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IN THE SUPREME COURT OF FLORIDA

CASE NO. SC11-1446

ANA MARIA CARDONA,

Appellant,

-vs-

STATE OF FLORIDA,

Appellee.

AMENDED INITIAL BRIEF OF APPELLANT

APPEAL FROM THE CIRCUIT COURT OF THE
ELEVENTH JUDICIAL CIRCUIT OF FLORIDA
IN AND FOR MIAMI-DADE COUNTY

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INTRODUCTION

This is a direct appeal from judgments of conviction and sentence of death, imposed by the Honorable Reemberto Diaz, Judge of the Eleventh Judicial Circuit in and for Miami-Dade County, Florida. In this brief, the clerk's record on appeal is cited as "R.," the transcript of the proceedings as "T," and the penalty phase transcript as "P." Unless noted otherwise, all emphasis is supplied.

STATEMENT OF THE CASE AND FACTS

In 1990, Ana Maria Cardona was convicted of murdering her son, Lazaro Figueroa, and sentenced to death. The State relied heavily on the testimony of a codefendant, Olivia Gonzalez. As the prosecution stated, "there would have been a very large whole in the case," without Gonzalez's testimony. *Cardona v. State*, 641 So. 2d 361 (Fla. 1994) (*Cardona I*). This Court relied on the same testimony in affirming the conviction. *Id.* The Court ordered a new trial after postconviction counsel discovered that the State had hidden material, exculpatory statements by the codefendant. *Cardona v. State*, 826 So. 2d 968 (Fla. 2002). The codefendant did not testify at the retrial.

At this new trial, the defense presented evidence that the victim was not in Ana's custody during the time he was abused and murdered. The family in whose house Ana lived never saw Lazaro. There was no serological or other physical evidence linking Lazaro to Ms. Cardona's apartment, despite his numerous wounds. Another person, Gloria Pi, confessed to killing the child, giving details known only to the police. The State argued that this was a false confession and relied on Ana's own statement to show Lazaro was in her custody. That statement, however, was obtained by the same detective who extracted the allegedly false statement from Ms. Pi. Ana Cardona made this statement after she was found on her knees, pleading and kissing the detective's feet. After a trial marred by

discovery violations, extensive comments on silence, and pervasive improper arguments, the jury found Ms. Cardona guilty.

A bare majority of 7 jurors recommended death based on a single aggravator. After additional fact-finding, the judge sentenced Ana Cardona to die.

* * *

Ana Cardona grew up in Castro's Cuba. Her father abandoned the family. She first met him by chance on the street when she was six or seven. (P. 677). Her mother often told her she was "damned" or "stained," going so far as to tell Ana she was not her daughter. (P. 678). Ana struggled in school and had to repeat grades. (P. 679) Officials placed her in a residential school, but she never made it past fourth grade. (P. 679-80). At around ten years old, she was sent for tutoring, but the tutor's cousin sexually assaulted her. (P. 680). When Ana told her mother, she refused to believe it. (P. 681). Ana left and went to live with her Aunt, but her uncle and cousin behaved inappropriately toward her to the point where the Aunt did not want to leave Ana alone when they were around, and Ana eventually went back to her mother. (P. 683-85). Ana attempted suicide three times between the ages of fourteen and sixteen. (P. 687). At fifteen or sixteen, she left her mother's house and moved in with five older girls who introduced her to street life: marijuana, pills, alcohol, and sex with men and women. (P. 687-88).

Ana arrived in America alone and pregnant in 1980, having escaped Cuba during the Mariel Boatlift. (P. 673). After arriving in Miami, she gave birth to her son, Juan Puente. (T. 3000). Ana became the girlfriend of Fidel Figueroa, and he was the father of her daughter, Tahimi. In 1987 Ana was again pregnant with his child. Fidel Figueroa was murdered in September 1987, one month before his son Lazaro was born. (T. 3016, 3035, 4013).

From early on, Ana established a pattern of leaving Lazaro in the care of others – even strangers – for weeks or months on end. Martha Fleitas's husband had been close with Fidel Figueroa in Cuba. When Lazaro was only months old, Ana met Mrs. Fleitas for the first time. (T. 3021, 3027). That same day, she left Tahimi and Lazaro with Ms. Fleitas. (T. 3021, 3050). Ana left a phone number, but no one ever answered when Fleitas called. (T. 3033). Ms. Fleitas had the children for a period of months. (T. 3048).

Ana also left her children with Carlos Lima for weeks or months at a time. At first, he would babysit the three children overnight once a week or so. (T. 3117). Eventually, one night became two and then three days. (T. 3118). Then Ana told him she'd been evicted, and he offered to take in all three children. (T. 3119). At some point, Ana retrieved Juan, but left Tahimi and Lazaro in Lima's custody. (T. 3119). She left him a beeper number, but she did not respond for "weeks on end." (T. 3120).

In July of 1988, Ana asked Suzy Hernandez to babysit Lazaro and Tahimi for the weekend. (T. 3242-43). Ms. Hernandez had never met Ana, but her boyfriend had been friends with Fidel Figueroa, and she had seen Ana at Fidel's funeral. (T. 3237-41). Ana did not return to pick up the children on Sunday. (T. 3246, 3268). By August, she had still not returned. (T. 3247). In early September, Hernandez contacted Carlos Lima to discuss what to do about the children. (T. 3249). They decided they would have to turn the children over to the Department of Health and Rehabilitative Services (HRS). (T. 3130, 3249).

Afterward, Ana called Hernandez and asked that she and Lima go to court to help her get the children back from HRS. (T. 3250). They attended the hearing, where the judge placed the children back in custody of Lima and his mother. (T. 3140, 3250-51). In October or November, however, HRS gave the children back to Ana. (T. 3142-54). Even after this, Ms. Hernandez continued to babysit the children. In November, she babysat Juan, Tahimi, and Lazaro at Ana's apartment in Hialeah. (T. 3255-56). She babysat on several other occasions after HRS returned the children to Ana, sometimes for weeks at a time. (T. 3286). Hernandez cared for Lazaro and Tahimi over Christmas and New Year 1988-89. (T. 3257).

The State presented little testimony about where Lazaro or the rest of the family stayed in the months that followed. In July and August of 1989, Ana and the three children lived with Olivia Gonzalez in a hotel on Miami Beach. (T. 3300-02;

3620). Prior to September 1990, Ana resided in a housing development at NW 7th Avenue and 14th Street. (T. 4902-03). That month she, Olivia Gonzalez, Juan, and Tahimi moved to the home of the Piloto's at 5976 SW 3rd Street in South Miami.

Louis Piloto rented an efficiency in his house to Ana Cardona and Olivia Gonzalez September through the beginning of November of 1990. (T. 4993; 4995; 5019). During this time Mr. Piloto never saw or heard a small boy living there. (T. 5077). Neither did his 9-year-old son, Louis, Jr., or his daughter Marixa, who lived nearby and visited with her own two-year-old son. (T. 5077, 5149).

Louis Piloto built his home himself. (T. 4995). The interior walls of Ana and Olivia's room were hollow sheetrock over two-by-fours. (T. 4996). The room shared a wall with Piloto's mother-in-law's room, and there was a hollow-core door between them. (T. 4997). Mr. Piloto left a gap of approximately two inches at the bottom of the floor in order to let the air-conditioning circulate when it was on. (T. 4998). The shower door was transparent. (T. 5000). The closet was about four feet wide and 21inches deep with slatted doors. (T. 5001-05; R. 9587-90).

The efficiency's door opened onto the backyard. (T. 5006). Ana and Olivia kept that door and the windows wide open. (T. 5006, 5012). Mr. Piloto had a tool shed in the yard just a few feet from the efficiency door. (T. 5006, 5057-58). He would often go to the shed for tools or supplies. (T. 5006-07). He also kept love birds the yard which he or his son would feed twice a day. (T. 5010-11, 5082). He

could see right into the efficiency. (T. 5011). Ana and Olivia never tried to close the door when he approached. (T. 5011). Whenever there was a problem with the efficiency, they would leave word for Mr. Piloto, and he would come to check on it when had an opportunity. (T. 5015). He did not come right away, and he did not tell them when he would be coming. (T. 5015-16). One time they asked him to fix the closet doors. He could see that there were boxes and clothing inside. (T. 5017-18).

Mr. Piloto never saw any sign that a two-to-three-year-old lived in the efficiency. (T. 5018). He never saw any diapers or baby-bottles. (T. 5018). He never heard the voice, crying, or screaming of a small child. (T. 4999). He denied ever telling police that he had seen a little t-shirt with "something like" lollipops drying on the clothesline. (T. 5049)

Louis Piloto's son, Louis Jr., was 9 in 1990. (T. 5075). He and his five-year-old sister played with Juan and Tahimi almost everyday. (T. 5075-76). Louis Jr. never saw or heard a three-year-old boy. (T. 5077; 5087; 5096). Piloto's adult daughter, Marixa, confirmed that the doors and windows were kept open, and she neither saw nor heard a third child in the efficiency. (T. 5149).

On the morning of November 2, 1990, a Florida Power and Light worker discovered the body of a child in the yard of a home in a wealthy area of Miami Beach. (T. 2825; 2837-38). The body was obscured by bushes, and was not visible

from the street or the door of the house. (T. 2843-44). Dr. Bruce Hyma examined the body at around midday, and he estimated that the child had died eight to twelve hours earlier. (T. 4004). The body was emaciated, and showed signs of severe abuse. (T. 4003-18). One of the many injuries was to the left arm. As a result of trauma, muscles in the arm had ossified, leaving the arm fixed at a ninety-degree angle. The body wore a diaper filled with encrusted feces, and the diaper had been wrapped many times around with brown plastic packing tape. (T. 4003-06). The child was also missing two teeth.

Unable to identify the child, the police made an appeal to the public and distributed flyers with a photo. (T. 3842). They held back certain information, including the fact of the tape wrapped around the diaper. (T. 3482-83). On November 6, Martha Fleitas saw a photograph on television. (T. 3035). She called police and told them it was Lazaro Figueroa, the son of Fidel Figueroa and Ana Cardona. (T. 3014, 3035).

Early in the search, a woman named Betty Walker contacted the police to tell them she recognized the boy in the poster. (T. 4298; 4303). She said she had seen the boy several times near where she worked in northern Miami Beach. (T. 4296-4300). She saw him running from 75th Street, across Harding Avenue toward Abbot Avenue. (T. 4300-02). He was small and looked malnourished. (T. 4300). She thought he looked like he was between three and four. (T. 4305-06).

Sometimes she would see him wearing diapers. (T. 4301, 4308). She noticed that something was wrong with his right arm. He held it as though it were in a fixed position or in a sling. (T. 4300-02).

Mercedes Estrada lived in apartment 2A at 8030 Abbott Avenue. (T. 4586-88). A family lived next door to her in apartment 3A. The mother's name was Joyce, and one of her children was a teenager named Gloria. (T. 4589-90). On Halloween night, she heard a disturbance next door. She heard a little boy screaming followed by a "horrific thump" against her living room wall, and the screaming stopped. (T. 4595-96). She reported the incident to HRS the next day, but never received any response. (T. 4597-98). Weeks later a woman named Miriam Ramos came to her apartment and showed her a flyer with a picture of a boy, as well as pictures of two women.[1] (T. 4599-602). Ms. Estrada thought she had seen the boy in the flyer before. (T. 4604). On November 27, Ramos took her to a Burger King to meet with Miami Beach detective Joseph Matthews. (T. 4605).

After talking to Ms. Estrada, Detective Matthews went to 8030 Abbott Avenue with Detective Trujillo to talk to Gloria Pi, and her mother. (T. 3424). While he was speaking to Gloria on her front step, he noticed a piece of tape on the mailbox similar to the tape that had been on Lazaro's diapers. (T. 3488; 3495). He asked her about it, and Gloria told him that it was the tape she used to wrap around

[1] Ramos was an HRS employee who carried out her own unauthorized investigation into the case.

the baby to keep the diaper up. (T. 3496). He asked her if she had babysat the child who had been found dead, and she began to cry. (T. 3496-97). She said, "I yelled at him, pushed him, he hit his head on the wall, his face hit the wall then he fell on the floor, then he died."

Matthews consulted with the State Attorney and took Gloria and her family to the police station. Matthews read Gloria her rights and questioned her for 2 hours. (T. 3498-510). She said that a woman in Flamingo park asked her to babysit the child. (T. 3504). Gloria claimed that the woman wouldn't identify herself or the baby, but paid her fifty dollars. (T. 3505-11). Gloria watched the child for two weeks at a time, and sometimes she forgot to feed him. (T. 3510-12). When she described again how she wrapped the diaper, Matthews tested her: He suggested that she just used a little piece of tape to hold the diaper up. (T. 3512). Gloria insisted that she had in fact wrapped the tape around the boy. (T. 3512). She said she was home alone with him when she killed him. (T. 3512). When her mother and her mother's friend returned, they took her to dump the body in the bushes. (T. 3513). Matthews had some concerns about her confession. Gloria initially said the woman in the park wouldn't give the boy's name, but then she used the name Lazaro. (T. 3505). She also reported inflicting wounds that weren't found on the body. (T. 3567-69). Matthews thought Gloria was slow, "not normal." (T. 3561-62).

At 7:00 or 8:00 the next morning, Detective Gary Klueger drove Gloria back to 8030 Abbott Avenue. (T. 4954-55). During the ride, Gloria asked what the difference between intentional and accidental was, and he tried to explain. (T. 4956). Afterward, Gloria said that she only gently shoved the baby. (T. 4596). At the apartment, Gloria showed him where she was standing when she pushed the baby, where his head hit the wall, where he slept, and where she kept his toys. (T. 4957).

The police continued to search for Lazaro's family. They searched school records for Juan Puente, and learned that he had been enrolled in school in South Miami. (T. 3002). They eventually received information that Juan was at school in St. Cloud, near Orlando. (T. 4890). Detectives Santiago and Schiaffo along with two Osceola deputies went to the school and waited for Ana and Olivia Gonzalez to come pick up Juan. (T. 3719-21). After the stop, Olivia became very aggressive. (T. 4894). Detective Santiago told Ana that Lazaro was dead, and she began to cry. (T. 3723) She told him she had left Lazaro with "some lady." (T. 3723). The detectives arrested Ana and Olivia and took them to the Sheriff's Office. (T. 3721-22, 3725). Santiago read Miranda warnings during the drive. (T. 3726-30). Ana initially told Santiago that she had given Lazaro over to an elegant lady she met in a restaurant in Hialeah. (T. 3737).

Detective Mathews came north to conduct the interrogation. Santiago acted as interpreter. (T. 3745). The whole time Santiago was with her, Ana Cardona asked over and over what would happen with her children. (T. 3781, 3785). At one point Matthews sent Santiago to look for a tape recorder. (T. 3791). He returned to find Ana Cardona on her knees, crying and kissing Det. Matthews' feet. (T. 3792). She was crying and begging not to have her children taken away. (T. 3792).

The detectives proceeded to take a formal, tape-recorded statement. (T. 3752, 3762; R. 8990-9080). The statement began at 10:00 p.m., some 7 hours after Ana was arrested. (T. 3759; R. 8890). In it, she said that Lazaro was hurt when he jumped off the bed and hit his head. (R. 8995, 9020). She attempted to revive him, but was unsuccessful. (R. 8996-99). She was afraid to call the police because they would take her children away. (R. 8999-9001). When Olivia came home, she too tried to revive the child. (R. 9016-17). Ana asked that they leave Lazaro on someone's doorstep. (R. 9017-18). She wanted to leave him at a house where the people would have a lot of money. (R. 9026-27, 9031). She put him where he could be seen. (R. 9035-36). He was alive when she left. (R. 9039). Afterward she decided they should leave and go to St. Cloud. (R. 9056-57).

She told the detectives that they hid Lazaro when they were staying at the Piloto's because they would have been thrown out otherwise. (R. 9062). Asked about the diapers, she said she would use a little piece of tape to keep him from

taking them off. (R. 9047). When the detectives asked how Lazaro had lost his teeth, Ana said they fell out because they were decayed. (R. 9065-66). She denied that he had any other injuries, other than a slight limp from twisting his foot. (R. 9066-68). During the formal statement, Ana continued to beg the detectives not to take her children away. (R. 9028, 9059, 9075).

