IN THE SUPREME COURT OF FLORIDA

JOHN ROBERT BALLARD, :

Appellant, :

vs. : Case No.SC03-1012

STATE OF FLORIDA, :

Appellee. :

_____:

APPEAL FROM THE CIRCUIT COURT
IN AND FOR COLLIER COUNTY
STATE OF FLORIDA

INITIAL BRIEF OF APPELLANT

JAMES MARION MOORMAN
PUBLIC DEFENDER
TENTH JUDICIAL CIRCUIT

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STATEMENT OF THE CASE

The Collier County Grand Jury indicted the appellant, John Robert Ballard, for the first-degree murders of Jennifer Jones (Count I) and Willie Ray Patin, Jr., (Count II) and robbery (Count III) on March 7 and 6, 1999. [V1 32-33] Defense counsel moved to bar imposition of the death penalty on the ground that Florida's capital sentencing procedure is unconstitutional under the Sixth, Eighth, and Fourteenth Amendments and the decision in Ring v. Arizona, 536 U.S. 584 (2002). [V1 50-68; V4 671-77, 681] The court denied the motion. [V4 681-82]

Ballard was tried by jury before Circuit Judge Lauren Miller from March 31 through April 4, 2003. [V1 125; V6 1] The court denied defense counsel's motion for judgment of acquittal at the close of the State's case [V10 958-62] and at the close of all the evidence. [V11 1060] The jury found Ballard guilty as charged on all three counts of the indictment. [V1 194-95]

The penalty phase trial was held on April 11, 2003. [V1 206] Defense counsel moved for a judgment of acquittal notwithstanding the verdict. [V1 204-05; V5 776-86] The court denied the motion. [V5 786] The jury recommended the death penalty for both murders by a vote of nine to three. [V1 220]

Both parties filed sentencing memoranda. [V1 223-31; V2 232-50] The Spencer[1] hearing was held on May 2, 2003. [V2 357; V3 607] Ballard addressed the court. He expressed sorrow for the deaths of his friends Jennifer and Bubba and told the court that he did not kill them. [V3 609-11] A presentence investigation report was prepared. [V2 362-70] On May 23, 2003, the court sentenced Ballard to death for each of the murders (Counts I and II) and to fifteen years in prison for the robbery (Count III). [V2 377-90, 395-408]

In support of the death sentences, the court found three aggravating circumstances: 1. Both murders were heinous, atrocious, or cruel (great weight).[2] [V2 378-79] 2. The murders were committed during the commission of a robbery (great weight).[3] [V2 380] 3. Ballard was previously convicted of another capital felony, the contemporaneous murder convictions (great weight).[4] [V2 380-81]

The court considered the following mitigating circumstances: 1. Extreme mental or emotional disturbance[5] was not proven by Dr. Dee's testimony that Ballard suffered from brain damage, but was established by Dr. Dee's testimony that Ballard is learning disabled (very little weight). [V2 381-83] 2. Impaired capacity

[1] Spencer v. State, 615 So.2d 688 (Fla. 1993).
[2] § 921.141(5)(h), Fla. Stat. (1997).
[3] § 921.141(5)(d), Fla. Stat. (1997).
[4] § 921.141(5)(b), Fla. Stat. (1997).
[5] § 921.141(6)(b), Fla. Stat. (1997).

to appreciate the criminality of his conduct or to conform his conduct to the requirements of law[6] was not proven. [V2 383] 3. The defendant's background:[7] A. Ballard's father was an alcoholic (proven - very little weight). [V2 384] B. Ballard's father suffered from mental illness (proven – very little weight). [V2 384] C. Ballard was exposed to his parents' alcoholism as a child (proven – moderate weight). [V2 384-85] D. Ballard had no stable father figure while growing up (proven – moderate weight). [V2 384-85] E. Ballard was deprived of a nurturing mother while growing up (proven – moderate weight). [V2 384-85] F. Ballard was deprived of the only real nurturing parent he had, his half-sister Cynthia Moore, at the age of six (proven – moderate weight). [V2 385] G. Ballard was subjected to severe punishments as a child (proven – moderate weight). [V2 385-86] H. Ballard was forced to witness severe punishments of his brothers and sisters (proven – moderate weight). [V2 385-86] I. Ballard was forced to witness incidents of domestic abuse in his home as a child (proven – moderate weight). [V2 385-86] J. Ballard was subjected to neglect as a child (proven – some weight). [V2 386] K. Ballard was never provided with regular medical care as a child (proven – some weight). [V2 386] L. Ballard was never provided with regular

[6] § 921.141(6)(f), Fla. Stat. (1997).
[7] § 921.141(6)(h), Fla. Stat. (1997).

dental care as a child (proven – some weight). [V2 386] M. Ballard suffers from learning disabilities (proven – very little weight). [V2 386-87] N. Ballard has a limited education (proven – very little weight). [V2 386-87] O. Ballard suffers from hearing loss (proven – very little weight). [V2 387] P. Ballard supplies emotional support to his children (proven – moderate weight). [V2 387] Q. Ballard is a good father and nurturing parent to his children (proven – moderate weight). [V2 387] R. Ballard provides emotional support to his wife (proven – moderate weight). [V2 387] S. Ballard loves his wife and children (proven – moderate weight). [V2 387] T. Ballard is a loving son to his mother (proven – moderate weight). [V2 387] U. Ballard provides emotional support to his mother (proven – moderate weight). [V2 387] V. Ballard is a hard worker and solid provider for his family (proven – some weight). [V2 388] W. Ballard has been a loyal supportive friend to many (proven – very little weight). [V2 388] X. Ballard has often helped others in need (proven – very little weight). [V2 388] The court rejected Ballard's claim that he was innocent of the charged offenses on the ground that lingering or residual doubt is not a mitigating factor as a matter of law. [V2 388] The court found that each of the aggravating circumstances, standing

alone, would be sufficient to outweigh the mitigating circumstances. [V2 389]

Defense counsel filed a notice of appeal to the Second District Court of Appeal on June 2, 2003. [V2 448] Defense counsel filed an amended notice of appeal to this Court on June 27, 2003. [V2 457] The trial court appointed the public defender to represent Ballard on this appeal. [V2 456]

STATEMENT OF FACTS

The State's Case

Jennifer Jones and Willy (Bubba) Patin lived in an apartment on 55th Terrace in Collier County. [V8 517-18, 534, 551-52] Jones had a small red Mazda hatchback. [V8 521, 537] Patin was unemployed. Jones had a housecleaning job and sold marijuana. The marijuana sales usually occurred in her bedroom. [V8 519-20, 536, 543, 545] John Ballard lived directly across the street with his wife and children. Ballard, Jones, and Patin were friends. Ballard was a regular visitor at their apartment. [V8 528, 532, 541-43]

On Saturday, March 6, 1999, Ariana Harralambus went to the apartment to see her friend Jones around 10:00 p.m. She said Jones, Patin, Ballard, Rob Daily, Mike Howell, and Louis were there. [V8 518, 529-30, 534] Daily said he was not sure whether Ballard was there on Saturday; he thought Ballard was there on Friday night. [V8 535-36] Jones and Patin were planning to move to Texas on Monday because Patin had a job lined up with his

father. [V8 521, 545] Also, a week before, Francisco Garcia shot through Jones and Patin's windows. Garcia was with two other men. They were affiliated with a gang. [V8 546] Harralambus testified that Jones had over a thousand dollars on Saturday night. Jones usually kept her money in her purse, under her waterbed mattress, and in a shoebox in her closet. [V8 521]

Jones and Patin had a boat. Harralambus and Daily made plans to go out on the boat with them Sunday morning around 11:00. [V8 522, 536] Both Harralambus and Daily tried to call and page Jones on Sunday without success. [V8 523-24, 537] Harralambus went to the apartment, but Jones' car was not there. She then went to a shopping center and tried again to page and call Jones. She returned to the apartment and left a folded note above the door asking Jones to page her. Jones never paged her. [V8 523-24] Daily also went to the apartment. He saw Patin's truck in the back yard, but Jones' car was gone. He was not able to contact them on Sunday. [V8 537]

On Monday, Harralambus tried to page and call Jones before going to work because Jones left her wallet in Harralambus' mother's car Saturday night. She was unable to contact her. [V8524-25] Daily also tried to call and page Jones without success. [V8 537-38]

Around 9:00 a.m. on Monday, a deputy responding to a call about an abandoned vehicle found Jones' Mazda in the woods at the back of a vacant lot on Painted Leaf Lane. [V8 555-63] The car had not been reported as stolen, and it did not appear that the ignition had been tampered with. [V8 556-57, 563] Officers who processed the car later found blood and fingerprints. The prints were not identified as coming from John Ballard. [V9 761] The deputy drove past Jones' apartment, which was 1.3 miles from the vacant lot, but he did not see anything out of the ordinary. [V8 558, 560] Ballard lived on Painted Leaf Lane with his father-in-law Wayne Berry in 1994 when the road was named 28th Avenue Southwest. Berry's address was 6190 28th Avenue Southwest. Berry moved in 1996. [V8 564-66]

After work on Monday, Jones' friend Red went to the apartment, tried to open the sliding back door, then went to Daily's house and said he could not contact her. Daily called Jones' father, then met him in front of her apartment. Daily tried to open the front door. [V8 538-40, 545] They went to the sliding door, found that it was locked, and forced it open. They found Patin in the guest bedroom and Jones in her bedroom. [V8 540-41, 549] Daily could not find the telephone, so he went to the next-door neighbor's apartment and called the police. [V8 540]

Collier County Sheriff's Deputies and emergency medical personnel responded to the call around 4:46 p.m. They found Jones' body on the floor of the master bedroom and Patin's body on the floor of the spare bedroom. [V8 550-53; V9 716, 723] Blood spatter on Jones' body and the limited amount of blood spatter in the master bedroom, except in the vicinity of her body, indicated that she was not up very long after being attacked. [V9 723-24, 753-55] Extensive blood spatter in the bathroom, hall, and spare bedroom indicated that Patin was initially attacked in the bathroom, then went down the hall and crawled around the spare bedroom until he ended up in the vicinity of the closet. [V9 717-22, 725-739, 753,755] A barbell with a bloody fingerprint was found in the spare bedroom. [V8 582; V9 736, 738, 760] A curl bar with a bloody fingerprint was also found in the spare bedroom. [V9 759] Swabbings of suspected blood were taken from the barbell. Scrapings of suspected blood were taken from the curl bar and a lamp in the spare bedroom. [V9 744] The fingerprints on the barbell and curl bar were not identified as those of John Ballard. [V9 759-60] Some hair was found on a pair of plaid shorts by the weight bar. [V8 586, 595] The drawers of a dresser in the spare bedroom had been opened. [V9 755-56, 758] A black purse was found in the hallway. It had been knocked over or dumped over. [V8 583;

V9 718-19, 738, 758-59] A bottle of nail polish was found inside or next to the purse. [V8 585] The investigators were unable to determine how the apartment had been entered and what weapon was used to commit the murders. [V8 589-90]

Dr. Manfred Borges, the medical examiner, viewed the bodies at the scene and conducted the autopsies. [V9 763-64] He found multiple hairs in Jones' right hand under a torn piece of a plastic bag, which was stuck to her hand. [V8 575-76, 595-96; V9 695-97, 725, 766-69, 776-77, 790, 793, 797-99] He could not say how the hairs got in her hand. [V9 795] He collected a sample of her head hair [V9 768-69], nail scrappings and clippings [V8 577-78; V9 770, 789], and a sample of her blood for DNA testing. [V9 770] He also conducted a rape kit examination, but he did not find that Jones had been raped. [V8 577-78; V9 794] Dr. Borges determined that Jones died as the result of blunt force trauma to her head which shattered her skull. She was struck in the head at least three times. Her death would have been quick, but not necessarily instantaneous. [V9 778-81, 784, 794, 796] Jones also suffered defensive injuries. Her left thumb was broken, and there were abrasions on the fingers of her left hand. [V9 782-83] Jones was five feet, six inches tall and weighed 88 pounds. [V9 788]

