IN THE SUPREME COURT OF FLORIDA

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

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

INITIAL BRIEF OF APPELLANT

JAMES S. PURDY
PUBLIC DEFENDER
SEVENTH JUDICIAL CIRCUIT

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PRELIMINARY STATEMENT

Counsel will refer to the record on appeal using a Roman numeral to designate the volume followed by the appropriate Arabic number designating the pertinent pages.

STATEMENT OF THE CASE

On April 9, 2009, the spring term grand jury, Fifth Judicial Circuit, in and for Marion County, returned a two-count indictment charging Joshua Damian Fulgham and Emilia Lily Carr, the appellant, with the first-degree murder and kidnapping of Heather Strong. (I 1). On April 28, 2009, the State filed a notice of intent to seek the death penalty. (I 31).

Appellant filed several pleadings attacking the constitutionality of Florida's death penalty sentencing scheme. See e.g., (II 260-390; III 391-587). Following a pretrial hearing, the trial court denied the majority of Appellant's motions. (XV 28-72). The pertinent motions will be discussed infra.

On November 9, 2010, Appellant filed a notice of intent to present expert testimony of mental mitigation. (IV 623-6).

On November 23, 2010, the State filed a motion in limine to preclude a Appellant from introducing evidence of statements that Joshua Fulgham, Appellant's codefendant, made to any witness concerning his participation in the murder of Heather Strong. (V 824).

All parties stipulated to the severance of Appellant's case from her co-defendant, Joshua Fulgham. (XXVI). The case proceeded to a jury trial before the Honorable Willard Pope. On the morning of the final day of jury selection,

Appellant moved for a continuance which the trial court denied. (XXXI 393).

At the close of the State's evidence, Appellant moved for a judgment of acquittal, which the trial court denied. (XXXIX 1708-13).

During Appellant's case-in-chief, the trial court excluded, as hearsay, evidence relating to Appellant's codefendant's involvement with the victim, specifically a certified copy of an injunction and accompanying affidavit. (XXXIX 1794-7). The trial court also excluded, on the same basis, evidence of Appellant's codefendant 2004 arrest report for battery on the murder victim. (XXXIX 1797).

Following deliberations, the jury returned verdicts of guilty as charged on both counts. (VII 1264-5). The trial court adjudicated Appellant guilty of the two offenses. (VII 1263).

A penalty phase convened on December 8, 2010. (XLI 1967). At the beginning of the penalty phase, the court granted the State's motion in limine, thus excluding evidence relating to Appellant's codefendant. (XLI 1972-1).

Following deliberations, the jury recommended, by a bare majority seven-to-five vote, that Appellant be put to death for the murder of Heather Strong. (VIII 1370; XL 1956).

On February 17, 2011the trial court heard additional testimony and evidence

at the Spencer[1] hearing. (II 340-490).

On February 22, 2011, the trial court sentenced Appellant to death for the first-degree murder and to a consecutive life sentence for the kidnapping. (X 1892-1904, 1927-55).

The trial court found three aggravating circumstances:

(1) the capital felony was committed while Carr was engaged in the commission of the kidnapping of the victim, Heather Strong-great weight;

(2) the capital felony was especially heinous, atrocious, or cruel-great weight ;

(3) the capital felony was committed in a cold, calculated, and premeditated manner, without any pretense of moral or legal justification-great weight.

The trial court considered the statutory mitigating factors, concluding that only one applied; Emilia Carr has no significant history of criminal activity. The trial court gave that factor significant weight. (X 1937-9). The trial court considered but rejected three statutory mitigating factors, i.e., Carr's age of twenty-four; Carr acted under extreme duress or under the substantial domination of Josh Fulgham; Carr was under the influence of extreme mental or emotional disturbance.(X 1937-9).

As for the nonstatutory mitigating factors, the trial court found:

[1] Spencer v. State, 615 So.2d 688 (Fla. 1993).

(1) Carr was raised in a poor home environment-little weight;

(2) Carr had an unprotecting mother who sometimes chose the man in her life over the care of her children-little weight;

(3) Carr was raised in a dysfunctional family-little weight;

(4) Carr was bright, a good student, and graduated high school-little weight;

(5) Carr was a good mother-little weight;

(6) Carr was a good daughter-little weight;

(7) Carr performed community service and charitable/humanitarian deeds-little weight;

(8) Carr regularly attended church and Bible study while growing up-little weight;

(9) Carr completed modeling school-little weight;

(10) Carr completed massage therapy school-little weight;

(11) Carr participated in ROTC in high school-little weight;

(12) Carr was a "child" mother who gave birth to her first child at the tender age of seventeen-little weight;

(13) Carr was a single parent-little weight;

(14) Carr is bilingual-little weight;

(15) the murder was an isolated, one-time incident-some weight;

(16) the mental health expert's testimony supports a life sentence-little weight;

(17) the presentence investigation report recommends consecutive life sentences-some weight;

(18) life in prison, without possibility of parole, meets the needs of society and is therefore appropriate-some weight;

(19) the jury recommendation for death was a bare majority of seven to five-little weight;

(20) Carr has the support of friends and family-little weight;

(21) Carr was sexually abused as a child by her grandfather and her father, which resulted in her removal from the home after she reported the abuse-little weight;

(22) Carr was seven-months pregnant and was experiencing a high-risk pregnancy at the time of the offense-little weight;

(23) Carr voluntarily gave statements to law enforcement and was generally cooperative-little weight;

(24) Carr did not flee from law enforcement even after becoming aware that she was likely a suspect-little weight.

(X 1940-52). The trial court rejected some mitigating factors, either finding that they were not proven or were not true mitigation, specifically:

(1) Carr is intelligent-not mitigating;

(2) Josh Fulgham, the codefendant, manipulated and controlled Carr-not proven;

(3) Josh Fulgham played the victim, Heather Strong, and Carr against each other-not proven;

(4) Carr is immature and wanted a relationship-not proven;

(5) Joshua Fulgham, the codefendant, actually killed Heather Strong-not proven;

(6) Carr's statements are the only proof of her involvement in the crimes-not proven and not mitigating;

(7) Carr did not intend for the kidnapping or murder to occur-not proven.

(X 1945-51).

Appellant filed a timely notice of appeal on February 23, 2011. (X 1908). This brief follows.

STATEMENT OF FACTS

Guilt/Innocence Phase

State's Case-in-Chief

This case involves a love triangle in rural Marion County. Appellant's codefendant, Josh Fulgham, and his wife, Heather Strong (the victim), moved from their native Mississippi to Marion County in 2003. Heather and Josh had a very stormy, off-and-on relationship. They also had two children together. Eventually, Emilia Carr, the appellant, became sexually and romantically involved with Joshua Fulgham. Ultimately, Josh and Emilia had a child together. Emilia was pregnant with her second child by Josh, when the murder occurred. Josh and Emilia's relationship was stormy as well. Josh tended to stay with Heather until they fought. He would then move in with Emilia. This pattern continued over the course of several years. (XXXIII 739-749). These two stormy relationships ultimately culminated in the murder of Heather Strong.

Heather Strong worked at the Iron Skillet restaurant located in the Petro station in Reddick, Florida. Brenda Smith, Heather's boss, knew of the tumultuous relationship between Heather and Josh. In the fall of 2008, Heather was living with Ben McCollum[2] and appeared to be a very happy woman. On December 26,

[2] McCollum described how Josh interfered with his own relationship with Heather.

2008, Heather and Josh suddenly got married. Six days later, Josh threatened to kill Heather and was arrested. Josh remained in the county jail for approximately one month.

Shortly before Josh was released from jail, two men (law enforcement), came by the Petro station and talked to Heather about Josh. After the meeting, Brenda Smith gave Heather some advice. She strongly suggested that Heather not agree to Josh's release, pointing out that “he is really going to kill you when he gets out.” Smith also advised Heather, "You don't tell somebody what you're going to do. You just do it. You know, because of the way he is, you know, why would you ever tell him you are taking the kids and leaving."[3] (XXXIII 659).

During her morning shift on Sunday, February 15,2009, Strong received an “emergency” phone call , after which she expressed concern about her children. After the call, Strong told her boss, “It was Josh.” (XXXIII 648-53). Strong left work that day at 3:00 p.m., the conclusion of her shift. Brenda Smith never saw Heather again.

Shortly after Josh had been jailed for his assault on Heather, several

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Josh had thrown rocks at McCollum’s house. He had also cursed at him through his window and confronted him with a firearm. (XXXIII 668-70, 672-3). On the day Heather went missing, McCollum had declined her invitation to rekindle their relationship.(XXXIII 671).

[3]There was evidence throughout the trial that Heather intended to leave Josh and

members of the "group" [4] were drinking at the mobile home shared by Heather and Josh. Josh and his mother had prepared a letter for Heather to rewrite, ostensibly to get the charges dropped and get Josh released from jail. Emilia presented the letter to Heather but she refused to cooperate. According to witnesses, Emilia became angry, grabbed Heather by the hair, and briefly held a knife to her throat in an attempt to force the issue. Cooler heads prevailed and the incident dissipated. Everyone agreed that alcohol was a factor in the incident. The pair subsequently reconciled their differences and were civil, even friendly. (XXXIII 674-80, 691).

Jason Lotshaw grew up with Emilia and Jamie Acome. Shortly before Josh was released from jail, Heather moved in with James "Jamie" Acome. 688-Heather put the deposit on the apartment using a check she received from the women's rape crisis center, presumably the result of Josh's domestic violence. (XXXIII 688). On February 15, 2009, Acome babysat Heather's two children while she worked her morning shift at the Iron Skillet. She came home following work and Acome left to run some errands. When he returned home around eight o'clock that evening, Heather and her children were gone. He subsequently received a phone call from Josh Fulgham, apparently telling him that he and Heather were back together. As a

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move back to Mississippi with all of her children, including the two by Josh.

[4]Emilia, Josh, Heather, Christy Stover, Jason Lotshaw, and James Acome (who has three felony convictions) socialized with each other, having many connections.

result of that call, Acome moved out of the apartment. He never saw Heather again. (XXXIII 680-87).

Emilia's Threats Against Heather

During Josh's incarceration that January, 2009, Emilia was socializing with Jason Lotshaw and Acome, both friends with whom she had grown up. During a drive to the store to buy diapers, Emilia offered $500 to Lotshaw and Acome if they got Heather Strong drunk, so that Emilia could kill her by snapping her neck. (XXXIII 700-3). At the time of his testimony, Lotshaw was in jail, charged with burglary and grand theft. Although he was looking at 20 years, the prosecutor had offered him five years. The state attorney's office could not make any promises, even if he testified at Emilia's trial.

James Acome's sister-in-law, Christie Stover, met Emilia when she moved into the trailer park. Stover's younger brother was good friends with Josh Fulgham. During the month of January, when Josh was incarcerated in the county jail, Emilia called Stover several times. Emilia was upset that Heather had falsely accused Josh, resulting in his incarceration. Emilia professed her love for Josh and wanted him released. She told Christie that she was willing to pay $500 for someone to kill Heather. She stated that she would do it herself, but could not

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Acome and Emilia shared a child. XXXIII 674-7, 686-7, 721-5).

move the body due to her advanced pregnancy. Stover admitted that she did not take Emilia seriously. Emilia had recently received her income tax refund, and everyone was trying to get a piece of it. (XXXIII, 721-32).

Heather Goes Missing

When Josh Fulgham was released from the county jail on February 6, 2009, he went to live with his mother, Judy Chandler. (XXXIII 750). On Sunday afternoon, February 15, Chandler had composed a letter apparently at Josh's request. The letter was a document for Heather to sign giving custody of their two children to Josh. (XXXIII 750-3; State's Exhibit 4). Later that day, Chandler returned home and saw Josh and Heather driving out of her driveway in Josh's car. When Chandler went inside, she discovered that the couple had left their children, McKinzie and Zachary with her. (XXXIII , 750-6). Josh returned to his mother's house about 8:30 or 9:00 that night. He had the document that Heather purportedly signed. In spite of Josh's insistence, Chandler maintained it was not Heather's signature. (XXXIII 752-6). Two days later, Chandler and Josh used the letter to register McKinzie at a new school close to Chandler's home. On that same day, Emilia moved into Chandler's house with Josh. The couple moved out a week or so later into a nearby trailer park. (XXXIII 753-6).

Misty Strong, Heather's cousin who still lived in Mississippi, began to worry

when she could not get in touch with Heather. Misty knew that Heather and Josh had continuing problems in their relationship. Josh was very controlling and did not want Heather to have contact with her family. While she was with Josh, Heather had no cell phone or computer access. Eventually, Misty contacted the Marion County Sheriff's office and expressed her concern. (XXXIII 732-9, 779-84). Deputy Billings of the Marion County Sheriff's office began the investigation. She interviewed Heather's current boyfriend, James Acome. She learned of Josh Fulgham's relationship with Heather and also found out about Josh's arrest in January for aggravated assault with Heather as the victim. After speaking to several other friends and coworkers, including Josh Fulgham, she issued a bolo for Heather Strong as a missing person. (XXXIII 779-84).