Throughout Detective Santiago's trial testimony, the prosecutor emphasized that Ana had never asked him what had happened to Lazaro. (T. 3733-44, 3774, 3794-95). The judge overruled defense counsel's objection to the comment on Ana's silence. (T. 3734).

During voir dire, prospective juror Brizo revealed that she remembered the case from when it happened. When the court asked if she could set aside what she knew, she said she would try, and spoke of her feelings as a mother. (T. 107-08). She told the judge she thought she could set aside any bias, and she agreed with the state that she "had to" set her knowledge and emotions aside. (T. 107-110). When defense counsel asked Brizo if she could presume Ana innocent, she replied: "I can. I don't know my answer now because I have to see. **I have to see what makes this person innocent in order for me to believe she is innocent**." (T. 112). The judge interrupted to explain the presumption of innocence, and she agreed she could follow the law. (T. 112-13). When the defense later asked if she could

imagine finding Ana not guilty, Ms. Brizo said: "Yes. I can imagine saying because **if I see something that proves she is not guilty I have to say she is not guilty**. It's something that's proven – " (T. 115). The court denied the defense cause challenge. (T. 116-17).

A second juror was unable to say how the case would affect him as the father of a small child. When asked if the fact that he had a baby would influence him, Juror Gabriel said: "Maybe, I'm not sure." (T. 1581). When the defense asked him if he'd be able to deal with seeing pictures of an injured child, Mr. Gabriel said he was, "not sure as of right now." (T. 1581). Counsel asked him if this gave him reason to doubt his ability to be neutral, and he replied: "Not as of right now, no." (T. 1581). Asked a final time how having a five-month-old would affect him, he answered: "You know, I'm not sure as of right now, no." (T. 1582). Once again, the court denied a cause challenge. (T. 1587).

A third juror, Rapaport, told the judge he opposed the death penalty, but he could consider it in an appropriate case. (T. 532-34). Several times he said he would have difficulty setting his feelings aside and following the law. (T. 534-35; 557-58). It became clear however, that while he could otherwise follow the law, he would favor life over death. (T. 534-35, 546-47, 558). The court struck Mr. Rapaport over defense objection. (T. 559-62).

The State's witnesses testified about Lazaro's condition and treatment in the first two years of his life. Martha Fleitas stated that Lazaro was thin, but fine. (T. 3026). Though in her deposition she said Lazaro had no bruises, at trial she testified that "he had bruising like children … not like beating bruises. (T. 3043, 3029). Carlos Lima testified that the kids all looked ok when he started babysitting them. (T. 3145). Lazaro was a bouncing baby boy who ate like crazy. (T. 3122). When Suzy Hernandez first babysat for Tahimi and Lazaro in July of 1988, Lazaro had no bruises, but he seemed "skinny and "scared." (T. 3243-44). When she babysat at the Hialeah apartment, he was always in the crib, which was messy and smelled like bad milk. (T. 3259). Lazaro had no bruises or scratches. (T. 3283-84). Though Hernandez testified that Lazaro did not look healthy or well-fed at this time, in deposition she had said just the opposite. (T. 3283). Fred Quintero, who worked at the Olympia motel in the summer of 1989, said Olivia and Ana's room was a shambles, the mattress had been urinated on, and Lazaro was always in a corner. (T. 3304-07). He saw Ana scold and spank Lazaro for urinating on the mattress, and she smacked him across the face and in the back of the head. (T. 3316). Both Quintero and his wife testified that they saw Ana dragging Lazaro up stairs by the arm such that his feet were hitting the stairs. (T. 3309, 3621-22). Lazaro was dirty and he wore a diaper that needed to be changed. (T. 3621). A woman named Carla Ventrano who stayed at the hotel said she saw Ana punch

Lazaro in the back and pull his hair. (T. 3355). In her deposition she had testified that she wasn't sure who punched the child. (T. 3365-66). She described an incident in which she saw Ana take Lazaro into the bathroom. Ventrano could hear water running, and she heard Lazaro screaming. (T. 3356). She claimed she saw Juan and Tahimi punch Lazaro, as well. (T. 3359).

Gloria Pi took the stand and denied killing Lazaro or having any contact with him at all. (T. 4408, 4414). At least initially, she also denied telling the detectives anything to the contrary: She did not tell them she babysat for Lazaro, she did not tell them she slammed him into the wall, she did not tell them her mother and mother's friend put the body in the bushes, she did not ask Klueger about the difference between intentional and accidental, and she did not demonstrate where she threw Lazaro against the wall. (T. 4409, 4420). She did not tell the detectives she wrapped tape around the diaper, though in deposition she said she had. (T. 4406-07, 4409).

Gloria went on to *admit* telling Matthews she threw Lazaro on the floor. (T. 4411). Matthews threatened her, telling her he would take her away from her family unless she told the truth about killing the boy. (T. 4414, 4420). Eventually she made something up so he would leave her alone. (T. 4415-17).

Gloria testified that in 1990 she didn't start school until October. (T. 4593). But she also agreed that she was out for two-and-a-half months and did not return

to school until mid-November. (T. 4393). The defense introduced school records showing that in the fall of 1990 Gloria did not attend school until November 13. (T. 4857-59; R. 9581-83). The State called a special education teacher who said she remembered Gloria being in class before Lazaro was found in November. (T. 5233-36).

In 1990, Debra Sobra lived in apartment 6A at 8030 Abbott Avenue. (T. 3604). Her two-year-old son and her mother lived with her. (T. 3603). Her son would play with Gloria and her siblings every day. (T. 3605). On Halloween she allowed Gloria to take her son trick-or-treating. (T. 3607). She never knew Gloria to babysit for anyone or care for a child for a period of weeks. (T. 3610).

Priscilla Malave, however, testified that Gloria was babysitting at a different location. Ms. Malave's family owned apartments at 7821 Carlyle Avenue in Miami Beach. (T. 4757). She lived in unit 1. (T. 4758). A young couple with three children lived in unit 4, the apartment next door to hers. (T. 4761). Gloria's mother would bring her to unit 4 to babysit. (T. 4760). Gloria liked to come to Ms. Malave's kitchen and talk. (T. 4763).

One day, Gloria confessed that she had killed a child. (T. 4763). Gloria told Malave she had thrown him against the wall because he was crying too much. (T. 4763). This conversation happened after Halloween and before the discovery of Lazaro's body was in the news. (T. 4764). Sometime later, detectives came to

speak to her, and they took the carpet out of unit 4, apparently because they found what might have been a bloodstain. (T. 4768).

Priscilla's daughter, Sharon Malave, also lived in her parents' building on Carlyle. (T. 4796). A few days after Halloween, Gloria called. (T. 4804). Gloria sounded very scared. (T. 4805). She said she had done something "very, very bad" and she was going to be taken away from her family. (T. 4805).

Lazaro died when force caused his brain to rotate and shear within his skull – a "diffuse axonal injury." (T. 4136, 4140, 4149, 4209-11). This caused damage to both the corpus callosum and the brainstem. (T. 4217). These injuries would have caused the boy to lose consciousness immediately, and ultimately killed him. (T. 4139, 4210; P. 163). Dr. Hyma testified to a long list of other injuries suffered by Lazaro. He was severely malnourished, and his weight was in the fifth percentile. (T. 4015). His right arm was broken. (T. 4030). His skull was fractured, there were subdural and epidural hematomas and there were several bedsores.. (T. 4117-22, 4026-27, 4055, 4142). Altogether, Hyma catalogued 43 injuries, categorizing them as hours old, days-to-weeks old, and weeks to months old.[2] Dr. Ronald Kim, the State's neuropathologist, testified that the cause of death was damage to the brain stem and corpus callosum. (T. 4215, 4217). Dr. Hyma agreed that the brain injuries were fatal and a sufficient cause of death, but gave a cause of death of "child abuse

[2] His chart is reproduced as an appendix to this brief.

syndrome," because Lazaro would have died eventually due to the fact he had many other injuries that weren't treated. (T. 4140-41, 4149).

Despite the existence of these many injuries, the crime scene investigators were unable to find any serological evidence that Lazaro was ever in the efficiency at the Pilotos' house. (T. 3659). The only possible physical link was hair consistent with Lazaro's found on a frying pan packed inside a box. (3895-96).

The State's forensic odontologist, Richard Souviron, testified to injuries including torn frenula and two missing teeth. He opined that one of the two teeth had been lost more than six months before Lazaro died. (T. 3838; 3841-42; 3855). In the first trial and his deposition, however, he testified that all of the injuries to the mouth he observed were less than six months old, including the two missing teeth. (T. 3841-43; 3855-56). Asked if he had changed his opinion, Dr. Souviron answered, "Yes." (T. 3842-43). He explained that since the first trial he had looked at a photograph he hadn't seen before. (T. 3841-43; 3860). The defense objected to the discovery violation pursuant to *Richardson v. State*, 246 So. 2d 771 (Fla. 1971). (T. 3843-47). When the judge held a hearing on the violation, it did not inquire into whether the violation was willful or inadvertent, whether it was trivial or substantial, or what the procedural prejudice may have been. (T. 3860-64). Instead, he asked what the substantive prejudice was, "In connection with the rest of the evidence in the case." (T. 3862).

In closing argument, the prosecution deployed a profusion of comments long held to be improper. The prosecutors repeatedly told jurors that the case was about "justice for Lazaro," and urged them to render that justice by deciding "the truth." (T. 5328-29, 5341, 5352-54). They warned jurors the defense was trying to mislead them, making "diversionary" a refrain, and describing the defense closing as a "magnificent display … a real show …" (T. 5328-29, 5333-38, 5343, 5435). They implied they had special knowledge of what went on when Matthews interrogated Ana, giving their personal assurance that she was guilty. (T. 5329, 5343, 5473, 5478). They made an demeaning character-attack against Ana Cardona personally, argued her failure to ask the detectives questions as evidence of her guilt, and relied on facts that weren't in evidence. (T. 5330, 5338-39, 5342, 5436-38, 5443-44, 5452-53, 5457, 5466-67, 5474).

During deliberations, the jury sent out a question requesting copies of Gloria Pi's deposition and trial testimony. (T. 5524-26; R. 9785). The judge responded by offering a read-back of the trial testimony, and the jurors accepted. (T. 5531, 5445; R. 9787-89). The jurors continued to deliberate, and were sequestered overnight. (T. 550-51). On the second day of deliberations the jury delivered a verdict finding Ana Cardona guilty as charged. (T. 5557-5560; R. 9874).

In the penalty phase the State recalled Dr. Hyma to repeat his guilt-phase review of all of Lazaro's injuries. (P. 81-180). He testified to pain from injuries

that occurred outside the dates alleged in the indictment, injuries that occurred months before Lazaro's death, and wounds that had healed and would no longer be painful. (P. 133).

In mitigation, the defense called inmates and corrections officers who knew Ana during her incarceration. Her fellow-inmates spoke of how she had helped them adapt to jail, and to cope with their problems. (P. 512-81, 625-35). Some of the inmates called her "Mima" or mother. (P. 493, 540). Corrections officers testified that Ana was literally a model prisoner. Officer Cindy Bellinger testified that Ana made her job easier because she could use Ana as an example for other inmates. (P. 337). Ana befriended some "problem inmates" and they stopped being a problem. (P. 337). Other officers agreed that Ana was helpful, respectful, obedient, and made their jobs easier. (P. 290-92, 600, 911-12). The inmates and others spoke to Ana's religious devotion. (P. 190-207; 516, 539, 586-93).

Ron McAndrews is a retired prison warden. (P. 374). He was Warden at Florida State Prison, and carried out executions there. He reviewed Ana's prison and jail records and interviewed her. He found Ana's record in prison to be "remarkable." (P. 401). She went ten years without any disciplinary reports, and all her evaluations were satisfactory or above satisfactory. (P. 401). Ana had adopted the attitude that "rehabilitation comes from within." (P. 403). Good inmates like Ana help control the prison population by teaching others the ropes. (P. 393). He

testified that Ana was a well-adjusted prisoner who had learned the importance of being a role model and reaching out for help when needed. (P. 428). She is the kind of inmate who can make other inmates better and the jobs of the guards easier. (P. 428).

Dr. Jethro Toomer performed a clinical assessment of Ana Cardona's psychological development. (P. 670). At counsel's request, the assessment focused only on Ana's life up to the time she came to the United States. (P. 672). Because he was not assessing Ana's current functioning, Toomer did not think testing would be useful. (P. 673). He reviewed Ana's youth, her abandonment by her father, rejection by her mother, and abuse at the hands of those who were supposed to help her. Ana's childhood was destructive to any sense of self-esteem. (P. 678). The lack of stability and support in her life prevented her from developing the skills necessary to form personal relationships, weigh alternatives, and project consequences. (P. 689).

Ana's children Juan and Tahimi also testified. When Tahimi was twelve she started asking her foster mother about contacting Ana. They started writing to each other, and Ana always wrote, even when Tahimi didn't. (P. 777). Eventually Tahimi was able to visit Ana in person. (P. 778-81). Her connection to her mother became very important to her. (P. 781). She feels lucky she has two families, her birth family and her foster family. (P. 804). Juan has been less successful in life

than his sister, and is a convicted felon. He first went to visit his mother when he was fifteen or sixteen. (P. 749). They have been writing to each other since that time. (P. 755). She urges him to stay out of trouble, and he finds his motivation in his relationship with her. (P. 755-58).

As in the first phase, the prosecutor made a series of improper closing arguments in the penalty phase. It argued facts not in evidence to suggest that there were witnesses to Ana's life in Cuba whom Dr. Toomer should have interviewed. (P. 1115). The State again denigrated defense counsel, and it mocked and belittled mitigating evidence. (P. 1112-13, 1117, 1121-22).

The jurors recommended death by a bare majority of seven to five. (P. 1181-82).

At the *Spencer*[3] hearing, the defense presented the testimony of Dr. Giselle Hass, a clinical psychologist. (R. 11913). She has published articles on battered women and domestic violence. (R. 11917). These include articles in law reviews and publications for the Justice Department's Office of Domestic Violence Against Women. (R. 11917). She has developed a special area of expertise regarding domestic violence as it relates to Hispanic and immigrant women. (R. 11918-19). Dr. Hass reviewed the reports and testimony of other experts who had evaluated Ana. (R. 11939). She reviewed the prison records for Ana Cardona and Olivia

[3] *Spencer v. State*, 615 So. 2d 688, 690-91 (Fla. 1993)

Gonzalez, and performed her own evaluation of Ana. (R. 11939-40). Ana's reports were characteristic of a victim of domestic violence. (R. 11942-45). Hass also conducted testing including the Trauma Symptom Inventory, and the results supported the conclusion that in Ana suffered from post-traumatic stress disorder correlated to domestic violence in her relationship with Olivia. (R. 11942, 11946-49). She also opined that Ana was under extreme emotional stress in the period leading up to Lazaro's death. (R. 11998).

The trial judge found a single aggravating circumstance: HAC. It rejected seven proposed mitigating factors, and found nineteen, and sentenced Ana Cardona to death. (R. 13713-27).

SUMMARY OF THE ARGUMENT

I. The trial court erred by denying two defense cause challenges, and granting a State challenge to a death-scrupled juror.

A. When juror Brizo was asked if she could presume Ana Cardona innocent, she said she would "have to see what makes this person innocent in order to believe that she is innocent." Though she agreed with the judge that she could follow the law, she went on to say that she could imagine finding Ana Cardona not guilty, "because if I see something that proves she is not guilty I have to say she is not guilty …" The trial court erred in denying the cause challenge.

B. The court erred in denying a second cause challenge against juror Gabriel, who was unable to say whether or how having a small child of his own would affect him in deciding this case.

C. The court further erred when it granted a State cause challenge against juror Rapaport, who said he could follow the law though he would lean in favor of a life sentence.

II. The State introduced evidence that Ana Cardona never asked detectives what happened to her son, and argued this as evidence of her guilt. The judge mistakenly permitted the comments on Ms. Cardona's silence on these

points because she had waived her rights and made a statement. This misreading of the law violated Ms. Cardona's rights under both the state and federal consitutions.

III. The State's expert admittedly changed his opinion between the two trials. The court, however, failed to make a full inquiry into the discovery violation. It never asked if the violation was willful or inadvertent, or whether it was trivial or substantial. Most importantly, the judge never concedered the *procedural* prejudice to the defense, instead asking how the new testimony would prejudice the defendant's case "[i]n connection with the rest of the case all the evidence."

