IN THE SUPREME COURT OF FLORIDA

JOHN ROBERT BALLARD,

Appellant,

CASE NO. SC03-1012

vs.

STATE OF FLORIDA,

Appellee.
_____/

ANSWER BRIEF OF THE APPELLEE ON APPEAL FROM THE TWENTIETH JUDICIAL CIRCUIT IN AND FOR COLLIER COUNTY, FLORIDA

CHARLES J. CRIST, JR.
ATTORNEY GENERAL

SCOTT A. BROWNE
Assistant Attorney General
Florida Bar No. 0802743
Concourse Center 4
3507 East Frontage Road, Suite 200
Tampa, Florida 33607
Telephone: (813) 287-7910
Facsimile: (813) 281-5501

COUNSEL FOR APPELLEE

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PRELIMINARY STATEMENT

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STATEMENT OF THE CASE AND FACTS

Ariana Harralambus testified that she was a friend of victim Jennifer Jones and had known her for nine years. She was also acquainted with her boyfriend, victim, Willy Patin ["Bubba"]. (V-8, 518-19). On Saturday night, March 6, 1999, she arrived at Jennifer's house a little after 10:00 pm. Several other people were present, including the appellant, John Ballard. (V-8, 518). Harralambus testified that in her opinion the house was clean that Saturday night. (V-8, 519).

Harralambus testified that Jennifer had a job but that she also made money by selling "pot here and there." (V-8, 520). When she sold pot in the house it was generally done in her bedroom. (V-8, 520). However, sometimes the transaction occurred in the front kitchen area or dining room. (V-8, 520). Harralambus was aware that Jennifer had marijuana in the house that Saturday. Since Jennifer and Willy were moving to Texas Monday morning, Jennifer had all her money in the house, over a thousand dollars. Harralambus actually observed the money. (V-8, 521). Jennifer kept the money in several locations, her purse, under the waterbed mattress [the top or bottom corner], as well as in a shoe box in her closet. (V-8, 521). Harralambus left the house at approximately 12:00. When she left, three people were still in the house, Rob

Daley, Jennifer, and Bubba. (V-8, 522).

They had plans to get together the next day at around 11:00 am. to go out on Jennifer's boat. (V-8, 522). However, Harralambus did not see Jennifer the next day. Harralambus called at approximately 10:00 when she left her house. (V-8, 523). She called and paged Jennifer but did not get any response. (V-8, 523). She went over to Jennifer's house but noticed the car was missing. She knocked on the door "to see if Bubba was home" but did not get any answer. (V-8, 523). She continued her attempts to reach Jennifer, calling her seven or more times. (V-8, 523). Harralambus tried to contact Jennifer again on Monday by paging her and calling the house phone. (V-8, 525). Harralambus wanted to see where she had been that weekend and return her wallet which had been left in Harralambus's car that Saturday. (V-8, 525).

Harralambus testified that a number of people regularly came over to Jennifer and Bubba's house. One of those people was John Ballard who lived across the street from them. (V-8, 528). Ballard, Jennifer and Bubba appeared to be friendly toward one another. (V-8, 528). Ballard used to play Nintendo Video games with Bubba. (V-8, 528-29).

Ballard was present in the house that Saturday but Harralambus did not recall what time he left the house. (V-8,

529). Harralambus was not aware of any arguments or disagreements with Ballard at that time. (V-8, 530). It seemed that Ballard had a good relationship with Bubba. (V-8, 532). She saw Ballard after the murders and did not notice anything unusual or alarming. (V-8, 533).

Robert Dailey testified that he was an electrician, lived about a block from the victims' house, and was acquainted with Willy Patin, otherwise known as Bubba. (V-8, 533-34). On Saturday March 6, 1999 he went over to the victims' house. He was at the house on and off all day, hanging out. (V-8, 535). He was not sure if he saw Ballard there that Saturday night. (V-8, 535). Dailey testified that Jennifer made money cleaning houses on Marco Island and also sold "a little bit of drugs." (V-8, 536). Dailey knew that the victim kept money hidden under the sink, in her bedroom, or under her bed. (V-8, 536). Dailey left the house at "about one o'clock in the morning" on Sunday. (V-8, 536). He was the last one to leave and they had plans to go out on their boat the next day. (V-8, 536).

Dailey tried to contact Jennifer and Bubba, calling their house phone and paging Jennifer. (V-8, 537). He went over to the house and noticed her car was gone but that Bubba's truck was in the back yard. (V-8, 537). Jennifer owned a red Mazda

hatchback. (V-8, 537). Dailey was not able to make contact with them on Sunday. (V-8, 537). On Monday afternoon he returned to the house and knocked on the door. He got no answer and tried to enter but the door was locked. (V-8, 538). He tried to enter through the back sliding door but could not open it. (V-8, 539). Dailey started getting worried because he and Bubba would talk every day. Dailey looked up Jennifer's father in the phone book and told him "something didn't feel right because nobody had talked to them all weekend." (V-8, 539).

Daily met Jennifer's father at the front of the house. They went around and popped out the sliding glass door to gain entry. (V-8, 539-40). Upon entering, they noticed boxes and called out for Jennifer. They found Jennifer in one bedroom and Bubba in the other. (V-8, 540). He looked for the house phone to call the police but could not find it hooked up to the charging base in the kitchen where it was normally kept. (V-8, 540). He ran to the neighbor's house and used the phone to call the police. (V-8, 540). While inside the house, Dailey did not touch anything, maybe a wall. (V-8, 541).

Dailey testified that he had only known Ballard a few months. However, Bubba and John appeared friendly. (V-8, 542). He did not observe or feel any animosity between

Jennifer and Ballard. (V-8, 542). He never saw Bubba go over to Ballard's house and thought that Ballard felt comfortable going over to Jennifer and Bubba's. (V-8, 542-43). On one occasion Ballard attempted to fix the engine on Jennifer and Bubba's boat. (V-8, 543).

Since Jennifer sold drugs it was not unusual to see people in the victims' house. (V-8, 544). On Saturday night he recalled four people in the house toward the end of the night, Ariana (Harralambus), Louis and Mike Howell. (V-8, 544). They were more or less just hanging out with friends. (V-8, 544). The victims were moving to Texas because Bubba had a job lined up with his dad. (V-8, 545). However, Dailey admitted that Jennifer might have been concerned because their windows had been shot out the previous week. (V-8, 546). He was present when the shots came through the window of the house. Daily knew the shooter's name was Francisco Garcia and that he was affiliated with a gang. (V-8, 546-47).

Robert Jones testified that the victim, Jennifer Jones was his daughter. (V-8, 548). He testified he went over to Jennifer's house and broke into it through the back window. He saw everything scattered around. He saw Bubba in the guest bedroom and Jennifer in the other bedroom on the floor. He did not touch Bubba but did grab Jennifer's arm. (V-8, 549).

The arm was on her chest and when it wouldn't move he realized something was very wrong. (V-8, 549). He left the house through the front door. (V-8, 549). He recalled going out the front door but did not remember opening it or even unlocking it. (V-8, 550).

Mike Wittenberg testified that at the time of the murders he was a lieutenant patrol supervisor with the Collier County Sheriff's Office. (V-8, 551). He arrived at the scene and thought that the victims were deceased but wanted to be sure. (V-8, 552-53). He was careful not to disturb anything. When EMS arrived, the EMS supervisor came in through the front door and used an EKG strip to check for signs of life. (V-8, 553). There were no signs of life. The EMS supervisor was "the only person to come close to them, to my victim." (V-8, 553). Other than placing the EKG strips, they did not touch the victim. (V-8, 553-54).

Corporal Todd Saner testified that he responded to a call on March 8, 1999 on Painted Leaf Lane in reference to a motor vehicle. (V-8, 555, 561). The car had apparently been abandoned in the woods. (V-8, 555). He found the red Mazda, two door hatchback at 9:00 in the morning.[1] (V-8, 556). He looked through the window and noticed the ignition switch was

[1]That was the same day the victims' bodies were found. (V-8, 562)

not popped and no wires were exposed to indicate the car was stolen. (V-8, 556). Nor did he observe any stereo equipment stolen or that any equipment had been stripped from the car. (V-8, 562-63). He ran the tag and it came back as registered to Jennifer Nicole Jones. (V-8, 558). Saner drove by the residence but did not notice anything out of the ordinary and did not stop. (V-8, 558). He drove the distance from the where the victims and the defendant lived to the location where the car was dropped: "It was approximately 1.3 miles." (V-8, 560).

Wayne Berry testified that his daughter is married to John Ballard. (V-8, 564). He used to live on Painted Leaf Lane. He identified his old house and testified that Ballard lived with him from early 1994 until March or April of that same year. (V-8, 565). They moved from that Painted Leaf home in March of 1996. (V-8, 566).

Deputy Ray Erickson of the Collier County Sheriff's Office testified that he was in the crime scene investigation unit. (V-8, 570). He had been with the Sheriff's Office for 18 years and responded to a crime scene in the Golden Gate area on 55th Terrace. (V-8, 570). Nobody was present in the home except the victims when he arrived at the house. (V-8, 570). He entered with another investigator. (V-8, 571). It

was a two bedroom duplex and it appeared that they had been packing to move with boxes. (V-8, 571). From the walkway he could see the male victim and observed the female victim in what he concluded was the master bedroom. (V-8, 571). The female victim (Jennifer) was laying on her back. (V-8, 571). (Ex. P-8).

Deputy Erickson pulled fingerprints that had already been dusted in several areas of the home. (V-8, 572). He lifted a print from the waterbed frame near the body of the female victim. (V-8, 573). The fingerprint was located around the female victim's upper torso, from the shoulder to the waist area. (V-8, 574).

Deputy Erickson also assisted in bagging evidence. (V-8, 574). Items of evidence were collected by the medical examiner, Dr. Borges. (V-8, 576). Exhibit number 10 reflected a paper bag used to cover the right hand of victim Jennifer Jones. (V-8, 581). Deputy Erickson was present when an item was collected by the medical examiner from the right hand of victim Jennifer Jones. (V-8, 576). "The medical examiner is handling the hands very carefully to see if there's any evidence on the hands. At that point you have to give a person room to stand back and you take a picture of what you need to take a picture of. He would be the one to

collect that." (V-8, 596).

Dr. Borges separated items of evidence and packaged it on his own before Deputy Erickson signed for it and repackaged it. (V-8, 576). Deputy Erickson attended the autopsy and verifies everything the medical examiner packages so that he can attest "to what he put in there." (V-8, 576). Among the items collected were nail clippings and a rape kit. (V-8, 577-78).

Bath towels were collected from the bathroom of the residence with blood on them. (V-8, 581). Carpet and padding were collected from the hallway leading to the spare bedroom where victim Patin was found. (V-8, 582). Door molding was removed which had blood on it. (V-8, 582). A barbell type weight was also collected from the bedroom of the victims' residence. (V-8, 582). A sock with suspected blood on it was found in a box "just as you're getting ready to enter the hallway." (V-8, 583). Blood soaked toilet paper was also collected in the bedroom where Patin's body was found. (V-8, 583). A black purse was found in the hallway, either knocked over or dumped over. (V-8, 583). Pieces of door trim from the bathroom were collected. A sample of blood was collected from the shower curtain inside the bathroom. (V-8, 584). Blood scrapings were also collected from the toilet. (V-8,

585). A blood sample was also collected from a cardboard box next to Jennifer's body. (V-8, 585). Exhibit number 27 represented hair removed from victim Patin in the spare bedroom. (V-8, 586). Patin's body was found in this room. Id. Blood scrapings from the wall were taken from the hall "right across from the bathroom." (V-8, 587). State's Exhibit 42 was a fingerprint card, taken from the side of the waterbed frame. (V-8, 587). [The latent examiner Identified it as 50].

Four prints were lifted from the waterbed frame. (V-8, 591). Exhibits 26, 27, 50, and 88. He lifted the prints and thought that none of the prints on the waterbed frame were bloody. (V-8, 593). Deputy Erickson denied the house was a mess, but did note that boxes were all over the house and it looked like they were moving. (V-8, 594-95). Over a hundred fingerprint cards were taken in this case. (V-8, 599).

Joseph Barber, a secondary supervisor of the latent department with the Collier County Sheriff's Office, testified that he receives fingerprints from the crime scene and attempts to identify them as belonging to a specific individual. (V-9, 601). Deputy Barber testified that he received some 118 latent fingerprint cards in this case. The first thing he did was determine if the cards contained a

print of value or no value. (V-9, 603). He explained that crime scene technicians are taught not to make any determination of value in the field. So, they process areas and if they "get any type of mark, they're encouraged to lift that and mount it on a card. It may be just a smudge, it may be a cloth mark, anything, they lift it because they are not experts in the field of fingerprint." (V-9, 603). The first thing he does when he gets the cards is to examine them to determine if there's potential for identification at all." (V-9, 603-04). They will take any card which shows any ridge pattern at all and mark those with a potential for identification. (V-9, 604). "I usually take the very best prints and start, especially in capital cases, and start working with them immediately with the victims, and also if there are any suspects." (V-9, 604).

