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IN THE SUPREME COURT OF FLORIDA

CASE NO. SC11-1446

ANA MARIA CARDONA,

Appellant/Cross-Appellee,

vs.

THE STATE OF FLORIDA,

Appellee/Cross-Appellant.

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

AMENDED ANSWER BRIEF OF APPELLEE/INITIAL BRIEF OF CROSS-APPELANT

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STATEMENT OF CASE AND FACTS

Defendant became involved in a relationship with Fidel Figuero. (V204/3023-24, V205/3240) In September 1987, when Defendant was 8 months pregnant with LF, Figeuro was killed. (V205/3237, 3241) When LF was a few months old, Defendant left her daughter TC and LF with Martha Fleitas and her husband Leandro, Figuero's cousin. (V204/3021-22, 3026) LF was small and thin for his age and had bruises on him when he arrived. (V204/3026-27, 3029) However, he had a healthy appetite, fattened up, started crawling and had no health concerns while in Fleitas' care. (V204/3030-31)

After Fleitas had been caring for the children for some time, she decided that she needed documentation from Defendant giving her custody. (V204/3032) When she attempted to contact Defendant at the number she had left, she was unable to do so. (V204/3033) Eventually, Fleitas located Defendant at a hotel, and Defendant agreed to come to Fleitas' home later. (V204/3033) When Defendant arrived, she took the children instead of signing the documentation. (V204/3034, 3048)

When LF about 6 months old, Defendant hired Carlos Lima to babysit. (V205/3115-16, 3130-31) Originally, Defendant would leave all 3 children with Lima and his mother Corrina overnight about once every week. (V205/3115, 3116-17) However, Defendant

soon began to leave the children for days at a time. (V205/3118) She then told Lima that she had been evicted, and he offered to take the children full time. (V205/3118) While JP returned to his mother shortly, TC and LF remained in Lima's care for between 6 and 8 months. (V205/3119-20) When he lived with Lima, LF was a healthy child who ate constantly and was learning to walk and dance. (V205/3122-23, 3247-48, 3261) Susy Hernandez, a mutual acquaintance, assisted Lima in caring for the children. (V205/3121, 3130, 3242-43) When Hernandez first cared for LF, LF was about 9 months old but had not been exposed to solid foods. (V205/3245-46)

Defendant had given Lima a beeper number to contact her but would not respond to pages for weeks on end. (V205/3120-21) When Defendant did respond to the pages, she would greet Lima by saying, "Fuck! What do you want?" (V205/3125-27) When LF developed an ear infection, Lima was unable to contact Defendant until he was driving LF to the hospital. (V205/3125-28, 3135) At Lima's insistence, Defendant appeared briefly at the hospital but never saw LF, whom she always seem to care for less than her other children, and left him there with Lima. (V205/3128-29, 3137-38, 3258) As a result, Lima realized that he could not continue to care LF and TC without formal custody. (V205/3124-25, 3129-30) As such, Lima surrendered TC and LF to DCF.

(V205/3129-30, 3131, 3135-36) DCF initiated court proceedings that were attended by Lima, his mother, Hernandez and Defendant. (V205/3139-40, 3250) Lima sought custody of the children and was given temporary custody. (V205/3140-41, 3250-51) However, Defendant objected to surrendering the children, and Lima was required to return the children to Defendant after 6 weeks. (V205/3140-42, 3254)

Once Defendant got her children back, she again contacted Hernandez to babysit for her. (V205/3256) Hernandez agreed to do so on several occasions and had LF and TC in her custody between Christmas 1988 and New Year's Day 1989. (V205/3257-58, 3285) When LF was at Defendant's apartment, he was kept in a crib constantly, the sheets in the crib reeked of spoiled milk and LF's bottle was always dirty. (V205/3259) LF seemed unhappy in his mother's care and appeared to be losing weight. (V205/3260, 3282) Hernandez considered adopting LF but was unable to obtain consent to do so. (V205/3260-61)

Around July or August 1989, Defendant was living at the Olympia Motel on Miami Beach. (V206/3301-03) She was originally given the room in which the motel owner stayed when he was in town. (V206/3304) Fred Quintero, the motel maintenance man, was sent to move Defendant from that room. (V206/3300-02) Quintero discovered that Defendant was living in the room with another

woman and 3 children. (V206/3303-04) The room was a shambles, and the mattresses had all been urinated on. (V206/3304) LF, who was very skinny, was kept seated on the floor in a corner next to the closet away from everyone else and appeared very fearful. (V206/3304-06, 3317) Quintero and his wife subsequently saw Defendant dragging LF by the arm across a set of concrete steps and into a closing door on several occasions when she went to the ice machine. (V206/3308-12, V208/3619-25) Ms. Quintero described LF as filthy and underweight and stated that he was wearing a diaper in desperate need of changing. (V208/3621, 3624) Quintero also observed Defendant hitting LF forcefully on random parts of his body and face when he went to check on the condition of the room to which Defendant was moved. (V206/3314-17) He never saw Defendant behave in anything but a negative manner toward LF but observed her being affectionate to TC and described JP as an asset to Defendant. (V206/3317-19)

Carla Ventrano became stranded at the Olympia Motel when Defendant was living there. (V206/3345-49) She was invited to eat and socialize in Defendant's room. (V206/3348-50) She observed that Defendant allowed her other children to move around the room and play but that LF, who was very thin and frail, was required to stay on the bed. (V206/3351-52, 3358) Ventrano never saw Defendant pick up or hold LF or otherwise

display affection for him. (V206/3353, 3358) However, she did see Defendant punch LF in the back with a closed fist and pull his hair. (V206/3355-56) She also observed Defendant take LF into the bathroom and heard running water and LF screaming. (V206/3356-57) When Defendant fed LF, LF was required to stand with his arms behind his back while Defendant placed a large spoon in his mouth. (V206/3357-58) Defendant also allowed JP and TC to hit LF. (V206/3358-59) Ventrano was sufficiently concerned by what she saw to contact DCF. (V206/3360)

From September through November 1990, Defendant lived in a room in a house owned by a family named Piloto. (V218/4902-03, V219. 4992-94, 5019) When Olivia Gonzalez rented the room for herself and Defendant, Piloto informed her that he did not want too many people living in the room. (V219/5025-26) While Piloto saw Defendant's other two children, he never saw or heard LF. (V219/4994-99, 5011) Prior to living at the Pilotos, Defendant had lived in HUD housing in Miami. (V218/4903)

On November 2, 1990, Craig Kriminger, an FPL employee, was sent to a residence in an affluent section of Miami Beach to make a repair. (V203/2823-26, 2859) Kriminger parked his truck and went to work on a utility pole. (V203/2827-36) At one point, Kriminger returned to his truck and noticed a torso of a child in some bushes next to the house. (V203/2836-38) The torso was

not visible from the road, front door or driveway. (V203/2839, 2843-44, 2852, V210/4002) Thinking that the torso was a Halloween decoration, Kriminger called one of his coworkers to look. (V203/2840-41) On closer examination, Kriminger realized it was a real dead body and contacted the police. (V203/2841-42)

When the police arrived, they observed a dead boy wearing a tee shirt with a lollipop design, a pair of shorts and a diaper, which had been taped to his skin. (V203/2851, 2881, V204/2931-33, 2934, 2944-45, V207/3481, V210/4003) The body was very thin such that the knees were bigger than the thigh, and there was a visible bruise around the right eye. (V203/2857-58, V210/4003) The right leg appeared small, and the left leg appeared to be normal sized. (V210/4003) Rigor mortis had set in, which indicated the child had died 8 to 12 hours before midday on November 2, 1990. (V210/4004) However, there was nothing available to identify the child. (V204/2968)

In an attempt to identify the boy, the police conducted news conferences and prepared and distributed flyers. (V204/2971-75) As a result, Fleitas contacted the police On November 6, 1990, and provided them with footprints taken when LF was born and a picture of Defendant and Figuero. (V204/2979-82, 3014-15, 3035-38) In following up on this information, Det. Joseph Matthews went to an apartment where Defendant had

previously lived and obtained a basket containing an album with pictures of Figueroa's funeral and a copy of a Medicaid card with Defendant and her children's names on it. (V204/2992-3000, 3016-17) Det. Matthews then checked school records and learned that JP had attended school in South Miami before Defendant abruptly removed him. (V204/3002-03) The school subsequently received a request to transfer JP's records to Nisgan Elementary School in St. Cloud, Florida. (V204/3004)

The Miami Beach Police then contacted the Osceola County Sheriff's Office for assistance and sent Det. Eddie Santiago and Det. Gary Shaffolow to St. Cloud. (V204/3076-77, V207/3406, V209/3716-18) Before the Miami Beach detectives arrived, Dep. Andrew Strecher went to the Dixie Hotel in St. Cloud and observed a brown car. (V204/3075, 3077-78) After the detectives arrived, Dep. Strecher went to the school and attempted to locate JP. (V204/3078-79) After learning that JP would be leaving school shortly, Dep. Strecher went to the area where the parents picked up their children and waited. (V204/3079-80) When the brown car arrived and stopped in front of the school, the police approached the car and found Defendant and Gonzalez inside. (V204/3080-82, V209/3719-21) While Defendant admitted her identity, she produced no identification. (V209/3722, 3724)

When Defendant asked why the car was being approached, Det.

Santiago told her that it was about LF. (V209/3722) Defendant appeared worried and started to cry. (V209/3722-23) Det. Santiago then informed Defendant that LF was dead and that she needed to return to Miami. (V209/3723) Defendant claimed that she had left LF with a woman in Miami weeks earlier. (V209/3724) Upon being shown a flyer, Defendant identified LF as the dead child. (V209/3724-25) Det. Santiago assisted in transporting Defendant to the Osceola County Sheriff's Office. (V209/3725) En route, Defendant started asking about what would happen to her other children and Gonzalez. (V209/3725-26) Before responding to these questions, Det. Santiago informed Defendant of her *Miranda* rights, and Defendant waived those rights. (V209/3726-30) They then discussed what would happen. (V209/3730) Throughout Det. Santiago's contact with Defendant, Defendant never asked what had happened to LF. (V209/3730-36)

At the police station, Defendant told Det. Santiago that she had left LF with a woman in a restaurant in Hialeah. (V209/3737-39) She claimed the woman saw LF, said he was cute and asked to take him. (V209/3737-39) Defendant stated that she did not know this woman but that she was elegant looking. (V209/3739) After receiving this information, Det. Santiago allowed Defendant to visit with her children and Gonzalez while he called Det. Matthews to relay the information. (V209/3739-40)

Det. Matthews then traveled to Osceola County. (V209/3740-41)

That evening, Det. Matthews interviewed Defendant at the Osceola Sheriff's Office with the assistance of Det. Santiago. (V207/3437-38, 3439-41, V209/3711-12, 3741) Before questioning, Defendant was informed of her constitutional rights and signed a written waiver. (V207/3442-46, V209/3705-11, 3741-47) She personally added the statement "I swear that I will tell the truth before God" to the bottom of the waiver form. (V209/3743, 3746, 3747) At the time she signed the waiver, Defendant appeared to be alert and not under the influence of drugs or alcohol. (V209/3748-49) In the interview, Defendant claimed that LF had been jumping on a bed, fell off and struck his head on the tile floor. (V209/3750) She averred that she attempted to revive him with perfume water and then waited for Gonzalez to come home. (V209/3750) After discussing the matter with Gonzalez and waiting until the next day, Defendant claimed that a decision was made to leave LF in a wealthy neighborhood so that someone else would care for him. (V209/3750-52) She insisted that LF was alive and in pain when she left him. (V209/3751) After providing this information, Defendant gave a formal, taped statement. (V209/3752-53, 3757-58, 3764-70)

In her confession, Defendant again claimed that LF had been injured in an accidental fall from a bed. (V59/8990-9080) She

also averred that she was not supposed to have children in her apartment and hid LF's presence from her landlord. (V59/8994-95, 9010-12, 9062-63) She stated that LF lost his 2 front teeth from sucking on a pacifier and that the injuries to his arm and leg were the result of previous falls. (V59/9065-70)

When the room that Defendant had been occupying at the Dixie Hotel was searched, there were shoes, clothing and toys strewn about it and more items kept in unpacked bags. (V204/3062-69) The curtains and blinds had been taped shut. (V204/3069-70) One of the items impounded from the room was a baseball bat. (V204/3066-67) Crime Scene Tech. Beth Dennis-Knight performed a phenophthalein test on the bat, which gave a presumptive positive result for the presence of blood. (V205/3105-11)

As a result, Defendant was charged by indictment, filed on January 11, 1991, with the first degree murder of LF and aggravated child abuse of LF. (V1/69-71) The matter proceeded to trial on March 5, 1992. (V1/2) That trial resulted in Defendant being adjudicated guilty on both counts and sentenced to death for the murder and 15 years imprisonment for the child abuse. (V1/6, 22) Defendant appealed her convictions and sentences to this Court, which affirmed on June 2, 1994. *Cardona v. State*, 641 So. 2d 361 (Fla. 1994). However, during a subsequent post

conviction appeal, this Court determined that Defendant was entitled to a new trial because the State had failed to disclose reports of interviews with Gonzalez. *Cardona v. State*, 826 So. 2d 968 (Fla. 2002).

On November 23, 2004, Defendant filed a motion claiming that she was retarded and ineligible for the death penalty. (V1/124-25) The trial court appointed Dr. Enrique Suarez to evaluate Defendant in response to this motion. (V1/164-65)

At the hearing on the motion, Dr. David Nathanson, a psychologist, testified that he evaluated Defendant in 1992 and 2005. (V28/4463-73, V22/3449-51) In 1992, he gave Defendant the WAIS-R and the Bender Visual Motor Gestalt test, asked her to perform academic tasks and conducted an interview with her. (V22/3453, 3460-61) He was unable to score the WAIS-R because it is in English and Defendant did not understand English but estimated that Defendant's score would have been between 55 and 70. (V22/3453-54, 3473) He chose to given this test instead of the EIWA, a version of the WAIS normed in Puerto Rico, because he believed the EIWA scores were inflated, the test was normed in the 1960's and he believed that a performance IQ was sufficient. (V22/3455-59) He averred that he translated the test to Defendant, which compromised the validity and reliability of the result but was accepted practice in situations in which a

test was not available in taker's language. (V22/3459-60) He stated that Defendant appeared to be under a lot of stress when he gave the WAIS-R, which adversedly impacted her performance. (V22/3475, 3477-78) He believed Defendant had only a 5th grade education but did not consider her educational level important. (V22/3462-64) He found her orientation to time, place and person to be poor. (V22/3484) He did not believe she was malingering and did not believe retarded people could malinger. (V22/3485) Based upon his evaluations, he opined that Defendant functioned at the mildly mentally retarded level and was brain damaged. (V22/3452, 3477)

On cross, Dr. Nathson admitted that he did not review Defendant's school records and did not speak to anyone from Cuba or any civilian witnesses. (V22/3490) He did have general conversions about Defendant with jail guards but did not adminster adaptive functioning testing. (V22/3490-94) He acknowledged that WAIS-R and EIWA were not only in different languages but also asked different questions to account for cultural differences. (V22/3498-99) He admitted that the WAIS manual stated that the test should not be translated and that doing so produced invalid results. (V22/3513-14) He acknowledged that he had given Defendant the EIWA and that she achieved a verbal IQ of 58, a performance IQ of 59 and a full scale IQ of

56. (V22/3516) He admitted that these results were inconsistent with his belief that the EIWA produced inflated scores. (V22/3517) He acknowledged if Defendant had suffered brain damage after the age of 18, she would not be retarded. (V22/3538-39)

Wanda Romero, a psychologist, testified that a person's cultural background had to be considered in diagnosing retardation. (V22/3542-61, 3568, 3592) In this case, she reviewed prior evaluations of Defendant, police reports and statements by Defendant and people who knew her and evaluated Defendant herself in 2005. (V22/3578-80) During her evaluation, she interviewed Defendant and administered the house-tree-person test, the Woodcock Munoz test, the WAIS-III, the Beck Aniety Inventory, the Beck Depression Inventory and the Vineland Adaptive Functioning Scales. (V22/3580-82)

In considering adaptive behavior, Dr. Romero relied on information gleaned from prior evaluation as accurate even though those evaluations relied on information provided by Defendant and she had provided information that was not accurate. (V23/3590-92) She determined that Defendant had done poorly in school, dropped out after the 4th grade and was illiterate. (V23/3596-97) She believed that the results of the number of Bender tests Defendant had taken showed development

delays in motor skills and brain damage. (V23/3597-3606) She also found deficits in comprehension and self care. (V23/3606-12) She also relied on Defendant's lack of judgment and impulsivity as evidence of a lack of self direction. (V23/3620-22) She pointed to Defendant's dislike of doctors, her failure to use birth control, her statements about having LF by C-section and her drug use as evidence of a deficit in the areas of health and safety. (V23/3622-25) She found a deficit in functional academics based on her educational history and the results of the Woodcock Munoz. (V23/3625-31) She also determined that Defendant has a deficit in work and leisure because her only employment was in a bar and she allegedly needed assistance in that job. (V23/3631-32)

Dr. Romero believed that Defendant had limited social skills because she was quiet and preferred to spend time on her own. (V23/3613-14) To corroborate this belief, she administered the Vineland to Elsa Perez and read an interview with Ida Guzman, both of whom had known Defendant in Cuba. (V23/3615-16) She also averred that Defendant's ability to use community resources was poor and pointed to Figuero's wealth and her lack of a checking account as evidence based on the assumption that Figuero was giving her money. (V23/3616-20) She also noted that Figuero provided her with help at home and that she had no job

so that she had no responsibilities. (V23/3619, 3621)

