally warranted. This case is not one of the "least mitigated." As discussed above, there was significant mitigation – even if erroneously rejected by the trail court.

(1) Mental Mitigation

Regardless of what label is used this evidence was extremely significant – particularly under the circumstances this case. Mr. Ault suffers a mental disorder which impairs his ability to control his desire to have sex with young girls. But for the disorder Mr. Ault would not have sought to be with the young girls and the capital offenses would not have resulted. Death is not proportionate due to something Mr. Ault could not control.

(2) Pedophilia

But for Mr. Ault's pedophilia he would not have sought out the girls and the capital offenses would not have resulted. Both Dr. Carter and Dr. Kramer agreed Mr. Ault suffered from pedophilia T1050, 1175-76.

(3) Brain Damage

Appellant's compulsion can be explained, at least partially, due to his brain damage. The evidence of brain damage came from the testimony of neurologist Dr. Ross and from unequivocal results from objective evidence – Pet scan and EEG tests. These objective tests show damage to the frontal and temporal lobes T1108. The frontal area controls judgment and impulses T1112-13. The temporal area controls emotions and memory T1112. Compulsion can be triggered due to this type of brain damage T1115. The brain does not go through the logical sequence of the consequences T1115. Mr. Ault's brain damage may have been caused from head

trauma T1118. Mr. Ault has a history of head trauma T1061. The bottom line is that Mr. Ault has brain damage which goes helps explain his control problems and pedophilia.

(4) Low IQ

As discussed in Point VII, Mr. Ault's IQ was scored at 77 and 80. Although the objective evidence of brain damage and the evidence of pedophilia and compulsion is more important than an IQ score, the low IQ may further help understand Mr. Ault's problem with judgment – especially combined with these other mental problems.

(5) Mr. Ault's abusive childhood

As a boy Mr. Ault was repeatedly raped by his older brother over a period of years T1183-84, 1047. This helps explains the origins of his pedophilia. T1049-50. Taken in combination with his brain damage, Mr. Ault's flawed life due to his compulsion was inevitable. Mr. Ault's history of victimization by his brother, and other childhood difficulties, completes the unfortunate portrait.

(6) Mr. Ault reached out for help

Mr. Ault knew right from wrong and knew his compulsion to sexually abuse young girls was wrong. However, Mr. Ault was unable to stop himself. In what may be an unprecedented action – Mr. Ault asked the victim to turn him in (See Point IV). Undersigned counsel has never seen another capital case in Florida where a defendant tried to stop himself by such an action. Someone who seeks to stop something he

can't control by such an action (which would result in prison) is removed from the class of the least mitigated. This mitigation by itself makes the death penalty disproportionate in this case. Combined with the other mitigation the death penalty is overwhelming disproportionate in this case.

(7) Remorse, confession, cooperation with police.

This mitigation again helps to explain Mr. Ault's situation. As explained earlier Mr. Ault tried to stop his behavior. After the killings Mr. Ault flawed mind resulted in the bodies being placed in the attic of his own home. Obviously a rational mind would not have done this. However, Mr. Ault would ultimately take responsibility for the killings and had remorse for what he had done. This mitigation fortifies that Mr. Ault did not want to abuse and kill the young children. The actions were those of a flawed mind and this case does not fall within the least mitigated for which the death penalty is reserved.

(8) Good adjustment in prison

As discussed in Point II, this is important mitigation in deciding punishment of life in prison without the possibility of parole verses death. The issue is not whether someone who cannot control their behavior with young girls should be released into society in 5, 10, 15 or 20 years. The issue is whether someone should die or be isolated from children for the rest of his life. This is a very strong mitigator.

It is very difficult to compare Mr. Ault's case to others in deciding proportionality. Mr. Ault's case goes beyond other cases with regard to mitigation. It could be said that Appellant's flawed mind makes death disproportionate by itself. However, Mr. Ault's mitigation goes far beyond his flawed mind. Unlike any other case, Mr. Ault tried to stop himself by urging the victim to turn him in. Furthermore, death is not needed where Mr. Ault can adjust to prison.

