IN THE SUPREME COURT OF FLORIDA

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

REPLY BRIEF OF APPELLANT

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

CAREY HAUGHWOUT
Public Defender
15th Judicial Circuit

Jeffrey L. Anderson
Assistant Public Defender
Florida Bar No. 374407
Criminal Justice Building
421 3RD Street/6TH Floor
West Palm Beach, Florida 33401
(561) 355-7600
appeals@pd15.state.fl.us

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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.

The symbol “AB” will denote Appellee’s Answer Brief.

ARGUMENT

POINT I

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

As a preliminary matter, Appellee has quoted Dr. Carter's testimony from the first sentencing which had rebutted claims that Appellant decided to kill because he was out of touch with reality. These claims were never made at the resentencing. The focus of the resentencing was Appellant’s compulsive pedophile disorder. Thus, Dr. Carter's testimony at the first sentencing is pretty much irrelevant to the resentencing which is the subject of this appeal.

Appellee addresses Point I in pages 36 to 39 of its Answer Brief.

Appellee does not dispute Dr. Ross's testimony nor that there was objective

evidence in the form of the PET scan and EEG which definitively show Appellant has brain damage. Instead, Appellee claims Dr. Carter's transcript testimony refuted this objective evidence of brain damage. Such a claim is without merit. Dr. Carter's transcript testimony was **seven years before** the EEG and PET scan testing were done. Carter did not refute the evidence of brain damage-- Carter was totally unaware of this evidence. If Carter had reevaluated Appellant with the knowledge of this evidence at least some of her findings would be different.

Appellee's claim that Appellant was malingering brain damage is without merit. How does one malinger PET scan and EEG results showing brain damage?

Appellee also claims the evidence shows that Appellant's brain damage occurred **after** the capital offense. Such a claim is without merit. The testimony presented showed that head trauma occurred before the offense in question. T1061. In fact, after the capital offense Appellant has been in constant custody -- either in prison or jail. There has been no evidence presented that Appellant has suffered any head trauma during his incarceration after the offense. The only possible time for the trauma and brain damage would have been **prior** to the capital offense.

Appellee also claims the rejection of the undisputed evidence of brain damage was harmless error. Appellee claims the aggravation side of the weighing process makes the error on the mitigation side of the weighing process harmless. However, it

must be recognized in this case **three jurors voted for life**. They did not vote for life based on the aggravating circumstances. They voted for life based on the mitigating circumstances -- including brain damage. The decision between life and death is a weighing process. Appellee's claim that the improper rejection of mitigating evidence from one side of the scale is harmless is simply illogical and wrong. Recently in Porter v. McCollum, 558 U.S. ___ (2009) the Court noted that it is unreasonable to conclude that the improper exclusion of mitigation from one side of the scale would not impact the balance of the scale:

> Had the judge and jury been able to place Porter's life history "**on the mitigating side of the scale**," and appropriately reduced the ballast on the aggravating side of the scale, there is clearly a reasonable probability that the advisory jury—and the sentencing judge—"**would have struck a different balance,"** *Wiggins*, 539 U. S., at 537, **and it is unreasonable to conclude otherwise**.

Porter v. McCollum, 558 U. S. ____ (2009) (emphasis added).

Finally, Appellee claims the error is harmless because Dr. Ross did not directly state the brain damage caused Appellant's behavior. However, like intent, how one thinks is not a product of direct evidence. The circumstantial evidence that Appellant's compulsive pedophilia was due to brain damage is overwhelming and unrefuted. As noted by the trial court, Dr. Ross's testimony provided evidence connecting the brain damage to behavior including compulsive pedophilia:

> 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). This evidence was not refuted. Appellee's claim that there was no brain damage is contrary to the evidence and is rank speculation.

Moreover, it is well recognized that brain damage combined with physical childhood abuse is a recipe for future violent behavior. Neurological Abnormalities in Murderers, Blake; Pincus; and Buckner; 45 NEUROLOGY 1641 (September 1995). Even putting aside the unrefuted evidence of compulsive pedophilia, researchers have found a direct link between antisocial personality and prefrontal brain damage. Reduced Prefrontal Gray Matter Volume and Reduced Autonomic Activity in Antisocial Personality Disorder, Raine, Lencz, Bihrle, LaCasse, Colletti; ARCHIVES OF GENERAL PSYCHIATRY, Vol. 57, NO. 2, pages 119-127 (February 2000).

The unrefuted evidence supports a connection between brain damage and the capital offense. The capital offense includes felony murder and kidnapping and sexual battery of the children. Dr. Ross's testimony provided the connection between the

brain damage and pedophilia. It was undisputed and unrefuted below that the pedophilia compulsion was the cause of the kidnapping and rape of the children which is part of the felony murder. In fact the trial judge specifically recognized this in his first sentencing order:

> It is the opinion of this Court that the Defendant has experienced mental and emotional problems in his life. It is equally clear to the Court that the **compulsive nature of pedophilia was the catalyst leading to the deaths** of Deanne Mu'min and Alicea Jones.
>
> ****
>
> Mr. Ault is a convicted pedophile, and **there is no question that this is a compulsive mental disorder.**

SR591-592 (emphasis added). The evidence regarding the compulsive pedophilia did not change during the two sentencings -- the prosecution utilized the transcript of its expert's testimony from the first sentencing while the defense **added** evidence of the PET scan and EEG.

