

IN THE SUPREME COURT OF FLORIDA

CASE NO. 79,787

ANA CARDONA,

Appellant/Cross-Appellee,

VS .

THE STATE OF FLORIDA,

Appellee/Cross-Appellant,

**FILED**

SID J. WHITE

JUL 19 1993

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Chief Deputy Clerk

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ON APPEAL FROM THE CIRCUIT COURT OF THE ELEVENTH  
JUDICIAL CIRCUIT IN AND FOR DADE COUNTY, FLORIDA  
CRIMINAL DIVISION

\*\*\*\*\*

BRIEF OF APPELLEE

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## INTRODUCTION

Appellee/Cross-Appellant, **the State of Florida**, was the prosecution in the trial court and Appellant/Cross-Appellee, **Ana Cardona**, was the defendant. The parties will be referred to as they stood in the lower court. All emphasis is supplied unless otherwise indicated. The symbol "R" will designate the record on appeal.

## STATEMENT OF THE CASE

The State accepts the defendant's procedural history as accurate.

## STATEMENT OF THE FACTS

The State rejects the defendant's factual recitation as convoluted and virtually unreadable. The State would summarize the guilt and penalty phase evidence as follows:

### Brief Overview

Prior to giving birth to the victim, **Lazaro Figueroa**, the defendant lived with a well-off drug dealer named Fidel Figueroa. Fidel, the defendant, their two year old daughter T. and the defendant's seven year old son J. lived in an upscale apartment

and maintained a lavish existence. A week prior to the birth of the victim (D.O.B. 9/18/87), Fidel Figueroa (Lazaro's father) was murdered. Fidel left a \$100,000 "estate" which the defendant exhausted in ten months time. During this ten months Lazaro and his two siblings spent most of the time living with friends and relatives. At age eleven months Lazaro and siblings were turned over to HRS by the last of the line of "babysitters", who had been caring for the children for some three months and thought enough was enough. HRS doctors examined Lazaro (9/13/88) and found him healthy and normal. Lazaro weighed twenty pounds. When his emaciated body was found over two years later (11/2/90), at age three, Lazaro weighed eighteen pounds.

On November 30, 1988, HRS returned custody of all three children to the defendant. This is the date in the indictment on or about which the aggravated child abuse committed by the defendant upon Lazaro began, continuing until his battered body was discovered on November 2nd, 1990. A few months after the children were returned to her, the defendant became romantically involved with co-defendant Olivia Gonzalez, who moved in with the defendant and the children. They lived in a string of cheap hotels, with Olivia's job and shoplifting the only source of income. During this period the defendant beat, starved, confined, emotionally abused and systematically tormented Lazaro, who spent the last two months of his life locked in a closet so the landlord would not learn of his existence. Olivia Gonzalez

was aware of and in fact participated in the abuse, however the trial court found her role to be far less sustained and egregious than the defendant's. On November 1, 1990, Lazaro was beaten severely by the defendant with a baseball bat. This beating left Lazaro comatose, so the defendant decided to abandon her still breathing son in the bushes of a residence, where he died.

Upon seeing the news coverage of the discovery of her son's body, the defendant decided to flee to Orlando. When located by police, the defendant claimed Lazaro fell off the bed. Olivia Gonzalez eventually admitted her role and described the final beating and prior abuse to the detectives. The medical examiner testified that Lazaro died from "child abuse syndrome," meaning the combined effect of the incredible physical abuse, including starvation, he had suffered in the year and a half prior to his death. The medical examiner testified as follows:

**Dr. Bruce Hyma (M.E.)**

The victim was found lying in bushes, clad in blue shorts, a t-shirt and no shoes. His diaper was heavily soiled and wrapped repeatedly with adhesive tape. The child was emaciated. The left side of his scalp had an open festering wound, his left eye was black and blue, and his right leg was much thinner than the left (R. 3182). The body was discovered Friday, November 2, 1990. He examined the body at the scene at 11:40 a.m., with the time of death within twenty-four hours and



more probably within twelve hours of his initial examination (R. 3185). The victim had very little lividity (settling of blood by gravity) because he had very little blood to begin with, i.e., severe anemia. (R. 3187). His initial impression was that Lazaro had been extensively physically abused. His diaper was "heavily soiled with encrusted feces" (R. 3189).

The autopsy exam revealed the victim to be very thin and malnourished, with protruding ribs. His left arm and elbow had a rigid deformity rendering the arm useless. The right leg was extremely thin, with the left leg much bigger. (R. 3192). The abdomen was concave (curved inward) and had a scar on the right side.

Using Lazaro's birth records (10/18/87) and those from his HRS examination (9/13/88), Dr. Hyma testified that he weighed seven pounds six ounces and was twenty-one inches at birth. Eleven months later HRS measured him at twenty and one-half pounds and twenty-eight inches. At the time of his death at thirty-six months, Lazaro weighed eighteen pounds and was thirty-five inches tall. (R. 3197). When Dr. Hyma examined Lazaro at the scene, he estimated his age at twenty-four months.

Dr. Hyma then went through the various injuries he discovered. He described the condition of Lazaro's left arm as follows:

A. As I already explained, the left arm here is fixed. The elbow is fixed, the joint doesn't move and that's the result of the process occurring up here between the elbow and shoulder.

If you could feel this arm, the arm is like stone. The upper arm was like stone, The process that caused it to become like stone is a process we call mycitis osficant (phonetic) where the muscle of the arm, in an attempt to heal itself, has turned to bone. The body normally would replace the muscle with scar.

But in this case it replaced it instead of scar actually replaced it with bone and as a result of that the muscle, of course, is functionless. It freezes the arm in this position.

(R. 3200).

The remaining soft tissues in the left elbow had blood under the surfaces, but little visible bruising due to Lazaro's lack of blood. The cause of the bone formation was repeated blunt trauma, ". . . over and over and over again.", over months and for as long as a year. The muscles were repeatedly crushed to such a degree that rather than normal scarring, the muscle cells turned to bone. (R. 3202). Some of the soft tissue injuries on the elbow were only days old.

Lazaro's left hand, the outer part, was deeply bruised throughout, right through to the tendons. (R. 3205). This was again caused by repeated blunt trauma. The palm of the left hand

had similar deep blunt trauma bruising. The wounds to the hand are consistent with defensive wounds. (R. 3206). Some of the bruising is again only days old. There is a deep bruise where the left arm connects to the shoulder.

Lazaro's right arm has ". . . a splintered fracture of the ulna, 'a bone on the outside of the forearm. (R. 3209). The position of the fracture, in the middle of the ulna, indicates it is a classic defensive wound, incurred when the arm is raised to protect his upper body from a blunt trauma. (R.3210). This fracture occurred within days of his death.

As for Lazaro's legs, Dr. Hyma originally thought the extremely thin right leg was abnormal and the much thicker left leg almost normal. However upon internal examination the left leg was found to be full of blood from hip to ankle. His left leg was literally one long deep blunt trauma bruise. The left foot from heel to toe is likewise one continuous deep bruise, again from multiple blunt traumas. (R. 3213-14). The two biggest toes on his left foot are deformed from multiple blunt trauma. There are also ligature marks on the big toe indicating a binding of the foot. (R. 3215). The toenail of the fourth toe is crushed from blunt trauma. Most of the injuries to the left leg are very recent. There is a much older blunt trauma injury to the left knee which left a visible knot of scar tissue on the knee. (R. 3217).

Lazaro's very thin right leg had no evident injuries, but his right foot and toes had suffered various blunt trauma injuries. (R. 3219). These extend from heel to toe, and are only days old.

Lazaro had pressure sores on both sides of his lower back, consistent with lying down on his back for a prolonged period. These sores, which take several days to develop, are very recent. R. 3230). He had a deep blunt trauma bruise on his left buttocks again a recent injury.

The left side of Lazaro's chest wall had a deep, seven inch bruise caused by blunt trauma (R. 3232). This bruise is actually several wounds superimposed on each other. Some are months old, some only days old. The previously described bruise to the left shoulder was also a composite of old and new blunt trauma injury. Dr. Hyma described these as "injury upon injury." (R. 3235).

Dr. Hyma then described the injuries to Lazaro's face and head. The tissue around the left eye was bruised and there was a laceration on the right eye, as well as a bruise in the middle of the forehead. (R. 3237). There is a thermal scar from a burn on the left cheek, consistent with a cigarette burn. (R. 3239). The left ear has a pressure sore, which together with those on his back is consistent with laying on his back with head facing to

the left for a prolonged period. These sores are recent, within a week old. In addition to the festering blunt trauma wound on the left side of the scalp, there was a blunt trauma laceration to another area of the scalp as well. (R. 3242).

As to the open festering (infected) blunt trauma wound on the left scalp, the opening had allowed meningitis bacteria to invade the left side of Lazaro's brain. (R. 3243). On the back of his head is a triangular shaped blunt trauma scar that had already begun to heal. It could be weeks old, unlike the very recent left scalp open wound. (R. 3244).

The inside of Lazaro's mouth revealed that the soft tissue inside of the upper and lower lips, the frenulum, was obliterated by scar tissue, characteristic of repeated external blunt trauma to the mouth through closed lips. (R. 3246). These scar tissue build-ups take many months to develop. The scar tissue or "knot" on Lazaro's forehead also would take months to develop, and also resulted from repeated blunt trauma. There were other less visible blunt trauma scars on his right temple. (R. 3248).

Dr. Hyma then described his internal examination of Lazaro's head. He first observed a visible skull fracture on the left side of his head, starting over the left eye socket and continuing upward. It takes a tremendous blow to fracture a

child's skull because of its elasticity. The cause was violent blunt trauma. (R. 3253). The fracture is several days old. It caused large tears in the fibrous sheet encasing the brain, and extensive bleeding from the damaged blood vessels. (R. 3255). The brain had developed an epidural blood clot that was a composite, meaning it resulted from both old injuries and new injuries to the brain. This indicates the skull was initially fractured, then days later another blunt trauma was inflicted to the same area. (R. 3258). There is also an almost completely healed subdura hematoma from a months old brain trauma. (R. 3261).

As to the brain interior, the olfactory nerve was crushed by the blow which caused the skull fracture. Lazaro received a later blow which was delivered with such force that it ripped apart the nerve connections that bind the spinal cord to the rear brain. (R. 3265). This injury is only hours old and would have rendered him comatose, and was distinct from the skull fracture blow, which was days old. This final injury was invariably a fatal one (R. 3266), and was caused by ". . . a very violent decelerating or shearing force that the brain has undergone as a result of a blunt external force." (R. 3267). This was a fatal injury, however Lazaro was already dying from his other injuries when this final blow was inflicted. (Id). Lazaro's temporal lobes were also fatally infected with meningitis by this time, if left untreated.

As to the violent brain shearing which tore the nerves connecting the spinal cord and brain stem, it cannot be tied to a specific external skull trauma. It could have resulted from violent shaking or head impact with a relatively soft but unyielding surface. The cause was extremely sudden deceleration of the head. The brain, like a passenger in an automobile accident, is destroyed by its own momentum. (R. 3277). Whatever the source, the connecting tissues between the two brain hemispheres were similarly sheared.