Huckaby v. State, 343 So. 2d 29 (Fla. 1977) is a rape case where this Court vacated a death sentence based on proportionality. This Court could have created new law at the time saying death was disproportionate because there was no murder. **But it did not**. Instead, death was disproportionate due to the mitigating circumstances. In Huckaby v. State, 343 So. 2d 29 (Fla. 1977) the court found two aggravators, including EHAC; a history of "sincere threats on the lives of his nine children and wife over the course of many years, and he in fact caused them bodily harm from beatings and other forms of wanton cruelty." Huckaby, 343 So. 2d at 33. Nonetheless, the Court vacated the death sentence because:

> There was **almost total agreement on Huckaby's mental illness and its controlling influence on** him. Although the defense was unable to prove legal insanity, it amply showed that Huckaby's mental illness was a **motivating factor in the commission of the crimes** for which he was convicted. Our review of the record shows that the capital felony involved in this case was committed while Huckaby was under the influence of extreme mental or emotional disturbance, and that while he may have comprehended the difference between right and wrong his capacity to appreciate the criminality of his conduct to conform it to the

law has substantially impaired.

343 So. 2d at 33-34. (emphasis added). Likewise, in this case Mr. Ault's mental disorder was the controlling factor for the crime. The instant case had more substantial mitigation than in Huckaby. Here, there was additional objective evidence of brain damage (EEG, Pet scan), that Mr. Ault tried to have his behavior stopped, that he had an abusive childhood, that he could adjust well to prison, etc. The bottom line is this case had much more mitigation. It is not one of the least mitigated for which the death penalty is reserved. Death is disproportionate. Mr. Ault's death sentences should be vacated and remanded for imposition of a life sentence.

POINT XII

THE TRIAL COURT ERRED IN ADMITTING IRRELVANT AND PREJUDICIAL PHOTOS INTO EVIDENCE OVER APPELLANT'S OBJECTIONS.

Over Appellant's objections (T885, 889, 894-95) the prosecutor was permitted to introduce State's Exhibits 27-30 into evidence T895, 907. Exhibit 27 was a photo of the victim's head in a bloated condition after death. Exhibits 28 and 29 are photos of the vaginal area. Exhibit 30 is a photo of the neck area.

It is true that photographic evidence, if relevant, is generally held admissible regardless of its character as gruesome or gory. Allen v. State, 340 So. 2d 536 (Fla. 3rd DCA 1976). However, if such photograph's primary effect is to inflame the passions of the jury, its introduction will result in a reversal of the conviction. Jackson v. State, 359 So. 2d 1190 (Fla. 1978).

The trial court acknowledged that the photos were gruesome and inflammatory:

> **THE COURT**: Well the **pictures are gruesome**, that one in particular. I don't use that word lightly, but as the doctor indicated, it is evidence of what occurred in this sequence of events, and I'm going to allow these pictures.

T895 (emphasis added). However, the trial court rejected Appellant's arguments that the photos were irrelevant and that any relevancy they might have was outweighed by undue prejudice.

The prosecutor argued the photos were admissible to corroborate that a sexual battery occurred T890. The trial court rejected this claim noting that the corroboration of crimes was not an issue T890. The trial court was correct. Appellant was no longer on trial for sexual battery or murder. This was only the penalty phase and not the guilt phase. The prosecution had already introduced Appellant's confession to explain the sexual battery and killings. The crimes were not in dispute and thus the photos were not relevant. As explained in Almeida v. State, 748 So. 2d 922 (Fla. 1999) it is error to introduce inflammatory photographs to show things that are not in dispute:

> The state introduced the Exhibit No. 10 an autopsy photo of the victim that depicted the gutted body cavity. Almeida claims that this was error. We agree. Although this Court has stated "[t]he test for admissibility of photographic evidence is relevancy rather than necessity," Pope v. State, 679 So. 2d 710, 713 (Fla. 1996), this standard by **no means constitutes a carte blanch** for the admission of gruesome photos. To be relevant, a photo of a deceased victim **must be probative of an issue that is in dispute**. In the present case, the medical examiner testified that the photo was relevant to show the trajectory of the bullet and nature of the injuries. **Neither of these points, however, was in dispute**. Admission of the inflammatory photo thus was gratuitous.

