IN THE SUPREME COURT OF FLORIDA

EMILIA CARR,

Appellant,

vs.

STATE OF FLORIDA,

Appellee.

CASE NUMBER SC11-476

APPEAL FROM THE CIRCUIT COURT
IN AND FOR MARION COUNTY, FLORIDA

REPLY BRIEF OF APPELLANT

JAMES S. PURDY
PUBLIC DEFENDER
SEVENTH JUDICIAL CIRCUIT

CHRISTOPHER S. QUARLES
ASSISTANT PUBLIC DEFENDER
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(386) 254-3758

ATTORNEY FOR APPELLANT

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TABLE OF CITATIONS

IN THE SUPREME COURT OF FLORIDA

EMILIA CARR,

Appellant,

vs. CASE NO. SC11-476

STATE OF FLORIDA,

Appellee.

PRELIMINARY STATEMENT

Appellant replies to only some of the points contained in the State's answer brief. As to points not addressed herein, Appellant relies on the arguments set forth in the initial brief.

ARGUMENTS

POINT I

IN REPLY TO THE STATE AND IN SUPPORT OF THE CONTENTION THAT THE TRIAL COURT'S EXCLUSION OF CRITICAL, RELEVANT EVIDENCE AT BOTH THE GUILT AND PENALTY PHASES AND THE ERRONEOUS ADMISSION OF EVIDENCE AT THE GUILT PHASE RESULTED IN A SKEWED VIEW OF THE FACTS OF THE CASE, THUS DEPRIVING EMILIA CARR OF HER CONSTITUTIONAL RIGHTS TO CONFRONTATION, TO A FAIR TRIAL, EFFECTIVE ASSISTANCE OF COUNSEL, AND PROTECTION FROM CRUEL AND UNUSUAL PUNISHMENT UNDER BOTH THE FLORIDA AND UNITED STATES CONSTITUTIONS.

Florida Statutes 921.142(2) provides, in part:

> Separate proceedings on issue of penalty. --Upon conviction or adjudication of guilt of a defendant of a capital felony under s. 893.135, the court shall conduct a separate sentencing proceeding to determine whether the defendant should be sentenced to death or life imprisonment as authorized by s. 775.082....In the proceeding, evidence may be presented as to any matter that the court deems relevant to the nature of the crime and the character of the defendant and shall include matters relating to any of the aggravating or mitigating circumstances enumerated in subsections (6) and (7). **Any such evidence which the court deems to have probative value may be received, regardless of its admissibility under the exclusionary rules of evidence, provided the defendant is accorded a fair opportunity to rebut any hearsay statements.**

(Emphasis added.) Appellant emphasizes the highlighted portions to illustrate that different rules of evidence apply at the penalty phase. Additionally, those rules of

evidence favor the defendant, rather than the State.

"Any such evidence, which the court deems to have probative value, may be received, regardless of its admissibility under the exclusionary rules of evidence, provided the defendant is accorded a fair opportunity to rebut any hearsay statements." Blackwood v. State, 777 So. 2d 399 (Fla. 2000) (holding rule also secures the State's opportunity to rebut any hearsay statements introduced by the defendant during penalty phase). To hold otherwise would violate the Constitution of the United States of America, specifically Amendments Six, Eight, and Fourteen. Chambers v. Mississippi, 410 U.S. 284 (1973).

Additionally, Appellant points out that the Sixth Amendment to the United States Constitution guarantees the **ACCUSED** the right to confront witnesses against her. The right to confront witnesses guaranteed by the Constitution does not apply to the government, in this case the state of Florida.

POINT II

IN REPLY TO THE STATE AND IN SUPPORT OF THE CONTENTION THAT THE TRIAL COURT ABUSED ITS DISCRETION IN DENYING THE APPELLANT'S MOTION FOR A CONTINUANCE OF THE PENALTY PHASE DEPRIVING CARR OF HER RIGHT TO A FAIR TRIAL, TO EFFECTIVE ASSISTANCE OF COUNSEL, THUS RENDERING THE DEATH SENTENCE CRUEL AND UNUSUAL PUNISHMENT UNDER THE FEDERAL AND FLORIDA CONSTITUTIONS.

The State maintains that this issue has not been preserved for appellate review because Appellant "cannot identify a motion to continue to preserve anything for review." (Answer Brief, p. 57). The State alleges that, "Throughout her brief, Carr indicates only one instance where she requested a continuance." (Answer Brief, p. 57).

In the initial brief, Appellant points out numerous instances where trial counsel was clearly overwhelmed and unprepared. The prosecutor complained about defense counsel missing court-imposed deadlines for motions as well as counsel's last-minute filing of the motion to suppress. (XV 78-84; XVI 18). Appellant also personally spoke up on two separate occasions, expressing her alarm and concern at the rapidly approaching trial date with so much left to be done, and the apparent unpreparedness of her appointed counsel. (IXX 31-2; XVII 8). These facts give context to the claim raised on direct appeal. Appellant points

out the mental health professional's testimony at the penalty phase, admitting her lack of preparation, to demonstrate prejudice. Similarly, Appellant points out defense counsel's tardiness for court and the injury to her daughter to show context and prejudice.

Additionally, Appellant did specifically move for a continuance on at least two occasions, once to continue the guilt phase (at Emilia Carr's personal insistence), and once to continue the penalty phase (if needed, which it was). DIXX 24; XXXI 391-5). Both motions were clearly denied by the trial court.

POINT IV

IN REPLY TO THE STATE AND IN SUPPORT OF THE CONTENTION THAT THE TRIAL COURT ERRED IN USING DEFENSE COUNSEL'S ARGUMENT AND OPENING STATEMENT AS EVIDENCE; IN TREATING SOME MITIGATING EVIDENCE AS AGGRAVATING FACTORS; IN REJECTING VALID MITIGATING EVIDENCE; AND IN GIVING LITTLE OR NO WEIGHT TO SIGNIFICANT MITIGATING EVIDENCE, THUS VIOLATING CARR'S CONSTITUTION RIGHTS UNDER THE EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATE'S CONSTITUTION.