IV. The prosecution's improper closing arguments were numerous and serious. The prosecutors repeatedly told jurors that the case was about "justice for Lazaro," and urged them to render that justice by deciding "the truth." They warned jurors the defense was trying to mislead them, making "diversionary" a refrain, and describing the defense closing as a "magnificent display … a real show …" The prosecutors implied they had special knowledge of what went on when Matthews interrogated Ana Cardona, giving their personal assurance that she was guilty. They made an insulting character-attack against Ana Cardona personally, and relied on facts that weren't in evidence.

V. During the penalty-phase closing arguments, the judge again countenanced the State's improper arguments. The prosecution argued facts not in

evidence to suggest that there were witnesses to Ana Cardona's life in Cuba whom Dr. Toomer should have interviewed, it once again denigrated defense counsel, and it mocked and belittled mitigating evidence.

VI. The court permitted the State to argue HAC based on acts remote from the immediate circumstances of the victim's death, and itself found the aggravator to exist on that basis. Both the State and the judge referred to acts well outside the period charged in the indictment, some committed months before the victim died, and some of which could not have contributed to the child's death.

VII. The trial court relied on facts from Ana Cardona's first trial in sentencing her to death instead of limiting itself to the record before it, and imposed an unlawful "nexus" requirement on mitigation.

VIII. The court imposed a rigid test for intellectual disability when it denied Ana Cardona's motion to prohibit the death penalty. The court's approach is inconsistent with professional norms and *Hall v. Forida*, 134 S.Ct. 1986 (2014).

IX. The imposition of a death sentence based on a bare seven-to-five jury recommendation. Because the sentence was based on a judicial finding of a single aggravating circumstance never found by a jury, the sentence violates both and *Ring v. Arizona*, 536 U.S. 584, 589 (2002), and the Florida Constitution.

X. The errors in this case, when taken together deprived Ana Cardona of a fair trial, due process of law and a reliable sentencing process.

ARGUMENT

I. JURY SELECTION.

A criminal defendant has a constitutional right to an impartial jury. U.S. Const. amends. VI, XIV; Art. I § 9, Fla. Const. This right guarantees jurors who will not require the defendant to prove her innocence, and whose ability to be impartial is not in doubt. In a capital case, it also guarantees that jurors will not be excluded simply because they favor life over death. The trial court failed to honor these guarantees, and the Court must reverse for a new trial.

A. The Court Failed To Strike Two Jurors Despite The Fact One Could Not Presume Ana Cardona Innocent And The Other's Answers Raised Doubts To His Partiality.

"[J]urors should if possible be not only impartial, but beyond even the suspicion of partiality." *Matarranz v. State*, 38 Fla. L. Weekly S687 (Sept. 26, 2013) (quoting *O'Connor v. State*, 9 Fla. 215, 222 (Fla. 1860). "[I]f there is basis for any reasonable doubt as to any juror's possessing that state of mind which will enable him to render an impartial verdict," she must be excused for cause. *Singer v. State*, 109 So. 2d 7, 23-24 (Fla. 1958); *accord Hamilton v. State*, 547 So. 2d 630 (Fla. 1989); *Hill v. State*, 477 So. 2d 553 (Fla. 1985).[4] Here the court erroneously denied challenges to jurors Brizo and Gabriel even though Brizo stated that she

[4] The Court reviews the denial of a cause strike for abuse of discretion. *See Singleton v. State*, 783 So. 2d 970, 973 (Fla. 2001).

would require proof that Ms. Cardona was innocent, and juror Gabriel could give no assurance at all that he could serve impartially.[5]

1. Ms. Brizo

Prospective juror Brizo remembered this case from news accounts at the time of the crime. (T. 106). She knew about Lazaro being found, she knew there was another woman involved, and she knew that someone had been sentenced to death. (T. 106). When the judge asked her if she could set aside what she knew, she responded:

> MS. BRIZO: I'll try.
>
> THE COURT: You will try. Okay. You have some reservations?
>
> MS. BRIZO: I am a mother too. I am very touched about anything that can happen to children to be honest with you.
>
> THE COURT: How old are your children?
>
> MS. BRIZO: I have two girls. One is fifteen and one is twelve. You know, I'm really hurt when I see that somebody you know hurts a kid. But you know I try to be fair also and try to listen to different sides of the story but I am saying the truth. You know my feelings.

(T. 107-08). When the judge told Ms. Brizo she could not decide the case based on any bias, she again said, "I think I can." During the State's examination, Ms. Brizo

[5] The defense exercised a peremptory challenge against Ms. Brizo, exhausted its peremptory challenges, and unsuccessfully requested two additional peremptory challenges to strike Gabriel and another named juror, thereby preserving the issue for review. (T. 2285-2322). *See Trotter v. State*, 576 So. 2d 691 (Fla. 1990).

agreed with leading questions that she "had to" set her knowledge and emotions aside. (T. 110).

When the defense examined her, Ms. Brizo reaffirmed that she had concluded Ms. Cardona was guilty based on news accounts. (T. 112). As to whether she could presume Ana Cardona innocent, Ms. Brizo stated that she would need to see evidence of her innocence:

> MS. GEORGI: … Can you truly presume that she is innocent now? Only you can tell us that.
>
> MS. BRIZO: I can. I don't know my answer now because I have to see. I have to see what makes this person innocent in order for me to believe she is innocent.

(T. 112). The judge immediately interjected:

> THE COURT: Ms. Brizo under the Constitution of the United States of America this defendant is presumed innocent of the charges against her. As she sits here before you, she is presumed innocent of these charge[s] unless and until she has been proven guilty beyond a reasonable doubt by competent evidence presented during the course of the trial. That is our rule of law. That is the heart of the criminal justice system of this country. Okay.
>
> Now, obviously you mentioned to us that you've seen or heard something about this case in years pas[t] and you formed an opinion about this. Yet if you're selected you must presume Ms. Cardona is innocent of these charges at this time; can you do that?
>
> MS. BRIZO: Yes.
>
> THE COURT: Is there any doubt in your mind about that?
>
> MS. BRIZO: No.

> THE COURT: Can you set aside anything that you've seen or heard about this case and decide this case solely on the evidence that is presented during the course of the trial?
>
> MS. BRIZO: Yes.

(T. 112-13). Nevertheless, she ended her examination by reasserting her need for proof of innocence. Asked if she could imagine finding Ana not guilty, Ms. Brizo stated:

> MS. BRIZO: Yes. I can imagine saying because if I see something that proves she is not guilty I have to say she is not guilty. It's something that's proven –

(T. 115). The court denied the defense motion for cause. (T. 116-17).

"A juror is not impartial when one side must overcome a preconceived opinion in order to prevail." *See Hamilton v. State*, 547 So. 2d 630, 633 (Fla.1989) (quoting *Hill v. State*, 477 So. 2d 553, 556 (Fla.1985)). A juror may be rehabilitated through additional questioning, but it is not sufficient to merely convince the juror to retract her statement of bias. *See Mattaranz*, *Overton v State*, 801 So. 2d 877 (Fla. 2001). Even if a juror ultimately assures the court she will follow the law, the challenge must be granted if the juror's other responses create a doubt as to her impartiality. *See Hamilton* at 633; *see also Price v. State*, 538 So. 2d 486 (Fla. 3d DCA 1989) (noting that a juror's responses to a court's leading questions are not determinative of her impartiality). In *Overton* a juror consistently promised the judge he would not respect the defendant's right to not testify. This

Court nevertheless found error because he also said he had always believed that an innocent defendant would testify. 801 So. 2d 891-93.

The facts here are very similar to those in *Hamilton*, where the Court wrote:

> Although the juror in this case stated in response to questions from the bench that she could hear the case with an open mind, her other responses raised doubt as to whether she could be unbiased. For example, the juror's statement that Hamilton would be required to introduce evidence to convince her that he was not guilty pointedly demonstrates this juror's preconceived opinion of guilt. Essentially, this juror would require a defendant to prove his or her innocence rather than require the state to prove the defendant's guilt.

Hamilton at 633.

The trial court's attempt to rehabilitate Ms. Brizo was unsuccessful by any measure, and even less successful than the efforts made in *Overton* and *Hamilton*. Though Brizo briefly assured the judge she could respect "the heart of the justice system of our country," she ended as she began, unambiguously stating that she would require "something that proves she is not guilty."

2. Juror Gabriel

Juror Gabriel was unable to give any firm assurances that he would be able to be impartial in considering the death penalty. The young father of a five-month-old, he had particular difficulty in saying whether having a young child might affect him in this case. (T. 1580). He could only say that he was "not sure" whether it would affect him, and hedged his answers by limiting them to what he thought might be the case "as of right now."

MS. GEORGI: If you're on this jur[y] and you hear about horrible things being done to a three-year-old child, do you think the fact that you have a young child, a baby, is going to influence you?

MR. GABRIEL: **Maybe, I'm not sure**.

MS. GEORGI: Well that's something we should consider, don't you think?

MR. GABRIEL: Yeah.

MS. GEORGI: You might look at pictures of an injured child. The fact that if you sit on this juro[y], I'm sure you going to be shown pictures of an injured child. How do you think you'd be able to deal with that given that you have a five-month-old at home?

MR. GABRIEL: **I'm not sure as of right now.**

MS. GEORGI: Does that give you some reason to doubt your ability to be completely neutral in this particular case?

MR. GABRIEL: Not as of right now, no.

MS. GEORGI: When you say you're not sure, how your having a child would impact you?

MR. GABRIEL: No.

MS. GEORGI: Explain to me?

MR. GABRIEL: As of right now I'm just hearing thing[s], and it's like, you know, I don't know really have any feelings as of right now as of the situation. I'm just neutral just hearing what you're telling me, and I can't picture it in my mind as of right now.

MS. GEORGI: Okay. All I'm asking and only you can tell me is if the fact that you have a five-month old at home, how that's going to affect you[?]

MR. GABRIEL: You know, **I'm not sure as of right now, no.**

(T. 1581-82). Asked if he might be thinking of his own child when he saw pictures of Lazaro, Gabriel replied, "Not as it is right now." (T. 1580-82).

Mr. Gabriel's statements that he was "not sure" how being the father of a young child would affect him left a "reasonable doubt as to his impartiality and as to his ability to render a verdict based solely on evidence given at the trial." *Singer* at 19. Even when a juror ultimately states that he will be impartial, other statements that he is "not sure" can render that assurance so equivocal that a judge abuses his discretion in denying a cause challenge. *See Id.* at 24; *Kopsho v. State*, 959 So. 2d 168, 172 (Fla. 2007). Here, there was never any assurance at all that Mr. Gabriel would not be influenced by feelings about his young child while deliberating. Gabriel could have gone on to decide Ms. Cardona's fate based on an emotional reaction inflamed by picturing his own child in Lazaro's place, and that would be consistent with his statements in voir dire. Mr. Gabriel himself was unsure of his ability to be impartial, and his answers created a reasonable doubt requiring that he be stricken for cause.

B. The Court Erred By Striking A Juror Who Consistently Stated He Would Follow The Law Though He Favored Life Over Death.

A court may not exclude a juror simply because he favors life over death. *See Witherspoon v. Illinois*, 391 U.S. 510, 522 (1968); *Farina v. State*, 680 So. 2d 392 (Fla. 1996). The only question for the trial judge is whether the juror can

"conscientiously apply the law and find the facts." *Wainwright v. Witt*, 469 U.S. 412, 423 (1985). Once the court explained the law to him, prospective juror Rapaport consistently told the judge he would favor life over death, but he could recommend death and would follow the court's instructions – even going so far as to cite this case as one where death might be the appropriate penalty. (T. 536). His tendency to favor life did not disqualify him, and the court's conclusion he was "equivocal" is without support in the record. The exclusion of Rapaport denied Ana Cardona her right to trial by an impartial jury of her peers. U.S. Const. amends. VI, VIII, XIV; Art. I, § 9,17, Fla. Const.

Mr. Rapaport initially told the judge he didn't think he could sit on a penalty phase jury. (T. 532). He wasn't comfortable deciding another person's life, and he didn't think a jury was qualified to make such a decision. (T. 532). When the court questioned him about his beliefs, however, he made it clear his views would not prevent him from following the law. When the judge asked if his feelings would preclude him from following the law, he answered: "No, no, I don't think it would." (T. 533). He explained:

> MR. RAPAPORT: I would be able to follow along, and I would be able to be convinced to issue the death penalty or to, um, recommend the death penalty. Am I a hundred percent against it? I just don't feel comfortable with it. These are all things that sound better when you think about it now I'm on the spot.
>
> THE COURT: Are those feelings so strong that you will not consider the death penalty under any circumstances?

MR. RAPAPORT: No, they're not strong enough.

THE COURT: They're not strong enough?

MR. RAPAPORT: Right.

THE COURT: You would consider it?

MR. RAPAPORT: Yes.

(T. 532-34).

In its questioning, the State asked Mr. Rapaport if he remembered saying he couldn't recommend a death sentence. He replied:

> MR. RAPAPORT: … Well, it's a case-by-case basis, and this is a pretty unique case. This would fall under the case where I could probably seek it.
>
> MS. DANNELLY: Because of the nature of the charges?
>
> MR. RAPAPORT: Yeah.
>
> MS. DANNELLY: So you think that because the defendant is charged with first-degree murder of her son and aggravated child abuse that, **that might be the type of case where you might not be necessarily opposed recommending to the Court that he sentence her to death.**
>
> MR. RAPAPORT: Yeah, I'd have to see the evidence.

(T. 536-37).

The prosecution continued its attempt to get Mr. Rapaport to say he could not consider the death penalty. (T. 537-44). Eventually he agreed that he could not set his feelings aside and consider the two penalties "equally":

MS. DANNELLY: … Can you **equally** a recommendation [sic] on both of those to the Court?

MR. RAPAPORT: I don't think so.

MS. DANNELLY: You don't think so?

MR. RAPAPORT: I don't think I can put my personal feelings aside.

MS. DANNELLY: You can't put your personal feelings aside?

MR. RAPAPORT: No.

* * *

MS. DANNELLY: The personal feelings that you hold, do you feel that they would impair your ability to be a jury on this type of case and recommend the death penalty equally to –

MR. RAPAPORT: I don't think so. I don't know.

MS. DANNELLY: You don't think so.

MR. RAPAPORT: I don't know it how works normally. I've never tried a case like this.

(T. 534-35).

Nobody explained, "how it works normally." When the prosecutor asked Mr. Rapaport if his feelings would "impair" him, he responded that they might guide him. (T. 545). The judge asked him if he could "fairly consider both penalties, he responded, "I would definitely be leaning toward life in prison over the death penalty. I believe that give more room for error I guess." (T. 547). He further explained:

THE COURT: Can you consider both penalties though?

MR. RAPAPORT: Yes, I can consider both, not equally though.

THE COURT: Not equally. How equal is that?

MR. RAPAPORT: 75, 25.

(T. 546-47). When the prosecutor asked about the 75-25 break-down, Mr. Rapaport said: "It would changed based on each case." (T. 549-50). When she again asked whether he could set aside his feelings and follow the law, he asked for more information about that law and said: "If it was explained to me by the judge, I think I can make a decision like that." (T. 551).

Questions from the defense yielded the same answer. Asked if there was "any reason that [he] could not follow [the judge's] instructions?" Rapaport answered, "No." (T. 556). The court nevertheless continued to question him:

THE COURT: Mr. Rapaport, I need your attention so I can ask you a question. Can you follow the law and legally [sic] consider both a life sentence and death sentence? Can you consider both?

MR. RAPAPORT: No. Is that what you're asking me just now?

THE COURT: I'm asking you whether or not you can follow my instructions on the law and consider both possibilities?

MR. RAPAPORT: It depends on how it's laid out. I'm pretty ignorant of law.

THE COURT: My responsibility is to educate you on the law, okay. That's my job. Your job is to decide the facts.

MR. RAPAPORT: If you're to educate –

THE COURT: My job is to give you the law, your job is to apply the law to the fact and make a recommendation to me, okay. Assuming I do my job and give you the law, can you interpret and follow the law?

MR. RAPAPORT: Yes.

THE COURT: No doubt in your mind?

MR. RAPAPORT: There's a little bit of doubt.

THE COURT: There's a little bit of doubt?

MR. RAPAPORT: Yeah.