Of the 118 initial prints cards, Barber felt 46 might possibly provide ridge detail which would make it worth a try. "The others weren't worth a try." (V-9, 605). Of those 46, he was able to make an identification on 10. Three of those ten prints belonged to victim Jennifer Jones, six of the fingerprints belonged to victim Patin. (V-9, 606). Another fingerprint was found belonging to another subject named Freeman. His fingerprint was found on a CD located in the

abandoned vehicle belonging to the victims. (V-9, 606). Q-26 taken from the waterbed frame was just a smudge, no value for identification. That latent was taken from the side of the waterbed. (V-9, 607). Similarly, Q-88 was also taken from the waterbed frame but was "nothing but a smudge and worthless." (V-9, 607). Q-37 [waterbed frame] had some ridge detail that had the potential for identification value but that print or partial print was not identified to anyone. (V-9, 607). Similarly, Q-50 had some ridge detail, but, it was not matched to Ballard. (V-9, 608). When you have a print with some ridge detail, be it a palm print, footprint, fingerprint Deputy Barber explained there are three possibilities: The first is "that you could compare it to someone and find enough information within that print to definitely say it is a person" (V-9, 608). The second is that you can compare it to all prints and "come to the conclusion that this is not this person." (V-9, 608). "The third option would be that you do the comparison and you are taking a partial fingerprint, again, we're not talking about a beautiful good print. You take a partial print and, in fact, there's not enough information in that fingerprint to draw a conclusion and say this absolutely is this person or absolutely not this person. It is just not enough detail in

the print. There's ridges, but not enough to draw that conclusion." (V-9, 609).

On Q-37 and Q-50 Deputy Barber was not able to eliminate Ballard as a contributor nor exclude him. (V-9, 609). Deputy Barber testified that as most people know everyone has a unique set of fingerprints. He conducts comparisons by going through each of the ten fingers and picking out different characteristics. (V-9, 610). He finds technical points in each fingerprint and identifies that print to a person by finding the exact same points in "both prints." (V-9, 610). "Everything you find in one you have to find in the other, given the fact that fact that you have enough of the print to see these points." (V-9, 611). There is not a minimum number of points required by the FBI to confirm an identification, it is left up to the individual examiner. (V-9, 611). He testified that he sent some prints to the Florida Department of Law Enforcement. He sent up 105 of the prints. (V-9, 612). He did not send up the ones they had already made an identification on. (V-9, 613). State's Exhibit Number 42 was sent up to the FDLE, Fort Myers Crime Lab [50 marked]. (V-9, 613).

Deputy Ballard testified that he found a number of potential prints that could not be identified to any person.

One of those prints was marked as having been pulled from the inside driver's door handle of the victims' car. (V-9, 616). Questioned 55 was on a 25 pound "weight plate." (V-9, 619). Questioned 50 was found on the side of the waterbed frame. (V-9, 619).

Phillip Balunan testified that he had been employed by the FDLE for 19 years and that he is assigned to the latent fingerprint section. His responsibilities "include the examination, the processing, development, recovery and preservation of latent prints for purposes of identification." (V-9, 631). He has been in that position for four years and received one year and six months of training from FDLE. His training included proficiency testing. (V-9, 632).

He received 105 prints in the first submission related to this case. In the first group he made an identification on two cards, and, from a subsequent group he made another. In all, Analyst Balunan was able to make three identifications. (V-9, 636). He explained that he first examines a card to see if there is sufficient ridge detail for identification purposes. (V-9, 636). Once that its established they examine or compare the print to a subject or a victim for the purpose of elimination. (V-9, 636). Once he makes an identification, his work is reviewed by submitting his report which is

"verified by another crime laboratory analyst at the Florida Department of Law Enforcement." (V-9, 637).

Analyst Balunan testified that he compared the known finger and palm prints of John Ballard. (V-9, 637). When you photograph prints as Balunan did in this case it does not alter or change the prints. The photographs serve to give the examiner an enhanced ability to match or compare prints, it serves to protect the integrity of the original evidence, and, it gives them the ability to lighten or darken the photograph and change the contrast. (V-9, 639-40). "If the ridge detail is very faint, we would want to increase the contrast to make the ridge detail stand out more against the subject on which the fingerprint is on." (V-9, 640). Changing the contrast does not change or alter the ridge detail of the print. (V-9, 640). Using the photograph, Balunan examined Q-50 and came to the conclusion that it represented the fingerprint of John Ballard. (V-9, 641).

Analyst Balunan testified that he does not have a set number of points that he relied upon to make that determination, but testified that he plotted 10 which he felt were illustrative as an aid to explain how he made his determination. However, he testified that there are "indeed more points than 10 on these particular latent fingerprints."

(V-9, 645). He compared photographs of the known prints and compared them to the latent print photographed from Q-50. He determined that the number one finger and the right thumb were necessary to conduct a comparison. (V-9, 652). He then explained how he made the comparison and noted a number of characteristics that led him to conclude the print matched John Ballard. (V-9, 653-58). Unfortunately, there is no scientific method to be able to determine the age of a fingerprint. (V-9, 658).

Senior Crime Laboratory Analyst Steven Casper testified that he had been employed by FDLE for three years. Prior to that, he worked five years as a latent fingerprint examiner for the Lee County Sheriff's Office. (V-9, 671). He first gained experience in fingerprint examination with the New York Police Department. He attended advanced FBI Academy training courses for latent print examination and "advanced administrative latent fingerprint school." (V-9, 671). In 1992 Analyst Casper went back to the FBI Academy for a latent print photography course and "attended numerous other fingerprint courses and seminars since then." (V-9, 671). He conducted an examination of the known prints of John Ballard and compared them to prints reflected on State's Exhibit 39. He determined that the photographs of the print matched the

photograph from the known print of John Ballard. (V-9, 679).

Lieutenant Michael Gawlinski testified that he worked with the Crime Scene Bureau of the Collier County Sheriff's Office. (V-9, 689). He was trained in forensics, homicide investigation, and blood spatter analysis. (V-9, 689-90). In addition to formal training, he has experience in working 20,000 crime scenes. (V-9, 691). Blood spatter can be classified as drops, which are usually from low impact. (V-9, 692). Another form is impacted relating to a chain of events or incident with blunt force. (V-9, 692). Cast off blood is usually associated with blunt force trauma, it travels at a high rate of speed. (V-9, 692-93). Low impact blood is spherical in shape and changes form when it comes into contact with an object. Cast off is force that breaks it apart and leaves a distinctive pattern on whatever item it is found on. (V-9, 693). You can generally tell the direction of the stain from where it was traveling, it will be larger on one end. (V-9, 693).

Lieutenant Gawlinski arrived at the crime scene at 55th Terrace on March 8, 1999. (V-9, 693). He took photographs of the crime scene. State's Exhibit P-22. (V-9, 695). He photographed the right hand of Jennifer Jones and what was thought to be a torn piece of plastic bag under her hand. (V-

9, 695). He identified the chain of custody for the hair removed from the right hand of Jennifer Jones. (V-9, 696). He received it from the medical examiner Doctor Borges. (V-9, 697). Also, he came into possession of head hair from victim Patin. (V-9, 697).

The murder of the male victim left a large amount of blood in the residence. The attack upon Jennifer resulted in less blood and it was generally found immediately around her body. (V-9, 753). He could not give an immediate estimate, but Jennifer did not remain standing long after being struck. (V-9, 754). If she had been standing for any length of time Gawlinski would have expected more of a drop type pattern of blood. (V-9, 754). With victim Patin, there appeared to be more of a trail of activity, following the blood through different rooms. (V-9, 755). The drawers in the bedroom were found open. (V-9, 756). It looked like someone had just dumped the contents of the victim's purse on the ground. (V-9, 759). Two bloody latent prints were lifted from the weight bar but had not been matched to John Ballard. (V-9, 759-60).

Through Lieutenant Gawlinski the State introduced crime scene photographs of the victims and the blood trail through the house. Lieutenant Gawlinski also collected blood samples from various areas for submission to a lab for DNA testing.

(V-9, 738-45).

The medical examiner, Dr. Manuel Borges, testified that he was called to the scene of the murders. He explained that he goes to the scene of the crime to get information from the detectives but, also, to observe the scene before it is altered. Dr. Borges testified: "It's an opportunity to view the victims as they are at the scene. And by doing all of these things, correlate the findings that you're going to have later at the autopsy with what happened at the scene. It also gives you a chance to sometimes get an idea of what kind of specimens and so forth you should be collecting for evidence." (V-9, 763-64). Dr. Borges performed an autopsy on victims Willy Patin and Jennifer Jones. He identified a photograph of Jennifer which shows jewelry and a portion of some plastic clutched in her hand. (V-9, 766). That item was collected by him and packaged then turned over to a representative of the Sheriff's office. (V-9, 767).

On State's Exhibit Number 3, Dr. Borges testified that the packaging stated: "It has hair right hand and it's in my handwriting and it has my initials and this is from Jones." (V-9, 769). He recognized a paper bag labeled right hand as the bag which was placed on her hand at the crime scene. Dr. Borges explained: "Well, this paper bag would have been put on

her hand at the crime scene and her hand would have been brought - - her hands and Mr. Patin's hands as well would have been in paper bags that had been placed at the crime scene, and then they were brought that way to the Medical Examiner's Office. Those paper bags were placed in bags like this and submitted as evidence." (V-9, 772-73). Dr. Borges explained that the bags were placed there "in that fashion to protect the hands." (V-9, 773). An external examination of Jennifer Jones revealed her hand had a hair on it. He indicated it was found in her hand and was in contact with her skin.[2] (V-9, 776-77). The hair was in her hand, "underneath the plastic and not on top of the plastic. They were in the hand." (V-9, 793). If the hair had been recovered from a piece of plastic or on a bag, he would have noted that at the time it was removed. Dr. Borges explained: "I ultimately removed it from the hand, not the bag. And therefore, I describe it as being from the hand. Had I recovered it from the bag, I would have described it from the bag." (V-9, 798).

At the time of her death, Jennifer was five foot six inches tall and weighed 88 pounds. (V-9, 788). Dr. Borges concluded that Jennifer died from blunt force trauma to the head. (V-9, 784). Blunt force is "when an object having some

[2]Dr. Borges also collected nail clippings from Jennifer and drew blood from her. (V-9, 770).

density, some velocity, some force behind it, strikes the body." (V-9, 777). When that happens, "[t]he tissues can spread, lacerate, they tear, leaving bridges, the tissues are bruised, that means that tissues are disrupted and blood seeps in between the tissues or there are fractures in the underlying bone." (V-9, 777-78). Jennifer received blows to the head causing lacerations and the skull was fractured. Dr. Borges explained:

> The most significant area is inside the skull and what happened, what she had inside the skull where we basically reflected the scalp, sort of moved the scalp forward is that the bones in her skull were shattered in an eggshell fashion. If you drop a hard boiled egg you have the fracture of the shell. That's what we saw. Small fragments of bone and that force is transmitted into the brain and the brain itself had extensive massive injury and that's what resulted in her death and that death is not necessarily instantaneous, it's quick, but not necessarily instant. And obviously the more blows you receive the closer and closer you come to death.

(V-9, 780). Using a photograph to explain, Dr. Borges testified that there were at least three strikes. "There's three, probably more than three, how many more I really can't say. I described this as massive multiple blunt force injuries because the extent of the injuries - - it's not just the number, it's the massive force that was transmitted to those bones." (V-9, 781).

Dr. Borges noted that Jennifer suffered defensive

injuries. Jennifer had a hyper mobile left thumb, “which is another way to say that we describe a broken thumb.” (V-9, 782). Jennifer also had some abrasions or scraping of the skin, also on her left hand. (V-9, 782). There were abrasions and signs of bruising on the back side of her fingers, the middle index and ring finger. (V-9, 783).

At the time of his death, Mr. Patin was five feet seven inches tall and weighed 94 pounds. (V-9, 788). Mr. Patin suffered similar blunt force injuries. (V-9, 784). Patin had lacerations on his face and additional lacerations on the top of the head. “Again, we’re seeing the top of the head and we’re seeing these lacerations at the top of the head where some object having some force struck him on the top of the head and underlying that are massive fractures of the bones. The bones are shattered, again, in eggshell fashion and the underlying brain has extensive injury. The injury gets transmitted all the way through.” (V-9, 785). Each progressive blow brought Mr. Patin closer to death. Dr. Borges also noted Mr. Patin suffered defensive injuries. He noted that the middle finger “is avulsed, that means it’s turned off and the skin behind it is bruised and damaged. Imagine having your fingernail sheared off and that’s from blunt force injury. Again, a defensive injury indicating the

attempt to defend yourself." (V-9, 786). Mr. Patin's death was a homicide caused by blunt force trauma.[3] (V-9, 787).

Dr. Borges could not say what weapon or object was used to inflict the fatal blows, but a weight found in the home might have produced the fatal injuries. (V-9, 794-95). Dr. Borges said that because the object that caused the fatal injuries was hard and dense, consistent with a weight. However, Dr. Borges testified that there are numerous other possibilities. (V-9, 796).