The error cannot be deemed harmless. The total rejection of any evidence related to mental health distorts the weighing process of mitigators against aggravators. Evidence of brain damage is important mitigation. The error is prejudicial because the mitigation in the trial court's weighing equation did **not** include the brain damage.

Finally, at page 42 of the Answer Brief Appellee argues that this case should only be remanded for a judge resentencing and not for new penalty phase. However, this Court will reverse for new penalty phase where the jury could make the same

mistake as the trial court made in its sentencing order. Perez v. State, 919 So. 2d 347, 382 (Fla. 2005) (trial court improperly found HAC in the sentencing order -- new penalty phase proceeding was required because it could not be said beyond reasonable doubt the jurors did not also improperly find HAC); Elledge v. State, 346 So. 2d 998, 1003 (Fla. 1977) (trial court improperly took into account and nonstatutory aggravating circumstance -- it is possible jury did the same –"… since a man's life is at stake, we are compelled to return this case to the trial court for a new sentencing…").

Likewise, in this case and new penalty phase is required. The jury could have made the same mistake that the trial court made-- that Dr. Carter's transcript testimony from the first sentencing was covered the same mitigation relied on at the resentencing. Appellant relies on his Initial Brief for further argument on this Point.

POINT II

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

Appellee claims the trial court rejected this mitigation because the trial court **factually** rejected that Appellant can adjust the prison life. Appellee is wrong. The trial court did not say it was rejecting that Appellant had the ability to adjust. Rather, the trial court reached the legal conclusion that the ability to adjust categorically is not mitigation. The trial court is incorrect in this conclusion. See e.g., Cooper v. Dugger,

526 So. 2d 900 (Fla. 1988).

Appellee's claim that the mitigator is not factually supported is based on **its own claim and not that of the trial court**. This appeal is not to review Appellee's discretion. Furthermore, Appellee ignores the fact Appellant has successfully completed a prison sentence and instead relies on two unknown disciplinary reports to conclude Appellant did not adjust. Only having two DRs shows a good adjustment -- especially given the fact that a DR can be given for the most minor thing (such as not tucking in a shirt). It has never been alleged that Appellant committed any crimes in prison or had any major violations of the rules. Again, Appellant's prior successful sentence without incident is proof of good adjustment.

Appellee claims the error is harmless. However, the nature the error illustrates its harm. The trial court categorically rejected the mitigation as not being "a mitigator **for murder.**" R668 (emphasis added). Thus, it may be mitigation but it does not mitigate **murder** in the trial court's eyes. The trial court was saying this mitigation does not justify or excuse murder. This represents a fundamental misunderstanding of the nature of mitigating evidence.

The decision between life and death rests on weighing mitigating circumstances against aggravating circumstances. Mitigating circumstances are any circumstances that would go to the side of the scale that would weigh in favor of life in prison as

opposed to death. The circumstance does not have to justify or excuse the murder. The importance of mitigation depends on what one is mitigating from and what one is mitigating to. Mitigation that may be substantial in a capital case could be very insignificant or nonexistent in a noncapital case. For example, if one is a danger to society mental health mitigation which reduces culpability does not carry weight if one is trying to mitigate a three-year prison sentence to probation or time served -- because the defendant is still a danger to society and should not be prematurely released into society. However, in deciding between death and life without the possibility of parole there is no danger to society because mitigation does not involve a release from prison. Thus, mental health mitigation is more important in a capital case. More specifically, when mitigating a prison sentence from a term of years to release, or lesser years, an adjustment to prison is really not mitigating. However, in a capital case the good adjustment to prison can mean everything. The adjustment to the structured prison life is the only certainty about the capital defendant's future life. Thus, good adjustment is extremely important. The categorical rejection of this mitigation is not harmless beyond a reasonable doubt. Appellant relies on his initial brief for further argument on this Point.

POINT III

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

LITTLE WEIGHT.

Appellee claims that all the mitigation was compressed into one single, neat mitigator. However, as explained at page 22 of the Initial Brief, and which Appellee has not addressed or refuted, there are at least a minimum of **three separate areas** of mitigation. Claiming that the mitigation of Appellant's eighth grade education and the mitigation of Appellant being sexually abused, molested, and raped in his formative years are the same mitigation simply is not correct.

Appellee claims the trial court has essentially unbridled discretion and is not required to explain how it exercised its discretion. However, this is contrary to this court stressing the importance of specific written findings regarding mitigation. Van Royal v. State, 497 So. 2d 625 (Fla. 1986); State v. Dixon, 283 So. 2d 1 (Fla. 1973). Moreover, the sentencing order must reflect a "reasoned judgment" by the trial court. Dixon, supra at 10.

