IN THE SUPREME COURT OF FLORIDA

CASE NO. SC00-1366

ANA MARIA CARDONA,

Appellant,

vs.

THE STATE OF FLORIDA,

Appellee.

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

ANSWER BRIEF OF APPELLEE

ROBERT A. BUTTERWORTH
Attorney General
Tallahassee, Florida

LISA A. RODRIGUEZ
Assistant Attorney General
Florida Bar No. 0109370
Office of the Attorney General
Rivergate Plaza -- Suite 950
444 Brickell Avenue
Miami, Florida 33131
PH. (305) 377-5441
FAX (305) 377-5654

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

OTHER AUTHORITY

INTRODUCTION

The parties will be referred to as they stood in the Court below. The symbol "D.A.R." will refer to the record from the direct appeal, which includes transcripts. The symbols "R." will refer to the record from the Rule 3.850 proceeding, which includes transcripts. The symbol "S.R." will refer to the supplemental record on appeal.

STATEMENT OF THE CASE AND FACTS

On January 11, 1991, Defendant and Co-defendant Olivia Gonzalez Mendoza were indicted and charged with first-degree murder and aggravated child abuse for the death of Defendant's three-year-old son, Lazaro Figueroa. (R. 1-3)

Defendant's trial commenced on March 5, 1992. (D.A.R. 5) On March 20, 1992, the jury found Defendant guilty of first degree murder and aggravated child abuse. (D.A.R. 3445). The jury recommended imposing a sentence of death by a vote of eight to four. (R. 3784-85). The court imposed a sentence of death for the first degree murder count and imposed a consecutive term 15 years imprisonment for the aggravated child abuse count. (D.A.R. 3800, 3811).

Defendant appealed the convictions and sentences from her trial to this Court, raising the following issues, verbatim:

ARGUMENT I.

THE FLORIDA CASE LAW HOLDING THAT WHERE THE STATE CHARGES BOTH FIRST DEGREE PREMEDITATED

MURDER AND FIRST DEGREE FELONY MURDER THE COURT NEED NOT REQUIRE THE JURY TO MAKE SEPARATE FINDINGS WITH RESPECT TO EACH IS EITHER PER SE UNCONSTITUTIONALLY VAGUE OR UNCONSTITUTIONALLY VAGUE AS APPLIED TO THIS CASE.

ARGUMENT II.

THE COURT ERRED IN REFUSING TO SEVER FOR TRIAL PURPOSES THE RESPECTIVE CHARGES ASSERTED AGAINST DEFENDANT IN THE TWO COUNTS OF THE INDICTMENT BECAUSE THE STATE'S EVIDENCE AS TO ONE COUNT WAS UNFAIRLY PREJUDICIAL WITH RESPECT TO THE SECOND COUNT.

ARGUMENT III.

THE DEFENDANT IS ENTITLED TO A REVERSAL OF THE JURY'S VERDICTS OF GUILTY BECAUSE THE JURY CHARGE TAKEN AS A WHOLE WAS SO CONFUSING THAT REASONABLE PEOPLE COULD NOT HAVE UNDERSTOOD IT.

ARGUMENT IV.

THE TRIAL COURT ERRED IN REFUSING TO CHARGE THE JURORS REGARDING "WILLIAMS RULE"-F.S. 90.404-EVIDENCE BEFORE STATE TESTIMONY AND EVIDENCE WAS PERMITTED TO BE RECEIVED REGARDING TYPES OF CHILD ABUSE AND TREATMENT NOT ENCOMPASSED WITH AGGRAVATED CHILD ABUSE UNDER F.S. 827.03(1)(2).

ARGUMENT V.

THE DEFENDANT WAS DENIED A FAIR TRIAL AND THE DUE PROCESS of LAW, AS GUARANTEED BY THE UNITED STATES AND STATE OF FLORIDA CONSTITUTIONS, BY THE ACTIONS OF THE PROSECUTOR DURING VOIR DIRE EXAMINATION WHICH PRE-CONDITIONED THE JURORS TO FIND DEFENDANT [DEFENDANT] GUILTY OF CAPITAL MURDER AND TO RECOMMEND TO THE JUDGE THAT SHE BE SENTENCED TO DEATH.

ARGUMENT VI.

THE DEFENDANT WAS SUBJECTED TO CRUEL AND UNUSUAL PUNISHMENT IN VIOLATION OF THE EIGHTH AMENDMENT TO THE UNITED STATES CONSTITUTION AND THE COUNTERPART PROVISION OF THE FLORIDA CONSTITUTION, AND SHE WAS DENIED THE DUE PROCESS OF LAW IN VIOLATION OF THE FOURTEENTH AMENDMENT TO THE UNITED STATES AND THE COUNTERPART PROVISION OF THE FLORIDA CONSTITUTION BY THE SENTENCING ADVISORY JURY HAVING BEEN CHARGED TO CONSIDER THE APPLICABILITY OF THE HEINOUS, ATROCIOUS AND CRUEL AGGRAVATING CIRCUMSTANCES AS SET FORTH IN THE FLORIDA DEATH PENALTY TRIAL PROCEDURE STATUTE, I.E. 921.141(2).

ARGUMENT VII.

THE LOWER COURT ERRED IN SENTENCING [DEFENDANT] TO DEATH BECAUSE SUCH CONSTITUTED DISPARATE TREATMENT FOR TWO EQUALLY CULPABLE ACCOMPLICES.

ARGUMENT VIII.

THE TRIAL COURT ERRED IN REFUSING TO ALLOW DEFENSE TO CLAIM AS A NON-STATUTORY MITIGATING CIRCUMSTANCE THE FACT THAT THE DEFENSE CONTENTION THAT IT WOULD BE IN THE BEST INTERESTS OF THE TWO REMAINING CHILDREN OF DEFENDANT THAT THEIR MOTHER NOT BE EXECUTED AND IN REFUSING TO ALLOW DEFENSE TO BE ABLE TO SUFFICIENTLY PRESENT SUCH ISSUE TO THE JURY SITTING ITS CAPACITY AS THE SENTENCING ADVISORY JURY.

ARGUMENT IX.

THE IMPOSITION OF THE DEATH PENALTY UPON [DEFENDANT] VIOLATES HER FEDERAL AND STATE CONSTITUTIONAL PROTECTIONS AGAINST CRUEL AND UNUSUAL PUNISHMENT AND THE DUE PROCESS CLAUSES OF THE FEDERAL AND STATE CONSTITUTIONS AND/OR IT IS IN THE INTEREST OF JUSTICE THAT HER LIFE BE SPARED.

ARGUMENT X.

THAT PART OF FLORIDA'S DEATH PENALTY SENTENCING ADVISORY PROCEDURE, AS SET FORTH IN F.S. 921.141, WHICH REQUIRES THAT THE SAME JURY HEAR BOTH THE GUILT PHASE AND PENALTY ADVISORY PHASE OF THE TRIAL IS CONSTITUTIONALLY INFIRM.

On June 2, 1994, the Court affirmed Defendant's convictions and sentence of death. *Cardona v. State*, 641 So. 2d 361 (Fla. 1994). In affirming Defendant's convictions and sentence of death, the Court outlined the facts of the case as follows:

> Prior to giving birth to Lazaro on September 18, 1987, Cardona lived with Lazaro's father, a well-off drug dealer named Fidel Figueroa. Cardona, Fidel, their two-year-old daughter, and Cardona's seven-year-old son lived in an upscale apartment and maintained a lavish existence. The month before Lazaro was born, Fidel was murdered. Fidel left a $100,000 estate that Cardona exhausted in ten months. During this time, Lazaro and his sister lived with friends and relatives. Lazaro and his sister were eventually turned over to the Department of Health and Rehabilitative Services. According to medical records, when Lazaro was eleven months old, he was healthy and weighed about twenty pounds. In November 1988, Lazaro and his sister were returned to the custody of their mother.
>
> After the children were returned to her, Cardona became romantically involved with codefendant Olivia Gonzalez-Mendoza. Cardona and her children lived with Gonzalez-Mendoza in a series of cheap hotels. Gonzalez-Mendoza's various jobs and shoplifting were the women's only sources of income. During an eighteen-month period that began after the children were returned to her, Cardona beat, choked, starved, confined, emotionally abused and systematically tortured

Lazaro. The child spent much of the time tied to a bed, left in a bathtub with the hot or cold water running, or locked in a closet. To avoid changing Lazaro's diaper for as long as possible, Cardona would wrap duct tape around the child's diaper to hold in the excrement. Cardona blamed Lazaro for her descent "from riches to rags," and referred to him as "bad birth."

Gonzalez-Mendoza was aware of the abuse and began to participate in the abuse because it pleased Cardona. According to Gonzalez-Mendoza, on the last day of October 1990, Cardona severely beat Lazaro with a baseball bat. After splitting the child's head open, Cardona locked the little boy in the closet where he had been confined for the last two months. The next day, Gonzalez-Mendoza opened the closet door and attempted to quiet Lazaro by frightening him with the bat. When Lazaro began to scream at the sight of his mother, Cardona grabbed the bat from Gonzalez-Mendoza. Gonzalez-Mendoza then left the room. When she returned, Cardona told her that Cardona believed she had killed Lazaro. After dressing the child, the two women took Lazaro to a Miami Beach residence and abandoned him in some bushes, where he was later found.

* * *

The medical examiner detailed the injuries as follows. Due to repeated injury, the muscle between the elbow and shoulder of Lazaro's left arm had turned to bone, rendering the arm useless. The child had deep bruises on his left hand and palm that were consistent with defensive wounds. Lazaro's right forearm was fractured, in a manner also consistent with a defensive wound. The child's left leg, which was much thicker than the right, was engorged with blood. His feet and toes also had extensive deep bruises. Some of the child's toenails had been crushed. There were other deep blunt trauma bruises to the child's chest and buttocks. Lazaro's left eye was bruised and there was a laceration on

> his right eye. There were cigarette burns on the child's cheek and pressure sores all over his body, from being forced to lie in bed for extended periods. The inside of the child's lips was obliterated by scar tissue and his front teeth had been knocked out. There were lacerations to the scalp, the most recent of which was an open festering wound that had allowed meningitis bacteria to invade the child's brain through a skull fracture. The blow that caused that fracture also crushed the child's olfactory nerve. A later blow to the head had sheared the nerves connecting the spinal cord to the rear of the child's brain. According to the medical examiner, although this injury was fatal, Lazaro was already dying from his other injuries at the time the final blow was inflicted.
>
> As explained by the medical examiner:
>
> Lazaro Figueroa died from child abuse and neglect. Lazaro didn't die from one particular injury. Lazaro was physically abused over months of time.

Cardona, 641 So. 2d at 363. Rehearing was denied on August 31, 1994. *Cardona v. State*, 641 So. 2d 361 (Fla. 1994). Defendant filed a Petition for Writ of Certiorari in the United States Supreme Court, which was denied on February 21, 1995. *Cardona v. State*, 513 U.S. 1160 (1995).

On July 20, 1999, Defendant filed an amended motion for post conviction relief, raising the following thirteen claims for relief, verbatim:

CLAIM I

> [DEFENDANT] IS BEING DENIED HER RIGHTS TO DUE PROCESS AND EQUAL PROTECTION AS GUARANTEED BY THE EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND THE

CORRESPONDING PROVISIONS OF THE FLORIDA CONSTITUTION, BECAUSE ACCESS TO THE FILES AND RECORDS PERTAINING TO [DEFENDANT]'S CASE IN THE POSSESSION OF CERTAIN STATE AGENCIES HAVE BEEN WITHHELD IN VIOLATION OF CHAPTER 119, FLA. STAT. [DEFENDANT] CANNOT PREPARE AN ADEQUATE 3.850 MOTION UNTIL SHE HAS RECEIVED PUBLIC RECORDS MATERIALS AND HAS BEEN AFFORDED DUE TIME TO REVIEW THOSE MATERIALS AND AMEND.

CLAIM II

[DEFENDANT]'S CONVICTIONS ARE MATERIALLY UNRELIABLE BECAUSE NO ADVERSARIAL TESTING OCCURRED DUE TO THE CUMULATIVE EFFECTS OF INEFFECTIVE ASSISTANCE OF COUNSEL, THE WITHHOLDING OF EXCULPATORY OR IMPEACHMENT MATERIAL, NEWLY DISCOVERED EVIDENCE, AND/OR IMPROPER RULINGS OF THE TRIAL COURT IN VIOLATION OF [DEFENDANT]'S RIGHTS AS GUARANTEED BY THE FIFTH, SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS.

CLAIM III

[DEFENDANT] WAS DEPRIVED OF HER RIGHTS TO DUE PROCESS UNDER THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION AS WELL AS HER RIGHTS UNDER THE FIFTH, SIXTH, AND EIGHTH AMENDMENTS, BECAUSE THE STATE WITHHELD EVIDENCE THAT WAS MATERIAL AND EXCULPATORY IN NATURE AND/OR PRESENTED FALSE AND/OR MISLEADING EVIDENCE. SUCH OMISSIONS RENDERED DEFENSE COUNSEL'S REPRESENTATION INEFFECTIVE AND PREVENTED A FULL ADVERSARIAL TESTING OF THE EVIDENCE.

CLAIM IV

[DEFENDANT] WAS DEPRIVED OF HER RIGHT TO AN ADVERSARIAL TESTING AND THE EFFECTIVE ASSISTANCE OF COUNSEL AT THE PENALTY PHASE OF HER CAPITAL TRIAL, THUS RENDERING UNRELIABLE THE RESULTING DEATH SENTENCE, IN VIOLATION OF THE SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS.

CLAIM V

[DEFENDANT] WAS DENIED HER RIGHTS UNDER AKE V. OKLAHOMA AT THE GUILT AND PENALTY PHASES OF HER CAPITAL TRIAL, WHEN COUNSEL FAILED TO OBTAIN AN ADEQUATE MENTAL HEALTH EVALUATION AND FAILED TO PROVIDE THE NECESSARY BACKGROUND INFORMATIN TO THE MENTAL HEALTH CONSULTANT IN VIOLATION OF [DEFENDANT]'S RIGHTS TO DUE PROCESS AND EQUAL PROTECTION UNDER THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION, AS WELL AS HER RIGHTS UNDER THE FIFTH, SIXTH, AND EIGHTH AMENDMENTS.

CLAIM VI

[DEFENDANT]'S RIGHTS TO DUE PROCESS WAS DENIED WHEN SHE WAS CONVICTED AND SENTENCED TO DEATH DESPITE BEING INCOMPETENT IN VIOLATION OF HER RIGHTS AS GUARANTEED BY THE SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS.

CLAIM VII

[DEFENDANT]'S SENTENCING JURY WAS MISLED BY COMMENTS, QUESTIONS AND INSTRUCTIONS THAT UNCONSTITUTIONALLY AND INACCURATELY DILUTED THE JURY'S SENSE OF RESPONSIBILITY TOWARDS SENTENCING IN VIOLATION OF THE EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION. TRIAL COUNSEL WAS INEFFECTIVE FOR NOT PROPERLY OBJECTING.