The State contends that the trial court gave some weight to the mitigating circumstances. Appellant counters that the trial court was merely giving "lip service" to important, valid mitigation. Read in its entirety, the trial court's treatment of Appellant's poor upbringing and sexual abuse as a child, for example, is clearly an outright rejection of important mitigating evidence. The trial court repeatedly seems to require a "nexus" between a mitigating factor and the commission of the murder before considering the factor as valid mitigation.

Appellant points out that, as this Court recognized in Nibert v. State, 574 So. 2d 1059, 1062 (Fla. 1990), abuse as a child is always valid mitigation, despite the passage of time. Appellant maintains that being sexually abused as a child should **never** be given "little weight."

Although the trial court indeed wrote that it accepted many mitigating

factors, gave them little weight based on the lack of a "nexus" to the commission of the murder. A fair reading of the trial court's order makes it abundantly clear that the trial court did not **truly** consider many of the factors as valid mitigation at all. For this Court to find otherwise, threatens the very fabric and constitutionality of Florida's death-sentencing scheme. See, e.g., Hitchcock v. Dugger, 481 U.S. 393 (U.S. 1987).

The State further contends that if error has occurred, the proper remedy is not reversal of the death sentence, but rather remand for the entry of a corrected order. However, the State cites no authority for this proposition. Nevertheless, Appellant maintains that reversal is required in light of the **numerous errors** in the trial court's findings of fact. Life imprisonment without the possibility of parole is the appropriate sentence in this case.

POINT VIII

IN REPLY TO THE STATE AND IN SUPPORT OF THE CONTENTION THAT THE DEATH SENTENCE IS NOT PROPORTIONATELY WARRANTED BECAUSE THE MURDER WAS NOT THE MOST AGGRAVATED AND LEAST MITIGATED WHEN COMPARED TO OTHER FIRST-DEGREE MURDERS.

Appellant and her codefendant, Joshua Fulgham, were jointly indicted for the first-degree murder of Heather Strong as well as Strong's kidnapping. (I 1). Appellant's codefendant, Joshua Fulgham, was recently tried, by a different judge and jury (although under the same case number), and convicted as charged of first-degree murder and kidnapping. As they did in Appellant's case, the State also sought the death penalty for Fulgham. Following the penalty phase, the jury recommended life imprisonment without parole, thereby sparing Fulgham from a death sentence. (See attached Appendix A.) The trial court subsequently adjudicated Fulgham guilty and sentenced him to life imprisonment. (See attached Appendix B.)

Appellant now contends, at this first opportunity, that Joshua Fulgham's sentence of life renders Appellant's death sentence disproportionate. Counsel's failure to do so, under theses facts, could constitute ineffective assistance of counsel under the Sixth Amendment to the United States Constitution. See, e.g.,

Shere v. Moore, 830 So. 2d 56, 67-71 (Fla. 2002).

As this Court wrote in Shere v. Moore, 830 So. 2d 56, 60-1 (Fla. 2002):

> This Court has an independent obligation to review each case where a sentence of death is imposed to determine whether death is the appropriate punishment. See Morton v. State, 789 So. 2d 324, 335 (Fla. 2001). As we have stated, "The death penalty is reserved for 'the most aggravated and unmitigated of most serious crimes.'" Clark v. State, 609 So. 2d 513, 516 (Fla. 1992) (quoting State v. Dixon, 283 So. 2d 1, 7 (Fla. 1973)). In deciding whether death is a proportionate penalty, the Court must consider the totality of the circumstances of the case and compare the case with other capital cases. See Urbin v. State, 714 So. 2d 411, 417 (Fla. 1998). However, in cases where more than one defendant was involved in the commission of the crime, this Court performs an additional analysis of relative culpability. Underlying our relative culpability analysis is the principle that equally culpable co-defendants should be treated alike in capital sentencing and receive equal punishment. See Ray v. State, 755 So. 2d 604, 611 (Fla. 2000). See also Jennings v. State, 718 So. 2d 144, 153 (Fla. 1998) ("While the death penalty is disproportionate where a less culpable defendant receives death and a more culpable defendant receives life, disparate treatment of codefendants is permissible in situations where a particular defendant is more culpable.") (citation omitted).

In Shere, supra, this Court was unable to conduct a "true" relative culpability analysis because the codefendant was convicted of second-degree murder. However, Fulgham and Appellant, Emilia Carr, were both convicted as charged of first-degree murder and kidnapping. Therefore, appellate counsel and

this Court have the opportunity that Appellant's trial judge did not, i.e., the comparison of the death sentence imposed on Appellant Carr versus the life sentence imposed on her codefendant, Joshua Fulgham.

It is clear from the record on appeal, as well as the state's theory of prosecution , that Joshua Fulgham was, at the very least, equally if not more culpable for the murder of his own wife, Heather Strong. Of paramount importance is the fact that the victim in this case, Heather Strong, was Joshua Fulgham's wife and the mother of their children. The motive for the murder was to prevent Strong from returning to Mississippi and taking the couple's children with her. Joshua Fulgham refused to be separated from his children. Therefore, he hatched a plan to kill Heather with Emilia Carr's assistance. Fulgham had the primary motive. A minor, secondary motive on the part of Appellant might have been to keep Fulgham close to her in Florida, because Appellant was pregnant with Fulgham's next child. Nevertheless, Fulgham had the most to gain from Strong's death.

This Court should also consider the opposite positions taken by the State at each of the two trials that occurred in this case. During Appellant's trial, elected state attorney, Brad King, portrayed Appellant as the "mastermind" and leader. In contrast, during Fulgham's trial, elected state attorney, Brad King, portrayed

Fulgham as the primary, more culpable actor. The differing stances taken by the exact same lead prosecutor in these two trials was a point of great contention at the Fulgham trial, which took place well after Appellant's trial, in front of a different judge. (See attached Appendices C and D). Fulgham's lawyers lost that legal battle at the trial court level, but prevailed overall in the sentencing war by ultimately obtaining a life sentence for their client. (Appendices A and B).