Lazaro also had a completely healed bruise to his left frontal lobe, resulting from months old trauma, and the right front of the brain has a recent bruise behind the right eye. (R. 3280).

Dr. Hyma then related the results of his internal examination. He prefaced this with a brief recapitulation of the previously discussed injuries and when they occurred relative to the time of death. (R. 3281-3283). Many were hard to date because of their composite nature, i.e., injury upon injury.

As to the stomach, it was empty, as was the small intestine. The colon and rectum contained some feces. Lazaro was extremely dehydrated and malnourished. In addition to anemia, he had virtually no iron in his body. (R. 3284). The

malnutrition had retarded his bone growth, with his bone size that of a two year old. This malnutrition took months or perhaps a year to create these deficiencies. (R. 3285). His body weight had ". . . fallen way below the one percentile" by the time he died. (R. 3286). The malnutrition had to have started between his first and second year.

Lazaro's thymus gland, which programs the immune system's cells in childhood and disappears during adolescence, was virtually shriveled into nothing. In essence, his immune system was so overworked that it was ready to retire at age three. (R. 3289, 90). Lazaro had no iron in his spleen, bone marrow or liver, the result of chronic malnutrition. (R. 3291). His pancreas was so dehydrated and malnourished that the digestive juices it produces were like sludge, clogging that organ and inflaming it. (R. 3292). As for the empty stomach, it was most probably empty when he sustained the head injuries, which normally shut down the digestive track.

As for the length of time Lazaro survived in the bushes, he was either dead or extremely close to death when left there. (R. 3293, 94).

Lazaro's blood tests showed that he had been exposed to a ". . . herbicide, insecticide or some type of sedative drug at some unknown time." (R. 3298).



As to the cause of death:

A. Lazaro Figueroa died from child abuse and neglect. Lazaro didn't die from one particular injury. Lazaro was physically abused over months of time.

He also was neglected over months of time resulting in malnutrition and anemia. He was physically abused to the point of having irreversible brain damage which eventually hastened his death.

The injuries that we discussed to his brain were not necessary to cause his death. They in and by themselves, they certainly could explain his death. But his death was a culmination of all of his injuries.

Lazaro also had an impending meningitis. Had he survived the most recent head injury, his meningitis would have been fatal had it not been treated.

Lazaro was a physically abused and neglected child, and that was his cause of death.

(R. 3302).

**DR. RICHARD SOUVIRON**

Dr. Souviron is a forensic dentist who examined Lazaro's jaw and teeth as part of the autopsy. Lazaro had the teeth of a two year old in terms of developmental age. (R. 3003). Given his actual age of three, the disparity had to result from either malnutrition or disease. Lazaro's frenulum, where the upper and lower lips meet the gum, was torn apart, and he was missing his two upper front teeth. (R. 3004). The sockets show a healing

process. The teeth did not fall out naturally or because of disease, rather they were knocked out by massive blunt trauma, not the kind a child would get falling down. (R. 3007). Lazaro had no decay or disease in his other teeth. The ripping of the frenulum is a classic sign of child abuse by blunt trauma to the exterior of the mouth (R. 3009), especially in this case:

You can't see a child laying on the autopsy table and look at the mouth without seeing the scars and burns on his face and black and blue area. His body was totally beat up. He looked like he had come from Aushwitz.

(R. 3010).

These teeth were knocked out by a blow to the face within a few months of his death. (Id).

**Olivia Gonzalez** (Co-defendant)

Olivia met the defendant in March of 1989, at a disco. The defendant was an attractive, sought after woman (by the other woman), whereas Olivia is an ugly duckling. (R. 2774). The defendant started warming up to Olivia, which pleased Olivia to no end (R. 2775), and they had an initial week-long romance, which included cocaine use. Sometime later the defendant showed up at Olivia's apartment, seduced Olivia and stuck around another two weeks. During this time Olivia learned that the defendant had children, and that HRS was going to take custody if the defendant did not pick them up from her friend's house, where she

had left them. (R. 2781). At this juncture Olivia and the defendant decided to rent an apartment together, with the defendant's children.

When Olivia went to pick up the children, J. (then 9) and T. (then 4) came out of the house on their own. The defendant then came out, pulling Lazaro along by the arm. They looked hungry and unkept, so Olivia drove them to McDonalds. After a week at a hotel, Olivia rented an apartment for them in Hialeah, in the first week of April, 1989. They used cocaine while at the apartment. Olivia worked and the defendant did nothing. Olivia put J. in school, but at night J. stayed out until very late, and Taime played outside unsupervised by the defendant. (R. 2789).

As for Lazaro, the defendant kept him locked in the bedroom. He smelled terrible because the defendant did not enjoy changing his diapers and hit him whenever she had to do so. (R. 2790). While at the apartment Olivia and the defendant would fight because Olivia was footing the whole bill and the defendant did not clean, cook or care for the children properly. One day Olivia decided it wasn't working out, so she went back to live with her mother. (R. 2792). The defendant tracked her down and blackmailed Olivia into returning by threatening to reveal Olivia's sexual preference to Olivia's family. Olivia returned, and the defendant turned over a new leaf for a few days, then

they had a violent fight during which the defendant wounded Olivia's hand, a wound which cost Olivia her job. (R. 2794).

The defendant did not want to change, bathe or feed Lazaro, and would beat him as a quid pro quo for these parental services, for a total of three or four daily beatings, with each beating consisting of numerous blows. She used shoes and belts to supplement her fists. (R. 2796).

When Olivia lost her job, they got evicted for not paying rent, and they all moved into a trailer belonging to Reynaldo Rodriguez and Lorenzo Pons. (R. 2796). Neither Olivia nor the defendant were working at this point. They stayed in the trailer two weeks, during which the defendant kept Lazaro locked in a closet in the small bedroom. (R. 2798). The only time Lazaro was let out of the bedroom was when the defendant was high on cocaine, which markedly mellowed her attitude toward Lazaro. (R. 2799). The defendant was in fact almost a nice person while using cocaine, in stark contrast to her normal persona.

When the defendant fed Lazaro she literally shoveled the food down his throat, and he either kept pace or didn't eat. (R. 2800). Lazaro was not fed that often to begin with (Id). If Lazaro did not keep his hands behind his back at feeding time, he went without. (R. 2801). Olivia had not hit Lazaro up to this time. After the two weeks in the trailer they moved into a one

room efficiency at the Olympia hotel on Miami Beach. Olivia pawned her jewelry to pay the rent there. While his older brother J. frolicked on the beach or by the pool, Lazaro was bound tightly by the defendant in a bedsheet and left immobile on the bed. (R. 2802). This was in July of 1989 (when Lazaro was some twenty months old, with sixteen more to go).

While at the Olympia, Olivia began to hit Lazaro herself, both because he threw food and peed on the bed, and because it pleased the defendant when Olivia hit Lazaro. (R. 2804). During Lazaro's stint in the Olympia, the defendant beat him regularly when she had to ". . . change his pampers, take care of him, bathe him or give him food." (R. 2805). The defendant's rule basically was that if Lazaro was not tightly under wraps, he was considered to be misbehaving and hence fair game (Id). When asked how Lazaro acted toward the defendant, Olivia replied, "he was afraid of her" (Id). The defendant beat Lazaro with shoes and belts at the Olympia. While at the Olympia, the defendant had kept Lazaro in the closet while not attached to the bed. She would also stand him up in the bathtub, turn on *EITHER* hot or cold water, and leave Lazaro. Both the closet and tub treatment elicited screams from Lazaro, which in turn elicited a choking motion by the defendant's hands upon Lazaro's neck, until he stopped crying. The defendant would also lead Lazaro around by the hair. (R. 2808). Olivia confronted the defendant about her abuse of Lazaro several times.

The defendant told Olivia she hated Lazaro because her descent "from riches to rags" (the trial court's phrase) was all Lazaro's fault. (R. 2809). The defendant referred to him as the devil or "Mal nacido", meaning "bad birth" (R. 2810). The defendant absolutely forbid anyone from touching Lazaro or expressing any affection toward him. (Id). The reason Olivia started hitting Lazaro is that it inspired the defendant to shower Olivia with affection, an otherwise infrequent phenomonom. (R. 2811).

Olivia pled guilty to second-degree murder and aggravated child abuse and agreed to testify against the defendant. Olivia feels she is responsible for what happened to Lazaro. (R. 2812, 13). She will receive no more than a forty (40) year sentence. Olivia had never hit a child before hitting Lazaro, whom she hit "because she taught me how to hate the boy" (Id). The defendant convinced Olivia that their declining lifestyle was all Lazaro's fault.

The defendant would stick her fingers into Lazaro's eyes, he would cry, and she in turn would apply the noise suppression/choking maneuver once again. (R. 2815). She would bite his fingernails until they turned black, and would bite him on the back as part of her motherly services for torture exchange. (Id). Her gulp fast or starve feeding routine for

Lazaro continued at the Olympia. Olivia and the defendant shoplifted to get money for rent and cocaine. (R. 2816). They eventually left the Olympia and moved into the Ocean Palm Hotel.

At some point after moving to the Ocean Palm Hotel, they were visited by friend Carla Ventrano, and while Carla was there HRS agents showed up to conduct an investigation, but they did not take the children. The defendant accused Olivia of calling HRS, and they fought about it. Later on the police came, and found Lazaro alone in the full bathtub. (R. 2819). The police did nothing.

While at the Ocean Palm the defendant would lock Lazaro in the bathroom, placed in the tub with the hot water running on him. She did it because she hated him. Olivia also hit Lazaro at the Ocean Palm, with her hand, a belt, or a slipper. The defendant beat him with whatever was handy, and would do so daily, including whenever she had to change him. (R. 2820). To avoid this chore as long as possible, she would put tape all around the pampers to keep the feces from oozing out. Lazaro was essentially wrapped up tight as a drum, reeking in a sea of his own compressed filth. (R. 2821).

From the Ocean Palm Lazaro was transferred to the Tahiti Hotel; "the difference was this one had a kitchen." (R. 2822). They payed the rent by shoplifting. As with the Ocean Palm,

Lazaro did most of his time in the bathroom. On the occasions when Olivia would give Lazaro a little yard time, the defendant would hit him and then banish him back to his porcelain kingdom. (R. 2826). The defendant's hot water - scream - choke triad ruled over the Tahiti as well. (R. 2827). The beatings of Lazaro by the defendant increased at the Tahiti, whereas with Olivia it was "the same." (R. 2828). The defendant was beating Lazaro continuously, whereas Olivia would hit the defendant approximately once a day (Id). Olivia never confined Lazaro in the bathroom or closet. When the defendant locked him in the closet "she would stand him at the corner, looking with his eyes toward the wall and his hands behind his back." (R. 2837).

Olivia's mistreatment of Lazaro during their three months at the Tahiti consisted of hitting him with a belt on the legs, or with her hand or with a slipper. Sometimes she hit him because he was throwing his food on the bed, and sometimes she hit him because the defendant told her to do so. (R. 2838, 39). The defendant would drag Lazaro around by the hair at the Tahiti, and she would wrap him tightly on the bed so he could not move. The defendant was continuously beating Lazaro at the Tahiti. She hit him all over his body, with either her hands or any object she could find, and choked him when he cried. (R. 2840).