CLAIM VIII

[DEFENDANT]'S SENTENCE OF DEATH IS PREMISED UPON FUNDAMENTAL ERROR BECAUSE THE JURY RECEIVED INADEQUATE GUIDANCE CONCERNING THE AGGRAVATING CIRCUMSTANCES TO BE CONSIDERED IN A CAPITAL CASE IS FACIALLY VAGUE AND OVERBROAD IN VIOLATION OF THE EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION. TRIAL COUNSEL WAS INEFFECTIVE IN FAILING TO OBJECT TO THESE ERRORS.

CLAIM IX

[DEFENDANT] IS DENIED HER FIRST, SIXTH, EIGHTH

AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND THE CORRESPONDING PROVISIONS OF THE FLORIDA CONSTITUTION AND IS DENIED EFFECTIVE ASSISTANCE OF COUNSEL IN PURSUING HER POST-CONVICTION REMEDIES BECAUSE OF THE RULES PROHIBITING [DEFENDANT]'S LAWYERS FROM INTERVIEWING JURORS TO DETERMINE IF CONSTITUTIONAL ERROR WAS PRESENT.

CLAIM X

NEWLY DISCOVERED EVIDENCE ESTABLISHES THAT EXECUTION BY ELECTROCUTION IS CRUEL AND/OR UNUSUAL PUNISHMENT AND VIOLATES [DEFENDANT]'S RIGHTS UNDER THE EIGHTH AND FOURTEENTH AMENDMENTS OF THE UNITED STATES CONSTITUTION AND UNDER THE FLORIDA CONSTITUTION.

CLAIM XI

[DEFENDANT] IS INNOCENT OF THE DEATH PENALTY. [DEFENDANT] WAS SENTENCED TO DEATH IN VIOLATION OF THE EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

CLAIM XII

THE TRIAL COURT'S SENTENCING ORDER DOES NOT REFLECT AN INDEPENDENT WEIGHING OR REASONED JUDGMENT, CONTRARY TO FLORIDA LAW AND THE EIGHTH AND FOURTEENTH AMENDMENTS.

CLAIM XIII

[DEFENDANT] IS INSANE TO BE EXECUTED.

(R. 142-319).

At the *Huff* hearing[1], the lower court found, and Defendant conceded, she had received all records to which she was entitled. (D.A.R. 818) Additionally, the lower court granted an evidentiary hearing on a number of claims, including: Defendant's intellectual

[1]*Huff v. State*, 622 So. 2d 982 (Fla. 1993).

capacity; defense counsel's failure to present defense witnesses to testify concerning intoxication and battered spouse syndrome; defense counsel's failure to cross-examine Dr. Merry Haber; defense counsel's failure to present testimony related to the polygraph examinations; alleged *Brady* violations concerning Defendant's waiver of *Miranda* rights and the State's accommodations to Elizabeth Pastor, who testified on behalf of the prosecution; defense counsel's failure to seek change of venue; and defense counsel's failure to present evidence pertaining to the "Abbott Avenue" defense. (D.A.R. 833, 875-76, S.R. 932-33, R. 922) Over the course of a full three-day evidentiary hearing on May 16-18, 2000, the lower court heard testimony from the following witnesses: Maria Zerquera, an investigator from the Dade County State Attorney's Office; Attorney Cathy Vogel, the lead prosecutor; Attorney Jamie Campbell, the other prosecutor; Ramon Mier, an investigator from the Dade County State Attorney's Office; Gary Schiffo, one of the investigating officers formerly with City of Miami Beach Police Department; Attorney Ron Gaynor, Defendant's counsel during the guilt phase; Attorney Andy Kassier, Defendant's co-counsel during the guilt phase and chief counsel during the penalty phase; Attorney Bruce Fleischer, counsel for co-defendant Olivia Gonzalez Mendoza; Dr. Ricardo Weinstein, an expert retained by Defendant for post-conviction review of her case; Ms. Vanda Martin, assistant warden at Broward Correctional Institute

(B.C.I.); and Dr. David Nathanson, a psychologist that examined Defendant at the time of trial but was also retained by Defendant on post-conviction for supplemental testimony; and Dr. Lazaro Garcia, a psychologist who testified at the time of trial. (S.R. 931-32, R. 1194)

Ms. Campbell testified that she worked on Defendant's case in conjunction with Ms. Vogel. (R. 898) Both she and Ms. Vogel handled the plea negotiations with Gonzalez. (R. 900) She and Ms. Vogel were approached by Gonzalez's attorney, Bruce Fleisher, regarding the resolution of Gonzalez's case. (R. 903) Ms. Campbell identified a letter dated September 10, 1991 (Exhibit A), as a letter from Mr. Fleisher that outlined "some idea" of what Gonzazlez was going to say if her case was resolved. (R. 906) After receiving Mr. Fleisher's letter, the State Attorney's Office began to work out the details of Gonzalez's plea agreement. (R. 906) Eventually, Gonzalez was given a polygraph examination in the presence of Dr. Merry Haber, the mental health expert retained by Mr. Fleisher to examiner her. (R. 907-08) Subsequent to Mr. Fleisher's letter, the State requested that an investigator speak with Gonzalez to try and make a determination about Gonazalez's case. (R. 911) Ms. Campbell testified that Maria Zequera had been assigned to Defendant's case, but that neither Ms. Campbell or Ms. Vogel attended Ms. Zequera's interviews with Gonzalez. (R. 913) Ms. Zequera talked to the prosecutors about her investigation;

however, Ms. Campbell was not aware that Ms. Zequera had generated any report to the interviews with Gonzalez. (R. 920) Ms. Campbell had not seen the written reports, nor could she identify the handwriting on the reports. (R. 917) Ms. Campbell met with Elizabeth Pastor, a witness in the Defendant's case to talk about the case. (R. 923) Ms. Campbell acknowledged writing a letter to Judge Fruscante concerning Ms. Pastor's sentencing for an unrelated drug charge months after the trial. (R. 930-32) Ms. Pastor had already been convicted when Ms. Campbell contacted her regarding Defendant's case but later wound up on appeal and was remanded for resentencing. (R. 934) Ms. Campbell testified unequivocally she did not make any promises to Ms. Pastor regarding her testimony in Defendant's case. (R. 932)

Ms. Vogel testified she was assigned to prosecute Defendant's case from the beginning. (R. 941) She did not recall specifically when Mr. Fleisher began discussions about Gonzalez's plea negotiation, but that he approached the State and the negotiations occurred "later on." (R. 942-43) Ms. Vogel testified that she worked with Ms. Zequera and Mr. Mier; however, she did not recall "directing her to do everything she did." (R. 946) Ms. Vogel was aware that Ms. Zequera and Mr. Mier interviewed Ms. Gonzalez concerning her involvement in the case and Ms. Vogel discussed the case with the investigators. (R. 948) Ms. Vogel was shown the reports from the investigators' interviews with Gonzalez and

testified that she had not been aware that any reports had been generated from the interviews. (R. 949) Ms. Vogel acknowledged that had she known of the reports, she would have made copies and turned them over in discovery. (R. 950) She candidly admitted that portions of the notes were consistent with her handwriting but that portions were not consistent. (R. 973-75) She also stated that once Gonzalez became a witness, she listed her in discovery. She listed Dr. Haber, George and Brian Slattery in discovery, as well. (R. 963) Ms. Vogel testified that she never made any promises to Ms. Pastor regarding her testimony at Defendant's trial. (R. 960)

Maria Zerquera testified that she was an investigator for the State Attorney's Office. (R. 977) Part of her investigative duties was to interview prospective witnesses, and she generally takes notes of such interviews. (R. 983) She generally does not audiotape or videotape her interviews. (R. 983) Gonzalez was interviewed on September 19, 1991, October 1, 1991, and October 3, 1991. (R. 985-86, 989) She briefed Ms. Campbell and Ms. Vogel concerning her interview with Gonzalez, but such discussions were not word-for-word, line-by-line recitations of her interview. (R. 996-97)

Mr. Mier testified that he assisted Ms. Zerquera in her investigation of Defendant's case. (R. 1017) He testified that Ms. Zerquera was the lead investigator and that she probably discussed her interview with Gonzalez with the prosecutors. (R. 1017) Mr. Mier testified that he did not write the reports; the reports were

written my Ms. Zerquera. (R. 1020)

Detective Schiaffo testified that he previously worked with the Miami Beach Police Department and was assigned the lead on the investigation of Defendant's case. (R. 1024) He identified a police report dated November 3, 1990, regarding Lazaro's autopsy results. (R. 1027-29) Det. Schiaffo testified that his report indicated he had received information from Det. Srimshaw concerning Dr. Hyma's autopsy findings. (R. 1028-29) The report reflected that Det. Scrimshaw's supplement indicated that Dr. Hyma advised that Lazaro's cause of death was trauma to the head. (Exhibit Q). He further testified that he discussed Gonzalez's plea negotiations with the State later in his investigation. (R. 1029-30) Det. Schiaffo also identified a report which read: "...*suggested that later into the case*, if there is not more evidence produced toward defendant Gonzalez, then the State Attorney's Office would suggest that some type of plea be worked out with Gonzalez if she is to cooperate." (R. 1031)(emphasis added).

Mr. Gainor testified that he has been an attorney for about 14 years. (R. 1036) He worked as a prosecutor with the Dade County State Attorney's Office for two and a half years, where he handled misdemeanor and felony cases. (R. 1037) Eventually he worked in the State Attorney unit specializing in multi-kilo narcotics cases for about a year. (R. 1037) After leaving the State Attorney's Office, he worked at a private defense firm for a year and then

opened up his own office. (R. 1038) Prior to Defendant's case, Mr. Gainor handled a number of homicide cases on appointment. (R. 1038) Additionally, he previously had tried a death case, and the defendant was acquitted of the primary charge, thus eliminating the penalty phase. (R. 1040) Mr. Gainor testified that in Defendant's case, the defense team had been open to a number of different strategies, including the Abbott/GLoria Pi defense. (R. 1045) However, once Gonzalez flipped, the defense strategy changed. (R. 1045) Additionally, once the defense "looked at the [Abbott Avenue] defense and investigated it and took it apart, we realized that it would not have the significance in front of the jury that we thought it might have in the beginning." (R. 1047) Additionally, Mr. Gainor testified that his strategy of defense would focus on the fact that the majority of Lazaro's injuries coincided with the advent of Defendant's relationship with Gonzalez. (R. 1084) He further testified that he and Mr. Kassier had discussed and researched a motion for a change of venue; however, they had ultimately decided that moving the case to a smaller, less liberal jury pool may present more harm than benefit. (R. 1072) Mr. Gainor testified he did recall being provided with the reports pertaining to the three interviews of Defendant or the proffer letter from Mr. Fleisher. (R. 1058-59)

Mr. Kassier testified that he became involved primarily to handle the penalty phase. (R. 1107) Mr. Kassier testified that he

had previously worked at the Public Defender's Office where he had handled a first degree murder case. (R. 1104) Later, Mr. Kassier went into private practice and had two cases that proceeded to the penalty phase. (R. 1104) Likewise, Mr. Kassier testified that once Gonzalez indicated she would testify against Defendant, the defense theme focused on Gonzalez. (R. 1107-08) Mr. Kassier also testified that he did not recall having been provided of the reports pertaining to Gonzalez's interview with the State Attorney investigators. (R. 1115-17)

Mr. Fleisher testified that he had represented Gonzalez. (R. 1225) He identified the proffer letter he wrote to Ms. Vogel to initiate plea discussion. (R. 1226) With regard to the letter, Mr. Fleisher testified that it was not his intention that the letter ensure that Ms. Gonzalez was going to testify exactly as discussed in the letter but that it was his "interpretation of what she could possibly say." (R. 1228)

Dr. Nathanson testified that he had examined Defendant at the time of trial. (R. 1213) Dr. Nathanson testified that based upon his examination of Defendant, he would have opined at Defendant's trial that she was retarded and not schizophrenic. (R. 1234) Mr. Weinstein testified that based upon his evaluation of Defendant, he would have opined at Defendant's trial that she suffered from retardation and brain damage. (R. 1387-88, 1382)

After hearing closing argument from post sides on May 19,

2000, the lower court denied Defendant's motion for post-conviction in a six-page order dated May 27, 2000.

Defendant appealed the denial of motion for post-conviction relief.

SUMMARY OF THE ARGUMENT

Defendant's claims of no adversarial testing during the guilt phase are without merit. Defendant was not prejudiced by the State's failure to turn over reports of 3 interviews with Gonzalez because Gonzalez was impeached at trial with all of her prior inconsistent statements. Gonzalez truthfully testified regarding her contact with the prosecutors at the time of her plea; thus, the State did not present false testimony. Counsel was not ineffective for failing to competently cross-examine Dr. Haber regarding Gonzalez's prior inconsistent statements. Counsel adduced evidence of Gonzalez's confession that she abused Lazaro. Counsel made a strategic decision to forgo a motion for change of venue. Defendant's claim concerning prosecutorial comments in closing is procedurally barred.

Defendant's claims of no adversarial testing during the penalty phase of her trial are meritless. Defendant's claims related to counsel's failure to present evidence that Gonzalez was involved in Lazaro's murder are rebutted by the record. Defendant's challenges to HAC and relative culpability are procedurally barred. Defense counsel provided Defendant with competent mental health experts and made a strategic decision as to which expert to present at trial. Defense counsel made a strategic decision not to present the "Abbott Avenue Defense" as it was not supported by the evidence and instead focused the defense on the culpability of Gonzalez.

Counsel was not ineffective for failing to admit Gonzalez's polygraph results because such results were not properly admissible.

Defendant's public records claims have been exhaustively litigated and Defendant has not established how any of the lower court's rulings with respect to her public records claims were erroneous.

Defendant's competency claims are without merit. All of the court-appointed mental health experts, who examined Defendant at the time of trial, opined Defendant was competent.

Defendant's claim that she is insane to be executed is without merit.

Defendant is not innocent of the death penalty.

ARGUMENT

I. DEFENDANT'S CLAIMS OF NO ADVERSARIAL TESTING DURING THE GUILT PHASE OF HER TRIAL ARE MERITLESS.

Defendant contends that numerous errors "infected the guilt phase," that singularly and cumulatively require a new trial, as follows: (1) the State violated *Brady* by allegedly failing to disclose to Defendant that State Attorneys Office investigators conducted 3 separate interviews of co-defendant Gonzalez and by withholding a letter from Gonzalez's attorney that set forth Gonzalez's proffered testimony; (2) the State violated *Giglio v. United States*, 405 U.S. 150 (1972), by allegedly presenting and failing to correct the false testimony of Gonzalez regarding her contact and plea negotiations with the State; (3) the State violated *Brady* by allegedly failing to disclose that Dr. Hyma originally opined that the victim's cause of death was blunt head trauma and not aggravated child abuse; (4) the State violated *Brady* by allegedly failing to disclose that the State promised Elizabeth Pastor "consideration" for her testimony at trial; (5) defense counsel was ineffective for failing to impeach Dr. Merry Haber with Gonzalez's prior record and Gonzalez's prior statements; (6) defense counsel was ineffective for failing present the testimony of George and Brian Slattery; (7) defense counsel was ineffective for failing to rebut battered spouse evidence; (8) defense counsel was ineffective for failing to present the "Abbott Avenue" defense;

(9) defense counsel was ineffective for failing to move for change of venue; and (10) defense counsel was ineffective for failing to object to the prosecutors comments made in closing.[2] An analysis of each of Defendant's claims demonstrates that such claims are wholly without merit whether viewed individually or cumulatively.