THE COURT: What is it that you have doubts about?

MR. RAPAPORT: I just feel like I'd rather err on the side prison than the death penalty

THE COURT: Well, one thing is to say you'd rather do that, and another thing is to say that you will do that.

MR. RAPAPORT: I'm not saying that I would do that, I'm just.

* * *

THE COURT: So you tell me. Can follow the law as I give to it you and equally consider both sentences or not?

MR. RAPAPORT: No, I can't. I can follow the law as best as I can, and then, you know, **I can't say that I'd do them equally**, you know.

(T. 558).

The judge granted the State's cause challenge. He stated his belief that, "The fact that they can consider one penalty over another, very little and the other one

very large. It's also a possible cause challenge." (T. 559). However, he continued, he would not necessarily grant a cause challenge on this basis alone "if they can say they can follow the law." (T. 560). Nevertheless:

> The problem I'm having with this particular gentlem[a]n is that he seems to saying [sic] one thing to Ms. Dannelly. He seems to be saying one thing to you, and then he seems to be saying one thing to me. That means I have a reasonable doubt."

(T. 560-62).

The record does not support this conclusion. Mr. Rapaport's answers to the prosecution, defense, and court all boiled down to the same thing: He opposed the death penalty, he could nevertheless recommend death, he would follow the court's instructions, but he could not be **equally** in favor of death and life. Each of his "equivocal" answers was related to the question of whether the law required him to consider both penalties equally. He first expressed doubt about his ability to set his feelings aside when asked if he could equally recommend both penalties. (T. 544). When the court asked Rapaport if his feelings would prevent him from following the law, he replied that he would lean in favor of life. (T. 547). When he subsequently told the court he would he would have trouble applying the law, he tied it to the fact that he favored life over death. (T. 557-59). Other than this issue of being in favor of life, Mr. Rapaport consistently stated he could follow the law.

The law did not require Mr. Rapaport to treat a death sentence "equally" before he could sit on a capital jury. "The relevant inquiry is whether a juror can

perform his or her duties in accordance with the court's instructions and the juror's oath." *Farina* at 396. Nothing requires that a juror approach these questions with perfect neutrality toward the death penalty. The fact that a juror may lean in favor of one penalty over another does not mean that her views "prevent or substantially impair the performance of [her] duties … in accordance with her oath." *Wainright v. Witt*, 469 U.S. 412, 424 (1985); *see Farina*; *Chandler v. State*, 442 So. 2d 171, 173-75 (Fla. 1996) (fact that a juror "might go toward life" or "lean towards life" insufficient basis for strike). In *Bryant v. State*, 656 So. 2d 426, 428 (Fla. 1995), the trial court denied cause challenges against jurors who "expressed … a predisposition to impose the death penalty if the defendant was convicted of first degree murder." This Court found no error because the jurors, "stated either that they would follow the court's instructions or that they would weigh the aggravating and mitigating factors to determine whether death was the appropriate sentence." If anything, a juror who has seen no proof of aggravating circumstances, and has heard nothing in mitigation should enter the sentencing process predisposed to life.

Mr. Rapaport's supposed equivocation fell well short of the level ambivalence required to support a challenge for cause. In *Farina*, the juror stated she had mixed feelings about imposing the death penalty in an appropriate case. 680 So. 2d at 396. She stated, however, that she would "fairly consider" the death

penalty, and would "try" to give the State a "fair shake." Asked if she would give the penalty decision her "unbiased consideration," she replied she would "try to do what's right." Id. The Court found that the trial court abused its discretion in granting the cause challenge. Mr. Rapaport went considerably further. He promised that he could follow the law, though he would favor life.

II. COMMENTS ON SILENCE.

The prosecution repeatedly commented on Ms. Cardona's post-arrest silence as evidence of her guilt. It emphasized that Ms. Cardona – before and after police read *Miranda* warnings – failed to ask what had happened to Lazaro, and argued this as evidence of her guilt. The trial court condoned these comments, overruling repeated objections. In so doing, it violated Ana Cardona's rights under the Fifth and Fourteenth Amendments and Article I, Section 9 of the Florida Constitution.

Det. Santiago, Det. Schiaffo and two Osceola deputies intercepted Ms. Cardona and Olivia Gonzalez when they arrived to pick up Ana's son Juan from school. (T. 3719-21). They stopped the car and the two detectives went to the doors on either side. Santiago directed Ms. Cardona to get out. (T. 3721-22). He told her that Lazaro was dead, and she began to cry. (T. 3723). She told Santiago that she had left Lazaro with "some lady." (T. 3723). Det. Santiago read Ms. Cardona Miranda warnings in the car and she agreed to talk to him further. (T. 3726-30).

Santiago participated in interrogating Ms. Cardona, and eventually drove her, Ms. Gonzalez, and the children back to Miami Beach.

During her direct examination of Det. Santiago, the prosecutor asked:

> Q. During that time period when you first came in contact with the defendant once you advised her you were there about Lazarito, he was dead, people had to go back to identify him and bury him, did the defendant ever ask you what happened to Lazarito?

(T. 3733-34).

The defense immediately objected, and the Court held a sidebar conference. Defense counsel specifically objected to the comment on silence. The court responded: "But there is no comment[] on silence. She gave a statement." (T. 3734). The defense explained that the prosecutor "is eliciting a comment on silence about something that Ms. Cardona did not say." The court overruled the objection.

The prosecution resumed, asking:

> Q. Did the defendant ever ask you after you had told her that Lazarito was dead what happened to her son?
>
> A. She never asked me that.
>
> Q. During the entire time that you were with the defendant how many hours was it that day sir?
>
> MS. GEORGI: Your Honor objection to repetitious.
>
> THE COURT: Overruled.

(T. 3736). Later in Det. Santiago's testimony, the prosecutor again asked:

> Q. After taking of the statement, after all was said and done, tape recording is done and you are driving the defendant back to

Miami Beach during all of that time, prior to taking of the statement and taking of the statement, after the taking of the statement and during the ride back from Osceola County to Miami Beach did the defendant ever say anything to you about something what happened to her son, how did he die?

A. Never.

(T. 3774).

During cross-examination, Santiago testified that Ms. Cardona did ask some questions about Lazaro. (T. 3779-80). On redirect, the prosecution again highlighted her silence:

Q. But did she ask you questions about what happened to her son?

A. Never.

* * *

Q. Did she ever ask you any questions at that time or anytime during all the hours that you were with her about what happened to my son, how did he die?

MS. GEORGI: Objection asked and answered.

THE COURT: Overruled.

BY MS. DANNELLY:

Q. Did she?

A. Never asked me.

(T. 3794-95).

The prosecutor made this testimony a feature of her closing argument, arguing Ms. Cardona's silence as evidence of her guilt. Recounting Santiago's testimony, she asked the jurors:

> Did she say, did you ever hear him say that she said, when he told her, "We're here about Lazaro." Did she ever say –
>
> MS. ENRIQUEZ: Objection, [commenting] on silence.
>
> MS. DANNELLY: – "what happened?"
>
> THE COURT: Overruled.
>
> MS. DANNELLY: "What happened?" "What do you mean he's dead? What are you talking about? How did he die?"
>
> MS. ENRIQUEZ: Objection.
>
> MS. DANNELLY: "Where did this happen?"
>
> THE COURT: Overruled.
>
> MS. DANNELLY: You didn't hear any of that. Yeah, sure, in that little excerpt you were shown by the defense, there was one or two lines where it said, on cross-examination, didn't she ask you questions about Lazaro? Sure, she asked questions about Lazaro. She asked questions about Lazaro: When was he going to be buried, when was he getting buried, when are we going back to Miami, when am I going to identify his body? But on redirect, please recall, I asked him the question again, did the defendant ever ask you how he died, where he died, or what happened to Lazaro, the answer was no.
>
> MS. ENRIQUEZ: Objection.
>
> THE COURT: Overruled.
>
> MS. DANNELLY: No. No. No. No. Because she didn't ask, because she knew. She knew how he died. She knew where he died. And she knew how he died. She didn't have to ask that question.

(T. 5466-67). The defense renewed its objection after arguments concluded. (T. 5484). The court overruled the objection and denied a motion for mistrial.

A. Florida Constitution

The Florida Constitution forbids any comment on a defendant's silence at the time of arrest or thereafter. *See State v. Hoggins*, 718 So. 2d 761 (Fla. 1998). Article I, Section 9, provides even greater protection of the right to silence than the United States Constitution. The Fourteenth Amendment right to due process bars the use of post-*Miranda* silence for impeachment, but permits impeachment by post-arrest, pre-Miranda silence. *See Doyle v. Ohio*, 426 U.S. 610 (1976); *Jenkins v. Anderson*, 447 U.S. 231 (1980). Article I, Section 9 prohibits the use of all post-arrest silence, before and after the reading of *Miranda* warnings. *Hoggins*, 718 So. 2d at 769-70. This prohibition extends to "all evidence and argument" fairly susceptible of being interpreted as a comment on post-arrest silence. "Post-arrest" statements include those made at the time of arrest. Id. at 767; *see also Ash v. State*, 995 So. 2d 1158 (Fla. 1st DCA 2008) (improper comment on silence "immediately before" arrest).

The State violates a defendant's right to silence when it comments on her failure to volunteer a particular statement, even if she has made other statements to police. *See State v. Smith*, 573 So. 2d 306 (Fla. 1990). Smith was charged with manslaughter for shooting his friend. At the scene of the shooting, he stated: "I just

shot someone. He was going for my daughter." During the State's case-in-chief, a deputy testified that Smith never said anything about being frightened of the victim, never said anything about his daughter being sexually assaulted by the victim, and never said anything about acting in self-defense. *Id*. at 377. The prosecution proceeded to argue Smith's failure to make those statements as evidence of his guilt. This Court found error, holding that, "The prosecution is not permitted to comment upon a defendant's failure to offer an exculpatory statement prior to trial, since this would amount to a comment upon the defendant's right to remain silent." *Id*. (quoting *Hosper v. State*, 513 So. 2d 234, 235 (Fla. 3d DCA 1987). The Court did so despite the fact that Smith did not remain silent, but voluntarily made statements to the police.

Florida Courts have consistently held this line, whether or not the defendant offered spontaneous pre-*Miranda* statements. "The cases generally condemn any attempt to establish that the defendant did not protest his innocence in some way when he was arrested." *Giorgetti v. State*, 821 So. 2d 417, 422 (Fla. 4th DCA 2002); *see also Hoggins*; *West v. State*, 69 So. 3d 1075 (Fla. 1st DCA 2011); *Morris v. State*, 988 So. 2d 120 (Fla. 5th DCA 2008). This includes a defendant's omission of exculpatory details while making a voluntary statement. *See Smith*; *Robbins v. State*, 891 So. 2d 1102 (Fla. 5th DCA 2004). In *Robbins*, the defendant told police that the alleged victim had attacked him with sticks and bottles. At trial,

he testified that he believed he had been attacked with a knife. *Id*. at 1107. The prosecution introduced testimony from the arresting officers that Robbins never mentioned a knife when he told police about the attack. Id. The district court reversed based on the improper comments on Robbins's silence. In *Cowan v. State*, 3 So. 3d 446 (Fla. 4th DCA 2009), the court reversed where the State commented on the defendant's failure to protest his innocence during a monitored conversation with his codefendant.

In *Harris v. State*, 726 So. 2d 804 (4th DCA 1999), the court reversed based on comments strikingly similar to those at issue here. Harris was convicted with murdering the mother of his child. The child was found, alive, a few feet from the victim's body. "At trial, the state introduced evidence – and commented in closing argument about – the defendant's failure to inquire about his baby daughter when he was first approached by the police." *Id*. The district court reversed for a new trial.

Ms. Cardona's pre- and post-*Miranda* silence was also inadmissible under the Florida Rules of Evidence. In *Hoggins*, the Court held that Hoggins's silence was barred by the rules of evidence as well as the constitution. His silence would only have been admissible if it had impeached his trial testimony. "If a defendant's silence is not inconsistent with his or her exculpatory statement at trial then the statement lacks probative value and is inadmissible." 718 So. 2d at 771. Ms.

Cardona did not take the stand. There was no testimony to even try to contradict with her silence. There is no theory under which Ms. Cardona's failure to question her interrogators could be admissible in Florida.

B. United States Constitution

The prosecution's tactics also violated Ana Cardona's rights under the United States Constitution. The use of post-arrest, post-*Miranda* silence even to impeach a defendant's testimony violates her constitutional right to due process. *See Doyle v. Ohio*, 426 U.S. 610 (1976). "In such circumstances, it would be fundamentally unfair and a deprivation of due process to allow the arrested person's silence to be used to impeach an explanation subsequently offered at trial."

The use of Ms. Cardona's pre-*Miranda* silence in the State's case-in-chief likewise violated her rights under the federal constitution. Unlike the Florida constitution, the federal constitution does not prohibit impeachment with post-arrest, pre-*Miranda* silence. *See Fletcher v. Weir*, 455 U.S. 603 (1982). But the Supreme Court has never held that the Fifth or Fourteenth Amendments permit the use of post-arrest, pre-*Miranda* silence in the prosecution's case-in-chief. The weight of federal authority holds that they do not. *See, e.g., United States v. Velarde-Gomez*, 269 F.3d 1023 (2001); *United States v. Whitehead*, 200 F.3d 634 (9th Cir. 2000).

A waiver of *Miranda* rights does not excuse the constitutional violation. The Court's reasoning in *Doyle* demonstrates that individual exercises of silence in response to questions are inadmissible. Doyle relied on the fact that a person who has just heard her Miranda rights has been informed that what she says can be used against her, but her silence cannot. Consequently, "it would be fundamentally unfair and a deprivation of due process to allow the arrested person's silence to be used to impeach an explanation subsequently offered at trial." Justice Alito's opinion in *Salinas v. Texas*, 133 S.Ct. 2174 (Jun. 17, 2013) (plurality opinion) demonstrates that this application of *Doyle* is correct. Pre-arrest and pre-*Miranda*, Salinas answered police questions, but refused to answer whether his shotgun would match shells found at the scene of the murder. The Court concluded that there was no Fifth Amendment violation because Salinas never expressly invoked his Fifth Amendment right. It was careful to point out, however, that post-*Miranda*, due process forbids any comment on silence, despite the absence of a Fifth Amendment invocation: "Petitioner is correct that due process prohibits prosecutors from pointing to the fact that a defendant was silent after he heard *Miranda* warnings, *Doyle v. Ohio*, 426 U.S. 610, 617–618 (1976), but that rule does not apply where a suspect has not received the warnings' implicit promise that any silence will not be used against him, *Jenkins v. Anderson*, 447 U.S. 231,

240 (1980)." *Salinas*, n.3 (Alito, J.) (emphasis in the original) (internal parallel citations omitted).

III. DISCOVERY VIOLATION.

The State's expert witness admitted that he had changed his opinion between the first and second trials. (T. 3842-43). The prosecution was obliged to disclose this change, *see Scipio v. State*, 928 So. 2d 1138, 1142 (Fla. 2006), but did not. The defense alerted the court to the discovery violation. (T. 3843-45, 3860). The judge nevertheless failed to conduct a *Richardson*[6] inquiry. To the extent that he considered prejudice to the defense at all, the judge ignored "procedural prejudice," focusing only on prejudice "[i]n connection with the rest of the case all the evidence…" (T. 3862). The discovery violation and the failure to conduct a *Richardson* hearing are presumptively harmful, and this Court must reverse.

Dr. Richard Souviron, the Medical Examiner's Chief Forensic Odontologist, testified as an expert for the prosecution. Both in the first trial and his deposition, he testified that all of the injuries to the mouth he observed were less than six months old, including two missing teeth. (T. 3841-43, 3855-56). By the second trial, he claimed that one of the two teeth had been lost more than six months before Lazaro died. (T. 3838, 3841-42; 3855). Asked if he had changed his opinion, Dr. Souviron answered, "Yes." (T. 3842-43). He explained that he revised

[6] *Richardson v. State*, 246 So. 2d 771 (Fla. 1971).

his opinion when he examined a photograph he hadn't seen until after the 1992 trial. (T. 3858).

In his 1991 deposition, Dr. Souviron testified:

> A. There is definitely scarring in the area where the teeth used to be. The area is not completely healed over and therefore I'm going to say that a couple months for sure that they had been out but they hadn't been out for six months or a year.
>
> Q: But less than six months?
>
> A: Yes.