748 So. 2d at 929-930 (emphasis added).

The trial court ultimately ruled the photographs were relevant to show a sequence of events. However, evidence should not be admitted to merely show a sequence of events See Baird v. State, 572 So. 2d 904 (Fla. 1990). Moreover, even if the sequence of events was in issue, the inflammatory photos simply do not show the sequence of events. It was Appellant's confession that showed the sequence of events.

The photos merely inflamed the passions of the jury. The crimes and sequence of events were not in dispute. See Almedia.

The photos were not relevant to the medical examiners testimony. The medical examiner testified to the injuries and cause of death without using photos. The photos did not show anything separate that was in dispute, Almeida. The photos merely inflamed the passions of the jury.

The photos did show changes in the bodies – such as decomposition and bloating – **that occurred after the killing**. Cases have recognized that photos showing effects **after** the killing should not be admitted into evidence. See Czubak v. State, 570 So. 2d 925 (Fla. 1990) (photo showed condition of body caused by factor(dogs) other than crime itself); Reddish v. State, 167 So. 2d 858, 863 (Fla. 1964) (photographs of bodies after removal from scene were irrelevant and unnecessary); Wright v. State, 250 So. 2d 333, 337 (Fla. 2d DCA 1976) (reversal warranted even through jury instructed to ignore evidence); Rosa v. State, 412 So. 2d 891, 892 (Fla. 3DCA 1982) (photo which included the results of emergency procedures performed after the stabbing).

Any small relevance the photos had was substantially outweighed by unfair inflammatory evidence. Inflammatory photos unduly influence jurors toward guilty verdicts. See Law and Human Behavior, Vol. 30, no. 2(2006), David A. Bright and Jane Goodman - Delahunty; Gruesome Evidence and Emotion; Anger, Blame, and

Jury Decision - Making (Mock jurors who saw gruesome photos experienced more intense emotional responses, including greater anger at defendant, and convicted at a significantly higher rate than those not exposed to the photos).

Cases have recognized the same inflammatory prejudice. See Jackson v. State, 359 Do. 2d 1190, 1191-92 (Fla. 1978) (non relevant, or marginally relevant photos, may inflame jurors); Clark v. State, 337 So. 2d 858, 859-60 (Fla. 1976) (too much to expect jurors to ignore prejudicial material even when cautioned by instruction).

In Hoeffert v. State, 559 So. 2d 1246 (Fla. 4th DCA 1990) the court reversed when although the photo had some relevance it was minimal when compared to the dangers of unfair prejudice to the defendant:

> Finally, Appellant contends the trial court erred when it permitted the introduction of an autopsy photograph of the victim's head. The photograph depicted the internal portion of the victim's head after an incision had been made behind the ears to the top of the head, with the scalp rolled away revealing the flesh behind the ears to the top of the head, with the scalp rolled away revealing the flesh which underlies the hair overlies the skull. The state argued that it introduced the photograph to show that in addition to the other injuries sustained by the victim, he had suffered a separate blow to the left side of his head, and that he received the worst fight of the fight. The record contains other evidence which showed that the victim had broken fingers, bruises above the nose and lacerations on the back of the head. The medical examiner could have testified that the victim had a bruise on the left side of his head and a hemorrhage to the temporalis muscle without reference to the photograph. The **danger of unfair prejudice to Appellant far outweighed the probative value of the photograph** and the state has failed to show the necessity for its admission. In retrial, the photograph should be excluded. Accordingly, we reverse and remand this case for a new trial.

559 So. 2d at (emphasis added).

The inflammatory evidence should not have been admitted in this case. The evidence denied Appellant due process and a fair trial. 5th 6th 14th Amendments to U.S. Constit.; Art I §§ 9, 16, 17 Fla. Constit. This cause must be reversed.

POINT XIII

THE TRIAL COURT ERRED IN GIVING GREAT WEIGHT TO THE JURY'S DEATH RECOMMENDATION.

In sentencing Appellant to death, the judge made it clear that it "has given great weight to the sentencing recommendation provided by the jury pursuant to Tedder v. State, 322 So. 2d 908 (Fla. 1975)" R653. This violates Ross v. State, 386 So. 2d 1191, 1197 (Fla. 1980) error to apply **Tedder** Standard to death recommendation requires resentencing). Under this test a jury's vote for death would automatically affirmed as long as there was an aggravating circumstance**.** In other words, there is not a true independent sentencing by the trial judge as required by law. The sentence in this case was imposed in violation of section 921.141, Florida Statutes, the Fifth, Sixth, Eighth and Fourteenth Amendments to the Federal Constitution and Article I Sections 2, 9, 16 and 17 of the State Constitution. This cause must be reversed.