(1) Alleged *Brady* Violation Concerning Gonzalez's 3 Interviews and the Proffer Letter from Gonzalez's Attorney

Defendant argues that the failure of the State to disclose that 3 separate interviews of Gonzalez had been conducted by State Attorney investigators and that Gonzalez's attorney wrote a letter to the prosecutor proffering the gist of Gonzalez's expected testimony at trial constitutes a *Brady* violation. To prevail on this claim, Defendant must establish that the State possessed evidence favorable to the defense, that the defense did not possess and could not have obtained through the exercise of reasonable diligence, and that had the evidence been disclosed there is a reasonable probability that the result of the trial would have been

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[2]Additionally, Defendant argues that the lower court failed to address all of her claims and that she is therefor entitled to a remand so that full consideration of her remaining claims can be conducted. However, this contention is clearly rebutted by the lower court's extensive Order on Defendant's 3.850 Motion that clearly states that all of Defendant's claims, for which an evidentiary hearing was granted, "have been discussed" in said order. (S.R. 935) A review of Defendant's *Huff* hearing further reveals that the remaining claims were summarily denied based on procedural bars and rulings made during prior hearings. (R. 832, 881-84)

different. *Maharaj v. State*, 778 So. 2d 994, 953 (Fla. 2000); *Provenzano v. State*, 616 So. 2d 428 (Fla. 1993); *Melendez v. State*, 612 So. 2d 1366 (Fla. 1992); *Mendyk v. State*, 592 So. 2d 1076 (Fla. 1992).

First, it should be noted that the record establishes that defense counsel knew as early as September 27, 1991, that Gonzalez was in the process of attempting to cooperate with the State. (D.A.R. 1122-23) Furthermore, defense counsel was aware prior to Gonzalez entering the plea agreement in court, that the State Attorney's investigators had been working on the case and that Gonzalez had been interviewed by the investigators in the presence of Dr. Haber. (S.R. 10, S.R. 845-46) Thus, defense counsel could have reasonably obtained the substance of the interviews with the State Attorney investigators by simply deposing the investigators. Likewise, counsel could have obtained the letter from Gonzalez's attorney by requesting from the State copies of any letters from Gonzalez's attorney. There is no *Brady* violation, where the defendant has the ability to obtain access to the information, but fails to do *so*. *See, e.g., Haliburton v. Singletary,* 691 So. 2d 466 (Fla. 1997); *Hildwin v. Dugger*, 659 So. 2d 107 (Fla. 1995).

While neither prosecutor attended the interviews or was aware of the existence of the two reports generated from the interviews, the State properly conceded that the inadvertent suppression of the reports was a violation. (R. 916, 1530-31) However, Defendant has

not specifically alleged nor did she establish at the evidentiary hearing that any inconsistencies existed between the two interview reports and her eventual testimony at trial.[3] Indeed, the most defense counsel could offer was a proffer that *had* inconsistencies existed in the interview reports, trial counsel would have used them to impeach Gonzalez.

With regard to the proffer letter, the letter was authored by Gonzalez's attorney as to what he expected Gonzalez to testify based on his discussions with his client. (R. 1225-26) However, Defendant never established that Gonzalez authorized the contents of the letter. In fact, Gonzalez's attorney testified at the hearing that the letter represented only his "interpretation of what [Gonzalez] could possibly say." (D.A.R. 1226) As such, the State submits that the proffer letter would not have properly been admissible as impeachment evidence against Gonzalez. *See Brockinton v. State*, 600 So. 2d 29, 30 (Fla. 2d DCA 1992)(in order to impeach with a prior inconsistent statement, such statement must be the witness's statement); *Gross Builders, Inc. v. Powell*, 441 So. 2d 1142, 1143 (Fla. 2d DCA 1983).

More importantly, even if Defendant's attorney had received the letter from Gonzalez's attorney and/or the reports from the

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[3] Defendant not does allege in her Initial Brief how that the putative testimony contained in the proffer letter presented inconsistencies with Gonzalez's actual testimony at trial; however, no potential impeachment evidence was actually established at the evidentiary hearing with regard to the 3 interviews.

investigators and used such to impeach Gonzalez at trial, there is no reasonable probability that the outcome would have been different under the standards of *United States v. Bagley*, 473 U.S. 667 (1985). The statements in the proffer letter and in the investigators' reports are essentially the same as, and are cumulative to, the statements that Gonzalez gave to George Slattery on June 24, 1991, and to Brian Slattery on December 27, 1991. (S.R. 854-73) In its Amended Discovery Response dated February 14, 1992, the State listed both George and Brian Slattery, who were deposed by defense counsel on February 24, 1992, at which time their reports were turned over to the defense. (S.R. 874-78)

Furthermore, defense counsel aggressively impeached Gonzalez with her plea agreement, her statements to the Slatterys concerning her admission that she hit Lazaro in the head with a bat and other incidents in which she beat Lazaro, and with her deposition. (D.A.R. 2937, 2991, 2954, 2972, 2985-86, 2976, 2993, 2940-47, 2948-50) As Gonzalez was effectively impeached with her other statements, the putative impeachment gleaned by the 3 interviews of Gonzalez or the proffer letter from her attorney would merely have been cumulative impeachment evidence. Cumulative impeachment evidence does not serve as a basis for granting a motion for post conviction relief. *Willimson v. Dugger*, 651 So. 2d 84, 88-89 (Fla. 1994), *cert. denied*, 516 U.S. 850 (1995); *see also Jones v. State*, 709 So. 2d 512, 521 (Fla. 1998); *Buenoano v. State*, 708 So. 2d 941,

951 (Fla. 1998). Accordingly, the lower court properly found that Defendant suffered no prejudice from the State's failure to produce the 2 reports of investigator interviews of Gonzalez or the proffer letter because there is no reasonable probability that the result of the trial would have been different. (R. 935) Contrary to Defendant's contention, the lower court's analysis of materiality was not flawed;[4] the lower court found that Defendant's trial would nonetheless have resulted in her conviction even if Gonzalez had been cross-examined concerning the subject interviews:

> 9. As to defense counsel's contention that *Brady* material was withheld by not providing defense counsel with the investigators' reports from the State Attorney's office, it is abundantly clear to this Court that those reports would have assisted defense counsel in impeaching Olivia Gonzalez Mendoza, but that she was sufficiently impeached to a point where they needed not even call the polygraph examiners to impeach her testimony.[5] Thus, the testimony of the prior co-defendant was

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[4]In footnote 11 of Defendant's Initial Brief, she posits the lower court's alleged error in its materiality analysis upon the prosecutor's comment that "things be spelled out" to make a clear record in a capital case. However, the prosecutor merely commented that in order to create a clear record for appellate review, the specific basis for defense counsel's strategic decision be explained on the record, i.e. defense counsel chose to forego calling the Slatterys when their testimony would be cumulative to evidence elicited on cross-examination and would forfeit Defendant's "sandwich" during closing. (R. 1179-80) This cite is clearly inapposite to Defendant's contention that the lower court erred in its analysis of materiality under *Brady*.

[5]Indeed, Mr. Kassier, Defendant's trial counsel, testified at the evidentiary hearing that because he successfully impeached Gonzalez on cross-examination there was no need to call the Slatterys for further impeachment, as such would have been cumulative. (R. 1079)

> not necessary to obtain defendant's conviction. Thus there was no prejudice to the defendant by failing to produce the 2 reports, or the proffer letter from Gonzalez Mendoza's attorney.

(S.R. 935)

Thus, as this claim pertains to Defendant's guilt phase, there existed no reasonable probability that result of her trial would have been different. As such, the lower court properly denied this claim.

(2) Alleged *Giglio* Claim as to Gonzalez's Testimony

Defendant next argues that the State violated *Giglio v. United* States, 405 U.S. 150 (1972), by allegedly failing to correct Gonzalez's false testimony concerning her discussions with the prosecutors prior to her trial testimony. In order to demonstrate a perjured testimony claim, Defendant must show:

> (1) that the testimony was false; (2) that the prosecutor knew the testimony was false; and (3) that the statement was material.

Craig v. State, 685 So. 2d 1224, 1226 (Fla. 1996); *see also Routly v. State*, 590 So. 2d 397 (Fla. 1991). "[M]ere inconsistencies in testimony by government witnesses do not establish knowing use of false testimony." *United States v. Lochmondy*, 890 F.2d 817, 822 (6th Cir. 1989); *see also United States v. Bailey*, 123 F.3d 1381, 1395-96 (11th Cir. 1997)(proof of perjury requires more than showing of mere memory lapse, unintentional error or oversight); *United States v. Michael*, 17 F.3d 1383, 1385 (11th Cir. 1994)(conflicts in testimony are insufficient to show perjury).

Defendant erroneously predicates her alleged *Giglio* claim upon two portions of Gonzalez's testimony, which when viewed in context, clearly demonstrate that Defendant cannot meet her burden of establishing: a) the testimony was false or b) the State was aware the testimony was allegedly false.

The first portion of Gonzalez's testimony that Defendant now contends was false concerns the prosecutor's question to Gonzalez about whether she had discussions with anyone about her case. (D.A.R. 2932-33). Gonzalez had testified that she had never struck Lazaro on his head with a baseball bat. (D.A.R. 2933) In order to explain the context of a prior inconsistent statement Gonzalez made to Brian Slattery that she may have, in fact, struck Lazaro in the head with a bat but not remembered it, the prosecutor attempted to segue the direct examination into Gonzalez's conversation with Mr. Slattery. However, when the prosecutor asked Gonzalez whether she remembered discussing the case with anyone, Gonzalez initially said no. (D.A.R. 2932) Thus, to refresh Gonzalez's memory of the Slatterys' polygraph examinations, at which Dr. Haber was present, the prosecutor followed up with specific questions about whether Gonzalez recalled speaking with the Slatterys and Dr. Haber about her case. (D.A.R. 2933) Gonzalez answered in the affirmative. (D.A.R. 2933) Then, the prosecutor moved directly into the prior inconsistent statement Gonzalez had made that she could have hit Lazaro in the head with the bat while under drugs but not

remembered it. (D.A.R. 2934) Obviously, the prosecutor was correcting Gonzalez's misstatement that she had not discussed the case with anyone in order to steer Gonzalez into discussing the damaging prior inconsistent statement to Brian Slattery and Dr. Haber that she struck the victim with a baseball bat. The full excerpt of Gonzalez testimony on this point demonstrates that the prosecutor was not attempting to give the false impression that Gonzalez had never discussed her involvement in the case with the State. As such, the lower court properly denied this claim.

The second comment that Defendant argues constitutes a *Giglio* claim merely reflects a truthful answer to defense counsel's question:

> Q: Well, we'll get into when you said that. Now Miss Gonzalez, you recall that the day you pled guilty to murder and pled guilty to aggravated child abuse was Friday, the 14th, Valentine's Day; correct?
>
> A: Yes.
>
> Q: And *at that time* you had not had discussions with the prosecutors about your case; had you?
>
> A: No.
>
> Q: But you had discussions with your attorney, Mr. Fleisher; correct?
>
> A: Yes.
>
> Q: And you knew that you had made several trips to the offices of George and Brian Slattery to talk to them about your case?
>
> A: Yes.

(D.A.R. 2944)(emphasis added) Simply stated, there is no false

testimony necessitating correction. Gonzalez had not had any discussions with the prosecutors, Ms. Vogel and Ms. Campbell, prior to entering her plea. Both Ms. Vogel and Ms. Campbell testified at the evidentiary hearing that the only instances in which they talked to Gonzalez about the case were shortly before Defendant's trial as part of standard pre-trial preparation of witnesses and during her direct testimony during trial. (R. 952-53, 973-74) While Gonzalez was interviewed by investigators from the State Attorney's Office and was subjected to polygraph examinations by the Slatterys, which was discussed both on direct and cross-examination, she did not discuss her case with prosecutors prior to entering her plea to the court. Despite Defendant's supposition, the prosecutors' testimony on this issue is unrebutted; Gonzalez did not testify otherwise at the evidentiary hearing and Defendant produced no evidence to the contrary. Thus, *Craig v. State*, 685 So. 2d 1224 (Fla. 1996) is clearly inapplicable. In *Craig*, the prosecutor affirmatively misled the jury to believe that the co-defendant, who testified against the defendant at trial, was serving two consecutive life sentences for murders when the prosecutor knew that the co-defendant had already been granted work release and the defense was unaware of such fact. *Id.* While the jury in *Craig* was deprived of its ability to fully assess the co-defendant's credibility because of the prosecutor's misrepresentation, Defendant's jury was not presented with any such

misrepresentation and was fully able to assess Gonzalez's credibility. As the testimony was not false, the lower court properly denied this claim.

(3) Alleged *Brady* Violation Regarding Dr. Hyma

Defendant also contends that the State committed a *Brady* violation by failing to disclose Officer Schiaffo's one page police report, which included the following line concerning Dr. Hyma's conclusion of cause of death: "Dr. Hyma advised that the cause of death was from trauma to the head further a massive ceribal [sic] Hematoma to the front left lobe extending to the top of the skull." Not only did Defendant fail to establish at the evidentiary hearing that her defense counsel did not possess this report, but defense counsel conceded he was aware of Dr. Hyma's assessment and that Dr. Hyma's testimony at trial was consistent with Officer Schiaffo's summary in the report:

> Q: Looking at Defense Exhibit O, I believe it is O. It is the police report that was written by Police Officer Schiaffo. In the police report it mentions that someone told Schiaffo that Dr. Hyma said the child died of being struck on the head.
>
> A: That is what it says in the report, yes.
>
> Q: Okay. And do you remember Dr. Hyma's testimony? Correct?
>
> A: Yes.
>
> Q: All right. Now, Dr. Hyma said that the child died of child abuse. Right?
>
> A: Correct.

Q: But he also said that the fatal blow had do with the brain, shearing of the brain of Lazaro Figueroa. Wouldn't that be correct?

A: That is my recollection of his trial testimony, yes.

Q: Which would be consistent with a one line sentence of what Dr. Hyma had told whoever went to the autopsy.

A: Yes.