Dr. Romero administered the WAIS-III by translating it to Defendant. (V23/3638-40) She stated that the instructions for the test only allowed for translation of the instructions. (V23/3640) She obtained a verbal IQ of 61, a performance IQ of 68 and a full scale IQ of 61. (V23/3640) She averred that translating the test affected the validity of the verbal score. (V23/3640-41) She gave the Vineland to Perez, Wendy Crane and Defendant. (V23/3643) Perez and Crane did not know enough about Defendant to produce scoreable results. (V23/3644-45) Defendant's scores indicated that she was moderately retarded. (V23/3646-49) The Beck tests indicated that Defendant was very anxious and depressed. (V23/3649-50) She did no validity testing. (V23/3654) Based on all this information, Dr. Romero opined that Defendant was mildly mentally retarded. (V23/3651) She was aware that Defendant has obtained an IQ of 90 on a prior administration of the EIWA but discounted that score because the EIWA was normed in the 1960's in Puerto Rico, it produced inflated scores and Cubans and Puerto Ricans were too culturally different to produce reliable results. (V23/3655, 3660-91) However, she averred that using a test normed on Americans was proper because the manual allowed translation. (V23/3667-72)

On cross, Dr. Romero admitted that a Cuban would be more

culturally similar to a Puerto Rican than an American. (V23/3714-15) She admitted that the percentages of racial and ethinic groups in the norming samples for a test affected the results. (V23/3716-20) She admitted that several of the doctors on whose reports she relied had found Defendant to be malingering. (V23/3726-28) She averred that Defendant's history of substance abuse also affected her performance on tests. (V23/3739) She was unaware that Defendant had received social service benefits. (V23/3763-64) She admitted that she had assumed the Figuero was giving Defendant money and that Defendant would not have been able to save and handle money if he was not doing so. (V24/3785) She was unaware of records showing that Defendant had sought medical care on several occasions. (V24/3788-92) She was aware that Defendant had a long history of supporting herself by stealing. (V24/3831) She acknowledged that the WAIS-III manual actually stated that translating the test caused invalid results. (V24/3836-37) She admitted that there was a version of the WAIS normed in Spain that she did not use. (V24/3872)

Dr. Ernesto Castillo, a psychiatrist, testified that he evaluated Defendant in 1992. (V24/3896-99) He was aware she was Cuban, as was he, and spoke to her only in Spanish. (V24/3899) During their interview, Defendant initially claimed not to know

what her charges were even though she admitted that her attorneys had repeatedly discussed them with her and then stated that she was accused of killing a child but did not do it. (V24/3901) She stated that she had a relationship with a woman on whom Defendant was dependent for support and drugs and who unduly influenced her. (V24/3903) She also stated that she shoplifted for a living. (V24/3905) Defendant also claimed to be experiencing auditory hallucinations. (V24/3904) Dr. Castillo determined that Defendant was not suffering from any mental disorder and was malinerging. (V24/3905-07) He opined that she functioned at the low average level of intellectual functioning, which was consistent with her level of education. (V24/3908)

Delia Chiquette testified that she met Defendant at Broward CI, where she was serving a sentence for a Nevada drug conviction and working as a law clerk at the prison. (V40/6117-34) She was assigned to assist the death row inmates and visited them 3 times a week for the 5 years she was there. (V40/6137) Defendant interacted with the other death row inmates and watched the TV in her cell. (V40/6140-47, 6163) She would talk to Chiquette about information she had seen on the news and current events. (V40/6147-48, 6161-62) Defendant also received books and magazines from the library several times a month. (V40/6148-57) Because Defendant had expressed an interest in

learning English, she received books to assist her and began conversing in English. (V40/6156, 6176) Defendant discussed the content of the books and quality of the translation with Chiquette. (V40/6157-59) Defendant was well groomed. (V40/6179-81)

Raquel Bild-Libben, a psychologist, testified that she evaluated Defendant for schizophrenia and retardation in 1992. (V20/3165-74) During her evaluation, she interviewed Defendant in Spanish, reviewed reports of prior evaluations of Defendant and information about the crime and administered the MMPI, the incomplete sentence test and the Bender. (V20/3172-77, 3179) On the Bender she gave, Defendant did well, which was inconsistent with her performance on Benders administered by others. (V20/3181-96) In fact, Dr. Bild-Libben noted that there were marked inconsistencies in Defendant's performance on testing by different experts and that all of the experts did not believe that Defendant was putting forth her best effort. (V20/3219-22)

Dr. Bild-Libben averred that the comprehension subtest on the WAIS-R was highly correlated to overall IQ because it tested abstraction and that Defendant received a low average score on this subtest when Dr. Nathanson administered the WAIS-R. (V20/3197-3202) Because this subtest was least affected by anxiety and depression, this score made it probable that

Defendant's overall IQ was in the low average range and excluded the possibility that Defendant was retarded. (V20/3202, 3207-08) The scores on the digit span subtest and subtests that were timed were greatly lowered by mental health conditions, such as depression. (V20/3203-05) Further, having a limited education affected scores on subtests that were based on information learned in school, such as vocabulary. (V20/3211-12) Additionally, Defendant's performance on the incomplete sentence test that Dr. Bild-Libben administered showed abstract thinking. (V20/3213-18) As such, Dr. Bild-Libben opined that Defendant was not retarded and was probably functioning in the borderline range of intellectual functioning, noting that none of the testing of Defendant's intelligence appeared to have yielded a valid result and that Defendant appeared to have been resourceful in adapting to life in this country. (V20/3224-30)

Enrique Suarez, a psychologist, testified that he evaluated Defendant by reviewing documents concerning her, including her medical records; interviewing her in Spanish; administering portions of the WAIS-III, the TONI-III and the VIP (twice) to Defendant and administering that ABAS to 7 individuals from the jail. (V30/4636-44, 4701-05, 4741-43, 4762-63, V34/5236-37, 5257, 5284) He opined that information from the medical records, including statements about a need for a second crib prior to the

birth of her second child and statements about her holding a job for 3 years and notations that she was fully oriented, showed that Defendant was able function adaptively. (V30/4637-66) The list of materials that Defendant had obtained from the prison library showed that she was reading novels. (V30/4670-72) Inmate requests showed abstract reasoning and adaptive functioning. (V30/4675-87)

Dr. Suarez considered Defendant's ability to communicate with him during the interview showed Defendant was oriented and reasoned abstractly. (V30/4709-16) She also made claims regarding experiencing hallucinations that were consistent with malingering. (V30/4716-20) She provided an extensive history of drug abuse beginning at age 14, and stated that she had provided medical care, including vaccinations, for her children. (V30/4720-22, 4732-36)

Dr. Suarez averred that the WAIS was normed on the English speaking population of North America and that verbal IQ scores are greatly influenced by education and culture. (V30/4743, 4766-67) He noted that Defendant performed in the average range on 1 of the subtests he performed, in the borderline range on 4 subtests and in the retarded range on 1 subtest. (V30/4745-55) The performance IQ obtained as a result was 72. (V30/4755-57) Defendant obtained a 77 IQ on the TONI-III. (V30/4773) The first

VIP yielded an invalid, inconsistent profile, which was suggestive of lack of effort, and the second yielded an invalid, irrelevant profile, which was suggestive of malingering. (V30/4776-81, V34/5230-32, 5258-63) He averred that the range of IQ scores and subtest scores obtained by Defendant over time suggested that her low scores were the result of malingering. (V34/5266-72) He admitted that the EIWA had disadvantages but averred it was a more appropriate test to use with Defendant than the WAIS. (V34/5273-76) The ABAS results were all above the retarded range. (V34/5284-89) Dr. Suarez opined that Defendant was not retarded. (V34/5291)

Martin Helo, a librarian, testified that he knew Defendant during her time on death row and she seemed withdrawn and shy to him. (V39/5926-33) He admitted that there was a language barrier between himself and Defendant. (V39/5956) He recalled that Defendant requested lots of materials from the library, including novels and books to learn English. (V39/5969-72)

Aida Guzman, who had 6 felony and 13 misdemeanor convictions for crimes of dishonesty, testified that she was about 16 and Defendant, who was 7 years younger than she, was about 11 when they became friends. (V39/5983-90, 5998-99) Defendant was unable to care for her personal hygiene, clean her room, tell time or cook and could not learn. (V39/5990-94) She

was dependent on others and was a follower. (V39/5993-95) She did not understand money or have a job and was unable to read. (V39/5995-96) Guzman was being treated for auditory hallucinations. (V39/6001-02) After considering the evidence, the trial court denied the motion. (V42/6412-28)

On August 18, 2008, Defendant wrote the State and inquired if Dr. Hyma had changed his opinion since the first trial and indicated that she might depose Dr. Hyma again if he had done so. (V43/6621) The State responded that it had not asked Dr. Hyma to do any additional work and did not know if he had changed his opinion. (V43/6625) Defendant replied that the State had a duty to inform her of any change in testimony and requested that the State do so. (V43/6622) Defendant then communicated with Dr. Hyma directly about any change of opinion. (V43/6623)

On August 30, 2008, Defendant filed a motion seeking to declare Florida's capital sentencing scheme unconstitutional based on *Ring*. (V44. 6718-48) In this motion, Defendant complained that the jury was not required to specify the aggravators it found and it was not required to be unanimous. *Id.* During the hearing on the motion, Defendant argued that *Ring* required jury findings of aggravators and that, if the jury's recommendation was a sufficient finding, the jury needed to be

instructed on its role. (V52/8069-70) The motion was denied. (V49/7580, V52/8070-72)

On September 2, 2008, Defendant added a Dr. Barry Lipton as a witness. (V44/6889) During his deposition, Dr. Lipton, a dentist, opined that LF lost his teeth as the result of a traumatic injury in the last 3 to 8 weeks of his life. (V53/8197) He based this timeframe on his review of photos of the mouth and jawbone that showed that the tissue had filled in but there was no new bone growth. (V53/8211-12, 8213-14) He averred that the traumatic injury could have been a fall, having something pulled out of LF's mouth or a punch. (V53. 8197-98)

On the third day of voir dire the first time that the retrial was attempted, the State informed the trial court that Defendant had committed a discovery violation by listing a new expert witness. (V176/66) When the trial court required Defendant to proffer the new expert's opinion, Defendant responded that the expert would testify that the injury to LF's left arm was 4 to 8 weeks old. (V176/69) Defendant argued that the State was not prejudiced because the new opinion represented only an alternative injury date for 1 of many injuries. (V176/70, 81) As a result of this discovery issue and the difficulty in finding suitable jurors, the trial court decided to strike the venire. (V176/84-89)

During individual questioning about pretrial publicity in the second voir dire, Monica Brizo stated that she was originally from Peru and that she recalled hearing from the media that LF's body was found, that another woman was involved in the crime and that someone had previously been sentenced to death. (V186/106-07) When asked if she could set this information aside, Brizo stated that she would try and that she was very touched by matters concerning harm to children. (V186/107-08) She then repeatedly stated that she could set her feelings and the media coverage aside as she was required to set her feelings aside frequently in her work. (V186/108-111)

On questioning by the defense, Brizo stated that she only been exposed to publicity about the case in 1992, and that she had heard the person had been found guilty. (V186/111-12) However, she would base her decision in this matter exclusively on the evidence presented. (V186/112) She averred that she could presume Defendant was innocent and stated that she wanted to see what made the person innocent. (V186/112) When the trial court explained that the presumption of innocence placed the burden on the State to prove Defendant guilty, Brizo stated that she understood and would presume that Defendant was innocent without any doubt in her mind and set aside her prior knowledge of the case. (V186/112-13) When questioned about her knowledge of the

prior death sentence, Brizo stated that she recalled 2 women being involved and vaguely recalled hearing that 1 had been sentenced to death. (V186/113-14) However, Brizo was adamant that she could set this aside and judge the issues solely on the evidence presented. (V186/114) She again noted that she was required to set aside her feelings and judge matters based exclusively on evidence as part of her job. (V186/114-15)

Based on this individual questioning of Brizo, Defendant moved to excuse her for cause because she allegedly paused when the trial court first asked if she could set aside her knowledge of the case, allegedly only agreed to set her knowledge aside after leading questions by the State and allegedly required Defendant to prove herself innocent. (V186/116-17) The trial court disagreed with Defendant characterization of Brizo's actions and noted that the questions Defendant had asked were leading. (V186/117) Defendant then noted that Brizo had not been questioned about the burden of proof but might be subject to a cause challenge on her lack of understanding. (V186/117) The trial court responded that voir dire would continue regarding the other issues but that it did not believe that Brizo's responses regarding pretrial publicity rose to the level of a cause challenge. (V186/117)

During general questioning by the Court, Brizo stated that

she was auditor for the county, that she had not previously served on a jury, that her husband was a school gym teacher and that her cousin was a Miami-Dade Police officer. (V186/134-35) When asked if she would consider the testimony of an officer the same way she would any other witness, Brizo stated that she did not understand but agreed she could do so when the trial court explained the concept to her. (V186/135-36)

During individual questioning about the death penalty, Brizo stated that she had no doubt that she would be able to follow the law. (V187/293-94) She averred that she had no beliefs that would influence her decision about the death penalty. (V187/295) She stated that she understood the burden of proof rested exclusively with the State and that she would not consider the possible penalty in deciding if the State had proven Defendant guilty. (V187/296-97) Brizo believed that she could be a fair juror and had no expectations regarding whether the State would be able to prove its case. (V187/298) She admitted that there had been times during questioning when she had not fully understood the terms used. (V187/298-99) She did not think Defendant should be sentenced to death simply because she had been convicted of killing a child and would consider both sentences. (V187/299) She stated that she always tried to be fair and that she was committed to following the law.

(V187/301)

During general questioning by the court, Jesse Rapaport stated that he had working in international trade for 6 to 7 years, had never served on a jury, had a friend with the border patrol with whom he had previously discussed her work and had attended some college. (V188/423-34) During individual questioning regarding the death penalty, Mr. Rapaport informed the court that he had never previously considered the death penalty and then stated:

> I would have to be a hundred percent certain of that. I would be okay with it I think. I don't know. I really don't know. Is that a fair answer?

(V189/531) After the trial court explained that the death penalty would only be considered if the State had already proven Defendant guilty, Rapaport stated that he did not believe he could consider imposing the death penalty because it did not go with his beliefs. (V189/532) When the trial court asked if his belief would preclude him from following the law, he responded that he did not believe that any jury was qualified to decide that anyone should die. (V189/533) When the trial court reiterated the question, Rapaport stated that he did not believe his feelings would preclude him from following the law, acknowledged that his responses were illogical and stated that he could be convinced to impose the death penalty. (V189/533) He

acknowledged that he had feelings against the death penalty but that they were not so strong that he would never consider the death penalty under any circumstances. (V189/534)

When the State asked Rapaport to explain why he believed that no jury was qualified to decide the issue, he stated that he believed in a "parliamentary state" and thought that the decision should be made by a panel of judges. (V189/534-35) He claimed to have given the issue a great deal of thought and could not bear the sense of responsibility. (V189/535) When the State pointed to the nature of the charges in the case, he first stopped responding to questions and then stated that he might consider the death penalty in this type of case but would need to see the evidence. (V189/535-37) When the State indicated that no one expected a juror to make any decisions without considering the evidence, he responded that he believed that Defendant's guilt was already beyond debate. (V189/537-38) When the State started to question the basis of this statement, he stated that he did not know if Defendant was actually guilty but was under the impression that "they" had already decided she was. (V189/538) When the State asked how this impression affected his views on the death penalty, he stated that it did not. (V189/538-39) He then averred that the death penalty might be appropriate if Defendant was found guilty. (V189/539)

The State then attempted to explain how a bifurcated death penalty trial worked and asked if Rapaport would consider the possibility of a death sentence in deciding whether Defendant was guilty. (V189/539-40) After rephrasing the question several times, he stated it would not affect him. (V189/540) He then stated that he would be considering the possibility of a penalty phase during the guilt phase. (V189/540-41) When the State then asked if he could set aside his personal feelings, he responded that he thought he could but was not sure. (V189/541-42) When the State asked if he was certain he could be fair to both side, he responded that he was not certain and was not qualified. (V189/542-43) When asked again if he could set aside his personal feelings and consider both recommendations equally, he stated that he could not put aside his personal feelings. (V189/544) When asked if his feelings would impair his fairness, he stated that he would be guided by his feelings. (V189/545) When the State indicated that it did not understand the answer, he responded, "I think it doesn't make sense, but it shouldn't." (V189/545-46) He then attempted to return to discussing the guilt phase of trial. (V189/546)

When the State then attempted to give a brief description of aggravators, mitigators and the weighing process and inquire if Rapaport had a bias in favor of a particular recommendation,

Defendant objected. (V189/546) The trial court sustained the objection and rephrased the question itself. (V189/546-47) In response, Rapaport stated that he was already leaning toward a life recommendation and that he would "value life in prison more than the death penalty." (V189/547) When the trial court inquired if he would consider making either recommendation, he stated he would but that both would not get equal consideration. (V189/547) When asked what he meant by not giving equal consideration, he stated, "75, 25." (V189/547)

When the State inquired about that split, Rapaport acknowledged that he was already 75% in favor of a life recommendation and added, "it would change based on each case, no." (V189/550) When asked again if he could set aside his personal feeling and reach a decision based on the facts and the law only, he stated that he thought he could but it would be "kind of tough." (V189/551)

On questioning by the defense, Rapaport stated that his impression that Defendant was already guilty was based on the discussion of the penalty phase and the fact that Defendant had been in jail since 1992. (V189/552) When reminded that the trial court had already mentioned a prior conviction being reversed, he stated that he would have difficulty setting aside the fact of the prior conviction but would try. (V189/552-54) After

Defendant made a long speech about the instructions the trial court would be providing, he stated that he would try to follow them. (V189/555-56) When Defendant asked if there was any reason why he would not follow the instructions, he was unable to provide such a reason. (V189. 556) Defendant then asserted that he would not be instructed on how to vote but would be entitled to make his own decision. *Id.* He stated he would be able to do so. *Id.*

When the trial court followed up by asking whether Rapaport could consider both recommendations, he again stated that he could not do so. (V189/557) When asked if he would follow the court's instructions, he stated that it would depend on the instructions. (V189/557) When the trial court informed him that it would give him the instructions on the law and his job would be to apply the law to the facts as he found them, he first stated he could follow the instructions, then admitted that he doubted his ability to do so and finally stated that he could not do so if he was required to consider both recommendations equally. (V189/557-58)