Appellant's Interviews with Law Enforcement

Beginning March 18, 2009, Appellant gave several interviews to detectives at the Marion County Sheriff's office. While some personnel interviewed Emilia in one room, others were interviewing Josh Fulgham in a separate interview room. At various times during the numerous interviews, which lasted over several days, Emilia was transported back and forth between the police station and her home. Additionally, some of the interviews were over the telephone, when Emilia called various detectives. (XXXIV 801-902; States Exhibit 13, 14, 15, and 16). Initially,

Emilia told police that she had no knowledge of Heather's whereabouts or fate. She told police that Josh knocked on her bedroom window early Monday morning, February 16, and told her that he loved her.

Using information gleaned from interviews of Josh, detectives repeatedly confronted Emilia, urging her to tell the complete truth. Eventually, Emilia told police that Josh had confessed to her that he killed Heather in the storage trailer that was parked on the back edge of Emilia's mother's house, where Emilia also lived with her children. Emilia explained that she did not initially tell the detectives this story, because she thought that Josh was "full of crap", and she did not believe him. Josh had told her that the alligators in Orange Lake would devour Heather's body, leaving no trace. (XXXIV 845-55).

Meanwhile, Josh, who was under arrest, offered to lead police to the spot where he buried the body. Josh led them to Emilia's mother's house; police received consent to search from Emilia's mother; and they obtained a search warrant. Police dug where Josh directed and recovered Heather Strong's decomposing body. (XXXIV 869-72). Dr. Barbara Wolf, the medical examiner, performed the autopsy and could not determine the cause of death. The only injury the doctor found was a small bruise on Heather's forehead. This was a result of some type of blunt force trauma that was in no way a life-threatening injury.

(XXXV 1019-20). Dr. Wolf then reviewed police reports and interviews of witnesses and suspects. Using that information, Dr. Wolf opined that Heather's death was caused by suffocation. (XXXV 995-1038). Heather had a blood-alcohol level of .099. (XXXV 1037-38). Evidence recovered at the burial and the trailer revealed no physical evidence tying Emilia to the murder. (XXXV 1041-1093; XXXVI 1098-1133).

Detectives continued to conduct interviews of Emilia. She implied that she knew more information than she was giving them. She repeatedly asked for immunity in exchange for testimony that she could provide as a witness, although not a participant in the crime. Emilia eventually added to her first account of Josh knocking on her window early that morning. After telling her he loved her, Josh warned Emilia not to go in the back or to let anyone else go back there. Finding that strange, Emilia went into the trailer and found Heather's body, duct taped to a chair. When Josh returned that evening, Emilia yelled at him and told him to get rid of the body. Emilia never dreamed that Josh would bury Heather's body in her mother's yard. Josh explained that he had lured Heather to the trailer with the promise of hidden money. Once in the trailer, he confronted her about leaving the state with his children and killed her. (XXXVI 1152-1270). Emilia subsequently admitted that Josh had called her on the night of the murder, telling her of his plan.

She did not believe that he would go through with it. (XXXVII 1311-6). Emilia continued to participate in interviews with law enforcement, both in person and on the phone. Law enforcement contacted Josh's sister, Michele Gustafson, who agreed to wear a "wire" in an attempt to elicit incriminating statements from Emilia. While police listened, Michele took him Emilia for a ride to a park in Alachua County. After much prompting and prodding, Emilia explained that Josh tricked Heather into coming to the trailer by telling her that Emilia had hidden some money there. Josh arrived at Emilia's house with Heather in the car. As Josh had instructed, Emilia remained inside her house for several minutes. When Emilia entered the trailer, Josh was confronting Heather about having him jailed. Heather continued to threaten to return to Mississippi the children. Josh hit Heather in the head with a broken flashlight. Heather attempted to run out of the trailer. In doing so, she knocked Emilia over. Josh dragged her back and began duct taping her to a chair. Josh told Heather that she had cost him everything. They placed the garbage bag over Heather's head. They tried to break Heather's neck, figuring it would be quick and painless. Heather suffocated as a result of the garbage bag. Emila and Josh buried the body in the back yard. Josh forced Heather to sign the children's custody letter before killing her. Emilia repeatedly emphasized that Josh needed to keep his mouth shut, so that everyone could get

their stories straight. Emilia also repeatedly expressed her surprise that Josh carried out his plan. When he talked about it, Emilia never took him seriously. (XXXVIII 1446-1526).

Once the police heard the conversation between Emilia and Michele, they brought Emilia to the sheriff's office where they confronted her with the recording. Emilia told police a factual version fairly consistent with what she told Michele. She admitted to being a principal to the murder, in that she was present, did nothing to stop it, and assisted as Josh ordered her. Emilia explained that, at most, she helped Josh tape Heather to the chair. Based on Josh's order, she made a halfhearted attempt to break Heather's neck. Emilia failed because she was shaking so badly. Josh brought her to the trailer; Josh hit her with a flashlight; Josh taped the garbage bag, that Emilia put over Heather's head; and Josh ultimately kill her by placing his hand over the garbage bag where it covered her mouth and nose. (XXXVIII 1526-1653; State's Exhibit 16).

Defense Case-in-Chief

Emilia's family testified that, on the night the murder allegedly occurred, she remained in the house all night. A couple of friends came over for a birthday celebration. No one saw Josh come to the house that night. If something had happened in the trailer out back, no one in the house could have heard it. (XXXIX

1722-39).

Emilia Carr testified in her own defense. Initially, she voluntarily accompanied a female deputy to the police station during the early evening hours on March 18, 2009. Over the next couple of days, she gave several subsequent interviews. The first interview ended late that evening. After being home for only thirty minutes, the police returned to her front door. She again voluntarily went to the station, where she stayed until 11:00 a.m. the next morning. After being home for a few hours, when she was able to get some sleep, the police again picked her up for more interviews. She was not actually released to stay home until 6:00 that evening. (XXXIX 1760-63).

During the interviews, Emilia repeatedly lied to the authorities because of threats that she would not see her three small children. The Department of Children and Families had removed her children from her home. As long as she remained a suspect, her children could not be returned. Therefore, she gathered as much information as she could in an attempt to get immunity and make a deal.

In addition to the police feeding her information about the case, Michele Gustafson, Josh Fulgham's sister, help fill in some of the details. Emilia's conversation with Gustafson was another attempt to gather information; act as if she were on Josh Fulgham's side; and go back to the police with the information.

That way, it would appear she knew more about the case than she really did. In addition, she made up some facts; specifically, the location of Heather Strong's shoes, and the flashlight used to hit her in the head. The truth was that the shoes did not belong to Heather[5], and the flashlight was simply a random one that was stored in the trailer. (XXXIX 1763-65, 1769, 1770). She had very little sleep during this time period. She was eight-months pregnant, and she was desperately trying to regain custody of her three young children.

The fact of the matter was that she had no involvement in Heather Strong's demise. She did not even see Josh Fulgham that evening. Emilia and Josh never discussed having Heather Strong killed. (XXXIX 1780). Emilia never saw Heather in the trailer either dead or alive. In fact, she did not even know who had actually killed Heather. (XXXIX 1776). Contrary to the State's theory, Carr was not attempting to blame Lotshaw and Acome for Heather's death. Rather, Carr was attempting to blame Josh Fulgham and his mother. She only referred to Acome and Lotshaw during her conversation with Michelle Gustafson in an attempt to persuade Gustafson that she was on Josh Fulgham side. (XXXIX 1782-83).

[5] Immediately prior to her murder, James Acome lived with Heather Strong and became familiar with her clothing. He identified the shirt that Heather was wearing when she was killed. When confronted with the shoes that Appellant led the police to as Heather shoes, Acome testified that they did not appear to be any shoes that Heather owned. (XXXIX 1788-90).

Earlier in the day, Emilia and Josh Fulgham had spoken several times on the phone. They were arguing over the fact that Josh Fulgham wanted Emilia to put their baby up for adoption. Fulgham never told Emilia that he was bringing Heather over to the trailer behind Emilia's house. Emilia did not go out to the trailer that night, nor the next night. She found out that Heather Strong was buried on Emilia's mother's property when Detective Buie told her. (XXXIX 1766, 1770-71).

Carr admitted that she told Michelle Gustafson that she wanted to kill that "bitch," Heather Strong. Carr reported that she said the same thing about her ex-husband. (XXXIX 1773). Carr denied offering money to either Lotshaw or Acome to help her kill Heather. (XXXIX 1773-4). When Carr told police that she did not know anything, they insinuated otherwise. They warned her that she would go to prison for the rest of her life and would not see her child born. Carr believed that if she gave them what they wanted to hear, they would work with her, so she could save her children. (XXXIX 1777).

Penalty Phase

State's Case

The State played excerpts of recorded interviews and conversations that the

jury had previously heard at the first phase of the trial. (XLI 1992-2006). The State also introduced Appellant's certified kidnapping conviction obtained in the first phase. XLI 2006; State's Exhibit 69). The only new evidence presented by the State consisted of victim impact testimony from the victim's mother (XLI 2007-24).

Evidence in Mitigation

Emilia Carr was born Emilia Lilly Yera on August 8, 1983 to Maria Zayas and Palayo Vinales (aka "David"), in Central Florida. Maria Zayas was raised in a home of Mexican farm workers. They were not highly educated people. Maria did not finish high school and has a low functioning intelligence. Maria had her first child Christina when she was only thirteen. Maria had a sexual relationship with a young man in the camp. Maria had a second child, Umberto Perez. The family lived in Central Florida. In 1982 Maria met and married Palayo Vinales (aka "David"), Emilia's father. He came to the United States via the Mariel boat lift in the early 1980's. Emilia Carr has a brother, Umberto Perez, and two sisters, Christina and Millagra or "Miracle". Christina and Millagro have severe disabilities and are handicapped in various degrees, placing additional familial responsibilities on the members of this family.

At the age of five, Emilia Carr was removed from her home by state

authorities, due to her father and grandfather's sexual abuse of her sibling, Christina. The family, minus Christina, reunited after they moved to Boardman, Florida, a small community located in northwest Marion County. Christina live a short way from the rest of the family with her grandmother. Over the years, she was taken for visits to be with the rest of the family. Each time, she was repeatedly exposed to her perpetrator, under supervised conditions.

Emilia was a toddler at the time Christina was abused. As she grew, she became the next family victim by her father (Christina's stepfather), who began grooming Emilia for molestation at a young age. When Emilia was a small child, her mother looked after Milagro, also known as Miracle, who was disabled at birth. Emilia also visited Christina regularly to help her mother care for her. Sometimes Emilia would go with her mother, but most of the time she would spend with her father.

As a result., when Emilia was the young age of six, her father began to abuse her. This course of conduct continued throughout Emilia's youth until her senior year in high school. At that time Emilia suspected that her father would chose a new family member to molest now that Emilia was grown. The only one left was Millagro. Millagro and Emilia were extremely close sisters. Emilia was strong and tall and took care of her little sister ever since she was small. Fearing for Miracle's

well being, Emilia told someone at school what had happened to her. After years of harboring this secret of sexual abuse by her father, Emilia risked everything to protect her little sister Miracle. She spoke out and told the secret.

Her father was arrested and jailed. While her father was incarcerated pending trial, he attempted to hire a “hit man” to kill his wife, Maria, his daughter, Emilia and his mother in law. The Marion County Sheriff's office intercepted this attempt to kill his family members and charged him with solicitation to commit first degree murder. When Emilia was subpoenaed to testify at the pretrial deposition for the sexual abuse charges, she recanted. This was undoubtedly the result of pressure from her mother who scolded her for tearing apart her family. Emilia recanted her allegations claiming her father did not molest her. Even so, her father was never released from jail. He pleaded guilty to solicitation of first-degree-murder and was sentenced to a term in the Florida Department of Corrections. He subsequently died in prison.

Emilia Carr was always a good student. As a young teenager her family put the money together to send her to the Barbizon Modeling School in Tampa, Florida. In high school Emilia joined the ROTC program. Her participation in this program, and her dream of joining the Marines brought great pride to her family. She later went on to attend and complete certification to be a licensed massage

therapist.

When Emilia was sixteen, her mother introduced her to an older man. Emilia became pregnant with her first child. The couple got married and lived together with their first child, Joshua. The dream of the military was forgotten. By all accounts, Emilia as a good mother and housekeeper. Emilia became pregnant with her second child. After a few years the couple began having marital problems and finally split. Emilia loved being a mother and was a good one. Her children became her life.

After her divorce, Emilia became pregnant with her third child. After a few years of single life, Emilia met and married Jamie Carr. It was also during this time that Emilia met Joshua Fulgham. Emilia divorced her second husband in October, 2008. Before her divorce was final, Emilia became pregnant with her fourth child. Emilia was pregnant in a high risk pregnancy when the murder of Heather occurred. Emilia was still pregnant when she was arrested. Emilia's fourth child was born shortly after her incarceration. Emilia never had custody of this child. She was seized by Department of Children and Families and placed into foster care immediately upon her birth. (XLII 2034-2125, 2131-4).