Dr. Borges also found multiple hairs in Patin's left hand [V9 771, 793], but could not say how the hairs got there. [V9 795] Dr. Borges collected a sample of Patin's head hair [V9 697-98, 771], nail scrappings and clippings [V9 789], and a sample of his blood. [V8 580-81, V9 772] He determined that Patin also died of blunt force trauma to the head which shattered his skull. [V9 784-87] His death was also quick, within seconds or minutes, but it may not have been instantaneous; each blow brought him closer to death. [V9 786, 794, 796] Patin also suffered a defensive injury. The fingernail of his left middle finger was sheared off, and the skin behind it was bruised and damaged. [V9 786] Patin was five feet, seven inches tall and weighed 94 pounds. [V9 788] Dr. Borges examined a weight that was consistent with producing the blunt force trauma, but he could not say the weight was used to kill Jones and Patin. [V9 795-96]

A deputy found four fingerprints on the frame of the waterbed near the location of Jones' body. [V8 573-74, 587-88, 591-92, 598] More than a hundred latent prints were lifted from the apartment. [V8 599] Deputy Joseph Barber, a fingerprint examiner for the Collier County Sheriff's Office with twenty years experience [V8 600; V9 601-02, 614], received 118 latent print cards to examine. He found that forty-six of the prints were suitable for compari-

son. Of those, he was able to identify ten, none of which were made by Ballard.[8] [V9 603-05, 615] Of the four latent prints found on the frame of the waterbed, two were smudges not suitable for identification. [V9 606-07] Two more, Q37 and Q50, had some ridge detail, but Barber could not identify them. [V9 607-09] Nor could he eliminate Ballard as the person who made them. [V9 609] Barber testified that he had used enlarged photographs of finger-prints for courtroom presentations in the past, but it was not a process used for identification. [V9 612] Barber sent 105 unidentified prints to FDLE. [V9 612-13] One of the unidentified prints which was suitable for comparison came from the inside driver's door handle, but the officer who found it did not specify which vehicle it came from. [V9 616] Mr. Tabakman, the other Collier County Sheriff's Office fingerprint expert, reviewed Barber's work in this case and agreed with his conclusions. [V9 624-25]

Phillip Balunan, an FDLE crime laboratory analyst with four years experience in fingerprint identification [V9 631], examined the 105 unidentified prints and identified three of them. [V9 635-36] He made the identification about one year after finishing his probation after his training. [V9 660] He was certified by FDLE but not by the International Association of Identification. [V9

[8] Three prints were made by Jones, six were made by Patin, and one was made by someone named Freeman. The Freeman print was found on a CD in Jones' car. [V9 605-06]

663-64] He passed annual proficiency examinations given by FDLE. [V9 666-67] Balunan photographed the latent prints and used the photos to make the identifications. [V9 636] The latent prints can be enhanced by making the photo lighter or darker or by changing the contrast of the photo. [V9 639-40] Balunan identified Q50 as the fingerprint of John Ballard. [V9 641-42] His identification of the print was subjected to peer review and confirmed by FDLE fingerprint analyst Steven Casper. [V9 667, 670-79]

Balunan prepared a chart to demonstrate the points he used in reaching this conclusion. [V9 642] Defense counsel objected to the chart and requested a Richardson[9] hearing. He argued that in a deposition Balunan said he used one on one photographs, while the chart used enlargements. Balunan also said in deposition that he did not know how many points of identification he used, while the chart had numerous arrows pointing at points of identifica-tion. This information was not provided to the defense before trial nor in the deposition. [V9 642-43] The prosecutor responded that Balunan had not prepared anything to show the jury at trial at the time of the deposition. Also, he was not offering the chart into evidence, but to show how Balunan came to his conclusion. [V9 643] The court excused the jury to conduct a Richardson inquiry. [V9 643-44]

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

Balunan said he prepared the chart earlier during the week of trial. [V9 644] The points shown on the chart were not the only ones he used to make the identification. [V9 644-45] The chart was a representation to demonstrate how he conducted his examination. He did not use a set number of points. He plotted ten points on the chart for the demonstration, but there were more than ten points on the latent fingerprint. [V9 645] The chart was prepared with enlarged photos from the latent lift card and the inked print card to which he compared it using one on one photos. [V9 645-46] In his deposition, defense counsel asked if he noted how many points of identification there were, and Balunan answered no. [V9 646] Number one on the chart was Balunan's beginning point. There were many points of identification. Balunan had not made any note or reference in his examination about how many points of identification he had. [V9 647] The numbers on the chart were "not for numerical purposes," he could have used letters. "There's no numerical value as to the points of identification." [V9 648]

Defense counsel argued that he inquired about points of identification, and Balunan did not give him any, but now they were going to be discussing numbers. He should have been given that information in advance. He would have prepared differently.

He could have looked at it and gotten another expert if he needed one. [V9 649] The prosecutor replied that the points on the chart were not the only ones Balunan relied on. He was just using the chart to demonstrate how he concluded this was Ballard's print. The fact that the chart said 10 did not make any difference. [V9 649-50] The court ruled that there was not a discovery violation and permitted use of the chart for demonstrative purposes. [V9 651]

When the jurors returned to the courtroom, the court instructed them, "What you're now going to be looking at is not evidence, it's only used as a demonstrative aid." [V9 651] Balunan testified, using the chart, that he photographed the known and latent fingerprints, making light, medium, and dark copies of the latent print photo. This process did not change anything in the photo. [V9 651-52, 661, 665] He then used a magnifying loop to examine each of the ten known prints and determined that the number one finger deserved more examination. [V9 652-53, 660-61] He examined that known print side-by-side with the latent print and matched individual characteristics present in both. [V9 653-54] He did not have a particular starting point, but for purposes of showing how an examination is done, he had "tried several points on latent fingerprints and the ink fingerprint to explain

or to demonstrate to you that these two fingerprints are, indeed, made by the same finger." [V9 654] He then described how each of the ten points marked on the chart had the same ridge characteristics on both the known and latent prints. [V9 654-57] He told the jury he did not do or base his examination on the chart, which was for demonstrative purposes. [V9 657, 664-65] There were more points that he did not mark. [V9 657] There is no scientific method to determine the age of a fingerprint or how long it has been in place. [V9 658, 665]

In March, 1999, FDLE analysts prepared stain cards from known samples of Jennifer Jones' blood and Willie Patin's blood. [V10 813-23] In December, 1999, a nurse drew a known sample of John Ballard's blood and gave it to a detective who observed the blood draw. [V10 805-12]

John Kilbourn, a forensic scientist for a private, commercial laboratory [V10 834, 851], examined six hairs that were found in Jennifer Jones' right hand. He compared them to a sample of Jones' head hair and determined that three of the hairs were consistent with her head hair. Two hairs were too short to make any conclusion. The sixth hair had been cut in two and placed in separate test tubes. This hair was accompanied by PCR extracts from the root and shaft. It was consistent with the known arm

hair of John Ballard. [V10 836-39, 852, 857-58] Hairs cannot be absolutely identified by microscopic examination. It is not as scientifically exact as fingerprint or DNA identification. [V10 857-58]

Kilbourn testified that human hair has three growth stages: (1) the anagen phase, during which the hair is growing for two to eight years; (2) the catagen phase, during which growth discontinues, and which lasts a few weeks; and (3) the telogen phase, during which the bulb of the root reduces in size for two to four months until it falls out from washing, brushing, or blowing wind as a naturally shed hair. [V10 839-41, 853-54] A hair in the telogen phase is loosely held and can be "forcibly removed" with normal daily activity. In the late telogen phase very little force is required to remove it. [V10 856-57] A hair in the late telogen phase has no viable cellular material attached to the root. [V10 841, 854] When a hair in the anagen phase is forcibly removed, the root is distorted, and there is a lot of tissue attached to it. When a hair in the catagen phase is forcibly removed, the bulb is becoming dehydrated, and there is viable tissue on it that can be tested for DNA. When a hair is in the early telogen phase, there is still enough tissue on it for DNA analysis. [V10 842-43, 854]

Kilbourn determined that the hair consistent with Ballard's arm hair was in the telogen phase. The PCR extracts that came with the hair were from an attempt to do DNA analysis. When Kilbourn saw the hair, there was no cellular tissue left on the hair, so he could not determine whether it was forcibly removed or naturally shed. [V10 843-45, 855, 869]

Kilbourn examined hundreds of hairs in this case. He identified some of them as those of Jones and Patin. [V10 845] Some of the unidentified hairs were body hairs; he was not given known samples of body hairs for comparison. Some of the unidentified hairs were too short for comparison. There were other hairs he simply could not identify; they might have come from Jones, Patin, or other people who had been in the house. [V10 846] Hairs can be transferred from one surface to another, for example, from the carpet to a person's hand. [V10 861-62]

There were five forcibly removed hairs that Kilbourn could not identify. One of those came from the barbell. [V10 847-48] Several hairs came from a striped shirt. One of those was a forcibly removed hair that he could not identify. [V10 848] There were also nine unidentified limb hairs on the striped shirt. [V10 866] Fifty-nine hairs came from the right hand of Willie Patin. He identified twelve of them as consistent with Patin and twelve

as consistent with Jones. Some were forcibly removed; some were not. There was an unidentified non-Caucasian hair with a telogen root. There was an unidentified Caucasian pubic hair, two unidentified body hairs, four unidentified limb hairs, an animal hair, and a couple of short hair fragments that he could not identify. [V10 848-49, 858-60] Sixty-four hairs or fibers came from Patin's left hand. Twelve of the hairs were consistent with Jones, and forty-one hairs were consistent with Patin. There were also body hairs and hairs that were too short for identification. [V10 849, 861] Six hairs came from a pair of plaid shorts found by the weight bar. Four of them were consistent with Patin. There were two forcibly removed hairs that could not be identified. [V10 850, 862-63]

There were also five unidentified limb hairs on the plaid shorts. [V10 866] Two body or limb hairs from the spare bedroom door could not be identified. [V10 862] Numerous hairs were found in Jones' car, including forty-seven unidentified hairs. None of the hairs from the car were consistent with Ballard's known arm hairs. [V10 863] Numerous hairs were found on a torn poster with blood on it. Several of them were unidentified limb and body hairs. [V10 863-64] An unidentified Caucasian pubic hair, an unidentified limb hair, and three unidentified head hairs were

found on a piece of carpet and padding from the hallway. [V10 864] Several unidentified hairs and hair fragments were found in the paper bag investigators placed on Patin's right hand. Two unidentified limb hairs were found in the paper bag placed on Patin's left hand. [V10 869] An unidentified limb hair and several cut hairs were found on Patin's black shorts. [V10 865-66] Several unidentified limb hairs were found on a white sock with blood on it. Numerous hairs, including six unidentified limb hairs, were found on a blue tank top from the spare bedroom. An unidentified hair was found on a black bra from the spare bedroom. [V10 866] An unidentified hair, several short hairs, an eyelash hair, and an eyebrow hair were found on a gray shirt from the spare bedroom. Short, unidentified hairs were found on clothing found under Jones. An unidentified hair fragment was found on carpet from the spare bedroom. [V10 867] An unidentified limb hair was found on carpet under Patin's head. A large number of unidentified limb hairs were found on the sheets used to transport the bodies. [V10 868]

Patricia Bencivegna, an FDLE DNA analyst [V10 876], conducted PCR analysis of the known blood stain cards for Jennifer Jones, Willie Patin, and John Ballard and the hair, which she cut in two, from Jennifer Jones' right hand. She obtained a DNA profile from

the hair that revealed a mixture of profiles. Patin was excluded as a possible source. Jones was included as the source of a minor component in the mixture. Ballard was included as a "possible source" of the mixture. She requested SDR analysis for a higher degree of discrimination. [V10 887-90, 893-94, 910-11] The other hairs from Jones' right hand were not suitable for PCR analysis. [V10 913-15]

