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IN THE SUPREME COURT OF FLORIDA

CASE NO. SC11-476

EMILIA L. CARR

Appellant,

v.

STATE OF FLORIDA

Appellee.

SUPPLEMENTAL ANSWER BRIEF OF APPELLEE

ON APPEAL FROM THE FIFTH JUDICIAL CIRCUIT
IN AND FOR MARION COUNTY, FLORIDA

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FULGHAM PENALTY PHASE FACTS

The penalty phase of Fulgham's trial was held April 17-20, 2012. (SR, V117-124).

Carolyn Spence, Strong's mother, said Strong and her two younger brothers were raised in Mississippi. Strong worked while attending high school but moved in with Fulgham and his mother during her Senior year. However, Strong did not graduate. (SR, V117, R69, 71, 73; SR, V118, R116). Strong and Fulgham moved to Florida after their daughter was born in 2000. Their son was born a few years later. (SR, V117, R76). Strong visited her family in Mississippi a few times a year and maintained family contact. (SR, V117, R77). Strong's family suffered "total devastation" after she was murdered. (SR, V117, R90).

Spence and Strong had their ups and downs, and, on one occasion, they called the police on each other. (SR, V118, R116-17). Spence was able to see Strong's two children a few times after Strong's death. However, she had not seen them subsequent to their adoption by another family. (SR, V118, R109).

The State published several recorded phone calls made by Fulgham to Strong while he was in jail prior to her murder. (SR, V118, R119-163, State Exh. 64).

During the one phone call, Fulgham asked Strong, "What are you gonna do ... are you gonna push this or what?" Fulgham told Strong that he was sorry. (SR, V118, R119, 120-21). Strong

replied, "Josh, I don't know. When you get out, you're gonna f -
- - ing kill me." Fulgham told her that he was not going to go
near her. Strong told Fulgham that she could no longer be with
him anymore, "because I know what you gonna do." (SR, V118,
R121). Fulgham offered to pay bills and give Strong the house.
Strong said, "You're not gonna do that Josh. You're gonna kill
me when you get out of jail." (SR, V118, R122). Fulgham told
Strong, "quit thinking about yourself too much" but Strong said,
"I'm thinking about whether or not I want to live or die." (SR,
V118, R123). When Fulgham suggested Strong's family had
"brainwash[ed]" her, she said, "No. I've lived with you for
eleven years so I know what you're capable of." (SR, V118,
R123). Strong told Fulgham, "You're the one that's always filled
my head with I'm gonna kill you and I'm gonna do this and I'm
gonna do that. You. Nobody else." (SR, V118, R123-24). Fulgham
told Strong that he would not hurt her and asked her to help
bond him out of jail. (SR, V118, R125, 126).

During another phone call, Fulgham told Strong that he had
paid her rent. He asked Strong if she had been with another man.
Strong told him, "No." Strong said that Carr had held a knife to
her throat and told her, "that if I didn't write that letter,¹

¹The "letter" placed custody of Fulgham and Strong's children
with him. See State's Answer Brief, p. 8; Carr ROA, V33, R750-
51, 752, 756; Fulgham ROA, V118, R142.

she would kill me." (SR, V118, R127-28, 142). Strong said she only wanted to be with her children. (SR, V118, R127).

During the next phone call, Strong told Fulgham that she did not want him to go to prison, that she wanted to drop the charges against him. She said that the State Attorney's Office needed her to give a signed statement as to her intentions. Fulgham suggested moving to another county and "let's see how it goes." Strong told him that she loved him and wanted to be with him. (SR, V118, R129-30). Strong said, "I know you didn't have a bullet and you didn't point it at me ...". Strong was concerned that Fulgham did not trust her because of "what I did to you and what you did." Fulgham said he knew Strong was scared of him "because of everything that's happened in the past." (SR, V118, R130, 140). Strong said Fulgham's mother was helping her move to a new home. (SR, V118, R131). Fulgham said that living in another county away from everybody "would be nice" and that "I'm really done with her." He told Strong, "I do love you." (SR, V118, R132-33, 145). Strong said that Carr blamed her for "three miscarriages" that she had suffered and "that that's the reason why she wants to kill me." (SR, V118, R133-34). Strong told Fulgham that Carr was "trying to turn all of us against all of us, your mom, me, you." (SR, V118, R135). Strong said she was going to drop her claim against Fulgham. (SR, V118, R139). Fulgham told Strong, "I don't want that psycho coming over and

hurting you, or the kids ... I don't trust her." (SR, V118, R141). Fulgham told Strong, "You better watch out Heather ...I'm tell you to watch out ... Emilia ... I knew she was crazy." (SR, V118, R144). Fulgham told Strong, "We'll be happy out there away from everybody ... I promise I'll make you happy. I won't scare you no more." (SR, V118, R146).

During the next phone call, Fulgham promised Strong that he would not "be crazy" when he got out of jail, "I love you too much." He promised he would "never" hit her again. He felt "so bad" about all the times he hit her. He said, "You're so little. I'm so much bigger than you. It's a wonder I never hurt you so bad when I used to do that to you ... I know it hurt you ... I could have hurt you really bad all them times ... I know I've did bad things to you." (SR, V118, R153).

Judy Chandler, Fulgham's mother, said she grew up in Mississippi in a military household. Her father was strict and abusive but her mother was "loving." (SR, V118, R164, 165). Fulgham was the fourth of Chandler's five children. Fulgham has four sisters. Chandler was 14-years-old when she married Larry Fulgham. (SR, V118, R169). Larry is not Fulgham's biological father. (SR, V118, R170).

Chandler said Larry Fulgham was physically abusive. "The beatings became more and more serious." At one point, Larry knocked out her teeth and broke both her jaws. Larry had affairs

and abused drugs. Larry told Chandler she could not see her family. If she did, "he told me he'd kill me." (SR, V118, R172, 173). The children witnessed Larry beating her. (SR, V119, R325). When Chandler became pregnant with Josh,² Larry Fulgham was living with another woman. Larry came back home to Chandler and found out she was pregnant by another man, Kenneth Cooper. (SR, V118, R174; SR, V119, R297). Larry "beat the living crap out of me." Larry told her that "he would make certain that he killed that baby." Chandler said the beatings continued for nine months. (SR, V118, R175-76). Larry confronted Kenneth Cooper, who was also married, but Cooper "beat him down pretty hard so he ends up in the hospital." Because they lived in a small town, "everybody right away knew that I was pregnant with Kenneth Cooper's baby." (SR, V118, R176). Nonetheless, Chandler never sought help from anyone. (SR, V118, R177). Chandler said she "didn't do the best at protecting my child." (SR, V118, R177).