Lazaro would not try to come out of the closet because he was terrified of the defendant. The defendant did not allow the



other children to play with Lazaro, and she would get angry if Olivia tried to get close to him. (R. 2842). The defendant's beating of Lazaro got worse during the time at the Tahiti.

At the beginning of 1990 the group moved to the Hotel Hacienda Fernando, where they stayed only a week. They then moved into the Saturn Hotel in January, 1990. Lazaro's release date was now only nine months away. They literally begged, borrowed and stole to get the money to move into the Saturn (R. 2846), where they stayed for two or three months. Lazaro was now ". . . very thin, very thin." (R. 2847). His nails were black from the defendant's bitings, and he had dark bruises on his back and around the eyes.

At the Saturn Olivia's mistreatment of Lazaro consisted of hitting him around the feet with a belt or switch. The defendant liked to place him in the corner with bottle caps under his feet. The defendant refused to give Lazaro food, and would stick her fingers in his eyes. She would put bottle caps with the edges up, and make Lazaro kneel on them. (R. 2849). The defendant enjoyed seeing Lazaro in pain because she hated him; "she felt a hate, and she never, never did express why she hated him, but she hated him with all the strength in her soul. I had never seen anyone hate someone as she hated her son." (R. 2850). The defendant called Lazaro "bad birth" or "low-born," and called him the devil. While at the Saturn the defendant gave Lazaro

cocaine. When she was high on cocaine she enjoyed watching Lazaro bounce around from her gift of cocaine.

On several occasions at the Saturn the defendant threw Lazaro against the wall when she had to change his diapers. The urine and feces could only be held in by the adhesive tape for so long, and when the defendant knew she had no choice but to change the pamper, it was beating time again. (R. 2851, 52). The beatings and wall bangings would make Lazaro cry, and the defendant would shift into choking gear once more. The defendant's beatings were increasing in frequency and severity at the Saturn; "she would hit him with a more despicable manner, as if she wanted to do away with him . . . . She would hit him with all her strength." (R. 2852). Olivia did not hit Lazaro with anything near the aggressiveness and zeal mustered by the defendant.

From the Saturn they moved into the house of Lorenzo Dominguez, a friend of the defendant, and stayed there about a month. The defendant was now beating Lazaro with a stick all over his head and body, and he would have bruises everywhere. (R. 2855, 56). Olivia also hit Lazaro with the stick to try and make him keep quiet, because they were supposed to keep very quiet at Dominguez' house. While at this house Lazaro got thinner still. The defendant fed him once a day, ". . . if that." (R. 2858). Lazaro was either kept in the bathroom or made to stand against

the . . . As in the past, the defendant would beat Lazaro when she was high on cocaine, and vice-versa. (R. 2860).

From Dominguez' house they moved into Ronnie's Hotel, where they stayed about a month. This would take them to approximately June of 1990, with freedom for Lazaro now only a few months away. One day at Ronnie's the defendant stood Lazaro up against the wall and punched him in the mouth, breaking his teeth. (R. 2861). She kept him shut in the closet, lying motionless on the floor. If he moved "she would grab him by the hair, she would get a belt and start walloping him, with a belt, with shoes. She would push him against the floor." (R. 2862). Sometimes Olivia hit Lazaro at Ronnie's as well, with a belt or shoe, to try and make him quiet, especially when Olivia was on cocaine. It was the opposite with the defendant, whose only periods of nonhostility to Lazaro was when she was high on cocaine. (R. 2863).

After a month at Ronnie's it was back to Dominguez' house. For Lazaro it was back to Dominguez' closet, except during sleepy time, when the defendant ". . . would wrap him with the sheets and she would sink him inside the sofa so he wouldn't move." (R. 2865). Olivia by now had a full-time job during the day. At no time during their relationship did the defendant work. The defendant was doing alot of cocaine during this second stay at Dominguez', including crack cocaine, and this provided

Lazaro with a brief respite from the defendant's usual treatment of him. (R. 2870).

In September of 1990 Lazaro was transferred to a new facility for the final time, his sentence nearly served in full. Olivia rented a two bedroom efficiency from the Piloto family. Olivia told the Piloto's it would be two grown-ups and one child, because Olivia knew the Piloto's would not rent to a "family" of five.

Once at Piloto's, and for the entire two months prior to his final release, Lazaro Figueroa, D.O.B. 10/18/87, was kept by the defendant locked in the closet, tied up and gagged. (R. 2876, 77). The defendant continued the practice begun at the Saturn, of pumping Benadryl into Lazaro by the bottleful to keep him quiet.

It was at this time, in September of 1990, that the defendant told Olivia the defendant planned on dumping Lazaro on Halloween night, so that he would disappear and never be found. The defendant said lots of little children disappear on Halloween, never to be seen or heard from again. Olivia argued with the defendant about this, and Olivia did not believe the defendant would follow through with her plan. Bad call, Olivia. (R. 2877-2878).

The defendant kept Lazaro in the closet at all times at the Piloto's. (R. 2879-81). His arms were bound to his body with a sheet, his mouth taped. The pampers were bound in reams of adhesive tape changed only when the adhesive tape yielded to the laws of physics. (R. 2882). When Olivia was asked if she reported the defendant to HRS, she replied:

Q. Did you do anything about it? Did you ever call the police, call HRS?

A. No, I did not. I was a coward, I was scared of her.

Q. Then what happened? You opened the closet door; did you do anything?

A. I would loosen his hands and he would lie on the floor.

Q. He would drop to the floor from being exhausted from standing up all day; right?

A. Yes.

Q. Was he fat or skinny?

A. He was very skinny.

Q. What would happen after you untied him?

A. He would lie down on the floor and he'd stay looking toward the wall, and she would come and she would hit him with the feet against the head. So he turned against the wall so he wouldn't turn his head.

Q. Was Lazaro ever fed at the Piloto house?

A. Very few times. At those times, I gave him food. Those are the times when I gave him food.

Q. How often would you give Lazaro food at the Piloto house?

A. On Sunday when I would be home.

Q. Did you ever see the defendant feed him at the Piloto house?

A. Sometimes she'd do it. She would force him to eat fast, and since he wouldn't eat fast, she would break the dish over his head.

Olivia only remembers hitting Lazaro once during their stay at the Piloto's. The defendant had taken Lazaro out of the closet and he began to scream, so Olivia hit him once on the lower legs with a bat to scare him into being quiet. (R. 2884). The defendant, on the other hand, beat Lazaro regularly with the bat whenever she had to clean or bathe him. She hit him regularly on the arms and head with the bat starting from the time they moved in; ". . . every time she would see him, she would hit him. She wanted to kill him." (R. 2885). One time she beat him on the left arm with the bat, and Lazaro's whole arm turned black. (R. 2887). On another occasion the defendant opened up a hole on the side of Lazaro's head with a blow from the bat. (R. 2888). She stuck her fingers in his eyes and bit his fingernails, and she would instruct Olivia to do the same, even placing Lazaro's hand in Olivia's mouth. "She would laugh. She enjoyed that." (R. 2889).

The defendant smashed Lazaro's toes with the bat, causing his toenail to fall off. These beatings occurred whenever the defendant had to change Lazaro. (Id). The defendant's idea of bathing Lazaro was to put him in the tub with the hot water running. (Id). When he cried, the defendant would choke him until he stopped, as was her way. (R. 2890). The defendant beat Lazaro regularly on the legs and feet with the bat. (R. 2892):

In October of 1990 Lazaro's months in solitary confinement were drawing to their merciful end, his ticket to freedom almost in hand. On the last day of October the defendant ". . . got pissed off and hit him with a bat over the head." (R. 2897). The defendant had taken him out to bathe him "because he had been days without bathing. He smelled bad." Nor had he been changed during that time. (R. 2898). It had taken days, but his feces and urine had finally got the better of the adhesive tape. The defendant ordered Lazaro to take the diaper off himself, and while he fumbled she took the bat and slammed it into the top of his head, splitting it open. (R. 2899). Olivia took the bat away and put "mercury" on the wound. The defendant was conscious and crying, so of course the defendant choked him, then put him back in the closet. This was at 6:00 or 7:00 p.m. on October 30th, 1990. (R. 2900).

When Olivia returned home from work the next day, Monday, November 1st, she opened up the closet door. Lazaro started

screaming when he saw the defendant coming up behind Olivia. Olivia picked up the bat and tried to threaten Lazaro into being quiet. At that point the defendant grabbed the bat, and Olivia left the room thinking the defendant was going to bind and gag Lazaro and put him back in the closet. (R. 2901). When Olivia returned from taking a shower, the defendant told her "I believe I killed him." ((Id)). Lazaro was lying on his back in the closet, a piece of paper jammed in his mouth. Olivia tried to revive him with water and alcohol, but to no avail. Lazaro Figueroa was free at last.

The defendant put more tape around Lazaro's unchanged pamper, dressed him and wrapped him in a sheet and told Olivia they had ". . . to dump him.'" (R. 2902). Olivia told the defendant they should take him to the hospital, but the defendant responded that Olivia was either crazy or a snitch. Olivia was terrified, both by the situation and by the defendant. The defendant took Lazaro to the car, and Olivia got in and just started driving. Olivia stopped near a house on Alton Drive, in Miami Beach, and the defendant got out and put Lazaro in the bushes. (R. 2902).

After hearing of the discovery of Lazaro's body on the news, the defendant and Olivia fled to Orlando with Taime and J., stayed a few days at a Holiday Inn, then returned as a group to Miami to borrow money. (R. 2914-16). Olivia was afraid



to leave the defendant, that the defendant would come after her if she left. After obtaining money they drove to the town of St. Cloud and rented a hotel room. (R. 2917). Olivia got a job in St. Cloud, and enrolled J. in school there.

A few weeks later Olivia and the defendant went to pick up J. after school, and Detective Schiaffo of the Miami Beach Police was waiting for them. He showed them a picture of Lazaro, and the defendant told Schiaffo it was her son Lazaro, and that she had left him with a babysitter four months ago. (R. 2920). Olivia then told Schiaffo the same thing. At the police station she heard the defendant tell the police that she had given Lazaro to a rich woman in a restaurant in Hialeah. Olivia then tried to tell Schiaffo the same story, but he did not believe her. He told her it would be better for her if she told the truth. (R. 2923). The defendant and Olivia were still together at this point, and the defendant told Olivia to say nothing about the beatings, so the police would not believe she killed her son. (R. 2924).

Olivia was questioned several times. Her next story was that Lazaro fell off the bed, and they took him to Miami Beach to find a rich person to take care of him. (R. 2926). Olivia was telling Schiaffo what the defendant told her to say. She was trying to protect the defendant, and also afraid that the defendant might turn around and try and blame everything on

Olivia. (R. 2928). She was also physically afraid of the defendant, who had stabbed her in the hand on one occasion, requiring twelve stitches. (R. 2929).

Olivia made a prior statement that although she doesn't remember doing it, it is possible she also hit Lazaro on the head with the bat while totally intoxicated. However, this idea came from the interviewers, and she is certain she never did any such thing. (R. 2933, 34).

