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

REPLY BRIEF OF APPELLANT

JAMES MARION MOORMAN
PUBLIC DEFENDER
TENTH JUDICIAL CIRCUIT

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PRELIMINARY STATEMENT

This brief is filed on behalf of the appellant, John Robert Ballard, in reply to the Answer Brief of the appellee, the State of Florida. Appellant will rely upon the argument presented in his initial brief on Issue II.

ARGUMENT

ISSUE I

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

Appellee's truncated quotation from Barwick v. State, 660 So.2d 685, 694 (Fla. 1995), cert. denied, 516 U.S. 1097 (1996), receded from on other grounds, Topps v. State, 865 So. 2d 1253 (Fla. 2004), Answer Brief, at 46, fails to convey the full meaning of the passage quoted. This Court explained the trial court's role in ruling on a judgment of acquittal in a circumstantial evidence case as follows:

> In a circumstantial evidence case such as this, a judgment of acquittal is appropriate if the State fails to present evidence from which the jury can exclude every reasonable hypothesis except that of guilt. Atwater v. State, 626 So.2d 1325, 1328 (Fla. 1993), cert. denied, 511 U.S. 1046, 114 S.Ct. 1578, 128 L.Ed.2d 221 (1994); State v. Law, 559 So.2d 187, 188 (Fla. 1989). If a case is to proceed to trial where the jury can determine whether the evidence presented is sufficient to exclude every reasonable hypothesis of

> innocence beyond a reasonable doubt, the trial judge must first determine there is competent evidence from which the jury could infer guilt to the exclusion of all other inferences. Law, 559 So.2d at 189. If there is an absence of such evidence, a judgment of acquittal is appropriate.

Barwick, 660 So.2d at 694.

The State's circumstantial evidence was legally insufficient for the jury to infer Ballard's guilt of the murders and robbery of Jennifer Jones and Willie Patin *to the exclusion of all other inferences* because the State did not and could not prove *when* Ballard's fingerprint was placed on the frame of Jones' waterbed nor *when* his limb hair was removed from his arm or leg. The State's own evidence proved that Ballard was a friend, neighbor, and frequent guest of Jones and Patin and that he was a guest in their apartment the night before they were killed. [V8 518, 529-30, 534] No reasonable juror could conclude that the fingerprint and hair must have been placed at the scene at the time of the murders and at no other time. FDLE fingerprint expert Phillip Balunan, who identified the fingerprint as Ballard's [V9 641-642], testified that there is no scientific method to determine the age of a fingerprint or how long it has been in place. [V9 658, 665] When the State fails to prove that fingerprints could only have been made at the time of the crime, the fingerprint evidence is insufficient to convict. Jaramillo v. State, 417 So.2d 257 (Fla. 1982).

Appellee incorrectly asserts that this fingerprint was found in a location where Jones was known to keep her money. Answer Brief, at 60. Ariana Harralambus testified that Jones kept her money "in her purse or under her waterbed mattress, *the top corner or the bottom corner* and in a shoe box in her closet." [Emphasis added.] [V8 521] The fingerprint was found on the side of the waterbed frame. [V8 587] There was no testimony that it was near the top corner or bottom corner of the waterbed mattress.

The State presented no testimony about when the hair was removed from Ballard's arm or leg. Instead, the State presented evidence about the amount of force needed to remove the hair. John Kilburn, a private forensic scientist [V10 834, 851] who determined that the microscopic characteristics of one of six hairs found in Jones' right hand was consistent with the known arm hair of Ballard [V10 836-39, 852, 857-58], testified that the hair was in the telogen phase [V10 843-45, 855], and a hair in the telogen phase is loosely held and can be "forcibly removed" with normal daily activity. [V10 856-57] Roger Morrison, a lab director and DNA analyst for the Alabama Department of Forensic Science [V10 938-40], testified for the State that a limb hair in the telogen phase with soft tissue attached could be removed by a person scratching his arm or leg. [V10 953-55]

Dr. Borges, the medical examiner who performed the

autopsies [V9 763-768], testified that he found multiple hairs, including the one subsequently identified as Ballard's limb hair, 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] Dr. Borges could not say how the hairs got into her hand. [V9 795] The hairs could have been on the torn plastic bag prior to the murders. The State presented no evidence to explain how or when the piece of torn plastic got into Jones' hand.