As Justice Anstead wrote in his partial concurrence, partial dissent in Shere v. Moore, 830 So. 2d 56, 65-6 (Fla. 2002):

> Ray [775 So. 2d 604 (Fla. 2000)] and Slater [316 So. 2d 539 (Fla. 1975)] are two of numerous cases, going back some twenty-five years, in which this Court has acknowledged the principle that the relative culpability and punishment of a codefendant is an important factor to be considered in considering a capital defendant's sentence. See, e.g., McDonald v. State, 743 So. 2d 501 (Fla. 1999); Fernandez v. State, 730 So. 2d 277 (Fla. 1999); Jennings v. State, 718 So. 2d 144 (Fla. 1998); Howell v. State, 707 So. 2d 674 (Fla. 1998); Gordon v. State, 704 So. 2d 107 (Fla. 1997); Puccio v. State, 701 So. 2d 858 (Fla. 1997); Raleigh v. State, 705 So. 2d 1324 (Fla. 1997); Cole v. State, 701 So. 2d 845 (Fla. 1997); Slater v. State, 316 So. 2d 539 (Fla. 1975). In fact, there are at least seventy published opinions in which this Court has referred to this sentencing principle...This Court has adhered to this principle even when a codefendant is sentenced to life well after the defendant has been convicted and sentenced to death.
>
> In Scott v. Dugger, 604 So. 2d 465 (Fla. 1992), this Court considered the

propriety of disparate sentences for equally culpable codefendants where the codefendant was sentenced to life **subsequent** to the imposition of the death

sentence on the defendant, and while the defendant's sentence was pending review in this Court. This Court vacated Scott's sentence of death, finding that the "record in this case shows that Scott and [his codefendant] had similar criminal records, were about the same age, had comparable low IQs, and were equally culpable participants in the crime." Scott v. Dugger, 604 So. 2d 465, 468 (Fla. 1992). In Shere, at 66-7, Justice Anstead also pointed out that:

> This Court has applied this [Scott v. Dugger] same analysis in case after case. See, e.g., Fernandez, 730 So. 2d at 283 ("The record reveals and we find that appellant's degree of participation in the crime was similar to that of codefendant Abreu, a getaway driver who received a life sentence after a plea negotiation."); Puccio, 701 So. 2d at 863) ("We find that Puccio's sentence of death is disproportionate when compared to the sentences of the other equally culpable participants in this crime."); Hazen,700 So. 2d at 1211-12 (holding that defendant nontriggerman accomplice to murder could not be sentenced to death when more culpable nontriggerman accomplice received sentence of life imprisonment.); Curtis, 685 So. 2d at 1237 (reversing death sentence where "the actual killer was sentenced to life"); Slater, 316 So. 2d at 542 (reversing death sentence where "the court that tried the appellant also permitted the 'triggerman' . . . to enter a plea of nolo contendere").

Since Joshua Fulgham received a sentence of life rather than death, the trial court was not required to file findings of fact in support of the life sentence imposed. Buried deep in the genesis of Florida death penalty jurisprudence, some lawyers and judges assumed that written findings of fact would be filed in every first-degree murder case where the death penalty was sought, whether imposed or

not. For true proportionality review in capital sentencing, that should have been the case. Since the death penalty in Florida is reserved for the most aggravated and least mitigated first-degree murders, this should be the norm rather than the exception. In thirty-two years of practice, undersigned counsel recalls only a handful of capital cases where a trial court filed written findings of fact where a life sentence was imposed. In those instances, this Court never saw those orders, since this Court's jurisdiction does not encompass those appeals. This failure in the system severely hampers this Court's ability to conduct true proportionality review in capital cases.

Proper proportionality review by this Court should result in the vacation of Appellant's death sentence with remand for the imposition of life imprisonment without possibility of parole. Appellant and Fulgham were approximately the same age. A comparison of intelligence between the two would probably reveal that Appellant is slightly smarter than Fulgham. However, Emilia Carr has no significant history of criminal activity, which the trial court gave significant weight. Even from Appellant's trial transcript, it is clear that Fulgham does not share this critical mitigating factor. In fact, Fulgham spent approximately one month in jail only two weeks before the murder. While jailed, Fulgham stewed about the fact that his wife, Heather Strong, the victim in this case, was

responsible for his incarceration.

Most importantly, Joshua Fulgham had the primary motive to murder Heather Strong, his own wife, to prevent her from removing the children they shared as parents from the state of Florida. The evidence is also clear that the plan to stop Heather was Fulgham's. Although Fulgham enlisted Appellant's aid, Appellant was not even sure that Fulgham would ultimately murder his wife. The evidence supports her admissions that she was aware that Fulgham was going to threaten Heather, rather than kill her.

While Appellant may be a principal to first-degree murder, she was not the primary bad actor in this case. Although she admitted to helping Fulgham tape Heather to the chair, Fulgham was the one who placed his hand over Heather's mouth ultimately suffocating her. A proper weighing of the aggravating and mitigating factors in this case, as well as the relative participation of each codefendant, results in the inescapable conclusion that this Court should exercise its duty to ensure proportionate sentencing in capital cases. Life imprisonment is the just result in this case.

CONCLUSION

Based upon the foregoing cases, authorities, policies, and arguments,

Appellant respectfully requests this Honorable Court to

Respectfully submitted,

JAMES S. PURDY
PUBLIC DEFENDER
SEVENTH JUDICIAL CIRCUIT

CHRISTOPHER S. QUARLES
ASSISTANT PUBLIC DEFENDER
FLORIDA BAR NO. 0294632
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Daytona Beach, FL 32118
(386) 254-3758

ATTORNEY FOR APPELLANT

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been hand- delivered to the Honorable Pamela Jo Bondi, Attorney General, 444 Seabreeze Boulevard, Fifth Floor, Daytona Beach, Florida 32118, and mailed to Emilia Carr, DC#U24131, Lowell Correctional Institution, 11120 N. W. Gainesville Rd., Ocala, FL 34482-1479, this 21st day of June, 2012.