Chandler worked full time and supported the family. Larry sold drugs and abused drugs, sometimes in front of the children. (SR, V118, R175, 180). Chandler said she was not well-educated and did not think that something could have happened to Josh while she was being beaten by Larry. "I thought as long as I was going to the doctor and taking my vitamins, that everything

² Fulgham was born August 16, 1981. (SR, V118, R178).

would be okay." (SR, V118, R177). When Fulgham was born, his arm was twisted and turned backwards. (SR, V118, R118; SR, V120, R299). Chandler worked on it every day.³ Fulgham did not cry a lot, "he just kind of laid around and looked around ... he just wasn't active like he should have been." (SR, V118, R178-79). Chandler assumed Fulgham was healthy when he was born because he weighed 8 pounds and 14 ounces. (SR, V119, R326).

When Fulgham was about six months old, Larry was taking care of the children. Chandler came home and found "a big knot" on Josh's head. She accused Larry of trying to kill him. Larry then beat Chandler. Chandler never left Josh in Larry's care again. (SR, V118, R179-80; SR, V119, R325). Chandler and Larry Fulgham divorced when Josh was about two to three years old. (SR, V118, R182; SR, V119, R327). However, Chandler allowed Josh to visit Larry and his new wife. (SR, V118, R184).

Josh's Aunt Margaret babysat him until he was five-years-old. (SR, V118, R180). When Josh was about two-years-old, he ingested some rat poison at his aunt's house. He was taken to the hospital and had his stomach pumped. (SR, V118, R180, 181). In addition, Josh was in a car accident at the same age. He went into the windshield. At age three, Josh had problems swallowing food. Josh's doctor said his tonsils were too big. he was

³ Chandler said Josh had trouble using his hand and arm. He was a teenager before he could properly use a fork. (SR, V118, R185).

five-years-old before he had surgery to correct this problem. (SR, V118, R181, 182).

Prior to Josh's tonsil surgery, Chandler married Jimmy Patridge. Patridge "was a drunk" and "very mean." When Josh had trouble swallowing food, he threw up. Patridge made Josh eat the food again. Patridge was abusive to Chandler and the children. Chandler said, "This is a man who thought beating on children was a thing to do." (SR, V118, R183, 184, 194; SR, V119, R298, 325). Josh witnessed Patridge beating Chandler. (SR, V119, R326, 327). Patridge enjoyed scaring Josh by wearing masks and chasing him. (SR, V118, R183-84, 188). Chandler divorced Patridge when Josh was eight-years-old. (SR, V118, R187). Chandler ended her marriage to Patridge when she picked him up, slammed him into a table, and broke five of his ribs. (SR, V119, R327).

Chandler discovered her oldest daughter Rhonda was sexually abusing Josh when he was five years old. Rhonda was eleven years old at the time. Chandler tried to keep them separated but, "I had to work all the time ... I wasn't watching my children like I should be watching my children." (SR, V118, R186-87, 199). Chandler moved in with her parents after she divorced Patridge. (SR, V118, R188).

When Fulgham was nine years old, he was in another car accident while his grandmother was driving. His head went through the windshield. (SR, V118, R190). Fulgham started school

and completed first through third grade. However, he repeated fourth and fifth grade. (SR, V118, R191, 194). Nonetheless, Chandler did not have Fulgham tested for any learning disabilities. Chandler thought Josh "was just being lazy." (SR, V118, R194). At times, the school called Chandler to come get Fulgham because he was "acting up." Fulgham was a "good-sized child" compared to the other students. (SR, V118, R195; SR, V119, R326). In addition, Chandler's daughter Rhonda got into trouble, it "just kept getting worse and worse." Rhonda was sent to live with her paternal grandfather. (SR, V118, R197-98).

When Fulgham was nine-years old, he had a bicycle accident and injured his head. Chandler "patched him up" but did not take him to the hospital. (SR, V118, R199-200). Josh was nine-years-old when his maternal grandmother died. As a result, because he was very close to her, he did not want anything to do with anyone after her death. (SR, V118, R200).

Chandler married Gary Chandler when Josh was ten-years-old. (SR, V118, R206). Gary was also a drinker. He worked all day and drank beer all night until he went to bed. On occasion, he took Fulgham with him to a camp house. Chandler said Gary and his friends used Josh to fetch their beers. (SR, V118, R207). Between ages ten and thirteen, Fulgham had a difficult time in school. He got into a fight with another boy and was struck on the head with a stick. Fulgham did not do well in school, and,

as a result, Chandler took him out of school. Fulgham helped her around the house from that point on. In addition, Fulgham helped take care of his uncle who had previously had heart surgery. (SR, V118, R208-09).

Chandler allowed Fulgham to drive her car when he was thirteen years old. On one occasion, he was driving to his friend's house and had a car accident. Although Fulgham suffered a head injury, Chandler did not take him to the hospital. (SR, V118, R211-12). At fourteen-years-old, Fulgham started abusing marijuana and huffing gas. (SR, V118, R212). Fulgham also had a four-wheeler accident at age 15 when he crashed and the handle bars hit him in the head. However, he did not have any medical attention for his injury. (SR, V118, R213). In addition, he had a car accident in a Chevrolet Blazer that Chandler had bought for him and another accident on a dirt bike. Fulgham hit his head when he wrecked the dirt bike. (SR, V118, R214).

When Josh was sixteen-years-old, his sister Karen was severely beaten by her boyfriend. Chandler said Fulgham was there when she took Karen to the hospital. (SR, V118, R214).

Fulgham started dating Strong in 1997. Shortly thereafter, Strong moved in with them. They were both about 16-years-old at the time. (SR, V118, R215). Fulgham started abusing methamphetamine about 18 months later. Fulgham lost a lot of weight, became unhappy, and was hard to get along with. (SR,

V118, R220, 221). Fulgham and Strong's daughter was born in 2000. (SR, V118, R220). Fulgham was "tickled to death" with his daughter. However, he and Strong started to argue. They moved out of Chandler's home. (SR, V118, R222). Eventually Strong and Rhonda became friends. Chandler said they started abusing methamphetamine. Chandler took care of Fulgham/Strong's daughter. (SR, V118, R225, 228). In 2001, Chandler saw Strong hit Fulgham on the head with a cinder block. Chandler took him to the hospital. (SR, V118, R229).