Because the State's own evidence proved that the hair in question could have been removed from Ballard's arm or leg through normal daily activity or scratching, no reasonable juror could conclude that the hair could only have been removed during a struggle at the time of the murders. Because loose hairs are readily transferred from one surface to another by contact [V10 861-62], the hair could have come out from normal daily activity or scratching at any time Ballard was in Jones' apartment and could have ended up on the palm of her hand at the time of her death because she had recently touched the surface where the hair was resting.

Appellee incorrectly asserts that Jones had Patin's blood on her hand. Answer Brief, at 51. FDLE serologist Patricia Bencivegna actually testified that she found a DNA mixture from Jones' right hand fingernails. Ballard was excluded from this mixture. Neither Patin nor Jones could be excluded. [V10 916] This was not a positive identification of blood from

Patin. The State presented absolutely no evidence that the DNA mixture had anything to do with Ballard. Appellee's further assertion that this testimony was evidence that Jones touched Ballard in self-defense, Answer Brief, at 52, is nothing more than sheer speculation.

Aside from the legally insufficient fingerprint and hair evidence, the State presented no evidence to establish Ballard's identity as the perpetrator of the murders and robbery. The mere fact that Jones' car was found abandoned in a vacant lot 1.3 miles from Jones' apartment [V8 555-63] in a neighborhood where Ballard had lived in the past [V8 564-66] does not constitute competent, substantial evidence that Ballard was the perpetrator. The State presented no evidence to tie Ballard to the car – no eyewitnesses, no fingerprints, no hairs, no blood, nothing to establish that Ballard was ever in the car. Moreover, the State presented no evidence to link Ballard to the money and drugs missing from Jones' apartment.

The State was the only party in the trial court to have a burden of proof. Ballard had no obligation to present any evidence. He had no obligation to testify to explain when he made the fingerprint nor when and how the limb hair was removed from his arm or leg. Ballard had the constitutional right not to testify under the Fifth and Fourteenth Amendments, and it would be a violation of that right to infer his guilt from his silence. See Griffin v. California, 380 U.S. 609 (1965). The State had the burden to present

competent, substantial evidence establishing Ballard's guilt beyond a reasonable doubt by proving that the fingerprint and hair could only have been placed at the scene at the time of the offenses and at no other time. Because the State failed to carry its burden of proof, Ballard must be acquitted as a matter of law. See Barwick v. State, 660 So.2d at 694; Long v. State, 689 So.2d 1055 (Fla. 1997). In Long, at 1058, citing Jaramillo v. State, this Court observed, "even where evidence does produce a positive identification, such as fingerprints, the State must still introduce some other evidence to link a defendant to a crime."

As stated by the United States Supreme Court, "the Due Process Clause of the Fourteenth Amendment protects a defendant in a criminal case against conviction 'except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged.'" Jackson v. Virginia, 443 U.S. 307, 315 (1979). The State failed to carry its burden of proof in this case. This Court must reverse the judgments and sentences for murder and robbery and remand this case to the trial court with instructions to discharge John Ballard.

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.

In rejecting Dr. Dee's diagnosis that John Ballard suffered from frontal lobe brain damage, the trial court emphasized Dr. Dee's inability to determine when and how the brain damage occurred [V2 381], the absence of "truly objective tests" such as X-rays, CT scans, PT scans, or MRI's, and the success of his ten-year marriage. [V2 382] Regarding objective tests, the court plainly failed to understand Dr. Dee's testimony. The psychological tests he administered to Ballard are objective scientific tests that have been validated and accepted by the scientific community to identify frontal lobe brain damage. Moreover, most of the tests were developed at the University of Iowa while Dr. Dee was the director of the laboratory there, so he is particularly qualified as an expert on the tests. [V5 880-82] Dr. Dee does not refer patients to medical doctors for the kinds of physical tests listed by the court; instead, medical doctors refer their patients to Dr. Dee for the administration of his psychological tests and expert opinion. [V2 894] Dr. Dee's psychological tests are more sensitive indicators of prefrontal lobe damage than radiographic tests. [V2 892]