(T. 3855-56). In the first trial, he testified:

> Q. Were you able to tell whether it's within a year or two years?
>
> A. I can tell you within days and months. I can't tell you if it was one or three days. It was not six months earlier. It was within months.
>
> * * *
>
> But we do know with respect to the loss of the teeth they occurred within the last several months of the child's life?
>
> A. In my opinion that's correct.

(T. 3839-40).

At the second trial, however, he opined: "[The tooth] to the left his right [has] been out as I said over six months." (T. 3831, 3838, 3842). When the defense confronted Souviron with his prior testimony, the prosecutor suggested that it concerned other injuries, and did not address the lost teeth. (T. 3840). Asked about this, Souviron testified that he was referring to all the injuries, *including* the teeth.

(T. 3841-42). He also explained that he changed his testimony because of a photograph he had not seen before the first trial:

> A. … What I specifically – they referred to injuries. They referred **not only to teeth** but the other injuries on the body, the eye, the face, the head. That's what it says. That's based on what I just got through reading, injuries. It didn't specifically say teeth. It said frenulum and these other injuries. **You have to understand it when I gave that testimony I never saw the skeletal part which really does help refresh or to enhance my testimony as to aging.**
>
> Q. Are you telling us that back in 1992 you were testifying in court as to the injuries on the body and you weren't specifically talking about the teeth and frenulum like you're explaining to us today?
>
> A. No. I was talking about all the injuries, all the injuries, frenulum top and bottom, **the two front teeth** that are missing. The injuries on the rest of the body if you read that testimony you know what I'm talking about.
>
> Q. And in your opinion back then was that all of those injuries, all of these injuries were not six months of age they were within months?
>
> A. No.
>
> Q. That was your testimony then?
>
> A. Okay. All right.
>
> Q. Correct?
>
> A. I'm not really sure. No, I'm not sure.
>
> Q. Do you want to look at it?
>
> A. Yes. What I'm saying today is exactly what I meant in 1990. There are the injuries there that are less than six months old. I already said that there are injuries there that are over six months old.

> So if you look at the socket of the teeth just soft tissue you will see these teeth were loss less than six months. **When you look at the bone now you see a different story**, now you say woe [sic], this one is definitely older than the other. One of them is less than six months. One is older than six months. **I didn't have that in 1990.**
>
> Q. Are you saying that your opinion has changed since 1992?
>
> A. Yes.

(T. 3841-43).

The defense immediately alleged a discovery violation. (T. 3843). Despite Souviron's testimony, the prosecution claimed that the doctor had not reviewed anything between the trials, and had not changed his opinion. (T. 3384, 3845). It pointed to his testimony in the first trial that it was significant that the tooth sockets were healing differently, indicating one was older than the other, and "[n]owhere is he specifically asked in that testimony as to the age of each socket." (T. 3845-48). The defense clarified the changed opinion: "[B]ack in 1992 it was clear that nothing that he was opining was older than six months. Everything was within several months. Here in court today he tries to say it was six months to a year." (T. 3847). The judge initially found that there had been no violation. (T. 3850-51).

The state's redirect examination, however, cemented the violation's existence. The prosecutor showed Souviron exhibit 45, a photograph showing some bone regrowth where on of the lost teeth had been. (T. 3824-27, 3857). She then asked:

Q. Your testimony isn't change[d] from 1992 has it?

A. No. **Any scientist is going to modify their opinions based upon now evidence [sic]. This is – I didn't see this in 1991.**

Q. You didn't see any actually [sic] picture in 1992?

A. Correct.

Q. But you did see the bone area, you didn't see that picture?

A. That's correct.

(T. 3857)

Defense counsel renewed her objection to the discovery violation. (T. 3860). The defense once more explained that whereas Souviron had previously testified that all the injuries occurred within months, he now said that one was definitely more than six months old, and that the difference was significant. The judge responded, "How so? … **In connection with the rest of the case all the evidence**, how so?" (T. 3862).

The judge continued to focus on the harmfulness of the change in light of the other evidence in the case. In response to the judge's question, the defense pointed out that it maintained that Lazaro was not with Ms. Cardona for the last three months of his life. The judge interrupted:

> THE COURT: These are not fatal injuries. You did say that your client was not a good mother and didn't take well care [sic] of the child but that she didn't kill him.

(T. 3862). Counsel explained that the change of opinion would mean that the injury happened when Ms. Cardona was responsible for Lazaro. The judge again interrupted:

> THE COURT: Didn't the child have some other healed injury to the body?
>
> [Prosecutor]: Many. Many.

(T. 3863). The judge overruled the objection. (T. 3864)

Once a witness has given a recorded statement, the State must disclose any material change in that statement. *See Scipio v. State*, 928 So. 2d 1138, 1142 (Fla. 2006). Failure to disclose a change in an expert witness's opinion is a discovery violation that triggers a full *Richardson* hearing. *See, e.g., Scipio*.[7] "During a *Richardson* hearing, the trial court must inquire as to whether the violation (1) was willful or inadvertent; (2) was substantial or trivial; and (3) had a prejudicial effect on the aggrieved party's trial preparation." *State v. Evans*, 770 So. 2d 1174, 1183 (Fla. 2000), *accord Sinclair v. State*, 657 So. 2d 1138, 1140 (Fla. 1995). The failure to conduct a complete *Richardson* hearing requires reversal unless the State

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[7] *See also Acosta v. State*, 856 So. 2d 1143 (Fla. 4th DCA 2003); *Alfaro v. State*, 471 So. 2d 1345, 1345-46 (Fla. 4th DCA 1985); *Neimeyer v. State*, 378 So. 2d 818, 821 (Fla. 2d DCA 1979) (State had duty to disclose change in testimony by medical examiner who had given prior statement and deposition); *cf. Major v. State*, 979 So. 2d 243 (Fla. 3d DCA 2007) (noting that trial counsel was ineffective for failing to object to changed expert testimony, but affirming where the issue was not preserved for direct appeal).

can prove beyond a reasonable doubt that the error was harmless. *State v. Schopp*, 653 So. 2d 1016 (Fla. 1995).

The trial judge failed to make any of the inquiries required by *Richardson*. He did not ask whether the violation was willful or inadvertent, or trivial or substantial. And when he discussed prejudice, he improperly focused on the wrong kind. The third inquiry concerns *procedural* prejudice. *See Scipio*, 928 So. 2d 1146-47. "[T]he question of 'prejudice' in a discovery context is not dependent upon the potential impact of the undisclosed evidence on the fact finder but rather upon its impact on the defendant's ability to prepare for trial[.]" *Schopp* at 1019 (quoting *Smith v. State*, 500 So. 2d 125,126 (Fla. 1986)[8]). There is no burden on the defense to prove procedural prejudice during a *Richardson* hearing. *See Thomas v. State*, 63 So. 3d 55, 59 (Fla. 2d DCA 2011). Instead, the State must prove the absence of procedural prejudice. *See Cliff Berry, Inc. v. State*, 116 So. 3d 394, 418-19 (Fla. 3d DCA 2012).

In this case, the judge considered only substantive prejudice. He expressly asked defense counsel how the changed opinion was significant, "[i]n connection with the rest of the case all the evidence …" (T. 3862). He discounted the harm to the defense by observing, "[t]hese are not fatal injuries," and asking "Didn't the child have some other healed injury to the body?" (T. 3862-62). These were

[8] *Schopp* overruled *Smith* to the extent that *Smith* held a *Richardson* violation to be per se reversible error.

precisely the wrong questions. "An analysis of procedural prejudice does not ask how the undisclosed piece of evidence affected the case as it was actually presented to the jury. Rather, it considers how the defense might have responded had it known about the undisclosed piece of evidence …" *Scipio* at 1149-50. Though counsel tried to tell the judge that she might have proceeded differently had she known of the change, the judge ignored this and never called on the prosecution to prove the absence of procedural prejudice. (T. 3863-64).

The trial judge's failure to conduct a proper *Richardson* hearing is presumptively harmful. *See Cox v. State*, 819 So. 2d 705, 712 (Fla. 2002); *Stimus v. State*, 886 So. 2d 996, 998 (Fla. 5th DCA 2004). The Court must reverse unless the State establishes beyond a reasonable doubt that defense counsel's preparation or strategy would not have been materially different. *Schopp*, 1147-48. "'[T]he vast majority of cases' will not have a record sufficient to support a finding of harmless error and … there is a 'high probability' that any given error will be found harmful." *Id.* at 1148 (quoting *Schopp* at 1021).

The State cannot meet that burden here. Because the judge failed to inquire, the record is inadequate to fully determine the impact of the changed opinion. It does, nevertheless, affirmatively establish procedural prejudice. Defense counsel pointed out that she had asked the State to disclose whether their witness's opinions had changed. (T. 3843, 3861). Counsel explained:

> The bottom line is if they showed him new information that he had not seen before that affects his opinion it's precisely what we have been asking of the state for months and months. If your experts have changed their opinion or gone over anything new we simply need to depose them. Had that been disclosed to us we could have done so. None of this would have happened today.

(T. 3861-62). She further stated:

> The point is attributing any of those traumatic injuries to Ms. Cardona by back dating them now which is what he did today is extremely prejudicial. Had we known that prior to trial we might have proceeded differently. I can't tell you because I don't have – I don't know the full extent of everything he reviewed. I don't know what else he reviewed.

(T. 3863). Even in the absence of a proper *Richardson* hearing, the record makes clear that the defense was prejudiced in its ability to prepare for trial. The State cannot overcome the presumed prejudice, and the Court must reverse for a new trial.

IV. PROSECUTORIAL MISCONDUCT IN CLOSING ARGUMENT

A prosecutor has an ethical duty to seek justice rather than pursuing a conviction at all costs. *See Lewis v. State*, 711 So. 2d 205 (Fla. 3d DCA 1998).

> As the United States Supreme Court observed over sixty years ago, "It is as much [the prosecutor's] duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one."

Gore v. State, 719 So. 2d 1197, 1201 (Fla. 1998) (*quoting Berger v. United States*, 295 U.S. 78, 88 (1935)). Here the prosecution repeatedly ventured improper

arguments. Not satisfied with merely striking hard blows, it instead struck foul ones. *See Berge*r, 295 U.S. at 88. This prosecutorial misconduct deprived Ana Cardona of due process of law and trial by an impartial jury.[9] U.S. Const. amend. VI, VIII, XIV: Art. I, §§ 9, 16, 17, Fla. Const.

A. "Justice for Lazaro"

Again and again, the prosecutor told the jury that this case was about "justice for Lazaro:" "… It's really, it's really important to stay focused on what this trial has been about from day one and that is justice for Lazaro." (T. 5328).

> These photos, look at those photos. I know it's difficult, it's really difficult. But **this trial is about justice for Lazaro**, and we who labor here seek only truth.

(T. 5341).

> [MS. PAUTLER]: Remember this trial, we who labor seek only the truth. **This trial is about justice for Lazaro**.
>
> MS. ENRIQUEZ: Objection, inflames the jurors passion and misstatement of the law.
>
> THE COURT: Overruled.
>
> MS. PAUTLER: **Justice for Lazaro** …

(T. 5352).

> [MS. PAUTLER] When you elect that foreman, you have to decide what's the truth here, but I'm going to ask you, remember, **this trial is about justice for Lazaro**.

[9] The court reviews error in overruling defense objections to improper argument for abuse of discretion. *Brooks v. State*, 762 So. 2d 879, 902 (Fla. 2000).

MS. ENRIQUEZ: Objection, inflames the jurors.

(T. 5353). At this point, and for the first time, the judge sustained the objection, but within a page he reversed course. The prosecutor ended her closing argument by charging jurors to find Ms. Cardona guilty because, **"This is the only verdict that's going to give justice for Lazaro."** (T. 5354). The Court overruled the defense objection, and denied a subsequent motion for mistrial. (T. 5354-56).

Closing argument "must not be used to inflame the minds and passions of the jurors so that their verdict reflects an emotional response to the crime or the defendant rather than the logical analysis of the evidence in light of the applicable law." *Bertolloti* at 134 (Fla. 1985). A prosecutor may not demand a guilty verdict in the name of "justice for the victim." *See Dorsey v. State*, 942 So. 2d 983 (Fla. 5th DCA 2006). In *Dorsey*, the court condemned an argument "demanding justice for the victim." *Id.* at 986. In *Shaara v. State*, 581 So. 2d 1399 (1st DCA 1991), the court held improper "the prosecutor's comment that the victim was asking the jury for justice." In *Edwards v. State*, 428 So. 2d 357, 359 (Fla. 3d DCA 1983), the court reversed based on statements that called for justice "*on behalf of [victim's] wife and children.*" (emphasis in the original). The only issue before the jury was whether or not the State had proven its case beyond a reasonable doubt. The prosecutor's comments were nothing more than an attempt to divert and inflame the jury. *See also Watts v. State*, 593 So. 2d 198, 203 (Fla. 1992).

B. Burden-Shifting

In these same comments, the prosecution attempted to shrug off its burden of proof beyond a reasonable doubt:

> The standard for a criminal conviction is not which side is more believable, but whether, taking all the evidence into consideration, the State has proven every essential element of the crime beyond a reasonable doubt. For that reason, it is error for a prosecutor to make statements that shift the burden of proof and invite the jury to convict the defendant for some reason other than that the State has proved its case beyond a reasonable doubt.

Gore v. State, 719 So. 2d 1197, 1200 (Fla. 1998). The prosecution nevertheless urged the jury to convict Ms. Cardona based on what it thought was "true."

In the comments above, the State repeatedly linked the ultimate issue – "justice for Lazaro" – with "the truth." The prosecutor twice quoted, "We who labor here seek only truth," and she told jurors that once they had elected a foreman, their job was to "decide what's the truth here." (T. 5341, 5352-53). The prosecutor also reminded the jury that they had agreed to "uphold and honor" the law, "Because we who labor here seek only truth, and the truth is she killed her little boy. She tortured that kid." (T. 5329). In the second closing argument, the prosecutor told jurors: "You're here to consider the evidence, not to imagine what somebody might have been thinking or might have been saying or might have been doing. **You're here to seek the truth based upon what you heard in this courtroom.**" (T. 5476).

Florida courts have uniformly condemned arguments that urge the jury to decide the case based on "truth" or which side they believe rather than proof beyond a reasonable doubt. *See, e.g., Gore*, 1200-01; *Paul v. State*, 980 So. 2d 1282, 1283 (Fla. 4th DCA 2008); *Covington v. State*, 842 So. 2d 170 (Fla. 3d DCA 2003); *Northard v. State*, 675 So. 2d 652, 653 (Fla. 4th DCA1996); *Clewis v. State*, 605 So. 2d 974, 974 (Fla. 3d DCA 1992); *Bass v. State*, 547 So. 2d 680, 682 (Fla. 1st DCA 1989). In *Northard* the court found in error in a single instance of a milder version of the State's argument in this case: "[Y]ou will deliberate and come back with a verdict, a verdict that simply reflects the truth …" The court wrote that "[T]he prosecutor's comment could have resulted in a juror voting to convict appellant because the juror believed that in truth appellant committed the crime, even if the state had not met its burden of proof." *See also Gibbs v. State*, 193 So. 2d 460 (Fla. 2d DCA 1967).

C. Denigrating The Defense.

"Verbal attacks on the personal integrity of opposing counsel or on the manner in which counsel conducted the defense are improper and have no role in the State's case." *Braddy v. State*, 111 So. 3d 810, 853-54 (Fla. 2012), *cert. denied*, 134 S.Ct. 275 (U.S. 2013) and "A prosecutor may not ridicule a defendant or his theory of defense." *Riley v. State*, 560 So. 2d 279, 280 (Fla. 3d DCA 1990). The prosecution nevertheless persistently ridiculed the defense as a "diversion," warned

jurors the defense would Ms. Cardona's attorneys would "cloud" and "muddle" the issues, mocked the defense closing argument as "a magnificent display … a real show," and suggested that defense counsel was being dishonest.