After Rapaport was out of the room, Defendant suggested that the fact that he would not give equal consideration to both possible recommendations did not indicate that he was subject to a cause challenge because of the differing burdens of proof

regarding aggravation and mitigation. (V189/559) The trial court responded that it understood the difference in the burdens of proof and that it would not grant a cause challenge simply because a person was leaning toward one recommendation over the other if the person agreed to follow the law. However, it found Rapaport's equivocation sufficient to raise a reasonable doubt about his impartiality. (V189/559-60) Defendant insisted that the inconsistent answers were a result of him thinking out loud and that his statements that he could consider the death penalty were sufficient to show that he was not subject to a cause challenge. (V189/560-61) The trial court reminded Defendant that the issue was whether it had a reasonable doubt about the juror's impartiality and stated that it had such doubt based on the inconsistency of the answers. (V189/561-62) Defendant then suggested that the equivocation was the result of the State asking leading and improper questions. (V189/562) After noting that Defendant had not objected to the questions, the trial court excused Rapaport for cause. (V189/563-64)

During questioning regarding the death penalty, Jonathan Gabriel stated that he would be able to recommend either sentence based on the facts and the law. (V195/1550-53) When questioned by the State, Gabriel stated that he had a little problem with the fact the State was seeking the death penalty

but had no feelings on the issue. (V195/1553-54) He stated that he had no problem with the fact the State was seeking the death penalty against a woman. (V195/1554) He stated that the fact that Defendant was charged with abusing her son to death was not a sufficient basis to determine what sentence to recommend. (V195/1554-55) He averred that he was capable of recommending either sentence based on the facts. (V195/1556-58) When asked if he had any doubt about his ability to do so, he stated he was pretty sure. (V195/1557) When asked to clarify if he was using pretty sure as a figure of speech or an expression of doubt, Gabriel responded his decision would depend on the facts of the case and he was open to making either recommendation. (V195/1557-58)

In Gabriel's presence, Defendant suggested that the crime she was charged with involved her repeatedly abusing her child and stated that the crime was "pretty, pretty horrible." (V195/1566-67) When Defendant asked Gabriel about his feelings regarding the appropriateness of the death penalty in this case, he responded that his view would depend on the seriousness of the situation. (V195/1577) Defendant then suggested that first degree murder, particularly of a child, was serious and inquired if he believed that death was the only possible sentence. (V195/1577-78) When he responded that it was not, Defendant

asked him to explain why not. (V195/1578) He responded that he was aware of a situation in which someone had been charged with murder even though his actions were unintentional. (V195/1578) After suggesting that a conviction in this case would be based on intentional acts, Defendant again inquired if the death penalty would be the only appropriate sentence, and Gabriel again stated that it would not be. (V195/1578-79) He averred that he was not leaning toward any sentence and was trying to keep his personal feelings out of his decision-making. (V195/1579-80)

Defendant then pointed out that Gabriel had a young child at home who he loved and adored and inquired if hearing "about horrible things being done to a three year old" might "influence him." (V195/1580-81) He responded that he was not sure but that he had no reason to doubt that his ability to be completely neutral at this point. (V195/1581) He explained that Defendant's statements were not affecting his neutrality. (V195/1581-82) He averred that he would not be thinking of his child when viewing pictures of an injured child. (V195/1582)

In moving to excuse Gabriel for cause, Defendant argued that the fact Gabriel had been smiling throughout the questioning and was only 19 years old showed that he was immature. (V195/1585) When the State pointed out that he was

actually 21, Defendant suggested that he had acted like he was 15 because he was "just smiling and light-hearted and not a care in the world. . . . At one point he's concerned about his five-month-old baby and at another it doesn't mean a thing." (V195/1585) Defendant then added that he had allegedly equivocated about whether he could remain neutral in a case regarding a child. (V195/1585-86) The trial court denied the cause challenge. (V195/1587)

The trial court began general voir dire by explaining the presumption of innocence and the burden of proof to the venire. (V198/1981-84, 1998-99) All of the veniremembers responded that they understood and would follow the law. *Id.* It also provided a lengthy explanation of how a trial is conducted. (V198/1986-90)

During its questioning, the State again stressed that it had the burden of proof, and the veniremembers again indicated that they understood and would follow the law. (V198/2005-17, 2130-31) When the State questioned the venire about its ability to look at graphic photos, Gabriel did not indicate that it would be problematic. (V198/2021-30) Brizo stated that she would not consider the possibility of a penalty phase in determining guilt and that she would apply her common sense in evaluating the evidence. (V198/2048-49, 2051-52) Both Brizo and Gabriel stated that they would be able to consider both sentencing

possibilities. (V198/2103-05) Gabriel stated that he had previously worked for a person who used cocaine and that he would have to keep sharp things away from her. (V198/2084-85, 2099) He would set aside that personal experience. (V198/2100)

During defense questioning, Brizo stated that she was lucky enough to have parents who could assist her in caring for her children but understood that not everyone was so lucky. (V199/2171-72) While she believed she was responsible for her children's welfare, she understood that some things happened. (V199/2172) One of her coworkers was stationed in the State Attorney's Office, but it would not affect her. (V199/2191-92) She indicated that she wanted to serve on the jury because it was a big responsibility as a citizen for which she was ready. (V199/2197, 2200) Brizo would respect Defendant's decision to be in a homosexual relationship. (V199/2214) She understood Defendant has a right not to testify and would not hold her exercise of that right against her although she would like to hear from Defendant. (V199/2228-31) She was okay with the weighing of aggravators and mitigators. (V199/2238) She believed that it was important to consider information about Defendant's background in deciding her sentence. (V199/2250) Gabriel also believed the weighing process was fair. (V199/2240) He would consider background information because he wanted as much

information as possible in making a sentencing decision. (V199/2259)

During jury selection, Defendant renewed her cause challenge to Brizo, asserting that her statements during individual questioning about the death penalty showed that she would be biased in a case concerning a child, had prejudicial information regarding pretrial publicity, had a problem with the presumption of innocence and would shift the burden to Defendant. (V199/2284-85) The trial court denied the cause challenge, and Defendant exercised a peremptory challenge to excuse her. (V199/2285) Defendant accepted Gabriel without renewing any cause challenge when she still had peremptory challenges available. (V199/2309)

After she exhausted his peremptory challenges, Defendant requested 2 additional peremptories, claiming her cause challenges to Brizo and Adam Rastafar had been improperly denied. (V199/2313) She stated she would have used the additional challenges to excuse Gabriel and Salvatore. (V199/2314) After the panel and 3 alternates had been selected but before jury selection had concluded, Defendant repeatedly stated that she was accepting the jury subject to the objections she had made to the denial of his cause challenges to Brizo and Rastafar. (V199/2321, 2323) She also stated that she wanted to

provide the court with a list of State cause challenges to which she had previously objected and particularly complained about the excusal of Harris. (V199/2324) When jury selection actually concluded, Defendant accepted the jury subject to her prior objections. (V201/2707) Immediately before the jury was sworn, Defendant filed a pleading in which she asserted that she was renewing all prior objections and motions. (V55/8553, V202/2715)

During her opening statement, Defendant asserted that the evidence would show that she was not responsible for LF's death because she had placed him in the care of a babysitter around September 1990. (V203/2790-2809) However, she acknowledged that she had not been a good mother to LF. *Id.*

During trial, Det. Matthews testified that the investigative materials regarding this case were kept in a room with glass wall at the Miami Beach Police Department and were visible to individuals who entered the juvenile, crimes against property and homicide areas. (V207/3398-3403) Det. Matthews had seen Miriam Ramos in this area on several occasions at the desk of Det. Steven Jones, who was assigned to be the liaison to DCF in this matter. (V207/3403, 3407-08, 3412-13, 3415-16)

After LF had been identified by Fleitas, Det. Matthews received a call from Ramos one evening in which Ramos claimed she was an investigator with DCF and insisted that Det. Matthews

meet her at a Burger King. (V207/3416-20, 3427) When Det. Matthews did so, he found that Ramos was accompanied by Mercedes Estrada. (V207/3420-21) Det. Matthews then had a conversation with Estrada in which Ramos repeatedly interjected herself. (V207/3421-22) After this conversation, Det. Matthews went to the apartment building where Estrada lived and spoke to her next door neighbor Joyce Valenzuela and her 14 year old daughter GP, whom he had previously interviewed. (V207/3422-30) Valenzuela and GP agreed to come to the police station and were interviewed. (V207/3429-32) Det. Matthews then had the Valenzuela family taken to a motel while crime scene processed their apartment based on the family's consent. (V207/3432-35, 3571)

On cross, Det. Matthews admitted that the fact a diaper was taped to LF when he was found was not released to the public. (V207/3483) However, the information was known to the people involved in the investigation. (V207/3483) Det. Matthews acknowledged that he had noticed tape similar to the tape on the diaper on the mailbox for the Valenzuela apartment when he went there after speaking to Estrada. (V207/3488) GP told him that she had used that tape to keep a diaper up on a child she babysat, that she had pushed the child, that the child's face had hit a wall and that the child fell to the floor dead.

(V207/3496-97) GP stated that a woman had given her the child in a park. (V207/3504) While GP had stated that the woman had refused to identify either herself or the child when she was originally interviewed, she now claimed the child was named LF. (V207/3504-05) She also averred that she had custody of this child for weeks at a time. (V207/3510) She provided a variety of accounts regarding the disposition of the body of the child, including one involving bushes. (V207/3513-14) GP claimed that her family had previously been forced to move because she had hurt a different child with a razor. Subsequently, both she and her mother indicated the statement was untrue, and investigation into the statement failed to corroborate such an attack. (V207/3501-02)

On redirect, Det. Matthews testified that he learned that Ramos had been to the Valenzuela apartment several times before he ever went there. (V207/3555) He stated that GP was mentally slow. (V207/3561) He averred that the description GP provided of the woman who allegedly gave GP the child in the park was not consistent with Defendant or Gonzalez. (V207/3563-64) He stated that he asked GP about causing cuts to LF's back that did not exist to test her veracity and that GP responded that she had cut LF's back with a razor. (V207/3567) GP similarly suggested that she had put holes in LF's ears with a fork when such

nonexistent holes were mentioned. (V207/3568) Det. Matthews stated that no evidence was ever found linking LF to the Valenzuela apartment. (V207/3574)

Det. Matthews stated that the tape found in Defendant's room at the Dixie Motel and on her car was package tape like the tape found on LF's body. (V207/3572-73) This type of tape was commonly available. (V207/3573-74) Det. Matthews stated that he never charged Valenzuela or GP with any crimes. (V207/3569) When they were not charged, Det. Matthews received an angry and threatening phone call from Ramos. (V207/3575-76)

Crime Scene Tech. Maritza Fonseca took hair samples from Valenzuela and her children and from JP and TC. (V208/3590-96) She also took paint scrapings from the Valenzuela's mailbox. (V208/3596-97) Det. Cornelius Oregan took hair samples from the members of the Piloto family. (V208/3598-99)

Debra Sobra testified that she, her mother and her son RS lived in the same apartment building as the Valenzuelas in the fall of 1990. (V208/3603-05) Ms. Sobra's mother would sit in the courtyard of building and watch RS play with the Valenzuela children and going in and out of the Valenzuelas' apartment regularly. (V208/3605-07) Ms. Sobra never saw GP babysitting for anyone, much less having custody of a child for weeks, and never observed any disturbance at her apartment. (V208/3609-10)

On October 31, 1990, Valenzuela took her children and RS trick or treating. (V208/3607-08) When it started to get dark, Sobra found the group within a block of the apartment and took RS home while the Valenzuelas continued to trick or treat. (V208/3608-09)

Teresa Merritt, a serologist, testified that she tested a portion of wall from the Valenzuela apartment for blood and found none. (V208/3633-38) She also examined a frying pan from the Pilotos' apartment and found hairs but not blood. (V208/3638-39) On analysis, the hairs were consistent with LF and inconsistent with the members of the Piloto household, Defendant, Gonzalez and Defendant's other children. (V208/3640-46, 3649-50) Merritt examined the diaper and found LF's hair and animal hair on it. (V208/3646-47) On cross, Merritt stated that she found type A blood on a sheet from the Piloto house and sent it for DNA testing. (V208/3657) She also examined hair from a boxspring in the house that was not consistent with LF. (V208/3657) On redirect, Merritt stated that Defendant had type A blood. (V208/3671)

When the State asked Det. Santiago if Defendant had ever asked what happened to LF, Defendant objected. (V209/3733-34) At sidebar, Defendant argued that the question somehow shifted the burden and was a comment on silence. (V209/3734) The trial court

pointed out that Defendant had made a statement so that the comment did not concern silence. *Id.* Defendant insisted that it would still be an improper comment despite the fact that Defendant had not remained silent. (V209/3734-35) The trial court rejected this argument and overruled the objection. (V209/3735)

Det. Santiago testified that he and Det. Shaffolo drove Defendant, her children and Gonzalez back to Miami Beach. (V209/3770-73) During the ride, Defendant and Gonzalez kissed and chatted. (V209/3733-74) Defendant did not cry and her demeanor was completely different than her demeanor during her taped statement. (V209/3774)

Dr. Richard Souviron, a forensic odontologist, testified that he examined remains found on Miami Beach and took xrays and photographs on November 3, 1990. (V209/3802-11) Based on this examination, he opined that the child's 2 missing front teeth had been removed traumatically and that his gum tissue had been lost through repeated traumatic injuries over a period of months. (V209/3811-17) The remaining teeth were not chipped, which was inconsistent with the missing teeth having been lost in an accident. (V209/3814-15) The difference in healing showed that the front teeth were lost at different times. (V209/3826) Dr. Souviron opined that the gum injuries were between 6 months

and a year old, that one tooth had been lost more than 6 months before death that other tooth had been lost in the last several months of the child's life. (V209/3817, 3829) Dr. Souviron averred that LF's teeth suggested he was approximately 2 years old at the time of his death. (V209/3819-22) When he subsequently learned LF was actually 3 years old, he opined that the discrepancy in his tooth development was caused by longstanding malnutrition. (V209/3822)

During cross, Defendant sought to impeach Dr. Souviron with his testimony from the first trial about the age of tooth loss. (V209/3839-40) The State objected that the prior testimony concerned the gum injury, and the trial court overruled the objection. (V209/3840) After reviewing his prior testimony, Dr. Souviron stated that the portion of the prior testimony that Defendant was relying upon was not specific to the teeth and that he had provided that testimony without seeing the skeletal part. (V209/3841-42) He stated that seeing the skeletal part had caused him to revise the timeline of the injuries. (V209/3842)

After eliciting this testimony, Defendant came sidebar and asserted that the State had committed a discovery violation by failing to disclose a change in opinion. (V209/3843) The State requested the opportunity to question the doctor because Defendant was attempting to impeach him with testimony that

concerned other matters. *Id.* When the trial court inquired whether Dr. Souviron was provided with new pictures that caused the change, the State responded that he had not been. (V209/3844-45) The State averred that the difference in testimony was based on a difference in the questions asked and provided the trial court with a transcript of the prior testimony. (V209/3845-46) After reviewing the transcript, the trial court indicated that it did not see a real change of opinion and requested that Defendant explain the difference she perceived. (V209/3846) Defendant insisted that the change was that a tooth had been lost more than 6 months before death when he had previously testified that all of the injuries occurred within 6 months. (V209/3846-47) The State responded that Dr. Souviron was simply not asked the ages of specific injuries at the first trial. (V209/3847-48) After noting that Dr. Souviron had been permitted to testify regarding a variety of injuries, the trial court stated that it did not find that there had been a discovery violation. (V209/3849-51) When testimony resumed, Dr. Souviron stated that his opinion was that one of the teeth had been lost within 6 months. (V209/3854-55) Defendant then impeached Dr. Souviron with his deposition testimony in which he had stated that the scarring on the gums indicated that LF had lost the teeth months earlier but within 6 months of his death.