Chandler divorced her husband in 2000 and moved to Florida in 2003. (SR, V118, R230). At that time, Strong was pregnant with Fulgham's second child, Brady. (SR, V118, R231). In June 2003, Fulgham and Strong moved from Mississippi to Florida. After Brady was born, Fulgham and Strong put Brady up for adoption. (SR, V118, R232). Chandler said Fulgham and Strong were getting along "off and on" but Fulgham was still abusing drugs. (SR, V118, R233).

Chandler eventually became aware of the volatile relationship between Fulgham and Strong. Strong and Fulgham had another child in November 2006. (SR, V118, R233, 237). Strong went back to Mississippi several times for short periods of time but always returned to Florida. (SR, V118, R235, 237, 238). When Strong went to Mississippi in June 2008, Fulgham had a relationship with Carr. (SR, V118, R239). Chandler frequently

took care of Fulgham and Strong's two children. (SR, V118, R242-43). Eventually Strong moved in with Ben McCollum and Carr moved in with Fulgham. As Strong's relationship with McCollum grew, Fulgham was not able to see his children. (SR, V118, R243, 245). Chandler recalled an incident where Fulgham had Strong arrested for domestic violence after Strong slapped him. (SR, V118, R246). However, three months later, on December 26, 2008, Fulgham and Strong got married. (SR, V118, R247, 249). On January 6, 2009, Strong had Fulgham arrested for domestic violence. (SR, V118, R249). Chandler and Carr visited him in jail. (SR, V118, R250-51). Chandler informed Carr that Fulgham and Strong were married and requested that Carr stay away from Fulgham "until all this was taken care of and worked out between the two of them." (SR, V118, R251). However, Fulgham tried to get a lawyer for his current charge with Carr's help. (SR, V118, R252-53).

In January 2009, Chandler said Fulgham asked her to get the children's social security cards and birth certificates from Strong in order for him to file his tax return. He wanted to use his refund in order to pay for a lawyer. Strong would not take Chandler's phone calls. (SR, V118, R253). As a result, Chandler told Carr to get Strong drunk, and then "just take the cards and the birth certificates and ... bring them to me." (SR, V118,

R254). Chandler eventually got the documents from Strong. (SR, V118, R255).

Chandler said Fulgham got out of jail on February 6, 2009. Chandler did not have any contact with Carr at this time. (SR, V118, R257; SR, V119, R278). Chandler said Fulgham was not able to see his children. Strong indicated she was going to go to Mississippi. (SR, V119, R280, 281). On February 15, 2009, Fulgham came to Chandler's house. They discussed the children and that Strong was planning on going to Mississippi without the children. (SR, V119, R282). Chandler prepared a document that Fulgham planned to have Strong sign. The document⁴ stated that he would have the children and Strong could see them when she came back from Mississippi. (SR, V119, R283-84). However, when Chandler saw the executed document, she knew that Strong had not signed it herself. (SR, V119, R302). Nonetheless, on February 17, 2009, the document was used to enroll Fulgham's/Strong's daughter in school in Chandler's school district. (SR, V119, R288, 303).

Sometime during February 15, 2009, Chandler saw Fulgham and Strong leaving her house. Chandler said Fulgham told her, "they were in a hurry" and they left. (SR, V119, R287, 322). However, Chandler admitted she had previously given a recorded statement

⁴ The document was dated February 15, 2009, and was published for the jury. (SR, V119, R285-86).

to law enforcement and stated that she had not seen Strong on February 15, 2009.⁵ (SR, V119, R304, 322, 324). Chandler became concerned when she did not later hear from Strong. Chandler had the two children with her and was used to Strong calling and checking on them. (SR, V119, R287). In addition, Strong's family had called Chandler to check on Strong. (SR, V119, R303).

Subsequent to Fulgham's arrest in March 2009, Fulgham's and Strong's two children were living with Chandler. She was trying to get custody of them. The children were put into foster care and ultimately adopted. (SR, V119, R289, 290).

Chandler recalled talking to mitigation specialist Cindy O'Shea and telling her that she was shocked that she carried Fulgham to term and that he was born healthy. (SR, V119, R300). In addition, Chandler admitted Fulgham was removed from school when he was young because he caused problems. (SR, V119, R301, 326).

Chandler said she saw bruises on Strong while she was in a relationship with Fulgham. Further, Chandler recalled talking to Fulgham while he was in jail in January 2009 and Fulgham said that "he had a plan that he just didn't get it executed in time." (SR, V119, R301).

⁵ Although the statement is in the record, it was not published for the jury. (SR, V119, R307-14).

Leslie Hopkins, Fulgham's cousin, said the two were very close while growing up in Mississippi. (SR, V119, R328-29, 330). However, Hopkins said Fulgham's sister Rhonda sexually abused her and Fulgham when they were young. (SR, V119, R333, 335-36). Rhonda warned Hopkins and Fulgham that if they told anyone, "something bad would happen." (SR, V119, R337). The sexual abuse ended when Hopkins and Fulgham were about ten years old. (SR, V119, R338).

Hoskins recalled seeing bruises on Fulgham while they were growing up. She knew all of Chandler's husbands and said they were abusive. (SR, V119, R338).

Dr. Heather Holmes, psychologist, evaluated Fulgham. She met with him three times -- November 8, 2011, December 30, 2011, and March 27, 2012. (SR, V119, R339, 349). In addition, she reviewed the following: notes from two mitigation specialists (Kate O'Shea and Cindy O'Shea); a chronological timeline of Fulgham's life; Fulgham's statements to police; an expert report from Dr. Ouaou, a neuropsychologist; a report written by Dr. Steven Gold, a specialist in PTSD; and she interviewed Chandler, Hopkins, and Hopkins' mother, Diane (Chandler's sister). She also reviewed the raw data of the IQ test administered to Carr.⁶

⁶ Carr's IQ is 125 - "high average. It's a very intelligent person." (SR, V119, R373, 375). Fulgham's IQ is 81 - "low average ... someone who struggles a little bit." (SR, V119, R376).