POINT XIV

THE TRIAL COURT ERRED IN DENYING APPELLANT'S MOTION FOR A PRESENTENCE INVESTIGATION REPORT.

Appellant requested that a presentence investigation report (PSI) be done. The trial court denied the request and stated, "what's the P.S.I. going to tell me that I don't already know about this man?" SR497-492. This was error.

Rule 3.710(b) of the Florida Rules of Criminal procedure requires a PSI where the defendant is not helping counsel to challenge the death penalty:

> (b) Capital Defendant Who Refuses To Present Mitigation Evidence. Should a defendant in a capital case choose not to challenge the death penalty and refuse to present mitigation evidence, the court shall refer the case to the Department of Corrections for the preparation of a presentence report. The report shall be comprehensive and should include information such as previous mental health problems (including hospitalizations), school records, and relevant family background.

In the present case Mr. Ault refused to participate in presenting mitigating evidence – and even moved to waive his entire penalty phase T1345. The fact that the trial court had made up its mind and there was nothing to tell him that he didn't know about Mr. Ault exacerbates rather than eliminates the error (See Point XVI). This case must be reversed.

POINT XV

THE TRIAL COURT ERRED IN CONDUCTING A PRETRIAL CONFERENCE IN APPELLANT'S ABSENCE.

The trial court erred in conducting a pretrial conference in Appellant's absence. This denied Appellant's rights pursuant to Article I, Sections 2, 9, 16 and 17 of the Florida Constitution; the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution; and Florida Rule of Criminal Procedure 3.180. Appellant was involuntary absent from an important part of a pretrial hearing on September 27, 2005.

The right to be present has been held to be a fundamental component of due process pursuant to Florida law and the United States Constitution. Francis v. State, 413 So. 2d 1175 (Fla. 1982); Turner v. State, 530 So. 2d 45 (Fla 1987); Coney v. State, 653 So. 2d 1009 (Fla. 1995); Snyder v. Massachusetts, 291 U.S. 97, 54 S.Ct. 330, 78 L.Ed. 674 (1934). Florida Rules of Criminal Procedure 3.180(a)(3) requires the presence of the defendant at any pre-trial conference unless waived in writing. In addition, for any waiver to be effective there must be an inquiry demonstrating that the waiver of the defendant's presence is knowing, intelligent and voluntary. See Coney v. State, 653 So. 2d 1009, 1013 (Fla. 1995) ("court must certify through proper inquiry"); Turner v. State, 530 So. 2d 45, 49 (Fla. 1987) (defendant must be made aware of rights he was waiving to knowingly and intelligently waive); Butler v. State,

676 So. 2d 1034 (Fla. 1st DCA 1996).

There was no valid waiver in the present case. The hearing on September 27, 2005, was normal until defense counsel requested to speak with the trial judge and prosecutor alone – and then proceeded to attack Mr. Ault's character by telling the ultimate sentencer (the trial court) he was difficult and was filing bar complaints and law suits against him:

> MR. POLAY: Okay. Judge, could I have a few moments on the record with you and Mr. Donnelly alone?
>
> THE COURT: Yeah.
>
> *****
>
> (Thereupon, the following proceedings were had in the jury room.)
>
> MR. POLAY: Let me tell you my problem Judge if you don't mind.
>
> THE COURT: All right, go ahead.
>
> MR. POLAY: Here's my situation, the last time we were up before Your Honor I indicated to you that I wish to withdraw from the case and the reason I told you that I wish to withdraw; one, I mean, obviously he's difficult to deal with but in addition to that I'm dealing with Bar complaints and suits.
>
> *****
>
> I just want to point out the problems that I'm having and that does in fact concern me because I don't want to be out in a position where I have to divulge information that may in fact hurt him.
>
> ******

> MR. POLAY: Okay. I'll readdress it when it becomes ripe. I just want to point out one thing. The issues that I dealt with in the initial bar complaint I had no – the court denied my motion to withdraw, I'm not saying you're right, I'm not saying you're wrong, Judge. The way the case law is right now there wasn't a conflict, I didn't really have to divulge anything, so in effect I understand what the Court did, I understand your ruling, I had no problem with that. But what concerns me is if I'm forced to go to the next level I may have a problem with Mr. Ault.
>
> THE COURT: I'm looking forward to hearing all about it.