(R. 1163-64)

Thus, Defendant cannot satisfy the requirement that defense counsel did not possess or could not have reasonably obtained the information in Officer Schiaffo's report. Furthermore, Defendant cannot establish that had the report been suppressed, she would have been prejudiced. Indeed, Dr. Hyma testified at trial that Lazaro suffered a fatal blow to his brain:

> If the brain twists enough, it can actually tear the small nerve fibers in the parts of the brain. What has resulted here, the nerve fibers have been ripped apart from each other in this part of the brain.
>
> * * *
>
> This is a fatal injury. This injury however is sufficient to cause death but it's not necessary in this case. Lazaro has so many other injuries, that this injury is not necessary to explain death.
>
> (D.A.R. 3267)

Dr. Hyma's testimony detailing the extensive injuries Lazaro suffered over the course of his short life spanned approximately 40 pages of transcripts. (D.A.R. 3229-69) Additionally, Dr. Hyma testified that Lazaro also suffered the beginning ravages of meningitis that would have eventually killed him if untreated.

(D.A.R. 3268) Thus, when viewed within the bleak context of Lazaro's countless lacerations, bone fractures, hematomas, dehydration and malnutrition, bed sores, burn scars, decaying abscesses, bacterial infection, and blunt trauma wounds resulting from Defendant's systemic and chronic aggravated child abuse over the course of 18 months, the fatalness of Lazaro's final brain shearing is nearly inconsequential because Lazaro would have succumbed to any of a host of other injuries eventually. Indeed, this court noted in its opinion:

> According to the medical examiner, although this injury was fatal, Lazaro was already dying from his other injuries at the time the final blow was inflicted.
>
> * * *
>
> Lazaro Figueroa died from child abuse and neglect. Lazaro didn't die from one particular injury. Lazaro was physically abused over months of time.

Cardona 641 So. 2d at 363.

Moreover, Officer Schiaffo authored the report that merely summarized Officer Shiaffo's understanding of what Dr. Hyma had advised *another* officer regarding Lazaro's cause of death. Thus, even if the report had been inconsistent with Dr. Hyma's testimony at trial, Dr. Hyma did not author the subject report. Thus, any impeachment value from hypothetical inconsistencies between Dr. Hyma's trial testimony and the police report would be extremely minimal. *Morton v. State*, 689 So. 2d 259, 264 (Fla. 1997).

As Defendant cannot satisfy the requirements of *Brady*, the

lower court properly denied this claim.

(4) Alleged *Brady* Violation Regarding Elizabeth Pastor

Defendant also argues that the State violated *Brady* by failing to disclose to the jury that the State allegedly promised Pastor "consideration" for her testimony. This claim is wholly without merit.

Ms. Vogel testified unequivocally at the evidentiary hearing that she never promised any special consideration for Pastor nor that Pastor ever asked for such consideration. (D.A.R. 960-961). Indeed, this testimony is unrebutted because Defendant failed to present any evidence whatsoever at the hearing that (1) Ms. Pastor thought she was promised "consideration" by the State at the time of her cooperation and testimony at trial or (2) that the State was aware that Ms. Pastor might have thought she was being promised such "consideration" for her testimony at trial. As such, there is no *Brady* violation as the State did not withhold any favorable or impeachment evidence from the defense. *See Breedlove v. State*, 580 So. 2d 605 (1991).

Defendant erroneously relies upon a letter from Pastor's attorney in an unrelated matter written eight months after Defendant's trial that informed Ms. Vogel that Ms. Pastor believed that the State would make "every effort to secure some consideration for her" at the sentencing on her drug charges. However, Ms. Pastor had already been convicted of the drug charges

when Ms. Vogel contacted her concerning Defendant's case. (D.A.R. 932) As Ms. Vogel explained, writing the letter to the sentencing judge in Ms. Pastor's case out of courtesy eight months after Defendant's trial was the extent of any effort expended on Pastor's behalf:

> Q: Okay. And did you - the letter that you wrote, was it something that you had promised Ms. Pastor that you were going to write?
>
> A: No. Her case I guess wound up on appeal and it was sent back for resentencing on - it was drug charges and there was a minimum mandatory sentence. So there was not really anything statutorily that would require mitigation, so I would not have promised her something I could not do. I never talked to the State Attorney's Office up there. I never did anything like that. I just simply wrote the letter.
>
> (R. 933-34).

Events that occurred well after Defendant's trial and the time at which Pastor cooperated with the State do not establish that Pastor was promised any consideration from the State for her testimony as Defendant alleges. Defendant failed to present any evidence at the hearing that refuted Ms. Vogel's testimony that she never promised Pastor any consideration for her testimony or that Pastor ever asked her for consideration. Consequently, Defendant cannot establish that the State withheld material and exculpatory evidence and/or presented misleading evidence concerning Pastor's sentencing in an unrelated criminal case. Thus, the claim was properly denied.

Furthermore, even if there had been a *Brady* violation, there is no reasonable probability that this evidence would have changed the outcome of the proceedings. Ms. Pastor was only one of many witnesses who testified about how Defendant acted around Lazaro, her testimony comprising less than seven pages of transcript including cross-examination. (D.A.R. 2647-54) She testified that on one occasion Defendant had brought Lazaro to her home with bruises to his eye, chin and arm, but that Defendant had stated that J[redacted] had taken Lazaro to the park and that Lazaro had fallen. She also testified that Lazaro was kept in the front seat of the car when Defendant would visit. She further testified that Lazaro was always full of snot, very thin, and wearing only a pullover shirt and diaper. (D.A.R. 2643-46) However, in cross-examination, Ms. Pastor stated that she never saw Defendant use excessive discipline or abuse Lazaro and that Gonzalez was rude, angry, and had a bad manner around children. (D.A.R. 2648, 2654) Thus, although her testimony was damaging to Defendant, it was also helpful in the suggestion that it was Gonzalez who was the abuser.

As Defendant cannot establish that there exists a reasonable probability that result of her trial would have been different if the defense had known that Pastor was allegedly promised "consideration" for her testimony, the lower court properly denied this claim.

(5) Alleged Failure to Adequately Cross-examine Dr. Haber

Defendant next alleges that defense counsel was ineffective for failing to adequately cross-examine Dr. Haber concerning three police reports showing that Gonzalez had previously been arrested for battery and Gonzalez's prior statements to George and Brian Slattery. Defendant relies upon *Mendoza v. State*, 700 So. 2d 670, 677 (Fla. 1997); *Valle v. State*, 581 So. 2d 40 (Fla. 1991); and *Parker v. State* 476 So. 2d 134, 139 (Fla. 1985) for the proposition that Dr. Haber should have been impeached with Gonzalez's prior criminal history. However, the aforementioned cases all hold that it is proper to cross-examine an expert as to his *knowledge* of appellant's involvement in other crimes. *Id.* Thus, defense counsel would only have been entitled to ask Dr. Haber at trial whether she was aware of Gonzalez's prior arrests. In the instant case, Defendant failed to call Dr. Haber at the evidentiary hearing to establish whether she knew of Gonzalez's prior arrests or whether the incident reports would have been altered her opinion that Gonzalez was a dependent personality. To the extent that Dr. Haber had no knowledge of the reports, Defendant would not have been able to impeach her beyond simply asking whether she was aware of the existence of the such reports.

Additionally, Defendant alleges that defense counsel failed to cross-examine Dr. Haber about Gonzalez prior statement to George Slattery that she had previously hit Lazaro with a baseball bat. However, defense counsel in fact asked Dr. Haber about attending

Gonzalez's interview with George Slattery, and Dr. Haber averred that she had attended the interview. (D.A.R. 3042) Defense counsel then cross-examined Dr. Haber about Gonzalez's denial she had struck Lazaro with the baseball bat and about Gonzalez's failure to be honest and straightforward at first. (D.A.R. 3038, 3042, 3044) Gonzalez had testified prior to Dr. Haber and had been subjected to extensive cross-examination concerning her failure to initially admit to having struck Lazaro with a bat or participate in any of the abuse. Thus, defense counsel had already provided the context of Gonzalez's conflicting statements to Dr. Haber and the Slatterys.

In fact, at the evidentiary hearing, Mr. Kassier testified that his strategy with regard to Dr. Haber's cross-examination was to convey to the jury that (1) Dr. Haber had formed "a certain relationship" with Gonzalez that led to Dr. Haber's bias when evaluation Gonzalez's and Defendant's relationship with one another and (2) Dr. Haber had based her opinion about Gonzalez primarily upon what Gonzalez herself advised Dr. Haber. (D.A.R. 1132) This strategy dovetailed with Dr. Haber's direct examination, in which she testified that Gonzalez "attached herself to" Dr. Haber during the course of their contact. (D.A.R. 3032) Indeed, Mr. Kassier deftly questioned Dr. Haber at trial about the fact that her analysis was based predominantly on her interviews with Gonzalez and that Gonzalez was particularly "at ease" with Dr. Haber due to

their close rapport. (D.A.R. 304-42) Defense counsel cannot be deemed deficient merely for his strategic decision to pursue a different theme during his cross-examination than what Defendant now pleads on post-conviction should have been taken. *Van Poyck v. State*, 694 So. 2d 686 (Fla. 1997); *Card v. Dugger*, 911 F.2d 1494, 1507 (11th Cir. 1990).

The State further submits that Defendant misinterprets Dr. Haber's testimony. Defendant did not testify that Gonzalez could never be violent toward someone else. In fact, Dr. Haber testified that there are always arguments within the battered spouse relationship and that sometimes the battered spouse will fight back but will never win. (D.A.R. 3029) She further testified that Gonzalez had a dependent personality, which caused her to fear that she would be rejected by her mother if her mother were to discover she was a homosexual as Defendant threatened. (D.A.R. 3030) She also testified that Gonzalez was attached to Defendant because of Defendant's acceptance of Gonzalez's homosexuality, Defendant's rewards of "wonderful sex," and Defendant's beauty in the face of Gonzalez's self-perceived ugliness. (D.A.R. 3030-31) Because Gonzalez was afraid to lose all of these perceived benefits, Gonzalez stayed in the relationship. (D.A.R. 3030) Thus, the theme of Dr. Haber's testimony was not simply that Gonzalez lacked the capacity to be violent as Defendant suggests, but rather that Gonzalez had a dependent personality that fixed in her a

destructive relationship with Defendant. As such, Dr. Haber's testimony would not have been significantly undermined by the presentation of the police reports.

Furthermore, Dr. Haber's testimony was corroborated by the testimony of: Lorenzo Pons, who testified that Defendant was as strong as Gonzalez and that Defendant never let anyone control her; Anselmo Lopez, who testified that Defendant was in control of the relationship; and Jose Calderon, who testified that Gonzalez was afraid of Defendant. (D.A.R. 2468, 2472, 2578, 2684) As the record demonstrates that counsel more than adequately cross-examined Dr. Haber, there is no reasonable probability that further cross-examination would have undermined Dr. Haber's conclusions. As Defendant can establish neither that counsel was deficient nor that she suffered any prejudice such that there would have been a different result in the guilt or penalty phase of Defendant's trial, the lower court properly denied this claim. *Strickland.*

(6) Alleged Ineffectiveness for Failing to Call the Slatterys

Defendant also contends that counsel was ineffective for failing to call either or both Brian and George Slattery, the persons who administered the polygraph examinations to Gonzalez to impeach her trial testimony. However, the record illustrates that in fact defense counsel effectively impeached Gonzalez during her cross-examination with the admissions she made to the Slatterys. (D.A.R. 2988, 29991) Specifically, Defendant complains that the

Slatterys should have been called to testify that Gonzalez admitted to them: she hit Lazaro with a belt; she hit Lazaro with a broomstick; she struck Lazaro with a bat; she hit Lazaro with other objects; she "threw Lazaro up against a door and split his lip;" she initially tried to point the finger at Defendant for all the abuse; at one point she confessed that she could have killed Lazaro; and she provided different versions of the eighteen month period of torturous abuse Lazaro suffered in the final period of his life. In fact, *all of this testimony* was actually elicited from Gonzalez. (D.A.R. 2838, 2839, 2848, 2884, 2933-3429, 2947-48, 2950, 2971, 2972, 2978, 2979, 2981, 2985, 2987-88) Furthermore, Dr. Haber also testified that initially Gonzalez was not forthcoming in her participation in Lazaro's abuse and instead implicated Defendant exclusively. (D.A.R.3026) Nothing substantively would have been gained by calling the Slatterys as witnesses merely to repeat that evidence and duplicitously impeach Gonzalez with the same admissions that had already been elicited. Failure to present cumulative evidence does not constitute ineffective assistance of counsel. *See Occhicone v. State*, 768 So. 2d 1037 (Fla. 2000); *Reichmann v. State,* 777 So. 2d 342 (Fla. 2000); *Valle v. State*, 705 So. 2d 1331 (Fla. 1997).

In fact, at the evidentiary hearing, Mr. Kassier explained that the defense had subpoenaed both Slatterys for trial during which the Slatterys stood outside the courtroom ready and available

to testify if need be. (R. 1079) Nonetheless, after the defense's successful cross-examination of Gonzalez, there was no need to call either Slattery to testify. (R. 1079) Defense counsel explained his strategic decision to forgo the witnesses' testimony:

> Because after [Gonzalez] testified, it was our belief through either direct or cross-examination that we had gotten out of her and on the record what the Slatterys were going to testify to anyway. So it would have been repetitive."

(R. 1079) Defense counsel further testified that calling either or both of the Slattery witnesses would have forfeited the advantage of the defense's opportunity for rebuttal closing arguments, or the "sandwich." (R. 1079) Thus, defense counsel made a reasonable strategic decision to not present the witnesses' testimony. *See Van Poyck v. State*, 694 So. 2d 686 (Fla. 1997). As defense counsel's decision was part of his trial strategy, Defendant cannot establish she received deficient representation. *Haliburton v. State*, 691 So. 2d 466 (Fla. 1997). Likewise, Defendant cannot establish she suffered any prejudice from counsel's decision to omit the Slatterys' testimony because the impeachment evidence that the Slatterys' offered had already been adduced through Gonzalez's cross-examination.[6] As such, the lower court properly denied this claim.

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[6]The lower court specifically found in its order that defense counsel had "sufficiently impeached" Gonzalez with her prior admissions and inconsistent statements during cross-examination such that the Slatterys' testimony was not needed. (S.R. 935)

While Defendant casually notes in her brief that the Slatterys "may not have been permitted to testify to that the statements made by Gonzalez were made during the course of a polygraph examination and that she had failed," she nonetheless continues on to argue defense counsel was ineffective for failing to call the Slatterys to discuss their professional opinion that Gonzalez failed the polygraph examination. However, Florida law clearly holds that neither of the Slatterys would have been permitted to testify to their belief that Gonzalez was being deceptive or truthful with them. *See, e.g., State v. Townsend*, 635 So. 2d 949 (Fla. 1994); *Henry v. State*, 652 So. 2d 1263 (Fla. 4th DCA 1995).