In her deposition, Olivia had admitted to hitting Lazaro with a broom stick, hitting him five times with a bat, and pushing him against a door, causing a cut on his lip. (R. 2985, 86). In a statement to Brian Slattery, actually her third statement to Slattery, she did tell him she hit Lazaro on the head with the bat, but she was talking about over two months before his death, when she hit him on the feet with the bat and may have hit his head in the process. (R. 2981, 2991-2993). She did not hit him with the bat in the last two months of his life, that was done solely by the defendant.

#### Other Guilt Phase Witnesses

Numerous other witnesses testified at the guilt phase, and the State would summarize their testimony as follows, in the order in which they testified.

Stewart Silver is an FPL employee. He discovered Lazaro's body in the bushes next to the driveway of a large home on Miami Beach. He discovered the body at 8:30 a.m., November 2, 1990. (R. 2289). Craig Kriminger was his partner, who was with him when he found the body. Lydia Shows is a crime scene technician who helped process the crime scene, i.e., where the body was discovered. (R. 2303). William Sampson is a crime scene investigator and helped the processing of the scene, in particular the process of supergluing Lazaro's body for fingerprints. (R. 2313). This process was unsuccessful. (R. 2315).

Detective Roland Vas was a homicide detective. He testified concerning the murder of Lazaro's father, Fidel Figueroa, a.k.a. Anthony Madrigal. (R. 2318). At that time the defendant, Fidel's girlfriend, was within a month of giving birth. Dr. Michael Hass, a DNA specialist, used the autopsy blood of Fidel and blood from the defendant and Lazaro to establish that Fidel and the defendant were Lazaro's parents. (R. 2327). Tina Diaz presented medical records showing that Lazaro was born to the defendant at Hialeah Hospital on October 18, 1987. (R. 2334). Juan Arruabarrema presented records of Lazaro from Miami Childrens Hospital. (R. 2336). Maria Guiterrez presented the records of Lazaro from the McLamore Shelter for Abused and Neglected Children. (R. 2338).

Luzmary Arboleda worked as a nanny for the defendant prior to and after Lazaro's birth, during which time the defendant lived at the Charter House Apartments. (R. 2341). Arboleda left when Lazaro was a month old, and saw no abuse. (R. 2342). Leandro Fleitas was Fidel Figueroa's cousin, who stayed at Fidel and the defendant's luxury apartment at the Charter House in June of 1987, when the defendant was pregnant with Lazaro. The defendant, Fidel, J. and T. lived very well, and had many luxuries. (R. 2347). Fidel was murdered in September of 1987 and Lazaro was born the next month. The maid took care of baby Lazaro, doing all the feeding, etc. When the baby was a month old the defendant moved to a house in Kendall. The defendant was supporting herself and the children with the more than \$100,000.00 left after Fidel's death. (R. 2350). In approximately May of 1988, the defendant left baby Lazaro and his sister T. with Mr. Fleitas for about a month. Lazaro was a happy, beautiful baby at this time (R. 2351); "Fine, fine. He was very alert." The defendant picked up her children after a month. When Lazaro was first dropped off at the Fleitas, he seemed very hungry, ". . . he would eat like he was desperately hungry." Lazaro seemed to blossom while with the Fleitas. (R. 2356).

Fleitas' wife Marta then testified that when Lazaro was dropped off he was small for his age and ". . . was very under-nourished." (R. 2360), "very thin" (R. 2361). Marta wanted to

take Lazaro to the doctor because he was so thin, and she kept trying to reach the defendant to get Lazaro's papers. When Marta finally tracked down the defendant and told her she needed Lazaro's papers to take him to the doctor, the defendant responded by taking back Lazaro, as well as T. (R. 2362).

When Lazaro was staying with the Fleitas, the defendant had come by with clothing and food for the girl, T. (R. 2367).

Carlos Lima had met the defendant through a friend, and babysat for the defendant's children in **1988**, at first about one time a week. (R. 2371). He babysat for the children at the defendant's Kendall home. At the beginning he was paid, but then the defendant, who was not working, ran out of money and was evicted from the house in Kendall. At that point he took baby Lazaro and T. home with him. He thought he was going to be looking after them for a few weeks until the defendant got back on her feet. It turned out that Lima and his wife took care of Lazaro and T. for a six month period, though during part of this time the children stayed with friend Susie Fernandez. (R. 2374).

Lima had to communicate with the defendant via her beeper. Lazaro was a very healthy, happy, bouncy little six month old in the Summer of **1988**, "he was adorable." (R. 2376). During this period Susie Fernandez, a good friend, helped care for the children and kept them at her house as well. (R. 2377).

Fernandez and Lima juggled the role of parents for Lazaro and T. After a while Lima and Fernandez decided it was best to take the children to HRS, because "the mother was nowhere to be found." (R. 2378). HRS gave Lima the children back to care for while they investigated the defendant. At this time, "little Lazaro was, you know, a chubby little baby." (R. 2380). HRS eventually told Lima to give Lazaro and T. back to the defendant, and he did. The defendant favored T. over Lazaro. (R. 2357). When the defendant was at the house in Kendall, there were other adults present besides the defendant, who helped care for the children.

Susie Hernandez met the defendant while she was pregnant with Lazaro. One day in July of 1988 the defendant brought Lazaro and T. over, presumably for the weekend. Monday rolled around, and the defendant was a no-show. Hernandez and her husband had the children for the next month and a half. (R. 2393). Carlos Lima helped the Hernandez care for the children. After repeated unsuccessful efforts to reach the defendant, they finally called HRS. (R. 2393). Lazaro was with Carlos Lima in October, 1988, while HRS did their investigation. On October 17th they had a nice party to celebrate Lazaro's first birthday. Susie pawned her cross to buy a nice outfit for Lazaro. Thirteen days later, HRS ordered the return of Lazaro to the defendant. (R. 2394).

Susie ". . . loved Lazarito very much, like a son." (R. 2395), and she visited him afterwards at the defendant's apartment in Hialeah; "I would go see how he's doing. I worry about him." (Id). She used to bring food to the defendant's apartment for Lazaro. She would pick up Lazaro and bring him to her house, and Lazaro spent Christmas of 1988 at Susie's house. In January of 1989 the defendant moved and Susie could not locate her. She never saw Lazaro again. (R. 2396, 97).

Thomas Fritzpatrick is a Hialeah police officer with the child abandonment unit, to whom Susie Hernandez turned over Lazaro and T. in September of 1988 (9/13/88). He turned them over to HRS. (R. 2408).

Iris Calero was the HRS "Protective Services Counsel." (R. 2410). Her limited role was to counsel the parent, i.e., the defendant, and in this regard she saw the defendant twice, in December of 1988. The defendant moved shortly thereafter and Calero never saw her again. (R. 2417, 18).

Denise Galvez was the defendant's and Olivia's neighbor in Hialeah in the Spring of 1989. She would see J. and Taimé occasionally. She saw Lazaro only once, and when she saw his legs she thought there was something wrong because he had trouble walking. Denise told the defendant to take him to an orthopedic doctor. The defendant did not seem receptive to her advice. (R.

242). Denise was the defendant's neighbor for three or four months.

Georgina Calero rented an apartment to Olivia in February, 1989. The defendant and her three children were also there. She never saw Lazaro, the littlest one, playing outside. She only saw Lazaro once. The defendant was carrying him, wrapped in a sheet. (R. 2441). Olivia and the defendant were evicted because they had loud arguments between them.

Lorenzo Pons took in the defendant, Olivia and children into his home after the eviction by Calero, described immediately above. (R. 2453). Pons lived with Reynaldo Rodriguez in a trailer. During the day the defendant kept Lazaro locked up in the bedroom. (R. 2456), while J. went to school and [REDACTED] played outside. Lazaro was confined to the bed **by** the defendant, in a prone position, except when being fed or cleaned. (R. 2457). One day Lazaro threw Olivia's hat collection on the floor, and Olivia tossed Lazaro onto the bed. She did not hit him. (R. 248). That was the only time he saw Olivia **do** anything concerning Lazaro. He saw the defendant hit Lazaro twice, hard. (R. 2459). Once was because Lazaro had come outside. She did not want Lazaro to come outside. They were hard blows with her hand. When Lazaro tried to come outside **the** defendant would scream at him. It was "as if he were a puppy or something." (R. 2463). On the second occasion, Pons saw the defendant beat



Lazaro repeatedly with a shoe, again because he tried to come outside. (R. 2464). Pons never saw Olivia hit Lazaro. (R. 2465).

One time Pons found Lazaro alone and dirty, so he took him to a neighbor, Zoila, to bathe. After the bath he saw that Lazaro had bumps on his head that were sensitive to touch, and two adult size bite marks on his back. (R. 2467). The defendant is very masculine, ". . . she strong, also; very strong." (R. 2469). On cross when asked why he did nothing about the beatings, he replied "I took it as her character, as if it was something normal coming from her." (R. 2471, 72). The defendant was stronger than Olivia. (R. 2474). It seemed that the defendant was feeding Lazaro well. (R. 2478, 79).

Migaly Alvarez was a neighbor of Pons, who let Alvarez into the bedroom to visit Lazaro. When she walked **up** to the bed, Lazaro acted afraid and took a defensive posture. (R. 2491). She was present when Zoila gave Lazaro a bath. He had scars on his head that were painful, and ". . . on his back, his back he had beatings and a bite, some big bites, as -- bruises, as if they were bites." (R. 2491). Lazaro did not seem malnourished. (R. 2499). Lazaro's fingernails were bitten and black, as if they had been crushed. (R. 2503).

Manuel Fleitas was a relative of Fidel's who stayed at both the defendant's Charter House apartment and the house in

Kendall. During that time Lazaro was not there, rather the defendant had given Lazaro to her god child, Nika, to care for him. Manuel would pick Lazaro up for a day or two, then return him to Nika. (R. 2509). During Manuel's eight months living with the defendant, she was never alone with Lazaro." She didn't have time" for him. (R. 2510). Lazaro looked exactly like his dead father Fidel.

Sandra Ruggles worked at the Olympia Hotel. The defendant stayed there a month. She saw the defendant walk through the lobby dragging Lazaro by the arm. His diaper was soiled and he was dirty. (R. 2528, 29). Fred Quintero was a maintenance man at the Olympia. He had to enter the defendant's room several times, and saw that Lazaro was always kept standing in a corner. (R. 2541). Lazaro appeared afraid and underfed. (R. 2545). "All he had was a layer of skin over bones on him . . . he had just a layer of skin on him." (R. 2546). On two or three occasions she saw the defendant belt Lazaro with her hand. "It wasn't a controlled hit." (Id). Whenever the defendant walked with Lazaro, she dragged him by his left arm. Quintero's wife, Graciela, saw the defendant with Lazaro on two occasions. Both times his pamper was totally overloaded and both times she saw ". . . the pulling, the yelling at the child, the pulling and the dragging, literally dragging of the child. (R. 2559).