John Kilbourn testified that he was a forensic scientist specializing in microanalysis. He explained that field involves examination of trace evidence such as hairs, fibers, paint particles, and explosive [residue] for potential use in civil and criminal cases. (V-10, 834). He has been doing this type of work for thirty-four years. Kilbourn was a fellow of the Academy of Forensic Scientists, member and past president of the Southern Association of Forensic Scientists as well as a member of other organizations relating to the field of forensic sciences. (V-10, 834). Kilbourn had a degree from Auburn University in pharmacy and pharmacology. (V-10, 834). He has testified 800 times in the field of

[3]Hair was recovered from the left hand of Mr. Patin and the doctor pulled head hair. (V-9, 771). Dr. Borges also drew blood from Mr. Patin. (V-9, 772).

forensic science and trace evidence. (V-10, 835).

Kilbourn was asked to conduct hair comparisons in this case. He examined a number of hairs, one in particular, item five in a sealed manilla envelope. It was labeled PCR extracts from a hair removed from the right hand of Jones. (V-10, 836-37). In this envelope was a plastic bag with extracts 255 root and 256 shaft. (V-10, 837). He examined the shaft and root under a microscope after they had been mounted on slides. He compared those samples to known arm hair of John Ballard. (V-10, 837). He also had a smaller envelope labeled in a similar manner and inside the envelope were five hairs. He compared those to the known head hair of Jennifer Jones and determined that three of those hairs from the envelope were consistent with her head hair. (V-10, 838). The remaining two hairs were too "short to make any conclusion." (V-10, 838). On item 5-A, those two hairs were consistent with the known arm hairs of John Ballard.[4] (V-10, 839, 852).

Kilbourn explained the three growth stages of hair: The Anagen phase where the hair is growing, it takes place over the course of two to eight years. At the end of this period of time, the follicle ends the growth stage and this is called

[4]This was a single hair that had been cut in half. (V-10, 852).

the Catagen phase. This Catagen phase is relatively short. It lasts a few weeks at most. (V-10, 840). The last stage is the Telagen phase where the bulb of the root starts to sling down, getting smaller and smaller until there is no longer any tissue in the follicle to hold the hair in place. (V-10, 830-40). This Telagen phase normally lasts a number of months. Once the "bulb has decreased sufficiently in size and it becomes dehydrated, it almost looks like the end of a paintbrush. It's just a very, very small bulb, then by some type of mechanism either traumatically or naturally this hair will fall from the follicle." (V-10, 840). Kilbourn explained that this process is a gradual one and just "because you enter the Telagen phase does not mean that hair is ready to be released from the scalp or the arm or wherever it might be. It is only when it reaches the late Telagen phase somewhere in this two to four month period that there's no longer viable salivary tissue holding that hair in place." (V-10, 841). A hair in this late stage would be called late Telagen phase. A hair in this phase can be naturally shed or removed with some type of force. This hair is ready to fall out and slight activity of moving the hair may cause it to be naturally shed. (V-10, 841). He would not expect to find genetic material on a hair in the late Telagen phase: "There's

no viable material that's present on the late Telagen phases." (V-10, 841).

It is hard to tell the difference between a hair in the late Catagen and early Telagen phase. "There's not a demarcation that you can say it's definitely in one phase or the other because it is such a gradual process." (V-10, 842). Kilbourn determined that the hair on item number five was in the Telagen phase. (V-10, 843). However, after DNA analysis was performed on the hair, he would not expect any cellular tissue to be left on that hair. (V-10, 845). Consequently, he could not make a determination on whether the hair was forcibly or naturally shed. (V-10, 845). In the late Telagen phase hairs might be dislodged by everyday activity such as washing hair or scratching. (V-10, 856).

Kilbourn examined hundreds of hairs in this case. He identified hairs belonging to victims Patin and Jones. (V-10, 845). Also, he found hairs on which he was unable to make an identification on. (V-10, 846). Some of the hairs were very short hairs, body hairs, or hair fragments, that due to their length or lack of characteristics, did not allow an inference to be made on identification. (V-10, 846). Some hairs may have come from the victims or from someone else who had come into contact with the house. He did determine that some hairs

were forcibly removed. (V-10, 846). Of the hundreds of hairs Kilbourn examined, he determined that only five hairs were forcibly removed. One slide had two hairs together in some root tissue, for a total of five hairs. (V-10, 847). However, he was not able to determine the source of the hair. (V-10, 847). One of the hairs was found in an area of the stain around the Olympic barbell. (V-10, 847-48). Another hair was found on a striped shirt. One other was described as a hair from the right hand of Willy Patin, which had approximately 59 hairs or hair fragments and fibers. (V-10, 848).

There were some hairs that were identified as from Mr. Patin, some were consistent with Jennifer Jones. Some were forcibly removed, some were not. (V-10, 848-49). There was a Caucasian pubic hair and an animal hair. Kilbourn examined body hairs and a couple of short hair fragments that he was unable to identify. (V-10, 849). In sum, within Patin's right hand were some 12 unidentified hairs, two animal hairs and some fibers. (V-10, 860). Item 19, from the left hand of Willy Patin contained hair consistent with Patin and Jones. (V-10, 849). Some 64 hairs or hair fragments and fibers were found. Out of those hairs, 12 were microscopically consistent with Jones. (V-10, 861). And, 41 were microscopically

consistent with Patin. The remaining hairs were unidentified. (V-10, 861). He did not have any body hair standards to check in reference to the victims in this case. Without known standards of body hair from the victims he could not make an identification. Kilbourn explained that hairs from various body parts differ both visibly and microscopically. You can't look at a person's head of hair and identify their arm or pubic hair. (V-10, 849). Without known standards, Kilbourn testified, you cannot come to any type of conclusion. (V-10, 849-50).

Kilbourn testified that Exhibit 27 was identified as hair from the plaid shorts by the weight bar. The bag contained six hairs, four of which were identified microscopically being consistent with Mr. Patin. Two hairs were forcibly removed and one hair being light brown and one being medium dark brown. He could not say to who they may have originated from. (V-10, 850).

Kilbourn agreed that it is possible for hair to be transferred from one surface to another such as carpeting into someone's hand. (V-10, 862). Kilbourn found some 70 hairs in the car and that 47 of them were unidentified. (V-10, 863). He did not find any hair microscopically consistent with the known arm hair of Ballard. Kilbourn did not, however, have

any sample or known standard of Ballard's head hair. (V-10, 863).

On the torn bloody poster, there were numerous hairs or hair fragments, one Telagen root body from fine hair, another Telagen, light brown body hair, Telagen root unidentified. (V-10, 864). A white sock with blood on it had several unidentified limb hairs on it. (V-10, 866).

Ms. Jones only had six hairs in her hand. Three were consistent with her own hair, one was consistent with Ballard's arm hair, and, the other two could not be identified because they were too short. (V-10, 870). In contrast, Patin had in both hands combined 114 hairs or hair fragments. None of those matched Mr. Ballard. (V-10, 870).

Roger Morrison testified that he is a forensic scientist with the Alabama Department of Forensic Science in Huntsville Regional Laboratory. He was also a partner in a private firm, Analytical and Forensic Associates. (V-10, 938). He had an associate with the firm, John Kilbourn. (V-10, 938). He has testified numerous times in trace analysis in Alabama, Florida, Georgia, North Carolina, South Carolina, Tennessee, Arkansas and Missouri. (V-10, 940-41). Morrison testified that he was familiar with the phase of hair growth and has conducted STR [DNA] testing on hairs. (V-10, 941). His

experience testing hairs with Telagen root were as follows: "The results have been that typically - - if there's what we call follicular tags or epithelial tissue, the Telagen root of the hair, the DNA testing is possible. If there's no soft tissue associated with the Telagen hair then we do not get DNA results." (V-10, 941-42). "If they are Anagen hairs, then they were generally suitable for DNA analysis and if Telagen hairs and soft tissue they're suitable for DNA analysis. If they're Telagen without soft tissue then they're suitable for mitochondrial DNA testing." (V-10, 957).

Morrison explained that when there is a "follicular tag" or "soft tissue" "it means to remove that hair there has to be some force involved to get that out of the follicle." (V-10, 942). Morrison testified:

> In Telagen hair, in the early stages of the Telagen phase of hair cycle there are roots that are associated with the club end of the hair which attaches themselves to this soft tissue.
> So to remove that hair it takes some amount of force to do that. As it gets into the later phase of Telagen cycle or phase of the hair, those roots disappear and then the hair easily falls out and is what we generally refer to as a shed hair or naturally removed hair.

(V-10, 942).

Given his experience with hair and obtaining DNA profiles and using an STR analysis which obtained "12 to 13 low sides,"

Morrison testified:

> In my experience and from what I know about the structure of hair, to be able to get a 12 out of 13 profile on the hair it would [have] to have soft tissue associated with it and it would have to be forcibly removed.

(V-10, 943). Morrison was not able to define the amount of force required to remove the hair, just that it was force as opposed to naturally shed hair. (V-10, 943).

Morrison testified that while the Telagen phase is the final phase of a hair about to leave the body, it does not mean it is immediately going to fall out. A Telagen phase lasts at least six months in the follicle for pubic and body hair. (V-10, 945). A naturally shed Telagen hair would be one he associates with everyday activities, not force. "That would be a hair with a root club and no soft tissue associated with it." (V-10, 953). It is possible that scratching could provide the force necessary to dislodge the hair. (V-10, 953). However, it would be dependent upon the amount of force the person used in scratching. (V-10, 955). Morrison would expect a hair with soft tissue associated with it to require more force to dislodge than through normal friction which comes naturally from putting on clothes, showering, or shampooing. (V-10, 954).

Patricia Bencivegna testified that she is an FDLE Crime

Laboratory Analyst in the serology and DNA section. (V-10, 876). She explained that testing requires sufficient genetic material to render a result and that DNA can be degraded if it's exposed to excessive heat or bacteria degradation. However, such degrading does not change the profile, or change the profile to match another person's DNA. (V-10, 880-881). The lab must take proficiency tests and neither the lab nor Ms. Bencivegna have failed such tests. The lab is licensed and accredited. (V-10, 882).

Bencivegna testified that she received what has been marked State's Exhibit Number 3 and 3-A which was identified as hair removed from the right hand of victim Jones. (V-10, 887). She examined the hair to see if it was suitable for DNA testing. Bencivegna first examined the hair to determine if it was human or animal, then, she testified: "...I see if it's a root, contained in the root portion of the hair, if a root is present. I would look at what growth stage the hair is in and any type of tissue or cellular material present." (V-10, 887). Although she was not an expert in hair comparison, she was aware the hair had a "root" and therefore might have suitable genetic material for testing. (V-10, 914). Once she determined suitable material was present, she cut the hair and placed it in tubes for DNA testing. (V-10, 888). The

extraction process is a way to break open the cells containing the DNA and create multiple copies. (V-10, 889). The root of the hair is exposed to heating and is bottled, spinning open the cells. “It’s a little bit violent to basically open the cellular pores.” (V-10, 890). She would not expect to have any tissue left on the hair. The hair in this case revealed a mixture of profiles. Willy Patin was excluded as a possible source but Jennifer Jones was included as a minor component to the DNA mixture. (V-10, 890). She did not have a stain to compare the major part of the profile. (V-10, 890).

A swabbing from nail clippings indicated positive for the presence of blood. The swab revealed a mixture of DNA profiles. Patin and Jones cannot be excluded as possible sources of that DNA profile but Ballard was excluded. (V-10, 916). The mixture tells you who can be included based upon their known standards. (V-10, 918). For the type of DNA testing conducted, Patin would be included as one in 21 Caucasian population and one in 262 African-American and Hispanics. (V-10, 919). She did not have any indication that someone else’s DNA profile is hidden in the mixture profile. (V-10, 923-24). However, it was at least “possible” that another person’s DNA was present in the mixture. (V-10, 924). Since she had no indication of another person present in her

opinion the sample did not warrant further testing. (V-10, 924-25).

Two bath towels tested positive for the presence of blood and a cutting was removed for DNA testing. The towels DNA profile was consistent with Willy Patin and could not have come from Jennifer Jones. (V-10, 896-97). [11-A]. A seat cover tested positive for the presence of blood, as did a sock, a cut from the roll of toilet paper and the weight. Samples or cutting from carpeting from the hallway leading into the spare bedroom were prepared for DNA analysis [Ex. 12]. (V-10, 897). The DNA profile was consistent with Willy Patin and could not have originated from Jennifer Jones. (V-10, 898). Blood found on the door molding was consistent with Willy Patin and could not have originated from Jennifer Jones. (V-10, 898). Blood on the sock was consistent with the DNA profile obtained from Patin. (V-10, 898). A roll of toilet paper was tested and the profile was consistent with Willy Patin. (V-10, 899). An Olympic 10 pound weight tested positive for the presence of blood. A sample of that blood was tested and the profile was consistent with Patin. (V-10, 900). A swabbing from the Olympic barbell also tested positive for the presence of blood and DNA testing revealed a profile consistent with Patin. (V-10, 903).

A blue “blow up chair” tested positive for blood and DNA testing revealed a profile consistent with Willy Patin. (V-10, 901). A piece of door trim from inside the bathroom revealed the presence of blood and subsequent DNA testing revealed a profile consistent with Patin. (V-10, 902). Similarly, a piece of door frame from the bathroom revealed a DNA profile consistent with Willy Patin. (V-10, 902). Blood on the shower curtain was tested and the DNA profile was consistent with Patin. (V-10, 905). A scraping of blood from the toilet seat tested positive for blood and subsequent testing revealed a DNA profile consistent with Patin. (V-10, 906). Scrapings from the bathroom floor revealed a DNA profile consistent with Willy Patin. (V-10, 906-07).