Dr. Ava Land, a forensic psychologist, met and talked with Emilia Carr, and administered at least one psychological test. Dr. Land also reviewed documents

relating to the case. During her testimony at the penalty phase, Land admitted that she had not completed her assessment of Emilia and would like to review additional information. With the limited information she had reviewed, she found no indication of any serious mental illness. Emilia does have a very bland demeanor in expressing affect. There were some symptoms of post-traumatic stress and anxiety. Dr. Land concluded that Emilia is fairly bright with an IQ score of 125.

Dr. Land explained that Emilia's family situation affected Emilia's development as a person. Emilia's mother was intellectually deficient, resulting in deficient parenting. Dr. Land detailed the sexual abuse. Emilia was molested by both her grandfather and father. She had early memories of the grandfather fondling her genitals and asking her to perform certain sex acts in exchange for money. As she developed, her breasts were routinely fondled by her father. She remembered showering with her father and being forced to wash his penis. The abuse finally stopped when Emilia stepped up to protect her little sister. (XLII 2135-51).

SUMMARY OF THE ARGUMENT

Initially, Appellant contends that her trial was unfair, where at the guilt phase and the penalty phase, the State successfully convinced the judge to exclude relevant, critical evidence relating to Josh Fulgham's relative culpability in the murder of Heather Strong. By stretching the rules of evidence, the jury was not given an accurate picture of Josh Fulgham's more important role in the murder of his own wife.

Additionally, because Appellant's trial was severed from her codefendant, evidence of Fulgham's actions was improperly introduced by the State at the guilt phase. Appellant had no ability to confront that evidence, thus violating her constitutional right to confrontation.

Appellant contends that the trial court abused its discretion in denying several motions to continue, the first made prior to trial, the second at the end of jury selection, and the third prior to the commencement of the penalty phase. On the witness stand, Appellant's mental health expert in mitigation admitted that she had not completed her evaluation and investigation prior to her testimony. Trial counsel was overwhelmed with family medical emergencies and was not prepared to try the case. Emilia Carr personally expressed great concern on the record about the representation by her lawyer.

Reversible error occurred at the penalty phase where the prosecutor engaged in improper closing argument. The prosecutor misstated the appropriate law as to how the jury should treat certain mitigating evidence. Contemporaneous objections were overruled and motions for mistrial were denied. The prosecutor was allowed to continue the improper argument resulting in a tainted jury recommendation.

Appellant attacks her death sentence on various grounds. The trial court treated mitigating evidence as aggravating; improperly required that a nexus exist between mitigation and the murder; and denigrated or gave little to no weight to valid, significant mitigation.

Appellant challenges the imposition of her death sentence where it was based on a bare majority (seven-to-five vote). The improper closing argument by the prosecutor, combined with the improper exclusion of relevant evidence undoubtedly contributed to the one extra vote that led to the imposition of the death penalty.

The trial court also erred in finding the "heightened premeditation" aggravating factor where the evidence did not support such.

Appellant challenges the trial court's finding that the murder was especially heinous, atrocious, or cruel, where she had no prior knowledge of the cruel method

that Josh Fulgham would use to kill his wife.

Finally, Appellant contends that Florida's capital sentencing scheme violates the United States Constitution as interpreted in Ring v. Arizona, 536 U.S. 584 (2002) Appellant concedes that this Court has repeatedly rejected this argument but urges reconsideration.

ARGUMENT

POINT I

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.

The trial court's admission of hearsay evidence at the guilt phase violated Appellant's constitutional right to confront witnesses as guaranteed by the Sixth Amendment.

Trial court rulings on the admissibility of evidence are generally reviewable for abuse of discretion. Ray v. State, 755 So.2d 604, 610 (Fla.2000); Alston v. State, 723 So.2d 148, 156-57 (Fla.1998). "In considering a trial court's ruling on admissibility of evidence over an objection based on the Confrontation Clause, the standard of review is de novo." Milton v. State, 993 So.2d 1047, 1048 (Fla. 1st DCA 2008) (citing Hernandez v. State, 946 So.2d 1270 (Fla. 2d DCA 2007)).

The issue before this Court is a complex evidentiary one. The issue involves two separate groups of documents. One group was admitted at the guilt phase over Appellant's hearsay and confrontation objections. Initially, Appellant will address

that evidence introduced by the State, over objection, at the guilt phase. The trial court granted the State's motion to take judicial notice, and admitted the documents as a business record exception to the hearsay rule (IV 761-6; XXXIII 757-78; State's Exhibits 5, 6, and 7). These documents consisted of school board records that indicated the transfer of the murder victim's child to a different school two days after the victim's disappearance and murder. (The documents were prepared when Josh Fulgham, Appellant's codefendant, and Josh's mother registered the child for school).

At a November 22, 2010, pretrial hearing, the trial court ruled this evidence admissible. (XX 560-71). Trial counsel objected on numerous grounds, including hearsay; confrontation and Crawford; relevance; and Florida Statutes Section 90. 403 (the prejudicial effect outweighed its probative value). The trial court noted. Appellant's objections stating that the issue was preserved. Although counsel did not object to the introduction of the evidence when introduced at trial, the issue is preserved. § 90.104., Fla. Stat. (2009).

The prejudicial portion of those documents was the addition of the name of an "emergency contact," who would be allowed to pick up the child from school. The name added to the school records was that of Emilia Carr, the appellant. The person who registered the child admitted that Emilia Carr had no part in the

registration process.

The prejudice is obvious. The very act of Joshua Fulgham adding Emilia Carr as a person authorized to pick up the victim's child constituted inadmissible hearsay. Appellant was unable to adequately confront the witness against her, Joshua Fulgham, her codefendant, because his trial was severed for Bruton[6] confrontation reasons. At the very least, any slight probative value is substantially outweighed by the unfair prejudicial effect. § 90.403, Fla. Stat. (2009).

The jury was presented with official business records that proved that the victim's husband, who was having an affair with Emilia, the appellant, registered his child at a public school two days after the murder. In the child's medical emergency contact information, Josh Fulgham listed Emilia Carr as an authorized person. A mere two days after the murder, an official business record connected Emilia directly to the person who actually killed Heather. Appellant had no opportunity to confront this evidence. This violated her constitutional right to confront witnesses against her guaranteed by the United States Constitution.

[6]Bruton v. U.S., 391 U.S. 123 (1968).

The trial court's exclusion of relevant evidence at both the guilt and penalty phases violated Appellant's constitutional right to present evidence in her own defense.

Guilt Phase Error

Any evidence that tends to support the defendant's theory of defense is admissible, and it is error to exclude it. Vannier v. State, 714 So.2d 470, 472 (Fla. 4th DCA 1998). Where evidence tends in any way, even indirectly, to establish a the defendant's theory of the case, it is error to deny its admission. Rivera v. State, 561 So.2d 536, 539 (Fla. 1990). The Supreme Court said in Chambers v. Mississippi, 410 U.S. 284 (1973), that "[f]ew rights are more fundamental than that of an accused to present witnesses in his own defense."

During Appellant's case in chief at the guilt/innocence phase, defense counsel sought to introduce a certified copy of an injunction that Josh Fulgham had obtained against Heather Strong, the victim. The affidavit for the injunction indicated that Heather intended to take the couple's children back to Mississippi. Counsel requested that the court take judicial notice of the certified copy of the injunction obtained from the court file. The trial court, *sua sponte*, ruled that, although he could take judicial notice of the court file, the injunction, and accompanying affidavit were hearsay that met no exception. The prosecutor

belatedly argued that the affidavit was not properly authenticated where Appellant had not proven that Josh signed the affidavit. The trial court ruled that the injunction and accompanying affidavit were inadmissible hearsay. (XXXIX 1794-7). The trial court also excluded evidence that Josh Fulgham was arrested in 2004 for battery on Heather. The arresting officer's report indicated that Josh attempted to smother Heather by sitting on her chest and putting his hand over her nose and mouth. The State objected based on hearsay; the trial court sustained the objection; and excluded the evidence. (XXXIX 1797).

The issue arose once again at the beginning of the penalty phase. The prosecutor noted that defense counsel had marked for evidence the injunction records, previously discussed, and a certified probable cause affidavit regarding Josh Fulgham's 2004 arrest for misdemeanor battery on Heather Strong. The prosecutor pointed out that the injunction evidence had been excluded at the guilt phase as hearsay. The prosecutor also mentioned the State's motion in limine previously granted. Defense counsel responded that the evidence of the arrest was relevant to the substantial domination mitigator, in that Fulgham had a history of physical violence and dominance of females. Defense counsel also contended it was relevant to the "catch-all" mitigator regarding any aspect of the crime or the defendant's character. (XLI 1972-73). The trial court initially stated that it was his

"understanding… that the mitigation had to have something to do with this case." (XLI 1973). The trial court stated, " the catch-all, anything for consideration, isn't that what the Spencer hearing is for ?". (XLI 1974). Once defense counsel explained the law to the trial court, the judge questioned the relevance of the background or character of the codefendant, Josh Fulgham. (XLI 1975). The evidence was completely excluded at the penalty phase as well.

By excluding the evidence, the trial court, in direct contrast to his ruling in favor of the State which Appellant contests in the first section of this argument, completely severed Josh, the actual murderer, from Emilia. As demonstrated in the first section of this point, the State was able to have it both ways. They unfairly connected Emilia to Josh in a way that she could not adequately confront and refute that evidence. When Appellant attempted to, balance the scales, so to speak, the trial court's ruling thwarted her efforts. The jury heard much about Josh through Emilia's own statements to police and others. The excluded evidence would have demonstrated Josh's motive to kill Heather. Additionally, it demonstrated a pattern and history of violence perpetrated by Josh on Heather. It could be considered "reverse" Williams rule evidence. A new trial is mandated.

Penalty Phase Error

Florida Statutes clearly allows for hearsay testimony in the penalty phase of the trial. §921.141 (1), Fla. Stat. In fact, the United States Supreme Court has consistently held that preclusion of relevant evidence at a capital sentencing proceeding runs afoul of the Court's holdings that emphasize the importance of providing to the jury as much information as possible. Lowenfield v. Phelps, 484 U.S. 213 (1988); Lockett v. State, 438 U.S. 586 (1978) (finding unconstitutional any state-imposed restriction on the admissibility at sentencing of any perceived mitigation).[7] In Green v. Georgia, 442 U.S. 95 (1979), the United States Supreme

[7] The statute, by its plain language, allows hearsay to be admitted at the penalty phase provided that "**the defendant** is accorded the opportunity to rebut any hearsay statements." Fla. Stat. §921.141(1). This is in accord with the Sixth Amendment and Crawford v. Washington, 541 U.S. 36 (2004), holding that the Sixth Amendment requires that the **defendant** have the opportunity to rebut hearsay evidence. See also State of North Carolina v. Lewis, 619 S.E.2d 830, 835 (N.C. 2005) ("[T]he rule against hearsay is an evidentiary rule directed at preserving the accuracy and truthfulness of trial testimony. However, there exists a constitutional protection - the right to confrontation - which also restricts the admissibility of out-of-court statements at trial. This right is preserved in both the Sixth Amendment to the United States Constitution and the North Carolina State Constitution Declaration of Rights. **It applies only in criminal prosecutions and may be invoked only by the accused**. U.S. Const. amend. VI; N.C. Const. art. I, § 23.") (emphasis added); Al-Amin v. State of Georgia, 597 S.E.2d 332, 349 n. 12 (Ga. 2004) (Constitutional right to confrontation **not** implicated where proponent of the hearsay is the defendant. The limitations imposed on the government in Crawford v. Washington are not applicable to defense evidence.); Green v. Georgia, 442 U.S. 95 (1979) (reversing a death sentence where the trial court excluded the defense offered hearsay evidence). (See also dissent of J. Rehnquist,

Court reversed a death sentence where the trial court had excluded defense offered hearsay evidence, ruling:

> Regardless of whether the proffered testimony comes within Georgia's hearsay rule, under the facts of this case its exclusion constituted a violation of the Due Process Clause of the Fourteenth Amendment. The excluded testimony was highly relevant to a critical issue in the punishment phase of the trial, see Lockett v. Ohio [citation omitted] . . . . In these unique circumstances, "the hearsay rule may not be applied mechanistically to defeat the ends of justice." Chambers v. Mississippi [citation omitted]. Because the exclusion of [the] testimony denied petitioner a fair trial on the issue of punishment, the sentence is vacated and the case is remanded for further proceedings . . . .

Green v. Georgia, 442 U.S. at 97.