Additionally, Defendant argues that Gonzalez should have been impeached with her alleged statement to the State Attorney's investigators in which she "openly admitt[ed] to striking Lazaro with the bat." Defendant cites in her brief to pgs. 1188-89 of the evidentiary hearing in support of this allegation; however, a review of that portion of the hearing reveals only that defense counsel testified that if Gonzalez had told investigators she hit Lazaro in the head with a bat that such statement would have been something significant with which to impeach Gonzalez. (R. 1188-89) The actual State Attorney investigator reports do not advise that Gonzalez made such an admission to investigators. Rather, it plainly reads only that "Ms. Gonzalez reports Lazaro Figueroa was physically abused with a belt, a broomstick, a plastic bat."

Accordingly, counsel's actions were neither deficient or prejudicial under the standards of *Strickland*. The lower court properly denied this claim.

(7) Alleged Failure to Rebut Battered Spouse Evidence

Defendant next alleges that defense counsel was ineffective for failing to present expert testimony that Defendant was the battered spouse to rebut Dr. Haber's testimony that Gonzalez was the battered spouse. Defendant contends that such testimony would have refuted Dr. Haber's findings and supported the defense theory that Gonzalez murdered Lazaro. Contrary to Defendant's assertion, defense counsel testified at the evidentiary hearing that he did investigate the battered spouse syndrome defense. (R. 1160-61, 1171, 1173). Furthermore, defense counsel's Statement of Services Rendered on Behalf of Maria Cardona reflect that he spent several hours researching the applicability of battered spouse syndrom. (D.A.R. 842, 844) After contemplating and researching such a defense, defense counsel strategically decided that such a defense would not be persuasive in light of the facts of Defendant's case:

> I felt it was inappropriate for that reason and also because we were not dealing with a crime committed by Ana against Olivia. And I felt it was really a stretch to try to convince the jury that Ana would have done these things to a child as a consequence of battered wife syndrom. . . ."

(R. 1171) Indeed, Florida law supports defense counsel's conclusion, as battered spouse syndrome evidence is admissible in

cases involving an abused spouse's theory of self-defense. *Weian v. State*, 732 So. 2d 1044 (Fla. 1999); *State v. Mizell*, 773 So. 2d 618 (Fla. 1st DCA. 2000). Lazaro, not yet three years old at the time of his death, had been subjected to severe neglect, malnourishment, dehydration, kept bound and gagged in a closet for entire days, and subjected to systemic beatings and abuse over the course of eighteen months. Clearly, Defendant could not entertain even the chimera of a self-defense theory against her unprotected son, such that battered spouse syndrome evidence would have benefitted her.[7] Additionally, Defendant concedes that her counsel testified at the evidentiary hearing that she never advised him that she was a battered spouse. Defense counsel further testified that the fact that Defendant never complained of being a battered spouse and that the lack of other evidence supporting Defendant being a battered spouse factored into his strategic decision to direct her defense in another direction. (R. 1161) Therefore, defense counsel's decision to avoid alienating a jury with a theory of battered spouse self-defense was a reasonable strategic decision. *Strickland.*

Moreover, Defendant failed to present an expert at her

[7]In its order, the lower court noted the fatuousness of applying this defense to Defendant's case: "As to the battered spouse syndrome, it was clear from defense counsel, Andy Kassier, that this could apply to issues between the two women, but such a defense would have nothing to do with the murder of the child for which the defendant was charged." (S.R. 934)

evidentiary hearing who could offer a concrete expert opinion concerning Defendant's battered spouse syndrome. Dr. Nathanson merely offered that Defendant had been beaten by Gonzalez and was financially and emotionally dependent on Gonzalez but offered no formal diagnosis that Defendant was a battered spouse nor did Dr. Nathanson offer an opinion that Gonzalez murdered Lazaro based on Defendant's "dependence" upon Gonzalez. (R. 1231) Similarly, Dr. Weinstein testified that Defendant was a "dependent individual" who "engages in relationships with people who are often very abusive" but did not specifically testify to a professional opinion that Defendant suffered from battered spouse syndrome. (R. 1394)

The testimony of Defendant's attorney and mental health experts at the evidentiary hearing established that counsel investigated the battered spouse theory and strategically decided not to pursue it, and that any failure to further investigate this area was not a deficiency that would have resulted in a reasonable probability that the outcome of the proceedings would be different. *Strickland.*

(8) Alleged Failure to Present the "Abbott Avenue Defense"

Defendant alleges that trial counsel was ineffective for not presenting the defense involving a teenager named Gloria Pi, who allegedly babysat Lazaro and who had confessed to the murder. The record clearly establishes that counsel thoroughly investigated this defense. (D.A.R. 844-847) Defense counsel's witness lists

dated December 30, 1991, and January 30, 1992, reflect those parties whom Defendant contends in her brief had knowledge of this alleged defense. (S.R. 841-42, 844-45) Additionally, depositions or sworn statements investigating this issue were taken from Rose Lesniak, Miriam Ramos, Mercedes Estrada, Gloria Pi, Joyce Venezuela, Det. Joe Matthews, Det. Gary Sciaffo, Det. Paul Scrimsaw, Lt. W. O'Neil, Debra Soba, Karen Malove, Lucille Malove, Pete Lendon, Yvette Torres, Nefali Albino, Cornelia Swait, Ismet "Peny" Lopes, Iris Calero, Joan Robinson, Isabella Afandor, Beverly Batch, James Lopriano, and Cherry Jenkins.

At the evidentiary hearing, defense counsel Gainor testified that the defense in Defendant's case evolved and had initially encompassed a number of theories that included the "baby sitter out on Miami Beach," or the Abbott Avenue defense. (R. 1045) He further testified that this defense was taken "seriously" and that he "had it investigated actively." (R. 1046) However, after extensive examination, he concluded that the more he "investigated it and took it apart, [he] realized that it would not have the significance in front of the jury that we though it might have in the beginning." (R. 1047) Specifically, Mr. Gainor testified that once Gonzalez became a State witness, his approach to Defendant's defense and the possibility of employing the Abbott Avenue defense drastically changed and the focus of the defense shifted toward implicating Gonzalez. (R. 1054) Similarly, with respect to

presenting the Abbott Avenue defense in the penalty phase, Mr. Gainor testified that he discussed the decision but made a strategic decision not to risk alienating a jury with presenting the information at first blush at the penalty phase: "frankly, we figured at this point if it was not brought up in front of the jury that had decided that she was guilty, we probably would not get away with that tactic." (R. 1053) As the evidence in the trial record and the testimony at Defendant's evidentiary hearing firmly establish that defense counsel thoroughly researched the Abbott Avenue defense but opted for a strategy of different defense, counsel clearly cannot be deemed deficient for failing to investigate and present evidence related to this issue. *Strickland*. Moreover, even if counsel had overlooked this defense, Defendant would not be able to establish any prejudice under the facts of her case: Lazaro suffered continued and horrific abuse over the course of eighteen months in which he was in the sole custody of Defendant. Accordingly, the lower court properly denied this claim.

(9) Alleged Failure to Move Venue

Defendant alleges that counsel was ineffective for failing to request a change of venue. This claim is without merit and conclusively refuted by the record. At the conclusion of trial, Mr. Gainor filed a motion for attorneys fees that set forth his preparation and activity in the case and included 6.5 hours for

researching and preparing a motion for change of venue. (D.A.R. 841-42) The same motion also indicates that Mr. Gainor spent time preparing voir dire questions about the publicity in the case. (D.A.R. 842) Most importantly, the trial transcripts reflect that each prospective juror was questioned about any publicity they had heard about the case, that those who expressed any knowledge were questioned individually, and that those who could not set aside what they had heard and determine the case only on what occurred in the courtroom from the witnesses and evidence were excused for cause. (D.A.R. 1378-1553, 1861-1974, 1555, 1883, 1906, 1915, 1929, 1932, 1936, 1955, 1963) All but five members of the jury panel raised their hands when asked whether they had heard of Defendant's case in the media. (D.A.R. 1378) Nonetheless, after individual questioning only thirteen jury panelists out of fifty were not able to serve because of preconceived ideas they had formed about the case due to media coverage. (D.A.R. 1556) Thus, there would have been no grounds to move for a change of venue. *See Patton v. State*, 25 Fla. L. Weekly S749 (Fla. Sept. 28, 2000); *Rolling v. State*, 695 So. 2d 278 (Fla. 1997); *Provenzano v. Dugger*, 561 So. 2d 541 (Fla. 1990).

Additionally, Mr. Gainor reiterated at the evidentiary hearing that he had researched and discussed moving for a change of venue but had made a strategic decision to not pursue a change of venue once Gonzalez flipped. Due to the potentially controversial

aspects of the defense, defense counsel decided that there was some advantage to sticking with a Dade County pool that offered the "chance of getting some measure of liberality," rather than risking a move to a small town in Florida that could be less receptive to the defense. (R. 1072)

As defense investigated changing venue but made a strategic decision to forgo a motion to change venue, he cannot be deemed deficient especially in light of the unlikelihood he would have prevailed on such a motion. *Sireci v. State*, 773 So. 2d 34 (Fla. 2000). Furthermore, Defendant failed to establish any evidence that any member of the jury was affected by the media coverage, such that she suffered any prejudice from defense counsel's decision to failure to move venue. As Defendant cannot satisfy either deficiency or prejudice with respect to this claim, the lower court properly denied this claim.

(10) Alleged Failure to Object

Defendant's final claim of Argument I alleges that defense counsel was ineffective for failing to object to "inflammatory, irrelevant, and outrageous statements made by the prosecution during closing arguments." Specifically, Defendant asserts the prosecutor's comments that Lazaro was destined to die at Defendant's hands from the time he was born and that it will be Defendant who will be laughing if she is convicted of anything less than first degree felony murder were improper. (D.A.R. 3361-62,

3362-63). Defendant also complains that counsel did not enforce the trial court's order during trial that prohibited the prosecutors from referring to the victim as "little baby Lazaro," and that the prosecutor referenced the victim as "little baby Lazaro" thirty-five times in her closing argument.

The State submits that this claim is procedurally barred in that it could have or should have been raised on direct appeal. *Robinson v. State*, 707 So. 2d 668 (Fla. 1998). Furthermore, it is improper to raise the claim in terms of ineffective assistance of counsel in an attempt to avoid the procedural bar. *Teffeteller v. Dugger*, 734 So. 2d 1009 (Fla. 1999); *Medina v. State*, 573 So. 2d 293 (Fla. 1990); *Kight v. Dugger* 574 So. 2d 1066 (Fla. 1990).[8]

Moreover, the comments by the prosecutor were not improper but fair comment upon the evidence, defense counsel's questioning of Gonzalez, and defense counsel's closing argument. (D.A.R. 2950-51, 3335, 3347) As the medical examiner testified, Lazaro's autopsy revealed he suffered the beginning ravages of meningitis, in

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[8]Defendant relies upon *Mordenti v. State*, 711 So. 2d 30, 32 (Fla. 1998), to assert that counsel's failure to object to the prosecutor's improper comments "is a constitutional error which warrants an evidentiary hearing." However, *Mordenti* involved a trial court issuing an order summarily denying the defendant's motion for post-conviction without either having held an evidentiary hearing or a *Huff* hearing to afford the defendant the opportunity to even argue why an evidentiary hearing was warranted. *Id.* at 31. This Court ruled that such was error and ordered the lower court to hold a *Huff* hearing within 30 days. *Id.* at 32. In the instant case, the lower court held both a Huff hearing and an evidentiary hearing and properly denied this claim as procedurally barred.

addition to various brain injuries, including the fatal brain shearing, as well as countless lacerations, bone fractures, hematomas, dehydration and malnutrition, bed sores, burn scars, decaying abscesses, bacterial infection, and blunt trauma wounds. (D.A.R. 3229-69) Lazaro was born to Defendant and in her custody for majority of his short life. The evidence further established that Defendant left Lazaro with a succession of caretakers during the first half of his life, who sadly provided at least minimum care that Defendant withheld during the second half of Lazaro's life when he remained with her, with no regard for his actual well-being. (D.A.R. 2368, 2374-78, 2339-41, 2350) During the periods in which Lazaro was with such caretakers, at times upwards of several weeks or months, Defendant never visited Lazaro. (D.A.R. 2368, 2374-78) At one point, Carlos Lima and Susie Hernandez had been caring for Lazaro for several months without hearing from Defendant and only after the threat of a notification to HRS did Defendant return to pick up Lazaro. (D.A.R. 2378) Hence, the evidence establishes that throughout Lazaro's life, Defendant manifested a complete disregard for his well-being and chronicly abused him, such that Lazaro would have succumbed to some eventual fatality. Hence, the prosecutor's comment he was destined to die accurately reflected the evidence presented at trial.

Similarly, the prosecutor's comment that Defendant would be the one laughing if she were to be convicted of less than first

degree felony murder was fair reply to defense counsel's closing argument. Defense counsel argued that Gonzalez would be "laughing at all of us" if she testified successfully against Defendant and then received a light sentence for her testimony and was out on the street in twenty-two years. (D.A.R. 3347)

The references to "little baby Lazaro" in closing were not improper because that was how the witnesses had referred to the victim. Trial counsel had objected to the prosecutors framing their questions to the witnesses by using the reference of "little baby Lazaro." Counsel recognized, however, that there was a difference between how the prosecutors referred to the victim in their questioning of the witnesses and how they characterized the victim in closing argument. (D.A.R. 2671) *See Thomas v. State*, 748 So. 2d 970 (Fla. 1999); *Breedlove v. State*, 413 So. 2d 1 (1982). Even if the comments and references by the prosecutor were improper, they were not of such a nature that counsel's failure to object to them was reasonably likely to have caused a different outcome of the proceedings. As such, counsel cannot be deemed ineffective.

Defendant also alleges that counsel was ineffective for failing to request that the jury be voir dired on an outburst by an individual named Carmen Traya, who stated that "They still say justice exists" after the jury had returned a guilty verdict and was being instructed on the upcoming penalty phase. (D.A.R. 3419)

This claim is wholly without merit and was therefore properly summarily denied by the lower court. There was no basis to question the jury concerning Ms. Traya's statment. Assuming that the jury had heard the statement, it was nothing more that a comment agreeing with the guilty verdict that the jury had already returned. The statement made no comment on Defendant or what an appropriate sentence should be. Thus, the statement could not in any way have influenced the jury as to what sentence they should recommend. As such, the lower court properly found counsel was not effective for failing to ask the trial court to voir dire the jury on a non issue.

ARGUMENT

II. DEFENDANT'S CLAIMS OF NO ADVERSARIAL TESTING DURING THE PENALTY PHASE OF HER TRIAL ARE MERITLESS.

Defendant contends that she was deprived of adequate adversarial testing during the penalty phase of her trial. She bases her claim on: (1) defense counsel's alleged failure to present mitigation evidence pertaining to Gonzalez's participation in the murder; (2) defense counsel's alleged improper use of mental health experts; (3) defense counsel's alleged failure to present Abbott Avenue evidence as mitigation; (4) defense counsel's alleged failure to introduce Gonzalez's polygraph results; and (5) defense counsel's alleged failure to object to constitutional error. Defendant also complains the trial court erroneously found the murder was heinous, atrocious, and cruel (HAC), and only gave little mitigating weight to Defendant's substantially impaired capacity to appreciate the criminality of her conduct or conform her conduct to the requirements of the law, and that Defendant was not acting under duress or the domination of Gonzalez.[9] However, these complaints clearly relate to the sufficiency of the trial court's sentencing order, which is not properly raised on post-conviction. Moreover,

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[9]Whether a mitigating or aggravating circumstance has been established by the evidence is subject to the competent substantial evidence standard of appellate review and the weight given to a mitigating circumstance is within the trial court's discretion and subject to the abuse of discretion standard. *See Campbell v. State*, 571 So. 2d 415 (Fla. 1990); *see also Kearse v. State*, 770 So. 2d 1119 (Fla. 2000).