SR184-187 (emphasis added).

There was no purpose behind the defense attorney attacking Mr. Ault in front of the trial court other than making sure the trial court would be biased against Mr. Ault. As noted above , the defense attorney went on to tell the trial court he might be divulging more damaging information against Mr. Ault SR 187, and the trial court responded, "I'm looking forward to hearing all about it" SR187.

Mr. Ault's presence at the hearing would be important. The defense attorney would not have attacked Mr. Ault in his absence – that is why he asked to be alone. Further, Mr. Ault should know if his character is being besmirched in front of the person who would ultimately sentence him – the trial judge. Mr. Ault's absence cannot be deemed harmless.

POINT XVI

APPELLANT WAS DENIED DUE PROCESS AND A FAIR SENTENCING WHERE HE WAS SENTENCED BY A BIASED TRIAL JUDGE.

As mentioned in Point XV, the trial court had been informed by Mitch Polay on September 27, 2005, that Appellant was being difficult, filing bar complaints and law suits, and there was further damaging information yet to be revealed. Later, Polay was removed as counsel and Appellant represented himself.

On November 16, 2006, Appellant informed the court he no longer wanted to represent himself and wanted Melody Smith (the penalty phase attorney at Appellant's first trial) to represent him. The trial court stated he couldn't appoint Melody Smith because it would not be legal under the new rules (i.e. the wheel):

> **THE COURT:** In fact, I believe I would have to – under the new rules and everything I would probably have to go by the wheel. I don't even think it would be legal for me to do that. But having said that, I'm denying your motion to appoint Melody Smith as your attorney.

SR391. However, the trial court would ultimately appoint Polay as Appellant's attorney even though all parties, including the trial court knew that such an appointment would also violate the new rules (i.e. wheel) SR427, 429. The trial court even noted that if it were to appoint Polay outside the wheel Appellant's argument about appointing Melody Smith would be valid SR429. However, instead of appointing an attorney Appellant could work with, the trial court appointed an

attorney who was secretly leaking damaging information regarding Appellant (Point XV). Appellant submits the trial court was biased. This is also demonstrated by the trial court making up his mind about Appellant so that in his mind there was nothing further he could learn about Appellant from a PSI (See Point XIV).

Both due process of law and the appearance of justice require that an unbiased judge preside over critical court proceedings. Santobello v. New York, 404 U.S. 257 (1971). Once a trial judge makes up his mind on a matter, the judge should no longer preside over the case. See Mawson v. United States, 463 F. 2d 29, 31 (1st Cir. 1972) (new judge required for resentencing for both the judge's sake and the appearance of justice once it appears he has made up his mind). It has be recognized that "a judge is not a computer." Green v. State, 351 So. 2d 941, 942 (Fla. 1977). A judge is human and simply cannot ignore a bias once it exists. Thus, the "precepts of justice" and the recognition that certain influences made a judge "less sensitive to due process considerations" requires that a judge not preside over certain proceedings. Land v. State, 293 So. 2d 704, 708 (Fla. 1974).

The state must provide a trial before an impartial judge, and the harmless error rule does not apply to a trial before a biased judge. Rose v. Clark, 478 U.S. 570, 577-578, 106 S. Ct. 3101, 92 L.Ed. 2d 460 (1986) (citing Tumey v. Ohio, 273 U.S. 510, 47 S.Ct. 437, 71 L.Ed. 749 (1927)). Appellant's sentencing on a capital offense by a biased judge violated the Fifth, Sixth, Eighth and Fourteenth Amendments of the

Federal Constitution, and Article I Sections 9, 16, and 17 of the State Constitution.

This cause must be reversed.

POINT XVII

THE TRIAL COURT ERRED IN FAILING TO RESPOND TO APPELLANT'S REQUEST TO REPRESENT HIMSELF.