(SR, V119, R349-50, 352). On one occasion, Holmes met in person with the two mitigation specialists, Drs. Ouaou and Gold, and, via telephone at the same meeting, with psychiatrist Dr. Maher. (SR, V119, R355). In Holmes' opinion, based on interviews, evaluations and symptoms that Fulgham reported, Fulgham suffers from post-traumatic stress disorder. (SR, V119, R357, 358).

Holmes said the sexual abuse that Fulgham suffered "was extreme. It was significant." The abuse began between the ages of six and seven. The sexual abuse was "very damaging" because Fulgham suffered "extreme exposure to sexual incestuous repeated abuse." (SR, V119, R359-60). Holmes said Fulgham "has tremendous difficulty with sexual boundaries, with boundaries in general, with intimacy in his relationships with women. He is very conflicted how to go about a natural, healthy relationship with a female." (SR, V119, R360). Holmes said that would be common for Fulgham to have conflictual relationships with women because he had suffered from this type of trauma. Fulgham had "tremendous difficulty knowing how to navigate or what is a healthy acceptable relationship with a woman." (SR, V119, R365, 366).

In Holmes' opinion, Fulgham also suffered from polysubstance dependence. (SR, V119, R368, 380). He was exposed to marijuana at an early age and started drinking and abusing marijuana at age 14. He huffed gas and abused methamphetamine.

In addition, he abused painkillers. (SR, V119, R369-70). In Holmes suggested neuropsychological testing for Fulgham in order to diagnose (or rule out) a cognitive disorder NOS, due to all of Fulgham's head injuries. (SR, R119, R370-71, 372).

Holmes said that, in her opinion, a difference of 44 points in Fulgham's IQ of 81 compared to Carr's IQ of 125 indicated that Carr had "the upper hand ... in which he was easily manipulated." (SR, V119, R376, 378, 392). However, Holmes said there were times when Fulgham realized he was being manipulated. (SR, V119, R393). Holmes said Carr did not manipulate Fulgham into murdering Strong. (SR, V119, R394).

Holmes said Fulgham was currently being administered Prozac and Vistaril. Prozac, "a mild medication," combats anxiety and depression. Vistaril is a "short-acting" drug that combats anxiety and a person feels better "immediately." (SR, V119, R379). These medications are consistent with treatment for PTSD. (SR, V119, R380).

Holmes said that neither she nor any of the other experts in this case conducted personality disorder testing on Fulgham. (SR, V119, R389).

Holmes concluded that, in her opinion, Fulgham suffered from PTSD due to prior extreme physical and sexual abuse, substance dependence, and massive head injuries up until the time of Strong's murder. (SR, V119, R381-82, 383). However,

Holmes said this was not an excuse or the cause of why Fulgham killed Strong, but rather was "merely what was going on in his life." (SR, V119, R384).

Dr. Robert Ouaou, neuropsychologist, evaluated Fulgham and administered 14 different tests that included the Wisconsin Card Sorting test, the Wechsler Memory Scale test, the WAIS IQ test, and a malingering test. (SR, V120, R414, 426). In Ouaou's opinion, Fulgham "was making maximum effort." (SR, V120, R421-22, 427). Ouaou also reviewed Fulgham's medical records from Mississippi; interview narratives from Cindy and Kate O'Shea, the mitigation specialists; reports written by Drs. Gold and Lambos; Fulgham's statements to police; Det. Buie's testimony during cross-examination; and closing arguments in the guilt phase. (SR, V120, R458). Ouaou did not review the 12 hours of videotapes of Fulgham's interactions with police during his statements. He did not listen to the recorded phone calls Fulgham made from the jail to various people. Ouaou said if he had, "it could have" given him insight into Fulgham's ability to adapt to circumstances and comprehend what was happening at the time. (SR, V120, R469, 470).

Ouaou explained that executive functioning is the frontal part of the brain and the most sensitive to brain injury. (SR, V120, R441). A person with frontal lobe dysfunction reacts differently than a normal person. Ouaou said the frontal lobes

control rage, sex, and help inhibit impulses and responses. (SR, V120, R443). Based upon test results, in Ouaou's opinion, Fulgham has deficits in this area of his brain. (SR, V120, R444).

Fulgham scored an 81 on the WAIS test which Ouaou said is in the low average range, the lowest "10 percent level" of the population. (SR, V120, R449-50, 459, 463). Fulgham had deficits in learning and memory. On the Wisconsin Card Sorting test, Fulgham "bombed out horrifically." (SR, V120, R457).

In Ouaou's opinion, Fulgham has abnormal memory impairments. There is a "clear pattern of significant frontal lobe damage ... which is profoundly impaired." (SR, V120, R460, 461). In Ouaou's opinion, Fulgham's deficits may have been caused by the head injuries, methamphetamine dependence, or a combination of both. (SR, V120, R462). Further, in Ouaou's opinion, Fulgham had frontal lobe damage to his brain and gross neurological damage in intellectual functioning at the time of Strong's murder. (SR, V120, R463). However, in Ouaou's opinion, Fulgham's deficits were not the "cause" of why Fulgham killed Strong. (SR, V120, R464-65). Ouaou concluded that Fulgham has deficits in the executive functioning, processing speed, and learning and memory.⁷ (SR, V120, R474).

⁷ Fulgham tested "normal" in executive functioning on the Stroop Color Test. (SR, V120, R475, 478-79).

Ouaou was aware that Fulgham was in jail from January 6, 2009, until February 6, 2009, and that Strong was murdered on February 15, 2009. (SR, V120, R471, 480). Ouaou did not know that Fulgham told Strong from jail during January 2009 that he wanted to get back with her. Ouaou also was not aware that, at the same time, Fulgham told Carr he was kissing up to Strong just so he could get out of jail. In addition, Ouaou was not aware that Fulgham was also telling his mother and sister that he had to kiss up to Carr because she had the money to bond him out of jail and hire an attorney. Ouaou relied on standardized testing in making his determination of Fulgham's ability to reason, but, "it could" have made a difference in his opinion if he was aware of Fulgham's conversations with others while incarcerated. (SR, V120, R471, 473).