Bencivegna also found the presence of blood in the nail clippings from Jones' right hand. DNA analysis revealed a mixture of DNA profiles. Ballard was excluded as a possible source of the mixture. Patin and Jones could not be excluded.[10] [V10 892-93, 915-20, 923, 925] She found DNA profiles consistent with Patin and usually excluding Jones from blood stains found on bath towels from the bathroom, carpet from the spare bedroom, a white sock, toilet paper, a ten pound weight, a blue blow-up chair, bathroom door trim, bathroom door frame, an Olympic barbell, a curl bar, a lamp from the spare bedroom, the shower curtain, scrapings from the toilet, scrapings from the bathroom floor, a seat cover, and a fingernail polish bottle from Jones' purse. [V10 895-910] The DNA profile of a hair from Patin's right hand was consistent with Patin. [V10 910, 920] The DNA profile of blood found on a piece

[10] Bencivegna said Jones and Patin could not be included on direct exam. [V10 892-93] On cross-exam, she corrected herself and said they could not be excluded. [V10 916-19]

of cardboard box was consistent with Jones and could not have come from Patin or Ballard. [V10 911-12] Bencivegna examined evidence from the sexual assault kit and found no semen or sperm. [V10 921]

Melissa Suddeth, an FDLE DNA analyst and supervisor [V10 928-29], performed STR analysis of the hair from Jones' right hand and found that it matched Ballard's DNA profile. She calculated the frequency of the match as one in every 11.8 quadrillion African-Americans, one in every 750 trillion Caucasians, and one in 2.5 trillion Southeastern Hispanics. [V10 933-35]

Roger Morrison, a lab director and DNA analyst for the Alabama Department of Forensic Science, who is also engaged in private practice [V10 938-40], testified that DNA testing is possible on a hair with a telogen root if it has a follicular tag, soft tissue associated with the root of the hair. If there is no soft tissue, DNA results cannot be obtained. When there is soft tissue associated with the root of the hair, some force had to be involved to remove the hair from the follicle. However, he could not say how much force was required because there is less and less attachment to the soft tissue as the hair goes through the growth phases. In the later part of the telogen phase, the root disappears, and the hair easily falls out as a shed hair or naturally removed hair. This can occur from normal daily activity. [V10

941-43, 952-54] In the case of a limb hair in the telogen phase with soft tissue attached, a person scratching his arm or leg might produce enough force to forcibly remove the hair. [V10 953-955] If he obtained a 12 out of 13 STR profile on a telogen hair, it would have to have soft tissue associated with it and would have to be forcibly removed, but he could not determine the amount of force. [V10 943] He did not examine any physical evidence in this case and did not review any notes. [V10 945] Head hairs remain in the telogen phase for two to four months, while pubic, body, and limb hairs remain in the follicle six months longer. [V10 945]

Defense Evidence

Ray Wickenhouser, a Louisiana lab director and forensic scientist who specializes in DNA and trace evidence [V10 963-65], testified that a full DNA profile can be obtained from a telogen hair if it has as few as twenty to fifty cells attached. A naturally shed telogen hair can have enough cells attached, even a flake of dandruff, to obtain a full DNA profile. [V10 975-76] His lab finds a follicular tag on a naturally shed hair quite often. [V10 982-83] "We routinely get a DNA from a Telagen [sic] hair." [V10 979] Wickenhouser reviewed Kilbourn's notes. The notes were very thorough with regard to other hairs, but Kilbourn failed to note whether the telogen limb hair had any root sheath material or adhering debris. [V10 977-78, 981] He described it as a typical telogen hair. [V10 980] The fact that a DNA profile was obtained from the hair meant that biological material was on the hair, "but to say what kind of cells were originally on the hair and how that hair was removed . . . you're just speculating." The DNA profile could have been obtained from bodily fluid on the hair, a follicular tag, or dandruff. Once the cells are "digested" to obtain the DNA, "you really can only speculate[.]" [V10 978] "There's only some things it could be, but to say it's one without or to the exclusion of the other, you can't say." When a telogen hair

is almost ready to fall out naturally, washing or scratching can cause it to fall out. [V10 979, 987] Just as there is a continuum of development of a hair from the anagen phase to catagen to telogen, the force needed to remove a hair is a continuum. A telogen hair can be forcibly removed, but there is no way to tell that by looking at the hair. [V10 984] The amount of force needed to remove a telogen hair with tissue attached to it is so minimal it could happen in daily life. [V10 984-85] A hair with a follicular tag can fall out by itself, or it can be pulled out. [V10 985-86] Hairs can be transferred from one surface to another. A hair could be transferred from a carpet to a hand abutting the carpet. [V10 986-87]

Shawn Weiss, Associate Technical Director of the Forensic Department at LabCorp of America and a DNA analyst [V10 988], performed mitochondrial DNA analysis on two Caucasian limb hairs found on the carpet under Jones. They did not match John Ballard. [V10 989-90]

Defense counsel introduced thirty-four fingerprint cards into evidence. [V10 992-1000; V11 1001-12] They were fingerprints that Joseph Barber could not identify as John Ballard's. [V11 1012]

Mike Gawlinski of the Collier County Sheriff's Office examined the entire interior of Ballard's vehicle several months after the homicides, but he did not find any blood. [V11 1014-15]

On February 28, 1999, Ballard reported a drive-by shooting at Jones' apartment. [V11 1024-27] A deputy drove Ballard to the scene of a traffic stop to identify the car that had been involved. [V11 1017-20] The driver of the car was Donald Tafoya. The passengers were Francisco Garcia, Claudio Perez, Alberto Rameriz, and Alejandro Yanez. The officers who searched the car found a .22 caliber rifle and several .22 caliber rounds. Garcia was arrested for the shooting. Tafoya was arrested for driving without a license. The others were released. [V11 1026, 1030] Garcia and Tafoya were members of a street gang, LaRaza. The gang had been involved in criminal activity, intimidation, and robbery. There were eighty members and associates of the gang. [V11 1029-31]

On Sunday on the weekend of the homicides, Ballard and his family attended a cookout held by his neighbor Jodi Crossman. There was nothing unusual about Ballard's behavior. The cookout ended between 9:00 and 10:00 p.m. [V11 1032-34]

In March 1999, Robert King lived at 6280 28th Avenue South-west. King walked his dogs in the morning and in the evening on a

regular basis. Around 6:00 p.m. Sunday evening on the weekend of the homicides he walked past a five-acre vacant lot. He did not see any vehicle at the lot. The next morning, he walked onto the lot and saw the back end of a car sticking out from some brush about two hundred feet from the road. He could not have seen the car from the road. [V11 1037-41] The lot was a place where numerous people liked to party. King had piled up some rocks and sticks to keep people from going back into the lot. The sticks had not been disturbed when he went by on Sunday, but on Monday he noticed that someone had been there and moved some trash and the rocks and brush. [V11 1039, 1041-42]

State's Rebuttal Evidence

Joseph Barber compared the 38 unidentified fingerprints introduced by the defense with the known prints of Donald Tafoya. They were not Tafoya's prints. [V11 1059]

Penalty Phase

Prior to trial, defense counsel moved to bar imposition of the death sentence because Florida's capital sentencing procedure is unconstitutional under Ring v. Arizona.[11] [V1 50-68; V4 670-77, 681] The court denied the motion. [V4 681-82]

At the beginning of the penalty phase of trial, defense counsel moved for a judgment of acquittal notwithstanding the verdict. [V1 204-05; V5 776-82, 785] The court denied the motion. [V5 786] Defense counsel renewed the motion to bar imposition of the death sentence under Ring. The court responded, "It's on the record." [V5 787-88]

The prosecutor relied upon the evidence presented at trial to support the aggravating circumstances. [V5 791] He presented victim impact testimony by Patin's sister, Stacey McDowell [V5 793-94, and Jones' stepmother, Tammy Jones. [V5 795-97]

Patty Butler testified that John Ballard was her fourth child. [V5 797-98] Her husband, James Ballard, drank a lot, argued with her, hollered at the kids, and hit them with his hand. [V5, 798-99] She divorced him when John was two and a half. Mrs. Butler was very strict and taught her children to show respect for adults. If they misbehaved, she gave them three warnings, then spanked them with a belt. [V5 800] Her daughter, Cynthia, took

[11] Ring v. Arizona, 536 U.S. 584 (2002).

care of John after school. Cynthia loved him and treated him as her "baby doll." [V5 802] After her divorce, Mrs. Butler worked night and day. [V5 803] During the day, John stayed with a babysitter or at nursery school. When he was two or three, he would leave the nursery school and walk two miles home. [V5 804-05] If one of the children broke something while she was at work, she would punish all four by sending them to their rooms. [V5 806] When John was four or five, Mrs. Butler married Willie Lopez. The kids loved him, but she had their marriage annulled. [V5 807]

John started school in Florida. [V5 811] Mrs. Butler moved to California with her children for three years. [V5 808-09] When she returned to Florida, the school district tested John and determined that he had a learning disability and attention deficit disorder. They held him back in school one year. A year later, they found that he had a hearing problem caused by an ear infection when he was six months old. [V5 811-12, 814, 819, 821-22] Mrs. Butler took John to a pediatrician for his shots and when he was sick. She had a hard time taking him to the dentist because he was afraid, but she finally found one that he liked. He had very bad teeth. [V5 812-14]

Mrs. Butler married Bob Lackett when John was seven and in the second grade. [V5 809] John did not like Lackett because he

was an alcoholic. John would go away on weekends with his friends. [V5 815-16] Mrs. Butler and Lackett were divorced after five years. She married Archie Butler when John was in his early teens. [V5 809-10] John quit school when he was sixteen. [V5 814]

Cynthia Moore was eleven when her brother John was born. Her mother was working ten hours a day, so she was the primary caretaker of John, her sister Karen, and her brother Kevin while their mother was at work. [V5 824-25] Cynthia loved and took care of John. She walked him, held him, and played with him. [V5 827] Her mother did not really want to have children. She believed they were to be seen and not heard. "If you opened your mouth you got a backhand." [V5 828] James Ballard was her mother's fourth husband. [V5 827] Cynthia was very scared of him because he was abusive. He spanked them with his hand. Her mother used a belt to spank them. If one of them got in trouble, her mother would beat all of them. As Cynthia grew older, she had to make drinks for her mother. [V5 825-26, 832]

They moved out of the Ballard residence when Cynthia was thirteen. [V5 826] Her mother was married to Willie Lopez for less than a year. [V5 827] Cynthia left home when she was seventeen and John was six. When she was eighteen, her mother asked her to move to California with her to take care of the other

children. [V5 829, 835] Cynthia stayed with her family for less than a month in California. Her mother's new boyfriend told her to leave. After he left her mother, Cynthia spent six more months with her family. She got married when she was nineteen and stayed in California when her mother returned to Florida. She saw John only twice after that, when he was twelve or thirteen and when he was seventeen. They stayed in touch with telephone calls. [V5 831-32, 835] John seemed to have a happy, normal life. He told her about his jobs, his children, and fishing. [V5 836] John was a good brother. They have a bond of love that will never go away. [V5 834]

James Ballard, John's half-brother, was nine or ten years old when John was born. Their father was a salesman with an alcohol abuse problem who stayed out late at night. He was a very firm disciplinarian and became physically abusive as time went on. He beat John and the other children with a belt, a paddle, or his hand. [V5 836-40] John's mother took her kids and moved to another house two or three blocks away. John continued to spend a lot of time at his father's house with his other half-brothers. [V5 840-41] Because John's mother was often out of the house, the younger neighborhood kids hung out there smoking and getting into trouble when John was five or six. [V5 841-42] John's mother was

also a strict disciplinarian. “Everyone got backhanded[.]” [V5 842] Their father added a fourth bedroom to his house and rented rooms to prostitutes when John was six or seven. [V5 843-44] John grew up to be a good man, a good husband, and a good father with three kids. [V5 844, 847, 849-50]