Defendant concedes that the trial court's order reflects "statutory and nonstatutory mitigation was considered and found."

(1) Alleged Failure to Present Evidence of Gonzalez's Involvement

Defendant next argues that defense counsel was ineffective during the penalty phase of Defendant's trial because, just as Defendant argued with respect to the guilt phase, counsel failed to present evidence demonstrating Gonzalez's involvement in the murder. Defendant contends that this evidence affected the penalty phase issues of relative culpability and the applicability and/or weight of HAC. However, any issue regarding the lower court's finding and weight of HAC and relative culpability[10] could have or should have been raised on direct appeal, and therefore is procedurally barred. *Francis v. Barton*, 581 So. 2d 583 (Fla. 1991). Recasting a procedurally barred claim in terms of ineffectiveness of counsel does not raise the bar. *Robinson v. State*, 707 So. 2d 668, 697-99 (Fla. 1998).

Moreover, a review of this claim reveals that Defendant complains not that defense counsel failed to present evidence of Gonzalez's involvement in the murder but rather that counsel allegedly failed to present evidence of Gonzalez's prior

[10]Defendant, in fact, appealed the trial court's finding of that she was more culpable than Gonzalez and this Court found that "the record in this case supports the trial court's finding that Cardona was the more culpable of the two defendants. Thus, the disparate treatment is justified." *Cardona v. State* 641 So. 2d 361 (Fla. 1994)

inconsistent statements and prior arrests for battery. Specifically, Defendant complains that counsel failed to present: that Gonzalez gave prior inconsistent statements to the Slatterys; that Gonzalez initially gave Dr. Haber a white-washed version of her participation in Lazaro's abuse and murder; and that Gonzalez had an incentive to lie and heap the blame on Defendant in order to avoid the death penalty. However, as discussed in Argument I, defense counsel did in fact exhaustively impeach Gonzalez with her prior inconsistent statements during Gonzalez's cross-examination and also extensively discussed the fact Gonzalez received the benefit of plea deal for her testimony. (D.A.R. 2937, 2991, 2954, 2972, 2985-86, 2976, 2993, 2940-47, 2948-50) As the jury heard prior inconsistent statements during the guilt phase, repetition of the inconsistent statements during the penalty phase would have been cumulative. Failure to present cumulative evidence does not constitute ineffective assistance of counsel. *See Reichmann v. State*, 777 So. 2d 342 (Fla. 2000); *Valle v. State*, 705 So. 2d 1331 (Fla. 1997).

Additionally, this impeachment evidence is not truly mitigating evidence at all but rather a thinly-veiled appeal to lingering doubt, i.e. Defendant may not actually be guilty because the State's witness could be lying. This Court has previously held that "residual doubt or lingering doubt of guilt is not an appropriate mitigating circumstance." *Sims v. State*, 681 So. 2d 1112, 1117

(Fla. 1996); *see also Bogle v. State*, 655 So. 2d 1103, 1107 (Fla. 1995), *cert. denied*, 516 U.S. 978 (1995). To the extent that counsel would not have been permitted to pursue a lingering doubt penalty phase theme with this impeachment evidence, he cannot be deemed deficient for failing to do so. *Teffeteller v. Dugger*, 734 So. 2d 1009 (Fla. 1999).

Defendant also complains that defense counsel was ineffective for failing to present in the penalty phase evidence related to the results of Gonzalez's polygraph tests, the proffer letter from Gonzalez's attorney, reports from State Attorney interviews, and police reports showing Gonzalez had been arrested for prior batteries. This evidence is also not truly mitigating in nature but only aimed at promoting lingering doubt, which as previously discussed is not proper mitigation evidence. Moreover, polygraph results are inadmissible. *See, e.g., State v. Townsend*, 635 So. 2d 949 (Fla. 1994); *Henry v. State*, 652 So. 2d 1263 (Fla. 4th DCA 1995). The letter was authored by Gonzalez's attorney as to what he *expected* Gonzalez to testify based on his discussions with his client and Defendant never established that Gonzalez authorized the contents of the letter. (R. 1225-26) In fact, the letter cautioned that it was merely "a basic proffer without any of the trimmings." (D.A.R. 1226) As such, the State submits that the proffer letter would not have properly been admissible as impeachment evidence against Gonzalez. *See Brockinton v. State*, 600

So. 2d 29, 30 (Fla. 2d DCA 1992). Additionally, the statements in the proffer letter and in the investigators' reports are essentially the same as, and are cumulative to, the statements which Gonzalez gave to the Slatterys, about which defense counsel cross-examined Gonzalez. Therefore, there is no reasonable probability that the outcome of Defendant's proceeding would have been different. *United States v. Bagley*, 473 U.S.667, S.Ct. 3375 (1985).

Defendant also argues that the jury should have been presented with Gonzalez's prior arrests for battery before she met Defendant, but such evidence had no bearing upon Defendant nor even does it substantiate Defendant's allegation that she was abused by Gonzalez. The only ostensible purpose of such evidence would be to impeach Gonzalez's testimony that she was the battered spouse in the relationship and therefore plant a seed of lingering doubt in the jury's mind as to Defendant's guilt. To the extent the arrests would be relevant to establishing a battered spouse syndrome theory of mitigation, defense counsel testified at the evidentiary hearing that he felt such a theory in the penalty phase was inappropriate:

> And I felt it was really a stretch to try to convince the jury that Ana would have done these things to a child as a consequence of battered wife syndrome.

(R. 1171) As defense counsel made a tactical decision to not pursue this theory of mitigation and risk alienating the jury or losing credibility, he cannot be deemed deficient. *Strickland*.

Finally, Defendant alleges that the jury should have been

advised during the penalty phase that the majority of abuse to Lazaro occurred after Gonzalez entered Defendant's life. However, this evidence was adduced during the guilt phase, and the jury was keenly aware of the schedule of Lazaro's demise through the testimony of lay witnesses and the medical examiner. Indeed, counsel argued in his guilt phase closing that the worse part of the abuse to Lazaro was evinced only during the time in which Gonzalez was living with Lazaro and Defendant. (D.A.R. 3341, 3354) As the jury heard this evidence and argument during the guilt phase, Defendant suffered no prejudice such that there exists a reasonable probability that the outcome of her penalty phase would have been different had counsel simply repeated this evidence and argument. *Strickland*.

(2) Allegedly Improper Use of Mental Health Experts

Defendant argues that she was denied effective assistance of counsel because counsel presented mental health experts whose testimony conflicted with one another and failed to call an available and competent expert who would have offered mitigating evidence that Defendant was retarded and brain damaged. Defendant contends that defense counsel erroneously presented the testimony of psychologists Dr. Dorita Marina and Dr. Alex Azan when Dr. Marina diagnosed Defendant with schizophrenia and Dr. Azan did not. However, the record of Defendant's trial, as well as Defendant's evidentiary hearing, demonstrate that defense counsel thoroughly

investigated mental health mitigating evidence, retained competent mental health professionals who conducted comprehensive examinations of Defendant, and made a strategic decision to present the most persuasive of such testimony to the jury.

Defendant's position that counsel's election of Drs. Marina and Azan was deficient due to their conflicting testimony is heavily compromised by a review of their actual testimony at trial. Dr. Azan administered the Minnesota Multiphasic Personality Inventory (MMPI) to Defendant in Spanish. (D.A.R. 3543) Dr. Azan testified that Defendant suffered from severe emotional problems, paranoia, suicidal ideation, and depression. (D.A.R. 3556, 3558) Additionally, Dr. Azan testified that her test results endorsed mental confusion and schizophrenia, and that the 8 scale of Defendant's exam indicating schizophrenia was "the highest point scale" of Defendant's results. (D.A.R. 3560) However, Dr. Azan declined to diagnose Defendant as schizophrenic because of the manner in which she "related to [him] and conducted herself during the evaluation." (D.A.R. 3559) Dr. Azan further opined that Defendant did not think the way "normal" people do, had "feelings of inferiority and insecur[ity]," lacked self-confidence and self-esteem, and was at high risk of hurting herself or severe behavior. (D.A.R. 3556-57) Additionally, Dr. Azan advised that the F scale of Defendant's test results, which could potentially indicate an invalid test, was elevated but that within the context of the entire

examination, he felt the test results were valid. (D.A.R. 3554)

Dr. Marina obtained an extensive psychosocial history from Defendant encompassing both Defendant's life in Cuba and in the United States. (D.A.R. 3622, 3629-36) Dr. Marina spent between seven and eight hours with Defendant, administered a neuropsychological questionnaire, the Wechsler Adult Intelligence Scale, neuropsychological tests, the Bender Motor Gestalt Test, the Thematic Apperception Test, the House-Tree-Person test, and extensive interviews with Defendant. (D.A.R. 3623-38) Dr. Marina testified that due to the length of time already spent with Defendant, she did not give Defendant the MMPI test, as Defendant's reading skills were inferior and reading the entire test to Defendant would have been too time consuming. (D.A.R. 3628) Dr. Marina specifically testified that her findings were consistent with those obtained by the MMPI performed by Dr. Azan: "Yes. They are very, very much in line." (D.A.R. 3638) As Dr. Azan previously testified, Dr. Marina opined that Defendant did not think normally. (D.A.R. 3645) Dr. Marina stated that Defendant's feelings merged with her thinking so that her thinking was distorted and that she "was not able to conceptualize" or deal with things logically and was susceptible to faulty judgment and poor decision-making. (D.A.R. 3645) Further, Dr. Marina opined that Defendant suffered from depression, feelings of insecurity and a "very, very negative" self concept. (D.A.R. 3650) Dr. Marina also opined that based upon

her tests and interview with Defendant, she felt Defendant was schizophrenic and paranoid. (D.A.R. 3644) Additionally, she diagnosed Defendant with high suicidal ideation. (D.A.R. D.A.R. 3652) She further testified that the high F score that Dr. Azan had noted in his findings correlated with her diagnosis of paranoia and schizophrenia. (D.A.R. 3639) Thus, while Dr. Azan did not diagnose Defendant with schizophrenia as Dr. Marina had, both psychologists opined Defendant suffered from emotional problems, depression, thinking disorders, poor self-esteem, suicidal ideation, paranoia and had indicia of schizophrenia. (D.A.R. 3650, 3644-45, 3638-39, 3556-57, 3559) Overall, the majority of their testimony was quite consistent.

Also important to note is that both Dr. Marina and Dr. Azan did not diagnose Defendant with retardation. Despite Defendant's I.Q. result within the retarded range, Dr. Marina unequivocally testified: "I do not believe she is retarded even though I obtained scores that show, that put her in the retarded range, I don't think she is retarded." (D.A.R. 3638) In fact, Dr. Marina's opinion is entirely consistent with the great number of other mental health professional who tested Defendant prior to trial. (R. 1168) The four court-appointed mental health experts, Dr. Stanford Jacobson, Dr. Gary Schwartz, Dr. Lazaro Garcia, and Dr. Anastacio Castellio, all opined that Defendant was not retarded and furthermore that Defendant malingered in order to falsify I.Q. results. (R. 1169,

3597) For instance, Defendant told Dr. Jacobson that 7 + 6 equaled 51, 2 + 2 equaled 0, and 1 + 1 equaled 3, while Defendant was able to perform more difficult tasks. (See State's Exhibit 1-D from the evidentiary hearing transcript) Dr. Garcia explained Defendant's misleading I.Q. scores within the retarded range during his deposition.[11] All the court-appointed experts who observed Defendant uniformly noted clinical impressions of Defendant inconsistent with someone who is retarded and indications that Defendant was deliberately not putting forward her best effort on the tests. Even Dr. Marina, Defendant's expert, testified that Defendant's I.Q. test results were "spuriously low." (D.A.R. 3667) Dr. Garcia testified at the evidentiary hearing that Defendant's cultural deprivation may have artificially depressed her I.Q. scores. Defendant scored 56 on the EIWA test performed by Dr. Nathanson on February 21, 1992, then scored 63 and 90 on much more difficult WAIS-R tests performed on March 2, 1992 and June 30, 1992 respectively. Dr. Garcia equated the discrepancy in the EIWA and WAIS-R tests to failing a third grade spelling test and then passing a bar exam shortly thereafter. (Pgs. 621, 623, 628-30 Deposition of Dr. Garcia) Thus, as defense counsel Mr. Kassier testified at the evidentiary hearing, the defense knew that the State had a large

[11] As Defendant noted in her brief, this portion of the evidentiary hearing was mislabeled April 18, 2000, and the clerk thus failed to include it in the record. Defendant indicated he filed a motion to supplement the record with this transcript.

arsenal to rebut Dr. Nathanson's facile diagnosis of Defendant's retardation. Moreover, at the time of trial no mental health expert who had examined Defendant, aside from Dr. Nathanson, was willing to testify that Defendant was retarded. (R. 1168) As he explained at the evidentiary hearing, defense counsel made a tactical decision to forgo presenting Dr. Nathanson's testimony, as such would conflict with Dr. Marina's opinion and be heavily rebutted by the State's witnesses. (R. 1170) Defense counsel is not ineffective for failing to present evidence that is inconsistent. *Cherry v. State*, 781 So. 2d 1040 (Fla. 2000).

Additionally, Defendant argues defense counsel was ineffective for failing to present the testimony of Dr. Nathanson *instead of* the testimony of Drs. Marina and Azan. However, as previously discussed, Dr. Nathanson's superficial diagnosis of Defendant's retardation would have been heavily impeached by the testimony of the State's mental health experts who examined Defendant.