Anselmo Lopez was a neighbor of the defendant's in the Summer of 1989. He looked after Lazaro one time for a few hours. He was thin and had dirty diapers; "so what I noticed, the kid was sick for attention, he was lonely. He would put his hands to me, and he was in bed." (R. 2566). Lazaro's diapers were always soiled with excrement, sometimes wrapped in duct tape. (R. 2573). Lazaro was skinny and seemed slow. (R. 2574). He never saw the defendant give Lazaro any attention. One time when Lazaro was crying, she heard the defendant say "I wish you were never born," (R. 2577). She was always screaming at him and threatening him, and kept him on the bed almost all the time. (R. 2577). The defendant and Olivia fought alot, and the defendant seemed in control of the relationship. (R. 2578). One time the defendant stabbed Olivia in the hand during a fight. (R. 2579). He saw Olivia hit Lazaro once, with a sandal on his pamper. (R. 2586).

Carlos Fernandez was the manager of the Ocean Palm hotel. He had most of his contact with Olivia, who paid the rent. On one occasion he got a complaint of a baby crying. He went to the room, heard the crying, got no response to his knocking and decided to go inside. (R. 2591). Lazaro was in the bathtub crying. As soon as Lazaro saw him Lazaro jerked back and raised up his hands, almost falling down. The crying had lasted two or three hours before Fernandez entered. Lazaro had on only a soiled diaper. (R. 2592). The child's mouth was white and dried out and he was hysterical, so Fernandez called the police, after

which he cleaned and washed Lazaro. Lazaro's dirty bottle was on the floor, so Fernandez gave him some water.

Officer Christine James responded to the apartment. Lazaro was in the bathtub crying. He had a soiled diaper, but had no visible signs of abuse. Ofc. James called HRS who advised they were sending an agent over that night. (R. 2599). When the defendant returned, Ofc. James was advised by HRS to leave Lazaro with his mother if everything seemed okay. It did, so Ofc. James departed. (R. 2600).

Carla Ventrano and her husband were staying at the Olympia in August of 1989. She had occasion to visit the defendant and Olivia in their room. Lazaro was kept on the bed and not allowed to get off. (R. 2608). A few nights later Carla's husband got arrested. She had no money to stay another night, and Olivia and the defendant allowed her to spend the night with them. J. was allowed to run around and do whatever he wanted. T. was given alot of affection by the defendant. As for twenty-two month old Lazaro:

A. The only interaction that I did see, I would see him get punched with her fist in the back, I would see her pull his hair to sit him down, I would see -- I saw on one occasion where she put him in the bathroom and the lights were off and the shower was on and he was screaming, and the one time that I did see him eat, I saw he had to stand there with his hands behind his back, and it appeared to me he had to open his mouth as wide as he could so he wouldn't drop anything.

Q. Do you remember what meal that was that she fed him there?

A. I know it was rice?

(R. 2613).

If Lazaro stood up on the bed, the defendant would punch him as an adult would punch another adult. (R. 2614). This occurred several times; "The hitting and the type of treatment I described to you wasn't on one occasion, it was the entire time I was there that I noticed this. (R. 2615). She did not see Olivia mistreat Lazaro, although J. and T [REDACTED] hit him, which the defendant saw but did nothing to stop. Lazaro was " . . . very, very slim, skinny." (R. 2617). After she left their apartment, Carla called HRS. (R. 2619).

Elizabeth Pastor had known the defendant since childhood. She and the defendant used to do cocaine together regularly. After Fidel died, she visited the defendant at the house in Kendall. (R. 2637). Lazaro was a small baby, and was being taken care of by Irasema, not the defendant. The defendant and Olivia came to Pastor's home on several occasions, usually to eat. the defendant would not want to bring Lazaro into the house from the car. Lazaro had clear signs of beatings, including bruises to his eyes, chin and arm. The defendant said he got the injuries falling on the playground. (R. 264). Lazaro was quiet and sad, listless (Id). Lazaro was dirty, "he was always full of like snot and so forth." (R. 2646). He was very thin.

Joseph Ventrano is Carla's husband. He visited the defendant's room at the Olympia. Lazaro was not allowed off the bed, not even allowed to move. (R. 2658). He saw the defendant yank Lazaro by the arm and punch him in the back. He visited the room a second time, and saw the defendant give Lazaro the same treatment;" He wanted to play, you know, like little kids do. The mother would grab him, slap him, punch him. It was pretty bad." (R. 2660). Lazaro was very thin. Olivia also hit Lazaro, but not like the defenant. One time Ventrano's little son was put on the bed. The little Ventrano started to bite Lazaro so Carla started to grab her own son, but the defendant said "Let him go. No, let him go." (R. 2662). Lazaro was sometimes shut up in the bathroom as well as a closet.

Jose Calderon also visited the defendant's room at the Olympia. Lazaro was kept wrapped in a sheet on the bed. When the defendant fed Lazaro he had to put his hands behind his back, while she literally shoved the food into his mouth. (R. 2678). The defendant was constantly hitting Lazaro all over his body, with a belt and her hand. (Id). The defendant would tell Lazaro he looked like his father (Fidel), and she would say "why were you born?" to him. (R. 2679). Calderon saw Olivia spank Lazaro once on the pampers. He witnessed the fight where Olivia was stabbed in the hand by the defendant. Olivia spent more time with the children than the defendant. (R. 2683). Olivia said she

could not ". . . hack that kind of life anymore." Olivia was afraid of the defendant.

Alba Piloto owned the apartment where Lazaro spent the last two months of his life, September and October **of** 1990. The apartment is really the back part of her house. She supposedly rented it to Olivia, Olivia's "sister" Ana, and Ana's two children. (R. 2701). Olivia worked and Ana, the defendant, stayed home with J. and T. Piloto knew nothing of Lazaro.

Officer Steven Evans took photographs of the Piloto apartment including a possible baseball bat mark on the wall of the bedroom closet. (R. 2728).

Hilda Piloto is **Alba's** daughter. She never knew of Lazaro's existence. She assumed the crying she heard was from **T** (R. 2735).

James Garbarino is the President of the Erickson Institute for Advanced Study **of** Child Development, located in Chicago, Illinois. This is a graduate school and research center for child development. He specializes in child abuse, and has done **so** for twenty years. The term "child abuse syndrome" refers to a pattern of abuse by a parent against their child. (R. 2748). Lazaro's injuries are consistent with a pattern of continuous child abuse. (R. 2749). He did not interview the defendant or

Olivia, and cannot offer a particular diagnosis but rather will provide information concerning research findings and other pertinent information in the special field of child abuse. (R. 2750).

It is possible that a child could become a victim of the child abuse syndrome even though his siblings are treated normally; "It is plausible." (R. 2751). When a parent and child are mostly separated during its first year, the resulting lack of proper bonding is a risk factor for abuse. When the parent associates the child's birth with a major negative event in the parent's life, that is a risk factor. If the parent comes to blame the child for the negative event, the risk factor is increased. (R. 2752). The fact that the defendant called Lazaro "mal nacido," bad birth, indicates this risk factor is probably present. This could explain why he was singled out for abuse. Having a negative definition of the child from birth is definitely a negative risk factor.

Most cases of serious abuse begin with minor mistreatment and escalate over time. The abuser becomes desensitized over time. (R. 2753). It is very common for abuse to center around the parental duties of changing and feeding. One of the strongest negative risk indicators is lack of early bonding, as mentioned above. (R. 2754). The sole purpose of his testimony is to identify factors, generally, that might explain the abuse of



only one child from a group of siblings. (R. 2755). He attempted no diagnosis of abuse in this case.

Dr. Merry Haber is Olivia Gonzalez' clinical psychologist, originally retained by Olivia's attorney. Olivia has a dependant personality disorder, meaning she needs to be dependent on a strong figure, and will constantly seek approval from that figure. Olivia also suffers from battered spouse syndrome relative to the defendant. (R. 3027). Olivia had a very destructive, negative relationship with the defendant but did not have the ability to get out. The defendant had become Olivia's whole life. (R. 3028). She "emotionally, physically, sexually and psychologically was dependent on Ana." (R. 3029). Olivia's dependent personality was the catalyst in her becoming a victim of battered spouse syndrome.

Several factors kept Olivia from leaving. The defendant threatened to reveal Olivia's lesbianism to her mother. The defendant also gave Olivia positive reinforcement through acceptance and especially sex. Olivia felt she was ugly and the defendant beautiful, and that she could never find another so desireable. (R. 3031). Olivia felt she was inadequate, and having the defendant as a lover eased these feelings. Dr. Haber's opinion was that Olivia, who had no prior history of being abused or abusive to others, did so with Lazaro to please and obtain affection from the defendant. (R. 3034).

Lucille Ross recovered a baseball bat from the defendant's hotel room in St. Cloud, after the murder. (R. 3049). George Borgi matched this bat to the indentation in the closet wall at the Piloto's apartment. (R. 3056).

Theresa Merritt works in the crime laboratory, and she matched a hair she removed from a skillet (found in the St. Cloud hotel room) to a hair taken from Lazaro during the autopsy. (R. 3082). There was no human tissue, other than the single hair, on the skillet. (R. 3084).

Detective Edward Santiago acted as interpreter for Detective Schiaffo when they questioned the defendant and Olivia in St. Cloud. He read the defendant her rights. (R. 3093). The defendant's first story is that she gave Lazaro to a rich woman in a Cuban restaurant, because she had no money or job. (R. 3097). Olivia had told him it was a Burger King. Three or four hours later the defendant changed her story. (R. 3099). This time she said Lazaro fell off the bed and hit his head on the tile floor (R. 3107), after which she could not revive him.

The tape recording of this second statement was played for the jury, beginning at R. 3126. The defendant stated basically that she loved Lazaro a lot, that she tried to revive him after he hit his head on the tile. She was afraid to call

the police or take him to the hospital because she did not want to lose her other children. "I loved Lazaro more than my life. I wanted the best for him." (R. 3130). She left him on a doorstep "so that they can do something for him." (R. 3134). It was her decision to leave him there. They left him at a rich house, where they could see him. (R. 3138). Lazaro was still alive. "It was all an accident." (R. 3144). Lazaro's teeth fell out by themselves, and there was nothing wrong with his arm. (R. 3146). He had hurt his leg jumping up and down. He had lots to eat.

Det. Gary Schiaffo was the lead investigator. (R. 3161). His testimony mirrored that of Det. Santiago.

The State's last witness was the medical examiner, whose testimony is summarized above. The defense rested without calling any witnesses. (R. 3318).

#### Penalty Phase

The State presented the testimony of the medical examiner as the only evidence in its case in chief.

Dr. Bruce Hyma

The injuries to Lazaro's left arm would produce "excruciating pain." The process that turned muscle to bone "would entrap nerve fibers and entrapped nerve fibers will cause the sensations of pain and its a searing pain, it's a strong pain that would go on for months and months until to a point where the nerves would no longer be living." (R. 3525). The injuries that caused the knot on his forehead would have caused "a severe pain." (R. 3526). The months old subdural hematoma would have caused "excruciating throbbing headaches. One I can't even imagine myself." (R. 3527). The injuries to his left knee also entrapped nerves, with continuous searing pain until the nerves died. The swelling around the brain would have caused "severe, severe headaches, excruciating headache." (R. 3528).