Kenneth Ballard, John’s half-brother, testified that their father had been abused as a child and drank to try to forget. Their father had a harsh attitude towards them. Kenneth tried to avoid him. Their father and John’s mother were only married for about two and a half years. [V5 853-55] Kenneth only remembered one or two occurrences of physical abuse involving their father and John’s mother. [V5 856] Their father rented rooms to his friends, some of whom were prostitutes, when John was about five. [V5 855] John was shy and quiet. [V5 856] After 1976, Kenneth had seen John only a couple of times. In 1981, when John was about thirteen, he was quiet but playful. [V5 856-57] When they were together, Kenneth enjoyed being with John. He loved John very much. [V5 857-58]

Kevin Cole was also John’s half-brother; they had different fathers. Kevin was four when John was born. Their mother and John’s father were only together for about two years. [V5 860-61] When they were children, Kevin and John built forts, fished, and

played baseball and football together. [V5 861] Kevin did not remember being around John's father when he was intoxicated. He did remember that their mother drank. [V5 862-63] Their mother was often away from home working or taking time for herself while they were children. They had to take care of themselves. [V5 864] They became very independent. John had trouble communicating his feelings. [V5 865] Their mother and grandparents were very strict. The children were punished with a "back hand in the back seat" or with a belt. [V5 866] John's hearing and learning disabilities were discovered when they were in California and John was in the fourth grade. [V5 863, 867] John sometimes ran away from home for two days at a time. [V5 867] About three years after they returned to Florida from California, Kevin left home to finish school. John was in the sixth grade. [V5 871-72] John grew up to be a very good father. [V5 872-73]

Dr. Henry Dee, a clinical neuropsychologist, interviewed and tested Ballard on March 8 and April 12, 2002. [V5 877-82] Dr. Dee determined that Ballard's full scale IQ was 90, which is below average. His full scale memory score was 89. Dr. Dee found there was a significant discrepancy between Ballard's verbal IQ, which fell in the 27th percentile of the population, and his nonverbal IQ, which was at the 61st percentile. Such a discrepancy is always

found in people like Ballard with a history of a learning disability, especially reading difficulties. [V5 882-83, 892] The discrepancy between the verbal IQ and nonverbal IQ also raised the question of brain damage. [V5 883-84, 892] Ballard's performance was normal on the Benton visual retention test, the judgment of line orientation test, facial recognition test, visual form discrimination test, and Wisconsin card sorting test. His performance on the category test, 63 errors, was in the brain damage range. This test result, in combination with the normal scores on the other tests, was a reliable indication of frontal lobe damage. [V5 884-85] The category test is a more sensitive measure of frontal lobe damage than radiographic tests. [V5 892] Dr. Dee could not determine when the brain damage occurred from Ballard's history. People with longstanding brain damage of this type have long histories of odd behavior. They are very impulsive. Ballard's history of frequent job changes and running away was consistent with frontal lobe damage. [V5 885-88] Such brain damage is permanent. [V5 890] The way the brain is connected is impaired. The normal connections are gone and are not coming back. [V5 896-97] Dr. Dee concluded that Ballard suffered from an extreme mental or emotional disturbance at the time of the offense. [V5 890-91, 894] Frontal lobe syndrome "is

by definition serious, there's so much disorganization of behavior." [V5 893] Ballard's ability to conform his conduct to the requirements of law was substantially impaired by the brain damage, which "destroys one's inhibitory controls. You may know it's wrong, but still can't keep yourself from doing it." [V5 895-96]

Donna Howard testified that John Ballard was the son of her best friend. Ballard's mother lived in her guest house. She had known him for 13 or 14 years. He was a very devoted son and father. He helped his mother with mowing the lawn, weeding, and other chores. Howard never heard Ballard say a harsh word. He was always very respectful. [V5 897-99]

Michelle Ballard had been married to John for almost ten years. [V5 901] The Ballard's had three children, eight-year-old John, six-year-old Dustin, and three-year-old Joy. [V5 902] Michelle said Ballard was a great father. He was supportive of her and the children. He worked hard. He helped other people. [V5 903-05] Despite his learning disability, he would read to the children after reviewing the books with Michelle. [V5 905-06] Michelle read a letter written by their son John expressing his love for his father. [V5 909-10]

SUMMARY OF THE ARGUMENT

ISSUE I John Ballard is innocent of the murders and robbery of Jennifer Jones and Willie Patin. The State's only evidence of Ballard's guilt was circumstantial. Ballard's fingerprint was found on the outer frame of Jones' waterbed. A limb hair with a DNA profile that matched Ballard's DNA profile was found in Jones' right hand. Her body was on the floor near the waterbed. The State failed to prove that the fingerprint and hair were left at the scene at the time of the homicide. Ballard was a friend and neighbor of Jones and Patin. He was a frequent guest in their apartment and was there on the Saturday night preceding their deaths on Sunday. Jones was a marijuana dealer who conducted most of her transactions in her bedroom. It is likely that Ballard was in her bedroom as a guest at some time before the homicides. The hair could have been "forcibly removed" from Ballard's arm by Ballard rubbing or scratching his arm, or through innocent contact with Jones or someone else. There were numerous unidentified fingerprints in the apartment, including bloody fingerprints on a curl bar and a barbell weight which could have been the murder weapon. The blood on the curl bar and weight had a DNA profile that matched Patin. Another unidentified fingerprint was found on

the inside door handle on the driver's side of Jones' car, which was found abandoned in a vacant lot the morning after the homicides. Numerous unidentified hairs were found on Patin's hands and in the apartment. The unidentified fingerprints and hairs are consistent with the hypothesis that someone other than Ballard committed the crimes. Because the State's evidence was not inconsistent with any reasonable hypothesis of innocence, it was insufficient as a matter of law to sustain the convictions. The trial court violated Ballard's due process right to proof beyond a reasonable doubt of his guilt when it denied his motions for judgment of acquittal. The convictions and sentences must be reversed, and this case must be remanded with directions to discharge Ballard.

ISSUE II Defense counsel objected to the State's failure to disclose a chart prepared by the FDLE fingerprint expert using enlarged photos of the latent fingerprint found on the waterbed and Ballard's known fingerprint. The chart showed ten points of comparison to demonstrate how the expert identified the latent print as Ballard's, although the expert testified in deposition that he did not know how many points of comparison there were. The trial court erred by ruling that there was no discovery violation and by failing to make the findings required in a

hearing on the discovery violation. The failure to disclose the chart and the information it displayed was prejudicial to defense counsel's ability to prepare for trial. If defense counsel had known about and seen the chart before trial, he could have hired an independent expert to assist him in determining the validity of the methods used and identification made by the State's expert. He may have been able to have the independent expert testify to rebut the State's expert's testimony. The court's errors in responding to the State's discovery violation violated Ballard's rights to effective assistance of counsel and a fair trial. The convictions and sentences must be reversed, and this case must be remanded for a new trial.

ISSUE III The trial court violated the Eighth Amendment by finding that the defense had not proved the mitigating circumstances of frontal lobe brain damage and Ballard's substantially impaired ability to conform his conduct to the requirements of law. The defense proved these mitigating circumstances with competent, substantial, believable testimony by Dr. Henry Dee. Dr. Dee's testimony was not controverted by other evidence. The death sentences must be vacated, and this case must be remanded for resentencing.

ISSUE IV The Florida death penalty statute violates the Sixth Amendment right to a jury trial because it does not require the aggravating circumstances necessary for imposition of the death penalty to be found by the jury. Although two of the aggravating circumstances in this case, prior capital felony conviction and murder during the course of a robbery, were based on the jury's guilt phase verdicts, the court alone found the most significant aggravating circumstance in this case, that the murders were heinous, atrocious, or cruel. The death sentences must be vacated, and this case must be remanded for resentencing.

ARGUMENT

ISSUE I

THE STATE DID NOT PROVE THAT JOHN BALLARD KILLED OR ROBBED JENNIFER JONES OR WILLIE PATIN.

Introduction

John Robert Ballard is innocent of the murders and robbery of Jennifer Jones and Willie Patin. Although the State proved that Jones and Patin were killed and robbed, the State did not prove that Ballard was the perpetrator of those crimes.

The State proved that Ballard was a friend and neighbor who frequently visited the duplex apartment shared by Jones and Patin [V8 528, 532, 541-43], he was a guest in the apartment the night before the crimes occurred [V8 518, 529-30, 534], his fingerprint was found on the outer frame of Jones' waterbed [V8 573-74, 587-88, 591-92, 598; V9 641-42], and one of his limb hairs was found in Jones' right hand. [V8 575-76; V9 695-97, 725, 766-69, 776-77, 790, 793, 797-99; V10 836-39, 852, 857-58, 887-90, 893-94, 910-11, 933-35] Jones' body was found on the floor of the master bedroom next to the waterbed. [V8 549, 552] The State also proved that

unidentified, bloody fingerprints were found on an Olympic barbell weight and curl bar in the spare bedroom where Patin's body was found [V8 549, 552, 582; V9 736, 738, 744, 759-60], the DNA profile of the blood on the weight and curl bar was consistent with Patin's [V10 900, 903-04], the weight was consistent with the injuries suffered by both Jones and Patin [V9 795-96], Jones' car was abandoned in a vacant lot [V8 355-63], and an unidentified fingerprint was found on the inside door handle of the car. [V9 616, 761] This circumstantial evidence established that Ballard had been in the home of his friends and neighbors and had touched the frame of their waterbed, but it did not prove that Ballard committed any crime against Jones and Patin.

The State's evidence raised a reasonable hypothesis that someone other than Ballard was responsible for the murders and robbery, left bloody fingerprints on the curl bar and the Olympic barbell weight which could have been the murder weapon, and left another fingerprint on the inside driver's door handle of Jones' abandoned car. Under these circumstances, the trial court violated Ballard's constitutional right to due process of law by denying defense counsel's motions for judgment of acquittal. [V1 204-05; V5 776-86; V10 958-62; V11 1060]

The Law

The due process clauses of the United States and Florida constitutions required the State to prove the identity of the perpetrator beyond a reasonable doubt. See U.S. Const. amends. V and XIV; Art. I, § 9, Fla. Const. "[T]he Due Process Clause protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged." In re Winship, 397 U.S. 358, 375 (1970). "The state bears the responsibility of proving a defendant's guilt beyond and to the exclusion of a reasonable doubt." Long v. State, 689 So.2d 1055, 1057 (Fla. 1997). "A fundamental principle of our criminal law is that the prosecutor must establish beyond a reasonable doubt the identity of the accused as perpetrator of the charged offense." Owen v. State, 432 So.2d 579, 581 (Fla. 2d DCA 1983).

The standard of review for the denial of a motion for judgment of acquittal is *de novo*. Pagan v. State, 830 So.2d 792, 803 (Fla. 2002), cert. denied, 539 U.S. 919 (2003). A special standard of review applies when the only evidence of guilt is circumstantial. Darling v. State, 808 So.2d 145, 155 (Fla. 2002); Jaramillo v. State, 417 So.2d 257 (Fla. 1982). "Where the only proof of guilt is circumstantial, no matter how strongly the

evidence may suggest guilt a conviction cannot be sustained unless the evidence is inconsistent with any reasonable hypothesis of innocence." McArthur v. State, 351 So.2d 972, 976 n.12 (Fla. 1977); Darling, at 155; Jaramillo, at 257.

If the State does not present evidence inconsistent with the defendant's hypothesis of innocence, no view that the jury may lawfully take of the evidence favorable to the State can be sustained under the law; the State's evidence would be insufficient to warrant a conviction as a matter of law. Darling, at 156. "Circumstantial evidence must lead 'to a reasonable and moral certainty that the accused and no one else committed the offense charged." Cox v. State, 555 So.2d 352, 353 (Fla. 1989) (quoting Hall v. State, 90 Fla. 719, 720, 107 So. 246, 247 (1925)). "Circumstances that create nothing more than a strong suspicion that the defendant committed the crime are not sufficient to support a conviction." Cox, at 353.