CHRISTOPHER S. QUARLES
ASSISTANT PUBLIC DEFENDER

CERTIFICATE OF FONT

I hereby certify that the size and style of type used in this brief is point proportionally spaced Times New Roman, 14 pt.

CHRISTOPHER S. QUARLES
ASSISTANT PUBLIC DEFENDER

IN THE SUPREME COURT OF FLORIDA

EMILIA CARR,	)	
	)	
Appellant,	)	
	)	
vs.	)	CASE NUMBER SC11-476
	)	
STATE OF FLORIDA,	)	
	)	
Appellee.	)	
	)	

Appendix A

Fulgham Penalty Phase Verdict Form

IN THE CIRCUIT COURT OF THE FIFTH JUDICIAL CIRCUIT OF THE STATE OF FLORIDA, IN AND FOR MARION COUNTY

THE STATE OF FLORIDA

VS

JOSHUA FULGHAM
_____/

CASE NO. 2009-CF-001253-A-Y

Filed in Open Court
The 20 Day of April, 2012
By _____ D.C.

VERDICT

The jury advises and recommends to the court that it impose a sentence of life imprisonment upon Joshua Fulgham without possibility of parole.

Dated this 20 day of April, 2012.

Foreperson

1074

IN THE SUPREME COURT OF FLORIDA

EMILIA CARR,

Appellant,

vs. CASE NUMBER SC11-476

STATE OF FLORIDA,

Appellee.

Appendix B

Fulgham Judgment and Sentence

IN THE CIRCUIT COURT OF THE FIFTH JUDICIAL CIRCUIT, IN AND FOR MARION COUNTY, FLORIDA

_____ Probation/Community Control Violator _____ Retrial _____ Resentence

STATE OF FLORIDA

Case Number: 42-2009-CF-001253-AXXX-XX

vs.

JOSHUA DAMIEN FULGHAM

JUDGMENT

The Defendant, JOSHUA DAMIEN FULGHAM, being personally before this Court represented by TANIA ZAHRA ALAVI, the attorney of record, and the State represented by BRADLEY E KING, and said Defendant having previously been tried and found guilty by jury on April 12, 2012, of the following crime(s):

OBTS Number(s): 0014261847, 4201186793

Count	Crime	Offense Statute Number	Degree
1	MURDER IN THE FIRST DEGREE	782.04(1a)	FCAP
2	KIDNAPPING	787.01(1a)	F1-PBL

X and no cause being shown why the Defendant should not be adjudicated guilty, it is ordered that the Defendant is hereby ADJUDICATED GUILTY of the above crime(s).

1110

Defendant's Signature

8/18/81

Defendant's Date of Birth

Joshua Fulgham

Print Name

FINGERPRINTS OF DEFENDANT

1. Right Thumb	2. Right Index	3. Right Middle	4. Right Ring	5. Right Little
				
6. Left Thumb	**7. Left Index**	**8. Left Middle**	**9. Left Ring**	**10. Left Little**
				

Fingerprints taken by:

Name and Title

273 DEPUTY
4.25.12

I HEREBY CERTIFY that the above and foregoing fingerprints are the fingerprints of the Defendant, Joshua Damien Fulgham, and that they were placed thereon by said Defendant in my presence in open court this date.

DONE AND ORDERED this 25th day of April, 2012, at Ocala, Marion County, Florida

JUDGE

Form: CAT 001 (8/09)

CIRCUIT COURT OF THE FIFTH JUDICIAL CIRCUIT, IN AND FOR MARION COUNTY, FLORIDA

STATE OF FLORIDA

vs.

JOSHUA DAMIEN FULGHAM

Case Number: 42-2009-CF-001253-AXXX-XX

OBTS Number(s): 0014261847, 4201186793

SENTENCE

(as to Count 1)

The Defendant, JOSHUA DAMIEN FULGHAM, having been adjudicated guilty herein, and the Court having given the Defendant an opportunity to be heard and to offer matters in mitigation of sentence, and to show cause why the Defendant should not be sentenced as provided by law, and no cause being shown

It is the sentence of the Court that:

X The Defendant is hereby committed to the custody of the Department of Corrections.

To be imprisoned (Check one; unmarked sections are inapplicable):

X For a term of natural life.

////

CIRCUIT COURT OF THE FIFTH JUDICIAL CIRCUIT, IN AND FOR MARION COUNTY, FLORIDA

STATE OF FLORIDA

vs.

JOSHUA DAMIEN FULGHAM

Case Number: 42-2009-CF-001253-AXXX-XX

OBTS Number(s): 0014261847, 4201186793

SENTENCE

(as to Count 2)

The Defendant, JOSHUA DAMIEN FULGHAM, having been adjudicated guilty herein, and the Court having given the Defendant an opportunity to be heard and to offer matters in mitigation of sentence, and to show cause why the Defendant should not be sentenced as provided by law, and no cause being shown

It is the sentence of the Court that:

X The Defendant is hereby committed to the custody of the Department of Corrections.

To be imprisoned (Check one; unmarked sections are inapplicable):

X For a term of natural life.

IN THE SUPREME COURT OF FLORIDA

EMILIA CARR,

Appellant,

vs.

STATE OF FLORIDA,

Appellee.