(V209/3855-56)

On redirect, Dr. Souviron stated that his deposition testimony had been based exclusively on the soft tissue but that the bone showed regrowth. (V209/3857) He averred that his opinion had not changed but that it had been modified by seeing the bone, which he had not seen at the time of the deposition. (V209/3857-58) Defendant renewed her prior objection, and it was overruled. (V209/3858) After Dr. Souviron was excused, Defendant again renewed her objection, clarifying that she was asserting that seeing a photo that had previously been disclosed changed the doctor's opinion. (V209/3860-61) When the trial court inquired why no one had asked the doctor when he had seen the photo, Defendant insisted that the State must have shown the doctor the picture between the first trial and the second. (V209/3861-62) When asked to clarify the exact change of opinion, Defendant insisted that Dr. Souviron's prior opinion had been that all of the injuries were less than 6 month old and had now made the gum and teeth injuries older. (V209/3862) Defendant insisted that the change was significant because the defense was based on Defendant not having custody of LF for the last 3 months of his life. (V209/3862) When the trial court inquired how this was true given that the teeth and gum injuries were not fatal, that LF had numerous healed injuries and that

Defendant had stated that she was not a good mother during opening, Defendant insisted that it might have caused her to proceed differently but could not say how. (V209/3862-64) The trial court again overruled Defendant's objection. (V209/3864)

Crime Scene Tech. Fabrice Nelson testified that he processed the Piloto home on December 6, 1990. (V210/3884-85) He stated that the home consisted of a main residence and attached efficiency apartment. (V210/3385) The apartment was furnished and had 1 entrance. (V210/3886-87, 3889) The furnishing included 2 beds and a dresser. (V210/3890-91) The height from the top of the beds to the floor was approximately 18 inches. (V210/3906) The apartment had a bathroom with a door and a closet with a door. (V210/3892-93) It was not possible to see into the bathroom or closet when their doors were closed. (V210/3892-93) Tech. Nelson impounded a frying pan found at the Piloto home because it had hairs on it. (V210/3895-97) He also observed areas that appeared to have blood on them in the apartment and took scrapings of area above the bathroom sink. (V210/3899-3900) He noted possible blood on a mattress and folding chair and impounded a sheet. (V210/3901-02)

Samuel Reynolds testified that he was a program operations administrator and records custodian for DCF. (V210/3988-92) He was aware that Ramos had worked for DCF in a clerical position

but stated that she was never an investigator. (V210/3992-93)

Dr. Bruce Hyma, the medical examiner, testified that he went to the scene where LF's body was found on November 2, 1990. (V210/3997-4001) When he got the body back to the morgue and removed the clothing, Dr. Hyma noted that the diaper was heavily soiled with feces and urine, which had dried to both the diaper and the body. (V210/4006) An examination of the penis and scrotum showed that they were inflamed and infected. (V210/4052) This condition would have taken days to weeks to develop. (V210/4052)

After the body was cleaned, it was xrayed, which showed that the bone development was consistent with an age of 21 to 27 months. (V210/4007) At the time of the autopsy, the body was 35¼ inches long and weighed 18 pounds. (V210/4008) The tissues that connected the gums to the lips had been replaced entirely by scar tissue. (V210/4009) This indicated that the mouth had been injured on at least 2 occasions, and that the injuries were not recent. (V210/4009-10) There was very little lividity present in the body because the child had been very anemic. (V210/4011-12)

After LF was identified, Dr. Hyma obtained his birth records and learned that LF was 3 years old and had been normal in height and weight at birth. (V210/4012-15) At 11 months, LF had fallen to the 10th percentile in height and the 25th

percentile in weight. (V210/4015) At his death, his height and weight were well below the 5th percentile. (V210/4015)

Dr. Hyma averred that while it was easier to date fresh injuries, dating injuries precisely was generally difficult. (V210/4015-16) In this case, he observed injuries that generally fell into three categories: injuries that occurred within hours of death, injuries that occurred in the days and weeks before death and injuries that occurred weeks to months before death. (V210/4016) However, some areas exhibited both new and old injuries. (V210/4016)

On external examination, the fact that the child was malnourished was evidenced by the fact that the bones were visible through the skin. (V210/4018) The right leg had very little muscle mass and was 1½" smaller in circumference that the left leg. (V210/4018-19) On internal examination, the thymus gland was very small, which was indicative of malnutrition. (V210/4020-21) This level of malnutrition would have taken months to occur. (V210/4019) It would have contributed to the anemia seen in the body. (V210/4019-20) The stomach was empty except for a teaspoon of bile and the remainder of the digestive tract was also empty. (V210/4022-23) There was no evidence of disease process in the digestive tract. (V210/4021-22) As such, Dr. Hyma opined that the malnutrition was the result of

starvation. (V210/4022) The pancreas had evidence of blockage in the ducts and early infectious processes. (V210/4021) This was consistent with dehydration in the days and weeks before death. (V210/4021) There was a 2" scar on the left buttock, and a linear scar on the right side of the abdomen. (V210/4024) Both scars resulted from injuries that were months old. (V210/4024) On the right side, right buttock and right shoulder and over the coccyx, there was evidence of bedsores. (V210/4026-27) The skin on the body also had a wrinkled appearance consistent with malnutrition and dehydration. (V210/4027-28) When the right buttock was dissected, 2 different areas of bruising associated with 2 recent blunt trauma injuries were found. (V210/4050-51)

LF's right hand was withered. (V210/4028) An examination of the right arm revealed that his right ulna had a splintered fracture in the middle and that there was blood and blood clots in the surrounding muscle. (V210/4028-32) The location and nature of this fracture and the lack of fracture in the radius indicated that it was the result of direct pressure on the middle of the arm. (V210/4031-32) This type of injury was consistent with a fresh, defensive wound. (V210/4032-33) The left arm was bent at a 90 degree angle at the elbow and fixed in that position. (V210/4035-36) The muscles in the upper arm felt like bone. (V210/4036) Internal examination revealed blood in

the elbow consistent with a recent blunt trauma injury and significant scarring and ossification in the upper arm muscles. (V210/4036-39) The ossification in the muscles of the upper arm would have caused a deformity to the arm and inability to move the elbow. (V210/4038-40) The process of ossification results from a serious traumatic injury that has penetrated the entire muscle mass, an infection of the muscle tissue or repeated injuries to the arm. (V210/4040-41) Given LF's age, the lack of evidence of a severe injury to the upper arm or a fracture to the humerus and the lack of evidence of an infection, Dr. Hyma opined that the cause of this ossification was repeated squeezing of LF's arm and was consistent with someone repeatedly grabbing LF's arm hard and dragging him months earlier. (V210/4041-46)

Dr. Hyma observed minimal bruising on the back of LF's left hand and some discoloration on the palm on external exam. (V210/4046-47) When he dissected the hand, he found the tissues were full of blood. (V210/4048-49) This and a scrape on the back of the hand indicated that it had been subjected to blunt force trauma. (V210/4048) This injury pattern was consistent with a recent, defensive wound. (V210/4049) Dr. Hyma opined that the totality of LF's injuries were such that he would have been unable to walk at the time of his death. (V210/4051-52) As such,

he did not believe that the injuries could have been sustained while jumping on a bed. (V210/4052)

Dr. Hyma stated that the skin on LF's penis was inflamed, that the area under the foreskin had an accumulation of material showing it had not been cleaned and that his scrotum was infected. (V210/4053) He averred that these conditions would have taken days to weeks to develop and were consistent with the caked, dried feces found on the body. (V210/4053-54)

There were abrasions on the middle of the forehead, on left side of the forehead, at the hairline and on the left side of the chin. (V210/4054-55) There was a bump next to the abrasion in the middle of the forehead and a circular scab on the chin. (V210/4054) The circular scab appeared to have been made by a heating element or cigarette. (V210/4059-60) Under the bump, there was a hematoma that was healing and scar tissue. (V210/4062-63) There was a bedsore that was infected on the left ear. (V210/4055) The bedsore would have taken days to weeks to develop. (V210/4056) The bump was months old. (V210/4063) However, the other injuries were only hours to days old. (V210/4056) The left eye was reddish blue in color, and there was skin missing from the eyelid. (V210/4057) This condition was a result of blood draining from the skull fracture. (V210/4057-58) There was a laceration and bruising under the right eye and

abrasion on the right cheek that was the result of a blunt trauma injury. (V210/4060-61)

LF's left leg was visibly bigger that his right leg. (V211/4069) On internal exam, Dr. Hyma discovered that the reason from this difference was that the tissues of the leg left were completely infiltrated with blood from the hip to the ankle. (V211/4069-70) At the knee, there was a resolving hematoma, but the rest of the injuries were fresh. (V211/4070) The injuries must have been caused by blunt force trauma and would have severely impeded mobility. (V211/4070-71) There was also bruising on the outside of the left foot and tops of the 2d and 4th toes. (V211/4072) This injury could have been caused by blunt trauma or crushing of the foot. (V211/4072) The bruising was days old. (V211/4073) There was blood under the nail of the big toe on the right foot, which was again consistent with a crushing injury. (V211/4074) The bottom of the right big toe and the bottom of the left foot also had permanent furrows on them. (V211/4074-75) This pattern showed that something had been consistently pressed against the feet and was consistent with a ligature. (V211/4074-76) The pressure sores all along the left back side of the body were also consistent with prolonged restraint. (V211/4077, V212. 4095-97) The lack of pressure sores on the legs indicated that LF's legs had been elevated when LF

was restrained. (V212/4098) The entire pattern was consistent with LF been hung up by his feet. (V212/4099-4105) Dr. Hyma found no injuries to the back consistent with a razor or other sharp object. (V212/4095) There were also no perforating injuries on the ears that would have been caused by a fork. (V212/4096)

There were 2 areas of injury on the left side of the chest; one below the breast and the other on the shoulder. (V212/4107-08) Microscopic examination revealed that both areas had fresh injuries layered over healing injuries. (V212/4108-09) These injuries were the result of at least 4 incidents of blunt trauma and occurred within weeks and hours of death. (V212/4109) LF had 1" laceration on the back of his head that was consistent with a blunt trauma injury and showed signs of healing consistent with being days to weeks old. (V212/4106-07) There was another blunt trauma injury superimposed on the pressure sore by the left ear that was days to weeks old. (V212/4110) On opening the scalp, Dr. Hyma found a large collection of blood under the skin, which was consistent with a days to weeks old head injury. (V212/4110-14) LF's skull was fractured at the forehead and around his left eye, consistent with a blunt trauma injury. (V212/4115-18) The fracture had begun to heal, indicating it was days to weeks old. (V212/4118-19) It also had 2 epidural hematomas associated with

it (one fresh and one healing), which was consistent with 2 sources of injury occurring in the last days to weeks of life. (V212/4120-22) While unconsciousness would result from this type of injury, consciousness would be regained during the healing process, and the injuries would be painful. (V212/4122) Dr. Hyma also found fresh and healing subdural hematomas, which indicated that there had been multiple blows to the head at different times and were not consistent with injuries from falls. (V212/4125-26) The injuries associated with the epidural hematomas had been inflicted in the days to weeks and hours to days range. (V212/4126) The subdural hematomas ranged from months old to hours old. (V212/4126) There were also contusions in the brain tissue in the frontal lobes, which had caused subarachnoid bleeding that was healing. (V212/4128-30) The corpus callosum, the tissue that allows the 2 sides of the brain to communicate, had been torn as the result of blunt trauma, which was a fatal injury that would have occurred hours or days before death. (V212/4133-35) There was also a shearing injury to the brain stem that was hours to days old. (V212/4135-38) These injuries were consistent with blunt trauma and the preexisting skull fracture would have contributed to these injuries. (V212/4139-40) Dr. Hyma opined that LF died as a result of the cumulative effect of all of his injuries even though the

injuries to the brain stem and corpus callosum hastened his death. (V212/4140-41)

Dr. Ronald Kim, a neuropathologist, testified that he reviewed photos, xrays, slides and report from the autopsy. (V212/4168-75) Based on this review, Dr. Kim opined that LF had suffered repeated injuries to his forehead that had caused extensive bleeding under the scalp and an extensive skull fracture. (V212/4180-82) However, the injuries would not have caused external bleeding because the skin on the forehead remained closed. (V212/4183-84) The injuries were the result of repeated blunt force trauma. (V212/4184-86) While the skull fracture was very extensive and caused extensive injury, it was not immediately fatal. (V212/4189-94) Dr. Kim estimated that some of the injuries were about a week old and others were months old. (V212/4197, 4204) The injuries had caused a crater to form in LF's brain tissue and the widespread death of a brain tissue. (V212/4202, 4208) They would have impaired LF's respiration during his last day of life. (V212/4209) A significant level of force would be needed to cause this type of injury and the force would have had to cause a rotation. (V212/4203-04, 4210) It was not consistent with being caused by a fall. (V212/4211-13) Dr. Kim stated that he saw nothing in his review of LF's injuries that would have been associated with a

lot of external bleeding. (V212/4214) He opined that LF died of repeated head trauma. (V212/4215-16) He did not believe the injuries were consistent with being thrown into a wall either. (V212/4220) He thought the most likely mechanism of injury was blows from a frying pan. (V212/4222-23)

Betty Walker testified that she worked for a supermarket on Miami Beach briefly in 1990. (V213/4296-98) While there, she saw a thin, young boy who had one arm that he always held like it was in a sling and who wore pampers running in and out of the store on occasion. (V213/4300-02) When she saw flyers the police had prepared after LF was found, she believed he was the boy she had seen and told the police. (V213/4298-99, 4303) On cross, Ms. Walker admitted that she had told the police the boy was between 4 and 6. (V213/4305-06)

Glen Moffitt, a former crime scene sergeant, testified that he received a request from Det. Matthews on November 28, 1990, to process an apartment on Abbott Avenue and had his technicians do so that day. (V213/4318-23) He also took aerial photos of Miami Beach. (V213/4323-24) John Huckstein testified that he and Stephen Miller processed the apartment on Abbott Avenue and collected numerous items of potential evidence. (V213/4337-53)

GP testified that she was disabled, illiterate and 14 years old at the time of the crime. (V214/4390, 4395-96) She admitted

that she had been in fights at school because the other students picked on her but denied ever seriously injuring another student. (V214/4393-94) She did not recall ever being deposed and insisted that statements in her deposition were incorrect. (V214/4394-97) She did not remember where she lived at the time or who her neighbors were. (V214/4319, 4399-4405) GP remembered LF being found dead and speaking to Det. Matthews. (V214/4405-06) However, she denied having stated that she had used tape on his diaper, had known LF or was involved in his death. (V214/4406-09, 4415-20, 4424) She did recall the police destroying her house and detaining her. (V214/4409-11) She averred that any inculpatory statement she did make was made to stop Det. Matthews from asking her the same question repeatedly. (V214/4411-12) However, Det. Matthews did not threaten her. (V214/4412)

GP stated that a woman from DCF forced her to attend LF's funeral. (V214/4429, 4437) Another woman from DCF interviewed her mother. (V214/4437-38) GP stated that one of her neighbors used to complain about her family constantly. (V214/4439-41)

Ramos testified that she worked for DCF as a secretary doing data entry at the time of the crimes. (V214/4469-74) After LF's body was found, Det. Steven Jones came to DCF, and Ramos ran a computer search for him that revealed LF's name.

(V214/4476-78) One night around Thanksgiving, her boss asked her to answer calls to the abuse hotline while he went to the bathroom. (V214/4479-80) While sitting at his desk, Ramos noticed that there was a report regarding abuse of an unknown child about 3 years old that had come in on November 1, 1990, and had not been investigated. (V214/4480-83) Ramos told her boss about the report and suggested that LF's siblings might also be in danger, and he told her to call the police. (V214/4482-83) Ramos called Det. Jones and then went to the Miami Beach Police station to speak to the detectives. (V214/4483-84) She claimed that she provided Det. Paul Scrimshaw with a copy of the abuse report and went with him to the Abbott Avenue apartment building. (V214/4485-85) She averred that after the officers spoke to people at the building, he insisted that they leave because the area was unsafe. (V214/4485-86)

The following day, Ramos returned to the Abbott Avenue address and spoke to the residents including Valenzuela. (V214/4487-88) She then called Det. Matthews, reported what she had learned and met with him. (V214/4488-89) She subsequently contacted Det. Matthews again and stated that she had found 5 more reports of abuse of young children. (V214/4489) Det. Matthews took the reports from her but told her she could not be involved in the case. (V214/4489) She also arranged for Det.

Matthews to meet with her and one of the neighbors from Abbot Avenue at a Burger King. (V214/4491) Det. Matthews allegedly continued to call her every day even though she allegedly never claimed to be an investigator. (V214/4490, 4493) She admitted that what she did was not within her job as a secretary and that she got in trouble for doing it. (V214/4494)

On cross, Ramos admitted that the report had been assigned to an investigator, that she was not an investigator, that she was ordered not to attempt to investigate the case and that she defied those orders. (V214/4499) She admitted that she was interested in the case and followed it closely. (V214/4500-01) She acknowledged that after running the computer search for Det. Jones, she contacted the police, went to the station and discussed the investigation with them. (V214/4502-05) She acknowledged that she decided to investigate the case on her own but insisted that she had a right as a state employee and citizen to do so. (V214/4508-10) She acknowledged that she was aware that DCF had returned LF to Defendant after a prior child abuse report when she started searching the records looking for reports of abuse that might be connected to LF's death and that she was the person who decided that reports about Abbott Avenue concerned LF even though this was not her job. (V214/4511-17) She admitted that she tried to get the police to agree with her

about the connection. (V214/4515-19) Ramos acknowledged that she had written a letter regarding her conduct in which she admitted taking photos from the investigation from the police and showing them to people at Abbott Avenue. (V214/4521-22)

Estrada testified that she lived at the apartment on Abbott Avenue in 1990 because she had lost her job and could no longer afford a nicer apartment. (V215/4584-89) She believed the other residents of the building were transients who made too much noise. (V215/4589-90) She found GP and Valenzuela particularly annoying and had complained to the landlord about GP making noise and allegedly threatening her on several occasions. (V215/4590-92) She claimed that on Halloween night, she heard a boy screaming for his mommy, the boy sobbing and thumping coming from GP's apartment. (V215/4594-46) She admitted that she had seen numerous people in the apartment at times and claimed she decided not to go next door because she did not know who was in the apartment. (V215/4596-98)

The following morning, Estrada reported what she had heard to DCF. (V215/4599-4600) Weeks later, Ramos came to Estrada's apartment and showed her pictures of a little boy and 2 women. (V215/4599-4602) Estrada believed she had seen one of the women at the apartments before and thought she recognized the boy. (V215/4603-04) She subsequently met with 2 detectives and Ramos

at a Burger King. (V215/4605-08) A couple of years later she gave a sworn statement to an investigator and a deposition. (V215/4608-09)

On cross, Estrada claimed that she only lived at Abbott Avenue for a month and then admitted she lived there for 18 months. (V215/4610-11) She insisted that she did not have problems with a lot of people at the building but acknowledged that she had numerous problems and made numerous complaints about the occupants of the adjoining apartment, not just GP and her family. (V215/4612-18) She had even called the police about the people who were there before GP. (V215/4617-21) However, she did not call the police about the incident on Halloween. (V215/4626-28) She reluctantly admitted that she was also had problems with Sobra. (V215/4622-25)

Estrada also reluctantly admitted that what she had told DCF in her call was that a child was heard crying in the apartment for an hour every night after thumps were heard on her wall. (V215/4628-31) She also acknowledged that she had told DCF the family had only been there for 2 months even though they had been there much longer. (V215/4631-32) She admitted that she was not sure when she had seen the people whose pictures she had identified. (V215/4646)

Priscilla Malave testified that she met GP and Valenzuela

in 1990 when GP was babysitting in an apartment building she owned. (V216/4754-61) Sometime after Halloween, GP told Malave that she had killed a little boy by throwing him against a wall for crying too much. (V216/4763-64) The killing allegedly occurred in her building; not Abbot Avenue. (V216/4777-78) When the police came to her building, she told them of GP's statement and showed them the apartment where GP had babysat, noting that its occupants had left abruptly after Halloween. (V216/4764-67) Malave considered the concept of GP babysitting strange because there was something mentally wrong with GP that caused her to act younger than she was. (V216/4772-73) Sharon Malave, Malave's daughter, testified that she also saw GP around her mother's building. (V216/4794-4800) GP spent Halloween there. (V216/4802-04) She averred that she received a phone call from GP a couple of days later saying she had done something wrong. (V216/4804-05)

Det. Gary Schiaffo testified that he kept the case file locked in a file cabinet next to his desk in an area of the police station for which a key card was required for entry. (V218/4881, 4904-07) He was aware that Rose Lezniak from DCF has a key card. (V218/4908-09) Sgt. Gary Klueger testified that he drove GP home after her interview with Sgt. Matthews. (V219/4949-55) During the ride, GP asked him the difference

between accidental and intentional and stated that she had gently shoved the baby. (V219/4955-56) At the apartment, GP identified where she was standing when she pushed the baby, where the baby's head hit the wall and where the baby slept and played. (V219/4957)

Marixa Piloto testified that when Defendant lived in her father's house, her father was not home much. (V220/5133-37) There were as many as 10 people living in the house, which created a lot of noise. (V220/5137-39) Her son had hidden from her in the closet in the apartment. (V220/5140-41)

Dr. Hyma testified that LF would not have been able to run during the last 3 weeks of his life because of malnutrition and the injuries to his leg. (V220/5165-68) After considering the evidence presented the jury found Defendant guilty as charged on both counts. (V63/9874, V224/5558) The trial court adjudicated Defendant in accordance with the verdict. (V64/9972-74, V224/5561-62)

On September 9, 2010, the State filed a motion to permit its expert to evaluate Defendant. (V65/10069-71) In denying the motion, the trial court indicated that it believed that allowing the State to have an expert evaluate Defendant would violate her constitutional rights. (V168/8) However, it granted leave for the State's expert to be present during Dr. Toomer's testimony.