A swabbing from the curl bar in the spare bedroom was positive for blood and the DNA profile was consistent with Willy Patin. (V-10, 903-04). Scrapings of blood from a lamp in the spare bedroom also had a profile of Willy Patin. (V-10, 904). Blood from the nail polish bottle revealed a DNA profile consistent with Willy Patin. (V-10, 910). State’s Exhibit 43, a cutting from a cardboard box, tested positive for the presence of blood and the resulting DNA profile was consistent with Jennifer Jones’s DNA profile. (V-10, 911-12). In terms of what type of DNA testing is utilized a lot has to

do with the size of the sample. (V-10, 922). The PCR testing from the hair recovered from the hand of Jones was consistent with Ballard's profile. (V-10, 911). At that point she requested more sensitive SDR analysis on the hair which "looks for a higher degree of discrimination." (V-10, 911).

A hair recovered from the left hand of Willy Patin was examined and found to be suitable for DNA analysis. The DNA profile was consistent with Willy Patin. (V-10, 906). State's Exhibit 11-A3, a cutting from a seat cover [automobile], revealed the presence of blood consistent with Willy Patin's DNA profile. (V-10, 909).

FDLE Crime Laboratory Analyst Melissa Suddeth testified that she is a supervisor in the serology and DNA section of the Tampa Crime Laboratory. (V-10, 928). She had training in population frequency used in DNA analysis and was familiar with the various databases used for statistical calculations based upon frequency of DNA profiles. (V-10, 930). Suddeth has analyzed approximately 3500 samples using PCR technology. (V-10, 931).

Suddeth examined State's Exhibit 3-A [internal lab ex. # 5 and 5A], described as hair removed from the right hand of Jennifer Jones. (V-10, 933). She also reviewed the blood

stain card prepared from a tube of blood drawn from John Ballard. (V-10, 933). Suddeth testified: "In this particular case, the DNA extraction part of the testing had already been conducted by an analyst and I took them and used the samples to compile an STR DNA profile from the extracts." (V-10, 934). "The DNA profile that was obtained from Exhibit Number 5, the hair from the right hand had an STR profile that matched was obtained from the sample made from John Ballard." (V-10, 935). Suddeth testified that the population frequencies found in the DNA profile constituted the following: "Approximately one in every 11.8 quadrillion African-American, 750 trillion Caucasians, 2.50 trillion Southeastern Hispanic individuals." (V-10, 935). If you were selecting an individual at random you would expect to have Ballard's DNA profile "again one in every 750 trillion individuals." (V-10, 935). Exhibit 5 was the only item of evidence connected with this case on which Suddeth was asked to perform an STR profile. (V-10, 936-37).

The Defense Case

Ray Wickenhouser testified that he was lab director for a Forensic Lab in Iberia, Louisiana. (V-10, 963-64). He specialized in DNA and trace evidence which includes hair and fiber. (V-10, 964). Wickenhouser described the three stages

of hair growth and explained that the last phase, the Telagen or resting phase lasts about a hundred days, but, it varies from individual to individual. (V-10, 970). Once the hair is released from the follicle, the hair is loosely held and can be released or shed by combing your hair, shampooing it, or, even sleeping on it. Id. It can be shed with adhering cellular material. (V-10, 970). A hair can be examined for the hair root, determined whether it's a pulled hair, what the growth stage is, if it has a root sheath or a "follicular tag that we can get a DNA profile from." (V-10, 971). Wickenhouser testified that cells adhering to the hair and not the hair itself provide the most DNA. (V-10, 971).

Wickenhouser testified that it is possible to get a full DNA profile from a hair in the Telagen phase with a follicular tag or even dandruff hanging on the hair. However, "we're looking ideally for a root sheath that shows some force and lots and lots of DNA or a little flake of dandruff or anything else that might be hanging on to the hair as well." (V-10, 975). It is not unusual to get sufficient DNA from a Telagen hair. (V-10, 976). In fact, Wickenhouser testified that "we are routinely able to come up with profiles full with naturally fallen out hair as well." (V-10, 976).

Wickenhouser reviewed Kilbourn's notes with respect to

State Exhibit 5A and noted that the hair had biological material and produced a full DNA profile. But beyond that Wickenhouser testified it is just speculation. Once the biological material on the hair has been digested in the testing process you cannot tell what the material reflected to the exclusion of another. (V-10, 978-79). Consequently, Wickenhouser took issue with use of the term "force" stating: "When a Telagen is preparing to be naturally fallen out, it's forced, but when it's so little it's the type of thing you do washing your hair or scratching your []arm or normally in day-to-day life really is the word." (V-10, 979). Although, "[f]orce is perhaps the right word when you're just dislodging your hair when it's ready to fall out anyway." (V-10, 980).

Wickenhouser did not dispute Kilbourn's finding that it was a Telagen hair. And, although Kilbourn's notes did not reflect a root or sheath, it was examined after PCR analysis and any root or sheath would have been washed off. (V-10, 981). He agreed that the concept of "force" would be a continuum and that it was possible to have a forcibly removed Telagen hair. But, Wickenhouser testified there was no way to tell the amount of force by just looking at the hair. (V-10, 984). Someone grabbing your arm it might provide sufficient force to remove a Telagen hair. (V-10, 985).

Shawn Weiss, Associate Technical Director of LabCorp, testified that she conducted a DNA test on hairs marked by the Sheriff's Office as exhibit 178-A. (V-10, 988-89). The item was two Caucasian limb hairs from the carpet under Jones. (V-10, 990). It was identified as two hairs coming from a carpet. (V-10, 989). Mitochondrial DNA testing did not link the two hairs to John Ballard. (V-10, 989).

Mike Gawlinski testified he analyzed the vehicle owned by Ballard and his wife for the presence of blood. (V-11, 1014). Ballard consented to the examination and Gawlinski did not find any blood. (V-11, 1015). Gawlinski was not sure of the exact date he examined the vehicle, but thought that it was "several months" after the murders. (V-11, 1016).

Shawn Arthur testified that in February of 1999 he was a road deputy with the Collier County Sheriff's Office and responded to a drive-by shooting. (V-11, 1017). He picked up a witness to the shooting, John Ballard, and transported him to a location where a vehicle suspected of involvement had been stopped. (V-11, 1018). "They ID'd the vehicle being involved in the incident, then I transported the witness back." (V-11, 1019).

Collier County Sheriff's Deputy Lori Schoffield testified that she responded to the scene of a shooting in the Golden

Gate area on February 28, 1999. (V-11, 1024). Ballard described a vehicle involved in the shooting which was subsequently stopped by the police. (V-11, 1025). Five people were in the vehicle and they found a .22 caliber rifle and several .22 rounds. (V-11, 1026). The people in the vehicle were "Donald Tafoya, Francisco Garcia, Claudio Perez, Alberto Ramirez, and Alejandro Yanez." (V-11, 1026). Francisco Garcia was the individual who was arrested. (V-11, 1026).

Collier County Sheriff's Deputy Tim Guerrette testified that at the time of the February shooting he was the street gang coordinator for the Sheriff's Office. (V-11, 1028). He went to the scene of the shooting and established that two of the individuals involved, Pepe Garcia and Donald Tafoya, were gang members. (V-11, 1029). The street gang they belonged to was known as LaRaza. (V-11, 1029). This gang has in the past been involved in a number of criminal incidents. (V-11, 1029). He thought that at the time of the shooting there were approximately 80 members in the LaRaza gang. (V-11, 1030).

Jodi Lee Crossman lived in a duplex next door to the Ballard's duplex on 55th Terrace. (V-11, 1032). She explained that the victims lived "katty-corner" from them. (V-11, 1033). On the weekend of the murders, Ballard and his family

came over to a barbecue. She did not notice anything unusual about Ballard's behavior. (V-11, 1033-34).

Robert King testified that he lived in the Southwest Golden Gate area on Painted Leaf lane back in March of 1999. (V-11, 1037). He walked his dogs twice a day on a regular basis, morning and evening. (V-11, 1037). On Sunday evening he walked his dogs past a vacant lot but did not notice any vehicle. (V-11, 1037). However, that Sunday evening he did not "go to the empty lot" but "walked beside it to the end of the street." (V-11, 1037-38). It was not dark, but dusk, and he did not walk into the lot. He acknowledged that the car was not visible from the street. (V-11, 1040). King admitted he did not know whether the car was there when he walked by on Sunday evening. (V-11, 1041). The next morning he went to the empty lot, which, King described as a "five-acre tract, it's a fairly large piece of property" (V-11, 1038). That morning he noticed a "car pulled up in the bushes." (V-11, 1038). Only when he actually walked on to the property which he did not do the previous evening did he notice a car. (V-11, 1038-39). However, there was brush around the front of the lot and he did not notice it was disturbed Sunday evening. (V-11, 1039).

State's Rebuttal Testimony

Joseph Barber testified that his examination of the crime

scene and the car revealed 38 unknown fingerprints. (V-11, 1059). He compared those prints to the known prints of Donald Tafoya, but did not obtain an identification: "They were not his prints." (V-11, 1059).

Any additional facts necessary for resolution of the arguments raised in this appeal will be discussed in the argument, *infra.*

SUMMARY OF THE ARGUMENT

ISSUE I - The trial court properly denied appellant's motion for a judgment of acquittal below. The State presented powerful physical evidence of appellant's guilt in the form of DNA and fingerprint evidence. The fact that one of Ballard's forcibly removed limb hairs was found in the master bedroom, **in victim Jones' hand**, alone provides substantial evidence of his guilt. In addition, his finger print was found on the waterbed frame, just a couple of feet from the victim's body, in a location where the victim was known to keep drugs and/or money. Although appellant was a friend and casual visitor in the victim's residence, there was no evidence presented to suggest that he had even been in the victims' master bedroom, much less provide an innocent explanation for how his finger print was placed on the water bed frame. Finally, the victims' car was found abandoned in a vacant lot next to a home in which appellant had previously lived, within easy walking distance of his house. This combination of circumstances, in a addition to other fair inferences from the evidence presented at trial, provide competent, substantial evidence of appellant's guilt.

ISSUE II - The State did not commit a discovery violation based upon use of a blown up photograph as a demonstrative

aid. No abuse of the trial court's discretion has been shown because the photograph on the chart was not evidence, but used for demonstrative purposes, and was an enlargement of a photograph previously disclosed and discussed during the fingerprint expert's deposition.

ISSUE III - The trial court properly weighed and considered the defense expert's testimony on the issue of brain damage. The trial court's ruling is supported by the record and should be affirmed on appeal.

ISSUE IV - Ring v. Arizona did not render Florida's death penalty statute unconstitutional.

ARGUMENT

ISSUE I

WHETHER THE TRIAL COURT PROPERLY DENIED APPELLANT'S MOTION FOR A JUDGMENT OF ACQUITTAL FOR MURDER AND ROBBERY? (STATED BY APPELLEE)

Appellant claims that the trial court erred in denying his motion for a judgment of acquittal and that the evidence is insufficient to support his convictions of first degree murder and robbery. The State disagrees.

While the trial court's decision denying the motion for a judgment of acquittal is reviewed de novo, the State is entitled to an extremely favorable review of the evidence. Pagan v. State, 830 So. 2d 792, 803 (Fla. 2002). "'A court should not grant a motion for a judgement of acquittal unless there is no view of the evidence which the jury might take favorable to the opposite party.'" DeAngelo v. State, 616 So. 2d 440, 442 (Fla. 1993)(quoting Taylor v. State, 583 So. 2d 323, 328 (Fla. 1991), cert. denied, 513 U.S. 1003 (1994)). "'As a general proposition, an appellate court should not retry a case or reweigh conflicting evidence submitted to a jury or other trier of fact. Rather, the concern on appeal must be whether, after all conflicts in the evidence and all reasonable inferences therefrom have been resolved in favor of the verdict on appeal, there is substantial, competent

evidence to support the verdict and judgment. Legal sufficiency alone, as opposed to evidentiary weight, is the appropriate concern of an appellate tribunal.'" Crain v. State, 29 Fla. L Weekly S635 (Fla., October 28, 2004)(quoting Tibbs v. State, 397 So.2d 1120, 1123 (Fla. 1981), aff'd, 457 U.S. 31 (1982)).

In a circumstantial evidence case, "the trial judge must first determine there is competent evidence from which the jury could infer guilt to the exclusion of all other inferences." Barwick v. State, 660 So. 2d 685, 694 (Fla. 1995). After the judge determines as a matter of law, whether such competent evidence exists, the "question of whether the evidence is inconsistent with any other reasonable inference is a question of fact for the jury." Long v. State, 689 So. 2d 1055, 1058 (Fla. 1997). In State v. Allen, 335 So. 2d 823, 826 (Fla. 1976), this Court stated:

> We are well aware that varying interpretations of circumstantial evidence are always possible in a case which involves no eye witnesses. Circumstantial evidence, by its very nature, is not free from alternate interpretations. The state is not obligated to rebut conclusively every possible variation, however, or to explain every possible construction in a way which is consistent only with the allegations against the defendant. Were those requirements placed on the state for these purposes, circumstantial evidence would always be inadequate to establish a preliminary showing of the necessary elements of a crime.