The evidence was even more probative at the penalty phase. If admitted, the evidence would have tended to prove that Josh substantially dominated Emilia in the commission of the murder of his wife. The evidence also tended to prove the relative culpability of the two codefendants. This would be the only opportunity for Appellant's jury to make that assessment. The arrest affidavit contains details where Heather had described a previous attack by Josh, in which he placed his

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442 U.S. at 99, noting "No practicing lawyer can have failed to note that Georgia's evidentiary rules, like those of every other State and of the United States, are such that certain items of evidence may be introduced by one party, but not by another. This is a fact of trial life, embodied throughout the hearsay rule and its exceptions."). But see Hitchcock v. State, 578 So.2d 685, 690 (Fla. 1990) (predating Crawford and ruling that the statute, despite its plain language that it refers only to the "defendant," applies the right to rebut to the state as well,

hand over her mouth and nose, the same method by which she ultimately killed her, sans the garbage bag. The evidence also revealed the history of violence between Josh and Heather, the ultimate victim. In that regard, the evidence constituted a type of reverse Williams rule evidence. The injunction that Josh sought provided the motive for killing her. Josh intended to stop Heather from taking his children back to Mississippi, by any means possible. The exclusion of this probative, powerful evidence resulted in an unconstitutionally tainted, bare-majority jury recommendation that Emilia should be put to death. Each of these excluded matters were highly relevant to the jury's consideration of whether the defendant should live or die for her crimes. See Cooper v. Dugger, 526 So.2d 900 (Fla. 1988); Garcia v. State, 816 So. 2d 554, 564-567 (Fla. 2002). Exclusion of them precluded the jury from making their reasoned determination of the sentencing issues. In Warren v. State, 577 So.2d 682 (Fla. 1st DCA 1991), the District Court reiterated that a homicide defendant is afforded wide latitude in the introduction of evidence in support of his theory of the case, and said that where there is even the "slightest evidence" which may be reasonably regarded as bearing on the defense, "all doubts as to the admissibility . . . must be resolved in favor of the accused." Id. at 684. See also Barber v. State, 576 So.2d 825 (Fla. 1st DCA

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contrary to the above-referenced cites).

1991) ("[A]ppellant complains that the trial court erred in sustaining the state's hearsay objection and precluding defense witness, Dr. Doheny, from relating what appellant told him concerning the amount of liquor appellant had consumed the night before the murder. Dr. Doheny offered this testimony in response to a question asking his expert opinion regarding appellant's blood alcohol level on the night in question. We agree that the trial court erroneously ruled that this testimony was not admissible.") The trial court in this case thus erred by excluding from evidence testimony bearing on Appellant's defense of the death sentence, rendering such sentence unconstitutional. The trial court in this case erred by excluding from evidence all of this testimony bearing on Appellant's defense of the death sentences, rendering such sentences unconstitutional. A new penalty phase is required. Art. I, §§9, 16 and 17, Fla. Const.; Amends. V, VIII, and XIV, U. S. Const.

POINT II

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.

An order denying a continuance will be reversed upon a showing of an abuse of discretion. Sliney v. State, 699 So.2d 662 (Fla. 1997). Llant's request for a continuance should have been granted where there was a rush to judgment; trial counsel was unprepared; the mental health expert was not sufficiently prepared; witnesses were unavailable; and counsel was dealing with a family emergency. This resulted in a "palpable abuse of discretion," unduly prejudicing the defendant. Fennie v. State, 648 So.2d 95 (Fla. 1994).

Trial counsel was clearly overwhelmed by a series of events beyond her control. Counsel's daughter suffered a severe injury requiring surgery, in the midst of trial. (XLI 1971). Counsel went so far as to mention her daughter's injury in closing argument at the penalty phase. (XLIII 2237-8). Additionally, certain witnesses could not be located and served subpoenas. Counsel also tried to call the medical examiner as her own witness, but the doctor repeatedly ignored the

numerous defense subpoenas. Most critically, the mental health expert who testified at the penalty phase regarding mitigation was completely unprepared. Counsel went so far as to apologize to the jury for the witness's failure to complete her report in time. (XLIII 2234).

Although appellate courts typically defer to a trial court's ruling on a motion for continuance, deference is not absolute. Smith v. State, 525 So.2d 477, 480 (Fla. 1st DCA 1988). It appears the common link in those cases in which a palpable abuse of discretion has been found is that defendant must be afforded an adequate opportunity to investigate or prepare for presentation of any applicable defense. Id. at 479; Beachum v. State, 547 So.2d 288 (Fla. 1st DCA 1989). It is helpful to follow the course of the proceedings below to illustrate the abuse of discretion in denying the requested continuances. The issue first appeared about three working weeks prior to trial. At a November 2, 2010, pretrial hearing, the prosecutor expressed concern that, with only 27 days before trial, defense counsel had yet to file her motion to suppress. He also complained that defense counsel had missed court-imposed deadlines for other motion filings. The trial court chastised defense counsel and urged her to comply. (XV 78-84).

At the next hearing (November 10), the prosecutor pointed out that defense counsel had missed yet another deadline (November 5), to file her motion to

suppress. The hearing on the motion to suppress had been scheduled for November 10, but the prosecutor canceled his subpoenaed witnesses when no motion was filed. The prosecutor then argued that Appellant should be precluded from filing a motion to suppress, where she was given two chances, but had not. "And now here we are… less than two working weeks before the trial, with other things that she hasn't done that we've got to arrange to get done." (XVI 18).

In response, defense counsel related her preparation for trial admitting to a laundry list of things left to be done over the next three weeks. These included the suppression issue; redaction of interviews and statements; additional investigation by the mitigation specialist; preparation of a diagnosis/mental mitigation report; and admissibility of Williams rule evidence. She ultimately believed she would be prepared for trial. (IXX 19-24). However, defense counsel concluded her report with the statement, "My client wants a continuance." (IXX 24). The hearing concluded with the court inquiring of Ms. Carr under oath. Although she ultimately did not request that counsel be discharged, Appellant pointed out that counsel had been unprepared the last several court appearances. (IXX 31-2). At the State's request, the judge made a specific finding that counsel was not ineffective. (IXX 34-5).

Citing the rapid pace of the proceedings and the seeming lack of preparation

by her trial counsel, Emilia Carr again expressed concern at the November 18, pretrial hearing, a mere eleven days prior to trial. Although a full-blown Nelson7 hearing was not conducted, the State was the first to express concern. When the court inquired, Carr pointed out that trial was scheduled to start in eleven days yet people haven't been spoken to; depositions haven't been done; and she wanted to be better informed. "And there's been 20 months, and it's just down to the wire...I don't understand." (XVII 8).

The problem arose yet again when, on the second and final day of jury selection, defense counsel indicated that she was having difficulty maintaining reasonable communication with Dr. Ava Land, her mental health professional, who would testify at the penalty phase. Although Dr. Land had seen Appellant, she had yet to conduct any psychological testing. Defense counsel expressed concern that, on the eve of trial, she was not prepared to present evidence of the mental mitigators at the penalty phase. Counsel suggested that the appointment of a different doctor might be necessary. That final day of jury selection, Appellant moved for a continuance, so that she could be effectively prepare for penalty phase. The trial court denied that motion, but made arrangements for Dr. Land to appear before the court, sooner rather than later. (XXXI 391-5). Dr. Land subsequently appeared before the court and, after consulting with counsel,

indicated that she believed she could complete the necessary work in time to testify at trial.

At the commencement of the penalty phase in the afternoon of December 8, 2009, defense counsel apologized for being late. She explained that she had a personal family emergency. Her daughter had been kicked in the chest by a horse that morning and was hospitalized at the regional medical center. (XLI 1971). Counsel insisted she was ready and penalty phase commenced. Appellant called Dr. Land who testified that she had occasion to meet Emilia Carr, talk with her, and give her some tests. She also reviewed unspecified documents. Defense counsel then asked:

> Q. Now, would it be fair to say that you have not totally completed your final assessment of Ms. Carr?
> A. Yes. There would be additional information I would like to review.
> Q. But as of this time, do you have--have you formed an opinion on certain mental health issues related to Ms. Carr?
> A. I believe I have something useful to offer at this point, yes.

(XLII 2137).

It is abundantly clear that Emilia Carr's convictions and death sentence are the result of a rush to justice. While trial counsel requested a continuance at several stages of the proceedings below, Appellant herself personally, on the record, expressed grave concern about the seeming lack of preparation by her trial

counsel. The travesty reached its culmination at the penalty phase when Dr. Land, the sole mental health professional in the case, admitted that she had not completed her evaluation of Emilia Carr. However, she believed that she had "something useful to offer." (XLII 2137). Not only has there been an abuse of discretion, but the denial of the continuance was so arbitrary and fundamentally unfair that it violates constitutional principles of due process. See Gandy v. Alabama, 569 F.2d 1318, 1323 (5th Cir. 1978); Shirley v. North Carolina, 528 F.2d 819, 822 (4th Cir. 1975).

The United States Supreme Court addressed this subject in Ungar v. Sarafite, 376 U.S. 575, 589 (1964):

> The matter of continuance is traditionally within the discretion of the trial judge, and it is not every denial of a request for more time that violates due process even if the party fails to offer evidence or is compelled to defend without counsel. Contrariwise, a myopic insistence upon expeditiousness in the face of a justifiable request for delay can render the right to defend with counsel an empty formality. There are no mechanical tests for deciding when a denial of a continuance is so arbitrary as to violate due process. The answer must be found in the circumstances present in every case, particularly in the reasons presented to the trial judge at the time the request is denied. (Citations omitted.)

When a motion for a continuance for the purpose of securing defense witnesses is denied, case law has identified various factors in considering whether denial of the motion was an abuse of the trial court's discretion: prior due diligence

to obtain the witness's presence; the degree to which such testimony is expected to be favorable to the accused; that the witness was available and willing to testify; and that the denial of the continuance caused material prejudice. Geralds v. State, 674 So.2d 96, 99 (Fla. 1996); Hicks v. Wainwright, 633 F.2d 1146, 1148-1149 (5th Cir. 1981).

Here, the defendant cannot be faulted for requested delay; the defense expert admitted she failed to complete her evaluation. At closing argument in the penalty phase, defense counsel felt compelled to apologize to the jury for this shortcoming. (XLIII 2234). Defense counsel's problems continued at the Spencer hearing. At its commencement, the trial court chastised counsel for her failure to file a sentencing memorandum. The court ruled Appellant had waived her right to file and he considered it waived. (XLIV 17-8). At sentencing, the trial court refused to accept the finally-filed memorandum , as timely, but insisted he had read and considered it.

An examination of the record reveals that Dr. Land testimony hurt rather than helped Emilia. Both the prosecutor and the trial court used Dr. Land's testimony to their advantage in arguing for and sentencing Emilia to death. Specifically, the trial court used her testimony extensively in rejecting or giving less weight to valid mitigating evidence. Specifically the trial court cited Dr.

Land's testimony extensively in his sentencing order: that Emilia was extremely intelligent; a leader not a follower; controlling and manipulative in her relationships with men; that she does not get emotionally attached to men; she has no codependency issues; and she has no mental illness or schizoid personality. (X 1937-8, 1941-2, 1945-6). In closing argument, the prosecutor (improperly) used Dr. Land's testimony about Emilia's sexual abuse as a child, "But remember what I asked the doctor: well, doctor, can you tie this to why she killed Heather Strong? No. No. The two aren't related." (XLIII 2199).

A strong likelihood of prejudice is present. See D.N. v. State, 855 So.2d 258 (Fla. 4th DCA 2003). Yet, the trial court allowed this to occur by its "a myopic insistence upon expeditiousness in the face of a justifiable request for delay," rendering the right to defend "an empty formality." Ungar v. Sarafite, supra. The due process rights of the individual must triumph over these other considerations of haste and dispatch. See also Hill v. State, 535 So.2d 354, 355 (Fla. 5th DCA 1988). A palpable abuse of discretion having been shown; reversal for a new trial and penalty phase is mandated.

POINT III

THE TRIAL COURT ERRED IN OVERRULING NUMEROUS OBJECTIONS AND DENYING SEVERAL MOTIONS FOR MISTRIAL WHERE THE PROSECUTOR'S IMPROPER CLOSING ARGUMENT AT THE PENALTY PHASE DENIGRATED VALID MITIGATION AND MISSTATED THE LAW, RESULTING IN AN UNCONSTITUTIONAL JURY RECOMMENDATION THAT EMILIA CARR SHOULD BE EXECUTED.

Introduction

During summation to the jury at the penalty phase, the prosecutor addressed the mitigating circumstance that Emilia Carr was sexually abused as a child and teenager by her own father and grandfather. The prosecutor then proceeded to minimize this substantial and weighty mitigating factor:

> You know, **she was sexually abused**. There is no question about that. **But remember what I asked the doctor: well, doctor, can you tie this to why she killed Heather Strong? No. No. The two aren't related.**
>
> You can still consider the sexual abuse as a mitigating circumstance, but I would suggest to you that would be a lot more significant, a lot stronger, a lot more grave if she had killed the person who had sexually abused her. Then you could say: well, yeah, absolutely. She didn't have the right to kill him (sic), but there is real mitigation there.

(XLIII 2199) (Emphasis added). Defense counsel immediately objected, contending that the argument was improper, disputing the prosecutor's contention that he had the right to argue the weight that the jury gives to mitigating

circumstances. The trial court overruled the objection but noted that the issue was preserved. (XLIII 2199-2200).