In Jaramillo v. State, 417 So.2d at 257-258, police found the bodies of two victims who had been shot in the head in the dining-living room area of their residence. The medical examiner determined that the deaths occurred between 2:00 a.m. November 30 and 2:00 a.m. December 1, 1980. The male victim's hands had been tied behind his back with cord, and the female victim's hands had

been handcuffed. The only proof of Jaramillo's involvement in the murders was that his fingerprints were found on a knife on the dining table, on the packaging for a knife found near a coil of cord similar to the cord used to tie the male victim's hands, and on a grocery bag near the table. Identifiable fingerprints which did not belong to Jaramillo were found on the handcuffs, the knife wrapper, and in the area of two bedrooms and closets which had been ransacked. Jaramillo testified that the victim's nephew, who lived with the victims, asked him to help straighten the garage on November 29. While stacking boxes, Jaramillo asked the nephew if he had something to cut them so they could be more easily stacked. The nephew said there was a knife inside a bag on the dining room table. Jaramillo took the knife out of the bag, removed the wrapper, and left the wrapper in the dining room. He used the knife to cut some boxes, put the knife back on the dining room table, and went home around 10:00 p.m. Jaramillo was convicted of the murders and sentenced to death. This Court reversed and remanded with instructions to discharge him because the State's evidence was not legally sufficient. The State's fingerprint evidence was not inconsistent with Jaramillo's reasonable explanation, and the State failed to establish that the prints

could only have been placed on the knife, wrapper, and bag at the time the murder was committed.

The present case is similar to Jaramillo because the State failed to prove that Ballard's fingerprint and limb hair could only have been placed in Jones' bedroom at the time the murders were committed.

The Fingerprint Evidence

A deputy found four fingerprints on the frame of the waterbed near the location of Jones' body. [V8 573-74, 587-88, 591-92, 598] More than a hundred latent prints were lifted from the apartment. [V8 599] Deputy Joseph Barber, a fingerprint examiner for the Collier County Sheriff's Office with twenty years experience [V8 600; V9 601-02, 614], received 118 latent print cards to examine. He found that forty-six of the prints were suitable for comparison. Of those, he was able to identify ten, none of which were made by Ballard.[12] [V9 603-05, 615] Of the four latent prints found on the frame of the waterbed, two were smudges not suitable for identification. [V9 606-07] Two more, Q37 and Q50, had some ridge detail, but Barber could not identify them. [V9 607-09] Nor could he eliminate Ballard as the person who made them. [V9 609]

[12] Three prints were made by Jones, six were made by Patin, and one was made by someone named Freeman. The Freeman print was found on a CD in Jones' car. [V9 605-06]

Barber testified that he had used enlarged photographs of fingerprints for courtroom presentations in the past, but it was not a process used for identification. [V9 612] Barber sent 105 unidentified prints to FDLE. [V9 612-13] One of the unidentified prints which was suitable for comparison came from the inside driver's door handle of Jones' car which had been abandoned in a vacant lot. [V8 355-63; V9 616, 761] Mr. Tabakman, the other Collier County Sheriff's Office fingerprint expert, reviewed Barber's work in this case and agreed with his conclusions. [V9 624-25]

Phillip Balunan, an FDLE crime laboratory analyst with four years experience in fingerprint identification [V9 631], examined the 105 unidentified prints and identified three of them. [V9 635-36] He made the identification about one year after finishing his probation after his training. [V9 660] He was certified by FDLE but not by the International Association of Identification. [V9 663-64] He passed annual proficiency examinations given by FDLE. [V9 666-67] Balunan photographed the latent prints and used the photos to make the identifications. [V9 636] The latent prints can be enhanced by making the photo lighter or darker or by changing the contrast of the photo. [V9 639-40] Balunan identified Q50 as the fingerprint of John Ballard. [V9 641-42] His iden-

tification of the print was subjected to peer review and confirmed by FDLE fingerprint analyst Steven Casper. [V9 667, 670-79]

Because the evidence must be viewed in the light most favorable to the State in reviewing the denial of a motion for judgment of acquittal, see Darling v. State, 808 So.2d at 155, the jury could reasonably find that Balunan's identification of Q50 as Ballard's fingerprint was correct. Nonetheless, the State presented no evidence from which the jury could have reasonably concluded that the fingerprint could only have been made at the time of the murders and robbery. The State's own evidence established that Ballard was a friend and neighbor of Jones and Patin and was a frequent visitor in their apartment. [V8 518, 529-30, 534] In fact, he was a guest in the apartment on Saturday night, the night before the crimes were committed. [V8 518, 529-30, 534] Moreover, the State's evidence established that Jones was a marijuana dealer who conducted most of her drug sales in her bedroom. [V8 520, 536, 543] As a friend and frequent guest, it is likely that Ballard entered her bedroom to participate in a marijuana transaction. The State presented no evidence that was inconsistent with this explanation for the presence of Ballard's fingerprint on the frame of the waterbed. Based upon the evidence

in the record, it is not possible to determine when the fingerprint was made.

The 102 unidentified fingerprints found in the apartment are also significant. Two of those unidentified prints were bloody prints found on the curl bar and Olympic barbell weight in the spare bedroom where Patin's body was found [V8 549, 552, 582; V9 736, 738, 744, 759-60], the DNA profile of the blood was consistent with Patin's [V10 900, 903-04], and the Olympic barbell weight was consistent with the injuries suffered by both Patin and Jones. [V9 795-96] Because the bloody fingerprints were found on objects which could have been used to commit the murders, it is likely that these prints were those of the actual killer. Another of the unidentified prints was found on the inside door handle of the driver's side door of Jones' car which was abandoned in a vacant lot. [V8 355-63; V9, 616, 761] It is also likely that this print was made by the actual killer. Because these prints were not identified, the State's own evidence suggests that the actual killer was someone other than John Ballard.

The Hair Evidence

Dr. Manfred Borges, the medical examiner, found multiple hairs in Jones' right hand under a torn piece of a plastic bag,

which was stuck to her hand. [V8 575-76, 595-96; V9 695-97, 725, 766-69, 776-77, 790, 793, 797-99] He could not say how the hairs got in her hand. [V9 795]

John Kilbourn, a forensic scientist for a private, commercial laboratory [V10 834, 851], examined six hairs that were found in Jennifer Jones' right hand. He compared them to a sample of Jones' head hair and determined that three of the hairs were consistent with her head hair. Two hairs were too short to make any determination. The sixth hair had been cut in two and placed in separate test tubes. This hair was accompanied by PCR extracts from the root and shaft. It was consistent with the known arm hair of John Ballard. [V10 836-39, 852, 857-58] Hairs cannot be absolutely identified by microscopic examination. It is not as scientifically exact as fingerprint or DNA identification. [V10 857-58]

Kilbourn testified that hairs can be transferred from one surface to another, for example, from the carpet to a person's hand. [V10 861-62] Defense witness Ray Wickenhouser, a Louisiana lab director and forensic scientist who specializes in DNA and trace evidence [V10 963-65], also testified that hairs can be transferred from one surface to another, and a hair could be

transferred from a carpet to a hand abutting the carpet. [V10 986-87]

Kilbourn testified that human hair has three growth stages: (1) the anagen phase, during which the hair is growing for two to eight years; (2) the catagen phase, during which growth discontinues, and which lasts a few weeks; and (3) the telogen phase, during which the bulb of the root reduces in size for two to four months until it falls out from washing, brushing, or blowing wind as a naturally shed hair. [V10 839-41, 853-54] A hair in the telogen phase is losely held and can be "forcibly removed" with normal daily activity. In the late telogen phase very little force is required to remove it. [V10 856-57] Defense witness Wickenhouser agreed that the amount of force needed to remove a telogen hair with tissue attached to it is so minimal it could happen in daily life. [V10 984-85] Kilbourn said a hair in the late telogen phase has no viable cellular material attached to the root. [V10 841, 854] When a hair in the anagen phase is forcibly removed, the root is distorted, and there is a lot of tissue attached to it. When a hair in the catagen phase is forcibly removed, the bulb is becoming dehydrated, and there is viable tissue on it that can be tested for DNA. When a hair is in the early telogen phase, there is still enough tissue on it for DNA analysis. [V10 842-43, 854]

Kilbourn determined that the hair consistent with Ballard's arm hair was in the telogen phase. The PCR extracts that came with the hair were from an attempt to do DNA analysis. When Kilbourn saw the hair, there was no cellular tissue left on the hair, so he could not determine whether it was forcibly removed or naturally shed. [V10 843-45, 855, 869]

Patricia Bencivegna, an FDLE DNA analyst [V10 876], conducted PCR analysis of the known blood stain cards for Jennifer Jones, Willie Patin, and John Ballard and the hair, which she cut in two, from Jennifer Jones' right hand. She obtained a DNA profile from the hair that revealed a mixture of profiles. Patin was excluded as a possible source. Jones was included as the source of a minor component in the mixture. Ballard was included as a "possible source" of the mixture. She requested SDR analysis for a higher degree of discrimination. [V10 887-90, 893-94, 910-11] The other hairs from Jones' right hand were not suitable for PCR analysis. [V10 913-15]

Melissa Suddeth, an FDLE DNA analyst and supervisor [V10 928-29], performed STR analysis of the hair from Jones' right hand and found that it matched Ballard's DNA profile. She calculated the frequency of the match as one in every 11.8 quadrillion African-

Americans, one in every 750 trillion Caucasians, and one in 2.5 trillion Southeastern Hispanics. [V10 933-35]

Roger Morrison, a lab director and DNA analyst for the Alabama Department of Forensic Science, who is also engaged in private practice [V10 938-40], testified that DNA testing is possible on a hair with a telogen root if it has a follicular tag, soft tissue associated with the root of the hair. If there is no soft tissue, DNA results cannot be obtained. When there is soft tissue associated with the root of the hair, some force had to be involved to remove the hair from the follicle. However, he could not say how much force was required because there is less and less attachment to the soft tissue as the hair goes through the growth phases. In the later part of the telogen phase, the root disappears, and the hair easily falls out as a shed hair or naturally removed hair. This can occur from normal daily activity. [V10 941-43, 952-54] In the case of a limb hair in the telogen phase with soft tissue attached, a person scratching his arm or leg might produce enough force to forcibly remove the hair. [V10 953-955] If he obtained a 12 out of 13 STR profile on a telogen hair, it would have to have soft tissue associated with it and would

have to be forcibly removed,[13] but he could not determine the amount of force. [V10 943]

From this evidence the jury could reasonably conclude that one of the six hairs found in Jones' hand was a telogen phase limb hair that was "forcibly removed" from the arm of John Ballard. However, the State's own experts admitted that they could not determine the amount of force necessary to remove the hair. It is just as likely that Ballard removed the hair by scratching or rubbing his arm as it is that Jones removed the hair by struggling with Ballard. For that matter, Jones or someone else could have removed the hair by rubbing or scratching Ballard's arm during innocent contact while Ballard was a guest in the bedroom.

There was no evidence to establish when the hair was removed from Ballard's arm. The hair could have come out while Ballard was in Jones' bedroom as a guest, just as he could have left his fingerprint on the waterbed frame while in the bedroom as a guest. Because loose hairs are readily transferred from one surface to another by simple contact, the hair could have originally fallen on the carpet, bed, or other furniture and then transferred to Jones' hand upon contact shortly before or at the time she was

[13] Defense witness Wickenhouser testified that a full DNA profile can be obtained from a telogen hair if it has as few as twenty to fifty cells attached. A naturally shed telogen hair can have enough cells attached, even a flake of dandruff, to obtain a full DNA profile. [V10 975-76] His lab often finds a follicular tag on a naturally shed hair. [V10 982-83]

killed. Thus, the fact that Ballard's arm hair was found in Jones' hand does not establish that Ballard was present at the time she was killed.