The prosecutor made the phrase "diversionary tactic" the refrain of her closing argument. She wasted no time in launching her attack. By the second paragraph she had already accused the defense of trying to distract the jury from what she claimed was the true issue, "justice for Lazaro":

> … It's really, it's really important to stay focused on what this trial has been about from day one and that is justice for Lazaro.
>
> The defense gave you this. They want you to play where's Gloria, where's Gloria? **It's a diversionary tactic**.
>
> MS. ENRIQUEZ: Objection.
>
> THE COURT: Overruled.
>
> MS. PAUTLER: **It's a diversionary tactic** because they don't you to focus on this statement, the statement that, that woman made on December 6, 1990. She had a lot to say, and in these words, if you listen to that statement, you read these words, you read in between the lines, you listen to what she says and what she doesn't say. And you get to the conclusion of what really happened to Lazaro. **Diversionary tactics** and –
>
> MS. ENRIQUEZ: Objection to diversion of the defense.
>
> THE COURT: Overruled.
>
> MS. PAUTLER: **They don't want you to look at this frying pan.**

(T. 5328-29)

MS. PAUTLER: **Don't let them cloud that issue and muddle it.**

MS. ENRIQUEZ: Objection to denigration of defense.

THE COURT: Overruled.

(T. 5333)

She saw it. She saw it in her statement, page number 72. I saw it on the news. I wanted to call you, but I didn't. Where is Gloria? **Diversionary tactic**.

MS. ENRIQUEZ: Objection, denigration of defense.

THE COURT: Overruled.

(T. 5334).

MS. PAUTLER: Taped to him. So it's like a body cast. **That's outrageous. That is outrageous.** Where is Gloria? **Diversionary**.

MS. ENRIQUEZ: Objection, denigration of defense.

THE COURT: Overruled.

(T. 5336).

[MS. PAUTLER]: …This is where the torture occurred the last two months of his life. **Diversionary**. That frying pan had his hair on it. **Diversionary**.

MS. ENRIQUEZ: Objection, motion [sic] of the defense.

THE COURT: Overruled.

(T. 5338).

[MS. PAUTLER]: Premeditation. Let's talk about that. **Diversionary**.

(T. 5343). At this point the judge called a sidebar. He did not sustain the objection but asked the prosecutor to refrain from using the word diversionary "in an abundance of caution." (T. 5344).

In its rebuttal closing argument, though deprived of its refrain, the prosecution nevertheless went on to describe the defense closing as a "magnificent display:" "You never heard about a lot of people and a lot of things that were said, **but you did see a magnificent display here, a real show here**." (T. 5435). The judge overruled the objection to "denigrating the defense." The prosecutor later referred to "another issue they throw in there, Gloria Pi." (T. 5461).

Arguments accusing the defense of attempting to confuse or distract the jury are improper. *See Braddy*, 111 So. 3d 853-54; *D'Ambrosio v. State*, 736 So. 2d 44 (Fla. 5th DCA 1999); *Izquierdo v. State*, 724 So. 2d 124 (Fla. 3d DCA 1998) (calling defense a "pathetic fantasy"). In *Braddy*, the Court condemned the State's argument that the defense closing was intended to draw jurors' attention away from aggravating circumstances. In *D'Ambrosio*, the court rejected arguments characterizing the defense as a "sea of confusion" which "defense counsel prays you will get lost in." In *State v. Benton*, 662 So. 2d 1364 (Fla. 3d DCA 1995), the court held that arguing it was defense counsel's "job to cross things up, to muddy the water," was improper. Ms. Pautler's claim that the defense engaged in "diversionary tactics" because, "[t]hey don't want you to look at this frying pan,"

is similar to an argument held to be improper by the Third District sitting en banc: "But [defense counsel] will tell you anything to get you to look away from the man who is sitting next to him, the Defendant." *Lewis v. State*, 780 So. 2d 125, 130 (Fla. 3d DCA 2001) (opinion on rehearing en banc). *See also Caraballo v. State*, 39 So. 3d 1234, 1248-49 (Fla. 2010) (argument that counsel's cross-examination was an attempt to distract the jury); *Fullmer v. State*, 790 So. 2d 480, 481 (Fla. 5th DCA 2001) ("Don't let [the defense] confuse you or mislead you."); *Carter v. State*, 356 So. 2d 67 (Fla. 1st DCA 1978) (argument that defense counsel was trying to "distort the record" and "mislead [the jury.]")

In its rebuttal, the prosecutor went on to tell jurors that defense counsel had misled them and hidden the truth, while contrasting counsel's dishonesty with her own candor: "… **because you need to know the truth. [You] need to know the whole story, which you haven't heard here this afternoon, but hopefully, in the short time I have with you, you're going to hear it now.**" (T. 5440). Derogatory remarks attacking the integrity of counsel deprive a party of a fair trial. *See Owens Corning Fiberglas Corp. v. Morse*, 653 So. 2d 409, 411 (Fla. 3d DCA 1995); *see Sanchez v. Nerys*, 954 So. 2d 630 (Fla. 3d DCA 2007) (arguments that counsel was "pulling a fast one," "hiding something," and "trying to pull something"); *Sun Supermarkets, Inc. v. Fields*, 568 So. 2d 480, 481 (Fla. 3d DCA 1990); *Valdez v. State*, 613 So. 2d 916, 917 (Fla. 4th DCA 1993) ("And where the

dog was, and, again, it is not a major thing, but it just bugs me that the defense really doesn't give you an accurate story. I have to get up and do it.").

Building on this theme, the prosecutor implied that the defense had misled the jury, stressing that defense counsel had not discussed the testimony of certain witnesses: "Interesting, you didn't hear the name Susie Hernandez this afternoon did you?" (T. 5440); "… because you know it from the one witness that you didn't hear about this afternoon. (T. 5443); "There's another woman you didn't hear about, Debra Sabo." (T. 5463-64); "You didn't hear about Debra Sabo, because Debra Sabo … is a witness who is explains the context of this testimony … You heard about an excerpt here, and an excerpt there." (T. 5465). By this argument, the prosecutor insinuated the defense was misleading the jurors and trying to hide the "truth" and the "full story." *See Caraballo v. State*, 762 So. 2d 542, 544 (Fla. 5th DCA 2000) ("Why did [defense counsel] tell you only half of the story?"); *Landry v. State*, 620 So. 2d 1099 (Fla. 4th DCA 1993) (And I think that says a great deal about the defense's argument when they're not arguing to what was said by the witnesses in this case."). This attack was particularly cynical in light of the fact that the prosecutor subsequently complained: "I don't even have the time left to discuss all that testimony with you." (T. 5445)

The prosecution also castigated counsel for her legitimate conduct of the defense. State witness Carlos Lima testified that Ms. Cardona would scream

vulgarities at him whenever he contacted her. (T. 3125-27). The defense impeached him with the fact that he had never mentioned this in his police statement, his deposition, or his testimony at the first trial. (T. 3218-22). In closing argument the defense pointed to this as one of several inconsistencies that called his testimony into question. (T. 5408-10). Over objection, the state argued:

> It's interesting, the defense focuses on that one time, that one word that they want you think about to try to poison your mind against Carlos Lima.

(T. 5439). In yet another argument, the prosecutor criticized counsel for "making a big issue" of the fact that Ms. Cardona was on the floor kissing Det. Matthews feet. (T. 5473). *Compare Servis v. State*, 855 So. 2d 1190, 1193 (Fla. 5th DCA 2003). ("*The defense wants to also make a big deal about when the defendant was arrested.*") (emphasis in the original).

D. Vouching

"[P]rosecutors may not directly or indirectly express their opinions as to the credibility of witnesses or the guilt of the defendant." *Martinez v. State*, 761 So. 2d 1074, 1081 (Fla. 2000). "[T]he expression by counsel in argument before the jury of personal opinion of guilt is not only bad form, but highly improper …" *Tyson v. State*, 100 So. 254, 255 (Fla. 1924). The prosecutors nevertheless gave jurors their personal assurances that Ms. Cardona was guilty, and that their witnesses' testimony was the "reality."

Det. Santiago found Ana Cardona on her knees, crying and kissing Det. Matthews feet. (T. 3792). The defense argued that that the detective had threatened her in order to get her confession (T. 5376-79). Over objection, the prosecutor assured jurors:

> You heard about everything that happened in that room in that conversation, because that's the reality. That's what was heard. That's what was done.

(T. 5473). This argument could only serve to tell the jury that the prosecutor herself knew "the reality" of what happened, and her witness's testimony was true.

The prosecutors also directly told the jury that they knew Ana Cardona was guilty:

> Because we who labor here seek only truth, and **the truth is she killed her little boy**.

(T. 5329).

> Because like I told you, **it's felony murder. Oh, you can rest assured of that**, because the kid died of aggravated child abuse but premeditation. Murder one, murder one. And it's going to get more painful. **You better believe it. This is what she did.**

(T. 5343)

> She is simply responsible for the death of her son. And as ugly as that is, it is true. Thank you.

(T. 5478).

Florida Courts have held these comments to be improper since before the Great Depression. *See, e.g., Tyson*. In *Sempier v. State*, 907 So. 2d 1277, 1278 (Fla.

5th DCA 2005), the court found fundamental error in arguments that included: "Ladies and gentlemen, you have all the testimony that you need. He did it. He's guilty. You should convict him." In *Fullmer v. State*, 790 So. 2d 480, 481 (Fla. 5th DCA 2001), the prosecutor argued: "Ladies and gentlemen, this man is so guilty. He is very guilty." *See also D'Ambrosio v. State*, 736 So. 2d 44, 48 (Fla. 5th DCA 1999) ("It is obvious. It is so apparent what justice is in this case, to find this defendant guilty for what everyone in this courtroom knows he did."); *Bass v. State*, 547 So. 2d 680, 682 (Fla. 1st DCA 1989) ("The man is guilty.").

E. Personal Attacks On Ms. Cardona

The prosecution further launched a demeaning attack on Ms. Cardona herself. A prosecutor may not engage in attacks on the character of the defendant calculated to inflame the jurors' passions. *King v. State*, 623 So. 2d 486, 488 (Fla. 1993). "It is improper in the prosecution of persons charged with a crime for the representative of the state to apply offensive epithets to defendants or their witnesses, and to engage in vituperative characterizations of them." *Green v. State,* 427 So. 2d 1036, 1038 (Fla. 3d DCA) (Fla. 1983). The prosecution nevertheless mocked Ms. Cardona as a narcissistic drama queen. In one racially-tinged attack, the prosecutor said:

> [MS. PAUTLER]: You know what's really interesting, what's on channel 23?[10] A lot of telenuvellas [sic]. That's what her statement reads like. Aye. Aye.

(T. 5342). The State stressed this theme throughout its closing arguments:

> MS. DANNELLY: You talk about a woman who is a drama expert. You look at her statement, you read it through carefully. Oh, my God.

(T. 5474).

> "… you look at the me, me, me of her statement" (T. 5330).
>
> … "it's all about her" (T. 5338).
>
> … "she had to keep him quiet because she didn't want to get kicked out, because it's all about her." (T. 5339).
>
> "… finally she finds her in some motel, somewhere on Okeechobee Road with some man" (T. 5438).
>
> "I submit to you that the person that Ana Cardona is most concerned with in this world is Ana Cardona." (T. 5452).
>
> "This is a woman who cares first and foremost for herself." (T. 5457).

In *Martinez v. State*, 761 So. 2d 1074, 1083 (Fla. 2000), this Court held improper the comment that the defendant "doesn't tell the truth to the women he's involved with; he cheats on them, he runs around on them …" In *Ryan v. State*, 457 So. 2d 1084, 1089 (Fla. 4th DCA 1984), the prosecutor portrayed the defendant as rich and manipulative, and the court reversed. In *Green*, the prosecutor referred to the defendant as a "dragon lady." The court wrote that "There is no reason, under any circumstances, at any time for a prosecuting attorney to be rude to a person on trial; it is a mark of incompetency to do so."

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[10] Channel 23 is a local Spanish-language television station.

Here, the only purpose of these arguments was to attack Ms. Cardona's character and inflame the jurors' passions against her.

F. Facts Not In Evidence

The State used facts that were never in evidence to vilify Ana Cardona and to manufacture a motive. During its opening statement, the prosecutor told the jury it would hear evidence of Ana's life in Miami before Lazaro was born. She told jurors they would hear about her arrival in Miami, and her relationship with Lazaro's father, Fidel Figueroa. (T. 2766-67). The prosecutor alleged the evidence would show that, "When the defendant met Fidel Figueroa she realized that she had hit the mother load." (T. 2767). Ana, the prosecutor asserted, lived in a penthouse at the Charter Club, where she lived "very, very well … Very, very well," before Fidel was murdered. (T. 2767, 69) The evidence, she said, would show that after Fidel died, Ana received large amounts of money from people who had owed him. (T. 2770).

The State introduced almost no evidence to support these statements. Detective Klueger testified he went to the Charter House in the course of the investigation. (T. 4979). Fidel was murdered. (T. 2995; 3015-16). Ana's supposed life of pampered luxury, however, was not introduced in evidence.

The absence of this evidence did nothing to deter the prosecutor from arguing it to the jury:

MS. DANNELLY: … Let's talk about Ana Cardona, the defendant. And let's go back to the beginning of when you first heard, in defense opening, about who she was and what kind of life she lived and what she was used to, a life of privilege, the charter club, the penthouse.

MS. ENRIQUEZ: Objection.

THE COURT: Overruled.

MS. DANNELLY: The housekeeper, the money and money and money and money. No obligations. People to help her all of the time.

MS. ENRIQUEZ: Objection: Facts not in evidence.

THE COURT: Overruled.

MS. DANNELLY: We didn't hear anything this afternoon yet about that life and that woman. Let's talk about that woman.

MS. ENRIQUEZ: Shifting the burden.

MS. DANNELLY: Judge.

THE COURT: Overruled.

MS. DANNELLY: Let's talk that woman. Let's talk about that woman for a while and what she did. What did she do when Fidel Figueroa was killed? She received a lot of money, a great sum of money from people that owed him money. And she went through it like that …

(T. 5436-37).

She is living high and happy in the penthouse at the Charter Club, and a month before his birth, her meal ticket is gone, and her whole life changes …

(T. 5443-44).

> I submit to you that the person that Ana Cardona is most concerned with in this world is Ana Cardona. Everything in her life was about her; from her party days when she used to run around, when she's with her friends.
>
> MS. ENRIQUEZ: Objection.
>
> THE COURT: Sustained.
>
> MS. DANNELLY: When she used to party with her friends. When she lived -- when she lived at the Charter Club.
>
> MS. GEORGI: We need a sidebar.
>
> MS. DANNELLY: When she lived at the Charter Club. When she lived at the Charter Club. When she lived with Fidel. When she lived that high life, and when that away, the problems of the defendant began.

(T. 5452-53).[11]

A prosecutor may comment on the evidence and logical inferences from that evidence. *See Conahan v. State*, 844 So. 2d 629, 640 (Fla. 2003). However, the Court has "long held that argument on matters outside the evidence is improper." *Bigham v. State*, 995 So. 2d 207, 214 (Fla. 2008) (citing *Pope v. Wainwright*, 496 So. 2d 798, 803 (Fla. 1986)). The State simply excused itself from proving part of its case, and the court permitted it to argue its position without evidentiary support.

[11] When the judge denied the defense motion for mistrial, he said he had sustained the defense objection because, "there was no evidence that she was partying," but there was evidence she, "lived a certain lifestyle." (T. 5485).

G. Harmful Error.

Defense counsel objected to the vast majority of the State's improper arguments. The Court, moreover considers "the properly preserved comments … combined with additional acts of prosecutorial overreaching …" *Ruiz v. State*, 743 So. 2d 1, 7 (Fla. 1999); *see Merck v. State*, 975 So. 2d 1054, 1061 (Fla. 2007) ("The Court considers the cumulative effect of objected-to and unobjected-to comments when reviewing whether a defendant received a fair trial"). When the objected-to and unobjected-to comments are taken together, the state cannot prove beyond a reasonable doubt that the prosecutor's misconduct did not contribute to the verdict. *State v. DiGuilio*, 491 So. 2d 1129, 1135-36 (Fla. 1986).

V. PROSECUTORIAL MISCONDUCT IN THE PENALTY PHASE

The State has the "duty to seek justice, not merely 'win' a death recommendation." *Merck v. State*, 975 So. 2d 1054, 1068 (Fla. 2007) (quoting *Urbin v. State*, 714 So. 2d 411, 422 (Fla. 1998)). The prosecutor nevertheless used its closing argument to argue facts outside the record and disparage the defense and its mitigation, in violation of Cardona's rights of due process, trial by an impartial jury, and a reliable sentencing process.[12] U.S. Const. amends. 5, 6, 8, 14; Art. I, §§ 9, 16,17, Fla. Const.