Once the prosecutor was given carte blanche by the trial judge's ruling, he went on to further denigrate other, valid mitigation:

> I mean, you could look at the facts, and say, **yeah, she had a difficult childhood**. But what impact does that have on the decision-making process of killing Heather Strong? What significance should you give it? And that's what you have to decide. Her own children, **she was a good mother, by all accounts**. She understood the significance of motherhood. What should that count? What should that count, **when she took the life of the mother of two other children who are now in an adoptive home, away from all of the family that they never knew**? What significance should you give it?

(XLIII 2201) (Emphasis added). Defense counsel immediately objected, contending that the argument was improper, in that it invoked an improper sympathy argument that disparaged Appellant's mothering versus Heather's caring for her own children who were now placed in an adoptive home. In essence, the prosecutor was turning a mitigating circumstance into an aggravating circumstance. The trial court "noted" the objection and reminded counsel that he would give the standard jury instruction on sympathy at the conclusion of argument. Pointedly, the judge did not instruct the jury at that critical time, when they heard the improper argument. Defense counsel then moved for a mistrial based upon the cumulative errors during closing argument to that point, which the

trial court denied. (XLIII 2202-3). In a vain attempt to prevent this type of improper argument by the State, Appellant filed and the trial court heard a pretrial motion in limine. (XV 32-3).

The Improper Victim Impact Argument

This Court has been increasingly willing to reverse a death penalty case based on prosecutorial misconduct in closing argument. In Bertolotti v. State, 476 So. 2d 130, 134 (Fla. 1985), this Court held:

> The proper exercise of closing argument is to review the evidence and to explicate those inferences which may reasonably be drawn from the evidence. Conversely, it must not be used to inflame the minds and passions of the jurors so that their verdict reflects an emotional response to the crime or the defendant rather than the logical analysis of the evidence in light of the applicable law.

Closing argument "must not be used to inflame the minds and passions of the jurors so that their verdict reflects an emotional response to the crime or the defendant rather than the logical analysis of the evidence in light of the applicable law." Adams v. State, 192 So. 2d 762 (Fla. 1966). This is a line quite easily crossed by a prosecutor, especially in a capital murder case where, as here, a young mother was murdered by another young mother.

The prosecutor's argument was improper in several ways. First, the prosecutor was essentially arguing victim impact evidence. This Court has

previously pointed out that this constitutes improper argument. Card v. State, 803 So. 2d 613 (Fla. 2001). Specifically, the prosecutor pointed out that, as the victim impact witness testified, the family had been forced to put Heather's children in adoptive homes. The prosecutor made it clear to the jury that Emilia Carr's murder of Heather literally ripped her family apart. The prosecutor successfully convinced the trial judge that he was only suggesting the appropriate weight to be given to the uncontroverted (as he himself admits) mitigating circumstance, that Emilia, by all accounts, was a good mother. The transparency of this argument is palpable.

By juxtaposing Emilia's mothering abilities against Heather's, the prosecutor crossed the line. The jury undoubtedly thought about the fate of Emilia's children as well as Heather's children. Both families had been ripped apart, but for very different reasons; Heather's, through no fault of her own, compared to Emilia, who was the only person the jury had to blame and punish accordingly. Under the circumstances, it is a miracle that the jury barely (7-5) voted for the ultimate sanction.

The prosecutor's excuse for this improper argument cannot carry the day. Although, this Court understands that victim impact evidence is not to be considered as aggravation, in spite of the standard instruction, juries do not. Similarly, this Court, if anyone, understands the weighing of valid mitigating

circumstances, juries do not. In fact, capital jurors are not instructed how to precisely weigh a mitigating factor in their deliberative process.

The Improper Denigration of Emilia's Sexual Abuse as a Child

The prosecutor clearly crossed the line with this argument. Valid mitigation, **which childhood sexual abuse clearly is**, need not have any "connection" to the reason a defendant committed the crime. The prosecutor made the same mistake the trial court made in his written assessment of the mitigating factors. As this Court stated in Cox v. State, 819 So.2d 705, 723 (Fla. 2002):

> The appellant also argues that the trial court wrongfully required a "nexus" between mitigating circumstances and the murder, before they would be assigned any weight. Clearly, Florida law does not require that a proffered mitigating circumstance have any specific nexus to a defendant's actions for the mitigator to be given weight.

As this court said in Nibert v. State, 574 So. 2d 1059, 1062 (Fla. 1990), and Brown v. State, 526 So.2d 903, 908 (Fla. 1988) (defendant's disadvantaged childhood, abusive parents, and lack of education and training, constitute valid mitigation and must be considered). The prosecutor's improper argument, which the trial court let go unchecked, undoubtedly led the jury to believe that Emilia's childhood abuse must somehow have caused Emilia to kill Heather. Without a causal connection, the jury undoubtedly thought that they need not give it much credence or weight. The standard jury instructions certainly don't help dispel the

misconception that State Attorney Brad King impressed upon them. Once again, the incredibly close vote means the State cannot meet their burden of proving this error harmless beyond a reasonable doubt.

The Cumulative Effect

If this Court does not agree that each improper argument, left uncorrected by the trial court, do not separately warrant a new penalty phase, surely this Court will find that the cumulative effect of the improper arguments lead to the inescapable conclusion that Appellant's death sentence is unconstitutionally tainted. Johnson v. Louisiana, 406 U.S. 356, 366 (1972) (Blackmun, J., concurring); Furman v. Georgia, 428 U.S. 235 (1972); Amends. V, VI, VIII, and XIV, U.S. Const.; Art. I, §§ 2, 9, 16, 17, 21, and 22, Fla. Const.

POINT IV

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.

"Determining whether a mitigating circumstance exists and the weight to be given to existing mitigating circumstances are matters within the discretion of the sentencing court." Hurst v. State, 819 So.2d 689, 697 (Fla.2002) (citing Campbell v. State, 571 So.2d 415, 420 (Fla.1990)). "[T]he trial court's conclusions as to the weight of mitigating circumstances will be sustained by this Court if the conclusions are supported by sufficient evidence in the record." Id. (Citing Mansfield v. State, 758 So.2d 636, 646 (Fla.2000)). This Court reviews a trial court's assignment of weight to mitigation under an abuse of discretion standard. See Blanco v. State, 706 So.2d, 7, 10 (Fla. 1997) (stating standard of review is abuse of discretion). Thus, this Court defers to the trial court's determination unless it is unreasonable or arbitrary-that is, unless no reasonable person would have assigned the weight the trial court did. Rodgers v. State, 948 So. 2d 655, 666

(Fla. 2006); Perez v. State, 919 So.2d 347, 372, 376 (Fla.2005); Elledge v. State, 706 So.2d 1340, 1347 (Fla.1997). Whether a particular circumstance is truly mitigating in nature at a capital sentencing is a question of law and is subject to de novo review by this Court. Tanzi v. State, 964 So.2d 106, (Fla. 2007).

The trial court improperly analyzed and weighed mitigating evidence by repeatedly stating that there was no "nexus" between the mitigation and the murder.

"A mitigating consideration is anything shown by believable evidence that, in fairness or in the totality of the defendant's life or character, extenuates or reduces the degree of moral culpability for the crime committed or that reasonably serves as a basis for imposing a sentence less than death." See, Crook v. State, 813 So.2d 68, 74 (Fla. 2002); Wichkham v. State, 503 So.2d 191, 194 (Fla. 1991).

Throughout the sentencing order, the trial court repeatedly rejects, denigrates, minimizes, and gives less or no weight to valid mitigation where the court "determines" that there is "no evidence of a nexus between this mitigating circumstance and the murder." The trial court commits this error in considering Emilia's poor upbringing (X 1940); her lack of a protecting mother (X 1940-1); her dysfunctional family (X 1941); and Emilia's sexual abuse as a child and teenager (X 1950). The trial court's analysis is inappropriate and improper. There is no requirement that valid mitigation must have a "nexus" to the reason the defendant

committed the crime. As this Court stated in Cox v. State, 819 So.2d 705, 723 (Fla. 2002):

> The appellant also argues that the trial court wrongfully required a "nexus" between mitigating circumstances and the murder, before they would be assigned any weight. Clearly, Florida law does not require that a proffered mitigating circumstance have any specific nexus to a defendant's actions for the mitigator to be given weight.

The Cox court pointed out that the judge in that case rejected proffered mitigators where the trial had enforced no such requirement. Instead, there was an absolute dearth of evidence contained in the record supporting the notion that the cited mitigators were relevant to the defendant in the instant case. See also Nibert v. State, 574 So. 2d 1059, 1062 (Fla. 1990), (error to reject defendant's physical and psychological abuse in his youth based on passage of time); See also, Crook v. State, 813 So.2d 68, 75 (Fla. 2002) (trial court erred in rejecting defendant's brain damage where there was "connection" to the crime).

The trial court's improper use of defense counsel's opening statement and argument as evidence to rebut valid mitigation.

In his sentencing order, the trial judge inexplicably quoted defense counsel's opening statement and argument to reject, refute, and diminish valid mitigating evidence. This is clearly improper. The standard jury instructions repeatedly inform the jury "What the lawyers say is not evidence, and you are not to consider

it as such." Fla. Std. Jury Instr. (Crim.) 2.1 (preliminary instructions regarding opening statements); "Please remember that what the lawyers is not evidence or instruction on the law." Fla. Std. Jury Instr. 2.7 (addressing closing argument). As the actual sentencer in a capital case, the trial judge has the role of making findings of aggravating and mitigating findings. These findings should be based on the evidence. See, e.g., Nibert v. State, 574 So. 2d 1059, 1062 (Fla. 1990), and Willacy v. State, 696 So.2d 693, 695 (Fla. 1997). Appellant's trial court actually treated defense counsel's argument as evidence. The validity of the entire sentencing order is called into question.

In rejecting the statutory mitigator that Emilia Carr acted under extreme duress or under the substantial domination of another person, the trial court referred to the testimony of the mental health expert who described her as a smart woman who is in control and manipulative in her relationships with men. The trial court then points out defense counsel's acknowledgment in her opening statement that Emilia Carr was "her own person." (X 1938-9). The trial court then quoted counsel's opening statement verbatim:

> Now Josh's relationship with Emilia is different. Josh and Emilia are kind of more like friends with benefits kind of relationship. They are not–the State would have you to [sic] 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.

(X 1939). The trial court gave little weight to Emilia's poor upbringing, the daughter of migrant farm worker. In doing so, the trial court inexplicably quoted defense counsel's argument at the Spencer hearing, where she said that the defendant "was the promise of her family." (X 1940).

The trial court's next quote of defense counsel was in his consideration that the mental health expert's testimony supported a life sentence. In dealing specifically with the doctor's opinion that Emilia was controlling and manipulating in her relationships, the trial court again quoted the same portion of defense counsel's opening statement used to reject the substantial domination mitigating factor. (X 1945-6). As a result, the trial court gave this mediating factor "little weight." (X 1946).

The trial court refers again to the quoted portion of defense counsel's opening statement in rejecting the proposed mitigating factor that Emilia was immature and wanted a relationship. The trial court writes, "Defense counsel's opening statement (cited herein above) contradicts this claim." (X 1946-7).

In preparing an important document in support of the imposition of a death sentence, a trial court should rely on evidence presented at trial (both at the guilt and penalty phases) rather than lawyers' unsworn opening statements and

argument. Counsel cannot cite this Court to no precisely applicable case authority. In thirty-two years of practicing law, counsel has yet to encounter a similar situation.

The trial court's improper denigration of Emilia Carr's childhood sexual abuse.

In considering the mitigating evidence of Emilia's sexual abuse by both her father and grandfather, from her tender years until high school, the trial court wrote:

> The defendant was sexually abused as a child by her grandfather and her father, and she was removed from the home when she reported the abuse. There is evidence in the record of this mitigating circumstance. However, **the latest that these acts occurred was in 1999, nine years prior to the time the defendant murdered Heather Strong**. The defendant's brother testified at the Spencer hearing that he did not believe her when she reported the abuse. **There was also no indication of any nexus or connection that existed between the defendant's abuse and her acts in the murder of Heather Strong**. Moreover, these events in the defendant's life did not deter her involvement in school activities and in charitable causes, as mentioned in other mitigating circumstances herein. Additionally, the passage of time and lack of nexus between the abuse and the murder of Heather Strong are reasons this court assigns this mitigating circumstance little weight. See Tanzi v. State, 964 So.2d 106 (Fla. 2007) and Cox v. State, 819 So.2d 705 (Fla. 2002).

(X 1950).

Tanzi dealt with the defendant's history of substance abuse, which the trial

court gave short shrift, because the defendant was in remission at the time of the murder. Cox involved the trial court giving less weight to Cox's dysfunctional upbringing (which did not involve sexual abuse), where, at age ten, Cox was removed from his parents' home and placed with a loving grandmother who treated him very well. The trial court in Cox considered the domestic disturbances witnessed by Cox to be relatively mild.

Here, Appellant's trial court considered the passage of nine years (from the age of fifteen, when the sexual abuse stopped, until the age of twenty-four, when the murder occurred) as a critical aspect in weighing this mitigation. Even more importantly, **the trial court appears to require that Emilia's sexual abuse have some nexus to the crime**[8] before he could give it any weight other than "slight." (X 1950).