The burn on his face would have caused intense pain. The pressure sore on his ear exposed the nerves and caused a throbbing pain. The open wound on the scalp would be "throbbing and very painful." (R. 3529). Every head movement would be painful. Lazaro's teeth were ripped out, exposing the raw nerve endings. It would be the same as the dentist pulling teeth without anesthetic. The healing process would be very painful. The injuries to his chest wall and left shoulder crushed nerves and caused throbbing pain. (R. 3531). The damage to his toe and fingernails would produce pain "that is very excruciating and painful." (Id).

As for the days old skull fracture, "there isn't any word I can describe what kind of headache that a conscious person would experience with a skull fracture such as this." (R. 3532). The blood clots would push against the brain and cause severe pain.

The splintered fracture to Lazaro's right arm would cause a throbbing, excruciating pain that would continue until the bone is properly set and healed. (R. 3533). The injuries to his swollen left leg would cause throbbing pain. The trauma to his buttock would be very painful. Dr. Hyma concluded with the following overall assessment:

I have been a medical examiner for five years. I have been a doctor for ten years. I have never seen this kind of torture before. This is the worst case of child abuse that I have seen in my short five years as a medical examiner. I have had the opportunity to investigate and autopsy other children that have been victims of child abuse but I have never seen the repeated chronic nature of injuries such as I have seen with Lazaro. This is like I said, this is the worst case that I have seen of this type of human torture in my career. (R. 3534, 35).

The State then rested, and the defendant called the following witnesses:

Dr. Alex Azan

Dr. Azan is a psychologist who administered the MMPI personality test to the defendant. The defendant scored in the invalid range, meaning it did not render a reliable accounting of her personality. (R. 3552-54). Dr. Azan attributes this to the stresses of imprisonment. Her scores on the "scale 8 and scale 6" indicate an individual with severe emotional problems and confusion, with feelings of inferiority, insecurity and low self-esteem (R. 3556), possibly violent or suicidal. Her score on depression was higher than normal, as was her score on "persecutory ideas." All her scores were effected by her incarceration. (R. 3558). She did not appear schizophrenic. (R. 3559). The test is only valid for the date the test is administered, in this case February 29, 1992.

At this juncture the State called its first rebuttal witness out-of-turn:

Dr. Anastacio Castiello

Dr. Castiello is a forensic psychiatrist. During his interview of the defendant she was cooperative but not "spontaneous," meaning she was not answering "in good faith." (R. 3571). As to her background, she stated she was an only child raised by her mother, having never met her father. She dropped

out of school in fourth grade because it was in a bad neighborhood. She has never had a job or attempted to obtain one. (R. 3573). Her mother took her to a psychiatric hospital when she was sixteen (no explanation why). She tried to kill herself, then successfully escaped. Her mother then tried to get her to take pills. She had abused cocaine, including crack, as well as quaaludes during the past five years. Her mother urged her to come to the United States twelve years ago. (R. 3574). She has three living children, and was married once.

At the time of the (pretrial) interview, she denied any knowledge of charges or why she was incarcerated. When Castiello said he did not believe her, she admitted she was accused of killing her own baby. (R. 3577). When asked whether she seemed to be giving honest answers, he stated ". . . respond[ed] with tangents, vague answers and not being straightforward or clear or to the point." (Id). He had to ask three times to get a straight answer.

The defendant denied killing anyone, and theorized that Olivia must have beat the child to death. (R. 3579). The defendant said she was under the influence of Olivia, and had done nothing wrong. She claimed to have numerous symptoms of mental illness, but he saw no evidence of mental illness. (R. 3580). The defendant claimed auditory and visual hallucinations, and tried to convey the impression she was severely mentally

disturbed. Dr. Castiello was not buying it; "I think the word malingering would apply. She was definitely attempting to appear in some sort of distress that in my opinion she was not." (R. 3594). The entire pattern of the interview indicated malingering. (R. 3585). The defendant was "very much aware of her situation and she was attempting to impress me that she had some serious mental problems." (R. 3586).

The defendant has a severe personality disorder. She has what's known as *ANTISOCIAL PERSONALITY*. (R. 3587). Basically, she makes up her own rules and does whatever she wants, whenever she wants. This disorder is within her conscious control. She is not schizophrenic. He cannot estimate her mental state during her mistreatment of Lazaro because she denied any mistreatment. She has low average intelligence, and her insight and judgment are inadequate. (R. 3597).

The defendant then called his second and last witness:

Dr. Dorita Marina

Dr. Marina is a psychologist. The defendant stated she did not meet her father until she was twelve, when she met him by accident. (R. 3630). She met him several more times, but he did not seem to care about her. When her mother told her father she had been raped at age eleven, her father did not get upset.



According to the defendant, a female friend of her mother had oral sex with the defendant while babysitting her, and on two subsequent occasions. Her mother refused to believe the defendant's allegations. (R. 3631). The defendant loved her mother but resented her refusal to believe the rape allegations. Her mother worked as a prostitute at night and left the defendant alone, and the defendant felt abandoned.

The defendant moved in with an aunt shortly after the alleged rapes, but the uncle acted in a sexually provocative way toward her. She went to live at a school during the week and spent weekends with her mother. Her mother removed her from the school when she developed head lice and an eye infection. The mother had two long-term boyfriends but neither acted as a father for the defendant. (R. 3634). The defendant has severe emotional problems from her childhood, and has "trembling on the upper part of her body and her legs are constantly shaking back and forth." (R. 3635). She feels rejected and abandoned. Children who are abused frequently become abusive parents. The defendant suffers from the victimization profile.

The defendant scored at the top of the retarded range on the Wechsler I.Q. test (67 verbal score), but she is not retarded. (R. 3637). She is most likely in the borderline range, but could be as high as average. Although her **MMPI** results are in the invalid range, Marina finds her high scores on

schizophrenia and paranoia to be significant. Marina believes the defendant's Rorschach test results are the most significant of all. (R. 3640). She believes this test is foolproof, i.e., malingering resistant. The defendant had a positive score for schizophrenia on the test. The test shows she has ". . . very, very serious problems in thinking.'" (R. 3641). Her emotions distort her thought processes so she uses bad judgment. She has a "deficient in perceptual accuracy" which can cause delusions and hallucinations. This also causes antisocial behavior.

The defendant is a dependent, immature person who cannot make decisions, and hates to have to do so. She cannot control her behavior or use good judgment. (R. 3648). She gets flooded with emotion under stress and makes bad decisions. She is stressed out, disorganized, impulsive in thinking and vulnerable. She views herself in a negative light, and is pessimistic. She is depressed and suicidal. (R. 3651). She is inept at relationships and has trouble making physical contact. This is consistent with a sexually or physically abused childhood.

The defendant's ability to appreciate the criminality of her conduct is impaired substantially (R. 3652), as is her ability to appreciate the requirements of law. She was acting "in a State of extreme duress" when she abused Lazaro, and was under the influence of an extreme mental or emotional disturbance. (R. 3653).

On cross-examination she stated that during her eight years in forensic psychology she has been listed as a State witness three times (R. 3659). She told the defendant whatever the defendant said would be used for her benefit, or not at all. Marina has no independent evidence to corroborate *ANYTHING* the defendant told her. **MARINA HAS NOT REVIEWED ANY OF THE EVIDENCE IN THE CASE.** (R. 3661). She relied on her interview and test results. She sought no confirmation. She did not ask the defendant why her mother would tell her father, at the accidental meeting, about an alleged rape the mother did not believe occurred. (R. 3663).

The defendant told her she went to prison in Cuba for a Light, but that she had actually done nothing wrong and was falsely accused. (R. 3664).

On the intelligence test, the defendant said that a ball was square and that there were ninety months in a year. Even Marina thought the defendant was being less than candid about that (R. 3666). Marina wrote that the test results were "*SPURIOUSLY LOW*" (emphasis added). (R. 3667). But spuriously doesn't mean false to Marina: "No. It means doubtfully. That's how I use it." (R. 3667). Marina never spoke with Dr. Azan, who administered the MMPI. She did not consider malingering as a source of the defendant's MMPI results. (R. 3671).

The defendant told Marina that she was so drugged up she could not stop Olivia from beating Lazaro. (R. 3681). Marina believed the defendant's assertion that she was high around the clock. *MARINA DOESN'T KNOW ANYTHING ABOUT THE DEFENDANT'S OTHER TWO CHILDREN* (emphasis added). (R. 3683). The defendant told her she couldn't make it through the day without smoking marijuana. Marina doesn't care that the evidence shows no marijuana use; "No. Because this is how she perceived it." (R. 3685). The defendant denied abusing Lazaro.

The State then continued its rebuttal case by calling Dr. Garcia:

Dr. Lazaro Garcia

Dr. Garcia is a psychologist. He reviewed various reports and then interviewed and evaluated the defendant. The defendant did not put her "best effort" into the intelligence test. (R. 3711). Garcia estimate she is low average to borderline. The defendant understood perfectly what the proper role of a caring mother entailed. (R. 3714). Her Bender results were coherent and organized, ". . . basically a very good Bender. (R. 3715).

The defendant reported that she supported herself as a prostitute after coming to America in 1980, doing quite well

within the subculture she belonged to (R. 3716). She made some \$350.00 a day, and would charge up to \$400.00 for group sex with men and woman. (R. 3717). She claimed to average \$2,000.00 a week. The defendant was bisexual and very promiscuous, and liked threesomes. (R. 3718). She had no problem relating her sexual exploits ". . . in a very casual manner." (Id). She reported going to a hospital in Cuba at age 16, following a suicide attempt. (R. 3719).

Garcia found the defendant had normal thought processes, and was always ". . . coherent and relevant." (R. 3721). She was goal oriented, neither shaky or tangential. He concluded "so everything was pretty within normal limits. All the findings were within normal limits. (R. 3722). She has no major mental illness." (R. 3723).

The defendant has an antisocial personality disorder. She does whatever she wants, with her main concern avoiding punishment. Me, me, me is the ". . . essence of the disorder." (Id). When asked about Lazaro's death, all she wanted to do was blame somebody else. (R. 3724). She was the real victim, falsely accused. She did not abuse Lazaro, rather she was too stoned to stop Olivia from doing so. Garcia noted "she has **the** ability to lie." (R. 3727).

Neither of the two statutory mental health mitigators apply to the defendant. (R. 3731). Gonzalez is not sure whether Olivia or the defendant was dominant, but the defendant certainly could have left the relationship if she wanted to. (R. 3744).

Dr. Gary Schwartz

Dr. Schwartz is a psychologist. He conducted a three hour competency evaluation of the defendant. There were no indication of schizophrenia or major mental disorder, "none whatsoever." (R. 3749). The defendant was malingering ("faking") on parts of the intelligence test. Neither of the two statutory mitigators are applicable to her. (R. 3751).

ISSUES PRESENTED

I.

WHETHER THE JURORS ARE REQUIRED TO REACH A SPECIFIC VERDICT AS TO PREMEDITATED MURDER OR FELONY MURDER, AND WHETHER THE ISSUE IS PRESERVED.

II.

WHETHER THE TRIAL COURT SHOULD HAVE SUA SPONTE SEVERED THE TWO COUNTS.