(V169/11)

Defendant also filed a motion to exclude Dr. Suarez as a witness. (V68/10609-11) In this motion, Defendant noted that she planned to present Dr. Toomer to testify regarding his opinion about trauma Defendant allegedly suffered before coming to this country and its effect on her "emotional development," which somehow did not concern her mental state while living in this country, based exclusively on his interview with her. *Id.* She also insisted that Dr. Suarez should not be permitted to testify because he had evaluated her in connection with her motion claiming that she was retarded. *Id.* In its response to this motion, the State pointed out that Dr. Toomer had testified in deposition regarding Defendant's mental state and averred that her mental condition was continuing such that he would be testifying about her mental state after her migration. (V69/10809-14) It argued that the fact that Dr. Suarez had been appointed based on Defendant's claim of retardation did not bar him from testifying in any other proceeding, as Fla. R. Crim. P. 3.203 contained no provision limiting the use of information gather in litigating retardation claims. *Id.* The trial court ruled that the State could not present any testimony from Dr. Suarez based on his evaluation of Defendant because it believed that the fact that Dr. Suarez had been permitted to evaluate

Defendant made his testimony improper. (V140/651, V147/7)

Both before and during the penalty phase, Defendant repeatedly moved to preclude consideration of the heinous, atrocious or cruel aggravator (HAC). (V68/10612-44, V71. 11131-33) She argued, *inter alia*, that consideration of the years of abuse LF suffered was improper because child abuse was not on the list of felonies that supported the during the course of a felony aggravator when LF died and the repeated abuse of LF allegedly did not concern the means and manner of his death. *Id.* She further contended that the evidence would be insufficient to show LF was conscious if only Defendant's acts immediately preceding LF's death were considered. *Id.* In response, the State pointed out that it was not arguing the during the course of a felony aggravator based on child abuse and noted that this Court had held that the entire context of the circumstances of the victim's death had to be considered in evaluating HAC. (V69/10825-31) It argued that since Dr. Hyma had already testified that LF had died from the cumulative effect of Defendant's abuse, all her actions against him were properly considered. *Id.* The trial court denied the motions. (V1/63, V136/10-11)

Defendant also filed a motion in limine seeking to prevent the State from asserting that Dr. Toomer's opinion was based on

uncorroborated information he obtained from Defendant. (V71/11095-96) She argued that since she was unable to travel to Cuba under state law, she could not corroborate the information and that this inability to corroborate should not be held against her. *Id.* The trial court granted the motion. (V71/11095)

During the penalty phase, Dr. Souviron testified that a substantial amount of force would have been necessary to knock LF's teeth out and that the injuries would have been very painful for days. (V136/50-55) The injuries to the gums would have been even more painful for a longer period of time. (V136/58-60) Dr. Hyma testified that LF suffered from extreme malnutrition from the time he was 11 months old until his death, which would have caused him to suffer from hunger pains when conscious. (V137/81-88) It also caused him to develop pancreatitis, which would have caused constant pain. (V137/88-89) The injuries that resulted in the ossification of LF's left arm would also have been severely pain and left LF in constant pain. (V137/91-93) The injuries to LF's legs would have caused him to be in pain any time he moved his legs or they were touched. (V137/93-101) LF would have felt an aching throb from the injuries to his chest. (V137/101-03) Injuries to LF's hand were causing further ossification would also caused pain. (V137/103-06) The break to LF's right arm was consistent with a

defensive wound and would have been extremely painful. (V137/108-11) The infection caused by being left in a heavily soiled diaper and the pressure sores over his body would have also caused extreme pain. (V137/111-21) The ligature marks and pressure sores also showed that LF was suspended by his legs, which would have cause chronic pain and increased the pain from the other injuries. (V137/121-26) The injuries to his head would have also been painful, as would the healing injuries to his skull and brain. (V137/126-35, 154-60) LF would have only become unconscious after the blow that injured the brain stem, which had to be inflicted on his last day of life. (V137/165-66) The other injuries would have caused his death. (V137/178)

Sister Margarita Castonella testified that she had corresponded with Defendant for 10 years and met her once. (V137/190-94) Based on this interaction, she believed that Defendant was deeply spiritual, concerned for others and sorry for her crimes. (V137/198-201) Rebecca Cortes testified that she had met Defendant through her work with a jail ministry, that Defendant had been baptized, that she was very religious, that she had spoken of her relationship with her mother and alleged sexual abuse, that she was remorseful and that she advised other inmates. (V140/586-92) Beatrice Oliveros, Jasmine Hibbert, Hilda Marin, Sabrina Simmons, Rosa Rodriguez, Laquisha Johnson, and

Barbara Martinez, jail inmates, testified that Defendant was a trustee in the jail, helped them cope with the stress of being incarcerated and was involved in religious activities. (V137/211-43, V139/491-501, 510-20, 533-40, 545-54, 569-75, V140/625-32) Off. Hermes Jimenez, Off. Cindy Belinger and Off. Sabrina Jones testified that Defendant had been a good inmate in the jail who kept her cell clean and served as a trustee. (V138/277-92, 329-39, V140/594-602) Ron McAndrews, a former prison warden, testified that after reviewing Defendant's jail and prison records and guards' deposition, he believed she would be a good inmate even though she had been caught in possession of a razor blade and other objects that could be used as weapons. (V138/373-428)

Dr. Jethro Toomer, a psychologist, testified that defense counsel asked him to conduct an evaluation of Defendant's development history until she came to this country and provided him with a chronology of her background. (V140/653-61, 670, 672) To do this evaluation, he interviewed Defendant about her background and conducted no testing. (V140/672-73) Based on the interview, Dr. Toomer opined that Defendant grew up without nurturing and a father. (V140/675-76) When she did meet her father, he rejected her. (V140/676) Her mother told her she was damned, stained and not her daughter. (V140/676) He averred that

this situation caused a loss of self esteem. (V140/678-79) Her education was erratic and only lasted to the fourth grade. (V140/679-80) She was allegedly sexually assaulted by a teacher's cousin when she was 10. (V140/680) Her mother allegedly beat her when told of the assault. (V140/681) Defendant then lived with an aunt who provided some nurturing. (V140/683) However, this environment was allegedly unstable because her uncle and cousin acted inappropriately. (V140/684-85) Defendant allegedly attempted suicide 3 times as a teenager. (V140/686) Around the age of 16, Defendant moved in with 5 older girls, had lesbian relationships with them and started using drugs. (V140/687-88) She subsequently became pregnant and immigrated to this country before giving birth. (V140/688) Dr. Toomer averred that this alleged trauma permanently affected Defendant's functioning. (V140/690)

Dr. Toomer admitted that he had not diagnosed Defendant with any recognized mental condition. (V140/691-92) He acknowledged that he only spoke to Defendant after she was convicted. (V140/693-95) He admitted that he could have given tests for malingering and personality functioning that would have provided information about the credibility of Defendant's statements. (V140/710-11)

JP testified that he was an 11 time convicted felon who

grew up in foster care after Defendant's arrest. (V140/742-46) At first, he was not allowed to see or write Defendant. (V140/749) After he was 16, he was allowed to visit her. (V140/749) JP believed it was important to make a relationship with his mother and stated that she had sent him letters of encouragement and had been a positive role model. (V140/753-58) TC testified that she too grew up in foster care and was eventually placed with the Glazers. (V141/768-72) Around the age of 12, she started writing and visiting Defendant. (V141/773-80) She believed that having a relationship with Defendant was important. (V141/781) While the Glazers had offered to adopt her, she had declined the offer after discussing it with Defendant. (V141/801-05) Louise Glazer testified that JP was belligerent when he lived with her because he wanted to live elsewhere and eventually had to leave because he became aggressive. (V141/812, 821-23) She encouraged TC to have a relationship with Defendant. (V141/824-27) When Defendant saw TC, she was very loving toward her. (V141/827-28, 831-32) She offered to adopt TC, and TC declined. (V141/832-33)

Cpl. Ronda Seabrook testified that she participated in a search of Defendant's jail cell in May 2008, during which colored pencils were found hidden in a cracker box, eyeliner pencils were found hidden in powder and a razor blade was found

hidden behind a toilet paper dispenser. (V142/873-90) Off. Julie Butler testified that Defendant asked to be a trustee and she had declined. (V142/920-28) She personally found the contraband during the May 2008 search of Defendant's cell and stated that Defendant was the only occupant of the cell at the time. (V142/934-40) On cross, Off. Butler stated that the occupancy of Defendant's cell area varied. (V142/945) Defendant then attempted to impeach Off. Butler with the fact that she had made the same statement in a deposition and elicited that Defendant would have a roommate if the area was full. (V142/945-47) She admitted that inmates were permitted to have pencils. (V142/948-49) Defendant suggested that Off. Butler should have checked with other uncalled officers regarding why Defendant's cell was searched. (V142/950) Defendant insisted that Off. Butler should have called maintenance to fix Defendant's toilet paper dispenser. (V142/951-55) Defendant chastised Off. Butler because she did not have a picture of the razor blade. (V142/955-56)

During the penalty phase charge conference, Defendant requested an instruction on the no significant criminal history while acknowledging that she had presented no evidence to support the instruction. (V143/1037) The State objected because no evidence had been presented and Defendant did have a criminal history. *Id.* The trial court overruled the objection and gave

the instruction. (V143/1037-38, V73/11477) After considering the evidence, the jury recommended a death sentence by a vote of 7 to 5. (V73/11482, V144/1181-82)

At the *Spencer* hearing, Defendant presented testimony from Dr. Gisele Haas that Defendant suffered from post traumatic stress disorder as a result of being in an abusive relationship with Gonzalez. (V76/11910-42) She based that opinion on statements Defendant made to her, reports regarding Gonzlez's conduct and the fact that Defendant had provided consistent statements to other defense experts. (V76/11942-48) When the State attempted to question Dr. Haas about her consideration of reports regarding Defendant's prior violent criminal conduct, Defendant objected, and the trial court ruled that the State could not discuss the conducted because it only went to consideration of aggravation. (V76/12005-11) Defendant also had the trial court take judicial notice of the order denying her retardation claims and admitted a transcript of Dr. Weinstein's post conviction testimony. (V76/12087-93) When the State sought to present Dr. Suarez's testimony in rebuttal to this evidence, the trial court excluded it. (V76/12095-12101)

In its sentencing memo, the State argued that the no significant criminal history should not be found or should be given minimal weight because the evidence showed that Defendant

had committed criminal acts even though those acts had not resulted in a conviction. (V81/12786) Defendant argued that the no significant criminal history mitigator should be found because the State had presented no evidence that she had a criminal history other than personal drug use. (V81/12832-33) On June 10, 2011, the trial court followed the jury's recommendation and sentenced Defendant to death for the murder of LF. (V86. 13713-27) In aggravation, the trial court found HAC and assigned it overwhelmingly great weight. *Id.* As statutory mitigation, it found that Defendant had no significant criminal history-little weight. *Id.* It considered and rejected the claim that the 2 statutory mental mitigators and the extreme duress mitigator. *Id.* As nonstatutory mitigation, the trial court found that her education was limited-little weight; her intelligence was limited-little weight; her lack of relationship with her father-slight weight; her emotional rejection by her mother-little weight; childhood abuse-minor weight; her immigration while pregnant-no weight; her reunification with her mother-no weight; the influence of others-miniscule weight; her codefendant's sentence-no weight; her behavior in prison-slight weight; her baptism in prison-minimal weight; being a trustee in jail-minimal weight; her being a good influence on other prisoners-slight weight; her making the corrections officers'

jobs easier-minimal weight; her spiritual growth-inconsequential weight; her substance abuse treatment-inconsequential weight; her reestablishment of a relationship with her other children-little weight; and her redemption-very little weight. *Id.* It rejected the claim that Defendant was a battered woman, that her codefendant played a substantial role in the murder and that she was remorseful. *Id.* It also sentenced Defendant to 15 years imprisonment for the aggravated child abuse to be served consecutively to the death sentence. *Id.* This appeal follows.

SUMMARY OF THE ARGUMENT

Defendant did not preserve an issue regarding the cause challenge to Gabriel, and the trial court did not manifestly err in ruling on the cause challenges. The trial court did not abuse its discretion in finding that the State had not commented on Defendant's right to remain silent. It also did not abuse its discretion in finding that Defendant failed to establish that a discovery violation had occurred or in ruling on the issue. Defendant failed to preserve an issue regarding most of the comments in closing, and the comments do not merit relief.

The comments in penalty phase closing do not merit relief. The trial court properly found HAC and rejected the retardation claim. Its sentencing order is correct. The claims based on *Ring* are meritless. There is no error to cumulate. The convictions

are supported by competent, substantial evidence, and the sentence is proportionate. The trial court abused its discretion in refusing to permit Dr. Suarez to testify and instructing the jury on the no significant criminal history mitigator and erred in finding that mitigator.

ARGUMENT

I. CAUSE CHALLENGES.

Defendant first asserts that the trial court abused its discretion in refusing to permit her to exercise cause challenges to Brizo and Gabriel and in allowing the State to exercise a cause challenge to Rapaport. However, Defendant is entitled to no relief because she did not preserve her challenge to Gabriel, and the trial court did not manifestly error in its rulings.

While Defendant now suggests that Gabriel should have been excused for cause based on his views about the death penalty, Defendant did not challenge him on that basis. Instead, Defendant argued that Gabriel should be excused for cause because he was allegedly too immature to sit as a juror. (V195/1585) As an afterthought, Defendant added that Gabriel had failed to provide a firm answer on whether he could remain neutral in a case regarding a child. (V195/1585-86) Since the challenge was on different grounds, this issue is not preserved.

Wade v. State, 41 So. 3d 857, 878 (Fla. 2010).

Moreover, this Court has explained that a defendant whose challenge has been denied early in the voir dire process must renew the objection at the time the jury is actually selected and sworn. *Matarranz v. State*, 133 So. 3d 473, 482-83 (Fla. 2013). Here, while Defendant made an initial challenge for cause to Gabriel during small group questioning about the death penalty on May 18, 2010, Defendant did not renew the cause challenge when jury selection occurred 2 days later. (V199/2309) Instead, he accepted Gabriel without reservation when she still had peremptory challenges available. *Id.* The only time she indicated any objection to Gabriel during jury selection was when she named Gabriel as a juror against whom he would have exercised a peremptory challenge if the trial court had grant additional challenges. (V199/2314) This is true despite the fact that the trial court had already indicated that it would reconsider its ruling on challenges when the jury was selected. (V186/117) As such, Defendant's cause challenge to Gabriel was not preserved.

Even if Defendant had preserved the issue regarding Gabriel and the other veniremembers were considered, Defendant would still be entitled to no relief. The test for determining juror competency is whether the juror can lay aside any bias or

prejudice and render a verdict solely on the evidence presented and the instructions on the law given by the court. *Lusk v. State*, 446 So. 2d 1038, 1041 (Fla. 1984). A juror must be excused for cause if any reasonable doubt exists as to whether the juror possesses an impartial state of mind. *See Bryant v. State*, 656 So. 2d 426, 428 (Fla. 1995); *see also Hill v. State*, 477 So. 2d 553, 556 (Fla. 1985). The mere fact that a veniremember has given an equivocal response does not necessarily show that he is not qualified to serve. *Kopsho v. State*, 959 So. 2d 168, 170 (Fla. 2007). Instead, a trial court is required to consider the totality of the veniremember's statements to determine whether the equivocation is sufficient to raise a reasonable doubt about the person's impartiality. *Id.* "The trial court has broad discretion in determining whether to grant a challenge for cause, and the decision will not be overturned on appeal absent manifest error." *Overton v. State*, 801 So. 2d 877, 890 (Fla. 2001).

While Defendant acts as if Gabriel equivocated about his ability to consider a life sentence, Gabriel actually consistently responded to questions by the trial court, the State and Defendant that he would impartially consider both recommendations. (V195/1550-58, 1577-80) Gabriel was only unsure of how hearing that Defendant had done horrible things to her

child might "influence him."[1] (V195/1580-81) However, Gabriel explained that the reason he was unsure was that he was maintaining his neutrality and not considering counsel's statement as actual evidence. (V195/1580-81) Moreover, he had already explained that he was trying to keep his personal experiences out of his decision making process. (V195/1579) Further, Gabriel only made his statements about being unsure of being influenced by the death of a child after Defendant had repeatedly suggested that what had occurred to LF was horrible. (V195/1566-67, 1580) Thus, the trial court did not manifestly err in finding that Gabriel's views on the death penalty did not disqualify him.