Moreover, just as numerous unidentified fingerprints were found in the apartment, numerous unidentified hairs were found in Patin's hands, the apartment, and the car. Dr. Borges found multiple hairs in Patin's left hand [V9 771, 793], but could not say how the hairs got there. [V9 795] Kilbourn examined hundreds of hairs in this case. He identified some of them as those of Jones and Patin. [V10 845] Some of the unidentified hairs were body hairs; he was not given known samples of body hairs for comparison. Some of the unidentified hairs were too short for comparison. There were other hairs he simply could not identify; they might have come from Jones, Patin, or other people who had been in the house. [V10 846]

There were five forcibly removed hairs that Kilbourn could not identify. One of those came from the barbell. [V10 847-48] Several hairs came from a striped shirt. One of those was a forcibly removed hair that he could not identify. [V10 848] There were also nine unidentified limb hairs on the striped shirt. [V10 866] Fifty-nine hairs came from the right hand of Willie Patin. He identified twelve of them as consistent with Patin and twelve

as consistent with Jones. Some were forcibly removed; some were not. There was an unidentified non-Caucasian hair with a telogen root. There was an unidentified Caucasian pubic hair, two unidentified body hairs, four unidentified limb hairs, an animal hair, and a couple of short hair fragments that he could not identify. [V10 848-49, 858-60] Sixty-four hairs or fibers came from Patin's left hand. Twelve of the hairs were consistent with Jones, and forty-one hairs were consistent with Patin. There were also body hairs and hairs that were too short for identification. [V10 849, 861] Six hairs came from a pair of plaid shorts found by the weight bar. Four of them were consistent with Patin. There were two forcibly removed hairs that could not be identified. [V10 861-62] There were also unidentified limb hairs on the plaid shorts. [V10 866] Two body or limb hairs from the spare bedroom door could not be identified. [V10 862]

Numerous hairs were found in Jones' car, including forty-seven unidentified hairs. None of the hairs from the car were consistent with Ballard's known arm hairs. [V10 863] Numerous hairs were found on a torn poster with blood on it. Several of them were unidentified limb and body hairs. [V10 863-64] An unidentified Caucasian pubic hair, an unidentified limb hair, and three unidentified head hairs were found on a piece of carpet and

padding from the hallway. [V10 864] Several unidentified hairs and hair fragments were found in the paper bag investigators placed on Patin's right hand. Two unidentified limb hairs were found in the paper bag placed on Patin's left hand. [V10 869] An unidentified limb hair and several cut hairs were found on Patin's black shorts. [V10 865-66] Several unidentified limb hairs were found on a white sock with blood on it. Numerous hairs, including six unidentified limb hairs, were found on a blue tank top from the spare bedroom. An unidentified hair was found on a black bra from the spare bedroom. [V10 866] An unidentified hair, several short hairs, an eyelash hair, and an eyebrow hair were found on a gray shirt from the spare bedroom. Short, unidentified hairs were found on clothing found under Jones. An unidentified hair fragment was found on carpet from the spare bedroom. [V10 867] An unidentified limb hair was found on carpet under Patin's head. A large number of unidentified limb hairs were found on the sheets used to transport the bodies. [V10 868]

This plethora of unidentified hairs could very well have included hairs from the actual killer of Jones and Patin. Because so many hairs were present but not identified, it is impossible to determine from the State's hair evidence who committed the crimes.

The Vacant Lot

Around 9:00 a.m. on Monday, a deputy responding to a call about an abandoned vehicle found Jones' Mazda in the woods at the back of a vacant lot on Painted Leaf Lane. [V8 555-63] The car had not been reported as stolen, and it did not appear that the ignition had been tampered with. [V8 556-57, 563] Officers who processed the car later found blood and fingerprints. The prints were not identified as coming from John Ballard. [V9 761] Blood from the seat cover had a DNA profile consistent with Willy Patin. [V10 909] The deputy drove past Jones' apartment, which was 1.3 miles from the vacant lot, but he did not see anything out of the ordinary. [V8 558, 560]

Ballard lived on Painted Leaf Lane with his father-in-law Wayne Berry in 1994, when the road was named 28th Avenue Southwest. Berry's address was 6190 28th Avenue Southwest. Berry moved in 1996. [V8 564-66]

Robert King, who lived at 6280 28th Avenue Southwest, testified for the defense that he saw the car in the vacant lot that Monday morning. [V11 1037-40] He said the lot was a place where people liked to party quite often. [V11 1042] King's testimony was not contradicted by the State.

In responding to defense counsel's motion for judgment of acquittal, the prosecutor argued that finding the car on a street with which Ballard was familiar was circumstantial evidence of his identity as the perpetrator of the crimes. [V10 961] Yet King's testimony established that people liked to party at the lot quite often, so numerous people were familiar with the location. Obviously, the actual killer could have abandoned the car in the vacant lot regardless of whether he had ever been on the street before. The fact that Ballard had previously lived in the neighborhood where the car was abandoned is nothing more than coincidence; it has absolutely no probative value in determining the identity of the actual killer.

Motive

During defense counsel's closing argument, he pointed out that there was no evidence of why Ballard would commit the crimes and suggested that there were parties at large who had a far greater motive to try to kill Jones and Patin. [V11 1090] In rebuttal, the prosecutor argued that the motive was money because Jones had at least a thousand dollars; Ballard had witnessed drug deals, knew she had money, and knew she was going to move to Texas. [V11 1091-92] However, there was no evidence Ballard had

ever indicated in any way that he wanted to steal Jones' money or drugs, and no evidence connecting any missing money or drugs to Ballard after the crimes. Taking Jones' money was a generic motive that could be attributed to anyone identified as her killer. There was no evidence at all that Ballard had such a motive.

The defense presented evidence that members of the LaRaza gang committed a drive-by shooting directed at Jones' apartment on February 28, 1990, about a week before the murders and robbery. Ballard assisted the sheriff's deputies investigating the shooting by identifying the car after it was stopped. Donald Tafoya was the driver of the car. Francisco Garcia was arrested for the shooting. There were three other men in the car, Claudio Perez, Alberto Ramirez, and Alejandro Yanez. The gang had about eighty members altogether. [V11 1017-20, 1024-30] Members of that gang must have had some motive for the drive-by shooting. While there is no evidence of what their motive was, it is possible that they were also motivated to rob and kill Jones and Patin a week after the drive-by shooting. The State's only evidence inconsistent with this hypothesis was that Deputy Barber compared Donald Tafoya's known prints with thirty-eight unidentified prints and determined that they were not Tafoya's. [V11 1059] But Tafoya was

only one member of the gang. Any other member of the gang could have robbed and killed Jones and Patin for revenge.

Conclusion

The State's circumstantial evidence was insufficient as a matter of law to establish John Ballard's guilt of the murders and robbery of Jones and Patin. There was no proof that Ballard's fingerprint on the waterbed frame was made at the time of the crimes. There was no proof that Ballard's arm hair found in Jones' hand was removed from his arm at the time of the crimes. The State's evidence was not inconsistent with the hypothesis that the fingerprint was made and the arm hair was removed while Ballard was a guest in the bedroom where his friend Jones conducted her marijuana sales. The State's own evidence suggested that the actual killer left unidentified bloody fingerprints on the curl bar and Olympic barbell weight found in the same room as Patin's body. The DNA profile of the blood was consistent with Patin's, and the weight was consistent with the injuries suffered by both Patin and Jones. The State's own evidence suggested that the actual killer left an unidentified fingerprint on the inside door handle of the driver's side door of Jones' car. The large number of unidentified fingerprints and hairs associated with the

crime made it impossible to determine from the forensic evidence who actually committed the crimes. The judgments and sentences must be reversed, and this case must be remanded to the trial court with directions to discharge John Ballard.

ISSUE II

THE TRIAL COURT ERRED BY FINDING THAT NO DISCOVERY VIOLATION OCCURRED WHEN THE STATE FAILED TO DISCLOSE THE FINGERPRINT COMPARISON CHART PREPARED BY THE STATE'S FINGERPRINT EXPERT FOR USE AS A DEMONSTRATIVE EXHIBIT AT TRIAL.

Phillip Balunan, an FDLE fingerprint analyst [V9 631], identified Q50, a latent print found on the frame of Jones' waterbed [V9 606-09], as the fingerprint of John Ballard. [V9 641-42] Balunan prepared a chart to demonstrate the points he used in reaching this conclusion. [V9 642] Defense counsel objected to the chart and requested a Richardson hearing. [V9 642-43]

In Richardson v. State, 246 So.2d 771, 775-776 (Fla. 1971), this Court held that when the defense calls the trial court's attention to the State's failure to comply with its discovery obligations under Florida Rule of Criminal Procedure 3.220, the court must conduct an adequate inquiry to determine whether the violation was inadvertent or willful, whether the violation was trivial or substantial, and what effect it had on the ability of the defendant to prepare for trial. The court has discretion to determine whether a discovery violation by the State results in harm or prejudice to a defendant, but that discretion can be properly exercised only after the court has made an adequate

Richardson inquiry. Wilcox v. State, 367 So.2d 1020, 1022 (Fla. 1979). In State v. Schoop, 653 So.2d 1016 (Fla. 1995), this Court receded in part from Richardson and Wilcox by holding that failure to conduct an adequate discovery violation inquiry is not *per se* reversible error and is subject to harmless error analysis.

"The purpose of a Richardson inquiry is to ferret out procedural, rather than substantive prejudice." Wilcox, 367 So.2d at 1023. The court must decide whether the discovery violation prevented the defense from properly preparing for trial. Id.

Defense counsel argued that in a deposition Balunan said he used one on one photographs, while the chart used enlargements. Balunan also said in deposition that he did not know how many points of identification he used, while the chart had numerous arrows pointing at points of identification. This information was not provided to the defense before trial nor in the deposition. [V9 642-43] The prosecutor responded that Balunan had not prepared anything to show the jury at trial at the time of the deposition. Also, he was not offering the chart into evidence, but to show how Balunan came to his conclusion. [V9 643] The court excused the jury to conduct a Richardson inquiry. [V9 643-44]

Balunan said he prepared the chart earlier during the week of trial. [V9 644] The points shown on the chart were not the only

ones he used to make the identification. [V9 644-45] The chart was a representation to demonstrate how he conducted his examination. He did not use a set number of points. He plotted ten points on the chart for the demonstration, but there were more than ten points on the latent fingerprint. [V9 645] The chart was prepared with enlarged photos from the latent lift card and the inked print card to which he compared it using one on one photos. [V9 645-46] In his deposition, defense counsel asked if he noted how many points of identification there were, and Balunan answered no. [V9 646] Number one on the chart was Balunan's beginning point. There were many points of identification. Balunan had not made any note or reference in his examination about how many points of identification he had. [V9 647] The numbers on the chart were "not for numerical purposes," he could have used letters. "There's no numerical value as to the points of identification." [V9 648]

Defense counsel argued that he inquired about points of identification, and Balunan did not give him any, but now they were going to be discussing numbers. He should have been given that information in advance. He would have prepared differently. He could have looked at it and gotten another expert if he needed one. [V9 649] The prosecutor replied that the points on the chart

were not the only ones Balunan relied on. He was just using the chart to demonstrate how he concluded this was Ballard's print. The fact that the chart said ten did not make any difference. [V9 649-50] The court ruled that there was no discovery violation and permitted use of the chart for demonstrative purposes. [V9 651]

The trial court erred by ruling that there was no discovery violation. Rule 3.220(b)(1)(K) required the prosecutor to disclose and to allow the defense to inspect, copy, test, and photograph "any tangible papers or objects that the prosecuting attorney intends to use in the hearing or trial and that were not obtained from or that did not belong to the defendant." See Shibble v. State, 865 So.2d 665, 668-669 (Fla. 4th DCA 2004) (failure to disclose expert report used by prosecutor for cross-examination was a discovery violation under rule 3.220(b)(1)(K) requiring trial court to conduct Richardson inquiry). The chart was a tangible object that was not obtained from and did not belong to John Ballard. The prosecutor intended to and, after the court's erroneous ruling, did use the chart as a demonstrative aid so Balunan could show the jury how he went about identifying Ballard's fingerprint. [V9 651-57]

The prosecutor's failure to disclose the existence of the chart before Balunan testified at trial cannot be excused because

the chart was not prepared until earlier during the week of trial. Florida Rule of Criminal Procedure 3.220(j) imposed a continuing duty to promptly disclose the chart when the prosecutor learned of its existence. Barrett v. State, 649 So.2d 219, 221 (Fla. 1994).