III.

WHETHER THE JURY CHARGES AS A WHOLE WERE IMPROPER, AND WHETHER THIS ISSUE IS PRESERVED.

IV.

WHETHER THE TRIAL COURT ERRED IN REFUSING TO GIVE A WILLIAMS RULE INSTRUCTION.

V.

WHETHER THE PROSECUTOR ASKED IMPROPER QUESTIONS ON VOIR DIRE, AND WHETHER THE ISSUE IS PRESERVED.

VI.

WHETHER THE HAC FACTOR IS UNCONSTITUTIONAL, AND WHETHER THE ISSUE IS PRESERVED.

VII.

WHETHER THE DEATH SENTENCE REPRESENTS DISPARATE TREATMENT.

VIII.

WHETHER THE TRIAL COURT ERRED IN REFUSING TO ADMIT A REQUEST FOR A LIFE SENTENCE FROM THE GUARDIAN OF THE DEFENDANT'S SURVIVING CHILDREN.

IX.

WHETHER THE DEATH PENALTY IS  
DISPORTIONATE.

X.

WHETHER SEPERATE GUILT AND PENALTY PHASE  
JURIES ARE REQUIRED, AND WHETHER THIS  
ISSUE IS PRESERVED.



### SUMMARY OF ARGUMENT

The defendant never requested that the jury be required to elect premeditated or felony murder, nor does the law require it. The defendant never moved to sever the two counts, and it is frivolous to suggest severance was required. The standard jury instructions, and the instruction on felony-murder, were not objected to and were proper. No Williams Rule instruction was warranted because all of the defendant's conduct toward Lazaro was wilfully done as part of a pattern of intentional torture, and fell directly under count two, aggravated child abuse. The defendant did not object to the HAC instruction or the constitutionality of this factor. The defendant did not receive disparate treatment because her co-defendant was far less culpable, as found by the trial court. The guardian's opinion, that the defendant's children would be better off if she lived, was irrelevant and properly excluded. The death penalty is not disproportionate because the torture the defendant inflicted and the pain Lazaro suffered are unprecedented, and far outweigh the weak nature of the mitigating evidence. Separate juries are not required for the guilt and penalty phases, and the defendant never requested separate juries.

As to the State's cross-appeal, the trial court should have found that the killing occurred during the course of a kidnapping. Lazara was bound, gagged and confined to a closet

during the last two months of his life, including at the time of the final, necessarily fatal beating. Whatever lawful parental authority the defendant had over Lazaro, in the custody sense, did not constitute lawful authority under the kidnapping statute. Lazaro was an unlawfully confined prisoner in every sense of the word.

## ARGUMENT

### I.

THERE IS NO REQUIREMENT FOR THE JURY TO ELECT BETWEEN PREMEDITATED AND FIRST DEGREE MURDER, AND THE ISSUE IS PROCEDURALLY BARRED.

The defendant had no objection to the jury instructions on either count (first degree murder and aggravated child abuse) (R. 3327). After the instructions were given he agreed that everything was in order as to the instructions. (R. 3446). When the jury sent a note as to whether they should indicate premeditated or felony murder, defense counsel agreed with the court's response. (R. 3415). This issue is thus procedurally barred. Additionally, as the defendant concedes, the law does not require separate verdicts for each theory of first degree murder. See Young v. State, 579 So. 2d 721 (Fla. 1991). See also Schad v. Arizona, 501 U.S. \_\_\_, 115 L.Ed.2d 555, 111 S. Ct. (1991).

### II.

THE TWO COUNTS WERE PROPERLY JOINED, AND THE ISSUE IS PROCEDURALLY BARRED.

The defendant did not move to sever the counts, and hence the issue is procedurally barred. Additionally, as the defendant concedes, where a defendant is charged with first degree felony murder, it is proper to join the underlying felony count (aggravated child abuse herein) with the first degree murder

count. That only makes sense, since the jury needs the facts of the underlying felony to determine the central element of felony murder, i.e., the defendant's guilt or innocence of the underlying felony. See State v. Enmund, 476 So. 2d 165 (Fla. 1985) (defendant properly tried, convicted and separately sentenced for both felony murder and underlying felony). It would be ridiculous to argue that the murder and aggravated child abuse herein were not "connected acts or transactions" within the joinder provisions of Fla. R. Crim. P. 3.150. The acts which constituted child abuse were identical to the acts which constituted the felony murder charge. Aggravated child abuse caused Lazaro's death. See Ellis v. State, 18 FLW S417 (Fla. July 1st, 1993) (proper joinder determined by existence of causal link between crimes charged in separate counts).

### III.

THE JURY INSTRUCTIONS TAKEN AS A WHOLE  
WERE NOT IMPROPER, AND THIS CLAIM IS  
PROCEDURALLY BARRED.

As stated under claim I, the defendant agreed to the jury instructions and hence this claim is likewise procedurally barred. The State is not sure what the defendant claims is wrong with the instructions, other than that discussed under claim I. The defendant seems to suggest that the definition of aggravated child abuse contained in the felony murder instruction should have contained the lessers for aggravated child abuse. This is a

meritless (and unpreserved) contention because the defendant cannot possibly be convicted under count I (felony murder) of anything other than first degree murder, second degree murder, third degree murder or manslaughter. Under count I if aggravated child abuse is not proven, the jury does not consider a lesser of aggravated child abuse, but rather the lesser degrees of homicide (assuming it does not find premeditated murder).

#### IV.

THE TRIAL COURT PROPERLY DENIED THE  
DEFENDANT'S REQUEST FOR A WILLIAMS RULE  
INSTRUCTION.

Throughout claims I, II and IV the defendant repeatedly asserts that behavior constituting omissions, i.e., withholding of food, refusal to seek medical attention, leaving Lazaro wallowing in his own feces, etc., cannot constitute willful torture, the essential element of child abuse under **F.S.** 827.03(1)(b). At trial the defendant made the same argument, claiming such omissions were outside the scope of the indictment and hence evidence concerning such omissions was Williams Rule evidence. The defendant relied on Jakubczak v. State, 425 So. 2d 187 (Fla. **3d** DCA). The State countered with Nicholson v. State, 579 So. 2d 816 (Fla. 1st DCA 1991), which held that omissions which are intentional, and done to inflict unnecessary pain and suffering, are covered by the definition of torture. The First District noted that the statutory definition of torture in F.S.

827.01(3) covers "every act, omission or neglect whereby unnecessary or unjustifiable pain or suffering is caused."

The Nicholson Court certified conflict with Jakubczak, and in Nicholson v. State, 600 So. 2d 1101 (Fla. 1992), this Court approved Nicholson I and held that "acts, omissions and neglect" means just what it says. If withholding of food is intentionally done, if leaving smashed skulls and splintered forearms untreated is part of an intentional plan to inflict unimaginable suffering, it constitutes torture under the Statute. The medical examiner testified Lazaro died from the entire pattern of abuse, the beatings, malnutrition, incomplete healing, etc.. Olivia testified it was all part of the defendant's objective, to make Lazaro suffer as much as possible until she was rid of him, forever. Everything the jurors heard was within the framework of the Indictment, and the fact that the trial court, in an abundance of caution, had the State delete the omission language from both counts of the indictment is irrelevant.

V.

NONE OF THE PROSECUTOR'S QUESTIONS WERE  
IMPROPER NOR WERE THEY OBJECTED TO.

None of the complained of comments were objected to and thus this claim is procedurally barred. As to the "commitment" questions (R. 1555-1569), the prosecutor is certainly entitled to

a commitment to follow the law and impose death if the aggravating outweigh the mitigating, as per the penalty phase instructions. The State was perfectly entitled to ask the jury if the nature of the crime, mother killing son, would effect them, and defense counsel was certainly listening to the answers because he moved to strike several jurors for cause who favored an automatic death penalty in that situation.

It was also totally appropriate to ask the jurors if they would hold it against the State if some persons who clearly had relevant information were nevertheless not called as witnesses by the State,

As for drug use, it is perfectly proper to inquire how the jurors feel about the defense of intoxication where it is a potential issue in the case (the defendant sought and received the voluntary intoxication instruction herein). See Lucas v. State, 568 So. 2d 18 (Fla. 1990).

Asking the jurors if they believe the death penalty should be reserved for serial killers is **CLEARLY** proper. The State's questions regarding expert witnesses were likewise proper, as were the questions concerning the jurors' attitudes on corporal punishment. That the State's questions violated the defendant's appellate counsel's personal sense of propriety is interesting but hardly a basis for relief, especially where trial

counsel was not similarly offended, at least not to the point of objection.

VI.

THERE WAS NO ESPINOSA ERROR AND THE ISSUE WAS NOT PRESERVED.

There was no objection to the HAC instruction, and the instruction given was the current standard instruction approved by this Court in 1992. (R. 3778).

The issue is thus procedurally barred and meritless.

VII.

THE DEFENDANT'S SENTENCE IS NOT DISPARATE TO HER CO-DEFENDANT'S BECAUSE HER CULPABILITY WAS FAR GREATER.

It is well settled that different treatment does not raise proportionality concerns unless the co-defendants are equally culpable. See Marek v. State, 492 So. 2d 1055 (Fla. 1986), and case cited therein at 1058.

In its sentencing order the trial court found that Olivia's testimony, that the defendant committed the vast bulk of the abuse and all of the fatal blows, was substantially supported by the corroborating evidence. (R. 800-801). Indeed, the various neighbors and visitors make it painfully clear that Olivia's mistreatment paled in comparison to that meted out by the



defendant. The defendant systematically starved, beat, choked and confined Lazaro on a virtually nonstop basis. There is no evidence that anyone but the defendant hated Lazaro and wanted him dead. Olivia's testimony regarding the last two months, when the fatal blows were struck, was uncontradicted and demonstrated a frenzy of torture and terror committed solely by the defendant. Hence Olivia's forty year sentence does not constitute disparate treatment. This was the defendant's ballgame, both literally and figuratively.

#### VIII.

THE TRIAL COURT PROPERLY EXCLUDED THE  
GUARDIAN OF J. AND T. FROM  
REQUESTING A LIFE SENTENCE FOR THEIR  
BENEFIT.

The defendant was free to argue her children should not be left without a mother. The trial court only excluded the guardian ad litem's opinion that a life sentence would be to their benefit. (R. 3468-80). The guardian's opinion does not relate to a circumstance of the offense or the character of the victim. In Payne v. Tennessee, 111 S. Ct. 1031 (1991), the Supreme Court said it would be improper for a victim's relative to express the opinion that the death sentence would be appropriate, and the same should be true with relation to the defendant's relatives or their representative. The guardian's opinion was simply irrelevant.

IX.

THE DEATH PENALTY IS NOT DISPORTIONATE.

It is axiomatic that weight, not numbers, controls the aggravating/mitigating equation. In this regard, the weight of the HAC factor cannot be properly gauged without a thorough review of the testimony of the medical examiner, Olivia, and the friends and neighbors who ventured into Lazaro's prisons. Once digested in full, the weight of this factor is both apparent and overwhelming. It goes way beyond the single day of abuse in Smalley v. State, 546 So. 2d 720 (Fla. 1989) (twenty-eight month old victim struck each time she cried, head dunked in water three times, then head slammed against wall). The torture Lazaro received over eighteen months is virtually unprecedented in scope and severity. There is nothing to compare this case to and hopefully there never will be.