The excusal of Rapport was also not manifest error. While he at times stated that he would follow the law despite his opposition to the death penalty (V189/533, 535-37, 539, 551, 555-56), he first responded that he could not do so and that he did not believe that any juror was qualified and continued to make similar statements throughout voir dire. (V189/532, 533, 534-35, 557-58) Moreover, while he at times stated that the possibility of a death sentence would not affect his consideration of guilt (V189/540), he stated it would at other

[1] Of course, the fact that Defendant had done horrible things to LF could properly influence Gabriel to convict Defendant of aggravated child abuse and find HAC.

times. (V189/540-41) Far from consistently agreeing to set aside his feelings and judge the matter impartially, Rapport stated that he would not do so, would permit his feelings to guide him and committed himself to recommending life 75% of the time regardless of the evidence. (V189/545, 547, 550) He made these statements even after the weighing process was explained to him. (V189/546-47, 550, 557-58) In fact, his responses were so inconsistent that he admitted that his answers were illogical and did not make sense. (V189/533, 545-46) Given this constant equivocation, the trial court did not manifestly error in granting the State's cause challenge to Rapport. *Wade*, 41 So. 3d at 876-78; *Johnson v. State*, 969 So. 2d 938, 946-48 (Fla. 2007).

Finally, the trial court did not manifestly err in rejecting the challenge to Brizo. Defendant's entire argument that Brizo was biased is based exclusively on her initial responses during individual questioning about pretrial publicity. However, Brizo subsequently and repeated stated that she would set aside her personal feelings and decide the matter exclusively on the facts and the law. (V186/108-11, 112, 114-15, 293-94, 298, 301)

While Brizo initially made statements that were not consistent with the presumption of innocence and the burden of proof, she did so before the concept had been explained.

(V186/112-13) Defendant herself elicited that Brizo had not fully understood everything the judge had said. (V187/298-99) In fact, when Defendant first moved to excuse Brizo based on her statements about proof of innocence, Defendant acknowledged that Brizo, who had moved from Peru as an adult, probably did not understand the concept of the presumption of innocence and had not been fully questioned on the issue. (V186/117) Once the fact that the State had the burden of proving Defendant guilty was explained, Brizo consistently indicated that she would hold the State to the burden. (V187/296-97, V198/1986-90, 2005-17, 2130-31) In fact, Brizo subsequently indicated that she understood Defendant did not have to testify and that the decision not to do so could not be held against Defendant. (V199/2228-31) As such, the trial court did not abuse its discretion in finding that the totality of Brizo's statements did not raise a reasonable doubt about her impartiality.

II. COMMENTS ON DEFENDANT'S STATEMENTS.

Defendant next asserts that the trial court abused its discretion in permitting the State to elicit that she had not asked questions about LF when making statements to the police and allowing the State to comment on this evidence. However, the

trial court did not abuse its discretion.[2]

As this Court has recognized, a defendant cannot contend that the State improperly commented on his right to remain silent when he did not remain silent. *Hudson v. State*, 992 So. 2d 96, 110-11 (Fla. 2008); *Hutchinson v. State*, 882 So. 2d 943, 955 (Fla. 2004). The United States Supreme Court has similarly held that a defendant who waives his right to remain silent cannot complain about its infringement. *See Raffel v. United States*, 271 U.S. 494, 496-97 (1926). In fact, it has held that a defendant must invoke his right to remain silent before he can complain about its infringement. *Salinas v. Texas*, 133 S. Ct. 2174, 2178 (2013).

Here, the record shows that Defendant did not invoke her right to remain silent. Instead, she made statements to the police continually from the time that she was first stopped by the police, including a full taped statement after waiving her rights. (V209/3722-39, 3741-58, V59/8990-9080) Since Defendant did not remain silent, the trial court properly rejected Defendant's assertion that her right to remain silent was violated.

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[2] This Court reviews a trial court's decision regarding the admissibility of evidence for an abuse of discretion. *Ray v. State*, 755 So. 2d 604, 610 (Fla. 2000). The same is true of comments in closing. *Breedlove v. State*, 413 So. 2d 1, 8 (Fla. 1982).

The cases on which Defendant relies do not compel a different result. None of these cases involve defendants who waived their rights and made statements extensive statements to the police. Instead, each of the cases involves defendants only making brief statements or no statements at all. *State v. Smith*, 573 So. 2d 306, 316-17 (Fla. 1990); *Morris v. State*, 988 So. 2d 120, 121-22 (Fla. 5th DCA 2008); *Robbins v. State*, 891 So. 2d 1102, 1105-06 (Fla. 5th DCA 2004); *Cowan v. State*, 3 So. 3d 446, 447 (Fla. 4th DCA 2009); *Fletcher v. Weir*, 455 U.S. 603, 603-04 (1982); *Doyle v. Ohio*, 426 U.S. 610, 613-14 (1976); *United States v. Whitehead*, 200 F.3d 634, 637-38 (9th Cir. 2000); *State v. Hoggins*, 718 So. 2d 761, 763-64 (Fla. 1998); *West v. State*, 69 So. 3d 1075, 1076-77 (Fla. 1st DCA 2011); *Giorgetti v. State*, 821 So. 2d 417, 422 (Fla. 4th DCA 2002); *Harris v.* State, 726 So. 2d 804, 805 (Fla. 4th DCA 1999); *United States v. Velarde-Gomez*, 269 F.3d 1023, 1026-27 (9th Cir. 2001)(admission of evidence that defendant was silent for hours). Since Defendant spoke at length, none of these cases apply.

III. ALLEGED DISCOVERY VIOLATION.

Defendant next the trial court erred in its handling of her claim of a discovery violation regarding Dr. Souviron. However, this issue is unpreserved, the trial court did not abuse its discretion in finding no discovery violation, the inquiry the

trial court did conduct was adequate and any error would be harmless.

As this Court has held, a defendant only preserves an issue regarding an alleged discovery violation when he makes a timely objection. *Reese v. State*, 694 So. 2d 678, 683 (Fla. 1997). An objection based on a discovery violation is not considered timely when the alleged discovery violation is revealed during a witness's direct testimony, but the defendant waits to see whether cross examination will be effective before raising the issue. *Guzman v. State*, 42 So. 3d 941, 943-44 (Fla. 4th DCA 2010). Here, this is precisely what occurred. During direct, Dr. Souviron testified to his opinion about the age of the injuries to LF's teeth and gums without objection. (V209/3817, 3829) Instead, she proceeded to attempt to impeach Dr. Souviron regarding the issue and continued to do so in the face of the State's objection that the attempted impeachment was improper. (V209/3939-40) Only after Dr. Souviron had reviewed his prior testimony and explained that the difference in testimony was based on a difference in questions did Defendant finally assert that there had been a discovery violation. (V209/3841-43) Since Defendant waited to see if her cross examination would be successful before raising the alleged discovery violation, this issue is unpreserved. *Guzman*, 42 So. 3d at 943-44.

Even if the issue had been preserved, Defendant would still be entitled to no relief. As this Court has recognized, a trial court's determination that the State did not commit a discovery violation must be reviewed for an abuse of discretion before any issue regarding the propriety of the trial court's inquiry can be considered. *Pender v. State*, 700 So. 2d 664, 667 (Fla. 1997); *Consalvo v. State*, 697 So. 2d 805, 812-13 (Fla. 1996).

Here, when Defendant did finally assert that there had been a discovery violation, the trial court determined that there was none. (V209/3849-51) That ruling was not an abuse of discretion.

Defendant seems to argue that any time a witness changes his testimony a discovery violation occurs. However, this is not consistent with the law. In *Bush v. State*, 461 So. 2d 936, 937-38 (Fla. 2000), this Court held that a change in testimony generally will not support a discovery violation. While this Court did clarify this holding in *State v. Evans*, 770 So. 2d 1174, 1182 (Fla. 2000), this Court made clear that it was simply clarifying that *Bush* did not apply when the State knew that a witness would materially change her testimony and did not disclose the change. Similarly in *Scipio v. State*, 928 So. 2d 1138, 1142 n.2 (Fla. 2006), this Court stated that *Evans* had merely qualified the holding of *Bush*. In fact, this Court has recognized that *Bush* still controls when the alleged change in

testimony did not result in a material difference and the questions to which the witness responded were different. *State v. McFadden*, 50 So. 3d 1131, 1133-34 (Fla. 2010). Moreover, both *Evans* and *Scipio* relied heavily on the continuing duty to provide updated information when the party became aware of the new information. *Scipio*, 928 So. 2d at 1141-43; *Evans*, 770 So. 2d at 1178-79. Thus, a showing that the State was actually aware of the change testimony has also been required. *Consalvo*, 697 So. 2d at 812-13; *Swanson v. State*, 823 So. 2d 281, 283 (Fla. 5th DCA 2002).

Here, Defendant pointed to little more than the fact that Dr. Souviron had just testified that his present testimony was not the same as his prior testimony because the question during the prior testimony was not as specific. (V209/3843) She presented nothing to show that the State was aware of a change in testimony and the State's asserted that he did not believe there was a change. (V209/3843-51) In fact, she did not provide the trial court with Dr. Souviron's deposition and asked that Dr. Souviron be removed from the courtroom when the State suggested that he should be questioned to clarify whether his opinion had changed and how. (V209/3843-44) As such, the trial court was limited to determining whether there was a material change in testimony based on Dr. Souviron's prior testimony.

In that prior testimony, Dr. Souviron had testified, just as he did during this trial, that the development of LF's teeth had been delayed by persistent malnutrition, that he had injuries to his gums and was missing 2 teeth, that the teeth were lost on different occasions and that the injuries were the result of blunt trauma. (DAR. 2998-3009) When he was asked about his opinion of cause of the injuries he observed not just to LF's mouth but also to his body, Dr. Souviron stated that it was blunt force trauma that he could not specifically date but that "it" had occurred within the last 6 months. (DAR. 3009-11) Given that Dr. Souviron had already stated that LF suffered multiple injuries on different occasions, exactly what "it" meant was far from entirely clear. Thus, the trial court did not abuse its discretion in finding that Defendant had failed to establish a discovery violation.

Moreover, the trial court also did not abuse its discretion in rejecting Defendant's claim when she renewed it after Dr. Souviron was excused. At that point, the trial court had heard that Dr. Souviron's deposition response was based on a question that was directed to evidence in the soft tissue and that the modification was based on the bone. (V209/3855-56, 3857-58) As the trial court noted, there would be no discovery violation if Dr. Souviron had not looked at the bone before testifying, and

Defendant never established when he looked at the bone. (V209/3860-62) As such, the trial court still did not abuse its discretion in finding no discovery violation.

Even if the trial court had abused its discretion in finding no discovery violation, the trial court should still be affirmed. When a trial court is informed that there has been a discovery violation, it is required to conduct an inquiry into the circumstances that covers, at least, whether the violation was willful or inadvertent and trivial or substantial and whether the trial preparation or strategy of the party that did not receive the discovery was adversely affected. *Richardson v. State*, 246 So. 2d 771, 775 (Fla. 1971). Where the record shows that the trial court did receive information on these issues, the inquiry regarding the discovery violation will be considered adequate. *State v. Hall*, 509 So. 2d 1093 (Fla. 1987).

Here, the trial court was aware that the State did not even perceive change in testimony, which would show that any failure to disclose the alleged change was inadvertent. Moreover, it knew that the alleged change consisted of a slight adjustment in the timing of nonfatal injuries, that LF had numerous injuries that had been sustained over a substantial period of time, that LF had been malnourished for an even longer time and that Defendant had advanced a theory of defense that involved LF only

being out of her custody at the end of his life, which suggested that the change was trivial and did not prejudice Defendant. Thus, the trial court did conduct an adequate inquiry regarding the alleged discovery violation. *Hall*, 509 So. 2d at 1097.

While Defendant suggests that the trial court considered the wrong form of prejudice by discussing LF's numerous other old injuries, this is not true. This Court has recognized that the presence of other evidence on an issue can be relevant to the issue of procedural prejudice. *Consalvo*, 697 So. 2d at 813. Here, while Defendant was unable to specify how the alleged change in testimony prejudiced her trial preparation, she did note that she had presented a theory that LF had been in someone else's custody when died in opening statement. (V209/3862-64) As the trial court noted, LF had numerous injuries old enough to have occurred when Defendant was not contesting that LF was in her custody and that the State had already presented evidence from individuals who had seen Defendant personally mistreating LF. Moreover, Defendant had admitted that she was not a good mother during her opening statement. Since Dr. Souviron had consistently stated that the injuries he observed were at least months old and not fatal, the trial court properly recognized that Defendant was not procedurally prejudiced. *Consalvo*, 697 So. 2d at 813.

Finally, this Court had recognized that the failure to conduct a *Richardson* inquiry can be harmless when the record shows beyond a reasonable doubt that a defendant was not procedurally prejudiced. *State v. Schopp*, 653 So. 2d 1016, 1020-21 (Fla. 1995). Here, not only does the record reflect that Defendant elected to proceed with a defense that placed LF in Defendant's custody when some of his injuries occurred, but also it reflects that Defendant had prepared to contest Dr. Souviron's testimony. She had hired her own dentist who had testified in deposition that the tooth loss could have been accidental and occurred closer in time to LF's death. (V44/6889, V53/8192-8217) As such, any error in the alleged failure to hold a *Richardson* inquiry would have been harmless. *Schopp*, 653 So. 2d at 1022-23.

IV. COMMENTS IN GUILT PHASE CLOSING.

Defendant next asserts that the State made allegedly improper comments during its guilt phase closing argument. However, Defendant is entitled to no relief as she did not preserve an issue regarding the propriety of most of the comments, the trial court did not abuse its discretion in denying the motions for mistrial that Defendant preserved, the comments were not fundamental error and any error in the preserved comments was harmless.

To preserve an issue regarding a comment in closing, it is necessary for a defendant to object to the comment contemporaneously on the grounds asserted on appeal. *Gonzalez v. State*, 786 So. 2d 559, 568 (Fla. 2001); *Brooks v. State*, 762 So. 2d 879, 898-99 (Fla. 2000). If a trial court sustains the defendant's objection, it is necessary for him to move for a mistrial to preserve an issue, which is then considered to be the denial of the motion for mistrial. *Rose v. State*, 787 So. 2d 786, 797 (Fla. 2001). A motion for mistrial is only properly granted if the comment was such as to have deprived the defendant of a fair trial. *Salazar v. State*, 991 So. 2d 364, 371-72 (Fla. 2008). When an issue regarding a comment is not preserved, this Court will only consider the issue if the comment constitutes fundamental error. *Hayward v. State*, 24 So. 3d 17, 40-41 (Fla. 2009). In demonstrating fundamental error, a defendant has a "high burden" of showing that the error was such that it "reaches down into the validity of the trial itself to the extent that a verdict of guilty could not have been obtained without the assistance of the alleged error." *Id.* at 41.

While Defendant acts as if she preserved issues regarding the propriety of the comments, this is not true. While Defendant cites to numerous comments in which the State used the words truth and justice, Defendant only objected to the 3 comments at

the end of the State's initial argument, and the trial court sustained 1 of the objection. (V222/5328, 5329, 5341, 5352, 5353, 5353, 5476) Even at that point, merely objected that the comments had inflamed the passion of the jury or was improper argument. (V222/5352-53) Defendant also did not object to the comment regarding GP that he now claims denigrated the defense or the comment regarding the length of argument and only moved for a mistrial regarding the comment regarding the whole story. (V222/5440, 5461, 5475) She based that motion on the assertion that the State had shifted the burden. (V222/5440) Her objections to the comments about Hernandez, Sabro and Lima or the issue about Defendant kissing Det. Matthews' feet were also not based on denigrating the defense. (V222/5439, 5440, 5443, 5463-64, 5665, 5473)

While Defendant asserts that the State made numerous comments that improperly vouched for evidence, Defendant only objected to 1 comment, and that objection was not based on improper vouching. (V222/5329, 5343, 5473, 5478) She did not object to any of the comments that she now claims were improper attacks on her. (V222/5330, 5338, 5339, 5342, 5438, 5452, 5457, 5474) She also did not object to the comment regarding the fact that she had lived in the Charter Club with Fidel before LF's birth. (V222/5443) The trial court sustained Defendant's

objection to the comment regarding partying. (V222/5452-53)

Since Defendant did not object on the grounds raised on appeal to the majority of the comments about which she now complains, she did not preserved the issue regarding the propriety of these comments. *Gonzalez*, 786 So. 2d at 568; *Brooks*, 762 So. 2d at 898-99. Moreover, the only preserved issue regarding the comments to which the trial court sustained objections and the comment about which she only moved for a mistrial is the denial of those motions. *Rose*, 787 So. 2d at 797. Thus, to obtain relief regarding any of these comments, Defendant needed to show that the comments were such that they deprived her of a fair trial. *Hayward*, 24 So. 3d at 40-41; *Salazar*, 991 So. 2d at 371-72. Since Defendant has not even attempted to do, the issue regarding all of these comments should be rejected.

Moreover, applying the correct standard, Defendant is not entitled to relief. While Defendant insists that the State used the word justice as a means of inflaming the passion of the, this is not true when the comments are reviewed in context. Instead, the State was reminding the jury that the evidence in this case showed that LF had been starved and beaten over a period of at least a year such that Defendant's assertion that she was not responsible for LF's death because he was not in her

custody for the last 2 months of his life was meritless and that it had proven Defendant guilty beyond a reasonable doubt. (V222/5328-29, 5341, 5347-54) Thus, the trial court did not abuse its discretion in denying the motion for mistrial, and the comments do not constitute fundamental error. *Braddy v. State*, 111 So. 3d 810, 841 (Fla. 2012).