The trial court is not performing its duty in by combining mitigation and giving it little weight without properly explaining why it is doing so. For example, the trial court found "**When the defendant was in his formative years, he was sexually abused, molested and raped by his older brother**" but gave this mitigation little weight R662, 664. However, this is extremely important mitigation. Such abuse has long-term mental and emotional impact. When a school shooting occurs trauma teams

are immediately sent to counsel students, even those who are not direct victims or witnesses. All the students have had their **zone of safety** violated and the potential long-term impact of this violation is well recognized. The long-term impact of being sexually abused, molested, and raped is obviously much greater-- especially where, unlike the school shooting, the victim does not receive counseling. Courts have also recognized the long term impact of abuse during childhood. See Porter v. McCollum, 558 U.S. ___ (2009) (trial court "discounted the evidence of Porter's abusive childhood because he was 54 years old at the time of the trial"—the Court concluded "It is unreasonable to discount the evidence of Porte's abusive childhood"). Thus, the abuse suffered by Appellant as a child is not something one gives little weight without an ounce of explanation. The trial court's combining this mitigation with other mitigation and then proceeding to give it little cumulative weight exacerbates the error and the harm.

Appellee argues that this mitigation only came from self reporting in which Appellant was malingering and thus is properly rejected. However, **the trial court found this mitigation -- he did not reject it**. Dr. Carter's test results were rejected due to malingering. Appellant's history of abuse was not rejected. Furthermore, to set the record straight, the history of abuse was not merely based on Appellant's statements. The abuse was also chronicled by Appellant's family. In fact, during the

first sentencing Appellant's relatives testified and the trial court found:

> Evidence was presented of sexual abuse imposed upon the defendant by his older brother, as well as evidence of physical abuse at the hands of his brother and father. In addition, evidence was presented that, **if not the cause, the abuse was a significant factor in the defendant's development as a pedophile**.

SR 601 (emphasis added). At the second sentencing, the trial court found "When the Defendant **was in his formative years**, he was sexually abused, molested and raped by his older brother". R662, R664 (emphasis added). In other words, the fact that Appellant was horribly abused as a child has never been at issue in this case.

Finally, Appellee asks this court to find the error harmless on the basis that it would not change the trial court's decision. This logic is based on the trial court **not** considering the mitigating evidence properly. However, until the trial court properly understands the nature and value of the mitigation -- it cannot be said that a proper evaluation would be harmless. As explained earlier, three jurors, after properly evaluating the mitigation, **voted for life because of the mitigation**. It cannot be said that the failure to properly evaluate the mitigation is harmless. Appellant relies on his Initial Brief or further argument on this Point.

POINT IV

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

Appellee claims there is substantial, competent evidence supporting giving this mitigation little weight. The trial court's order provides no such evidence. Appellee has not addressed or considered Appellant's argument on page 30 of the Initial Brief in explaining this mitigation.

Reaching out to stop the compulsion to abuse young girls is strong mitigation -- **but for** the compulsion, Appellant would not have abducted the girls and the capital felony would not have occurred. The trial court recognized this in its first sentencing order:

> It is the opinion of this Court that the Defendant has experienced mental and emotional problems in his life. It is equally clear to the Court that the **compulsive nature of pedophilia was the catalyst leading to the deaths** of Deanne Mu'min and Alicea Jones.
>
> ****
>
> Mr. Ault is a convicted pedophile, and **there is no question that this is a compulsive mental disorder.**

SR 591-592 (emphsis added). No reasonable person would claim that trying to stop this compulsion by asking a victim to turn him in was mitigation deserving very little weight.

By labeling the mitigation of Appellant asking the victim to turn him in as only showing a "spark of humanity" and nothing more improperly denigrates such mitigation. Being kind to a dog, or giving another directions, shows a spark of humanity -- but it is not of the same magnitude of trying to stop a compulsion from

abusing girls. Appellant relies on his Initial Brief for further argument on this point.

POINT V

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

Appellee addresses Point V in pages 29 to 34 of its brief.

Appellee does not directly address the focus of this issue. However, the essence of Appellee's argument is that the statutory mental mitigators do not apply to the capital felony of felony murder. Appellee, the trial court, and Dr. Carter all posited that the statutory mitigators are very limited and do not apply to the felony murder aspect of the capital felony.

The law is clear that statutory mental mitigating circumstances apply to capital felonies -- -- which includes the felony murder. See, e.g., Florida Statutes, section 775.082(1); section 782.04; section 921.141(1)(6); Smalley v. State, 546 So. 2d 720, 721, 723 (Fla. 1989) (this Court finds “except for theory of felony murder” Smalley would not be convicted of first-degree murder and also finds statutory mental mitigators apply due to family and financial pressures causing a depression).