Dr. Stephen Gold, psychologist, evaluated Fulgham. He reviewed transcripts of Fulgham's interview with police; expert reports; witness interview notes; and portions of the guilt phase portion of the trial. Gold also met with Fulgham on one occasion. (SR, V120, R491, 495, 496). In Gold's opinion, based on Fulgham's traumatic experiences, Fulgham suffers from PTSD. He also suffers from polysubstance dependence which Gold said "is often associated with children who witness domestic violence growing up." (SR, V120, R498, 499, 533). Fulgham witnessed repeated violent assaults in his home in addition to suffering

extreme physical, emotional, verbal, and sexual abuse himself. (SR, V120, R502-03, 504). In Gold's opinion, Fulgham meets all the criteria for PTSD, "... exposed to traumatic events ... chronically high levels of anxiety ... haunted by traumatic events ... nightmares and flashbacks ... emotional numbing ... difficulty remembering aspects of some of the trauma ... a general shutting down sensorially and emotionally ... trouble focusing on what was going on around him ... remembering and tracking experiences." (SR, V120, R532-33). In addition, Gold said that because Fulgham only completed school through the fifth grade, he was lacking in general knowledge, social and emotional development, and learning how to get along with peers and authority figures. (SR, V120, R535).

Gold concluded that in the days leading up to February 15, 2009, Fulgham suffered from PTSD, polysubstance dependence, disassociative experiences, episodes of disassociation, and limited intellectual, emotional and social development. (SR, V120, R540). However, Gold said that in reviewing Fulgham's statements to police, he did not see any indication that Fulgham experienced any type of flashbacks when he asphyxiated Strong. There was no indication that he killed Strong out of a sense of fright, flight or freeze. (SR, V120, R541-42). Gold said Fulgham had a clear recall a month later of the events that occurred

during Strong's murder. (SR, V120, R542). However, in Gold's opinion, Fulgham is "extremely remorseful." (SR, V120, R498).

Dr. Michael Maher, psychiatrist, evaluated Fulgham. (SR, V121, R565, 575). He reviewed voluminous documents that included Fulgham's medical records, Fulgham's statements to police; trial depositions; trial transcripts; forensic interview notes; and phone calls and related transcripts Fulgham made from jail. He also interviewed Fulgham and his mother. (SR, V121, R565, 569-71). Maher also spoke with Drs. Gold, Ouaou, and Holmes via telephone. (SR, V121, R573). Maher said Fulgham admitted murdering Strong and that he was remorseful. (SR, V121, R578).

Maher said Fulgham came from a multi-generationally, dysfunctional, chaotic, disordered family background. (SR, V121, R580). Fulgham was called "a bastard child" which had an impact on him. (SR, V121, R581). His family background included mental illness, incest, abuse, sexual promiscuity, and drug and alcohol abuse. Fulgham's case is "in the worse category." (SR, V121, R583, 588).

Maher said Fulgham's mother "was not a good mother." She did not provide a safe environment or the love and nurturing that a child needs. (SR, V121, R591). Fulgham suffered from depression as a teenager and required treatment. (SR, V121, R592-93). Maher said that there are other people who come from a dysfunctional background like Fulgham's but do not kill people.

Maher explained, "What we do in our lives in terms of these kinds of things is a balance between our strengths and weaknesses." (SR, V121, R593). Genetic factors also plays a role that can cause someone to be violent. (SR, V121, R595). Maher said that the beatings Chandler suffered during her pregnancy with Fulgham could have affected his development in utero. (SR, V121, R597). Fulgham's chronic illness with his tonsils as a child could have affected his development, as well. (SR, V121, R599). In addition, the head traumas that Fulgham suffered increased the risk of brain functioning problems. (SR, V121, R600).

Maher said Fulgham's relationship with his mother involved "a mutual unhealthy dependency; emotional, psychological, and other dependency, each upon the other." (SR, V121, R608). Fulgham's relationship with Carr was "an extremely unhealthy relationship that involved literally intense elements of love and hate on both parts ... they both brought out the worst in each other." (SR, V121, R611).

Maher said Fulgham had feelings for his children. Although he was not a good father, he had genuine concern and affection for them. However, he neglected them and made them vulnerable to abuse by his own failures. (SR, V121, R616-17, 629). Fulgham's relationship with Strong was "a sick relationship. It was a pathological relationship Josh hoped for and expected

Heather to be motherlike to him ... take care of him ... loyal to him ... support him." Strong always took Fulgham back and forgave him. (SR, V121, R617-18). In Maher's opinion, Fulgham has a dependent personality disorder. (SR, V121, R625).

Maher said that during the time leading up to Strong's murder, Fulgham was in a love/hate relationship with both Carr and Strong. However, his hatred focused on Strong. Maher said from Fulgham's "point of view, his state of mind, he barely knows what's going to happen next ..." Fulgham did not see what was happening "until he's way into it; in that trailer and engaged in the activity." In Maher's opinion, Fulgham's state of mind was "does it really happen? Is she really dead?" (SR, V121, R623, 624). Maher said that, because Strong went to Carr's trailer with Fulgham, she was "in this together with everybody else - - this crazy, social, sexual interaction with these other people." (SR, V121, R626). However, Maher clarified that Strong was not responsible for her own death. (SR, V121, R642).

Maher said Fulgham did not deny in assisting Carr in taping Strong to the chair in the trailer. Fulgham's "clear objective" was to subdue Strong. (SR, V121, R626, 627). Maher did not know if Fulgham could have stopped when Strong begged, "Don't do this to me." (SR, V121, R647). Maher was aware that Fulgham did not want Strong to take the children back to Mississippi. (SR, V121, R630). However, in Maher's opinion, Fulgham "had real doubts

about going through with it." Carr was stirring up conflict. (SR, V121, R630, 634). In Maher's opinion, it is not clear whether Fulgham's intent was to murder Strong. (SR, V121, R636). Subsequent to her murder, Fulgham and Carr buried Strong's body together. Maher said Fulgham was smart enough to know "I'm going to get in a lot of trouble, so I'm going to hide it. Very concrete, simplistic, anybody with an 81 IQ can figure that out." (SR, V121, R637).

Dr. Maher concluded that at the time of Strong's murder, Fulgham was severely impaired due to depression; head injuries; brain damage; and disturbing relationships with family and others. All of these problems led to Fulgham's inability to understand and appreciate "that they were talking about killing a human being." (SR, V121, R640, 641). In Maher's opinion, Fulgham has "genuine remorse" for his involvement in Strong's death. (SR, V121, R641).

The State published several more phone calls to the jury that Fulgham made from jail prior to Strong's murder. (SR, V122, R701-84).