Because the trial court erroneously determined that there was no discovery violation, the court failed to make the findings required by Richardson. The court did not determine whether the violation was intentional or inadvertent, whether it was trivial or substantial, and, most importantly, what impact it had on the ability of the defense to prepare for trial. Defense counsel told the court that he needed to know about the chart and the information it displayed in order to determine whether he needed to employ an independent expert. An independent expert could have assisted the defense by determining the legitimacy of Balunan's methods and his identification of the fingerprint.

The second aspect of procedural prejudice the trial court was required to consider was the appropriate sanction for the prosecutor's discovery violation. Wilcox, 367 So.2d at 1023. Under Florida Rule of Criminal Procedure 3.220(n), the court could have granted a mistrial, ordered the State to permit the defense to inspect the chart, granted a continuance for the defense to consult an independent expert, assessed the costs for the

independent expert against the State, prohibited the State from using the chart and the information it contained at trial, and/or instituted contempt proceedings against the prosecutor. Id. Because the court erroneously found that there was no discovery violation, failed to make the requisite findings, and failed to determine the appropriate sanctions for the violation, this Court must impose an "extraordinarily high" "standard for deeming the violation harmless." Cox v. State, 819 So.2d 705, 712 (Fla. 2002), cert. denied, 537 U.S. 1120 (2003). As explained in Cox,

> A defendant is presumed to be procedurally prejudiced "if there is a reasonable probability that the defendant's trial preparation or strategy would have been materially different had the violation not occurred." Pomeranz v. State, 703 So.2d 465, 468 (Fla. 1997)(quoting State v. Schoop, 653 So.2d 1016, 1020 (Fla. 1995)). Indeed, "only if the appellate court can say beyond a reasonable doubt that the defense was not procedurally prejudiced by the discovery violation can the error be considered harmless." Id.

819 So.2d at 712.

Ballard's defense was procedurally prejudiced by the State's discovery violation. In the deposition, Balunan told defense counsel he did not know how many points of comparison he used to make the identification, yet his chart had ten points of comparison marked, and Balunan testified before the jury that

there were even more points that he did not mark. [V9 657] If defense counsel had known about the chart and the information shown on the chart he could have consulted an independent expert to advise him about the validity of Balunan's methods and identification. Depending upon the independent expert's findings, he may have used the expert as a witness at trial to rebut Balunan's testimony. Because of the State's discovery violation, defense counsel was not properly prepared to respond to Balunan's testimony as aided by the chart. Thus, Ballard's constitutional rights to effective assistance of counsel and a fair trial under the Sixth and Fourteenth Amendments to the United States Constitution and Article I, sections 9 and 16(a) of the Florida Constitution were violated by the trial court's error in finding that no discovery violation had occurred. This Court must reverse the judgments and sentences and remand this case for a new trial.

ISSUE III

THE TRIAL COURT VIOLATED THE EIGHTH AMENDMENT BY FINDING THAT THE DEFENSE FAILED TO PROVE THE MITIGATING CIRCUMSTANCES OF BRAIN DAMAGE AND BALLARD'S IMPAIRED CAPACITY TO CONFORM HIS CONDUCT TO THE REQUIREMENTS OF LAW.

Defense counsel presented uncontroverted and believable evidence that John Ballard suffered from frontal lobe brain damage and his ability to conform his conduct to the requirements of law was substantially impaired. [V5 877-97] The trial court violated the Eighth Amendment by finding that these mitigating circumstances were not proved by the defense. [V2 381-83]

The Eighth Amendment requires individualized consideration of the character and record of the defendant and any circumstances of the offense which may provide a basis for a sentence less than death. Sumner v. Shuman, 483 U.S. 66, 72-76 (1987); Woodson v. North Carolina, 428 U.S. 280, 304 (1976). Thus, the United States Supreme Court has held, "in capital cases, the sentencer may not refuse to consider or be precluded from considering any relevant mitigating evidence." Hitchcock v. Dugger, 481 U.S. 393, 394 (1987); Eddings v. Oklahoma, 455 U.S. 104, 113-114 (1982). To insure fairness and consistency, this Court must conduct a

meaningful independent review of the defendant's record and cannot ignore evidence of mitigating circumstances. Parker v. Dugger, 498 U.S. 308, 321 (1991).

In a capital case, a mitigating circumstance is any aspect of a defendant's character or record and any of the circumstances of the offense that reasonably may serve as a basis for imposing a sentence less than death. Lockett v. Ohio, 438 U.S. 586, 604 (1978); Crook v. State, 813 So.2d 68, 74 (Fla. 2002). "Whenever a reasonable quantum of competent, uncontroverted evidence of mitigation has been presented, the trial court must find that the mitigating circumstance has been proved." Crook, at 74 (quoting Spencer v. State, 645 So.2d 377, 385 (Fla. 1994)). "All 'believable and uncontroverted' mitigating evidence contained in the record must be considered and weighed in the sentencing process." Crook, at 74 (citing Robinson v. State, 684 So.2d 175, 177 (Fla. 1996)). A trial court may reject proffered mitigation only if the record provides competent, substantial evidence to support that decision. Crook, at 74 (citing Mahn v. State, 714 So.2d 391, 401 (Fla. 1998); Spencer, at 385; Nibert v. State, 574 So.2d 1059, 1062 (Fla. 1990)).

This Court has adopted the following standards of review for mitigating circumstances:

> (1) whether a particular circumstance is truly mitigating in nature is a question of law and subject to de novo review by this Court; (2) whether a mitigating circumstance has been established by the evidence in a given case is a question of fact and subject to the competent, substantial evidence standard; and (3) the weight assigned to a mitigating circumstance is within the trail court's discretion and subject to the abuse of discretion standard.

Spann v. State, 857 So.2d 845, 858-859 (Fla. 2003).

Both brain damage and impaired capacity to conform one's conduct to the requirements of law are mitigating circumstances as a matter of law. "Clearly, the existence of brain damage is a significant mitigating factor that trial courts should consider in deciding whether a death sentence is appropriate in a particular case." Crook, at 75 (citing Robinson v. State, 761 So.2d 269, 277 (Fla. 1999)). Brain damage is a factor in the defendant's background that would mitigate against imposition of the death penalty under section 921.141(6)(h), Florida Statutes (1997). Substantially impaired capacity to conform one's conduct to the requirements of law is a statutory mitigating circumstance provided by section 921.141(6)(f), Florida Statutes (1997). Thus, the question to be decided on this appeal is whether competent, substantial evidence supported the brain damage and impaired capacity mitigating circumstances advocated by the defense.

Dr. Henry Dee, a clinical neuropsychologist, interviewed and tested Ballard on March 8 and April 12, 2002. [V5 877-82] Dr. Dee determined that Ballard's full scale IQ was 90, which is below average. His full scale memory score was 89. Dr. Dee found there was a significant discrepancy between Ballard's verbal IQ, which fell in the 27th percentile of the population, and his nonverbal IQ, which was at the 61st percentile. Such a discrepancy is always found in people like Ballard with a history of a learning disability, especially reading difficulties. [V5 882-83, 892] The discrepancy between the verbal IQ and nonverbal IQ also raised the question of brain damage. [V5 883-84, 892] Ballard's performance was normal on the Benton visual retention test, the judgment of line orientation test, facial recognition test, visual form discrimination test, and Wisconsin card sorting test. His performance on the category test, 63 errors, was in the brain damage range. This test result, in combination with the normal scores on the other tests, was a reliable indication of frontal lobe damage. [V5 884-85] The category test is a more sensitive measure of frontal lobe damage than radiographic tests. [V5 892] Dr. Dee could not determine when the brain damage occurred from Ballard's history. People with longstanding brain damage of this type have long histories of odd behavior. They are very

impulsive. Ballard's history of frequent job changes and running away was consistent with frontal lobe damage. [V5 885-88] Such brain damage is permanent. [V5 890] The way the brain is connected is impaired. The normal connections are gone and are not coming back. [V5 896-97] Dr. Dee concluded that Ballard suffered from an extreme mental or emotional disturbance at the time of the offense. [V5 890-91, 894] Frontal lobe syndrome "is by definition serious, there's so much disorganization of behavior." [V5 893] Ballard's ability to conform his conduct to the requirements of law was substantially impaired by the brain damage, which "destroys one's inhibitory controls. You may know it's wrong, but still can't keep yourself from doing it." [V5 895-96]

Dr. Dee's testimony was competent, substantial evidence that Ballard suffered from frontal lobe brain damage and substantially impaired ability to conform his conduct to the requirements of law. His testimony was believable and was not contradicted by any other evidence in the record. Therefore, the trial court was required to find that these mitigating circumstances had been proven by the defense and then to determine the weight to be given them in deciding the appropriate sentence. Crook v. State, 813 So.2d at 76. The trial court's failure to find and weigh the

brain damage and impaired capacity mitigating circumstances violated the Eighth Amendment. Eddings v. Oklahoma, 455 U.S. at 113-115.

This Court adopted the United States Supreme Court's harmless error analysis for constitutional error set forth in Chapman v. California, 386 U.S. 18, 24 (1967), in State v. DiGuilio, 491 So.2d 1129, 1134-35 (Fla. 1986), and recently reaffirmed DiGuilio in Williams v. State, 863 So.2d 1189 (Fla. 2003). Under this test, the question is whether there is a reasonable possibility that the trial court's error in failing to find and weigh the mitigating circumstances of frontal lobe brain damage and Ballard's substantially impaired capacity to conform his conduct to the requirements of law affected the court's decision to sentence Ballard to death. The error necessarily affected the court's weighing of the aggravating and mitigating circumstances because the court failed to find and weigh two of the most important mitigating circumstances in this case. This Court cannot be certain what weight the trial court would give to these mitigating circumstances. Because John Ballard's life is at stake, this Court must not speculate about the affect of the trial court's constitutional error on its sentencing decision. As in Crook, 813 So.2d at 78, this Court must vacate the sentences of

death and remand this case to the trial court to reconsider and reweigh all available mitigating evidence against the aggravating factors, and to determine the proper penalty in accordance with Florida law and the Eighth Amendment.

ISSUE IV

THE FLORIDA DEATH PENALTY STATUTE IS UNCONSTITUTIONAL BECAUSE IT VIOLATES THE SIXTH AMENDMENT RIGHT TO HAVE AGGRAVATING CIRCUMSTANCES FOUND BY THE JURY.

Defense counsel moved to bar imposition of the death penalty on the ground that Florida's capital sentencing procedure is unconstitutional under the Sixth, Eighth, and Fourteenth Amendments and the decision in Ring v. Arizona, 536 U.S. 584 (2002). [V1 50-68; V4 671-77, 681] The court denied the motion. [V4 681-82] Defense counsel renewed the motion at the penalty phase of the trial. [V5 787-88] The court sentenced Ballard to death for the murders of Jennifer Jones and Willie Patin upon finding three aggravating circumstances: 1. Both murders were heinous, atrocious, or cruel.[14] [V2 378-79] 2. The murders were committed during the commission of a robbery.[15] [V2 380] 3. Ballard was previously convicted of another capital felony, the contemporaneous murder convictions.[16] [V2 380-81]

The question presented by this appeal is whether the Florida death penalty statute, section 921.141, Florida Statutes (1997),

[14] § 921.141(5)(h), Fla. Stat. (1997).
[15] § 921.141(5)(d), Fla. Stat. (1997).
[16] § 921.141(5)(b), Fla. Stat. (1997).

is unconstitutional because it violates the Sixth Amendment as interpreted by the United States Supreme Court in Ring v. Arizona, 536 U.S. at 609, to require aggravating circumstances which are necessary for the imposition of a death sentence to be found by a jury.[17] This is a pure question of law, so the standard of review is *de novo*. State v. Glatzmayer, 789 So.2d 297, 301 n.7 (Fla. 2001); Armstrong v. Harris, 773 So.2d 7, 11 (Fla. 2000).