Appellant was convicted and sentenced for a capital felony which included the felony murder of the death occurring during the course of Kidnapping; Sexual Battery; or Aggravated Child Abuse. R1, R13,

It was unrefuted and undisputed and the lower court that the felony murder

(kidnapping and sexual abuse) was the product of Appellant's pedophilia, which even the prosecution expert, Dr. Carter found to be in axis I mental illness. T1176. In fact, in its first sentencing order, the trial court found that Appellant's pedophilic compulsion was the catalyst or cause of the underlying felonies of the felony murder:

> It is the opinion of this Court that the Defendant has experienced mental and emotional problems in his life. It is equally clear to the Court that the **compulsive nature of pedophilia was the catalyst leading to the deaths** of Deanne Mu'min and Alicea Jones.
>
> ****
>
> Mr. Ault is a convicted pedophile, and **there is no question that this is a compulsive mental disorder.**

SR591-592 (emphasis added). Thus, there is no dispute that the statutory mental mitigators apply to the capital felony of felony murder in this case.

Nor is it disputed that **but for** the compulsive pedophilia Appellant would not have kidnapped and thus would never have killed. It is only because the compulsive pedophilia that the girls were taken which in turn created the situation which they were killed. It is not disputed that Appellant never went out looking to kill. It was but for (as the trial court noted) **the catalyst of the compulsive pedophilia** that the capital offense ever occurred.

Appellee claims that because Appellant was not out of touch with reality, and knew right from wrong, the claim the statutory mental mitigators apply has been rebutted. However, neither Appellant nor any of his witnesses made such claims at the

resentencing. Dr. Kramer's testimony was that Appellant couldn't control his behavior with regard to his pedophilia-- and not that Appellant was out of touch with reality or did not know right from wrong. The problem with Dr. Carter's testimony is that it consisted of a transcript of testimony from seven years earlier, which was offered to rebut a different diagnosis which was not the focus at the resentencing. Dr. Carter was never asked to rebut the more recent findings of Dr. Kramer and Dr. Ross. In fact, Dr. Carter never knew of Dr. Kramer or Dr. Ross's findings. There was no meeting of the minds on what was being discussed. It was like one person talking about the weather and snow while another person talked about how hot it was -- only to discover that one person is talking about the weather in Wisconsin and the other is talking about the weather in Florida. There is no real conflict in their discussions. Likewise, here there was no real conflict between the testimony of Dr. Kramer, Dr. Ross and Dr. Carter as to whether Appellant could control his pedophilia.

In addition, the sanity (knowing right from wrong) or out of touch with reality standard is not the legal standard for statutory mental mitigation. E.g., Mines v. State, 390 So. 2d 332, 337 (Fla. 1980); Campbell v. State, 571 So. 2d 415, 418-419 (Fla. 1990). In fact, if one is out of touch with reality and does not know right from wrong he or she is insane. In other words, Appellee and Dr. Carter's construction of the statute defining metal mitigation requires proof of insanity. However, penal statutes

should be construed in favor of the defendant rather than using a strained construction against the defendant. See e.g., Kobel v.State, 745 So. 2d 979 (Fla. 4th DCA 1999) (if a penal statute is susceptible to differing constructions due process requires construction in the defendant's favor).

Appellee fails to cite any cases stating that one must be out of touch with reality for statutory mental mitigation to apply. There are many cases where the statutory mental mitigators apply when the defendant was never out of touch with reality. See, e.g. Harris v. State , 843 So. 2d 856, 869 (Fla. 2003) (statutory mitigation applies where earlier in life suffered head injury and had bipolar disorder); Cardona v. State, 641 So. 2d 361 (Fla. 1993) (diminished standard of living and daily cocaine use constituted statutory mitigation); Smalley v. State, 546 So. 2d 724 (Fla. 1989) (family, financial, health, and career pressures combined to impair capacity); Rivera v. State, 561 So. 2d 536, 538 (Fla. 1994) (borderline personality characterized by impulsivity constituted statutory mitigation); Irizarry v. State, 496 So. 2d 822, 824 (Fla. 1986) "passionate obsession" constituted statutory mental mitigation). It is common sense that one doesn't have to believe he is a dog, vampire, or fire engine etc., to have an impaired capacity or to be under a mental or emotional disturbance.

The trial court's rejection of the mitigation was based on an alleged conflict of Dr. Carter's transcript testimony with that the live testimony of Dr. Kramer and Dr.

Ross. **There is no conflict as to the pertinent issue—lack of control**. Dr. Kramer's testimony was that the kidnapping and sexual abuse of the girls was the result of the pedophile compulsion. As explained above, the trial court agreed with this evaluation and Dr. Carter also found Appellant suffered from a mental illness of axis I pedophilia.T1176. The discrepancy was a legal one -- whether statutory mental mitigation applies to felony murder. Also, as explained above, none of the defense witnesses were testifying Appellant didn't know right from wrong or was out of touch with reality. As explained above, the use of the sanity, or the out of touch with reality, standard is not a basis for rejecting mental health mitigation.