During a phone call between Fulgham and Chandler, Chandler tells Fulgham, "You know she was gonna do something. You knew she had something plotted and planned." Fulgham replied, "I thought I was gonna do something first, and I didn't." (SR, V122, R701-02). During a phone call with Carr, Fulgham said,

"She thinks everything is good." Carr replied, "So, in other words, you're kissing a - - right now ... ?" Fulgham told Carr that when he got out of jail the next day, he and Strong were going to the State Attorney's Office. Fulgham said, "She don't know it yet. But that's what's gonna happen. She's gonna tell them she lied on me." (SR, V122, R703). Fulgham also told his mother to get a gift card "Not for Heather, for them kids." (SR, V122, R704).

Fulgham also told Chandler he was worried about getting the children's social security cards as he did not want "Ben" to claim them. (SR, V122, R706). He asked Chandler to call Strong and tell her that he had someone lined up to do his taxes for him but that he needed the children's social security cards. (SR, V122, R706-07). Fulgham said, "All I'm wanting is the kids, now that we're married, she can't never take them from me, and I don't got to worry about that ... because that's the only reason I married her anyway, Mama." (SR, V122, R708). Fulgham also talked to his sister, Michelle Gustafson. Gustafson told Fulgham, "You still got rights to those kids." (SR, V122, R708-09). Gustafson suggested, "Just be done with her." (SR, V122, R709). Fulgham asked Gustafson to tell Strong that his mother had power of attorney "of everything." (SR, V122, R712). Fulgham did not want to anger Strong because he wanted the children's

social security cards. He was going to file his tax return for himself, his two children, and "Emilia." (SR, V122, R714).

In another phone call, Fulgham told Carr that he had talked to his sister and also to Strong. (SR, V122, R716). Fulgham told Carr that he was going to have Strong evicted from the trailer. (SR, V122, R716). Fulgham then asked Carr to get his children's social security cards from Strong. (SR, V122, R716).

During the next call, Fulgham talked to Strong. Fulgham said, "I've got your lot rent ... took care of." (SR, V122, R717). Fulgham asked Strong if he could claim her and the children on his taxes to which she replied, "Yes." Fulgham asked Strong to give his mother the children's social security cards. Strong agreed and said she would also give his mother the children's birth certificates. Strong again agreed to let Fulgham claim them on his taxes. Fulgham told Strong, "I'll take care of you for it. I promise you I will." (SR, V122, R718, 719). Fulgham's mother informed him that Strong had given her the children's paperwork. Chandler said she would file Fulgham's taxes for him. Fulgham told Strong that he would pay the rent and that the landlord would not bother her anymore. "Nobody out there better bother you anymore." (SR, V122, R719, 720).

During the next phone call, Fulgham told Strong that she could do whatever she wanted, "I'm not gonna stand in the way."

Fulgham said, "I just want you to be happy you can do better." (SR, V122, R720-21).

Fulgham called Carr and told her that they were "a team." Carr also said she would help get him out of jail. (SR, V122, R722-23).

Fulgham talked to his sister again. He told Gustafson, "I just called and did some a - - kissing to somebody because I know for a fact they got money. So I called ... and I told her I loved her, I was sorry about everything and I know we're gonna have that baby and I'm ready to take that stand and marry her and take care of my kid. Because she's got money, and she said I knew you'd come around." (SR, V122, r724).

Fulgham talked to Chandler again about bonding out of jail. Fulgham asked Chandler to get money from Carr because she had just gotten a tax return and sold her truck. Chandler said she would not go near Carr. Chandler suggested Gustafson get the money from Carr. (SR, V122, R725-27). Fulgham promised his mother that he would not get back with Carr, that he was using her to get some money to bond out of jail. (SR, V122, R729).

During another phone call, Fulgham told Carr he was sick of all the lies from everyone and "it's got to stop." (SR, V122, R751, 755). Carr told Fulgham, "Josh, every time you talk to her you start acting different towards me." (SR, V122, R754). Fulgham told Carr that he loved her. (SR, V122, R756). However,

Carr suggested Fulgham "work things out" with Strong. (SR, V122, R757). Fulgham told Carr to find another person to lie to and that he would go to court to pay child support for their unborn child. (SR, V122, R768-69). However, Fulgham again told Carr he loved her. (SR, V122, R771, 775).

During another phone call between Fulgham and Carr, Fulgham suggested Carr put their unborn daughter up for adoption. Carr refused. (SR, V122, R776-77, 778). Fulgham said he was leaving town after he got out of jail. (SR, V122, R779, 783). Carr and Fulgham said they loved each other. (SR. V122, R781).

SUMMARY OF THE ARGUMENT

Carr's "relative culpability" claim cannot be considered in the absence of factfindings by the sentencing court which do not exist. That is the rationale behind considering "relative culpability" claims arising after the Circuit Court has lost jurisdiction of the case (because notice of appeal has been filed in the direct appeal) during collateral review. This case clearly falls into that class of cases -- the "relative culpability" claim was raised for the first time in Carr's *Reply Brief*, something that in and of itself does not present an issue for appellate review. There is no reason that Carr's case should be treated differently from any other case.

Alternatively, if this Court elects to consider the "relative culpability" claim on direct appeal, the factfindings

by the Circuit Court that sentenced Carr to death are sufficient to establish that she is the more culpable of the defendants, and that her sentence of death is not disproportionate. If this Court decides the issue now, it is, of course, not cognizable in a post-conviction relief motion.

ARGUMENT

I. THE "RELATIVE CULPABILITY" CLAIM SHOULD NOT BE CONSIDERED AS A PART OF THE DIRECT APPEAL

In her supplemental brief, Carr says that this Court should consider her relative culpability in comparison to that of the co-defendant, Fulgham, because of the "unusual procedural posture" of this case. *Supp. Initial Brief*, at 2. Carr goes on to prove up the reason that such consideration is inappropriate by arguing that this Court should resolve the issue under a *de novo* standard of review instead of the long-settled and well-established rule that the "relative culpability of co-defendants" is a finding of fact by the trial court that will be upheld on appeal if it is supported by competent substantial evidence. *Puccio v. State*, 701 So. 2d 858, 860 (Fla. 1997). Carr recognizes this settled rule, and has presented no persuasive argument against its application to her case.

Florida law is settled that

in a death case involving equally culpable codefendants the death sentence of one codefendant is subject to collateral review under rule 3.850 when another codefendant subsequently receives a life sentence.