Prior to trial on April 20, 2007, Appellant moved to exercise his constitutional right to represent himself:

> THE DEFENDANT: Yes, Your Honor. There's a motion for relief to proceed as self counsel.
>
> THE COURT: Really? I didn't get that. Usually I get yours in a timely fashion.
>
> MR. ROSSMAN: That was Mr. Donnelly's only concern.
>
> THE COURT: Is that still on? Have you changed your mind?
>
> THE DEFENDANT: No.

SR474. The trial court did not hold an inquiry on Appellant's request. This was error.

The right to self-representation is personal and is not subject to the discretion of the trial court. Hutches v. State, 730 So. 2d 825 (Fla. 2d DCA 1999). The trial court does have discretion in determining whether the waiver of counsel is voluntary, intelligent and knowingly after conducting a proper inquiry. However, in this case no such inquiry was held. Thus, the issue does not involve the exercise of discretion. Rather, this issue involves a purely legal matter. Review is de novo.

The sixth amendment to the United States Constitution guarantees criminal defendants the right to self-representation. State v. Bowen, 698 So. 2d 248, 250 (Fla.

1997) citing Faretta v. California, 422 U.S. 806 (1975)). The right to self-representation and a defendant's choice must be honored out of that respect for the individual which is the lifeblood of the law. Goldsmith v. State, 937 So. 2d 1253 (Fla. 2d DCA 2006) (citing Faretta).

A criminal defendant who is competent to choose self-representation may not be denied that choice - even though the decision will most certainly result in incompetent trial counsel. Eggleston v. State, 812 So. 2d 524, 525 (Fla. 2d DCA 2002); Wheeler v. State, 839 So. 2d 770 (Fla. 4th DCA 2003). In Bowen, supra, this court held "that once a court determines that a competent defendant of his or her own free will has 'knowingly and intelligently' waived the right to counsel, the dictates of Faretta are satisfied, the inquiry is over, and the defendant may proceed unrepresented". Id. at 251. In Hill v. State, 688 So. 2d 901 (Fla. 1996), this court emphasized it is the competence to waive counsel and not the competence to act as counsel that is important:

> A defendant does not need to possess the technical legal knowledge of an attorney before being permitted to proceed pro se. As the Supreme Court stated in Godinez v. Moran, 509 U.S. 389, 399, 113 S.Ct. 2680, 2686-87, 125 L.Ed.2d 321 (1993), "the competence that is required of a defendant seeking to waive his right to counsel is the competence to *waive the right*, not the competence to represent himself.

688 So. 2d at 906; see also Kimble v. State, 429 So. 2d 1369, 1371 (Fla. 3d DCA 1983) (fact that defendant stated to the trial judge that he was unqualified in terms of

legal knowledge did not provide basis for denying defendant right to self-representation; defendant's technical knowledge of law is not relevant to an assessment of his knowing exercise of right to defend himself). In this case, Appellant's requests for self-representation should have been addressed and granted unless Appellant was deemed incompetent to waive counsel. The fact that Appellant was represented by competent counsel does not negate that he had a right to self-representation:

> ....the potential advantage of a lawyer's training and experience can be realized, if at all, only imperfectly. To force a lawyer on the defendant can only lead him to believe that the law contrives against him . . . the right to defend is personal. The defendant, and not his lawyer or the state, will bear the personal consequences of a conviction . . . and although he may conduct his own defense ultimately to his detriment, his choice must be honored out of "that respect for the individual which is the lifeblood of the law".

Faretta, 422 U.S. at 834, 95 S.Ct. at 2540-2541 (citations omitted) (emphasis added) cited in State v. Bowen, supra. At 250. The error denied Appellant's rights under the sixth amendment to the United States Constitution. Since errors concerning the improper denial of self-representation are not subject to harmless error analysis, McKaskel v. Wiggins, 465 U.S. 168, 104 S.Ct. 944, 79 L.Ed.2d 122 (1984) cited in Ollman v. State, 696 So. 2d 409, 410 (Fla. 1st DCA 1997), this error entitles Appellant to reversal.