Appellee relies on Davis v. State, 604 So.2d 794 (Fla. 1992) to claim that Appellant's **malingering on Dr. Carter's tests** is proof Appellant did not suffer any mental illness. Such a claim is without merit. In Davis the defense offered test results as evidence. The malingering on the test invalidated the results of that test-- it was not proof of the lack of mental illness. Moreover, unlike in this case, there was no evidence that Davis had brain damage. In this case the defense was not offering test results and no one disputed that Appellant was suffering from compulsive pedophilia at the time of the kidnapping and sexual battery which are part of the felony murder. The capital offenses were the byproduct 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. It was error to reject the mental mitigation. Appellant relies on his Initial Brief for further argument on this Point.

POINT VI

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

Appellee claims that if the trial court rejects the statutory mental mitigation it does not have to address the nonstatutory aspect of that mitigation. However, in Jackson v. State, 704 So. 2d 500 (Fla. 1997), this Court made it clear 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.

Jackson is the law in effect at the time of Appellant's resentencing. The trial court is on notice of this mental mitigation by the request for the statutory mental mitigation -- it is necessarily included mitigation. The evidence needs to be considered to ensure a reliable sentencing. To ignore such mitigation is an invitation to create arbitrary sentencing results. In fact, recently the U.S. Supreme Court in Porter v. McCollum, 558 U.S. ___ (2009) emphasized that non-statutory mental mitigation must be considered:

> Under Florida law, **mental health evidence that does not rise to the level of establishing a statutory mitigating circumstance may nonetheless be considered by the sentencing judge and jury as mitigat-ing.** See, e.g., Hoskins v. State, 965 So. 2d 1, 17–18 (Fla. 2007) (per curiam). Indeed, **the Constitution requires that "the sentencer in capital cases must be permitted to consider any relevant mitigating factor."** Eddings v. Oklahoma, 455 U. S. 104, 112 (1982).

Appellee's argument which avoids this edict violates both the U.S. and Florida Constitutions. Appellant relies on his Initial Brief for further argument on this Point.

POINT VII

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

Appellee claims the mitigation of Appellant having a low IQ is contrary to the evidence. However, as explained on page 30 of the Initial Brief Appellant's IQ was sufficiently low to qualify as a low IQ and this Court has recognized higher or comparable IQs as mitigating evidence. The IQ does not have to be below or at the level of retardation for it to have mitigating qualities. Low IQ is important mitigation. It helps measure one's ability to reason. The greater the IQ the greater the ability to deal with one's problems. The great ability to reason the greater the ability to fend off one's compulsions. While a normal person may or may not be able to fend off the compulsion from which Appellant suffered -- Appellant had a lesser ability to do so. Appellant relies on his Initial Brief or further argument on this Point.

POINT VIII

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

Appellee claims that the record **factually** supports rejection of this mitigation. However, the trial court found these mitigators **were factually supported** by the evidence-- but rejected them as mitigation. For example, Appellant confessed to the crimes. There is no factual dispute as to this mitigation. However, the trial court never explains why it is rejecting this as mitigation. Appellant cooperated with police. Again, this is not disputed. The trial court found this was factually supported but never explains its rejection of this mitigation. Appellee does not dispute that confessing and cooperating with police is mitigation. Thus, as with other mitigation, the trial court's rejection of this mitigation without explanation is error. Appellant relies on his Initial Brief for further argument on this Point.

POINT IX

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

Appellee claims that was no evidence to support remorse. However, Appellee totally ignores Detective Rhodes's testimony that Appellant was remorseful T 1024.

Appellee claims Dr. Carter refuted Dectective Rhodes. This is incorrect. Dr. Carter never addressed Detective Rhodes's testimony.

Appellee also claims that during the kidnapping, rape and killing Appellant did not voice remorse. However, this is at the time of the crime. If one was remorseful during the crime -- the crime would not occur. Appellee's requirement that remorse only be considered if voiced at the time of the crime would effectively redefine remorse so as to eliminate remorse as mitigation in all cases. Remorse by definition involves sorrow for what one has done in the past but does not apply to present and future acts. Detective Rhodes testified Appellant was remorseful for what he had done. The trial court erred in ruling there was no evidence which could support this mitigation. Appellant relies on his initial brief for further argument on this Point.

POINT X

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

At page 60 of its answer brief and appellee concedes the pedophilia diagnosis:

"The State did not challenge the pedophile diagnosis"

Appellee's Brief at 60. However, Appellee claims it is not mitigating because the trial court found it to be unrelated to this case. The trial court made no such finding. The trial court merely decided not to find this as mitigation—without giving any explanation. In fact, in its first sentencing order, the trial court found the pedophilia the catalyst for what occurred:

> It is the opinion of this Court that the Defendant has experienced mental and emotional problems in his life. It is equally clear to the Court that the **compulsive nature of pedophilia was the catalyst leading to the deaths** of Deanne Mu'min and Alicea Jones.
>
> ****
>
> Mr. Ault is a convicted pedophile, and **there is no question that this is a compulsive mental disorder.**

SR 591-592 (emphasis added). Although Appellee points out the pedophilia was not a motive for killing -- Appellee does not dispute that **but for** the pedophilia compulsion none of the kidnappings, sexual battery, or killings would have occurred in this case. Thus, contrary to Appellee's claim -- pedophilia was a mitigating circumstance in this case.