> As this court said in Nibert v. State, 574 So. 2d 1059, 1062 (Fla. 1990): First, Nibert produced uncontroverted evidence that he had been physically and psychologically abused in his youth for many years. The trial court found this to be "possible" mitigation, but dismissed the mitigation by pointing out that "at the time of the murder the Defendant was twenty-seven (27) years old and had not lived with his mother since he was eighteen (18)." We find that analysis inapposite. The fact that a defendant had suffered through more than a decade of psychological and physical abuse during the defendant's formative childhood and adolescent years is in no way diminished by the fact that the abuse finally came to an end. To accept that analysis would

[8]The trial court the same mistake throughout his findings, but the disregard of childhood sexual abuse is particularly unacceptable.

> mean that a defendant's history as a victim of child abuse would never be accepted as a mitigating circumstance, despite well-settled law to the contrary. Nibert reasonably proved this nonstatutory mitigating circumstance, and there is no competent, substantial evidence to support the trial court's refusal to consider it. See, e.g., Brown v. State, 526 So.2d 903, 908 (Fla.1988) (defendant's disadvantaged childhood, abusive parents, and lack of education and training, constitute valid mitigation and must be considered)...

The trial court repeatedly turns valid mitigation into aggravation and fails to independently find and weigh mitigating evidence.

This Court has identified what true mitigation is and what it is not. It is improper for a prosecutor or a trial court to turn valid mitigation into aggravation, thus using it against a defendant on trial for her life. In Hawk v. State, 718 So. 2d 159 (Fla. 1998), for example, this Court has recognized that it is improper to denigrate valid mitigating evidence that a defendant is deaf. The prosecutor called it an insult to all people (with similar handicaps) who have achieved greatness. See also James v. State, 695 So. 2d 1229 (Fla. 1997) (improper to rebut intoxication mitigation by pointing out defendant committed another felony, i.e., the use and possession of illegal drugs), and Hamilton v. State, 703 So. 2d 1038 (Fla. 1997) (improper to rebut mitigation that defendant is father and brother with fact that victim said, “Please don't kill me, I'm a wife and mother.”).

In dealing with the nonstatutory mitigating evidence, the trial court tends to

treat valid mitigating factors, not as mitigation. Instead the court actually turns the mitigation into aggravation. This seems to be done in the guise of assigning the proper weight to that evidence. For example, in dealing with Emilia's severely dysfunctional family, the trial court acknowledged the evidence that her upbringing was deficient; that parenting was lacking; and that she was sexually abused by her father and grandfather. (X 1941). The trial court then inexplicably goes on to explain that, nevertheless, Emilia is in control and "manipulating in male relationships; that she is of superior intelligence with an IQ of 125…; that she is a leader, not a follower; that she does not get emotionally attached to men; and she has no codependency issues." As argued elsewhere in this brief, the court then improperly concludes that there is no evidence of a nexus between her dysfunctional family and the murder. "Neither did it prevent her active participation in the various [school, etc.] activities discussed herein." (X 1941).

The trial court acknowledges that Emilia was a bright student who graduated from high school. He then dismisses it, because it establishes that she was capable of understanding the criminality of her conduct. (X 1942). In discussing the uncontroverted evidence that Emilia was a good mother, the trial court turns it against her, because she "babysat the two children of Heather Strong, the very person she helped murder." (X 1942). There was evidence that Emilia was a good

daughter (even though she was sexually abused by her father). The court then erroneously and inexplicably refers to Emilia's brother's opinion (which he subsequently recanted) that Emilia lied about the sexual abuse allegations against her father, because she was upset with him about discipline. (X 1942-3). The record is clear that there is no doubt that Emilia was sexually abused as a child. At the Spencer hearing, the State (for reasons unknown), elicited on cross that **Emilia's brother admitted at a deposition, that he first believed that Emilia might have made the allegations as retaliation.** (XLIV 38). The trial court's apparent erroneous reliance on inaccurate information is cause for great concern.

The trial court gives little consideration to Emilia's community service, charitable work, church attendance, participation in ROTC, and Bible study, because there was no evidence that it continued into her adult life. (X 1943-4). The court dismisses her successful completion of massage therapy and modeling school, because there was no evidence that she made any use of that education. (X 1943). The trial court gave little weight to the fact that Emilia was a mother at the tender age of seventeen, because there was no evidence it had any adverse effect on her. (X 1944). He reached a similar conclusion on her status as a single parent. (X 1944).

The trial court appears to shirk his independent duty[9] as a cosentencer in his consideration of a sentence of life without possibility of parole. The trial court appears to give it less weight because, "This mitigating circumstance was presented to the jury, and considered by the jury in the penalty phase of the trial. Notwithstanding this circumstance, the jury recommended the death penalty by a vote of seven to five." (X 1947-8). When asked to consider the close vote by the jury, the trial court observes that there is no "super majority" vote required under Florida's death sentencing scheme. He therefore gives little weight to the bare majority vote. (X 1948-9)

In giving little weight to Emilia having the support of her friends and family, the trial court oddly seems to base his decision, in part, on the fact that the family is dysfunctional. (X 1949-50). The trial court acknowledges that Emilia was experiencing a high-risk pregnancy at the time of the offense. He then appears to turn it into aggravation, since Emilia cited her pregnancy in seeking help from others for her problems with Heather. The court goes on to point out that the high risk pregnancy did not prevent her from murdering Heather. The court once again seemingly abdicates his duty, separate and apart from the jury, when he writes, "This evidence was put before the jury, and did not effect (sic) their verdict." (X

[9]Rogers v. State, 511 So. 2d 526 (Fla. 1999).

1951).

POINT V

THE TRIAL COURT ERRED IN FINDING THAT THE MURDER WAS COMMITTED IN A COLD, CALCULATED AND PREMEDITATED MANNER WITHOUT ANY PRETENSE OF MORAL OR LEGAL JUSTIFICATION.

In finding this aggravating factor applicable to both murders the trial court wrote, in part:

> This court has considered the four distinct elements to reach its conclusion about this aggravating circumstance. First, the killing was "cold." Heather Strong's death was the product of cool and calm reflection and not an act prompted by emotional frenzy, panic, or a fit of rage. Emilia Carr's actions were not only calm and careful, but they exhibited a degree of deliberate ruthlessness, as shown by her attempt to break Heather Strong's neck as Strong asked Emilia Carr to help her. Second, the killing was "calculated." Emilia Carr participated in a careful plan and prearranged design to commit this murder before the fatal incident. At trial there was testimony that the defendant offered money for help "snapping the victim's neck," and offered money to have the victim killed. Jason Lotshaw testified that the defendant offered him money to kill the victim, and Christie Stover testified that the defendant was trying to find someone to help her kill the victim, and she was willing to pay. Third, Emilia Carr exhibited "heightened premeditation." The evidence in this case was that Emilia Carr is a deliberate and calculated person. This is evident from the testimony of the State's witnesses, but is emphasized by the statements of the defendant herself in her recorded conversations with the co-defendant and his sister. The evidence in this case was more than that necessary to prove the premeditation prong of first-degree murder. Fourth, Emilia Carr acted with no pretense of moral or legal justification. When analyzed collectively the evidence in this case establishes beyond any reasonable doubt that this crime was committed in a cold, calculated and premeditated manner, and without any pretense of moral or legal justification. Emilia Can (sic) had harbored anger

> against Strong since December of 2008 when Strong reconciled with Fulgham, which caused Fulgham to throw Emilia Can (sic) out of the house. This anger intensified when Strong then had Fulgham arrested and held in jail for threatening her with a shotgun. In attempting to get Fulgham released from jail, Carr threatened Strong with a knife. After Fulgham's release, and on the day of Strong's disappearance and murder, Emilia Can (sic) and Fulgham discussed still being "down" or willing to participate in what they had already talked about. Can (sic) waited until Fulgham had gotten Heather Strong into the dark, isolated storage trailer to go out and assist Fulgham in binding her and then suffocating her. There were numerous opportunities for Emilia Carr to renounce her planned activity, but she chose instead to participate in the murder.
>
> Like heinous, atrocious or cruel, the aggravating circumstance cold, calculated and premeditated has been deemed by the Florida Supreme Court to be one of the most serious aggravating circumstances set out in Florida's death penalty sentencing scheme. Zommer v. State, 31 So.3d 733 (Fla. 2010); Everett v. State, 893 So.2d 1278 (Fla. 2004); Larkin v. State, 739 So.2d 90 (Fla. 1999).

There is proof beyond a reasonable doubt as to all four of the factors that comprise the aggravating factor of cold, calculated and premeditated, and this court gives it great weight.

(X 1935-6).

Standard of Review[10]

At trial, the State has the burden of proving aggravating circumstances beyond reasonable doubt. Robertson v. State, 611 So.2d 1228, 1232 (Fla. 1993)

[10]This same standard of review applies to all aggravating factors challenged by Appellant in this initial brief.

Moreover, the trial court may not draw "logical inferences" to support a finding of particular aggravating circumstance when the state has not met its burden. Clark v. State, 443 So.2d 973, 976 (Fla. 1983). Most recently, this Court has stated that it will not reweigh the evidence to determine whether the State proved each aggravating circumstance beyond a reasonable doubt. "Rather, our task on appeal is to review the record to determine whether the trial court applied the right rule of law for each aggravating circumstance and, if so, whether competent substantial evidence supports its finding." Willacy v. State, 696 So.2d 693, 695 (Fla. 1997) (Footnote omitted). See also, Way v. State, 760 So.2d 903, 918 (Fla. 2000).

Applicable Law

To establish the CCP aggravator, the State must prove beyond a reasonable doubt that:

> [1] the killing was the product of cool and calm reflection and not an act prompted by emotional frenzy, panic, or a fit of rage (cold), ... [2] that the defendant had a careful plan or prearranged design to commit murder before the fatal incident (calculated), ... [3] that the defendant exhibited heightened premeditation (premeditated), and [4] that the defendant had no pretense of moral or legal justification.

Evans v. State, 800 So.2d 182, 192 (Fla. 2001)(quoting Jackson v. State, 648 So.2d 85, 89 (Fla.1994)). "[T]he facts supporting CCP must focus on the manner in

which the crime was executed, e.g., advance procurement of weapon, lack of provocation, killing carried out as a matter of course." Lynch v. State, 841 So.2d 362, 372 (Fla.2003) (quoting Looney v. State, 803 So.2d 656, 678 (Fla.2001)).

In Lynch, this Court further defined each of the elements of the CCP aggravators as follows:

> This Court has held that execution-style killing is by its very nature a "cold" crime. See Walls v. State, 641 So.2d 381, 388 (Fla.1994). In Looney, this Court noted the significance of the fact that the victims were bound and gagged for two hours, and thus could not offer any resistance or provocation. 803 So.2d at 678. Further, the defendants in that case had "ample opportunity to calmly reflect upon their actions, following which they mutually decided to shoot the victims execution-style in the backs of their heads." Id....
>
> As to the "calculated" element of CCP, this Court has held that where a defendant arms himself in advance, kills execution-style, and has time to coldly and calmly decide to kill, the element of "calculated" is supported. See Hertz v. State, 803 So.2d 629, 650 (Fla.2001); see also Knight v. State, 746 So.2d 423, 436 (Fla.1998)....
>
> The third element, "heightened premeditation," is also supported by competent and substantial evidence. This Court has "previously found the heightened premeditation required to sustain this aggravator where a defendant has the opportunity to leave the crime scene and not commit the murder but, instead, commits the murder." Alston v. State, 723 So.2d 148, 162 (Fla.1998); see also Jackson v. State, 704 So.2d 500, 505 (Fla.1997)....
>
> The final element of CCP is a lack of legal or

> moral justification. “A pretense of legal or moral justification is ‘any colorable claim based at least partly on uncontroverted and believable factual evidence or testimony that, but for its incompleteness, would constitute an excuse, justification, or defense as to the homicide.’ ” Nelson v. State, 748 So.2d 237, 245 (Fla.1999) (quoting Walls, 641 So.2d at 388).

Lynch v. State**,** 841 So.2d 362, 372-73.

The Evidence

Emilia Carr's own words led to her convictions and death sentence. The only real evidence presented by the State of the events leading up to Heather's murder was obtained from Emilia herself. Although she clearly attempted to mislead the police during the first series of interviews, she eventually “came clean” when confronted with her secretly recorded conversation with Michele Gustafson. At that point, Emilia recounted a very credible narrative of the murder. This detailed and credible account that Emilia related to Gustafson, and the subsequent confession at the resulting police station, is the only real evidence presented by the State of the events that night. Anything else is supposition, which cannot support an aggravating factor nor the imposition of a death sentence. This is the State’s case, and they are stuck with it. The State cannot maintain that Emilia’s confession is true in some respects but not in others, where **they have no proof to**

the contrary.

The establishment of aggravating factors cannot be base on speculation and innuendo. The only thing that the evidence proves beyond a reasonable doubt is that Josh Fulgham had a plan to keep Heather from taking his children back to Mississippi. Even if Josh had planned well in advance to kill his own wife, the State failed to prove that Emilia knew of the plan to kill Heather ahead of time. The State clearly failed to meet their burden that the "heightened premeditation" factor applied to Emilia's participation.