Dr. Nathanson diagnosed Defendant as retarded based on "the entire context of everything that [he] did with Ana, all of his conversations and the test results" and noted his report that Ana could print her own name but could not read or write in Spanish (D.A.R. 1236) However, he did not specifically relate his finding to the diagnosis provided by Diagnostic and Statistical Manual on Mental Disorders (DSMIV), the accepted controlling authority on the criteria for retardation. Other than testifying that Defendant was

generally impaired in her adaptive skills, functionally illiterate, and "a scapegoat, . . .easily used by others," Dr. Nathanson did not enumerate Defendant's impairment in specific areas of adaptive functioning. Moreover, Dr. Nathanson's finding that Defendant was functionally illiterate were rebutted by several letters presented by the State at the evidentiary hearing in which Defendant successfully communicated with her prison doctor through written correspondence concerning the dosages of her medication. (See pg. 636, Dr. Garcia's deposition) Similarly, Dr. Nathanson's opinion that Defendant was merely a scapegoat used by others is clearly rebutted by Defendant's serial manipulation of others, including Gonzalez, to provide her room, board, and drugs. (D.A.R. 3742-43, 3724, 2788-89) Additionally, Vanda Martin, the assistant warden at Broward Correctional Institute, testified that Defendant competently communicated with her regarding other inmates in English, which belied the pretext that Defendant spoke Spanish only. (R. 1462-64) The evidence adduced that Defendant articulated her needs and concerns in English, serially manipulated others into providing for her, and thrived in the underground world of prostitution, illustrate she was not impaired in adaptive functioning, but merely adhered to a "different set of rules" as Dr. Garcia testified. (D.A.R. 3723) As Dr. Nathanson's opinion that Defendant was retarded would have been refuted by the testimony of the other available court-appointed experts and the evidence of Defendant's own

behavior, Defendant cannot establish she suffered any prejudice from defense counsel's failure to present Dr. Nathanson's testimony at the penalty phase. *Strickland*. Thus, the lower court properly denied this claim.

At the evidentiary hearing, defense counsel testified that his primary goal in the penalty phase was to establish that Defendant was "suffering from a major mental disturbance or defect at the time" of the murder. (R. 1144) Additionally, defense counsel testified that he felt it important for the jury to understand "who [Defendant] was" in an attempt to illuminate how Defendant could have permitted the death of her son. (R. 1144) The record demonstrates that Defendant's alleged retardation stood to be heavily rebutted and would have given the State the opportunity to introduce Defendant's chronic malingering on her I.Q. tests. Hence, defense counsel's tactical decision to opt for a major mental defect theme and emphasize Defendant's depression and other mental problems over retardation during the penalty phase was a reasonable one.

In addition to the scant support or corroboration of Dr. Nathanson's findings of retardation, Drs. Azan and Marina offered several material advantages over Dr. Nathanson. Defense counsel Mr. Kassier testified at the evidentiary hearing that several factors enabled Dr. Marina to establish a better rapport with Defendant than Dr. Nathanson could: Dr. Marina was a Cuban female; Dr. Marina was related to Defendant; and Dr. Marina was particularly adept at

interviewing Cubans who had migrated to the United States. (R. 1166) Counsel testified that he further based his strategic choice of experts on the fact that Dr. Marina had more experience testifying in court than Dr. Nathanson, who only started doing forensic work two years prior to Defendant's trial. (R. 1166)

Likewise, Dr. Azan also presented advantages over Dr. Nathanson. Dr. Azan had several years of experience performing forensic psychological examinations of inmates in New York and Florida. (D.A.R. 3540) Dr. Azan was also Hispanic and had worked as a doctral student in Minnesota together with two other doctors on the translation and adaptation of the MMPI for Hispanic subjects. (D.A.R. 3542) Dr. Azan's seminal contribution to the Spanish version of MMPI offered a depth of understanding with Defendant's test result, as well as credibility with the jury with regard to this key psychological tool. Conversely, Dr. Nathanson had primarily been involved with dolphin therapy programs for mentally impaired and physically disabled children and at the time of trial had only testified in court one prior occasion. (R. 1205, 1245) Furthermore, despite Defendant's allegation to the contrary, the record clearly shows that Dr. Azan was able to offer substantial corroboration of Dr. Marina's findings.[12] (D.A.R. (D.A.R. 3650, 3644-45, 3638-39,

[12]Defendant implies that because Dr. Azan testified prior to Dr. Marina it contributed to his lack of alleged corroboration to her testimony. However, this is a fatuous contention. Both State and defense witnesses were called out of turn at trial to accommodate conflicting schedules. Nonetheless, the jury was still

3556-57, 3559) Defense counsel's selection of Drs. Marina and Azan to support his theme that Defendant suffered from major mental defects and to offer mitigating evidence of such clearly followed his strategy for the penalty phase. As such, defense counsel was not deficient. *Strickland*.

Additionally, Defendant argues she was prejudiced by defense counsel's failure to elicit various mitigating evidence that Dr. Nathanson would have provided. Specifically, Defendant argues the jury should have heard that: she is retarded and brain damaged; she is a dependent person; she functions as an 8 year-old; she was subjected to prostitution and taken advantage of; she was emotionally disturbed at the time of the crime; she could not appreciate the criminality of her conduct or conform her conduct to the requirements of the law; and she was not anti-social. In fact, the jury did hear the vast majority of this evidence, though in different form.

The jury heard exhaustive testimony from Drs. Marina and Azan concerning Defendant's immaturity and dependent personality. (3647, 3556-58) Indeed, Dr. Marina testified that Defendant was "a very dependent person, a very immature person," incapable of making decisions and a level of incapacity "commonly found among

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able to assimilate all the evidence and testimony it heard regardless of the order of such testimony.

children."[13] (D.A.R. 3647, 3651) The jury heard extensive testimony regarding Defendant's early sexual abuse, that her teacher and the teacher's cousin took advantage of Defendant sexually and raped her while Defendant was in grade school. (D.A.R. 3631) The jury heard evidence that Defendant engaged in prostitution. (D.A.R. 3717) Indeed, Defendant informed Dr. Garcia that she created a regular enterprise for herself that included having sex with men and women, for which men would pay to watch. (D.A.R. 3717) In this manner, Defendant "knew how to manipulate the system," was "doing fairly well" within that subculture, earned roughly $600 a week, and "had achieved a position of. . . prominence." (D.A.R. 3717)[14]

Similarly, the jury heard Dr. Marina testify that Defendant lacked the capacity to appreciate the criminality of her conduct and was also unable to conform her conduct to the requirements of the law. (D.A.R. 3652-23) Dr. Marina also testified that Defendant was under the influence of extreme mental or emotional disturbance at the time of Lazaro's murder and abuse. (D.A.R. 3653) While neither Dr. Azan or Marina testified that Defendant was not anti-social to

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[13]Evidence of Defendant's alleged dependent personality rendering her incapable of leaving a lover, i.e. Gonzalez, was rebutted by evidence that Defendant had in fact left the father of her first child, as well as leaving the child of that union with the father. (D.A.R. 3665-66)

[14]Obviously, Defendant's own report to Dr. Garcia that she was on top and in control of a thriving underworld business refutes Defendant's contention on post-conviction that her practice of prostitution illustrated a victimized, passive and dependent person.

rebut Dr. Garcia's diagnosis, Dr. Marina was asked whether she felt Defendant's behavior was anti-social and replied in the negative. (D.A.R. 3669) There exists no reasonable probability that direct testimony that Defendant was not anti-social would have changed the outcome of the proceeding. After all, the uncontradicted evidence presented through all the witnesses at trial established that Defendant never worked or supported herself other than through prostitution, that she regularly abused drugs to the detriment and neglect of her children, and that she shop-lifted to fund her drug habit. (3717, 3681-83) Such facts embody the definition of anti-social provided by Dr. Garcia, and an ill-supported opinion by a hired expert would hardy have swayed a jury otherwise. In short, Defendant suffered no prejudice under *Strickland*.

Finally, Defendant claims that counsel was ineffective for failing to refer Defendant to follow-up neuropsychological testing based on Dr. Nathanson's recommendation in his report of February 2, 1992, that Defendant should be examined "neuropsychologically." In fact, Dr. Marina, a clinical psychologist, examined Defendant on February 26, 1992, and included a battery of neuropsychological tests. (D.A.R. 3623-28) In her report, Dr. Marina noted: "Most likely she suffered from a poor informal education also. Nevertheless, it can be noted that there are some indications in these sub-test scores that pin-point to organicity, and they are particular [sic] the scores on Picture Arrangement and Digit Symbol.

Both of these sub-tests are very much related to organicity." However, Dr. Marina did not diagnose Defendant with brain damage or recommend follow-up neurological evaluation for Defendant. Similarly, none of the other five mental health experts who examined Defendant at the time of her trial, Drs. Schwartz, Castiello, Garcia, Azan, and Jacobson opined Defendant's exams indicated the possibility of brain damage or recommended follow-up examination by a neuropsychologist. Having secured a number of mental health expert's examinations of Defendant, defense counsel's failure to have Defendant yet further tested specifically by a neuropsychologist was not unreasonable or deficient under the circumstances. Morever, even if defense counsel's failure to retain a neuropsychologist to evaluate Defendant had been deficient, Defendant cannot establish any prejudice. The only mitigating evidence that Defendant presented at the evidentiary hearing on this issue was the testimony of Drs. Nathanson, a psychologist, and Weinstein,[15] a neuropsychologist, who testified at the evidentiary hearing[16] that Defendant was retarded and brain damaged. As

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[15]Dr. Weinstein flew in from California to offer his opinion where he is board-certified and a graduate from a now-defunct tutorial institute in Los Angeles that offered none of its own courses but merely accepted credits from other universities. (R. 1360)

[16]Defendant alleges in his brief that the lower court exhibited a "lack of understanding of collateral proceedings" when he inquired of post-conviction counsel the purpose of Dr. Nathanson's testimony. However, a review of the evidentiary hearing clearly establishes that the lower court was merely attempting to maintain

previously discussed, none of the other numerous mental health experts that examined Defendant opined Defendant was either retarded or brain damaged. While Dr. Weinstein offered black-letter corroboration of Dr. Nathanson's diagnosis of retardation and brain damage, he seemed to ignore factors that were inconsistent with his diagnosis. For instance, when cross-examined about Defendant's lack of education skewing her I.Q. results downward, Dr. Weinstein equivocated that Defendant was not uneducated despite the fact that his records clearly indicated Defendant's schooling ceased in the fourth grade. (R. 1415)

Defendant cannot establish either deficiency or prejudice from counsel's choice of mental health expert testimony. As the lower court found in its order:

> "Numerous doctors examined her prior to trial. Other doctors using 20/20 hindsight today, who never examined her 8 years ago, have opined different opinions. Nevertheless, it is clear to this Court that defense counsel chose the doctors to testify which were inline with their strategy of showing that the defendant was schizophrenic and not either anti-social or mentally retarded."

(S.R. 934) *Elledge v. Dugger*, 823 F.2d 1439 (11th Cir. 1987), *cert. denied*, 485 U.S. 1014 (1988). Accordingly, the lower court properly denied this claim.

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an orderly presentation of the evidence by having post-conviction counsel indicate as to which of the several issues the testimony related. As it was not always evident from counsel's questions which alleged issue the testimony related, the lower court periodically inquired. (R. 1197, 989, 1022, 1081)

(3) Alleged Failure to Present the Abbott Avenue Evidence at the Penalty Phase

Just as Defendant alleged in claim (8) of Argument I pertaining to the guilt phase, she claims that defense counsel was ineffective in the penalty phase for failing to present the "Abbott Avenue" evidence. This Court has previously held that "residual doubt or lingering doubt of guilt is not an appropriate mitigating circumstance." *Sims v. State*, 681 So. 2d 1112, 1117 (Fla. 1996); *see also Bogle v. State*, 655 So. 2d 1103, 1107 (Fla. 1995), *cert. denied*, 516 U.S. 978 (1995). To the extent that counsel would not have been permitted to pursue a lingering doubt penalty phase theme with this impeachment evidence, he cannot be deemed deficient for failing to do so. *Teffeteller v. Dugger*, 734 So. 2d 1009 (Fla. 1999). Nonetheless, Defendant contends she was prejudiced because: the jury never heard Gloria Pi's confession; Dr. Marina's credibility was sacked when her testimony that Defendant took Lazaro to a babysitter was not corroborated; and counsel's penalty phase plan was inadequate.

Contrary to Defendant's assertions, Mr. Gainor testified at the hearing that the Abbott Avenue defense was taken "seriously" and he "had it investigated actively." (R. 1046) Mr. Gainor further explained that the thorough investigation into Gloria Pi, the fourteen year-old retarded girl who resided at Abbott Avenue, revealed that she had babysat Lazaro only one or two nights. (R. 1084) Hence, while evidence pertaining to this "Abbott Avenue"

defense was considered, it was ultimately not the focus of defense counsel's strategy either at the guilt or penalty phase for several reasons: Defendant conferred with counsel regarding her defense and conveyed that her position was that Gonzalez was responsible for Lazaro's murder and that Gloria Pi was not; Gonzalez became a witness for the State who was going to testify that Lazaro's death resulted from Defendant's abuse and neglect and not Gloria Pi; and the worst of Lazaro's abuse and injuries began a year and a half into the child's life terminating with his death at approximately three years old. (R. 1084-85). Thus, as Mr. Gainor elucidated: "[the various injuries were dated over different periods, a year and a half period, which would not be dealt with or explained through one or two baby-sitting sessions with Gloria Pi." (R. 1085) Indeed, Mr. Gainor properly concluded that attempting to pin Lazaro's horrific abuse and murder on a mentally-challenged young girl, who of necessity could not have inflicted the vast spectrum of injuries to Lazaro over the course of eighteen months, "would have backfired" and "affected [his] credibilty." (R. 1085) Consequently, for the same reasons Mr. Gainor decided to forgo presenting the evidence at the guilt phase, he chose not to present such evidence at the penalty phase. (R. 1053) Additionally, Mr. Gainor testified he did not want to risk alienating a jury with presenting the information at first blush at the penalty phase:"frankly, we figured at this point if it was not brought up in front of the jury that had decided

that she was guilty, we probably would not get away with that tactic." (R. 1053) As this was a strategic decision, counsel cannot be deemed ineffective. *Haliburton*.

Similarly, Mr. Kassier testified at the hearing that he also considered presenting the Abbott Avenue defense, but that for numerous reasons "the best strategy was going to be to indicate to the jury that Ms. Gonzalez was, in fact, the person who had caused the death of the child." (R. 1108) Although Mr. Kassier testified that he did not recall having any discussion with Mr. Gainor about presenting the evidence at the penalty phase, he also testified unequivocally that he had considered whether to present the Abbot Avenue evidence at the penalty phase. (R. 1111) Mr. Kassier also testified that his primary objective with respect to the penalty phase was to establish that Defendant "was suffering from a major mental disturbance or defect at the time...of the acts." (R. 1144) Hence, contrary to Defendant's assertions, Dr. Marina was effective in fulfilling defense counsel's objective for the penalty phase; Dr. Marina testified that Defendant suffered from a number of mental defects, lacked the capacity to appreciate the criminality of her conduct, and was also unable to conform her conduct to the requirements of the law. (D.A.R. 3652-23)

Defendant argues that counsel's failure to present the evidence related to Gloria Pi/Abbott Avenue weakened Dr. Marina's testimony in that the failure of defense counsel to adduce evidence that

Gloria Pi babysat Lazaro left Dr. Marina's testimony that Defendant took Lazaro to a babysitter uncorroborated and by inference implied Defendant was a liar. However, evidence had been adduced at trial that Defendant took Lazaro to a babysitter at various times. Thus, the jury had no reason to find Dr. Marina's testimony unbelievable. (D.A.R. 2361, 2392) Moreover, an examination of the portion of Dr. Marina's testimony to which Defendant cites in her brief refers to Defendant's allegation to Dr. Marina that Gonzalez had told Defendant she was taking Lazaro to a babysitter at 5480 North Bay Road, the location where Lazaro's body was recovered. (D.A.R. 3691-92) Had the Abbott Avenue evidence been presented, the jury would have heard that 5480 North Bay Road was not, in fact, Gloria Pi's address. (S.R. 592-93) Thus, the Abbott Avenue evidence would only have further demonstrated the falsity of Defendant's story to Dr. Marina.