Finally, Appellee claims the error is harmless based on the aggravating circumstances. However, Appellee ignores that the capital sentencing is a weighing process. The mitigation side of the scale was impacted by the error. Three jurors voted for life. This was not due to the aggravating circumstances. The vote for life

could only be due to the mitigating circumstances. After properly evaluating this mitigation three jurors believed the mitigation was so weighty so as to result in a vote for life-- despite the aggravating circumstances.

Appellee does not dispute page 45 of the Initial Brief which lays out an explanation as to why the pedophile disorder was mitigating in this case.

Appellant relies on his Initial Brief further argument on this Point.

POINT XI

THE DEATH PENALTY IS NOT PROPORTIONALLY WARRANTED IN THIS CASE.

Appellee does not dispute that for a death sentence to be proportionate it must be **both** -- (1) the most aggravated and (2) the lease mitigated category of capital offenses. Almeida v. State, 748 So. 2d 922, 943 (Fla.1999).

Appellee has not disputed pages 49 -- 51 of the Initial Brief which lays out why this cause does not fall within the category of lease mitigated capital cases. The death penalty is disproportionate in this case.

Appellee attempts to distinguish Huckaby v. State, 343 So. 2d 29 (Fla. 1977) on the basis that in Huckaby a murder did not occur. It is true a murder did not occur. However, this Court did **not** find death disproportionate due to the fact to murder didn't occur. Rather, death was disproportionate because Huckaby's mental illness had a controlling influence on him. Likewise, here Appellant's mental illness of compulsive

pedophilia had a controlling influence on him and **but for** this influence none of the capital offenses would have occurred. The trial court even recognized this:

> It is the opinion of this Court that the Defendant has experienced mental and emotional problems in his life. It is equally clear to the Court that the **compulsive nature of pedophilia was the catalyst leading to the deaths** of Deanne Mu'min and Alicea Jones.
>
> ****
>
> Mr. Ault is a convicted pedophile, and **there is no question that this is a compulsive mental disorder.**

SR591-592 (emphasis added).

Appellee cites a number of cases to claim to death is proportionate in the instant case. However, none of those cases is even remotely close to the present case.

The instant case is unique to all other death cases in Florida. **But for** Appellant's mental illness of compulsive pedophilia the capital offense would not have occurred. As noted above, the only case where a defendant's mental illness was a catalyst for the capital offense is Huckaby where death was deemed to be disproportionate. In addition, the instant case had the additional unique fact that Appellant asked the prior victim to turn him because he knew what he was doing was wrong. None of the cases cited by Appellee contains this unique fact. Appellant has been unable to find any case with this fact -- let alone any case with these two facts.

These facts make this case unique from all other capital cases. Appellee does a superficial **quantitative** comparison between this and other cases. However,

proportionality involves a **qualitative** rather than a **quantitative** analysis. In this case proportionality analysis by qualitatively comparing this case to other cases doesn't work -- because none are comparable. However, a proportionality analysis is, and must necessarily be, more than comparing cases. For example, there was nothing to compare with the initial death cases. Thus, they were unique. Proportionality analysis in such cases can only be based on whether the case is **both** the most aggravated and the least mitigated. Almeida. As explained on pages 48 to 52 of the Initial Brief, and which is not been disputed by Appellee, the instant case is not among the least mitigated. Thus, the death penalty is disproportionate in this case.

Finally, acceptance of Appellee's argument regarding the trial judge's subjective individual decisions regarding mitigating and aggravating circumstances moves us away from the capital sentencing decisions this Court envisioned in Dixon v. State, 283 So. 2d 1 (Fla. 1973) :

> …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). Appellant relies on his Initial Brief for further argument on this Point.

POINT XII

THE TRIAL COURT ERRED IN ADMITTING IRRELVANT AND PREJUDICIAL PHOTOS INTO EVIDENCE OVER

APPELLANT'S OBJECTIONS.

This issue involves the inflaming, rather than the informing, of jurors.

Appellee does not dispute that the photos of a child's bloated head and injured vagina are extremely prejudicial and inflammatory to jurors. Appellee does not dispute that capital cases require a cool and calm review of aggravating and (especially) mitigating circumstances. Unlike attorneys and judges who have been exposed multiple times to inflammatory photographs, lay jurors will likely be directly and indirectly influenced by such photographs. There is a real danger of lay jurors either consciously or subconsciously being impacted by inflammatory photographs. See Initial Brief at 56 -- 57. Even the trial court found the photographs be "gruesome" T895, and after examining the photographs during a recess and prosecutor stated to the judge "I hope we didn't ruin lunch for you" T904, line 8. The impact on lay juror would be much stronger.