This Court has rejected arguments that the decision in Ring v. Arizona renders the Florida death penalty statute unconstitutional under the mistaken belief that this Court is bound by the United States Supreme Court's decisions in Hildwin v. Florida, 490 U.S. 638 (1989), Spaziano v. Florida, 468 U.S. 447 (1984), Barclay v. Florida, 463 U.S. 939 (1983), and Proffitt v. Florida, 428 U.S. (1976), to uphold the statute. See Bottoson v. Moore, 833 So.2d 693, 695 n.4 (Fla.), cert. denied, 537 U.S. 1070 (2002); King v. Moore, 831 So.2d 143, 144 n.4 (Fla.), cert. denied, 537 U.S. 657 (2002). In both Bottoson and King, this Court quoted Rodriquez de Quijas v. Shearson/American Express, 490 U.S. 477, 484 (1989):

> If a precedent of this Court has direct application in a case, yet appears to rest on reasons rejected in some other line of decisions, the [other courts] should follow the case which directly controls, leaving to this Court the prerogative of overruling

[17] There is one exception to this rule. The judge alone may find an aggravating circumstance based on past convictions. Ring, at 597 n.4; Almendarez-Torres v. United States, 523 U.S. 224 (1998); Duest v. State, 855 So.2d 33, 48 (Fla. 2003).

its own decisions.

Bottoson, at 695; King, at 144-45. Moreover, this Court continues to rely upon its decisions in Bottoson and King to reject claims for relief pursuant to Ring v. Arizona. See, e.g., Duest v. State, 855 So.2d 33, 48 (Fla. 2003).

The flaw in this Court's reasoning is that Ring v. Arizona does not belong to a separate line of decisions apart from those upholding the Florida death penalty statute. Instead, Ring is the most recent decision of the United States Supreme Court in a line of cases beginning with Proffit in which the Court has addressed the constitutional validity of judicial findings of aggravating circumstances in capital cases. Ring is especially significant because it expressly overrules the Court's prior precedent on the precise issue presented by this case.

In Proffitt v. Florida, 428 U.S. 242 (1976), the Court did not address the requirements of the Sixth Amendment; instead, the Court was concerned with whether the Florida capital sentencing statute violated the Eighth Amendment by providing for the arbitrary and capricious imposition of the death penalty. Nonetheless, the Court rejected Proffitt's complaint that the judge, rather than the jury, made the findings of aggravating and mitigating circumstances to support a death sentence: "This Court

. . . has never suggested that jury sentencing is constitutionally required." Id., at 252.

Barclay v. Florida, 463 U.S. 939 (1983), approved the trial court's finding of non-statutory aggravating circumstances. The decision did not address the question of whether the judge or jury must be the finder of fact for aggravating circumstances.

In Spaziano v. Florida, 468 U.S. 447 (1984), the petitioner argued that to allow a judge to override a jury life recommendation and impose a death sentence violated the Fifth, Sixth, Eighth, and Fourteenth Amendments. The Court rejected each of those arguments. The Court specifically held that the Sixth Amendment does not guarantee the right to a jury determination of the appropriate punishment. Id., at 459.

Hildwin v. Florida, 490 U.S. 638 (1989), is the first of these cases to directly rule on the question presented here, whether the Sixth Amendment requires a jury finding of aggravating circumstances necessary to impose the death penalty. The Court began its analysis by observing that the Sixth Amendment "does not forbid the judge to make the written findings that authorize imposition of a death sentence *when the jury unanimously recommends the death sentence.*"[18] Id., at 640 (emphasis added).

[18] This raises the question, which cannot and need not be decided in this case, whether Hildwin might have been decided differently if the jury recommendation had not been unanimous.

The Court then quoted McMillan v. Pennsylvania, 477 U.S. 79, 93 (1986), for the proposition that "there is no Sixth Amendment right to jury sentencing, even where the sentence turns on specific findings of fact."[19] Hildwin, at 640. The Court concluded that "the Sixth Amendment does not require that the specific findings authorizing the imposition of the sentence of death be made by the jury." Id., at 640-41.

In Walton v. Arizona, 497 U.S. 639, 648 (1990), the Court relied upon and quoted its holding in Hildwin to uphold the Arizona capital sentencing statute. The Arizona statute did not provide for any jury participation in the capital sentencing process, and required the trial judge to hear the evidence, make findings of fact regarding the aggravating and mitigating circumstances, and determine the appropriate sentence. The Court explained its understanding of the Florida capital sentencing process upheld in Hildwin:

> It is true that in Florida the jury recommends a sentence, but it does not make specific factual findings with regard to the existence of mitigating or aggravating circumstances and its recommendation is not binding on the trial judge. A Florida trial court no more has the assistance of a jury's findings of fact with respect to sentencing issues than does a trial judge in Arizona.

[19] McMillan upheld the Pennsylvania mandatory minimum sentencing statute, which allowed the judge to find by a preponderance of the evidence that the defendant possessed a firearm during the commission of the crime.

Walton, at 648. The Court rejected Walton's claim that aggravating circumstances were elements of the offense which must be found by a jury: "[W]e cannot conclude that a State is required to denominate aggravating circumstances 'elements' of the offense or permit only a jury to determine the existence of such circumstances." Id., at 649.

However, in Ring v. Arizona, 536 U.S. 584, 588 (2002), the Court expressly overruled its decision in Walton. By overruling Walton, the Court necessarily overruled Hildwin because the Hildwin holding was the principal basis for the Walton decision. Thus, appellant is not asking this Court to overrule the United States Supreme Court's decision in Hildwin; that Court has already done so. This Court is required to follow the United States Supreme Court's interpretation of the Sixth Amendment. That Court's current interpretation of the Sixth Amendment requires the jury to find the existence of aggravating circumstances necessary for the imposition of the death penalty. Ring, at 609.

Under Florida law, there can be no doubt that findings of aggravating circumstances are necessary for the imposition of the death penalty. As this Court recognized in State v. Dixon, 283 So.2d 1, 9 (Fla. 1973), the statutory aggravating circumstances "actually define those crimes . . . to which the death penalty is

applicable in the absence of mitigating circumstances." The death penalty is not permitted where no valid aggravating circumstances exist. Elam v. State, 636 So.2d 1312, 1314-15 (Fla. 1994); Banda v. State, 536 So.2d 221, 225 (Fla. 1988), cert. denied, 489 U.S. 1087 (1989).

Because findings of aggravating circumstances are necessary to the imposition of the death penalty under the Florida death penalty statute, the Sixth Amendment, as interpreted in Ring, requires those findings to be made by a jury. Yet section 921.141, Florida Statutes, requires the findings of aggravating circumstances to be made by the sentencing judge instead of the jury. As the United States Supreme Court recognized in Walton, at 648, "A Florida trial court no more has the assistance of a jury's findings of fact with respect to sentencing issues than does a trial judge in Arizona." Therefore, section 921.141 is just as unconstitutional under the Sixth Amendment as the Arizona capital sentencing statute, and the trial court erred when it denied defense counsel's motion to declare the Florida capital sentencing statute unconstitutional pursuant to Ring. Because the death penalty statute is unconstitutional, there is no lawful authority for the imposition of any death sentence in Florida, and the death sentences imposed on Ballard should be vacated. Moreover, the

judge's denial of defense counsel's motion violated his Sixth Amendment right to a jury trial, which is structural error that can never be found harmless. Sullivan v. Louisiana, 508 U.S. 275, 281-82 (1993).

This Court has held that there is no Ring violation when the aggravating circumstances found by the judge include commission during the course of a felony and prior conviction of a capital or violent felony, as in this case. Robinson v. State, 865 So.2d 1259, 1265 (Fla. 2004); Owen v. Crosby, 854 So.2d 182, 193 (Fla. 2003).

However, under the United States Supreme Court's analysis of death sentencing systems, Florida is categorized as a "weighing" state. Parker v. Dugger, 498 U.S. 308, 318 (1991). In a weighing state,

> when the sentencing body is told to weigh an invalid factor in its decision, a reviewing court may not assume it would have made no difference if the thumb had been removed from death's side of the scale. When the weighing process itself has been skewed, only constitutional harmless-error analysis or reweighing at the trial or appellate level suffices to guarantee that the defendant received an individualized sentence.

Stringer v. Black, 503 U.S. 222, 232 (1992).

In this case, the sentencing judge found three aggravating circumstances, only two of which, prior convictions for capital

felonies and commission during the course of a robbery, he was permitted to find pursuant to Ring. Because Ring requires a jury to find all aggravating circumstances other than those based upon the defendant's prior conviction record, the judge's finding of the heinous, atrocious, or cruel aggravating circumstance was constitutionally invalid. Thus, the judge placed a thumb on death's side of the scale. This Court cannot assume that the thumb made no difference in the judge's weighing process when determining the sentence to be imposed. Instead, this Court must engage in constitutional harmless error analysis.

This Court adopted the United States Supreme Court's harmless error analysis for constitutional error set forth in Chapman v. California, 386 U.S. 18, 24 (1967), in State v. DiGuilio, 491 So.2d 1129, 1134-35 (Fla. 1986), and recently reaffirmed DiGuilio in Williams v. State, 863 So.2d 1189 (Fla. 2003). This Court explained,

> The test is not a sufficiency-of-the-evidence, a correct result, a not clearly wrong, a substantial evidence, a more probable than not, a clear and convincing, or even an overwhelming evidence test. Harmless error is not a device for the appellate court to substitute itself for the trier-of-fact by simply weighing the evidence. The focus is on the effect of the error on the trier-of-fact. The question is whether there is a reasonable possibility that the error affected the verdict. The burden to show the error was harmless must remain on the state. If the appellate court cannot

> say beyond a reasonable doubt that the error did not affect the verdict, then the error is by definition harmful.

Id., at 1189-1190 (quoting DiGuilio, at 1139).

Because the sentencing judge in this case found an aggravating circumstance he was not permitted to find under Ring's interpretation of the Sixth Amendment, gave great weight to that circumstance, and found numerous mitigating circumstances to be weighed against the two valid aggravating factors {V2 281-88], the constitutionally invalid finding must have affected his decision to sentence Ballard to death. This is especially true because the heinous, atrocious, or cruel factor is one of the most serious aggravating factors. See Cox v. State, 819 So.2d 705, 723 (Fla. 2002). The death sentences must be vacated, and this case must be remanded for entry of life sentences or a new penalty trial in which Ballard is accorded his Sixth Amendment right to have the jury determine whether the prosecution proves the existence of aggravating circumstances beyond a reasonable doubt.

CONCLUSION

Appellant respectfully requests this Court to reverse the judgments and sentences and remand to the trial court with

instructions to discharge appellant (ISSUE I), to grant appellant a new trial (ISSUE II), or to resentence appellant (ISSUES IV and V).

CERTIFICATE OF SERVICE

I certify that a copy has been mailed to Stephen D. Ake, Concourse Center #4, 3507 E. Frontage Rd. - Suite 200, Tampa, FL 33607, (813) 287-7900, on this _____ day of , .

CERTIFICATION OF FONT SIZE

I hereby certify that this document was generated by computer using Microsoft Word with Courier New 12-point font in compliance with Fla. R. App. P. 9.210 (a)(2).

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