POINT XVIII

FLORIDA'S DEATH PENALTY WHICH DOES NOT REQUIRE: THE FINDINGS UNDER RING V. ARIZONA, 122 S. CT. 2428 (2002); THE JURY TO BE PROPERLY ADVISED OF THEIR RESPONSIBILITY; A UNANIMOUS JURY FINDING FOR DEATH; A UNANIMOUS JURY FINDING OF AGGRAVATING CIRCUMSTANCES; A FINDING BEYOND A REASONABLE DOUBT THAT AGGRAVATING CIRCUMSTANCES OUTWEIGH MITIGATING CIRCUMSTANCES VIOLATES THE FIFTH, SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

This court has indicated it has not ruled on whether Ring v.Arizona, 122 S. Ct. 2428 (2002) applies in Florida. State v. Steele, 921 So. 2d 538, 540 (Fla. 2005) ("...this court has not yet forged a majority view about whether Ring applies in Florida'); but see Coday v. State, 946 So. 2d 988, 1005 (Fla. 2006) (stating in Steele this court determined Ring did not apply in Florida). In Steele this court made it clear that in order "to obtain a death sentence, the state must prove beyond a reasonable doubt at least one aggravating circumstance." 921 So. 2d at 543. In other words, the fact finder must find at least one aggravating circumstance - otherwise the maximum sentence that can be imposed is life in prison. In Cunningham v. California, 127 S. Ct. 856 (2007) the court emphasized the Federal Constitution right to a jury trial requires juries to find facts noting "the relevant 'statutory maximum' ... is not the maximum sentence a judge may impose after finding of additional facts, but the maximum he may impose without any additional facts". Thus, aggravating circumstances must be

found by the jury otherwise the maximum punishment is life in prison. Ring clearly applies to Florida's death penalty scheme.

Also, the Eighth Amendment requires "heightened reliability... in the determination whether the death penalty is appropriate..." Sumner v. Shuman, 483 U.S. 66, 72, 107 S. Ct. 2716, 97 L.Ed. 2d 56 (1987).

1. Due process was violated where the jury was not properly advised of their responsibility.

In this case the jury was constantly told its decision was "advisory" and the trial court would be making the sentencing decision. It is constitutionally impermissible to rest a death sentence on a determination made by a sentencer who has been led to believe that the responsibility for determining the appropriateness of the defendant's death rests elsewhere. See Caldwell v.Mississippi, 472 U.S. 320, 86 L. Ed. 2d 231, 105 S. Ct. 2633 (1985) (wherein the Court stated that the jury must be fully advised in the importance of its role and neither comments not instructions may minimize the jury's sense of responsibility for determining the appropriateness of death).

The comments and instructions which would leave the jury to believe that their decision is advisory violates Appellant's right to receive due process of law and a fair proceeding under the Fifth, Sixth, and Fourteenth Amendments to the united States Constitution and Article I Sections 8, 16 and 17 of the Florida Constitution.

2. Due process and the right to a jury trial were violated without the jury finding "sufficient aggravating circumstances" exist.

The Florida Legislature has not proclaimed the finding of one aggravating circumstance is sufficient to exceed a life sentence. Rather, the Legislature requires that "sufficient aggravating circumstances" exist. §921.141. A finding of one aggravating circumstance is not enough. There must be a finding of sufficient aggravating circumstances. Thus, the fact Appellant was found guilty of felony murder does not waive his rights to have the jury determine whether "sufficient" aggravators exist. The felony murder aggravator may not be "sufficient " to justify the death sentence. In fact, the death penalty has not been upheld in Florida when felony-murder is the only aggravator. See Jones v. State, 705 So. 2d 1364 (Fla. 1998); Williams v. State, 707 So. 2d 683 (Fla. 1998).

3. Due process and the right to a jury trial is violated where Florida allows a jury to decide aggravators exist and to recommend a death sentence by a mere majority vote.

As this court noted in Steele, Florida is the only state that allows a jury to decide aggravators exist and to recommend a sentence if death by a mere majority vote. 921 So. 2d at 548. This violates both Ring and the right to heightened reliability of the Eighth Amendment that other states require. In deciding cruel and unusual punishment claims, the practice of other states will be reviewed. See e.g., Solem v. Helm, 103 S. Ct. 3001 (1983); Thompson v. Oklahoma, 108 S.Ct. 2687 (1988).