[12] A court's rulings on objections to improper arguments are reviewed for abuse of discretion. *See Merck v. State*, 975 So. 2d 1054, 1061 (Fla. 2007).

A. Facts Not In Evidence

The prosecution urged jurors to reject mitigating evidence of Ana's childhood trauma based on a lack of corroboration from witnesses "who were available." (P. 1115). It did so knowing there was no evidence that witnesses to her early life were available and in the face of two orders in limine. (R. 11095-96; 11146-51). A prosecutor may not argue facts not in evidence, and the trial court erred in overruling the defense objection. *See Huff v.* State, 437 So. 2d 1087 (Fla. 1983).

Dr. Toomer evaluated Ms. Cardona concerning the effect of her traumatic childhood. Prior to trial, the defense filed a motion in limine to prohibit comment on the lack of corroboration of the events underlying his testimony. (R. 11095-96). The motion pointed out that state law[13] prohibited counsel, as state employees from travelling to Cuba to obtain this very evidence. The court granted the motion. (R. 11095). It separately entered an order proscribing any "attempt to argue facts not in evidence …" (R. 11151). The prosecutor nevertheless argued:

> … The reason why you heard from Dr. Capp is because it needed to be pointed out to you that very narrow aspect that was presented to Dr. Toomer of the defendant's life was totally unsubstantiated by any other outside source such as **family members who were available, friends who were available**.
>
> MS. ENRIQUEZ: Objection, pre-trial ruling.

[13] *See* §§ 110.1155, 112.061, Fla. Stat., (2010).

THE COURT: Overruled.

(R. 1115).

A prosecutor may comment on the evidence and logical inferences from that evidence. *See Conahan v. State*, 844 So. 2d 629, 640 (Fla. 2003). Argument on matters outside the record, however, is improper. *See Bigham v. State*, 995 So. 2d 207, 214 (Fla. 2008). The prosecutor suggested that she knew that witnesses who could speak to Ms. Cardona's early life were available, and implied that their testimony would not support the basis for Dr. Toomer's opinions.[14]

This argument is compounded by the fact that the prosecution argued a lack of corroboration that the State of Florida itself had forbidden the defense to pursue. When a party successfully excludes evidence, it cannot turn around and argue its opponent's failure to introduce it. *See, e.g., Garcia v. State*, 564 So. 2d 124, 128-29 (Fla. 1990); *State Farm Mutual Auto Insurance Co. v. Thorne*, 110 So. 3d 66, 74 (Fla. 2d DCA 2013); "Case law indicates it is improper for a lawyer, who has successfully excluded evidence, to seek an advantage before the jury because the evidence was not presented." *JVA Enterprises, I, LLC v. Prentice*, 48 So. 3 d 109, 115 (Fla. 4th DCA 2010); *Bauta v. State*, 698 So. 2d 860, 864 (Fla. 3d DCA 1997). Through its legislation, the State prevented defense counsel from pursuing

[14] The State in fact objected to questions intended to show that no such witnesses were available and that defense counsel was prohibited from traveling to Cuba to seek such witnesses. (P. 732-33).

evidence that would corroborate the basis for Dr. Toomer's opinions. The State Attorney then capitalized on this lack of corroboration to defeat mitigating evidence. The error is exacerbated by the fact that it traded on Ms. Cardona's poverty, in violation of her rights to due process and equal protection of law. *See Ake v. Oklahoma*, 470 U.S. 68 (1985). Only the indigent are assigned lawyers prohibited by law from pursuing mitigation.

B. Denigrating Defense Counsel

As in the first phase, the prosecutor attacked counsel for the manner in which they conducted the defense. One of the chief mitigating factors was Ana's conduct as a model inmate. (P. 303-4; 315, 423). In response, the State listed witnesses who would testify to an incident in which pencils and a razor blade were found in her cell. (P. 326). The defense, through its own witnesses, established that inmates sometimes plant contraband in another inmate's cell, and that Ms. Cardona remained a trustee after the incident. (P. 395, 419, 427, 957). The defense also cross-examined State witness Officer Julie Butler to the same effect. (P. 957). The cross-examination established that that the pencils were not contraband, the Ana denied the razor was hers, and that Butler continued to employ her as a trustee. (P. 948, 956, 957). Based on this, the prosecution mounted a misleading attack on the defense:

> [MS. DANELLY]: There was a lot made and I never – I guess I really didn't understand why there was a lot made about –

(P. 1112). The Court sustained an objection and denied a motion for mistrial. (P. 1112). The prosecutor continued:

> MS. DANNELLY: There was so much testimony about it, testimony about a razor blade, razor blades, one incident. Even to the point when the state called Correctional Officer Butler you remember her? Probably one of our last witnesses. **Why was she attacked?**
>
> MS. ENRIQUEZ: Objection, denigration of defense.
>
> THE COURT: Overruled.
>
> MS. DANNELLY: **Why was she cross-examined to the point** –
>
> MS. ENRIQUEZ: Objection.
>
> THE COURT: Overruled.
>
> MS. DANNELLY: **To the point where she was in a defensive position when the woman told you I allowed her to be a trustee**[?]

(P. 1112-13).

Florida courts have consistently condemned such attacks. For example, in *Adams v. State*, 830 So. 2d 911, 915 (Fla. 3d DCA 2002), the court found improper an argument that "implied to the jury that defense counsel acted in a demeaning, discourteous and unprofessional manner during the cross-examination ... " *See Lewis v. State*, 780 So. 2d 125 (Fla. 3d DCA 2001) ("Do you recall the abuse and ridicule piled on him by Defense counsel on cross-examination? ..."). The

prosecutor's suggestion that it was improper for the defense to cross-examine Lt. Butler was as improper as it was misleading.

C. Diminishing Mitigation

"This Court has long recognized that a prosecutor cannot improperly denigrate mitigation during a closing argument." *Delhall v. State*, 95 So. 3d 134, 167-68 (Fla. 2012) (quoting *Williamson v. State*, 994 So. 2d 1000, 1014 (Fla. 2008). Despite this, the State ridiculed mitigating evidence and suggested that it favored death.

Ana became a role model in prison. She helped corrections officers maintain order, guided other inmates in their adjustment to incarceration, and even served as a mother-figure to them. The prosecutor dismissed this with derision: " … I don't dispute it, she was good in jail. She talked to her cellies, her bunkies **as if it's camp**." (P. 1111). The judge overruled the objection.

The State further argued that Ms. Cardona's mitigation weighed against her. Her children testified to their efforts to re-forge their relationships with their mother and to the importance of that renewed connection. (P. 777-). The State argued that this cut the other way. Of Ana's son Juan, the prosecutor said, "[H]e sat there and he told you that he maintained whatever connection he could with his mother over those years since then. **And what has happened to his life during the connection? Has it gotten better … It's gotten worst. His life is worst**." (P.

1117). The court overruled the defense objection. Though Tahimi's rekindled relationship with her mother may have seemed to be mitigating, the State argued, over a sustained objection, that hope that Ana might one day get out of prison torpedoed the girl's chances for adoption. (P. 1121-22). Treating "conduct that actually should militate in favor of a lesser penalty" as aggravation results in a denial of due process. *See Zant v. Stephens*, 462 U.S. 862, 885 (1983), *quoted in Walker v. State*, 707 So. 2d 300, 314 (Fla. 1997).

D. Harmful Error

As observed above, the court does not consider improper prosecutorial arguments singly. Defense counsel objected to each of the improper arguments, and the State must prove the error harmless beyond a reasonable doubt. This the State cannot do.

VI. THE HAC AGGRAVATOR CANNOT BE BASED ON ACTS BEYOND THE IMMEDIATE CIRCUMSTANCES SURROUNDING THE DEATH.

The trial court found HAC based on actions outside the dates alleged in the indictment, and as far back as a year before Lazaro's death. "[T]he HAC aggravator focuses on the means and manner in which death is inflicted and the immediate circumstances surrounding the death." *Hernandez v. State*, 4 So. 3d 642, 669 (Fla. 2009) (quoting *Brown v. State*, 721 So. 2d 274, 277 (Fla. 1998)).

The judge nevertheless relied on – and permitted the State to argue to the jury – every instance of child abuse alleged in this case, going back to Ms. Cardona dragging her son by the arm in July to September of 1989. (T. 3620-21); (R. 14).

The indictment alleged that the murder occurred between October 28 and November 2 of 1990. (R. 69-72). The judge nevertheless relied on injuries the State's own expert said occurred weeks to months before Lazaro's death. These included scars to the child's buttock and abdomen, the ossifying injury in his left arm, a subdural hematoma and hematomas to the forehead and knee. He also relied on injuries the medical examiner said could have been days or weeks old, including bruises, bedsores, abrasions, diaper rash, and a burn.

These injuries, as well as some of the injuries received were not "the immediate circumstances surrounding the death," and were not the "means and manner in which death [was] inflicted. Dr. Kim, a State expert, testified that the cause of death was damage to the brain stem and corpus callosum. (T. 4215, 4217). Dr. Hyma agreed that the brain injuries were fatal and a sufficient cause of death. (T. 4140, 4149). He nevertheless stated that Lazaro died of "child abuse syndrome." (T. 4141). According to Hyma, this is because Lazaro would have died eventually due to the fact he had many other injuries that weren't treated. (T. 4141). This did not change the facts surrounding the actual killing. Whatever *may*

have happened if Lazaro went untreated, the immediate circumstances of his death involved a sudden blow to his head that rendered him unconscious.

The use of this evidence introduced nonstatutory aggravation. "The only matters that may be considered in aggravation are those set out in the death penalty statute." *Zack v. State*, 911 So. 2d 1190, 1208 (Fla. 2005). At the time of this crime in 1990, the fact that a murder was committed while committing aggravated child-abuse was not an aggravating factor. *See* § 921.141 (1990). Application of that aggravator would violate the prohibition against ex post facto laws. *See State v. Hootman*, 709 So. 2d 1357 (Fla. 1998), *abrogated on other grounds*, *State v. Matute–Chirinos*, 713 So. 2d 1006 (Fla. 1998) U.S. Const. Art. I, § 10; Art. I, § 10, Fla. Const. The use of this syndrome-theory of HAC allowed the State to use the aggravated-child-abuse retroactively. The State was able to argue every fact that would have supported that non-existent aggravator as nonstatutory aggravation.

VII. ERRORS IN THE SENTENCING ORDER

The sentencing order relies on facts the State never proved. The judge misapplied this Court's precedent on proportionality to reject the codefendant's forty-year sentence as mitigation. And it imposed an unlawful "nexus" requirement when finding and weighing mitigation. Each of these errors require that the Court remand for resentencing. U.S. Const. amends. VIII, XIV; Art. I, § 9,17, Fla. Const.

A. Facts Not In Evidence

The trial court cribbed its sentencing order from a void decision predicated on a lie. In *Cardona I* this Court affirmed Ms. Cardona's conviction on the basis of facts established by Olivia Gonzalez's testimony. The state, however, won that conviction by hiding evidence that would have shown Gonzalez was lying, and in *Cardona II* the Court vacated the conviction. In resentencing Ms. Cardona, the trial judge nonetheless plagiarized *Cardona I* when it recounted the facts supporting its death sentence. For example, the judge wrote:

> After the children were returned to the Defendant, she became romantically involved with Olivia Gonzalez-Mendoza. They lived with the children in a series of cheap hotels. The women survived by taking on various jobs and by shoplifting. During this period, the Defendant beat, starved, confined, emotionally abused, and systematically tortured Lazaro.

(R. 13714). In *Cardona I* the Court wrote:

> After the children were returned to her, Cardona became romantically involved with codefendant Olivia Gonzalez-Mendoza. Cardona and her children lived with Gonzalez-Mendoza in a series of cheap hotels. Gonzalez-Mendoza's various jobs and shoplifting were the women's only sources of income. During an eighteen-month period that began after the children were returned to her, Cardona beat, choked, starved, confined, emotionally abused and systematically tortured Lazaro.

Cardona I at 362. The trial judge also wrote:

> [T]he Defendant fled to the Orlando/St. Cloud area, where she was later arrested. The Defendant told police several stories about what happened to Lazaro including that he had fallen off the bed and injured himself. The Defendant said she tried to revive Lazaro, but when she was unable, she took Lazaro to a Miami Beach residence and left him on a doorstep so that the people who owned the house could help him.

(R. 13714). *Cardona I* stated:

> … [Cardona] and Gonzalez-Mendoza fled to the Orlando area and then to St. Cloud, where they were later arrested. Cardona told police various stories about what had happened to Lazaro. Finally, Cardona claimed that the child had fallen off the bed and injured himself. When she couldn't revive him, she took the boy to a Miami Beach residence and left him on a doorstep so the people who owned the house could help him.

Id. This Court singled out both of the passages in *Cardona II*, pointing them out as examples of its reliance on Olivia Gonzalez's testimony in deciding Ms. Cardona's direct appeal. *Cardona II* at 974, 976.

Throughout his order, the judge relied on facts from *Cardona I* or otherwise not in the record to justify the sentence of death. "[I]t is crucial that a sentencing order only reflect facts drawn from the record in the particular case." *Kormondy v. State*, 703 So. 2d 454, 463 (Fla. 1997). Reliance on facts outside the record denies a defendant's right to due process. *See Gardner v. Florida*, 430 U.S. 349 (1977); *Porter v. State*, 400 So. 2d 5 (Fla. 1981).[15] The judge's reliance on extra-record facts, combined with the erroneous rejection of mitigation requires that the case be remanded for resentencing.

In addition to the passages quoted above, the trial judge relied on facts outside of or contradicted by the record to find the HAC aggravator. The judge concluded that Ms. Cardona abused Lazaro because "She considered Lazaro a bad

[15] The Court reviews the reliance on facts not in evidence for harmless error. *See Krawczuk v. State*, 92 So. 3d 195, 201-02 (Fla. 2012).

birth and the cause of her going from riches to rags." (R. 13720). That testimony does not appear in the record, but in *Cardona I* the Court wrote: "Cardona blamed Lazaro for her descent 'from riches to rags,' and referred to him as 'bad birth.'" 641 So. 2d at 362.[16]

In the first trial, Olivia Gonzalez's testimony was crucial to establishing the extent to which Ms. Cardona was responsible for Lazaro's abuse. *Cardona II* at 974. The defense argued that without evidence that Ms. Cardona directly participated in the abuse, HAC could only be applied vicariously. (R. 12822-25); *see Perez v. State*, 919 So. 2d 347 (Fla. 2005). Rejecting this argument, the judge claimed: "The Defendant systematically tortured the child during his entire life, the abuse did not commence when Gonzalez appeared in her life." (R. 13720). In support of this, the judge pointed to Lazaro's mistreatment when the family was living at the Olympia motel. (R. 13719-20). In fact, Olivia Gonzalez lived with Ana at the Olympia. (T. 3323). This was the first report of any violence.

The judge further claimed that when Ms. Cardona was arrested, "she gave statements that she abused Lazaro …" (R. 13718). She made no such statement.

The sentencing order also used extra-record facts to reject mitigation. In rejecting the mitigating factor of capacity to appreciate criminality of conduct or

[16] The judge also wrote: "Fidel Figueroa left a substantial sum of cash upon his death. The Defendant spent this morning in a short period of time." (R. 13714). This was derived from *Cardona I*, where this Court stated: "Fidel left a $100,000 estate that Cardona exhausted in ten months." *Cardona I* at 362.

conform to the requirements of the law, the judge sought to contrast Ms. Cardona's treatment of Tahimi and Lazaro: "She did not starve her, tie her to a bed, lock her in a closet, beat her repeatedly, and dump her body in some bushes. The Defendant considered Lazaro a bad birth." (R. 13722). There was no evidence that Ms. Cardona tied Lazaro to a bed or locked him in a closet. These facts, like the "bad birth" testimony, came from *Cardona I*. In fact, at the first trial the State admitted that without Olivia Gonzalez, "there would be no way to show that this defendant bound and gagged her own child and left him in this closet." *Cardona II* at 980.