CASE NUMBER SC11-476

Appendix C

Fulgham Penalty Phase Proffer

IN THE CIRCUIT COURT OF THE FIFTH JUDICIAL CIRCUIT
OF THE STATE OF FLORIDA, IN AND FOR MARION COUNTY, FLORIDA

STATE OF FLORIDA	)	
	)	
V.	)	CASE NO: 2009-CF-1253(A)
	)	
JOSHUA D. FULGHAM	)	
	)	
_____	)	

DEFENDANT'S PROFFER INTO THE RECORD OF INTENT TO INTRODUCE EVIDENCE AT PENALTY PHASE OF STATE ATTORNEY'S INCONSISTENT ARGUMENTS AT CODEFENDANT'S TRIAL

COMES NOW, Defendant, Joshua Fulgham, by and through his undersigned counsel, and files this proffer of Defendant's intention to introduce evidence at penalty phase of State Attorney's inconsistent arguments at Co-Defendant Emilia Carr's trial:

1. Defendant has been convicted of first degree murder and kidnapping. The State of Florida is seeking the death penalty. State Attorney Brad King also served as lead prosecutor in trial for co-defendant Emilia Carr.
2. Upon the Court's denial of Defendant's motion to introduce excerpts of State Attorney Brad King's closing argument from the penalty phase of Co-defendant Emilia Carr's trial, the Defendant submits the following proffer for the Court's record.

PROFFER

Over the course of Defendant's penalty phase proceedings, Defendant has presented expert testimony from four different expert witnesses – Dr. Heather Holmes (forensic psychologist), Dr. Steven Gold (forensic psychologist), Dr. Robert Ouaou (neuropsychologist), and Dr. Michael Maher (psychiatrist). These witnesses, testifying in their respective professional

capacities, provided the jury with their expert opinions concerning a variety of issues relating to the Defendant, including his intellectual capacity, intellectual functioning, intelligence quotient, brain damage, brain trauma, post-traumatic stress disorder, substance abuse, drug addiction, and state of mind. Each of these witnesses had the opportunity to interview and evaluate Defendant, and based on those evaluations, each formulated a professional opinion as to Defendant's mental condition.

Prior to testifying, and over Defendant's objection, the Court granted a motion in limine filed by the State of Florida precluding the experts from testifying about any statements the Defendant may have made to them during their respective interviews and evaluations. Although the Court has permitted Defendant's expert witnesses to testify as to their opinions, how they formulated those opinions, and generally on what those opinions are based, they have been precluded from specifically discussing any specific statement made to them by Defendant, no matter how pertinent to their analysis or formulation of opinions that statement may have been. The Court has ruled that under *Mendoza*, these statements are self-serving, inadmissible hearsay and cannot allow an expert witness to act as a "conduit" to Defendant's otherwise inadmissible statements unless Defendant agrees to testify first.

Aside from asserting that these statements would not be hearsay (because they would not be introduced for the truth of the matter asserted, but rather as explaining the bases of the experts' opinions), Defendant has argued several times that this ruling is not only contrary to the text of section 921.141(1), Florida Statutes ("Any such evidence which the court deems to have probative value may be received, regardless of its admissibility under the exclusionary rules of evidence, provided the defendant is accorded a fair opportunity to rebut any hearsay statements."), *Blackwood v. State*, 777 So. 2d 399 (Fla. 2000) (holding rule also secures the

State's opportunity to rebut any hearsay statements introduced by the defendant during penalty phase), but also violates Defendant's Fifth, Sixth, Eighth and Fourteenth Amendment rights in that Defendant has been placed in a position where he must choose between waiving his Fifth Amendment right to refrain from testifying and his Sixth, Eighth, and Fourteenth Amendment rights to fully present his mitigation evidence because by limiting the experts from fully explaining the basis for their opinions in this manner, the Court has necessarily reduced the impact, weight, and credibility this testimony would otherwise receive by the jury.

This became all the more evident when State Attorney Brad King cross-examined these expert witnesses, pointing out to the jury that while they (the expert witnesses) had reviewed the transcripts of the recordings and videos of Defendant's jail phone calls to various parties and interviews with Detective Donald Buie, only the jury actually viewed the videos and heard the recordings, and was thus truly able to assess the Defendant's mind because they were able to hear the intonation of his voice, see how he interacted, see his body language, etc. as he spoke. Though each expert had personally interviewed and interacted with the Defendant – some for up to five hours – during their evaluation process, these witnesses were precluded from testifying about those interactions by the Court's earlier order, thus drawing into question the credibility of Defendant's witnesses' testimony and opinions and leaving Defendant's witnesses no way to adequately respond.

One of the themes of Defendant's mitigation evidence provided by these experts was that Defendant's history of sexual abuse, substance abuse, physical and emotional abuse and trauma had left him with diminished mental capacity and executive function deficiency that would allow Defendant to be more easily manipulated by most, particularly by women. This evidence was

presented to show that Defendant likely would not have actually gone through with the murder but for Co-defendant Emilia Carr's presence and encouragement.

To rebut this evidence, the State announced its intention to publish to the jury recordings of a number of phone calls made while Defendant was in jail in which Defendant discusses having his mother timely complete his taxes and expresses concern about his vehicle registration and paying the electricity bill at home. These calls were intended to rebut the evidence of Defendant's limited executive function. The State also announced its intention to publish several other calls in which Defendant appears to be manipulating both the victim, Heather Strong, and the Co-defendant, Emilia Carr. Over Defendant's objection, the Court allowed this rebuttal evidence to be presented.

However, just prior to the State's rebuttal presentation, Defendant became aware that Mr. King, acting as lead prosecutor in Co-defendant's case, had taken a different position with respect to the nature of Ms. Carr's relationship with Defendant as it related to her role in the murder. Specifically, in his closing argument, Mr. King highlighted certain testimony expressing that Ms. Carr:

> is smarter than most of us; 125 IQ, in the superior range, where average is 100. She is independent of the men in her life. You heard Dr. Land say, you know: No, she was independent. She didn't say just independent. She said independent and she is in control and manipulated the relationship.

See attached Transcript of Mr. King's Closing Argument at Emilia Carr's Advisory Sentencing Proceeding at 2172:5-11. This passage demonstrates that during Co-defendant Emilia Carr's case, Mr. King argued that Ms. Carr was smart, independent, and manipulated the relationship between her and Defendant Joshua Fulgham. That position is inconsistent with the position Mr.