Scott v. Dugger, 604 So. 2d 465, 469 (Fla. 1992).⁸ That basic rule has been in place, and functioning effectively, for more than 20 years. There is no reason, let alone a compelling reason, for altering that settled procedural rule solely for this defendant. It is undisputed that Fulgham's sentencing took place well after Carr's appeal was filed -- the issue was raised, **for the first time, in Carr's Reply Brief**. That fact, standing alone, is sufficient to demonstrate that the matter should be litigated in a post-conviction relief motion, which is the well-established procedure for bringing such claims. And, there is no reason advanced that establishes a basis for this Court to decide that it should deprive itself of the benefit of the reasoning and analysis of the trial court's findings about the relative culpability of Carr and Fulgham. This Court should not abandon settled law and decide the issue in a vacuum.

Further, this Court certainly should not undertake making factfindings, which is what it would be required to do in order to decide the relative culpability claim under the *de novo* standard Carr wants. No matter how Carr attempts to paint the posture of this case as "peculiar," it is no more or less peculiar than *Nelson v. State*, 73 So. 3d 77 (Fla. 2011), *Hannon v. State*, 941 So. 2d 1109 (Fla. 2006), and *Farina v. State*, 937

⁸ The State should not be construed as conceding that Carr and Fulgham are "equally culpable."

So. 2d 612 (Fla. 2006), where this Court followed *Scott* and considered the culpability issue on collateral review. Regardless of the specific posture of those cases, this Court has been consistent in deciding the "relative culpability" issue on collateral review. There is no reason at all to deviate from that settled procedure.

The posture of Carr's case is no more "peculiar" than any other death penalty case in which a co-defendant was sentenced to a life (or life without parole) sentence after the first-tried co-defendant was sentenced to death and had begun appellate review. Had Fulgham's case been concluded prior to Carr's sentencing, the result of Fulgham's case would have been known, and considered (with the resulting findings of fact) by Carr's sentencing court. That is not what happened, and there is no reason that Carr's case should be treated any differently than other cases which have presented the same issue. This issue should be litigated in the ordinary course of post-conviction review, applying the settled competent substantial evidence standard of review to the factfindings of the circuit court. *See, Gonzalez v. State*, 990 So. 2d 1017, 1032-1033 (Fla. 2008). Further, this is not a case where the sentencing court was "aware" of the sentence received by the co-defendant. *Shere v. Moore*, 830 So. 2d 56, 60 (Fla. 2002). The issue is proper for

consideration at the post-conviction stage, not during the direct appeal.

The critical event, for purposes of the direct appeal-collateral review decision, is whether Fulgham's eventual sentence was known at the time Carr was sentenced. There is no question that it was not -- the issue, such as it is, was raised for the first time in Carr's *Reply Brief*, which, in and of itself, is improper under well-settled law. *Hoskins v. State*, 75 So.3d 250, 257-258 (Fla. 2011) (citing *Hall v. State*, 823 So. 2d 757, 763 (Fla. 2002); *Jones v. State*, 966 So. 2d 319, 330 (Fla. 2007)). No case identified by Carr, and no case of which the State is aware, has resolved a "relative culpability" claim without considering the factual findings of the Circuit Court. Carr should not be treated differently from every other defendant who has raised this claim. There is a mechanism in place to afford review, and, if her conviction and sentence are ultimately affirmed on direct appeal, she can avail herself of that review if she wishes to do so.⁹ There is no reason not to follow settled Florida procedure, and there is every reason not to risk destabilization of that procedure. At the end, Florida

⁹ Since Carr has raised the culpability claim now, it is preserved for post-conviction review. Whether failure to raise this claim in her *Reply Brief* would have been construed as a procedural bar to post-conviction review is debatable, but it seems likely that it would not have been in light of *Scott* and the cases following it.

law is clear (and it is a fundamental appellate practice rule) that issues may not be raised for the first time in the appellant's *Reply Brief*. There is no reason suggested that this Court should not enforce that rule here. The very fact that Fulgham's sentence was raised for the first time in Carr's *Reply Brief*, coupled with the absence of factfindings by the sentencing court, establishes the second, settled, rule -- a co-defendant's subsequent life sentence is a matter for post-conviction review. Under the facts of this case, there is no reason to justify the departure from settled practice that Carr would have this Court indulge. Fulgham's sentence is a matter for post-conviction review, not for direct appeal when the factfindings necessary to an accurate resolution of the culpability issue simply do not exist.

II. CARR'S DEATH SENTENCE IS PROPORTIONAL

The State's position, as set out above, is that the "proportionality/relative culpability" claim, in the form that it has now taken, should be resolved in a post-conviction relief motion, not on direct appeal. The State does not waive that argument.

However, it is clear that the foundation of this claim (as framed on direct appeal) is the assertion that the co-defendant, Fulgham, was the "main actor" in Heather Strong's murder, and that Carr was influenced to commit an "uncharacteristic act"

because of her "emotional involvement and parental connection" with Fulgham. The problem is that there is a lack of evidence to support those claims, even considering the transcript of Fulgham's penalty phase.

In the sentencing order, the trial court said the following about the asserted "domination" by Fulgham in the context of the statutory mitigator:

e. The defendant acted under extreme duress or under the substantial domination of another person.

There was no evidence presented to establish this mitigating circumstance. In fact, the evidence from the expert witness for the defense, Dr. Ava Land, was that Emilia Carr was "a leader, not a follower." Moreover, Dr. Land stated Emilia Carr was of "superior intelligence" with an IQ of 125; that she does not get emotionally attached to men; that she is on guard against manipulation; and that she has no co-dependency issues. Dr. Land opined that Emilia Carr is "**in control and manipulating in male relationships.**" Moreover, counsel for the defendant acknowledged in her opening statement at trial that Emilia Carr was "her own person." Counsel stated:

"Now Josh's relationship with Emilia is different. Josh and Emilia are kind of more like friends with benefits kind of relationship. **They're not -- the State would have you to believe that Emilia is emotionally tied to Josh, Emilia is Emilia. She's her own person.**"

(Trial Transcript of Opening Statements, page 27). This mitigating circumstance does not apply.

(V10, R1938-9). (emphasis added). Carr cannot resurrect that mitigator now.