Appellee has not addressed nor disputed that any relevance of the inflammatory photos was substantially outweighed by undue prejudice. Thus, the photos should not have been admitted. Hoeffert v. State , 559 So. 2d 1246, 1249 (Fla. 4th DCA 1990).

Appellee also avoids discussing that the inflammatory photographs should not have been admitted into evidence to prove things that were not in dispute. Almeida v. State, 948 So. 2d 922, 929-30 (Fla. 1999) (photo was relevant to show nature of

injuries and the trajectory of the bullet -- however neither of these points was in dispute thus the submission of the photo was gratuitous and improper).

In this case the facts which the photos allegedly showed were not in dispute and were independently covered by the medical examiner's testimony. In fact, when the medical examiner was asked the value of the jury seeing the bloated head -- he answered that it, "attests to two things" (1) time she's been there and (2) strangulation. T899. However, these are the **medical examiner's conclusions and not what the photo shows**. The jury seeing a photo of the bloated head adds nothing when they are told by the medical examiner that he observed a bloated head. It is the medical examiner's explanation of why the bloated head shows time and strangulation that is of value -- and the photograph did not provide this information.

Appellee's claim that the inflammatory photo was needed to inform the jury is without merit. At best, the photos were used to corroborate the medical examiner's undisputed observation of bloating -- which in turn was used to corroborate the medical examiner's undisputed conclusion that the bloated head indicated that the cause of death was strangulation -- which in turn corroborated the undisputed confession by Appellant as to the strangulation -- which in turn corroborated the undisputed fact Appellant had been found guilty of first-degree murder. The photo was multiple tiers from what the prosecution was trying to prove. The photo was not needed -- the

prosecutor had an abundance of undisputed evidence to inform the jury. The prosecutor's insistence of the desire to corroborate undisputed facts does not justify the admission of inflammatory photos T890. The photos did not inform the jury – they inflamed the jury. Any minimal relevance of the photos was substantially outweighed by undue prejudice.

Another example is the child's injured vagina which was not in dispute and was described independently of the photo. Appellee's claim that the photo of the injured vagina was needed to inform the jury is without merit. The jury was informed by the medical examiner who could testify to his undisputed observation of tearing and bleeding of the vagina -- which in turn was used to corroborate his undisputed conclusion that the victim had been sexually battered -- which in turn corroborated the undisputed confession by Appellant to the sexual battery -- which in turn corroborated the undisputed fact Appellant was guilty of sexual battery and felony murder. The photo was multiple's tiers is from what the prosecution was trying to prove and its relevance was either minimal or nonexistent. The impact of the photo was to inflame the jury rather than to inform. Appellant relies on his initial brief for further argument on this point.

POINT XIII

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

Appellee claims that even where the jury gives a death recommendation the trial should give great weight to the death recommendation. However, this Court has made it clear that a recommendation of death should not be given great weight in a case involving a death recommendation. See Ross v. State, 386 So. 2d 1191, 1197 (Fla. 1980) (error Tedder standard and giving great weight to jury recommendation); Muhammed v. State, 782 So. 2d 343, 362 (Fla. 2001) (statement that jury recommendation should be given great weight was made in the context of a jury's recommendation of the life sentence and the application of that standard does not apply to a death sentence).

In this case, the trial court did not merely give great weight to the jury's recommendation of death, but it specifically said it was using a Tedder standard. R 653. The Tedder standard requires a trial court to uphold the jury recommendation -- unless there are no facts that could support the recommendation so that no reasonable person could differ. Tedder v. State 322 So. 2d 908, 910 (Fla. 1975). Clearly, the use of a Tedder standard is inappropriate where the jury recommends death—especially in this case where Mr. Ault was refusing to participate in presenting mitigating evidence and even moved to waive his entire penalty phase T 1345.

Appellee attempts to distinguish Ross on the basis that the trial judge in that case felt bound by the incorrect legal standard. Appellee's argument lacks logic. The use

of an incorrect legal standard is improper regardless of the reason for doing so. Judges do not have the discretion to use incorrect legal standards. An independent sentencing is required by law. This requirement cannot be avoided by using an incorrect legal standard.

The error is not made harmless by the fact that the trial court issued an order evaluating the aggravating and mitigating circumstances. Regardless of whatever the jury's recommendation, whether it be for life or death, the judge is required to issue order based on the aggravating and mitigating factors. See Grossman v. State, 525 So. 2d 833, 840 (Fla. 1988). The prejudice of using the Tedder standard in a death recommendation case is that the trial court is **not making independent evaluations – but is making evaluations in light of the jury's recommendation of death.** Furthermore, by using a Tedder standard the danger is that the judge is evaluating the evidence in an effort to support the recommendation. The judge's individual findings as to aggravators and mitigators is being made with the jury's death recommendation in mind and is not an independent finding with a blind eye to the jury's recommendation.