Long ago this Court made the following cogent observations

about circumstantial evidence:

> Circumstantial evidence may be said to be the inference of a fact in issue which follows as a natural consequence according to reason and common experience from known collateral facts. It is in the nature of things frequently necessary to resort to it to prove guilt in criminal proceedings. **The criminal always, if possible to do so, selects the occasion most favorable to concealment to indulge his appetite for crime and lust when no eyewitnesses are about to behold him.** Circumstantial evidence alone is therefore sufficient to support a verdict of guilty of the most heinous crime, provided the jury believe beyond a reasonable doubt that the accused is guilty upon the evidence, and this cannot be when the evidence is entirely consistent with innocence.

Lowe v. State, 105 So. 829, 830 (Fla. 1925)(citations

omitted)(emphasis added).

The Evidence Was Sufficient for the Trial Court to Submit the Issue of Appellant's Guilt to the Jury

In Orme v. State, 677 So. 2d 258, 262 (Fla. 1996), this Court observed that the "sole function of the trial court on motion for directed verdict in a circumstantial evidence case is to determine whether there is a prima facie inconsistency between (a) the evidence, viewed in the light most favorable to the State and (b) the defense theory or theories." The Orme Court found that the state presented sufficient evidence to rebut the defendant's theory that another person entered

the hotel room and murdered the victim after he had robbed the victim. This Court observed:

> [N]othing anywhere in the record suggests that another person was present in the motel room. Based on this record, the State's theory of the evidence is the most plausible that Orme was the one who had attacked and killed Redd. Put another way, competent substantial evidence supports the conclusion that the State had presented adequate evidence refuting Orme's theory, creating inconsistency between the State and defense theories. Accordingly, we may not reverse the trial court's determination in this regard.

677 So. 2d at 262.

As in Orme, based upon this record, the "State's theory of the evidence is the most plausible," that appellant was responsible for robbing and murdering Jennifer Jones and Willy Patin. It strains credulity to contend that appellant's print could have been left in the manner in which it was found on the waterbed frame by a casual visitor in the home. See K.S. v. State, 814 So. 2d 1190 (Fla. 5th DCA 2002)(defendant's fingerprint on kitchen window over seven feet above ground level, a location where a casual passerby would not likely leave a fingerprint and in a location suggestive of someone trying to open the window, was sufficient to overcome defendant's motion for a judgment of acquittal for burglary). In addition, petitioner's conviction did not rely solely upon the fingerprint, but additional compelling physical evidence,

his DNA.

The limb hair **found in the victim's hand** provides a direct link between appellant and the murders. The odds of this one limb hair of Ballard simply falling out, through some application of force, and somehow being picked up and transferred to the victim's hand is so remote, the jury was clearly entitled to reject it.[5] The hands were protected from contamination at the crime scene by paper bags (V-9, 773) and appellant's hair was found by the medical examiner in the victim's hand.[6] (V-9, 793). The hair had sufficient root or bulb to provide a full DNA profile and the experts generally agreed that some degree of force was required to dislodge the hair. The jury was entitled to rely upon and accept the testimony of the state expert, Morrison, that the hair, to provide such a full DNA profile, it would have to have been "forcibly removed." (V-10, 943).

The fact that a forcibly removed hair was located in the victim's hand, in her bedroom, is highly probative of appellant's guilt.[7] There was no testimony presented to

[5]Of the hundreds of hairs analyzed from the victim's residence, Kilbourn testified that only five were forcibly removed. (V-10, 847).

[6]The medical examiner testified that the hair was found in the hand, underneath the plastic, not on top of it. (V-9, 793).

[7]The population frequencies found in the DNA profile

establish that Ballard was ever in the master bedroom, much less spent any appreciable degree of time in the room. See Leonard v. State, 731 So. 2d 712, 719 (Fla. 2d DCA 1999)("Leonard's theory of events that his fingerprints could have been placed on the bottom of the same box of candy at the same supermarket where the victim subsequently purchased the candy box was so remote that it was inconsistent with the State's evidence."). According to trial testimony, Ballard was a neighbor and casual friend who would sometimes play video games with victim Patin. Ballard's hair in victim's hand and the incriminating fingerprint provide substantial evidence of his guilt. There was simply no reasonable, credible explanation for the fact his hair was found in the victim's hand and that his fingerprint was found on the waterbed frame.

Appellant's attempt to minimize the weight of the DNA evidence in this case by referring to the numerous hairs or hair fragments found on the hands of victim Patin is not persuasive. Unlike Jennifer Jones, the evidence indicated that Patin, after being fatally injured crawled through the

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constituted the following: "Approximately one in every 11.8 quadrillion African-American, 750 trillion Caucasians, 2.50 trillion Southeastern Hispanic individuals." (V-10, 935). If you were selecting an individual at random you would expect to have Ballard's DNA profile "again one in every 750 trillion individuals." (V-10, 935).

hallway into the spare bedroom. (V-9, 754). There was a trail of activity associated with Patin, reflected by the blood found in different rooms [bathroom, hallway, spare bedroom]. (V-9, 755). Patin's bloody hands certainly picked up hairs and hair fragments in this manner from the floor. (Supp-R, 1003-10, 105-17)[photographs reflecting the trail of blood]. In contrast, the evidence shows that victim Jones[8] did not crawl through the house and the lack of a blood trail indicates she remained in the immediate position in which she was found. (V-9, 754).

Jones had Patin's blood on her hand, the same hand with Ballard's hair, despite the fact that no other blood from Patin was found in the bedroom. (V-10, 916). As the prosecutor argued below:

> ...We also know that Jennifer has a lot of blood in her hand, same hand that has the hair in it. And that happens to be Willy Patin's. But the evidence that we showed you shows that Willy Patin's blood is not in that room. It's in the spare room. It's in the hallway. But it's not in that bedroom. In fact, the only blood in that bedroom happens to come from Jennifer Jones. So how does Jennifer Jones get in contact with Willy Patin? Well, it's easy. It's a transfer, because John Ballard was in contact with Bubba, because he beat him in the head and he got blood on him and then when he went to see Jennifer she touched him and was able to get that blood that was on John Ballard from Bubba underneath

[8]There was also less blood associated with Jones' wounds. The blood was generally located in the area immediately around her body. (V-9, 753).

her fingernails and that's why you have both Jennifer Jones and Willy Patin's blood under hers.

(V-10, 1068-69). As the prosecutor noted below, the blood in the hand and under her fingernails suggests, as does the hair in her right hand, that Jones reached out to defend herself, touching Ballard with her hand during the attack. Id.

Appellant posits that two bloody latent prints recovered from the weight and weight bar suggest that he is not the murderer. (Appellant's Brief at 39). However, the evidence introduced below does not support appellant's interpretation of these prints. While Lieutenant Gawlinski did testify that bloody latent prints had been lifted from an "easy curl bar" and "large Olympic bar" which had not been identified to Ballard, he did not testify that the bloody prints were of any value for comparison. (V-9, 759-60). Indeed, latent print examiner Barber testified that only one of the unidentified prints with "potential" for identification was found on the Olympic twenty-five pound weight plate.[9] (V-9, 619). Barber testified: "That was a 25 pound wight plate. When you have a bar bell there are metal weights that you slide on the bar bell to increase or decrease the weight. It was on the face

[9]Prior to the listing the items on which prints were found, defense counsel limited Barber to those items on which prints had been found with "potential" for identification but that were "unidentified." (V-9, 615).

of one of these weights." (V-9, 619). Notably absent from his testimony was any mention of another print on either the weights or weight bar which was suitable for comparison or that a print with "potential" for identification was "bloody."

It becomes evident from the trial testimony that the bloody prints or partial prints lifted from the "easy curl bar" or heavier Olympic bar were simply not suitable for comparison. The only unidentified print with potential for identification was found on the twenty five pound weight plate, not the bar. Consequently, appellant's argument that bloody latent prints identify someone other than the appellant as the murderer is not supported by the evidence. Moreover, it has not been established that either the weight or weight bar(s) played any role in the murders.

Patin's body was found in the spare bedroom with the weights. However, the fact the weights as well as much of the room had blood on it does not indicate the weight was in fact the murder weapon. Dr. Borges testified that while the weight might have caused the fatal injuries, it was only because what caused the fatal injuries was hard and dense. However, there were numerous other possibilities. (V-9, 796). The prosecutor aptly countered this defense contention below, noting that there was no evidence Patin was attacked in the

spare bedroom and that he was probably shedding blood and touching items before he died in that room. (V-11, 1094-95).

In addition to the hair and fingerprint evidence, additional circumstances support the jury's conclusion that Ballard committed the offenses. The victims' car was found in an area within walking distance of Ballard's home, just over one mile from his own house. Significantly, the car was abandoned in the vicinity of a home in which Ballard had recently lived. Ballard was therefore familiar with the vacant lot and knew it was a safe location to abandon the victims' car. The fact the car was stolen and abandoned delayed discovery of the murders.

It is also important to note that there was no evidence to indicate the murderer made a forced entry into the victims' home. This suggests the perpetrator was known to the victims. As the prosecutor argued below, given the recent shooting, the victims would certainly be reluctant to open up their house to a stranger late at night. (V-11, 1066-67). This combination of circumstances clearly supports the physical evidence identifying Ballard as the murderer.

Ballard's reliance upon Jaramillo v. State, 417 So. 2d 257 (Fla. 1982), is misplaced. In Jaramillo the defendant offered a reasonable hypothesis of innocence which explained

the existence of his fingerprints within the murder victims' home. This Court focused upon the defendant's uncontradicted testimony that he was in the victims' house cleaning out the garage just one day prior to the murder. Jaramillo, 417 So. 2d at 258. Moreover, the defendant's fingerprints were only found on items which he claimed he had touched and in areas of the house where he admitted he had been. Although an identifiable fingerprint was found on handcuffs used to subdue one victim, this print did not belong to the defendant. Consequently, the fingerprint evidence did not link the defendant to the murder scene. No evidence offered by the state in Jaramillo contradicted defendant's "reasonable" explanation for the presence of his fingerprints in the victims' home. Since the fingerprint evidence was equivocal, and it was the only evidence linking defendant to the crime, the State's evidence was not legally sufficient to sustain his conviction.

In contrast, here appellant offered no reasonable explanation for the appearance of his fingerprints on the waterbed frame in the master bedroom, a location where the victim was known to keep money. Moreover, the print was found in the room with victim Jones, within just a few feet of her body. (V-8, 573-74). The most appellant could muster by way

of an explanation in this case is from testimony of other individuals that Ballard was a friend and was observed inside the house. However, no one testified appellant had an affair with the female victim, that he helped move the waterbed, or for that matter, that appellant had even been in the victims' master bedroom.

It is curious that despite being a guest in the victims' home, the only fingerprint of Ballard's was found in an area associated with the murder and robbery, not in the kitchen or living room where one might expect to find the fingerprint of a friend or casual visitor. Accordingly, the trial judge and jury were fully entitled to reject Ballard's hypothesis of innocent contact with the waterbed frame and accept the Government's theory that the print was left when Ballard was searching for drugs after murdering the victims. This evidence, combined with the compelling DNA evidence was sufficient to overcome Ballard's motion for a judgment of acquittal.

Unlike Jaramillo, other evidence besides the fingerprints linked Ballard to the murder. Again, "the circumstantial evidence standard does not require the jury to believe the defense version of facts on which the state has produced conflicting evidence." Cochran v. State, 547 So. 2d 928, 930

(Fla. 1989). Put simply, in this case Ballard has offered no plausible explanation for the appearance of his fingerprint on the water bed frame.

In Benson v. State, 526 So. 2d 948 (Fla. 2d DCA), rev. denied, 536 So. 2d 243 (Fla. 1988), cert. denied, 489 U.S. 1069 (1989), the defendant claimed that the circumstantial evidence linking him to the car bombing first degree murders of his mother and brother was insufficient to submit the case to the jury. The evidence linking the defendant to the murders consisted primarily of evidence establishing motive[10] and opportunity, along with evidence that the defendant had purchased some materials identical to those used to make the pipe bombs. Palm prints found on two receipts for pipes from a hardware store matched the defendant's. At the funeral for the mother and brother, the defendant stated that he had "made and exploded bombs composed of copper pipe and gunpowder." Benson, 526 So. 2d at 950-51. The defendant argued that if this statement was made it "could have referred only to firecrackers." The defendant "also argued other interpretations of other aspects of the evidence." Benson, 526 So. 2d at 951. However, the Second District noted that

[10]"At the time of the crimes the mother's attorney was in town at her request and was looking into defendant's suspected mismanagement of the businesses." Benson, 526 So. 2d at 951.