This court explicitly recognized that the jury is free to mix and match aggravating circumstances without deciding unanimously, or even by a majority, the particular facts upon which it is choosing death:

> Under the law, the jury may recommend a sentence of death so long as a majority concludes that at least one aggravating circumstance exists. Nothing in the statue, the standard jury instructions, or the standard verdict form, however, requires a majority of the jury to agree on which aggravating circumstances exist. Under the current law, for example, the jury may recommend a sentence of death where four jurors believe that only the "avoiding a lawful arrest" aggravator applies, see § 921.141(5)(e), while three others believe that only the "committed for pecuniary gain" aggravator applies, see §921.141(5)(f), because seven jurors believe that at least one aggravator applies.

921 So. 2d at 545. Again, this violates both Ring and the Eighth Amendment right to heightened reliability.

4. Due process is violated where the jury does not have to find aggravators outweigh mitigators beyond a reasonable doubt.

In State v. Wood, 648 P.2d 71 (Utah 1981), cert. denied, 459 U.S. 980 (1982), the Utah Supreme Court held that the certitude required for deciding whether the aggravating factors outweighed the mitigating factors was beyond a reasonable doubt:

> The sentencing body, in making the judgment that aggravating factors "outweigh,: or are compelling than, the mitigating factors, must have no reasonable doubt as to that conclusion, and as to the additional conclusion that the death penalty is justified and appropriate after considering all the circumstances.

648 P. 2d at 83-84.

In State v. Rizo, 833 A. 2d 363 (Conn. 2003), the Connecticut Supreme Court recognized that the reasonable doubt standard was appropriate for the weighing process:

> Imposing the reasonable doubt standard on the weighing process, moreover, fulfills all of the functions of burdens of persuasion. By instructing the jury that its level of certitude must meet the demanding standard of beyond a reasonable doubt, we minimize the risk of error, and we communicate both to the jury and to society at large the importance that we place on the awesome decision of whether a convicted capital felony shall live or die.

833 A. 2d at 407 (emphasis added). The court recognized that the greater certitude lessened the risk of error that is paretically unreviewable on appeal:

> ....in making the determination that the aggravating factors outweigh the mitigating factors and that the defendant shall therefore die, the jury may weigh the factors improperly, and may arrive at a decision of death that is simply wrong. Indeed, the reality that, once the jury has arrived at such a decision pursuant to proper instruction, that decision would be, for all practical purposes, unreviewable on appeal save for evidentiary insufficiency of the aggravating factor, argues for some constitutional floor based on the need for reliability and certainty in the ultimate decision-making process.

833. A.2d at 403 (emphasis added). Finally, the court reversed the death sentence for failure to instruct that the aggravators must outweigh the mitigators beyond a reasonable doubt:

> Consequently, the jury must be instructed that it must be persuaded beyond a reasonable doubt that the aggravating factors outweigh the mitigating factors and that, therefore, it is persuaded beyond a reasonable doubt that death is the appropriate punishment in this case. In this regard, the meaning of the "beyond a reasonable doubt" standard, as describing a level of certitude, is no different from that usually given in

> connection with the questions of guilt or innocence and proof of the aggravating factor.
>
> The trial court's instructions in the present case did not conform to this demanding standard. We are constrained, therefore, to reverse the judgment of death and remand the case for a new penalty phase hearing.

833 A. 2d at 410-11. Likewise, the factfinder in this case must have been persuaded beyond a reasonable doubt that the aggravators outweighed the mitigators. Article I, Sections 2, 9, 16, 17 and 22 of the Florida Constitution; Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution. Appellant's sentences must be vacated.

CONCLUSION

Appellant requests this Court to reverse the death sentences and to remand for appropriate proceedings.

Respectfully submitted,

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_____
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of Appellant's Initial Brief has been furnished to: LESLIE CAMPBELL, , Assistant Attorney General, Office of the Attorney General, Ninth Floor, 1515 North Flagler Drive, West Palm Beach, Florida 33401-3432, by courier this _____ day of April, 2009.

_____
Counsel for Appellant

CERTIFICATE OF FONT SIZE

I HEREBY CERTIFY that Appellant's Initial Brief has been prepared with 14 point Times New Roman type, in compliance with a *Fla. R. App. P*. 9.210(a)(2), this _____ day of April, 2009.

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