Defendant's claim that comments using the word truth shifted the burden of proof also does not show fundamental error. In all but one of the cases relied upon by Defendant, the State had argued that it had met its burden of proof if it believed that the defendant was lying. *Gore v. State*, 719 So. 2d 1197, 1200-01 (Fla. 1998); *Covington v. State*, 842 So. 2d 170, 171-72 (Fla. 3d DCA 2003); *Northard v. State*, 675 So. 2d 652, 653 (Fla. 4th DCA 1996); *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 the remaining case, the State had asserted that the defendant had to prove its witness was lying. *Paul v. State*, 980 So. 2d 1282, 1283 (Fla. 4th DCA 2008). Here, none of the State's comments suggested that Defendant was guilty because she had lied or had failed to show the State's witnesses were lying. Instead, the State commented that "the truth is she killed her little boy" as introduction to its discussion of all of the evidence showing that LF had been systematically starved and

beaten, which showed that Defendant was guilty of aggravated child abuse, not felony child abuse, and that her claim that LF was not in her custody for the last 2 months of his life did not show that she was not responsible for his condition, and its comments regarding truth at the end of its initial argument were based on the assertion that it had proven Defendant guilty based on the facts and the law. (V222/5329-39, 5347-53) Moreover, its comment about truth in its rebuttal argument were made in response to Defendant's argument that the jury could speculate about what happened in finding Defendant not guilty, and again urged the jury to rely on the evidence and the law. (V222/5476) As such, none of these comments shifted the burden of proof and cannot be fundamental error for having done so.

The trial court also did not abuse its discretion in denying a motion for mistrial regarding the comment about the whole story and the unpreserved comments that Defendant complains denigrated her defense. During her closing argument, Defendant had repeatedly accused the State of hiding evidence and taking information out of context. Even though she had acknowledged that she had been a bad mother and had left LF in the care of babysitters such as Lima when he was months old, she insisted that Lima must have been lying because he had not mentioned an obscenity she used previously. (V222/5408-10) She

also insisted that the jury should infer that she was coerced into confessing because she was seen kissing Det. Matthews' feet. (V222/5371-85) Despite the fact that she had blamed GP in opening, she averred she was somehow not suggesting that GP killed LF. (V222/5389-91) Given these circumstances, the State's comments that Defendant had ignored the evidence that refuted her argument, that she had not discussed all of the evidence, that the feet kissing did not show coercion, that Defendant had accused GP and that Lima had not used the word because he had not been asked the exact words and was uncomfortable using the language were simply a fair response to Defendant's arguments. (V222/5439, 5440, 5443, 5461, 6453-64, 5465, 5473) As such, they do not constitute fundamental error. *Wade*, 41 So. 3d at 869-70.

The comments that Defendant now claims constitute improper vouching also does not constitute fundamental error because the comments do not constitute improper vouching. As this Court has explained, "improper vouching or bolstering occurs when the State 'places the prestige of the government behind the witness or indicates that information not presented to the jury supports the witness's testimony.'" *Wade*, 41 So. 3d at 869. Here, none of the State's comments placed the prestige of the State behind anyone nor did they suggest that unpresented information supported the witness's testimony. Instead, the State commented

that "the truth is she killed her little boy" as introduction to its discussion of all of the evidence showing that Defendant was guilty of aggravated child abuse, not felony child abuse, and that her claim that LF was not in her custody for the last 2 months of his life did not show that she was not responsible for his condition. (V222/5329-39) Moreover, its comment that "it's a felony murder" was made as an introduction to its argument regarding how the evidence showed that Defendant has acted with premeditation after it had reviewed the evidence showing aggravated child abuse and discussed how this evidence satisfied the elements of first degree felony murder. (V222/5340-43) Moreover, the comment about Defendant being responsible for LF's death was:

> You must reach your verdict based upon the evidence in this case, and not by speculation and not by imagining what should have, could have, would have happened. The facts as you know them. And the facts in this case, coming from the mouth of the defendant, cannot be changed. She is simply responsible for the death of her son. And as ugly as that is, it is true.

(V222/5478) As such, when viewed in context, each of these comments was merely an assertion that the State had met its burden of proof based on the evidence presented and do not constitute improper vouching.

The comment about reality was merely a fair reply to Defendant's argument about her confession. During her closing

argument, Defendant had extensively argued that the jury should infer that Det. Matthews had coerced her into confessing because she had asked Det. Santiago about what would be done with TC and JP, been seen kissing Det. Matthews' feet and GP had provided a false confession. (V222/5371-85) Recognizing that the testimony was that she had not been coerced and that she had admitted her statement was voluntary, Defendant accused the State of having hidden evidence regarding coercion. *Id.* In its rebuttal, the State merely replied that the claim that Defendant kissed Det. Matthews' feet for threatening her was illogical and that the jury had heard all of the testimony about the confession. (V222/5473) As such, this comment was not improper vouching either. *Wade*, 41 So. 3d at 869.

The comments that Defendant claims denigrated her were also not fundamental error. Instead, the comments were a fair response to the defense theory in this case. *Braddy*, 111 So. 3d at 840-41. Defendant's theory of the case involved portraying her as a pathetic figure who was forced to abandon LF because she lacked the financial ability and skills to support him. (V203/2799-2805) Defendant portrayed herself as such in her confession to the police, suggesting that she was unable to afford food and diapers for LF and that no one would assist her. (V59/8990-9080) Moreover, the confession is full of hysterical

ranting about how LF's death adversely affected Defendant. *Id.* In rebuttal of this testimony, the State presented evidence that Defendant had been given support in caring for LF when he was young, that she had abandoned him to the people who had provided the support, that they were forced to search for her, that she was once found in a hotel and that she had removed LF from the people who were providing support for him when they sought custody. (V204/3021-48, V205/3115-42, 3250-60) Thus, the comments about Defendant being hysterical in her statement and being only concerned with herself were fair response to Defendant's theory. As such, they were not fundamental error.

Moreover, Defendant's suggestion that the State improperly commented on facts not in evidence at the beginning of its rebuttal argument is not true. In her opening statement, Defendant had, in fact, asserted that she had lived a life of privilege and had money and household help when she lived with Fidel before LF's birth. (V203/2802-03) In making the comment, the State specifically referred to Defendant's opening statement and noted that Defendant had not discussed this concession in closing. (V222/5436) Moreover, the State did present evidence that Defendant lived at in the penthouse at the Charter Club. (V204/3025) Thus, the trial court did not abuse its discretion in finding that the State was not arguing facts not in evidence.

Smith v. State, 7 So. 3d 473, 509 (Fla. 2009).

Moreover, the trial court also did not abuse its discretion in finding that the comment about partying while living in the Charter Club did not merit a mistrial nor is the unobjected to comment regarding Defendant's life with Fidel fundamental error. Defendant had conceded that she lived a luxurious life when she was with Fidel, which included the use of drugs, in her opening statement. (V203/2801-04) The medical records associated with LF's birth showed that Defendant was a cocaine user who lived in the Charter Club. (V57/8828) Fleitas testified that Fidel had been in a penthouse. (V204/3025) Thus, the trial court did not abuse its discretion in finding that the comment about partying did not deprive Defendant of a fair trial nor was the comment Defendant about her life with Fidel fundamental error. *Hayward*, 24 So. 3d at 40-41; *Salazar*, 991 So. 2d at 371-72.

Further, any error in the trial court permitting the State to use the word diversion was harmless. *State v. DiGuilio*, 491 So. 2d 1129 (Fla. 1986). The uses of the word were brief. (V222/5329, 5333, 5334, 5336, 5338) The State made a lengthy argument in which it outlined the injuries that LF suffered and the time periods over which those injuries were sustained that was largely proper. (V222/5328-54) While the use of the word was unfortunate, the State was actually attempting to explain that

while Defendant had suggested that GP was responsible for LF's injuries, the injuries and starvation had occurred over more than the last 2 months of LF's life, such that she could not be responsible for them. GP's apartment was thoroughly searched, and no evidence connecting LF to that apartment was found. The statements GP had made regarding LF were inconsistent with one another and the evidence. Defendant was seen abusing LF and withholding food from him earlier in his life. While Defendant insisted that LF could not have been with her at the Pilotos', she confessed that he was and that she hid him. Ligature marks on LF's feet and pressure sores on his body confirmed that LF was restrained. Given this overwhelming evidence,[3] any error in the brief use of the word diversion was harmless.

V. COMMENTS IN PENALTY PHASE CLOSING.

Defendant next asserts that the State made improper comments during its penalty phase closing. However, the comments provide no basis for relief.

To preserve an issue regarding the propriety of a comment in closing, a defendant must have contemporaneously objected to the comment on the same grounds raised on appeal. *Braddy*, 111 So. 3d at 855. Further, during penalty phase closing, both whether the evidence actually establishes mitigation and the

[3] This evidence is sufficient to sustain Defendant's convictions. *Lukehart v. State*, 776 So. 2d 906 (Fla. 2000).

weight to be assigned to the mitigation are proper subjects of comments. *Cox v. State*, 819 So. 2d 705, 718 (Fla. 2002); *see also Davis v. State*, 2 So. 3d 952, 964 (Fla. 2008). Moreover, attorneys are permitted wide latitude in arguing the facts and law to the jury and may draw logical inferences in doing so. *Smith*, 7 So. 3d at 509. The propriety of the comments must be reviewed in the context of the record as a whole. *Caraballo v. State*, 39 So. 3d 1234, 1248 (Fla. 2010). As such, this Court reviews the trial court determination that a comment was proper for an abuse of discretion. *Id.* Additionally, when a trial court finds a comment improper but denies a motion for mistrial, a defendant is only entitled to relief if a mistrial was necessary to ensure that a defendant received a fair trial. *Id.* at 1249.

Applying these standards here, Defendant is entitled to no relief. While Defendant asserts that the State's comment about the lack of corroboration of the information Defendant provided to Dr. Toomer addressed facts not in evidence, Defendant's only object to this comment was that it violated a pretrial ruling. (V144/1115) Since these are not the same grounds being advanced on appeal, the issue regarding this comment is not preserved. *Braddy*, 111 So. 3d at 855.

Even if the issue was preserved, Defendant would still be entitled to no relief. During its cross examination of Dr.

Toomer, the State elicited that he had not spoken to numerous categories of individuals who would have had information about Defendant and who were available and did testify. (V140/727-28) During its closing argument, the State merely stated "[t]he reason why you heard from Dr. Capp is because it needed to be pointed out to you that 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." (V144/1155)(emphasis added). Since the State had actually presented evidence that there were categories of individuals who were available that Dr. Toomer did not speak to and Dr. Capp had testified that verification of information supporting an opinion about the effects of childhood trauma could come from individuals who knew the person after the trauma, the State's comment was not a comment on facts not in evidence when viewed in context. As such, the comment was not improper, and the trial court did not abuse its discretion in overruling Defendant's objection to it.

Moreover, Defendant's suggestion that the State prevented her from corroborating the information provided to Dr. Toomer by enacting legislation preventing the use of State funds to travel to Cuba and by objecting to Dr. Toomer's redirect testimony is

frivolous. The statutes at issue merely prohibit the use of State funds to travel or do business in certain countries. §110.1115(1) & §112.061(3)(3), Fla. Stat. However, the record reflects that Defendant could have, at least, tried to corroborate Defendant's statements without traveling or doing business in Cuba. Defendant actually presented testimony from Aida Guzman during the hearing regarding her alleged retardation that showed that Guzman had known Defendant since was a child and had been Defendant's neighbor when she lived with her mother. (V39/5983-6001, V42/6420-21) Moreover, the trial court permitted Dr. Toomer to testify that he understood that Defendant's mother, aunt and siblings had remained in Cuba. (V140/731-33) As such, Defendant's suggestion that the State prevented her from attempting to corroborate the information she provided to Dr. Toomer is frivolous.

Moreover, Defendant's assertion that the State improperly denigrated her mitigation is also unavailing. Regarding the comment about her relationship with other inmates, Defendant made only a general objection without asserting the State was denigrating her mitigation. (V144/1100) Her objection to the comment regarding JP was based on the assertion that the State was shifting the burden. (V144/1115) Not only was her objection to the comment regarding TC only a general objection but

Defendant waited to make the objection until the State commented on the matter for some time. (V144/1118-20) Since Defendant failed to make contemporaneous objections on the grounds asserted on appeal, these issues are unpreserved as well. *Braddy*, 111 So. 3d at 855.

Even if the issues were preserved, Defendant would still be entitled to no relief. As noted above, the State is permitted to comment on the existence and weight of proposed mitigation. *Cox*, 819 So. 2d at 718; *see also Davis*, 2 So. 3d at 964. Here, Defendant was arguing that she was a positive influence on other inmates as mitigation. (V73/11478) In support of this mitigation, she had presented numerous inmates to discuss how she had talked to them when they were homesick and shared clothing and personal items with them. (V137/211-43, V139/491-501, 510-20, 533-40, 545-54, 569-75, V140/625-32) Since children at camp frequently discuss homesickness and share things, the State's comment about this evidence was nothing more than a far inference from the evidence and a comment about the weight to be assigned to this proposed mitigation. (V144/1110-11) Since the State is permitted to comment on the weight to be assigned to the mitigation and to draw inferences from the evidence, the trial court did not abuse its discretion in overruling Defendant's objection.

Regarding the children, Defendant was arguing that her reunification with them and the importance of her bond with them was mitigation. (V73/11478) In support of this argument, Defendant presented testimony from TC and JP, as well as testimony from a foster parent. (V140/742-58, V141/768-33) As part of this testimony, Defendant elicited the difficulties they had experienced being foster children. *Id.* As this Court has noted mitigation must reflect on the defendant's character and not the character of the defendant's family member. *Hill v. State*, 515 So. 2d 176, 177-78 (Fla. 1987). In its comments in closing, the State merely noted this requirement and argued that the children's testimony did not prove mitigation that was entitled to a great deal of weight because JP had become an 11 time convicted felon during the time Defendant was allegedly being a positive influence in his life and that Defendant had convinced TC not to be adopted by the family who have loved and supported her. (V144/1117-21) In fact, the trial court correctly recognized as much when it denied Defendant's motion for mistrial after the State concluded its argument. (V144/1133-35) The trial court properly overruled Defendant's objections. *Cox*, 819 So. 2d at 718; *see also Davis*, 2 So. 3d at 964.

Any error in the remaining comment was harmless. *State v. DiGuilio*, 491 So. 2d 1129 (Fla. 1986). The comments questioning

why Defendant had attacked Off. Butler were brief (V144/1112-13) in the course of a lengthy argument that focused on the existence of aggravators and mitigators and the weight to be assigned to each. (V144/1092-1129) While questioning why Defendant attacked Off. Butler may have been poor phrasing, the State was merely attempting to show that it had proven that Defendant had been caught in possession of a razor blade that needed to be considered in weighing the mitigation based on Defendant's conduct while incarcerated. It actually conceded that Defendant had established that her conduct while incarcerated established mitigation. (V144/1100-13) It presented overwhelming evidence that LF had died as a result of the torture of starvation and beating that had lasted for more than a year, which proved HAC and showed it was entitled to the overwhelming great weight assigned to it. The mitigation Defendant presented was weak. While Dr. Toomer testified that Defendant became permanently dysfunctional based on childhood trauma, his opinion was based entirely on Defendant's statements about her childhood made at a time when Dr. Toomer admitted Defendant had a motive to fabricate and did not actually include any diagnosis of a mental illness. While Defendant had reconnected with her surviving children, her influence on their lives had not been positive. Given these circumstances, any

error in the State's phrasing of its comments about Off. Butler was harmless. The sentence should be affirmed.

VI. HAC.

Defendant next asserts that the trial court erred in considering injuries she inflicted on LF at times other than immediately before his death in finding HAC. However, the finding of HAC was proper.

This Court's review of a trial court's finding regarding an aggravator is limited to whether the trial court applies the correct law and whether its finding is supported by competent, substantial evidence. *Willacy v. State*, 696 So. 2d 693, 695 (Fla. 1997). In finding HAC, the trial court outlined the evidence showing that LF had been systematically starved and beaten while in Defendant's custody and the pain LF would have experienced as a result. (V86/13715-20) It also enunciated the legal standard for HAC and rejected Defendant's argument that only the final moments of LF's life should have been considered:

> The HAC aggravator focuses on the means and manner in which death is inflicted and the immediate circumstances surrounding the death. *Brown v. State*, 721 So. 2d 274, 277 (Fla. 1998). This aggravator pertains more to the victim's perception of the circumstances than the perpetrator's *Hitchcock v. State*, 578 So. 2d 685 (Fla. 1990). . . .
>
> The Defendant also argues in the Memorandum that the HAC is overbroad and that this Court should only take into account [LF's] last few hours, not the prolonged time that the Defendant abused and straved him. This argument does not merit discussion as he did

> not die from a single beating, but as Dr. Hyma testified, [LF] died of the cumulative effects of the beatings, that he was systematically tortured to death. The case law cited by the State supports the conclusion that the HAC is not overbroad.

(V86/13715, 13720) Because the trial court's findings are supported by competent, substantial evidence and it applied the correct law, the finding of HAC should be affirmed.

In arguing against HAC, Defendant first insists that it was improper to consider the numerous injuries she inflicted on LF other than the blows to the head that caused the shearing in the brain. However, this Court has repeatedly held that HAC must consider the context of the death of the victim, including the torture inflicted on the victim before he was finally killed. *Hernandez v. State*, 4 So. 3d 642, 670 (Fla. 2009); *Lott v. State*, 695 So. 2d 1239, 1244 (Fla. 1997). In fact, this Court has repeatedly recognized that HAC may be properly found based on conduct of the defendant that was torturous to the victim even when the eventual means of death were quick. *Hudson v. State*, 992 So. 2d 96, 115 (Fla. 2008); *Gore v. State*, 706 So. 2d 1328, 1335 (Fla. 1997); *Preston v. State*, 607 So. 2d 404, 410 (Fla. 1992). Thus, the trial court was correct to reject Defendant's argument that only the final blows should be considered. This is all the more true as the trial court found that LF did not die from the last blows but from the cumulative

effects of all of the injuries inflicted upon him. (V86/13720) That finding is supported by Dr. Hyma's testimony. (V212/4140-41, V137/183)

Further, Defendant's contention that the admission of the evidence of the torture she inflicted on LF amounted to nonstatutory aggravation and allowed the State to rely on an aggravator that did not exist at the time of the crime is specious. HAC is a statutory aggravator. Thus, the presentation of evidence that properly supported that aggravator does not result in the consideration of nonstatutory aggravation. Additionally, this Court has long recognized that aggravators can overlap. *Clark v. State*, 379 So. 2d 97, 104 (Fla. 1979); *Provence v. State*, 337 So. 2d 783, 785-86 (Fla. 1976). Thus, the fact that Defendant's torture of LF would now support two aggravators does not show that it was improper to consider that torture in support of HAC, which existed at the time of the crime.