"on appeal from the convictions we must view the evidence in the light most favorable to the state as it could reasonably been interpreted by the jury." Id. (citations omitted). The defendant argued that "there was no evidence directly showing that the particular pipe materials used in the bombs were the same as those purchased from Hughes Supply and that there was no evidence directly showing that defendant had constructed and detonated the bombs." Benson, 526 So. 2d at 952. However, the court noted that "permissible inferences do not require the exclusion of all other possible hypotheses." (citation omitted). The Second District concluded that certain conduct of the defendant, some of which was not particularly incriminating by itself, as a whole, constituted substantial, competent evidence of guilt.[11] "As to whether

[11]The Second District stated: "Among the evidence involving inferences bearing upon defendant's guilt in this case were the testimony of the sister as to defendant's activities prior to the bombings; the evidence that the relatively large diameter dimensions of the galvanized steel pipe materials, which, from the palm print evidence, could be concluded to have been purchased by defendant from Hughes Supply shortly before the bombings, were identical to the dimensions of that type of pipe materials used in the bombs; defendant's last purchase of those materials having been on the day the mother was looking closely into his suspected business mismanagement and had asked him to bring the books to her attorney the next day, which was the day of the bombings; the evidence as to why the defendant used the Suburban the morning of the bombings, how long he was gone with the Suburban, and as to why he departed from the Suburban immediately prior to the bombings; and defendant having made pipe bombs in the past." Benson, 526 So. 2d at 952.

there was a reasonable hypothesis of innocence and whether the evidence failed to eliminate such a hypothesis were issues for the jury to decide and were argued to the jury." Benson, 526 So. 2d at 952. (string cites omitted).

The court noted that the evidence must be looked to as a whole to determine whether or not it is sufficient to establish the defendant as the perpetrator of the crimes:

> ...As interpreted by the defendant this means that a conviction could rarely be justified by circumstantial evidence. *See* 1 Wigmore, Evidence, § 41 (3d ed. 1940). The rule is not that an inference, no matter how reasonable, is to be rejected if it, in turn, depends upon another reasonable inference; rather the question is merely whether the total evidence, including reasonable inferences, when put together is sufficient to warrant a jury to conclude that defendant is guilty beyond a reasonable doubt. [citations omitted]. **If enough pieces of a jigsaw puzzle fit together the subject may be identified even though some pieces are lacking.** Reviewing the evidence in this case as a whole, we think the jury was warranted in finding beyond a reasonable doubt the picture of the defendant Dirring." (emphasis added).

Benson, 526 So. 2d at 954 (quoting Dirring v. United States, 328 F.2d 512, 515 (1st Cir. 1964)(emphasis added). Based upon all of the evidence presented, the Second district in Benson found that the evidence was sufficient to conclude that the defendant was the perpetrator of the crimes.

As in Benson, in this case the State possesses sufficient pieces of the "jigsaw puzzle" to support appellant's

convictions. While evidence of motive was more developed in that case, in this case, scientific evidence links the appellant directly to the charged crimes. The State presented DNA [hair] and fingerprint evidence in this case. When the pieces of evidence are put together, the picture of appellant as the one responsible for the victims' murders becomes evident.

Appellant essentially posits that he is the victim of some coincidences or just plain bad luck. How unfortunate for him that his forcibly removed limb hair just so happened to be found in the bedroom where the body of Jennifer Jones was found. Remarkably, it also just so happened to be found in her right hand. How unlucky for appellant that despite being a casual visitor to the victims' house the only fingerprint of his found in the home was on the waterbed frame, next to Jennifer's body. It just so happened that this print was found in a location where the victim was known to keep money. Finally, how remarkably coincidental it was for Jennifer's car to be found after the murder in a vacant lot, next to a house where appellant used to live with his in-laws. It just happened to be located within a mile from appellant's own house, within easy walking distance. See Henderson v. State, 679 So. 2d 805 (Fla. 3d DCA 1996), aff'd, 698 So. 2d 1205

(Fla. 1997)(the state was only required to rebut a reasonable hypothesis of innocence and the defendant's explanation for his conduct, *"in light of the evidence,* created a legitimate question for the jury to determine.").

The problem with appellant's argument is that the hair and his fingerprint were not found in locations where one might expect to find a casual visitor's hair or fingerprints. There was no evidence to suggest appellant and Jennifer were romantically linked. There was no evidence to suggest that appellant helped the victims' move in which might explain his fingerprint on the waterbed frame. The most plausible conclusion to be made about appellant's hair in Jennifer's right hand is that it was forcibly removed at the time of her murder.[12] The physical evidence suggests Jones was struck down almost immediately and did not crawl along the floor, or, even move along it. Jones was found in the bedroom, face up, with her right arm coming across her body dangling down, the fingers of her right hand slightly curled. However, the hand itself did not appear to be touching the carpet. (Supp-R. 1013). The medical examiner testified that the hair was found in her hand, and was not found loose in the paper bag which

[12]The expert retained by the defense, Wickenhouser agreed that someone grabbing your arm might provide sufficient force to remove a Telagen hair. (V-10, 985).

was placed on the hand to protect it from contamination at the crime scene. (V-9, 773, 776-77, 798). The hair was removed from her hand, not the bag, or the piece of plastic which was in contact with her hand. (V-9, 798).

Finally, appellant contends that a street gang, LaRaza, had a motive to murder the victims based upon a drive-by shooting which occurred just prior to the murders. However, there was no evidence presented to suggest, much less identify any member of this group as the murderer.[13] See Rose v. State, 425 So. 2d 521, 522 (Fla. 1983)("Although circumstantial in nature, the evidence was sufficient for the jury to have found beyond a reasonable doubt that defendant, and no other person, kidnapped and murdered eight-year-old Lisa Berry."). Moreover, the beating deaths were not at all similar to the previous drive-by shooting. The fact that there was no evidence of a forced entry suggests that the killer was either known to the victims or not thought to be hostile. The fact that others might have a motive to murder the victims in this case, does not constitute a reasonable hypothesis of innocence. There was simply no physical evidence presented to indicate that a member of this gang murdered the victims.

[13]The unidentified prints in the home and car were compared to the known prints of Donald Tafoya, but did not match: "They were not his prints." (V-11, 1059).

The trial court heard all of the testimony and considered the arguments of counsel before determining that sufficient evidence was presented to the jury. The jury was able to weigh the evidence, observe the witnesses and evaluate their credibility. The jury found the evidence sufficient to establish appellant's guilt beyond a reasonable doubt. Appellant has offered this Court nothing on appeal which compels a different conclusion than that reached by the trial court and jury below.

ISSUE II

WHETHER THE TRIAL COURT CORRECTLY FOUND NO DISCOVERY VIOLATION FOR FAILURE TO NOTIFY THE DEFENSE THAT THE FINGERPRINT EXPERT HAD PREPARED A CHART AS A DEMONSTRATIVE AID FOR THE JURY?

Appellant next contends that the state committed a discovery violation by failing to give notice that the fingerprint expert had prepared a chart to use as a demonstrative aid for the jury. Although appellant correctly recognizes that rulings on discovery challenges are reviewed for abuse of discretion, see Pender v. State, 700 So. 2d 664, 667 (Fla. 1997) ("where a trial court rules that no discovery violation occurred, the reviewing court must first determine whether the trial court abused its discretion"); State v. Tascarella, 580 So. 2d 154, 157 (Fla. 1991) (explaining that a

ruling on whether a discovery violation calls for the exclusion of testimony is discretionary and should not be disturbed on appeal unless an abuse is clearly shown), he contends that such discretion can only be properly exercised after the court has made an adequate inquiry. Appellant further urges that because the lower court found no discovery violation that it failed to make the findings required by Richardson.[14] As a review of the record and the relevant law will show, appellant's arguments are baseless in law and fact.

During the trial, the State presented FDLE crime laboratory analyst, Phillip S. Balunan, to testify concerning his identification of a fingerprint found on the victim's waterbed as belonging to the defendant. (V-9, 631). As an aid to the jury, Balunan testified that he had prepared a "court chart to demonstrate how a comparison is conducted and demonstrate some of the points [he] used for basing [his] conclusion." (V-9, 642). Defense counsel objected to the chart because he had not been provided it before trial and because it was inconsistent with Balunan's deposition. Thereupon, trial court excused the jury and conducted a Richardson hearing. (9/643). During the Richardson hearing

[14] Richardson v. State, 246 So. 2d 771 (Fla. 1971).

the following inquiry was made of Balunan:

Q.[state] Mr. Balunan, when did you prepare that particular fingerprint comparison?

A. Yes, sir.

Q. No, when did you do that?

A. Earlier this week I began working on it, probably Monday or Tuesday.

Q. And it has a number of cards of prints on there and points of identification, you indicated. Are those the sole number of points of identification that you used?

A. No, sir, they are not. As I stated earlier, this is just a representation to demonstrate how I would conduct my examination and to guide me along with the people that I'm demonstrating this to. They're just guidelines to where I can logically or rationally show and follow the steps, and so someone that is not a trained expert can follow along with me.

In other words, they're to -- they're a map to help me explain to someone to understand what it is that I've done and how I based my conclusion.

Q. As far as the number of points, I think during the deposition Mr. Orlando asked you was there any particular number of points. You indicated was there [sic] not, is that still the same today?

A. That is true. There was not a set of number of points. I have 10 plotted, it is just the number of points I plotted that I feel would be effective in demonstrating to someone what my examination consisted of. There are indeed more points than 10 on these particular latent fingerprints.

Q. That chart was prepared from what?

A. From the actual latent fingerprint on the

latent lift card and from the ink print card from which I compared it to.

Q. And you did that based on one to one photograph?

A. Yes.

Q. And what you have there is just the same photograph, just blown up?

A. Enlarged, yes, it is.

Q. Okay.

THE COURT: Mr. Orlando, do you have any questions?

MR. ORLANDO: Yes.

BY MR. ORLANDO:

Q. Sir, do you recall when I took your deposition back in January of this year?

A. Yes, sir.

Q. And I asked you, did I not, regarding item Q-50, did you note how many points of identification there were and your answer was no?

A. That’s correct.

Q. So the question is did you note how many points of identification there were, answer no?

A. That’s correct.

Q. Now you’re prepared to, I’m gathering you want to discuss points of identification?

A. No, sir. As I stated earlier, these are merely a map so that I can rationally explain to someone what my examination consisted of. They help guide me around the fingerprint so I can point to, number one, tell someone who I’m explaining this to,

this is number one.

Q. What does number one represent?

A. My beginning point.

Q. So it's a point of identification?

A. There are many points of identification.

Q. You didn't tell me about any points of identification when I took you deposition, did you?

A. You did not ask about the individual points of identification. I believe the question was, as I understood it, how many points of identification are there, and I make no note or reference anywhere in my examination how many points of identification I have.

The Court chart itself has nothing to do with my identification other than to demonstrate to someone how I did this.

Q. But if I asked you a question, it's on page 22, line five, "Now, with respect to Q-50, do you make a note of how many points of identification were there?" Answer, "No." "Why not?" "I never do."

A. That's a correct statement.

Q. Now, you want to talk about points of identification that you did, in fact, make a note of, but did that after the deposition?

A. No, sir. I still -- these are not for numerical purposes. There's a difference between a numerical value and mapping for demonstration purposes. I could have just as easily used letters as numbers and then it could have the same effect.

I could have started with point A gone to point B to replace two. There's no numerical value as to the points of identification.

(V-9, 644-48).

When the Court inquired of defense counsel as to how he was potentially prejudiced, he stated that he would have prepared differently. When pressed by the court, he opined that "I could have looked at it and gotten another expert if I needed to do that." (V-9, 649).

After making the requisite inquiry, the trial court concluded that there was no discovery violation, that the photograph used on the chart was an enlargement of the one-on-one photograph that was discussed during the deposition and that it was permissible for demonstrative purposes. (V-9, 650). The Court further noted that the chart was not to be considered evidence and that it was only for demonstrative purposes and instructed the jury accordingly. (V-9, 650-51).

During direct examination, Balunan explained to the jury that he did not do or base his examination on the Court chart, that it was for demonstrative purposes and that there were more points of the characteristics in the fingerprint that he did not mark. (V-9, 657). On cross-examination, the only question he was asked about the chart was to confirm that the blown-up photograph was not what he used to make the fingerprint identification. (V-9, 665). Ballard made no further objections and did not request a continuance in order to obtain an expert.

Based on these facts, the trial court's conclusion that there was no discovery violation as the photograph used on the chart was not evidence, but used only for demonstrative purposes and was an enlargement of the one-on-one photograph that had been previously discussed during the expert's deposition is well supported. First, it is well settled that "[d]emonstrative aids and exhibits may be used during trial as an aid to the jury understanding a material fact or issue. The demonstrative evidence must be an accurate and reasonable reproduction of the object involved. The evidence is subject to a section 90.403 balancing. Usually demonstrative evidence is not admitted as an exhibit and taken to the jury room." Medina v. State, 748 So. 2d 360 (Fla. 4th DCA 2000), quoting, Ehrhardt, Florida Evidence § 401.1 (1999 Ed.). As in Medina, the chart at issue in the instant case was not introduced as evidence and was merely used as an aid for the jury.

Similarly, in State v. Trujillo, 764 So. 2d 852, 853-854 (Fla. 3rd DCA 2000), the court found that as a transcript of a tape introduced into evidence was not evidence and was merely used to aid the jury, there was no discovery violation in failing to previously produce a copy. The court explained in pertinent part:

> []In May 1997, the State disclosed to the defendant the name of a State witness, Brooks, and the

transcript of a recorded conversation between the defendant and Brooks. At the same time, the State provided the defendant with the audiotape of that conversation.