Prior "Threat"

The trial court attempts to use a threat that Emilia made against Heather more than one month prior to the murder. In that drunken incident, Emilia grabbed Heather's hair and held a knife to her throat. Emilia's threat was intended to convince Heather to drop aggravated assault charges that were keeping Josh in jail. By all accounts, the incident was a brief encounter where all parties were intoxicated. The incident quickly dissipated. The pair subsequently reconciled as friends and had social, even friendly interaction after that, well before the murder. (XXXIII 678-80, 690-1).

Additionally, the remoteness of a threat is a factor to be considered in assessing its relevance, weight, and applicability. See, e.g., Wester v. State, 141

Fla. 369, 193 So. 300 (1940) and Stafford v. State, 50 Fla. 134, 39 So. 106 (1905). This is especially so when the parties involved had resolved their differences almost immediately.

"Solicitation" to Murder

The trial court also cites two alleged solicitations, one made to mutual friends of both Heather and Emilia, to help Emilia kill Heather or to have Heather killed for a measly $500. These were actually only two random comments made by an angry Emilia in a rant about Heather having Josh arrested on trumped-up charges. (XXXIII 700-3). The second "solicitation" was to a girlfriend, made in the context of Emilia professing her love for Josh and ranting about Heather having him falsely arrested. Only one of the witnesses who heard these two "solicitations" testified that he believed Emilia was serious. (XXXIII 700-3, 728).

"Planning" and Animosity

In the interviews, police confronted Emilia with the comments she had made, weeks before the murder, about wanting Heather dead. She explained, and several State witnesses agreed, that these were empty threats, made in anger. Indeed, Emilia explained that, similarly, she never took Josh seriously when he talked about killing his wife. As Emilia explained to Josh's own sister: We had joked about it; we were not really serious; I thought he was full of shit, because

that's the way he is; he says one thing and never really follows through. (XXXVIII 1477-8). Many people have stated their desire to kill someone, but it is usually only hyperbole. Emilia told police the same thing: I don't think he intended to kill her; things just got out of hand; the killing was not planned; it was last minute; when Josh called and said he was on the way, Emilia did not think he was serious. (XXXVIII 1540-1, 1563-4).

The constant refrain in Emilia's confession was that she did not believe that Josh would really go through with "it", meaning the murder. Although Josh had a "plan", it did not include murder. Even if Josh did intend to murder his wife, Emilia certainly had no advance warning. Undoubtedly, she believed that Josh was going to confront Heather; make her sign the children's custody release; and perhaps rough her up a bit. Emilia clearly did not expect, nor have any prior knowledge, that the murder would happen.

The Emotional Aspect

While being secretly recorded by police, Emilia described Josh's affect that night to Michele, Josh's own sister. When Emilia entered the trailer, Josh was confronting Heather about all of the grief that he had caused her; having him jailed, costing him money, costing him his children, costing him everything. Whenever Heather said something he did not like, he hit her in the head with a flashlight.

(XXXVIII 1473-6). During the murder, Emilia described Josh's affect. His eyes were glazed over, as if he were in another place. He was not Josh that night. He was not in his right mind and was not emotionally there. He was not himself. It was as if another part of him had reached a breaking point. (XXXVIII 1502-4). When it was over, Josh expressed his wish that it had not come down to this (murder). Emilia asked him, "Really did it have to?" Josh replied, "It never would've stopped."

Appellant recognizes that this Court does not recognize a "domestic dispute exception" in connection with death penalty analysis. Lynch v. State, 841 So. 2d 362, 377 (Fla. 2003). However, evidence of an ongoing domestic dispute can help a defendant avoid a finding of the cold, calculated, and premeditated aggravating circumstance (CCP). See Evans v. State, 838 So.2d 1090, 1098 (Fla.2002) ("In some murders that [have] result[ed] from domestic disputes, we have determined that CCP was erroneously found because the heated passions involved were antithetical to 'cold' deliberation."); Santos v. State, 591 So.2d 160, 162-63 (Fla.1991) (CCP inapplicable where the defendant was involved in an highly emotional domestic dispute with victim and her family, even though defendant had acquired a gun in advance and made previous death threats against victim; murder was not "cold," even though it may have been calculated).

This case involves an emotionally charged love triangle that was a constant source of heartbreak, pain, violence, arrest, jealousy, and abandonment. Additionally, the fact that Josh shared children with both Emilia and Heather elevated their emotionally charged lives to a new height. The turmoil lasted several years before it's final explosion. While not an excuse for first-degree murder, this roiling situation is the antithesis of a cold, calculated, and premeditated plan.

No Prior Procurement of "Weapons"

In murdering his wife, Josh Fulgham used common everyday objects that one tends to find in a storage trailer. The State presented absolutely no evidence that these items were procured in advance, a critical consideration in the finding of this aggravating factor. See, e.g., Looney v. State, 803 So. 2d 656 (Fla. 2001). The storage trailer was filled with all types of tools and junk. The duct tape, the chair, the flashlight, and the large, black, garbage bag were merely random objects stored in the trailer. Certainly, Josh chose the location so that he could berate his wife in privacy forcing her to sign the custody paper. However, **the State failed to prove that even Josh had a carefully, calculated plan to murder his wife.**

The only thing that the evidence proves beyond a reasonable doubt is that Josh Fulgham had a plan to keep Heather from taking his children back to

Mississippi. (XXXVIII 1504). At Josh's trial, the State may be able to prove that he had a cold, calculated, preconceived plan to murder his wife. However, that is irrelevant to Emilia's knowledge and participation in the crime. Even if Josh had the requisite "heightened premeditation", the sins of Josh cannot be visited upon Emilia. The vicarious application of an aggravating circumstance has previously been condemned by this Court. Omelus v. State, 484 So. 2d 563, 566 (Fla. 1991).

The trial court gave this aggravating circumstance "great weight." (X 1936). The court found only two other aggravating factors, one of which is doubtful and the other the accompanying conviction for kidnapping, which was given too much weight. Additionally, the trial court accepted one valid statutory mitigator; improperly rejected other statutory and nonstatutory mitigators; and accepted much nonstatutory mitigation (although improperly weighing it), the error in its application cannot be harmless. Sochor v. Florida, 504 U.S. 527, 112 (1992). Amend. VI, VIII, and XIV, U.S. Const.; Art. I, 9 and 16, Fla. Const.

POINT VI

THE TRIAL COURT ERRED IN FINDING THAT THE MURDER OF HEATHER STRONG WAS ESPECIALLY, HEINOUS, ATROCIOUS AND CRUEL WHERE APPELLANT HAD NO IDEA THAT JOSH FULGHAM WOULD MURDER STRONG, MUCH LESS KILL HER BY SUFFOCATION.

Appellant would not challenge the trial court's finding of this aggravating factor as it applies to Josh Fulgham, Emilia's codefendant. However, Appellant vociferously challenges the application of this factor to Emilia Carr. The State failed to present **any** substantial, competent evidence, on which the trial court could conclude that this aggravating factor applies to Emilia Carr.

There is no doubt that Heather Strong died a brutal and violent death. As the trial court correctly points out, this Court has routinely approved the finding of this aggravating factor for strangulation, suffocation, and deaths of this type. However, there is a **complete lack of evidence** to prove that Emilia knew that Josh intended to kill his wife (See Point VI), much less in the brutal manner that he used in accomplishing the deed.

Additionally, Appellant contends that the trial court improperly based his finding of this factor, in large part, on an incident that occurred more than one month before the murder. That "threat," as termed by the trial court, was the result

of a drunken fracas and was completely unrelated to the murder. Furthermore, the evidence established that Emilia and Heather reconciled almost immediately, remained friends, and even babysat each other's children. (XXXIII 678-80, 690-1).

As far as Emilia's knowledge and participation[11] in the cruel manner in which Heather died, the trial court wrote:

> The medical examiner in this case, Dr. Barbara Wolf, testified that Heather Strong died as a result of suffocation, and that suffocation is a form of asphyxiation....Pooler v. State, 704 So.2d 1375 (Fla.1997). In Pooler, the Supreme Court held that threats made days prior to the actual killing could be used by the court to make common sense inferences about the fear, mental strain, and terror of the victim in the time leading up to the victim's death. Pooler threatened to kill his victim two days before the actual event of her murder, thus according to the court "giving her ample time to ponder her fate." Pooler at 1378. The rule of evaluating the victim's emotional state based on prior threats was followed in Hitchcock v. State, 991 So.2d 337 (Fla. 2008), where the Supreme Court said,
> "With respect to HAC, the circuit court correctly found that a threat on the victim's life contributes to the victim's apprehension prior to death and is thus relevant to the HAC aggravating factor. A threat need not be made contemporaneously with the murder in order to be relevant to the HAC aggravator if it causes the victim to experience fear, emotional strain, and terror in the moments leading up to her murder. See Pooler v. State, 704 So.2d 1375, 1378 (Fla.1997) finding evidence that

[11]Since Appellant is only challenging the personal applicability of this factor to Emilia, counsel has omitted irrelevant citations to cases and facts unrelated to Emilia's participation.

> the victim was threatened by the defendant two days before she was killed to be relevant to HAC aggravating factor even though the threat was not delivered on the day of the murder. Hitchcock at 355.
>
> The evidence at trial established that approximately a month before the actual murder of Heather Strong, Emilia Carr held a knife to Heather Strong's throat in an attempt to get Strong to sign a document that would be used to get charges against Joshua Fulgham dropped. Fulgham was in jail for allegedly threatening Heather Strong with a shotgun, for which she had him arrested. Notwithstanding the fact that this threat occurred a month prior to the murder, it is a factor that may, and should be considered based upon the circumstances in this case....
>
> ...This court finds this aggravating circumstance has been proven beyond a reasonable doubt and gives it great weight.

(X 1930-4).

Vicarious Application of Aggravating Factors is Improper

The analysis of the trial court overlooks at least one critical fact. There is absolutely no evidence that Emilia Carr knew that Josh Fulgham was going to kill Heather Strong, much less suffocate her with a garbage bag over her head. The only evidence of this aggravating factor comes from Carr's own statements. In all of those statements, she repeatedly and credibly denied knowing that Fulgham intended to murder his own wife; much less in the brutal way he did it. Emilia admitted helping Fulgham duct tape Heather to the chair. She described how

Fulgham forced Heather to sign the document releasing custody of the children to himself. It was only then that the bag was placed over Heather's head and Fulgham held his hand over the bag covering Heather's nose and mouth until she suffocated.

Although the facts are slightly distinguishable, this Court's holding in Omelus v. State, 484 So. 2d 563, 566 (Fla. 1991), is helpful in analyzing this claim. Omelus's codefendant hired him to shoot and kill the victim. Instead, Omelus stabbed the victim to death resulting in great suffering of the victim. In finding error in instructing the jury on HAC, this Court held:

> We need address only his claim that the trial court erred in instructing the jury that it could properly consider as an aggravating factor that this murder was especially heinous, atrocious, or cruel. We must agree with Omelus that the trial court erred in instructing the jury that it could consider this factor in determining its recommendation. Nowhere in this record is it established that Omelus knew how Jones would carry out the murder of Mitchell, and, in fact, the evidence indicates that Jones was supposed to use a gun. There is no evidence to show that Omelus directed Jones to kill Mitchell in the manner in which this murder was accomplished. Under these circumstances, where there is no evidence of knowledge of how the murder would be accomplished, we find that the heinous, atrocious, or cruel aggravating factor cannot be applied vicariously. We note that the trial judge correctly omitted this aggravating factor from his sentencing order in finding that the death penalty would be appropriate.

This Court found the error in Omelus to be reversible, not harmless error due, in part, to the prosecutor's closing which recounted the medical examiner's

testimony that the victim was stabbed nineteen times; slashed twenty-three times; a total of forty-two wounds on the body; that he lived for a period of time after this; that he knew he was going to be killed and tried to defend himself receiving cuts on his hands and wrists; pleaded for his life and experienced excruciating pain from these wounds, and the agony of drowning in his own blood. The prosecutor went on to argue that Omelus controlled the hand that held that knife which inflicted all of the victim's pain and suffering. Even though the Omelus trial judge did not find the HAC aggravating circumstance applicable, this Court found reversible error from the jury's instruction on the inapplicable circumstance, in light of the argument, the relatively close vote (8 to 4), and the trial court's finding of one mitigating factor.

The "Threat" Was Remote in Time, Had Dissipated, and Was Unrelated to the Murder.

As previously pointed out in Point ?, the trial court improperly placed great emphasis on an isolated incident that occurred more than one month prior to the murder. Emilia was furious that Josh had been jailed at Heather's insistence. On the night in question, Emilia, Heather, and other friends were socializing in the trailer park. Both Heather and Emilia were drunk. At one point in the evening, Emilia grabbed Heather by the hair and held a knife to her throat. She did this,

ostensibly, to convince Heather to drop criminal charges against Josh so that he could be released. By all accounts, the incident was a brief encounter where all parties were intoxicated. The incident quickly dissipated. The pair subsequently reconciled as friends and had social, even friendly interaction after that, well before the murder. (XXXIII 678-80, 690-1).