VII. SENTENCING ORDER.

Defendant next asserts that the sentencing order in this case contains errors. She avers that the order contains statements that must be based on facts not in evidence. She also argues that the trial court erred in allegedly rejecting her codefendant's sentence as mitigation. Finally, she contends that

imposed in improper nexus requirement in considering mitigation. However, Defendant is entitled to no relief because the trial court's findings are supported by competent, substantial evidence and it did not abuse its discretion in weighing the mitigation.[4]

While Defendant insists that there was no evidence that she fled to the Orlando area, told the police several stories and eventually provided a story about a fall and an attempt to revive LF before leaving him on Miami Beach, the record reflects that the testimony of Mr. Piloto, Sgt. Matthews, Det. Santiago and Dep. Strecher and Defendant's confession support these findings. (V219/5019, V204/3076-82, 3002-03, 3004, V209/3722-70, V59/8990-9080) As such, Defendant's claim that there was no evidence to support the trial court's findings on these issues is specious.

While Defendant also insists that there was no evidence that she had a romantic relationship with Gonzalez that began after she got her children back from HRS, that she mistreated LF before Gonzalez was part of her life, that she had a lavish lifestyle before LF was born, that she lived in cheap hotels, that her support with Gonzalez came from Gonzalez's jobs and

[4] This Court reviews sentencing findings for competent, substantial evidence. *Willacy*, 696 So. 2d at 695. It reviews the assignments of weight for an abuse of discretion. *Blake v. State*, 972 So. 2d 839, 846 (Fla. 2007)

shopping lifting, that she treated LF differently from her other children, that LF was tortured, that she admitted to abusing LF or that LF was restrained, this is again not true. Evidence that Defendant had a romantic relationship with Gonzalez that began after she got her children back was presented through Dr. Haas and Dr. Weinstein. (V75/11849, V76/11946, 11951-53, 11967-68) Fleitas, Lima and Hernandez provided testimony regarding Defendant's mistreatment of LF before this relationship. (V204/3021-48, V205/3115-36, 3242-62) Evidence of the jobs and shoplifting not only came from Dr. Haas but also through Defendant's confession. (V76/11954, 12049, V59/9006-07, 9044-45, 9055, 9071) Dr. Haas also testified that Defendant confessed to abusing LF. (V76/12024) Evidence was also presented that Defendant lead a lavish lifestyle in a penthouse with Figuero before LF's birth but lived in cheap hotels and other dwellings after Figuero's death. (V57/8828, V204/3025, 3032, V75/11847-48, V42/6412-28, V206/3301-03, V219/4994-99, 5011, V59/9023, 9063) The evidence also showed that Defendant treated LF differently than her other children. (V205/3119-20, 3128-29, 3137-39, 3258, V206/3317-19) Dr. Hyma and Dr. Souviron's testimony showed that LF was systematically mistreated over a prolonged period. (V209/3802-26, V210-12/3997-4141, V136/50-60, V137/81-160) Dr. Hyma also particularly testified that LF had been tied up.

(V137/121-26)

Further, Defendant admitted in her confession that she hid LF while living at the Pilotos. (V59/8994-95, 9010-12, 9062-63) Marixa Piloto testified that it was possible to hide a child in the closet there. (V220/5140-41) Ventrano testified that Defendant restricted LF to the bed. (V206/3351-52, 3358) As such, the trial court's findings are supported by evidence and represent permissible, common sense inferences about Defendant's reasons for her differential treatment of LF and where she restrained LF. *See Reynolds v. State*, 934 So. 2d 1128, 1156-57 (Fla. 2006). Defendant's claim to the contrary should be rejected.[5]

While Defendant claims that the trial court rejected her codefendant's sentence as mitigation merely because the codefendant had entered a plea, this assertion is belied by the sentencing order. Instead, it reflects that the trial court recognized that the codefendant had received a lesser sentence as mitigation and simply refused to assign weight to this mitigator because it had no evidence before it regarding Gonzalez' level of culpability and she had taken a plea to a

[5] This is particularly true as this Court has recognized that factual inaccuracies in a sentencing order do not merit reversal where the inaccuracies are inconsequential to the findings on aggravators and mitigators. *Dennis v. State*, 817 So. 2d 741, 763-65 (Fla. 2002).

lesser that made her less culpable as a matter of law. (V86/13724) This ruling was not an abuse of discretion.

This Court has recognized that a trial court can properly reject a codefendant's lesser sentence as mitigation when the codefendant was less culpable than the defendant. *Gonzalez v. State*, 136 So. 3d 1125, 1164-65 (Fla. 2014). Here, the only information the trial court had before it regarding Gonzalez was that she had plead guilty to second degree murder. This Court has recognized that a codefendant who was convicted of second degree murder is less culpable as a matter of law. *Shere v. Moore*, 830 So. 2d 56, 61-62 (Fla. 2002). As such, the trial court did not abuse its discretion in finding Gonzalez's lesser sentence was not entitled to weight as mitigation.

Defendant's nexus arguments are equally meritless. While Defendant insists that it was improper to require her to prove her mental state at the time of the crime to prove the statutory extreme mental or emotional disturbance mitigator, Defendant ignores that this mitigator is defined as "[t]he capital felony was committed **while** the defendant was under the influence of extreme mental or emotional disturbance." §941.121(6)(b), Fla. Stat. (emphasis added). As such, the mitigator itself requires a connection to the crime. Moreover, this Court has recognized that it is improper for a trial court to redefine the statutory

mitigators, even though the trial court must consider mental health evidence that does not satisfy the statutory mitigator as nonstatutory mitigation. *Johnson v. State*, 660 So. 2d 637, 647 (Fla. 1995). Thus, Defendant's argument is meritless. This is all the more true as the trial court did not reject this mitigator because Defendant had not shown a connection to the time of the crime. It rejected the mitigator because the evidence she presented was not credible. (V86/13721) The argument should be rejected.

Defendant's other nexus arguments are similarly meritless. This Court has recognized that statements concerning a connection between the proposed mitigator and the crime are not improper if they are merely part of the trial court's analysis of the evidence in context. *Martin v. State*, 107 So. 3d 281, 318-19 (Fla. 2012); *Cox v. State*, 819 So. 2d 705, 723 (Fla. 2002). It has also recognized that comparisons to similarly situated individuals are proper in deciding the weight to be assigned a mitigator. *Williamson v. State*, 681 So. 2d 688, 698 (Fla. 1996). Applying this standard, the trial court did not abuse its discretion in assigning weight to the claim regarding Defendant's traumatic childhood and lack of reunification with her mother. The only evidence Defendant presented that Defendant's traumatic childhood even existed was Dr. Toomer's

testimony based on Defendant's uncorroborated self report. Moreover, Dr. Toomer did not even attempt to explain how this information impacted Defendant as an adult. Further, as the trial court noted, not only were there many people who had not been reunited with their mothers but also Defendant never had a relationship with her mother. (V86/13723) Thus, the trial court did not abuse its discretion in weighing these mitigators.

The rejection of the battered spouse evidence was also proper. The only evidence presented to show that Defendant was a battered spouse was Dr. Haas' testimony. Dr. Haas had opined that it was Gonzalez's influence that caused LF's death. However, this opinion was based on a misunderstanding of whether Defendant had been abusive before she met Gonzalez, as the trial court noted. (V86/13723) Moreover, the trial court had already found this testimony incredible. (V86/13721) Thus, Defendant's claims about a nexus are meritless.

VIII. RETARDATION.

Defendant next asserts that the trial court erred in rejecting her claim that she was retarded. However, the denial of the claim was proper because the trial court's findings are supported by competent, substantial evidence.[6]

[6] This Court reviews a trial court's ruling on a retardation claim to determine if it is supported by competent substantial evidence. *Diaz v. State*, 132 So. 3d 93, 120 (Fla. 2013).

Here, the trial court rejected Defendant's retardation claim because the IQ scores she presented were invalid, the evidence she presented regarding her adaptive functioning came from an expert who made assumptions that were incorrect, the one person who testified regarding her abilities before the age of 18 was incredible and her years of substance abuse impacted her abilities. (R42/6412-28) It found the IQ scores invalid not only because her experts translated an American IQ test into Spanish but also because the reasons they gave for not giving the Puerto Rican version of the WAIS was inconsistent with her scores when given that test, they tested her when her mental state was artificially decreasing her scores and her inconsistent scores on other tests showed that she was not performing up to her potential. (R42/6426-27) Each of these findings is supported by competent, substantial evidence.

Both defense experts relied on IQ scores obtained by translating the American WAIS to Defendant. (V22/3453-54, 3473, V23/38-40) Dr. Nathanson admitted that this produced an invalid result, and the portion of the WAIS manual read during cross of Dr. Romero confirmed this was true. (V22/3513-14, V24/3836-37) Both stated that the EIWA inflated IQ scores. (V22/3459-60, V23/3655-91) However, Defendant achieved a lower score on the EIWA that Dr. Nathanson administered than she did on the WAIS.

(V22/3516-17) Dr. Nathanson admitted that Defendant's stress, anxiety and depression deflated her IQ scores, and Dr. Romero admitted that she had given Defendant testing showing Defendant was anxious and depressed at the time of her testing. (V223475, 3477-78, V23/3649-50) Dr. Bild-Libben and Dr. Suarez testified that Defendant's inconsistent performance on testing made her test results suspect. (V20/3181-96, 3197-02, 3207-08V34/5266-72) Dr. Romero opined about Defendant's adaptive functioning based on information that came from self-report and assumptions based on that information. (V23/3590-3621) However, on cross, it was shown that the assumptions and self-report were not valid. (V23/3726, V24/3785-92, 3821) Moreover, experts on whose information Dr. Romero relied had found her to be malingering. (V24/3905-07, V20/3219-22, V23/3726-28) Dr. Romero admitted that drug abuse would lower IQ scores, and Dr. Nathanson admitted if drug abuse damaged Defendant brain after she was 18, she would not be retarded. (V22/3538-39, V23/3739) Guzman admitted to being convicted of a multitude of crimes involving dishonesty and to being in treatment for mental illness and provided incorrect information about Defendant's age when they met. (V39/5983-90, 5998-99, 6001-02) Since the trial court's findings are supported by competent, substantial evidence, it should be affirmed.

In attempting to avoid the fact that the trial court's rejection of the claim is supported by competent, substantial evidence, Defendant cites to *Hall v. Florida* 134 S. Ct. 1986 (2014), and insists that it holds that the opinions of her experts had to be accepted. However, this is not true. In *Hall*, the Court recognized that Florida's definition of retardation was constitutional on its face. *Id.* at 1994. It only determined that the definition was unconstitutional as applied to defendants whose IQ scores were below 75 and who were precluded from presenting evidence of the other two elements of retardation. *Id.* at 1996, 2001; *see also In re Henry*, 2014 WL 2748288, *6-*7 (11th Cir. Jun. 17, 2014)(recognizing thet *Hall* only created procedural right to present evidence of other prongs); *Henry v. State*, 39 Fla. L. Weekly S411 (Fla. Jun. 12, 2014)(defendant with IQ of 78 and no evidence of adaptive functioning deficits not entitled to evidentiary hearing). Here, the trial court considered Defendant's evidence on all of the prongs of retardation and rejected the claim because her evidence was not credible and reliable. Since the definition was not applied in the manner the Court found unconstitutional in *Hall* here, *Hall* is inapplicable. The denial of the claim should be affirmed.

IX. *Ring* Claim.

Defendant next asserts that her death sentence is unconstitutional because Florida law does not require an unanimous jury recommendation of death and the imposition of the death sentence allegedly violated *Ring v. Arizona*, 536 U.S. 584 (2002). However, these arguments entitled Defendant to no relief.

This Court had repeatedly rejected the argument that Florida's capital sentence scheme is unconstitutional because jury recommendations do not have to be unanimous. *Kimbrough v. State*, 125 So. 3d 752, 754 (Fla. 2013); *Robards v. State*, 112 So. 3d 1256, 1267 (Fla. 2013); *Mann v. State*, 112 So. 3d 1158, 1162 (Fla. 2013). This Court has also rejected the claim that *Ring v. Arizona*, 536 U.S. 584 (2002), is violated when a death sentence was supported solely by the HAC aggravator that was not charged in the indictment or found unanimously by the jury. *Blackwood v. State*, 946 So. 2d 960, 976-77 (Fla. 2006). Moreover, contrary to Defendant's assertion that her sentence is not based on a jury fact finding regarding HAC, the United States Supreme Court has recognized that the jury "necessarily engaging in the factfinding required for imposition of a higher sentence, that is, the determination that at least one aggravating factor had been proved" in recommending death. *Jones*

v. United States, 526 U.S. 227, 250-51 (1999)(citing *Hildwin v. Florida*, 490 U.S. 638 (1989)); *see also Evans v. Sec'y, Florida Dept. of Corrections*, 699 F.3d 1249, 1255-65 (11th Cir. 2012). As such, the *Ring* claim is meritless and should be rejected.

X. CUMULATIVE ERROR.

Defendant finally asserts she is entitled to relief based on the cumulative effect of the errors she has alleged. However, Defendant is entitled to no relief because the alleged errors are unpreserved and meritless. *Griffin v. State*, 866 So. 2d 1, 22 (Fla. 2003).

XI. DR. SUAREZ'S TESTIMONY.

The trial court abused its discretion in refusing to permit the State to call Dr. Suarez to testify in rebuttal based on his evaluation of Defendant. The presentation of his testimony would have been proper.

While the trial court believed that allowing Dr. Suarez to testify regarding information that he had gained based on his evaluation of Defendant would violate her constitutional rights, this is not true. The United States Supreme Court has held that a defendant's constitutional rights are not violated when the State is permitted to present rebuttal evidence based on an evaluation when the defendant has placed her mental state at issue. *Kansas v. Cheever*, 134 S. Ct. 596, 599-603 (Fla. 2013).

As this Court has recognized, a trial court's ruling on the admissibility of evidence is an abuse of discretion when it is based on an erroneous view of the law. *Patrick v. State*, 104 So. 3d 1046, 1056 (Fla. 2012). As the trial court's belief that the evidence would have violated Defendant's constitutional rights was error, it abused its discretion in relying upon it to exclude Dr. Suarez's testimony.

Moreover, any suggestion that Defendant did not place her mental state at issue is specious. Dr. Toomer testified that Defendant was rendered permanently dysfunctional as a result of the trauma she allegedly experienced as a child. As the Court recognized in *Cheever*, the fact that the testimony that a defendant presented did not concern a particular mental disease or defect does not mean that the defendant did not place her mental state at issue. *Cheever*, 134 S. Ct at 602. This is all the more true as Dr. Toomer's testimony would not have been admissible if he had not rendered an opinion regarding Defendant's mental state and had simply recounted Defendant's statements. *Mendoza v. State*, 87 So. 3d 644, 666 (Fla. 2011). As such, the trial court abused its discretion in excluding Dr. Suarez's testimony based on its incorrect belief that doing so would violate Defendant's constitutional rights.

Any reliance on *Caraballo*, 39 So. 3d at 1252-53, was also

misplaced. There, this Court found that testimony from an expert who had evaluated a defendant for competence was inadmissible at a penalty phase because it violated Fla. R. Crim. P. 3.211(e), which specifically limits the uses of information received as a result of competency evaluations. However, Dr. Suarez was not appointed to evaluate Defendant for competence and did not do a competency evaluation. He evaluated Defendant for retardation under Fla. R. Crim. P. 3.203, which contains no similar provision limiting the use of the evidence obtained during an evaluation.

Moreover, the attempt to analogize competence to retardation is unavailing. The United States Supreme Court has explained that the limitation on the use of evidence obtained during a competence evaluation is based on the fact that competence is a condition of due process and does not involve a defendant placing her mental state at issue. *Estelle v. Smith*, 451 U.S. 454, 464-66 (1981). As such, retardation as a defense to the death penalty is not analogous to competency. Given these circumstances, the exclusion of Dr. Suarez's testimony was error.

Further, this error harmed the State. Dr. Toomer was permitted to testify that she became dysfunctional based entirely on her statements to him. Dr. Suarez would have

testified that Defendant was a malingerer, such that her statements were not reliable. This would have provided a basis for rejecting Defendant's claims for mitigation based on Dr. Toomer's testimony.

XII. NO SIGNIFICANT CRIMINAL HISTORY.

The trial court also abused its discretion in instructing the jury on the no significant criminal history mitigator, and erred in finding that mitigator. The mitigator should be stricken.

As this Court has recognized, a trial court is expected to only instruct the jury on those mitigators on which evidence has been presented. *Stewart v. State*, 558 So. 2d 416, 420 (Fla. 1990). Here, as Defendant admitted, she had presented no evidence in support of this mitigator. (V143/1037) As such, the trial court abused its discretion in instructing the jury on this mitigator.

Moreover, the giving of this instruction and consideration of this mitigator was particularly harmful. As this Court has recognized, the State can present evidence regarding criminal activity that would not qualify for the prior violent felony aggravator in rebuttal of this mitigator once Defendant claims it. *Walton v. State*, 547 So. 2d 622, 625 (Fla. 1989). Here, the State possessed such evidence. (V76/12005-11) However, because

Defendant had led the State to believe that she would not be claiming this mitigator until she requested after the close of evidence, it was prevented from presenting it. (V143/1037-38)

Moreover, the trial court was in no better position that the jury to evaluate this mitigator. When the State attempted to present its evidence regarding Defendant's criminal history at the *Spencer* hearing, the trial court refused to permit the State to do so. As such, instructing on, and finding, the no significant criminal history mitigator was error. It should be stricken.

CONCLUSION

For the foregoing reasons, the judgment and sentence of the trial court should be affirmed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing was furnished by email to **Andrew Stanton,** astanton@pdmiami.com, 1320 N.W. 14th Street, Miami, Florida 33125, this 7th day of August 2014.

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CERTIFICATE OF COMPLIANCE

I hereby certify that this brief is typed in Courier New 12-point font.

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