Additionally, Smalley presented a compelling case in mitigation. He was an otherwise decent man who could not cope with a crying child and essentially lost it for one afternoon in his life. The defendant herein, on the other hand, pursued a deliberate pattern of torture because she hated her son and enjoyed, yes *ENJOYED* seeing him suffer, not once, or twice, or for a day or a week, but thousands of times over eighteen months. Whenever she had to change him or feed him, it was beating and choking time. She loved for Olivia to hit him. She encouraged

her other children to hit him. She burned and bludgeoned and scalded and starved little Lazaro right off the face of the earth because it made her feel good. She gouged his eyes and crushed his nails and rotated his knees on bottlecaps because it gave her revenge for losing the opulant drug money fueled lifestyle she lived with Fidel. He reminded her not of Fidel but of the lost revenue that Fidel's death represented. She *CHOSE* to blame Lazaro. She *CHOSE* to torture Lazaro for the sin of his birth.

The defendant's mitigation is weak. The trial court rejected the mental health mitigating factors except the "riches to rags" (R. 804) emotional trauma. When compared to what she did to Lazaro and what he suffered, what is that worth? What is low average intelligence worth? What is cocaine use worth when the only time she was nice to him was when she was coked out? No one knows what her childhood was like because she is such a liar and faker and malingerer, and has told so many versions that its impossible to know the truth. She is the epitomy of the antisocial personality. Death in this case is not disportionate, rather it is as close to perfect justice as the human condition permits.

X.

SEPERATE JURIES FOR THE GUILT AND PENALTY  
PHASE ARE NOT REQUIRED AND THE ISSUE IS  
PROCEDURALLY BARRED.

Separate juries were neither requested nor required.

ISS-APPEAL

WHETHER THE TRIAL COURT ERRED IN REFUSING  
TO FIND THE AGGRAVATING FACTOR OF DURING  
THE COURSE OF A FELONY, I.E., KIDNAPPING.

The State argued to the Court that the murder occurred during the course of a kidnapping. (R. 3497-3506). The State's reasoning is as follows. F.S. 787.01 defines kidnapping in pertinent part as follows:

(1)(a) The term "kidnapping" means forcibly, secretly, or by threat confining, abducting, or imprisoning another person against his will and without lawful authority, with intent to:

1. Hold for ransom or reward or as a shield or hostage.
2. Commit or facilitate commission of any felony.
3. Inflict bodily harm upon or to terrorize the victim or another person.
4. Interfere with the performance of any governmental or political function.

Lazaro spent the last two months of his life bound, gagged and confined in a closet. It can hardly be contested that he was forcibly confined against his will. It is also beyond dispute that it was done to facilitate the commission of aggravated child abuse, felony child abuse, aggravated battery and aggravated assault, among other felonies. It most definitely was done with the intent to inflict bodily harm upon and to

terrorize Lazaro. The only remaining issue is whether the confinement was "without lawful authority."<sup>1</sup> The State's position, in a nutshell, is that a parent has no greater right to confine and commit felonies upon and terrorize their child than they would if it was a neighbor's child, or a stranger's child.

This is precisely the position taken by the Supreme Court of Arizona in State v. Viramontes, 788 P.2d 67 (Ariz. 1990) (en banc), and the State would adopt the powerful reasoning of that Court in toto. The Court below had held that lack of legal authority (the exact element at issue herein) could not be established as a matter of law because the victim was the defendant's son. The Arizona Supreme Court began by making the critical and infinitely logical distinction between "legal custody" under domestic law, and "legal authority" as a defense to kidnapping. When a parent makes off with their child during a custody battle, they usually cannot be charged with kidnapping because they have no intent to commit any of the unlawful predicate acts (violation of a court order would qualify as a predicate act under Arizona law). However the intent of the defendant therein was to abandon the child, an act of felony child abuse:

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<sup>1</sup> The fact that the State did not charge kidnapping in the indictment is irrelevant. See Turner v. State, 530 So. 2d 45 (Fla. 1987).

"Legal custody," a concept contained in domestic relations law, should not be confused with "legal authority," a defense to kidnapping under A.R.S. §13-1301(2). Regardless of any custody rights defendant may have possessed over the infant, he cannot assert that he had legal authority to engage in the action that resulted in abandonment of the child, which constitutes child abuse. "Legal authority" implies that behavior is sanctioned by law. *State v. Epps*, 36 Or.App. 519, 585 P.2d 425 (1978) (addressing lack of legal authority requirement in Oregon's kidnapping statute). Parents have authority to reasonably and appropriately discipline their children. *See, e.g.*, A.R.S. §13-403(1). However, parents do not have legal authority to subject their children to felonious acts. Although legal authority has not been defined by the legislature, under no imaginable circumstances could the legislature have intended that defendant's intent in taking the child to abandon it be legally authorized. Defendant's abandonment of a newborn child in a busy parking lot, protected only by a cardboard box, is not sanctioned by Arizona law.

The Washington Court of Appeals has stated that although married parents have a statutory equal right to custody of their children in that state, that right does not extend to situations in which the parent engages in misconduct affecting the child's well-being. *State v. Tuitasi*, 46 Wash.App. 206, 207, 729 P.2d 75, 77 (1986), citing *State v. LaCaze*, 95 Wash.2d 760, 763, 630 P.2d 436, 437 (1981) ("The statutory right to equal custody does not give parents 'legal authority' to engage in such conduct").

We conclude that the state properly charged defendant with kidnapping. Because he lacked legal authority to restrain the child for the purpose of abandonment, defendant was guilty of restraining the child. Custodial parents

cannot "consent" to the restraint of their minor children for felonious purposes. Furthermore, parents do not have legal authority to subject their children to felonious acts. Both elements, lack of consent and lack of legal authority, are satisfied here to establish defendant's knowing restraint of the child with the intent to commit a further felonious act. Thus, defendant could be charged with kidnapping even though he is the child's father.

Id. at 70, 71.

The decisions of the Iowa Supreme Court in the companion cases of State v. Siemer, 454 N.S.2d 857 (Iowa 1990), and State v. Simmons, 454 N.W.2d 866 (Iowa 1990), could hardly be more on point. The mother (Simmons) and her live-in boyfriend (Siemer) treated Simmons' seven year old son as follows:

The evidence discloses that Siemer began physically abusing Tracey in the fall of 1987. The abuse escalated after Christmas, at which time Tracey was banished to the furnace room of the basement. The room's entrance was covered with a dirty blanket, its windows were boarded over, and there was no light. There Siemer handcuffed Tracey to the rusty box springs that served as his bed. Tracey had no access to a toilet and was forced to lie in his own waste. A make-shift toilet made of a bucket and chair was eventually placed next to the bed so that Tracey could relieve himself without being freed from the handcuffs.

Siemer instructed April to handcuff Tracey to his bed every day after school. On Siemer's orders she also released him every morning at 6:30 a.m. to attend school. Tracey spent the weekends locked to his bed in the basement. Siemer told April to feed Tracey "a little food" each day but otherwise to "forget about him."

Tracey testified that from January through April Siemer beat him with a board and belt, hung him naked from a pipe in the ceiling, submerged him in ice water, cut him with a knife across his buttocks, fed him cat food, poured scalding hot water over his lower abdomen and genitals, and threatened him with further abuse if he dared reveal his plight. Medical experts testified that Tracey suffered permanent injuries from the scalding.

At no time did Tracey's mother, Donna Simmons intervene on his behalf. April was sworn on the pain of her own punishment to keep Siemer's "secret." Eventually, one of April's playmates saw Tracey in the basement and told her parents who alerted authorities. On the day Tracey was rescued, he was found huddled under fifty blankets in his dark and foul-smelling dungeon, shaking uncontrollably from the pain of second-degree burns to his genitals.

Siemer at 858, 859.

The Court seized the opportunity in Siemer (who they treated as having parental authority via "in loco parentis") to review the full range of law on the issue, including the Arizona Supreme Court's decision in Viramontes. The Court rejected the notion that the legislature had enacted child abuse statutes as the sole remedy for such abuse. The Court then held:

Like the Arizona court, we are persuaded that parents may not hide behind the guise of authority to escape punishment for conduct that is proscribed for all others by the kidnapping statute. Other jurisdictions that have addressed the question have similarly concluded that the authority vested in parents does not immunize them for conviction for acts



of unlawful restraint or kidnapping. *See People v. Walker*, 130 Ill.App.3d 58, 61, 85 Ill.Dec. 396, 398, 473 N.E.2d 995, 997 (1985)(holding son hostage is not reasonable exercise of parental authority); *State v. Warner*, 98 Ill.App.3d 433, 435-46, 53 Ill.Dec. 956, 958, 424 N.E.2d 747, 749 (1981) (confinement of child to unventilated bedroom for thirty days during summer is not reasonable exercise of parental authority); *Highley v. State*, 535 N.E.2d 1241, 1246 (Ind.App.1989) (parental authority does not exempt defendant from criminal sanction for holding girlfriend's sons hostage for seven and one-half hours with loaded rifle); *State v. Alladin*, 408 N.W.2d 642, 647 (Minn.App. 1987) (upholding kidnapping conviction of parent who held two-year-old daughter hostage for five hours); *State v. Tuitasi*, 46 Wash.App. 206, 209, 729 P.2d 75, 77 (1986) (parent acted "without legal authority" by threatening to take child from custodial parent for purpose of coercing custodial parent into engaging in sexual intercourse); *State v. Teynor*, 141 Wis.2d 187, 198, 414 N.W. 2d 76, 79 (1987) ("a parent may commit the offense of false imprisonment against the parent's child).

Because of the disparate objectives which kidnapping and custodial interference statutes seek to accomplish, we reject Siemer's argument that the limited immunity granted parents in the custody context applies to the case before us. The harm the kidnapping statute addresses is unlawful confinement or asportation which increases the potential or actual injury to the victim. *See State v. Ramsey*, 444 N.W.2d 493, 495 (Iowa 1989). While a parent has the authority to confine or remove a child under reasonable circumstances, we can conceive of no circumstance under which a parent could lawfully exercise such authority while harboring the intent to sexually abuse or subject the child to serious injury. We thus hold that parents, or persons standing in *loc*

*parentis*, are not beyond the reach of the kidnapping statutes as a matter of law.

Id. at 863, 864.

The trial court below was sympathetic to the State's position, but was hesitant to commit the sin of "legislating from the bench." (R.3505). Such restraint is laudable but misplaced. The term "lawful authority" must necessarily be defined and refined by the courts. Can it seriously be contended that the legislature of this State intended to bestow upon Ana Cardona the "lawful authority" to act as she did toward her son Lazaro?

CONCLUSION

The judgment and sentence are proper, and should be affirmed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing ANSWER BRIEF/INITIAL BRIEF ON CROSS APPEAL was furnished by mail to LEE WEISSENBORN, 235 N. E. 26 Street, Miami, Florida 33137 on this 16 day of July, 1993.



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