Appellant relies on his Initial Brief or further argument on this Point.

POINT XIV

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

Appellant relies on his Initial Brief for argument on this Point.

POINT XV

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

Appellee claims the pretrial conference did not qualify as a pretrial conference because the meeting was for informational purposes only and there was no request for a ruling. AB at 75. Appellee requests this Court to approve supplying of damaging information against capital defendant in his absence -- as long as a ruling is not specifically requested. Appellee cites to no cases that permit such conferences in the defendant's absence. Such a procedure simply goes against every notion of due process and fair play. All the cases cited by Appellee involve clear situations where defendant's presence would not matter. Whereas, the defendant's presence matters where negative information is being presented against him**.**

In Rodgers v. State, 934 So. 2d 1207, 1216 (Fla. 2006) this Court found a right to be present at a hearing in chambers where information was provided to the trial court about counsel's internal disagreements. Thus, the right to be present has been recognized. However, in Rodgers the presence was waived when Rodgers specifically "agreed" not to be present. In this case, there was no such agreement by Mr. Ault.

Appellee does not dispute that the information was negative but argues the error is harmless because the information could have been more specific. However, the information was sufficiently negative when presented to the ultimate sentencer.

Moreover, informing the ultimate sentencer that even more damaging information might be divulged exacerbates the situation T63.

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. Appellant relies on his Initial Brief for further argument on this Point.

POINT XVI

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

Appellee claims that this issue was not preserved for appellate review. However, Appellant specifically complained about the subject matter of this point and the impropriety of the trial judge which is the substance of this issue SR391 at lines 7 – 8. In addition, the actions of a biased judge can deny the defendant due process. The denial of due process can be fundamental error. See Hargrave v. State , 427 So. 2d 713, 715 (Fla. 1983). Appellant relies on his Initial Brief for further argument on this Point.

POINT XVII

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

Appellee claims that Appellant waived the Faretta hearing at the June 4, 2007 hearing. AB at 82. Specifically, Appellee claims that when Appellant was asked by the trial court if there were any other matters that needed to be addressed and the answer was, "no" the Faretta inquiry was waived. However, Appellee forgets to include the portion of the record showing that immediately after the need for the inquiry was specifically brought to the trial court's attention:

> THE COURT: All right. Is there anything else that—given everything I've told you—anything else we need to address today?
> MR. AULT: No. Your Honor.
> THE COURT: Okay. Thank you. Take him out of here.
> MR. POLAY: Judge, before you take him out –
> THE COURT: Wait a minute. His lawyer wants to say something.
> MR. POLAY: I just think that **you need to address whether or not he wants to represent himself**.

SR570 (emphasis added). The trial court then said when he asked Mr. Ault there was anything else and Mr. Ault responded "no", this was a waiver of the issue. SR570-571. The trial court refused to address the Faretta inquiry.

Appellee and the trial court were wrong in concluding Appellant was waiving his rights. Waiver of a constitutional right must be knowing and intelligent -- and not left to some ambiguity. Here, where the defense made it known to the court that the issue of self representation needed to be addressed – it cannot be said Appellant was

waiving his rights. Cf. Almeida v. State, 737 So. 2d 520, 525 (Fla. 1999) (court will not find waiver by authorities ignoring equivocal requests by the defendant).It was error not to inquire into self representation and not to hold an inquiry. Appellant relies on his initial brief or further argument on this Point.

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.

Appellant relies on his Initial Brief for argument on this Point.

POINT XIX

THE TRIAL COURT ERRED IN DENYING APPELLANT'S MOTION TO DISQUALIFY THE TRIAL JUDGE.

Appellee claims that caselaw dictates that Appellant's pro se motion to disqualify

the trial court be treated as a nullity. However, none of the cases cited by Appellee involve a pro se motion to disqualify. For the reasons explained in the supplemental brief, pro se motions to disqualify, or for self representation, should not be treated as nullities. Appellee is not disputed the logic supporting this concept.

Appellee also claims the trial court rejected the motion due to a lack of an affidavit. This is not correct. In addition, the motion was sworn thus taking on the substance, if not the form, of an affidavit. Appellant relies on his Initial Brief for further argument on this Point.

CONCLUSION

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

Respectfully submitted,

CAREY HAUGHWOUT
Public Defender
15th Judicial Circuit of Florida

_____
JEFFREY L. ANDERSON
Assistant Public Defender
Florida Bar No. 374407
421 3RD Street/6TH Floor
West Palm Beach, Florida 33401
(561) 355-7600; 624-6560

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, Ninth Floor, West Palm Beach, Florida 33401-3432, by courier this _____ day of December, 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 December, 2009.

_____

JEFFREY L. ANDERSON
Assistant Public Defender
Florida Bar No. 374407