When the audiotape of the Brooks conversation was reviewed by the State Attorney and Brooks, the State Attorney used professional sound equipment that is used in court but is not ordinarily available to the State Attorney for trial preparation. When reviewing the transcript and tape, Brooks crossed out portions of the transcript previously marked "unintelligible" and inserted the words he heard on the tape. That "amended" transcript was provided to defendant on August 4, 2000; defendant moved to prohibit the State from introducing that transcript into evidence.

Before jury selection, the [trial] court conducted a Richardson hearing and determined that the late delivery of the amended transcript constituted a discovery violation.

. . .

Neither the original transcript nor the "amended" transcript of the audiotape was evidence. "The transcript of a recorded conversation is not the evidence, but is merely an aid to the jury." Martinez v. State, 761 So. 2d 1074, 2000 Fla. LEXIS 1218, 25 Fla. Law W. S 471 (Fla. 2000); Matheson v. State, 500 So. 2d 1341 (Fla. 1987). It is the tape itself that is the evidence, see Matheson, 500 So. 2d at 1342, and the State provided that tape to the defense over three years ago. Furthermore, not only was there no discovery violation; the defense has demonstrated no prejudice. See Richardson v. State, 246 So. 2d 771 (Fla. 1971).

Trujillo, at 853-854

This Court's ruling in Mansfield v. State, 758 So. 2d 636, 647 (Fla. 2000), likewise, finds that when a previously

disclosed photograph is altered to be used as a demonstrative aid to the jury, there is no discovery violation in failing to give notice of same. This Court specifically explained:

> Mansfield next alleges error in the trial court's determination that the State did not violate the rules of discovery by failing to formally list photographic slides in its discovery. The State developed scaled photographs from the slides which were then used by the medical examiner at trial to illustrate the similarity between the pattern of the grim reaper ring recovered from Mansfield and the pattern injury on Robles' neck. Specifically, during her testimony the medical examiner compared the pattern on Mansfield's ring by placing the ring on the scaled photographs in front of the jury. This argument fails.
>
> During the Richardson hearing, it was established that the scaled photographs were developed from slides that were part of the medical examiner's business records. Further, the slides had been made available to Mansfield's original counsel during depositions and original counsel actually went through the slides. Additionally, the defense admitted that they were aware of the photographs at least one week prior to the Richardson hearing. Moreover, during pretrial motions held roughly two weeks prior to the Richardson hearing, Dr. Martin testified as to the similarity between Mansfield's ring and pattern injury on Robles' neck.
>
> Accordingly it appears that Mansfield, while not formally on notice as conceded by the State, was on notice of the use of photographs and as to the substance of Dr. Martin's testimony therefrom. On this record, we find the trial court did not abuse its discretion in ruling that the State did not violate the rules of discovery.

Id. at 647

It is undisputed that Ballard knew well before trial that Balunan had matched the latent print to Ballard's. The only argument that defense counsel made below was that he had asked about the points and that Balunan had said he did not make a note of how many points of identification there were, whereas the chart noted ten points. It is well settled that "when testimonial discrepancies appear, the witness' trial and deposition testimony can be laid side-by-side for the jury to consider. This would serve to discredit the witness and should be favorable to the defense. Therefore, unlike failure to name a witness, changed testimony does not rise to the level of a discovery violation and will not support a motion for a Richardson inquiry." Street v. State, 636 So. 2d 1297, 1302 (Fla. 1994)(quoting Bush v. State, 461 So. 2d 936, 938 (Fla. 1984)). Thus, Ballard could have put any discrepancies in front of the jury for its consideration. The record shows, however, that after Balunan explained to the court and the jury that the number of points was not limited to the ten designated on the chart, the only question Balunan was asked on cross-examination about the chart was to confirm that the blown-up photograph was not what he used to make the fingerprint identification. (V-9, 665). Ballard made no further objections to Balunan's testimony and did not request

a continuance in order to obtain an expert.

Moreover, contrary to appellant's argument, the court's inquiry was adequate. He inquired into both the timing of the preparation of the chart and the potential prejudice to the defendant. As to the timing, Balunan testified on Wednesday, April 2, 2003 that he had made the chart on Monday or Tuesday, at the beginning of the week for his own use as an aid to the jury. (V-9, 644). This Court in Consalvo v. State, 697 So. 2d 805, 812-813 (Fla. 1996), held under similar circumstances, that there was no discovery violation. This Court found no abuse of discretion where "the record reflects that the fingerprint expert was not acting on the State's request or at the direction of the State when he independently tried to match the unidentified fingerprints to someone other than the victim. The trial court did not abuse its discretion in finding no discovery violation on the part of the State." Id. at 812-13.

As to prejudice, counsel's only argument was that, "I could have looked at it and gotten another expert if I needed to do that." (V-9, 649). After he examined Balunan, he did not request a continuance to present another expert or assert any further need for a remedy. Accordingly, even if the trial court erred in not making a specific finding with regard to

prejudice, appellant is not entitled to relief as the admission of the chart in the instant case was harmless. Pender v. State, 700 So. 2d 664, 667 (Fla. 1997); Gross v. State, 720 So. 2d 578, 579 (Fla. 1st DCA 1998).

Based on the foregoing, this claim should be denied as appellant has failed to establish that the trial court abused its discretion in finding that there was no discovery violation as the photograph used on the chart was not evidence, but used only for demonstrative purposes and was an enlargement of the one-on-one photograph that had been previously discussed during the expert's deposition.

ISSUE III

WHETHER THE TRIAL COURT ERRED IN REJECTING THE MITIGATING FACTORS OF BRAIN DAMAGE AND IMPAIRED CAPACITY?

Appellant next claims that his death sentence must be reversed because the trial court allegedly failed to provide required findings of mental health mitigation based on the testimony presented below. Specifically, appellant disputes the trial court's rejection of his expert's testimony that appellant suffers from organic brain damage and a substantially impaired capacity to conform his conduct to the requirements of law.

The court below found that Dr. Dee's testimony could be

reasonably interpreted as establishing appellant is learning disabled, and therefore applied the "extreme disturbance" statutory mitigating factor with very little weight. (V-2, 381-83). However, Dee's testimony failed to convince the court that appellant suffered from organic brain damage or was substantially impaired in conforming his conduct to the requirements of law. (V-2, 381-83). Because the court determined that the existence of this mitigation had not been reasonably established, the question presented is whether substantial, competent evidence supports the court's findings. Spann v. State, 857 So. 2d 845, 858-59 (Fla. 2003).[15]

In sentencing appellant to die for the murders of Jennifer Jones and Bubba Patin, the trial judge complied with all applicable law, including the dictates of this Court's decision in Campbell v. State, 571 So. 2d 415 (Fla. 1990). She expressly evaluated the aggravating factors and mitigating circumstances, and insured adequate appellate review of her findings by discussing the factual basis for each of the aggravating and mitigating factors. Campbell clearly

[15]Although appellant recites the proper standards of review from Spann, he incorrectly identifies the question presented as "whether competent, substantial evidence supported the brain damage and impaired capacity mitigating circumstances" (Appellant's Initial Brief, p. 71). The question is whether sufficient evidence supports the trial court's findings, not whether sufficient evidence supported the contrary findings rejected below.

recognizes that the factual question as to whether a mitigating factor was reasonably established by the evidence is a question for the trial judge, and that the judge has the responsibility to assess the appropriate weight of any mitigation found. No abuse of discretion has been demonstrated with regard to the trial judge's factual findings in the instant case.

Appellant specifically takes issue with the trial court's rejection of some aspects of the expert mental health testimony offered by Dr. Dee. According to appellant, the trial court was obligated to accept all of Dee's opinions and conclusions, because Dee's testimony was not directly contradicted by any other evidence. This Court rejected this identical argument in Nelson v. State, 850 So. 2d 514, 529-530 (Fla. 2003), and reaffirmed that expert opinion testimony is not binding, even if uncontroverted. In Nelson, the same defense expert, Dr. Dee, opined that the defendant was acting under an extreme mental or emotional disturbance, based on Nelson's self-reporting of experiencing hallucinations on the day of the murder and having suffered from depression for many years. The trial judge found Dee's opinion to be less credible than the testimony of witnesses that observed the defendant throughout the evening prior to the murder and

testified that Nelson acted normal and that nothing unusual had happened over the course of the night. This Court affirmed the rejection of Dee's testimony in that case.

The court below similarly rejected some of Dee's opinions as unsupported factually. The judge reviewed Dee's testimony extensively in her sentencing order:

> 1. The crime was committed while the Defendant was under the influence of extreme mental or emotional disturbance. §921.141(6)(b) Fla. Stat. (1997).
>
> In support of this mitigating circumstance, the Defendant offered the testimony of Dr. Henry Dee, a board certified neuropsychologist. Dr. Dee is a clinical psychologist and obtained his Ph.D. in neuropsychology from the University of Iowa in 1969. He has been practicing in the field of neuropsychology in Florida since 1973.
>
> Dr. Dee met with the Defendant on March 8 and April 12, 2002. He administered a standard battery of neuropsychological tests to the Defendant. Based upon the results of those tests, Dr. Dee opined that the Defendant is "organically brain damaged." However, Dr. Dee noted that there is nothing convincing in the Defendant's history to establish why or when the damage he found may have occurred. According to the doctor, there is simply no way to know for sure.
>
> Dr. Dee stated, however, that certain events in the Defendant's life support his opinion. For example, according to the Defendant, there were episodes throughout the Defendant's youth of him running away from home. This often resulted in what the

doctor described as “aimless wandering.” Dr. Dee further stated that the Defendant is an impulsive risk-taker; and although industrious, the Defendant has had a high number of jobs. In essence, Dr. Dee concluded that the Defendant may be intelligent, but is self-limiting nonetheless, due to his brain damage.

The Court notes here that there were no truly objective tests presented in support of Dr. Dee’s opinion. No X-rays, CT scans, PT scans, MRI’s or other diagnostic test results were administered or admitted in evidence to support the doctor’s opinion. In addition, although Dr. Dee testified that the disparity between the verbal and non-verbal scores on the neuropsychological tests administered to the Defendant clearly indicate the presence of organic brain damage, the Defendant’s life circumstances at the time these crimes were committed are inconsistent with a diagnosis of brain damage.

In particular, according to the Defendant’s wife, Michelle Ballard, the Defendant has been married for ten years, has raised children, and has been described as a “good father,” an “inventive” parent, and a man who has “come a long way since we first met.” Indeed, Mrs. Ballard described characteristics and activities of the Defendant which lend more credence to the notion that the Defendant may have had a learning disability rather than brain damage.

Those characteristics and activities include “coin flip trips” and “rehearsed book readings,” the latter designed by the Defendant because he did not want his children to think him ignorant. These characteristics, along with the letter read in open court by Michelle Ballard penned by the Defendant’s oldest child, John, do not

> corroborate Dr. Dee's diagnosis of brain damage, but rather are more suggestive of a learning disability.
>
> The Court notes here that Dr. Dee's opinion was uncontroverted. But that does not require the Court to accept the testimony without reservation. Indeed, the fact that there was no truly objective evidence to support this statutory mitigating circumstance, the apparently otherwise normal lifestyle of the Defendant and all of the other circumstances noted above, do not, in this Court's view, support by a preponderance of the evidence the existence of this mitigating circumstance.
>
> However, to the extent that Dr. Dee's testimony can be reasonably interpreted to support the proposition that the Defendant is learning disabled (as opposed to brain damaged), the Court finds that this mitigating circumstance has been established but affords it VERY LITTLE WEIGHT.
>
> 2. The capacity of the Defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was substantially impaired. §921.141(6)(f), Fla. Stat. (1997).
>
> The Court recalls no testimony from Dr. Dee that would establish the existence of this mitigating factor nor does the Court find that there was any evidence presented on the Defendant's behalf to establish it.
>
> Accordingly, the Court finds that this statutory mitigating circumstance has not been proven by a preponderance of the evidence.

(V-2, 381-383).[16] The trial court's findings are consistent

with the testimony presented below, and supported by competent, substantial evidence. Dr. Dee acknowledged that he could not specifically identify the purported brain damage which was suggested by appellant's test scores; he could not determine when or how the damage may have occurred and conceded that his test scores could be attributed to a learning disability rather than brain damage. (V-5, 885, 887). The court noted both the lack of objective diagnostic support for Dee's conclusions as well as the inconsistency between Dee's impression of organic brain damage and the testimony from family members describing Ballard as a good and inventive parent with a normal lifestyle, suggesting a learning disability rather than brain damage.

Appellant's extensive reliance on Crook v. State, 813 So. 2d 68 (Fla. 2002), is misplaced. The nature and quality of the expert testimony presented below differed substantially from the evidence discussed in Crook. In Crook, three defense experts, two of which specialized in the field of brain injuries, testified unequivocally that Crook had sustained frontal lobe damage, principally tied to an incident when Crook was five years old and hit on the head with a pipe. The expert conclusions were supported by diagnostic testing, interviews with Crook's mother, and review of Crook's school

and medical records. This Court found "most significantly," that the experts in Crook were able to explain the causes and origins of Crook's brain damage and establish that there was a causal link between the damage and the homicide.