King now takes in his rebuttal case in Defendant Joshua Fulgham's penalty phase, specifically that Defendant Joshua Fulgham was manipulating Co-defendant Emilia Carr.

Upon finding this information, Defendant moved to introduce excerpts of Mr. King's closing argument from Emilia Carr's trial for the purpose of showing that the Prosecutor is arguing different, inconsistent theories, and contradicting his own prior arguments. *See Green v. Georgia*, 442 U.S. 95 (1979); *Fotopoulos v. State*, 838 So. 2d 1122, 1137-40 (Fla. 2002) (Lewis, J., concurring) (arguing that for counsel in possession of such information to fail to present it is "inexcusable and outside the broad range of reasonably competent performance under prevailing professional standards") (internal citations omitted); *State v. Gates*, 826 So. 2d 1064 (Fla. 2d DCA 2002) (holding "State's attempt to argue inconsistent theories of guilt against two codefendants to the same crime is fundamentally unfair.").

After renewing prior objections, motion for mistrial, and oral argument on this issue, the Court denied Defendant's motion to introduce excerpts from Mr. King's prior closing argument, concluding that the statement did not reflect that Mr. King had actually taken a position on the issue.

Proffering now, had those statements been admitted, Defendant would have published the same to the jury during Defendant's penalty phase closing argument. After publishing, Defendant would have argued that Mr. King had previously represented to another jury that Defendant was the one who was manipulated, and that the State Attorney is now contradicting himself in order to persuade this jury to recommend a death sentence for Defendant. Defendant would further argue that Mr. King's prior position was actually in accord with the testimony presented by Defendant's expert witnesses in the present case, and that he has changed his

position solely for the purpose of attaining a recommendation of death for Defendant Joshua Fulgham.

Preventing Defendant from introducing this evidence has only served to further the error of this Court's earlier ruling, and violates Defendant's Fifth, Sixth, Eighth, and Fourteenth Amendment rights to refrain from testifying and presenting – and having a sentencing jury consider – the entirety of Defendant's mitigation evidence.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY a true and correct copy of the foregoing has been delivered on this 19 day of April, 2012 to Mr. Brad King, State Attorney's Office, 110 NW 1st Avenue, Ocala, FL 34475.

Respectfully Submitted,

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IN THE SUPREME COURT OF FLORIDA

EMILIA CARR,

Appellant,

vs.

STATE OF FLORIDA,

Appellee.

CASE NUMBER SC11-476

Appendix D

Fulgham Trial Transcript Excerpt

IN THE CIRCUIT COURT OF THE FIFTH JUDICIAL CIRCUIT
OF FLORIDA, IN AND FOR MARION COUNTY

STATE OF FLORIDA

Plaintiff,

vs. CASE NO. 09-CF-1253-A-Y

JOSHUA FULGHAM(A),

Defendant.

PROCEEDINGS:	JURY TRIAL (EXCERPT)
BEFORE:	Honorable Brian Lambert Circuit Judge Fifth Judicial Circuit, In and For Marion County, Florida
REPORTED BY:	CONSTANCE MILLER, RPR Stenographic Court Reporter Notary Public State of Florida at Large
DATE:	April 19, 2012
TIME:	1:30 p.m.

A P P E A R A N C E S:

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APPEARING ON BEHALF OF STATE OF FLORIDA

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APPEARING ON BEHALF OF DEFENDANT

ALSO PRESENT:
Kathleen O'Shea, Defense Mitigation Specialist

I N D E X

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APRIL 19, 2012 1:30 p.m.

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MR. LENAMON: Can we come sidebar for one second, please, Judge?

THE COURT: Yes.

MR. HOOKER: Is it okay to hand out the transcripts?

THE COURT: Yes.

Yes.

MR. LENAMON: Judge, it was brought to my attention by Mr. Hartstone by who Mr. Hartstone. That we were going to be introduce the part of the closing statement.

MS. ALAVI: Judge, pursuant to rule 90.803(18) which is an exception to hearsay, I'm going to ask to move into evidence Mr. King's -- it would be an admission by a party-opponent, which fits under the rule, because the State is a party. Portion of Mr. King's closing argument in the Emilia Carr trial, which I have -- I will enter as an exhibit as well but I will bracket it off for the Court's review.

Does the Court need the rule?

And obviously, Judge, it's bee the position of the State that contrary to what he argues in his closing argument in Emilia Carr's trial, in our case and I

think that his words there are an admission against the State's interest, who is a party to the case.

MR. KING: I don't have any objection to the entirety of it being introduced into evidence, Your Honor, under the rule of completeness. I believe I'm entitled to have the entirety that explains that particular paragraph introduced.

MS. ALAVI: Well, I would have to see what he's talking about as to what particular paragraph.

MR. KING: Well, like everything else we've done, the rule of completeness, the entirety of my statement, which is the entirety of my closing argument.

MS. ALAVI: Well, I disagree with that because it's not like everything else we've done. When we asked to have the other part of Ms. Chandler's phone call regarding the model or whatever played, the Court ruled that the stuff she said, the rest of it was not coming in under the rule of completeness and the rule completeness --

THE COURT: It's discretionary on my part anyways.

MS. ALAVI: Well, the Court would have review the entirety of the closing argument then.

THE COURT: Fine.

MR. KING: And -- I'm sorry.

THE COURT: Go ahead.

MR. KING: They're still in their case in chief?

THE COURT: I guess they're asking to reopen it. After you rested, is that what we're doing?

MS. ALAVI: Yes, sir.

MR. HARTSTONE: Just introduce this one piece of evidence.

MS. ALAVI: Yes, sir.

MR. KING: I didn't hear.

MS. ALAVI: Yes, sir. Yes, sir.

MR. HARTSTONE: To introduce this one piece of evidence, yes, sir.