The trial court gave this aggravating circumstance "great weight." (X 1933-4). At the very least, the vicarious applicability should reduce the weight to be given to the circumstance. The court found only two other aggravating factors, one improperly (See Point V); the other being the accompanying kidnapping conviction, which was given too much weight. Additionally, the trial court accepted one valid statutory mitigator; improperly rejected other valid statutory and nonstatutory mitigators; and accepted much nonstatutory mitigation (although improperly weighing it), the error in its application cannot be harmless. Sochor v. Florida, 504 U.S. 527, 112 (1992). Amend. VI, VIII, and XIV, U.S. Const.; Art. I, 9 and 16, Fla. Const.

POINT VII

APPELLANT'S DEATH SENTENCE FOR THE MURDER OF HEATHER STRONG, WHICH IS GROUNDED ON A BARE MAJORITY OF THE JURY'S VOTE (7-5), IS UNCONSTITUTIONAL UNDER THE SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.[12]

Prior to trial, appellant unsuccessfully challenged the constitutionality of Florida's statute on this very ground. (I 110-111; XVI 515) The Eighth and Fourteenth Amendments require a heightened degree of reliability when a death sentence is imposed. Lockett v. Ohio, 438 U.S. 586, 604 (1978). A jury's recommendation of life or death is a crucial element in the sentencing process and must be given great weight. Grossman v. State, 525 So.2d 833, 839 n.1, 845 (Fla. 1988). In the overwhelming majority of capital cases in Florida, the jury's recommendation determines the sentence ultimately imposed. See Sochor v. Florida, 504 U.S. 527 (1992) (Stevens, J., joined by Blackmun, J., concurring in part and dissenting in part).

The statute does not authorize a bare-majority advisory sentence, but this Court has ruled that a jury vote of 7-5 favoring death is sufficient to

[12] Strict scrutiny is called for in the examination of statutes that impair fundamental rights explicitly guaranteed by federal or state constitutions. T.M. v.

support a death sentence. Rose v. State, 425 So. 2d 521 (Fla. 1983). Florida is alone among death penalty states to allow an advisory capital sentence by a bare majority vote.

Appellant recognizes that this Court has previously rejected arguments challenging the imposition of death sentences based on bare-majority jury recommendations. See, e.g., Jones v. State, 569 So.2d 1234, 1238 (Fla. 1990). However, Appellant maintains that allowing a bare majority of the jury to determine Appellant's fate violates the Sixth, Eighth, and Fourteenth Amendments to the United States Constitution as well as Article I, Sections 2, 9, 16, 17, 21, and 22, of the Florida Constitution.[13]

In addressing the number of jurors[14] in noncapital cases, the United States Supreme Court noted that no state provided for fewer than twelve jurors in capital cases, "a fact that suggests implicit recognition of the value of the larger body as a means of legitimating society's decision to impose the death penalty." Williams v. Florida, 399 U.S. 78, 103 (1970). In a concurring opinion, Justice Blackmun

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State, 784 So.2d 442 (Fla. 2001).

[13] Additionally, Appellant notes that the constitutional landscape of capital sentencing has changed dramatically in the last few years, See Ring v. Arizona, 536 U.S. 584 (2002), although not appreciably in Florida as yet. See, e.g., Williams v. State, 967 So.2d 735 (Fla. 2009).

[14] Counsel recognizes that the cited cases wrestle with the appropriate number of jurors to determine guilt/innocence rather than penalty. Appellant cites them as

agreed that a substantial majority (9-3) verdict in non-capital cases did not violate the due process clause, noted, however, that a 7-5 standard would cause him great difficulty. Johnson v. Louisiana, 406 U.S. 356, 366 (1972) (Blackmun, J., concurring).

Appellant's jury recommended **by the slimmest of margins**, that she be executed for the murder of Heather Strong. **One single solitary vote** ultimately made the difference in whether Appellant lives or dies for this crime. Such a result makes Florida's death penalty scheme arbitrary and capricious in violation of Furman v. Georgia, 428 U.S. 238 (1972).

Appellant's death sentence for Heather Strong's murder, which is based on a bare majority (7-5) vote of the jury, is unconstitutional. This Court should vacate Appellant's death sentence and remand for imposition of a life sentence without possibility of parole. Amends. V, VI, VIII, and XIV, U.S. Const.; Art. I, §§ 2, 9, 16, 17, 21, and 22, Fla. Const.

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persuasive authority by analogy.

POINT VIII

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.

This Court has long recognized that the law of Florida reserves the death penalty for "only the most aggravated and least mitigated" of first-degree murders. State v. Dixon, 283 So. 2d 1, 7-8 (Fla. 1973)(finding a "legislative intent to extract the penalty of death for only the most aggravated, the most indefensible of crimes"), cert. denied, 416 U.S. 943 (1974); see also Urbin v. State, 714 So. 2d 411, 416 (Fla. 1998); Cooper v. State, 739 So. 2d 82, 85 (Fla. 1999); Almeida v. State, 748 So. 2d 922, 933 (Fla. 1999).

In deciding whether the death sentence is proportionate in a particular case, the Court has summarized the guiding principles as follows:

> [W]e make a comprehensive analysis in order to determine whether the crime falls within the category of both the most aggravated and the least mitigated of murders, thereby assuring uniformity in the application of the sentence. We consider the totality of the circumstances of the case and compare the case to other capital cases. This entails a qualitative review by this Court of the underlying basis for each aggravator and mitigator rather than a quantitative analysis. In other words, proportionality review is not a comparison between the number of aggravating and mitigating circumstances.

Williams v. State, 37 So. 3d 187, 198 (Fla. 2010)(quoting Offord v. State, 959 So.

2d 187, 189 (Fla. 2007)(internal quotations and citations omitted)). The standard of review is *de novo*. See Larkins v. State, 739 So. 2d 90 (Fla. 1999).

Applying these principles, it is apparent that the present case is neither the most aggravated nor the least mitigated case for which the law has reserved the ultimate sanction of death. At the age of 24, Emilia Carr was eight-months pregnant with her fourth child. The father of that child is her codefendant, Joshua Fulgham. Emilia, Josh, and Heather, Josh's wife and the victim in this case, had been involved in a seedy little Peyton Place in rural Marion County, Florida. Josh and Heather had been together since they were sixteen. By all accounts, their relationship was a stormy and tumultuous one, filled with physical violence, threats, and Josh's abuse of Heather over several years. Josh and Heather shared two children, as did Emilia and Josh. Once Heather and Josh moved to Florida from Mississippi, Josh became involved with Emilia on a periodic and intermittent basis. The three of them formed an emotional, stormy love triangle.

Joshua had a history of abuse. Heather had finally had enough. Her plan was to go back to her family in Mississippi and take her children with her. Although, Heather and Josh finally married on December 26, 2008, six days later Josh threatened Heather with the gun and was jailed for most of January, 2009. Within a couple of weeks of being released from jail, Josh killed Heather Strong to

prevent her from taking his children away from him.

Emilia was clearly a participant in the murder. However, her emotional involvement and parental connection with Josh Fulgham, a very violent man, lead her to do something unlike anything she had ever done before. Emilia had no significant prior criminal history. Additionally, the trial court improperly rejected the statutory mitigator that Emilia acted under the substantial domination of Josh Fulgham. Her participation was relatively minor. There is no evidence that she knew, prior to seeing Heather in that trailer, that Josh planned to kill Heather. Joshua had a history of abuse. Heather had finally had enough. Her plan was to go back to her family in Mississippi and take her children with her. Although, Heather and Josh finally married on December 26, 2008, six days later Josh threatened Heather with the gun and was jailed for most of January, 2009. Within a couple of weeks of being released from jail, Josh killed Heather Strong to prevent her from taking his children away from him.

The trial court inappropriately found that Emilia's participation in the murder was cold, calculated, and premeditated, without any pretense of moral or legal justification. The vast majority of the evidence of Emilia's involvement and prior knowledge of the events came from her own statements. By all accounts, she never believed that Josh was serious about killing Heather. Emilia was clearly

upset with Heather's treatment of Josh, but there was scant evidence that she truly believed that there was a plan to kill Heather.

Emilia was a mother at the age of seventeen and never had a chance to develop as an individual. She came from an impoverished background, one of migrant farm workers. She was sexually abused by her grandfather and her father from her tender years until she was a teenager in high school. The only reason the abuse stopped was Emilia's heroic effort to save her little sister, Milagro. Her report of the sexual abuse tore the family apart, turning Emilia's own mother against her. Once her father was jailed, he attempted to obtain a "contract cold" on the lives of Emilia, her mother, and her grandmother. Afraid for her family, Emilia recanted her allegations of sexual abuse in spite of the fact that the surrenders acts really occurred. Her father suddenly died in prison after being convicted of the murder solicitation charges.

The only real aggravating factor in this case is the felony murder factor. As argued in Point V, the "heightened premeditation" aggravating factor was improperly applied. Additionally, the trial court inappropriately gave great weight to his finding that the murder was especially heinous, atrocious or cruel. The factor was inappropriately attributed to Appellant vicariously. See Point VI. Compared to the aggravation, substantial mitigation was considered and accepted

by the trial court. However, the trial court improperly rejected and weighed valid mitigation. See Point IV. Perhaps most importantly, the trial court accepted that Emilia Carr had no significant prior criminal history, a significant, weighty mitigating factor. Perhaps most importantly, Emilia was sexually abused beginning at her earliest memory. The abuse continued until her teenage years. The abuse stopped only because Emilia made the heroic decision to save her disabled, younger sister from a similar fate. The jury's recommendation was delivered by a bare majority. That close vote came after clearly improper argument by the prosecutor.

When the facts of the present case are compared to the preceding cases, it is clear that this is not one of the most aggravated and least mitigated. Death is a disproportionate penalty for Emilia Carr, and this Court should reverse her death sentence and remand for imposition of a life sentence with no possibility of parole.

POINT IX

FLORIDA'S DEATH SENTENCING SCHEME IS UNCONSTITUTIONAL UNDER THE SIXTH AMENDMENT PURSUANT TO RING V. ARIZONA.

During the course of the proceedings, trial counsel repeatedly challenged the constitutionality of Florida's Capital Sentencing Scheme. See, e.g., (I 54-64, 105-6, 110-17) None of the challenges were successful and Appellant was ultimately sentenced to death on both murder convictions. Most challenges were based on a denial of Appellant's Sixth Amendment rights as interpreted by Ring v. Arizona, 536 U.S. 584 (2002). The jury was repeatedly instructed and clearly understood that the ultimate decision on the appropriate sentence was the **sole** responsibility of the trial judge.

Appellant acknowledges that this Court has adhered to the position that it is without authority to declare Section 921.141, Florida Statutes unconstitutional under the Sixth Amendment even though Ring presents some constitutional questions about the statute's continued validity, because the United States Supreme Court previously upheld Florida's statute on a Sixth Amendment challenge. See, e.g. Bottoson v. Moore, 833 So. 2d 693 (Fla. 2002), cert. denied, 537 U.S. 1070 (2002) and King v. Moore, 831 So.2d 143 (Fla. 2002) cert. denied, 537 U.S. 1069

(2002). Additionally, appellant is aware that this Court has held that it is without authority to correct constitutional flaws in the statute via judicial interpretation and that legislative action is required. See, e.g., State v. Steele, 921 So.2d 538 (Fla. 2005).

Appellant points out that neither jury recommendation for his death sentences was unanimous. However, the trial court repeatedly instructed and the state persistently pointed out that the ultimate decision on sentence was the sole responsibility of the judge. If Ring v. Arizona is the law of the land, and it clearly is, the jury's Sixth Amendment role was repeatedly diminished by the argument and instructions in contravention of Caldwell v. Mississippi, 472 U.S. 320 (1985).

Since the jury did not make specific findings as to aggravating and mitigating factors[15], we cannot determine at this point whether the jury was unanimous in their decisions on the applicability of appropriate circumstances. Additionally, we cannot know whether or not the jury unanimously determined that there were "sufficient" aggravating factors before addressing the issue of whether they were outweighed by the mitigating circumstances.

At this time, Appellant asks this Court to reconsider its position in Bottoson and King because Ring represents a major change in constitutional jurisprudence

which would allow this Court to rule on the unconstitutionality of Florida's statute. This Court should vacate appellant's death sentences and remand for imposition of life imprisonment without the possibility of parole. Amends. VI, VIII, and XIV, U.S. Const.; Art. I, §§ 9, 16, and 17.

CONCLUSION

Based upon the foregoing cases, authorities, policies, and arguments, Appellant respectfully requests the following relief:

As to Points I and II, reverse and remand for a new trial;

As to Points III, vacate Appellant's death sentence and remand for a new penalty phase;

As to Points IV, V, VI, VII, VIII and IX, vacate the death sentence and remand for imposition of life imprisonment with the possibility of parole

Respectfully submitted,

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SEVENTH JUDICIAL CIRCUIT

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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 3rd day of January, 2012.

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CHRISTOPHER S. QUARLES
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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.

_____
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