Additionally, Defendant argues that Defendant was prejudiced by the omission of Gloria Pi's confession, as the confession would have shown HAC was inapplicable or lessened the weight of HAC. This contention is patently refuted by the record at trial and at Defendant's evidentiary hearing. As Mr. Gainor explained at the hearing, Gloria Pi had, by all accounts, only babysat Lazaro for one or two days. (R. 1085) Obviously the extremely limited exposure Gloria Pi had with Defendant would not have affected the jury's finding of HAC when the evidence showed Lazaro had suffered over the

course of eighteen months:

> Due to repeated injury, the muscle between the elbow and shoulder of Lazaro's left arm had turned to bone, rendering the arm useless. The child had deep bruises on his left hand and palm that were consistent with defensive wounds. Lazaro's right forearm was fractured, in a manner also consistent with a defensive wound. The child's left leg, which was much thicker than the right, was engorged with blood. His feet and toes also had extensive deep bruises. Some of the child's toenails had been crushed. There were other deep blunt trauma bruises to the child's chest and buttocks. Lazaro's left eye was bruised and there was a laceration on his right eye. There were cigarette burns on the child's cheek and pressure sores all over his body, from being forced to lie in bed for extended periods. The inside of the child's lips was obliterated by scar tissue and his front teeth had been knocked out. There were lacerations to the scalp, the most recent of which was an open festering wound that had allowed meningitis bacteria to invade the child's brain through a skull fracture. The blow that caused that fracture also crushed the child's olfactory nerve. A later blow to the head had sheared the nerves connecting the spinal cord to the rear of the child's brain.

Cardona 641 So. 2d at 363. There is no reasonable probability that had Gloria Pi's confession been presented during the penalty phase, the outcome of the proceeding would have been different. *Strickland.*

As the evidence in the trial record and the testimony at Defendant's evidentiary hearing firmly establish that defense counsel thoroughly researched the Abbott Avenue evidence and considered presenting such during the penalty phase but opted for a different strategy, counsel clearly cannot be deemed deficient for

failing to investigate and present evidence related to this issue. *Haliburton.*

Moreover, even if counsel had overlooked this defense, Defendant would not be able to establish any prejudice under the facts of her case: Gloria Pi had only babysat Lazaro on one or two occasions and Lazaro suffered continued and horrific abuse over the course of eighteen months in which he was in the sole custody of Defendant. Accordingly, the lower court properly denied this claim.

(4) Alleged Failure to Introduce Gonzalez's Polygraph Results

Defendant contends that her counsel was ineffective for failing to introduce the results of Gonzalez's polygraph tests. However, it was clear at the time of her trial that such was not admissible in Florida without a stipulation, even in a capital case. *See Delap v. State*, 440 So. 2d 1242 (Fla. 1984). There is presently no case in Florida holding that a defendant may introduce results of polygraph results in the penalty phase.[17] *United States v. Scheffer*, 523 U.S. 303 (1998); *Kokal v. Dugger*, 718 So. 2d 138, 143 (Fla. 1998); *Green v. State*, 688 So. 2d 301, 304 n.3 (Fla. 1997); *Groover v.*

[17]*Rupe v. Wood*, 93 F.3d 1434 (9th Cir. 1996) cited by Defendant is distinguishable because in that case the Washington Supreme Court had ruled that although polygraph tests were inadmissible in the guilt phase of a capital trial, they were admissible in the penalty phase. There is no such holding in Florida and *Rupe* is not binding on this Court. Furthermore, it should be noted that *Rupe* was decided four years after the trial in this case. Thus, counsel cannot be deemed deficient for failing to argue for the admissibility of polygraph evidence at the time of Defendant's trial. *Strickland.*

Singletary, 656 So. 2d 424 (Fla. 1995); *Hildwin v. Dugger*, 654 So. 107 (Fla.), *cert denied*, 516 U.S. 965 (1995). Since the results of Gonzalez's polygraph would not have been admissible, they could not have affected the outcome of Defendant's guilt or penalty phase. *Wood v. Bartholomew*, 516 U.S. 1 (1995). As such, the lower court properly denied this claim.

(5) Counsel's Alleged Failure to Object to Constitutional Error

Defendant alleges that her counsel was ineffective for failing to object to comments by the trial court and prosecutor that allegedly violated *Caldwell v. Mississippi*, 472 U.S. 320 (1985). However, this claim could or should have been raised on direct appeal and is therefore procedurally barred. *Francis v. Barton*, 581 So. 2d 583 (Fla. 1991). Moreover, given that the comments did not incorrectly state the jury's role in the capital sentencing procedure, counsel cannot be deemed ineffective for failing to raise this nonmeritorious issue. *Kokal v. Dugger*, 718 So. 2d 138, 143 (Fla. 1998); *Groover*, 656 So. 2d at 425; *Hildwin v. Dugger*, 654 So. 107 (Fla.), *cert denied*, 469 U.S. 1098 (1984); *Breedlove v. State*, 595 So. 2d 8, 11 (Fla. 1992).

ARGUMENT

III. DEFENDANT'S PUBLIC RECORDS CLAIM WAS PROPERLY DENIED BY THE LOWER COURT.

Defendant complains that she has been denied public records. However, the exhaustive record of her public records litigation demonstrates that the lower court heard her argument with respect to all public record demands and the various agencies responses and objections. On January 7, 1998, the lower court held a hearing in which attorneys on behalf of Florida Department of Corrections, Metro-Dade Police Department, City of Miami Beach, City of Miami, Florida Department of Law Enforcement, Department of Children and Families (DCF), and the Clerk of Court, in which the majority of issues Defendant raises on post-conviction were settled (1579-02)

Defendant argues she has been denied public records from the Florida Department of Corrections (DOC). At the hearing on her public records request, the record reflects she sought copious documents from Florida Department of Corrections that were not relevant to any issue at trial or any of Defendant's post-conviction claims, including DOC organizational charts and visitation logs of other inmates, as well as the medical records of other inmates. (R. 1596) While the lower court granted all medical records pertaining to Defendant, it denied requests pertaining to other inmates that had no bearing on Defendant's case and were burdensome due to the voluminous number of documents encompassed within Defendant's request. (R. 1596, 1591-92, 1594) "The language of section 119.19

and of rule 3.852 clearly provides for the production of public records. . . . However, it is equally clear that this discovery tool is not intended to be a procedure authorizing a fishing expedition for records unrelated to a colorable claim for post-conviction relief." *Sims v. State*, 753 So. 2d 66, 70 (Fla. 2000).

The lower court also heard Defendant's argument with respect to the public records of the City of Miami Beach. City of Miami Beach objected to Defendant's request for all the records it had on Defendant on the basis that City of Miami Beach complied nearly two years prior to the date of the hearing. (R. 1612) Defendant complains that she was denied access to records related to Defendant's children after they were placed into foster care at the time of Defendant's arrest. However, she fails to mention that the lower court granted her request with respect to all visits from DCF prior to Defendant's arrest, including all abuse reports. (R. 1635) Obviously, events that occurred after Lazaro's murder have no bearing on any of Defendant's claims and unnecessarily threaten the privacy of Defendant's surviving two children.

As Defendant correctly notes, the lower court reviewed over 1000 pages of documents in camera and determined that they were not public record. (R. 1692-93) However, Defendant fails to assert how the lower court erred in making such its determination. Defendant alleges she has been denied public records of notes from State Attorney investigators "secret meetings" with Gonzalez. However,

Defendant received the reports from the investigators three interviews with Defendant. (See Defendant's Argument I, in which alleges the reports were a *Brady* violation) The lower court sustained the State's objection to the relevance of the prosecutor's personnel records, and Defendant has not alleged how the lower court's ruling was erroneous. *Sims v. State*, 753 So. 2d 66 (Fla. 2000).

Defendant also complains she was denied public records in the possession of the City of Miami Beach Police Department and the State Attorney's Office related to Doris Cuto, Eduardo Ortero, Jose Rosario, Jose Ventrano, Mr. Calderon, and Manuael Fleitas. (R. 1569-76) After individually reviewing the subject documents, the lower court found the documents from the State Attorney's Office were barely legible hand-written notes made by the prosecutors reflecting "notes to themselves" regarding cases and the documents from the City of Miami Beach Police Department were irrelevant to Defendant's case and in some instances merely misfiled documents. (R. 1574) Again, Defendant has failed to allege how the lower court's ruling misapplied the law under Fla. R. Crim. P. 3.852. *Sims v. State*, 753 So. 2d 66 (Fla. 2000).

Lastly, Defendant sought the names and addresses of the jurors from Defendant's trial, as well as any criminal information related to the jurors despite the fact there has never been any allegation that any of the jurors lied in any manner. Furthermore, Defendant

requested all such information without providing any dates of birth, social security numbers, addresses or other identifying information (R. 772) Defendant cites *Buenoano v. State*, 708 So. 2d 941 (Fla. 1998). However that case involved a juror who had lied about his criminal history such that the information related to that juror's criminal history became relevant. *Id.* In the instant case, there is no evidence or even allegation that any juror lied.

The lower court held extensive hearings with regard to Defendant's public records request and ruled on the compliance of every agency that Defendant challenged, including exemptions claimed by the agencies. Defendant has failed to establish how the lower court erred in any of its rulings. Accordingly, the lower court correctly summarily denied this claim.

ARGUMENT

IV. DEFENDANT WAS COMPETENT AT THE TIME OF TRIAL; THUS, THE LOWER COURT PROPERLY DENIED THIS CLAIM.

Defendant contends the lower court erred in summarily denying her claims regarding competency. In the course of making this claim, Defendant convolutes three separate and distinct claims: a procedural imcompetency claim; an ineffective assistance of counsel claim regarding competency; and a substantive imcompetency claim. Each of these claims is analytically distinct and without merit.

With regard to the procedural imcompetency claim, this claim is governed by *Pate v. Robinson*, 383 U.S. 375 (1966). However, the trial court never received Dr. Nathanson's report, which opined Defendant was marginally competent. Moreover, the record reflects that the three court-appointed experts, Drs. Castiello, Schwartz, and Jacobson, all opined that Defendant was clearly competent to stand trial. (S.R. 828-40). Therefore, the trial court had no basis to have a bona-fide doubt as to Defendant's competency such that an evaluation was warranted. *Id.*

With regard to Defendant's claim that counsel was ineffective for failing to bring Defendant's imcompetence to the trial court's attention, this claim is refuted by the record. As previously discussed, defense counsel made a strategic decision to use Drs. Marina and Azan as experts over Dr. Nathanson and both of Drs. Marina and Azan opined that Defendant was competent. (See

evidentiary hearing exhibit A-21) Moreover, even Dr. Nathanson opined Defendant was marginally competent. (See evidentiary hearing exhibit A-22) Further, as previously stated, the three court-appointed experts, Drs. Castiello, Schwartz, and Jacobson, all opined that Defendant was clearly competent to stand trial. (S.R. 828-40). Thus, Defendant suffered no prejudice because any subsequent doctor who would have examined her would have most likely found her competent, as well. *See Patton v. State,* 25 Fla. L. Weekly S749 (Fla. Sept. 28, 2000).

Lastly, Defendant has not met her burden to establish a substantive imcompetency claim. *Dusky v. United States*, 362 U.S. 402 (1960). Under a substantive imcompetency claim, Defendant is "entitled to no presumption of incompetency and must demonstrate his or her incompetency by a preponderance of the evidence." *James v. Singletary*, 957 F.2d 1562, 1572 (11th Cir. 1992). Further, "neither low intelligence, mental deficiency, nor bizarre, volatile, and irrational behavior can be equated with mental incompetence to stand trial." *Medina v. Singletary*, 59 F.3d 1095, 1107 (11th Cir. 1995). Defendant has clearly not met this standard. Indeed, all the doctors that examined Defendant at the time of trial, including Dr. Nathanson who found her marginally competent, opined that she was competent to stand trial. Defendant has presented no evidence to support a finding that she was, in fact, incompetent.

As Defendant cannot establish that counsel was deficient in

securing competent mental health evaluations for her or that she suffered any prejudice, the lower court properly denied this claim. *Strickland.*

ARGUMENT

V. THE LOWER COURT PROPERLY DENIED DEFENDANT'S CLAIM THAT SHE IS INSANE TO BE EXECUTED.

Defendant alleges in this claim that she is insane to be executed but concedes that this claim is not ripe for review. Additionally, Defendant has set forth no facts which support such a claim. As such, the lower court properly denied this claim.

ARGUMENT

VI. DEFENDANT IS NOT INNOCENT OF THE DEATH PENALTY.

Defendant claims she is innocent of the death penalty because the only aggravating factor relied upon by the trial court, HAC, is vague and overbroad because it did not advise the jury that there could be no vicarious liability for this aggravating circumstance. However, as the issue concerning the constitutionality of this aggravating circumstance was not raised in the trial court, it is procedurally barred. *Castor v. State*, 365 So.2d 701 (Fla. 1978). Furthermore, to the extent it was raised on direct appeal, it is also procedurally barred. *Wournos v. State*, 644 So. 2d 1012, 1020 n.5 (Fla. 1994). It should also be noted that the State argued at trial that there was another aggravating factor that should have been found by the trial court, i.e., that the homicide was committed during the course of a felony, kidnapping. This Court determined that it did not have to decide on the State's cross-appeal, due to the applicability of the HAC aggravator. *See Cardona v. State*, 641 So. 2d 361 (Fla. 1994). Moreover, as Lazaro was in Defendant's custody during the eighteen months in which he was abused and eventually murdered, vicarious liability would not be an issue.

CONCLUSION

For the foregoing reasons, the trial court's order denying Defendant post conviction relief from his convictions should be affirmed.

Respectfully submitted,
ROBERT A. BUTTERWORTH
Attorney General
Tallahassee, Florida

LISA A. RODRIGUEZ
Assistant Attorney General
Florida Bar No. 0109370
Office of the Attorney General
Rivergate Plaza -- Suite 950
444 Brickell Avenue
Miami, Florida 33131
PH. (305) 377-5441
FAX (305) 377-5654

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing was furnished by U.S. mail to **Todd G. Scher,** Assistant CCR South, Office of the Capital Collateral Regional Counsel - South, 101 NE 3rd Ave. Ste. 400, Fort Lauderdale, FL 33301 this 25th day of June, 2001.

LISA A. RODRIGUEZ
Assistant Attorney General

CERTIFICATE OF COMPLIANCE

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

LISA A. RODRIGUEZ
Assistant Attorney General