MR. KING: And I would object, Your Honor. They had their chance to introduce whatever they wanted to. Without the entirety of this statement, it's not in context. What I'm talking about is the entirety of Emilia Carr's mitigation.

THE COURT: I would have to see the entirety of it.

MS. ALAVI: I think you can look at it, Judge.

MR. KING: Okay.

Right now or can we go ahead and --

THE COURT: No, we're going ahead.

* * *

THE COURT: All right. Jury's out. Here's the jury instructions; two for each side. I think they're

accurate.

MR. HARTSTONE: Thank you.

THE COURT: Ms. Alavi, do you have any type of case that says a statement made by the prosecutor in an earlier case is admissible?

MS. ALAVI: Judge, I'm relying on 90.803(18), admission against a party-opponent statement --

THE COURT REPORTER: I'm sorry, Ms. Alavi, can you please speak up a little bit?

MS. ALAVI: A statement that is offered against a party and is the party's own statement and either an individual or a representative capacity, it also -- that's Subsection A. It also fits under Subsection B, which is a statement of which the party has manifested an adoption or a belief in its truth.

And so I would say that this is an admission against a party-opponent. The State is a party in this case. The rules of evidence were not meant to be one-sided. If they were under that particular subsection only -- that subsection could only be used as a Defendant ever in a criminal proceeding, it could never be used again against the State of Florida. And it's clear that on what would appear to be page 2172 of the closing argument in Emilia Carr's case, that Mr. King, at the very least, adopted a belief in the

truth of any statement that was made by Doctor Land, but as clearly his own statement as well.

THE COURT: Do you have a copy of the entire transcript of his closing?

MS. ALAVI: Yes, sir.

MR. HARTSTONE: Yes, sir.

THE COURT: Do you have a copy of that as well or no?

MR. HARTSTONE: This is a -- this includes both the prosecution and the defense closings, just for purposes of having the certified of authenticity, the certificate of service and everything. I believe it starts 2167, I think is where the actual argument starts.

THE COURT: All right.

MR. KING: Twenty-one what?

MR. HARTSTONE: I think it's 2167.

MS. ALAVI: It begins on 2167 sort of an introductory sort of thing until he gets to 2172, and then factually sort of, that's where it begins.

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MR. KING: And Your Honor, if I could, I don't know if we've decided the closing argument and statement of a party-opponent issue.

THE COURT: I haven't -- I was just starting to

read but --

MR. KING: Well, if you just look at page 2172, the paragraph that they're referring to.

THE COURT: Okay. Which, tell me what line are we starting on.

MR. KING: 2172.

THE COURT: Line five?

MR. KING: Line five.

My statement is, "What do you know now about Emilia Carr from the psychologist that tested her?" So clearly, all I am doing is repeating to the jury the testimony that was in the record in that trial, and nothing more. And to suggest that I adopted that, is just wrong. It is the facts that had to be argued in that case, and we simply -- the law is clear, we can argue different theories with different defendants in the case, even if they're codefendants. But that's not even what's happening here. What's happening here is, that was the testimony of the trial of that expert witness. So it had to be dealt with in closing argument.

MR. LENAMON: We waive our client's presence, Judge, for the remainder of this hearing.

THE COURT: He just needs to get his medicine?

MR. LENAMON: Yeah.

THE COURT: That's fine.

MR. KING: And that's all that is, so it is not the adoption of that testimony and it's certainly not me stating the position of what I believed in that case.

THE COURT: Okay.

MS. ALAVI: It's fairly clear from the closing that he adopted that, and I think there's one other --

MR. HARTSTONE: If we could have a moment?

THE COURT: Yes, sir, go ahead.

MS. ALAVI: And let me just say, I think it's clear from the statement above as well, above that paragraph, that he adopted it. What do we know about Emilia Carr? And he goes in to what we know about Emilia Carr, and you read the -- I mean, if you read it in the context of the argument --

THE COURT: I'm sorry, I --

MS. ALAVI: -- it seems fairly clear me that he's at the very least adopted that position. He says we'll talk about them -- he's talking about certain evidence from 2171.

THE COURT: Okay, I'm looking at page 2171, is there a line that you want me to --

MS. ALAVI: Well, no, he's talking about general stuff there and then he goes into 2172, We'll talk

about that in a moment, but now you also have the opportunity to put that timeline, not just what happened, but what you know about Emilia Carr. And then he starts to go into that paragraph and continues from there. And I think from just before that paragraph and through there, I think it's fairly obvious that the -- at least that he adopted that position. And I think --

MR. HARTSTONE: There's one more passage I want to refer you to, but if you can give me a moment to just look.

THE COURT: What's the other passage?

MS. ALAVI: We're looking for it, Your Honor.

MR. HARTSTONE: We're looking for it.

THE COURT: All right.

MR. HARTSTONE: I'm sorry.

Your Honor, I'd like to refer you to that other passage --

THE COURT: I'm sorry? What page, I'm sorry.

MR. HARTSTONE: Yeah, 2173.

THE COURT: 2173?

MR. HARTSTONE: Yup. And it would be lines 12 through 17; really 15 to 17.

THE COURT: All right. So the comment is, Mr. King is arguing to the Emilia Carr jury, which is

the co-defendant in this case, she's, I guess that's referring to Emilia Carr, used to being in charge of those relationships. She's used to be to being in control, she ain't in control right now.

MR. HARTSTONE: Correct, Your Honor.

Those, in conjunction the comments that we had earlier referred you to on page 2172, I think clearly demonstrate that the State had taken a position on this.

MS. ALAVI: It falls under 90.803(18)(a) now as well as (b).

MR. KING: Your Honor, if you just look at it, it's just simply again, repeating what the expert said, is all that it is. That's what the expert said about her. She was -- she, Ms. Carr, was used to being in charge of relationships. That's what the expert said. And you have to argue in that case what the experts say; meaning this case, the expert says Emilia Carr is smart so I've got to deal with that, but the suggestion that I adopted that belief is not correct. It's simply repeating to the jury the testimony that they heard.