Moreover, in discussing the non-statutory mitigation that Carr uses to support the proportionality argument, the sentencing court said:

20. Dr. Ava Land's testimony supports a life sentence. Dr. Land testified that the defendant grew up in a deficient home as it relates to parenting, that she suffers from anxiety, and that the defendant suffered sexual abuse as a child. Dr. Land also testified that Emilia Carr suffered no serious mental illness or schizoid personality; the defendant could be manipulated, but she was "on guard about it;" that the defendant was "a leader, not a follower;" that Emilia Carr was of "superior intelligence" with an IQ of 125; that she does not get emotionally attached to men; that she has no co-dependancy issues; and that the defendant knows what is going on and does not disassociate herself from events, Dr. Land opined that Emilia Carr is "in control and manipulating in male relationships." Moreover, counsel for the defendant acknowledged in her opening statement at trial that Emilia Carr was her own person." Counsel stated:

"Now Josh's relationship with Emilia is different. Josh and Emilia are kind of more like friends with benefits kind of relationship. They're not - - the State would have you to believe that Emilia is emotionally tied to Josh. Emilia is Emilia. She's her own person"

(Trial Transcript of Opening Statements, page 27). The court gives this mitigating circumstance little weight.

21. The co-defendant, Joshua Fulgham, manipulated and controlled the defendant. **There is no evidence that the defendant was manipulated by Joshua Fulgham. In addition to the opinions of Dr. Land recited above, the defendant's conversations with Joshua Fulgham, the co-defendant, prior to the murder, and her conversation with Michelle Gustafson, who is Joshua Fulgham's sister, clearly demonstrate the defendant is in control of her own faculties, and is in fact quite**

concerned that Joshua Fulgham cannot keep his mouth shut about the incident when talking to law enforcement officers. Based upon the evidence at trial, and for the reasons articulated here in this paragraph and in paragraph 20 immediately above, the court finds this mitigating circumstance does not apply.

23. The defendant was immature and wanted a relationship. **There was no evidence presented to support this mitigating circumstance.** All of the evidence presented at every phase of this case suggests that this is just not true. Defense counsel's opening statement (cited herein above) contradicts this claim, indeed, an additional witness called by the defense at *the Spencer* hearing, Nathaniel Salvail, testified specifically that the defendant was not immature. Dr. Land's testimony reveals that the defendant is anything but immature, and that she is not dependant upon any relationship, Moreover, the testimony of the defendant herself refutes this claim. For all the reasons already articulated herein above, the court finds this mitigating circumstance does not apply.

26. Joshua Fulgham, the co-defendant, actually killed Heather Strong. The jury found the defendant guilty of first degree murder. The issue of whether the defendant committed the crime has been litigated and decided. The overwhelming evidence was that the defendant participated in planning and carrying out the murder of Heather Strong. By her own statements, the defendant tried to break Heather Strong's neck before she gave Joshua Fulgham the tape to secure the plastic bag over Heather Strong's head, and she taped the hands and feet of Heather Strong so Strong could not move. This argument is essentially a residual or lingering doubt argument. The Florida Supreme Court has repeatedly held that lingering doubt is not a mitigating factor. *Aldridge v. State*, 503 So. 2d 1257 (Fla. 1987); *King v. State*, 514 So. 2d 354 (Fla. 1987); *Way v. State*, 760 So. 2d 903 (Fla. 2000); *Darling v. State*, 808 So. 2d 145 (Fla. 2002); *Duest v. State*, 855 So. 2d 33 (Fla. 2003). Nonetheless, even if it were a mitigating circumstance in this case, **this court finds there is overwhelming evidence of the defendant's planning and participation in the murder of Heather Strong such that little weight would be**

given to the proposed mitigating circumstance, which is essentially that the defendant did not actually tape the bag over Heather Strong's head. The evidence is the defendant did everything but that, and tried to break her neck before assisting with completing the task of taping the bag over the victim's head.

(V10, R1945-46, 1947, 1948). (emphasis added). Those facts, which Carr does not challenge, demonstrate the proportionality of her death sentence. See *Walker v. State*, 957 So. 2d 560, 585 (Fla. 2007) and cases cited therein. The facts, as found by the sentencing court, point to Carr as the dominant force in the criminal enterprise. There is nothing which remotely suggests that Carr was dominated or controlled by her significantly-less-intelligent co-defendant. The evidence, and the findings of fact, are to the contrary -- Carr is on guard **against** being manipulated and is "in control and manipulating in male relationships." *Id.* Against those facts, Carr cannot sustain an argument that Fulgham is "equally culpable" so that his eventual life sentence creates a basis for relief.

Moreover, Fulgham's case was substantially mitigated, as demonstrated by the penalty phase testimony summarized at pages 1-29, above. Based on his background and personal life, Fulgham simply had more mitigation than did Carr, **in addition to the essentially undisputed fact that Carr was not being manipulated**

by anyone.¹⁰ If this Court is inclined to address the relative culpability/proportionality issue at this stage of the proceedings, Carr loses based on the factfindings that the sentencing court has already made. And, if this Court considers the issue now, it will not be available for subsequent consideration in a post-conviction relief proceeding.

CONCLUSION

Settled Florida law establishes that "relative culpability" sentencing issues based on a co-defendant subsequently receiving a sentence less than death are properly litigated in a post-conviction relief proceeding. The fact that the issue came into being after the State had filed its *Answer Brief* does not and should not affect that settled rule. There are no circuit court factfindings on the relative culpability issue which consider Fulgham's eventual sentence. This Court should not assume the role of factfinder as to this claim, but rather should allow the matter to be litigated in the normal course of post-conviction proceedings to insure that this Court has a full record on which to decide the claim. The fact that Fulgham was sentenced to life without parole before the time that Carr's *Reply Brief* was filed (and the claim therefore arose **during** the pendency of the direct

¹⁰ Fulgham may have thought that he was manipulating Carr. The evidence, which the sentencing court credited, was to the contrary.

appeal) establishes nothing that justifies ignoring settled practice.

Alternatively, if this Court determines that it should consider the culpability issue now, the record establishes that Carr was not being manipulated by Fulgham, which is the premise of her argument now (even though she disallowed that argument in the trial court). Carr's sentence of death should not be disturbed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the above has been furnished by U.S. Mail to: **Christopher Quarles**, 444 Seabreeze Blvd., Suite 210, Daytona Beach, Florida 32118 on this 1st day of October, 2013.

^{/s/} 

Of Counsel

CERTIFICATE OF COMPLIANCE

This brief is typed in Courier New 12 point.

^{/s/} 

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