Conversely, in the instant case, Dr. Dee's testimony as to the suspected frontal lobe brain damage and Ballard's asserted impaired capacity was not strong. Although Dee determined that the discrepancy between Ballard's verbal and nonverbal intelligence scores "raised the question" and was considered a reliable indicator of brain damage, Dee could not identify when or how any brain damage may have occurred, and did not believe any brain injury in this case "caused" the murder. (V-5, 883-887, 893). Dee's suspicion of brain damage was based entirely on the results obtained on Ballard's psychological testing; Dee admitted that his testing results were also consistent with Ballard's known learning disability, and that no objective medical testing, such as x-rays or brain scans, supported his opinion on the existence of brain damage. (V-5, 892-93). Unlike the noted brain injury specialists in Crook, Dee made no attempt to confirm his suspicion through radiology testing, witness interviews, or record reviews. Dee's conclusion that appellant understood that his actions were wrong but just couldn't stop himself from doing them was

only offered on redirect examination,[17] and Dee did not disclose the factual basis for his conclusion beyond his opinion that appellant could be extremely impulsive based on psychological tests. (V-5, 895-96). On these facts, the trial court's determination that organic brain damage and substantial impairment to conform actions to the law had not been proven is proper and not subject to rebuke on appeal. See e.g. Bertolotti v. Dugger, 883 F.2d 1503, 1518 (11th Cir. 1989)("Before we are convinced of a reasonable probability that a jury's verdict would have been swayed by the testimony of a mental health professional, we must look beyond the professional's opinion, rendered in the impressive language of the discipline, to the facts upon which the opinion is based.")(citing Elledge v. Dugger, 823 F.2d 1439, 1447 (11th Cir. 1987)).

In Crook, the trial court apparently did not explain its basis for rejecting the uncontroverted testimony of the defense experts, but remarked there had been no actual proof of damage. Crook, 813 So. 2d at 76-77. However, as previously noted, the sentencing order in this case provides the reasons for the rejection of Dr. Dee's testimony -- that it was unsupported factually, lacking the foundation discussed by the experts in Crook from diagnostic confirmation and a

medical history, and inconsistent with other testimony relating appellant's seemingly normal lifestyle. The equivocal nature of Dr. Dee's assessment aligns this case more appropriately with Shellito v. State, 701 So. 2d 837, 844 (Fla. 1997), where this Court affirmed the lower courts' rejection of purported evidence of brain damage. See also Robinson v. State, 761 So. 2d 269, 276-77 (Fla. 1999) (trial court properly reduced weight for mitigation of brain damage due to lack of evidence that it caused Robinson's criminal behavior).

Clearly, on the facts of this case, the court below had discretion to accept or reject Dr. Dee's testimony. Knight v. State, 746 So. 2d 423, 436 (Fla. 1998) (noting even uncontroverted expert testimony can be rejected, especially when it is difficult to reconcile with other evidence); Walls v. State, 641 So. 2d 381, 388 (Fla. 1994); Foster v. State, 679 So. 2d 747, 755 (Fla. 1996), cert. denied, 520 U.S. 1122 (1997). The court's order outlines relevant considerations which properly impact a reasoned credibility decision. Where, as here, opinion testimony relies on facts which are not supported by the evidence, its weight is properly diminished. Walls, 641 So. 2d at 388; Gudinas v. State, 693 So. 2d 953, 967 (Fla.) (affirming rejection of expert testimony on

statutory mental mitigators where expert's opinion was heavily based on unsupported facts), cert. denied, 522 U.S. 936 (1997). On the facts of this case, no impropriety has been shown with regard to the trial court's treatment of the mental mitigation evidence.

This Court has repeatedly recognized the relative weight to be assigned any aggravating or mitigating circumstance is within the broad discretion of the trial judge. Blanco v. State, 706 So. 2d 7, 10 (Fla. 1997), cert. denied, 525 U.S. 837 (1998); Cole v. State, 701 So. 2d 845, 852 (Fla. 1997), cert. denied, 523 U.S. 1051 (1998); Bell v. State, 699 So. 2d 674, 678 (Fla. 1997), cert. denied, 522 U.S. 1123 (1998); Campbell, 571 So. 2d at 420. As a general rule, a trial court's treatment of mitigation after a proper inquiry and comprehensive analysis of the evidence will not be disturbed on appeal. Knight, 746 So. 2d at 436. The trial court's single-spaced, fourteen page order in this case extensively discusses all of the judge's findings with regard to each mitigating factor proposed by the defense. (V2/377-390). A fair review of that order, and the testimony supporting it, clearly refutes appellant's claim that the court below did not properly consider the mitigating evidence he presented.

Finally, even if this Court reaches a different

conclusion with regard to the trial court's findings as to any of this mitigation, there is no reason to remand this cause for resentencing since it is clear that any further consideration would not result in the imposition of a life sentence. Despite limiting the weight of some of the mitigation proposed by appellant, the trial court did weigh the mental health testimony as statutory mitigation and found an additional 24 nonstatutory factors in mitigation. (V-2, 381-88). Any error relating to the sentencing court's failure to articulate additional findings regarding the mitigation is clearly harmless since the mitigation in this case cannot offset the strong aggravating factors found. Thomas v. State, 693 So. 2d 951, 953 (Fla. 1997); Lawrence v. State, 691 So. 2d 1068, 1076 (Fla.), cert. denied, 522 U.S. 880 (1997); Barwick v. State, 660 So. 2d 685, 696 (Fla. 1995); Armstrong v. State, 642 So. 2d 730 (Fla. 1994), cert. denied, 514 U.S. 1085 (1995); Wickham v. State, 593 So. 2d 191, 194 (Fla. 1991), cert. denied, 505 U.S. 1209 (1992); Cook v. State, 581 So. 2d 141, 144 (Fla.) ("we are convinced beyond a reasonable doubt that the judge still would have imposed the sentence of death even if the sentencing order had contained findings that each of these nonstatutory mitigating circumstances had been proven"), cert. denied, 502 U.S. 890 (1991).

Although appellant does not contest the proportionality of his sentence, this Court must conduct a proportionality analysis. The instant case involves a double murder -- a vicious, extended attack on a couple in their own home, in order to steal money. While numerous nonstatutory mitigating factors were found, the mental health testimony was not compelling and there was little of significance offered to mitigate the brutal murders. Comparable cases for proportionality purposes include Lynch v. State, 841 So. 2d 362 (Fla. 2003); Smithers v. State, 826 So. 2d 916 (Fla. 2002); Hannon v. State, 638 So. 2d 39 (Fla. 1994); and Jones v. State, 612 So. 2d 1370 (Fla. 1992). As appellant has offered no reasonable basis for vacating the death sentences imposed, and the facts demonstrate that this was a heavily aggravated case with little mitigation, this Court should affirm the sentences.

ISSUE IV

WHETHER THE FLORIDA DEATH PENALTY STATUTE VIOLATES THE SIXTH AMENDMENT? (STATED BY APPELLEE).

Appellant also challenges the trial court's denial of his motion to declare Florida's statute to be facially unconstitutional under Ring v. Arizona, 536 U.S. 584 (2002). As this is a purely legal issue, appellate review is de novo.

Trotter v. State, 825 So. 2d 362, 365 (Fla. 2002).

This Court has repeatedly rejected appellant's claim that Ring invalidated Florida's capital sentencing procedures. See Duest v. State, 855 So. 2d 33, 49 (Fla. 2003); Kormondy v. State, 845 So. 2d 41, 54 (Fla. 2003)(Ring does not encompass Florida procedures or require either notice of the aggravating factors that the State will present at sentencing or a special verdict form indicating the aggravating factors found by the jury); Butler v. State, 842 So. 2d 817, 834 (Fla. 2003)(rejecting Ring claim in a single aggravator (HAC) case); Porter v. Crosby, 840 So. 2d 981, 986 (Fla. 2003); Bottoson v. Moore, 833 So. 2d 693 (Fla.), cert. denied, 537 U.S. 1070 (2002); King v. Moore, 831 So. 2d 143 (Fla.), cert. denied, 537 U.S. 657 (2002).

Appellant criticizes this Court's reluctance to overrule United States Supreme Court precedent upholding the constitutionality of Florida's capital sentencing procedures, asserting that, by overruling Walton v. Arizona, 497 U.S. 639 (1990), the Ring opinion necessarily overruled Hildwin v. Florida, 490 U.S. 638 (1989), because Walton was premised on Hildwin. This oversimplification fails to acknowledge fundamental differences between the Arizona and Florida sentencing procedures. This Court has consistently maintained

that, unlike the situation in Arizona, the statutory maximum sentence for first degree murder in Florida is death. See Mills v. Moore, 786 So. 2d 532, 536-538 (Fla. 2001); Mann v. Moore, 794 So. 2d 595, 599 (Fla. 2001); Porter, 840 So. 2d at 986; Shere v. Moore, 830 So. 2d 56, 61 (Fla. 2002)("This Court has defined a capital felony to be one where the maximum possible punishment is death"). Because Ring holds that any fact which increases the penalty beyond the statutory maximum must be found by the jury, and because death is the statutory maximum for first degree murder in Florida, Ring does not establish Sixth Amendment error under Florida's statutory scheme. As appellant's argument has been consistently rejected, there is no error presented in the trial court's denial of his motion to declare Florida's capital sentencing statute to be unconstitutional.

Even if some deficiency in the statute could be discerned, appellant has no legitimate claim of any Sixth Amendment error on the facts of this case. Appellant claims initially that the Sixth Amendment violation created by adherence to the statute constitutes structural error which cannot be harmless under Sullivan v. Louisiana, 508 U.S. 275 (1993). He also posits that a constitutional harmless error analysis demonstrates the alleged jury defect in this case was

harmful because, accepting the fact that the prior violent felony conviction and during a robbery aggravators do not have to be found by a jury, those factors alone would not support the death sentences in this case. Both of these arguments are without merit.

Clearly, a Sixth Amendment violation can be harmless. Any claim to the contrary ignores the plain result of Ring itself, which was remanded so that the state court could conduct a harmless error analysis. Ring, 536 U.S. at 609, n.7. This result is consistent with a number of other United States Supreme Court decisions. See United States v. Cotton, 535 U.S. 625 (2002)(failure to recite amount of drugs for enhanced sentence in indictment did not require conviction to be vacated); Neder v. United States, 527 U.S. 1, 8-9 (1999) (failure to submit an element to the jury did not constitute structural error).

Moreover, appellant's harmless error analysis is flawed. Appellant's attempt to demonstrate harmful error in this case confuses the distinction between the right to a jury trial on a capital offense with the jury participation required for imposition of sentence. According to appellant, since Florida is a weighing state, a judge cannot consider any aggravating factor that was not expressly found by a unanimous jury. He

concedes that the judge below could properly rely on the aggravating factor of his prior violent felony convictions, but asserts that, because other weighty aggravating factors were found and applied by the court, the lack of jury findings on these other factors cannot be harmless. However, Ring does not create a right to jury sentencing or prohibit judicial sentencing; it only interprets the jury's role in finding a defendant death-eligible. See Ring, 536 U.S. at 612 ("What today's decision says is that the jury must find the existence of the *fact* that an aggravating factor existed. Those States that leave the ultimate life-or-death decision to the judge may continue to do so.")(Scalia, J., concurring). Appellant's claim that more than one aggravating factor must be found by a jury because, given the existence of mitigation, a single factor is insufficient to support a death sentence, is an assertion premised on this Court's requirements for a proportional sentence, rather than the findings necessary to convict a defendant of a capital offense.

In addition, appellant's death sentences are supported by the aggravating factors of prior violent felony convictions and during the course of a felony, traditional sentencing factors which may be used by a judge to apply a sentencing exceeding the statutory maximum for an offense and which were

found by a unanimous jury, as evidenced by the verdicts rendered. Almendarez-Torres v. United States, 523 U.S. 224 (1998); Duest, 855 So. 2d at 49.

The Sixth Amendment, as interpreted in Ring, provides no basis for condemning Florida's capital sentencing statute or disturbing the convictions and sentences obtained against appellant. This Court must affirm the death sentences imposed in this case.

CONCLUSION

WHEREFORE, based on the foregoing arguments and authorities, the State asks this Honorable Court to affirm the judgments and sentences entered below.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U. S. Mail to Paul C. Helm, Assistant Public Defender, Public Defender's Office, Polk County Courthouse, P. O. Box 9000--Drawer PD, Bartow, Florida 33831, on this 10th day of February, 2005.

CERTIFICATE OF FONT COMPLIANCE

I HEREBY CERTIFY that the size and style of type used in this brief is 12-point Courier New, in compliance with Fla. R. App. P. 9.210(a)(2).

Respectfully submitted,

CHARLES J. CRIST, JR.
ATTORNEY GENERAL

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SCOTT A. BROWNE
Assistant Attorney General
Florida Bar No. 0802743
Concourse Center 4
3507 East Frontage Road, Suite 200
Tampa, Florida 33607
Telephone: (813) 287-7910

Facsimile: (813) 281-5501
COUNSEL FOR APPELLEE