B. Refusal to consider Codefendant's sentence

The judge found that the codefendant's sentence of 40 years could not be proven as a mitigating factor because, "If a codefendant takes a plea to a lesser offense, the Defendant has not established that the defendant is more or equally culpable." (R. 13714). It cited *Wade v. State*, 41 So. 3d 857 (Fla. 2010). The Court's ruling in *Wade* and it's predecessors govern the use of a codefendant's sentence in *proportionality* analysis. *See Wade* at 867-68; *England v. State*, 940 So. 2d 389, 406 (Fla. 2006). Mitigation includes: "any aspect of a defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death." *Lockett v. Ohio*, 438 U.S. 586, 604 (1978). "[A]n accomplice's disproportionate sentence can be argued in mitigation …" *Hitchcock v. State*, 578 So. 2d 685, 690 (Fla. 1990), *vacated on*

other grounds, 505 U.S. 1215 (1992); *see also Messer v. State*, 330 So. 2d 137, 141 (Fla. 1976).[17]

C. The Trial Court Imposed a "Nexus" Requirement

"…Florida law does not require that a proffered mitigating circumstance have any specific nexus to a defendant's actions for the mitigator to be given weight." *Cox v. State*, 819 So. 2d 705,723 (Fla. 2002); *see also Orme v. State*, 25 So. 3d 536, 549 (Fla. 2009). The trial court nevertheless dismissed or devalued several mitigating factors on the lack of a causal connection with the crimes. The court assigned no weight to Ms. Cardona's lack of reunification with her mother because, "plenty of other people have come to this country, never seen their mother again and not tortured or killed their children." It gave "minor" weight to Ana's abusive childhood because "As Dr. Toomer testified, not everyone with these traumas commits crimes." (R. 13723). *Compare Nibert v.* State, 574 So. 2d 1059, 1062 (Fla. 1990). The court also stated that if Ana was under extreme mental or emotional disturbance, "it started long before Lazaro's death," and rejected the mitigator. (R. 13721).

The trial court rejected the mitigating circumstance that Ana Cardona was a battered woman. (R. 13723). It did so because Ana was a bad mother even before

[17] "Whether a particular circumstance is truly mitigating in nature is a question of law and subject to de novo review …" *Blanco v. State*, 706 So. 2d 7, 10 (Fla. 1997)

Ms. Gonzalez began to abuse her – again requiring that there be a direct connection between the abuse and the crime. The court also rejected this mitigator because there was no evidence that Gonzalez was more culpable. The mitigating nature of abuse does not turn on the relative culpability of the abuser for the crime at hand.

VIII. INTELLECTUAL DISABILITY

Every IQ test showed that Ana Cardona was intellectually disabled.[18] Dr. Romero administered the WAIS III and obtained a verbal score of 61, a performance score of 68, and a full-scale score of 61. (R. 3640). The State's expert, Dr. Suarez, tested only performance IQ and scored it at 72. (R. 4755). Dr. Nathanson estimated an IQ of 55 to 70 based on the WAIS-R. (R. 4005-06). The only tests that scored Ms. Cardona's IQ above 75 were from a discredited EIWA (Escala de Inteligencia de Wechsler para Adultos) and a TONI (Test of Nonverbal Intelligence)score estimating her intelligence at 77 – with a confidence interval of 69 to 85. (R. 3673-79, 4772-73). She was poorly oriented to time, couldn't work out bills at the bar where she worked, couldn't drive, find an address, use public transportation, or make it past the fourth grade. (R. 3484, 3617, 3625, 3632, 3596).

[18] Since the time of the Ms. Cardona's trial, the psychiatric and professional community have substituted the term "intellectual disability" for "mental retardation." The Florida Legislature and this Court have done the same. *See Hall* at 1990; *Hurst v. State*, 39 Fla. L. Weekly S293 n.2 (May 1, 2014).

Despite Ana Cardona's low IQ and limited functioning, the trial court found that she was unable to prove that she was intellectually disabled. (R. 6412-29). The court relied on – and indeed exceeded – the rigid approach to defining intellectual disability this Court had adopted. *See* Order Denying Defendant's Motion For Determination of Mental Retardation as a Bar to Execution, 15-17 (citing *Zack v. State*, 911 So. 2d 1201 (Fla. 2005)); (R. 6426). This approach is incompatible with the medical community's definitions of intellectual disability, and the trial court's finding is invalid. *See Hall v. Forida*, 134 S.Ct. 1986 (2014).

The Eighth Amendment forbids the execution of the intellectually disabled. *See Atkins v. Virginia*, 536 U.S. 304 (2002); U.S. Const. amends. VIII, XIV. Florida has defined intellectually disability as "significantly subaverage general intellectual functioning existing concurrently with deficits in adaptive behavior and manifested during the period from conception to age 18." § 921.137(1), Fla. Stat. (2013). It defines "significantly subaverage general intellectual functioning" as "performance that is two or more standard deviations from the mean score on a standardized intelligence test …" *Id.* This definition is broadly consistent with the one used by the medical community. *See Hall* at 1994; American Psychiatric Association, *Diagnostic and Statistical Manual of Mental Disorders* 33, 37 (5th ed. 2013).[19] The mean IQ test score is 100, and two standard deviations below that number is approximately 70 points. *See Hall* at 1994; DSM-5 at 37.

Florida's test for intellectual disability must be applied in a manner that is consistent the definitions used by the medical community. This Court has held that the number 70 represents a bright-line cutoff for determining intellectually disability: If a defendant scored even 71 on an IQ test, she could be executed. *See Cherry v. State*, 959 So. 2d 702, 712-14 (Fla. 2007). Medical definitions, however, recognize that IQ testing is imprecise, and take into account a "standard error of measurement" of plus or minus five points. *See* DSM-5 at 37. Medical professionals define intellectual disability based on a range of IQ scores from 65 to 75. *Id.* In *Hall*, the Supreme Court rejected Florida's rigid, unscientific cutoff, which "goes against the unanimous professional consensus." *Hall* at 2000 (quoting Brief for American Psychological Association et al. as Amici Curiae 12–13).

Ana Cardona achieved a verbal score of 61, a performance score of 68, and a full-scale score of 61 on the WAIS-III administered by Dr. Romero. (R. 3640). Because Ms. Cardona spoke only Spanish, Dr. Romero translated the test from English to Spanish. (R. 3640). This is an acceptable accommodation where necessary. (R. 3871-72). In order to avoid affecting the validity of the test, Dr. Romero placed less emphasis on the verbal portion in interpreting test. (R. 3640). Dr. Nathanson also translated when he administered the WAIS-R. (R. 3949). He too testified that this was an acceptable practice, though it compromised the

[19] This manual is commonly referred to as "DSM," followed by the edition number. The Appellant's brief will employ this convention.

validity of the verbal score – a point the judge emphasized. (R. 3949-50). Because of the translation, Dr. Nathanson did not report a precise numerical score. (R. 3949-50). He used the testing to arrive at a scoring range of 55 to 70. (R. 4005-06). Dr. Suarez's solution was to test only performance. (R. 4744-45).

The trial court denied the motion because, "The defendant has failed to prove that she has an IQ below 70," since, "Basically, the Defendant did not have a valid WAIS score." (R. 6427). This rigid requirement of a "valid" Wechsler or Stanford-Binet score under 70 violates *Hall*, is at odds with the consensus of the medical community and would permit the execution of intellectually disabled persons who do not speak English.

In *Hall* the Supreme Court rejected Florida's rule for "tak[ing] an IQ score as final and conclusive evidence of a defendant's intellectual capacity …" 134 S.Ct. at 1995. Professional norms dictate, "clinical judgment is needed in interpreting the results of IQ tests." Mental health professionals must "interpret[] the obtained score in reference to the test's standard error of measurement, the assessment instrument's strengths and limitations, and other factors, such as practice effects, fatigue effects, and age of norms used." *See* American Association on Intellectual & Developmental Disabilities, *Intellectual Disability: Definition, Classification, and Systems of Support* 35 (11th ed. 2010). The trial court's binary

approach to "validity" makes the absence an unqualifiedly "valid" score "final and conclusive evidence" that a defendant is not intellectually disabled.

The trial court's absolute validity test makes it impossible for Ms. Cardona to prove that she is intellectually disabled. She is a Spanish-speaker from Cuba. The trial court determined that the translated WAIS-III was invalid. No other tests could satisfy this standard. The Wechsler-based EIWA was normed on Puerto Ricans in the 1965. (R. 3660-61, 3673-75). The experts testified that its results were invalid. (T. 3945-48). There exists another Spanish-language version of the WAIS, but it was normed on Spaniards. (R. 3872-73). There is no approved IQ test that would meet trial court's validity requirement for Ana and most other Spanish-speakers. She faces execution due to her race, nationality, and language in violation of her rights to due process and equal protection. U.S. Const. amends. VIII, XIV; Art. I, § 2,9,17, Fla. Const.

The trial court also erred in finding there were no deficits in adaptive functioning. It ruled against the defense because:

> Defendant was able to seek medical attention when she needed it. She was able to recognize she needed a second crib before the birth of her second child. She was able to get her children vaccinated for rubella and able to take her son to the doctor for his bronchial asthma problems. She worked in a bar. She was able to procure cocaine. She is not deficient in personal hygiene.

(R. 6427-28). The trial court's treatment of adaptive functioning violates the Eighth Amendment, *Hall* and section 921.137.

Section 921.137 defines "adaptive behavior" as "the effectiveness or degree with which an individual meets the standards of personal independence and social responsibility expected of his or her age, cultural group, and community." § 921.137(1), Fla. Stat. (2013). This Court has interpreted this definition in conformity with clinical definitions of intellectual disability. *See Jones v. State*, 966 So. 2d 319, 326-27 (Fla. 2007) (citing DSM-IV). *Hall* makes clear that the constitution requires this.

The trial court's ruling ignores clinical definitions of adaptive functioning. Much of the behavior it relies on is to be expected from those with mild intellectual disability. The mildly intellectually disabled can, "usually achieve social and vocational skills adequate for minimum self-support …" DSM-IV-TR at 43. *See also* DSM-5 ("competitive employment is often seen in jobs that do not emphasize conceptual skills"). Having a job in a bar is not inconsistent with mild intellectual disability. Nor is it surprising that someone who can achieve "minimum self-support" can also "procure cocaine." The mildly intellectually disabled are not typically "deficient in hygiene." To the contrary, they may "may function age-appropriately in personal care." DSM-5 at 34. Even the *moderately* intellectually disabled "can attend to their personal care" with moderate supervision. DSM-IV-

TR at 43. A person who is expected to "acquire academic skills up to approximately the sixth-grade level," DSM-IV-TR at 43, can tell that two children might require two cribs, and that sick children need to go to the doctor. Schools require that children be immunized, and not only for rubella.

The court also turned the test for adaptive deficits on its head. The DSM-IV-TR definition asks whether there are deficits in just two of twelve areas. *See Jones* at 326; DSM-IV-TR at 41. Assessments of intellectual disability must, "assume that limitations in individuals often coexist with strengths." Am. Ass'n on Intellectual & Developmental Disabilities, Definition of Intellectual Disability, http://aaidd.org/intellectual-disability/definition#.U73Gd9yuJbM (last visited July 9, 2014). Ana Cardona couldn't work out bar bills, couldn't drive, find an address, or use public transportation. (R. 3617, 3632). She had to repeat grades and only achieved a fourth-grade level. (R. 3625, 3596). She could not care for her children and abandoned them. (R. 3611-12). She did not have a bank account, and was poorly oriented to time. (R. 3484, 3618). The trial court did not evaluate these weaknesses. Instead it cherry-picked a few relative "strengths" to dismiss these adaptive deficits, in violation of Florida law, *Hall* and the Eighth Amendment.

The trial court also erred when it created a fourth requirement for proof of intellectual disability. The court found that Ana Cardona was not intellectually disabled because her low IQ could have been caused by substance abuse, lack of

education, or depression. (R. 6428). Intellectual disability is defined as: "[A] significantly subaverage general intellectual functioning [B] existing concurrently with deficits in adaptive behavior [C] manifested during the period from conception to age 18." § 921.137(1); *see* DSM-IV-TR at 41; DSM-V at 33; AAID Definition of Intellectual Disability. These are the only criteria. "The diagnosis of intellectual disability should be made whenever Criteria A, B, and C are met." DSM-V at 39. By redefining intellectual disability, the trial court violated section 921.137. It also adopted a definition untethered from clinical definitions, in violation of the Eighth Amendment and *Hall*.

IX. THE IMPOSITION OF THE DEATH SENTENCE BASED ON 7 TO 5 VERDICT AND JUDICIAL FACT-FINDING DENIED ANA CARDONA THE RIGHT TO TRIAL BY JURY.

No other state would execute Ana Cardona on the verdict of a bare 7 to 5 majority. Florida is the only state which permits a death sentence based on a nonunanimous recommendation as to both the existence of aggravators and the recommendation of death. *See Steele v. State*, 921 So. 2d 538, 548-50 (Fla. 2005). The United States Supreme Court has never approved a nonunanimous verdict in a capital case. The furthest it has gone is to approve, in a noncapital case, the use of a verdict of a "substantial majority of the jury." *Johnson v. Louisiana*, 406 U.S. 356, 362 (1972); *see also Apodaca v. Oregon*, 406 U.S. 404 (1972). Florida's status as an outlier dooms any argument that a bare majority in a capital case could

satisfy *Johnson* and *Apodaca*. The "near-uniform judgment of the Nation provides a useful guide in delimiting the line between those jury practices that are constitutionally permissible and those that are not." *Burch v. Louisiana*, 441 U.S. 130, 138 (1979) (nonunanimous six-person juries unconstitutional). The bare-majority verdict violates the Sixth, Eighth, and Fourteenth Amendments to the United States Constitution. *But see Robards v. State*, 112 So. 3d 1256, 1267 (Fla. 2013) (7-5 recommendation not unconstitutional).

Even within Florida, capital murder is the only crime for which this State will increase a defendant's maximum sentence without a unanimous verdict. *See, e.g., Behl v. State*, 898 So. 2d 217 (Fla. 2d DCA 2005). Florida's "inviolate" right to trial by jury includes the right to a unanimous jury. Art. I, § 22, Fla. Const.; *see Jones v. State*, 92 So. 2d 261 (Fla. 1956) (verdict of a Florida jury must be unanimous). A death sentence based on a 7-5 majority independently violates Article I, sections 9, 16, 17 and 22 of the Florida Constitution. *But see Robards*.

The judicial fact-finding required by Section 921.141 violates the Sixth and Fourteenth amendments as interpreted by *Apprendi v. New Jersey*, 530 U.S. 466 (2000), and *Ring v. Arizona*, 536 U.S. 584, 589 (2002). In light of *Apprendi*, "the relevant 'statutory maximum' is not the maximum sentence a judge may impose after finding additional facts, but the maximum he may impose *without* any additional findings." *Blakely v. Washington*, 542 U.S. 296, 303-04 (2004)

(emphasis in the original). Moreover: "If the jury's verdict alone does not authorize the sentence, if, instead, the judge must find an additional fact to impose the longer term, the Sixth Amendment requirement is not satisfied." *Cunningham v. California*, 549 U.S. 270, 127 S.Ct. 856, 869 (2006). Ana Cardona's death sentence is based on a single aggravator that was never plead or proved to a unanimous jury and was not based on a prior conviction. Her sentence is solely the product of judicial factfinding. *See* § 921.141(3), Fla. Stat. (1999).

X. CUMULATIVE ERROR

The cumulative effect of the above errors deprived Ana Maria Cardona of a fair trial, due process of law, and a reliable sentencing process. Ms. Cardona's fate was decided by a jury that included jurors whose impartiality was in doubt, and from which a juror had been excluded becaue he would favor life over death. The prosecution relied comments on silence, discovery violations, and improper argument to win convictions and a death sentence. Cumulatively, these errors together with the other errors identified above undermine any confidence in the outcome of Mr. Cardona's trial and sentencing.

CONCLUSION

For the foregoing reasons, the convictions and sentence of death must be vacated, and this cause must be remanded for trial.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that the foregoing document was served to counsel for the appellee, Sandra Jaggard, Assistant Attorney General, Dept. of Legal affairs, 444 Brickell Ave, Suite #650, Miami, FL 33131 via the Court's e-filing portal on July 14, 2014.

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Undersigned counsel certifies that the type used in this brief is 14 point proportionately spaced Times New Roman.

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