MS. ALAVI: Judge, that's not really exactly the way that Dr. Land put it either in her testimony, which I have, so -- and if that's the position he's taking, then by his own argument, he would have said what he

said on page -- he would've prefaced like he did on page 2172. What do we know now about Emilia Carr from the psychologist that tested her, which he never says anything about on 2173. He's further advancing his argument based on that.

THE COURT: Well, I mean, in the context of 2172 line eight, he says you heard Dr. Land say, you know, no, she was independent, she didn't just say independent, she said independent and she is in control and manipulated the relationship. So that's what he's saying that Dr. Land, you heard Dr. Land say this.

And that, I mean, the start of that paragraph on line five of 2172, how do we know -- what do you know now about Emilia Carr from the psychologist that tested her; she's smarter. So he's saying this is what the psychologist says. This is the result of this.

MR. HARTSTONE: I mean, I guess my response to that would be, I don't really see why that makes a difference at all.

I mean, despite that being -- as Mr. King said, that was the testimony in the case, he's working with the testimony in the case, closing argument, an attorney has to select which passages or which pieces of evidence they want to present to the jury to make their case, and he chose to present to the jury that

she was in control of this relationship, that she's much smarter than our client and that she's not manipulated. In fact, as it says here she's -- again, 2172 line ten, she said independent and she is in control and manipulated the relationship.

So whether he adopted, the State adopted that belief personally, I think really isn't the issue. I think that the issue is really that's the position on this issue that they presented to the jury.

THE COURT: Was Dr. Carr's -- Dr. Carr was whose witness?

MR. KING: Dr. Land?

THE COURT: Land, I'm sorry.

MR. KING: Was the defense witness. She was the defense expert that did the IQ testing of her and did the other interviews and so forth of her to come to conclusions about her, and that was her testimony in the trial.

MS. ALAVI: Judge, let me just add that on page 15 of Dr. Land's trial testimony, Mr. King was cross-examining her and his question was:

"And she's smarter than most of us?

"Answer: Yes.

"Question: She's -- you said she was very independent, very proud and that she is in control and

manipulating of her male relationships?

"I believe so."

THE COURT: What does that prove?

MS. ALAVI: What is that from?

THE COURT: No, what does that prove? He's asking --

MS. ALAVI: It goes to further the argument.

MR. HARTSTONE: It lends credence to the idea that this is -- I mean, this is testimony that he was able to extract from a witness --

MS. ALAVI: He was eliciting.

MR. HARTSTONE: -- to later use it in his closing argument.

MR. KING: If you read that, I'm asking her didn't she say that? She already said that in direct. If you'll look back to her direct, that's what she said. And I merely pointed out that that is what she said.

MR. HARTSTONE: I guess I'm just a little lost on why, if you chose -- excuse me, if the State chose to put it in closing argument, to argue to the jury that she was in control of this relationship, no doubt to bolster their position that a death verdict should be rendered against her, I'm just not certain --

MR. KING: Because --

MR. HARTSTONE: -- a little unsure as to why it

matters specifically her testimony that the State was adopting. They adopted the language; that's really all that matters.

MR. KING: You don't --

MS. ALAVI: And not only that really, but on page 2173, it's obvious that he has furthered, furthered that position but with his own statements.

MR. KING: I'm sorry, Your Honor. I apologize.

I mean, in the context of a trial, you have to accept the facts as they are. There are times when you can argue that fact doesn't exist because there's contrary facts, or you accept the facts that you cannot disprove and you have to argue them. That doesn't mean you believe them, but you have to -- you have to in closing argument, explain what the other side's facts are and deal with that. And that's all that is.

It's just -- I mean, I understand them trying to make the reach, but it just, it just isn't there. It's simply a recitation of what Dr. Land testified to. I mean, I'm -- in this, in this trial, I will make comment, I'm sure, about what all the doctors here testified to. That don't mean I believe them, but it means I accept that that's what they said under oath and I have to deal with it.

MS. ALAVI: Well, once again, we have page 2173,

that is his extrapolation, if you will, from what she said and those are his words, not hers.

THE COURT: Okay.

MR. KING: I don't have anything else to say, Your Honor.

THE COURT: All right. If you want to proffer it outside the presence of the jury, I don't believe that it's an adoption by the State in that case, so I find it inadmissible here, but you certainly can proffer it to preserve it for any reviewing court.

MS. ALAVI: Judge, if the Court's okay, I'll go ahead and type it out separately and proffer it, and I'll turn it in tomorrow.

THE COURT: Or if you want to read it; however you want to do it. If you want to read it.

MR. KING: You can just mark it as an exhibit; however.

MS. ALAVI: Judge, we'll submit it in the morning.

MR. HARTSTONE: We'll submit something in the morning.

THE COURT: That's fine. We'll proffer it outside their presence.

Have you had a chance to look at the proposed jury instructions?

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***REPORTER'S NOTE: The asterisks (* * *) centered on an otherwise blank line as they appear in this transcript, represent where proceedings were had, but not ordered transcribed at this time. This transcript contains only testimony, as requested.

C E R T I F I C A T E

STATE OF FLORIDA

COUNTY OF MARION

I, CONSTANCE MILLER, Stenographic Court Reporter and Notary Public, State of Florida at Large, do hereby certify that I was authorized to and did stenographically report the foregoing proceedings taken in the case of STATE OF FLORIDA vs. JOSHUA FULGHAM, Case Number 42-2009-1253-Y, and that the foregoing pages, one through 18, inclusive, constitute a true and correct record of the proceedings to the best of my ability.

I FURTHER CERTIFY that I am not a relative or employee or attorney or counsel of any of the parties hereto, nor a relative or employee of such attorney or counsel, nor am I financially interested in the action.

WITNESS MY HAND this 26th day of May, 2112 at Ocala, Marion County, Florida.

CONSTANCE MILLER
Stenographic Court Reporter
State of Florida at Large