The tests given to John Ballard established the existence of frontal lobe damage. First, there was a significant discrepancy between Ballard's verbal and nonverbal IQ. He scored in the 27th percentile of the population on the verbal IQ test and in the 61st percentile of the population on the

nonverbal IQ test. This discrepancy "strongly raises the question of whether or not there's some sort of abnormality." [V5 882-83] There was a 22- point discrepancy between the results of these two tests, and that discrepancy was a reliable indication of brain damage. [V5 883-84] Dr. Dee wanted further evidence of the brain damage and found it in Ballard's deficient performance in the category test. People with brain damage make 50 or more errors on that test, and Ballard made 63 errors. The result on this test was a reliable indication of frontal lobe damage. [V5 884-885] People like Ballard "always . . . have a history of a learning disability, especially reading difficulties. And we know that he did have a history of learning problems. He was in SLD classes in school." [V2 883] Thus, Ballard's learning disability, which the trial court found to have been sufficiently proven by Dr. Dee's testimony [V2 383], was actually a symptom of the brain damage.

Given that Dr. Dee conducted objective scientific tests, which he is particularly qualified to administer and interpret, and concluded that there was reliable evidence of frontal lobe damage, the inability to determine when and how the damage was caused is immaterial. Dr. Dee attributed Ballard's childhood history of running away, his childhood learning difficulties, and his adult history of frequently changing jobs to the brain damage [V2 883, 887-88, 891], so we know that the damage was a long-standing condition that

existed prior to and at the time of the alleged offenses.

The trial judge rejected the statutory impaired capacity mitigating circumstance because she "recalls no testimony from Dr. Dee that would establish the existence of this mitigating factor[.]" [V2 383] Yet Dr. Dee testified:

> Q With regard to whether the Defendant at the time – or did Mr. Ballard have [the] ability to appreciate the criminality of his conduct or to conform his conduct to the requirements of the laws, would that be substantially impaired as a result of this illness?
> A No and yes.
> Q This type of injury impairs a person's ability to –
> A A way of describing it would be, it destroys one's inhibitory controls. You may know it's wrong, but still can't keep yourself from doing it.
> Q Impulsive.
> A Yes, extremely impulsive.

[V5 895-96] The trial judge is not entitled to reject a proposed mitigating circumstance that is supported by competent, substantial evidence solely because the judge cannot remember that the evidence was presented.

ISSUE IV

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

Appellee argues that this Court "has consistently

maintained that, unlike the situation in Arizona, the statutory maximum sentence for first degree murder in Florida is death." Answer Brief, at 87. The problem with this Court's analysis and the State's argument is that the State of Arizona made the same argument and the United States Supreme Court rejected it in Ring v. Arizona, 536 U.S. 584, 603-605 (2002). Arizona argued that first-degree murder was punishable by "death or life imprisonment" under Ariz. Rev. Stat. Ann. § 13-1105(c), so Ring was sentenced within the range of punishment authorized by the jury verdict finding him guilty of first-degree murder. The United States Supreme Court rejected the argument because Arizona law required the sentencing judge to find the existence of at least one aggravating factor before Ring could be sentenced to death. Id., at 603-605. In this respect the Arizona statute was exactly the same as the Florida death penalty statutes.

More recently, the United States Supreme Court has clarified its use of the term "statutory maximum" as applied for purposes of the Apprendi[1] rule: "[T]he statutory maximum for Apprendi purposes is the maximum sentence a judge may impose *solely on the basis of the facts reflected in the jury verdict or admitted by the defendant.*" Blakely v. Washington, 124 S.Ct. 2531, 2537 (2004). Applying this definition of "statutory maximum" the statutory maximum sentence for first-degree murder in either Florida or Arizona is life

[1] Apprendi v. New Jersey, 530 U.S. 466 (2000).

imprisonment. This is so because the death penalty statutes of both states require the sentencing judge to find one or more aggravating circumstances in addition to the jury's determination that the accused is guilty of first-degree murder before a death sentence can be imposed. Thus, the finding of aggravating circumstances is necessary for the imposition of a death sentence in either state. In Ring v. Arizona, 536 U.S. at 609, the United States Supreme Court held that the Sixth Amendment requires that aggravating circumstances necessary for imposition of the death penalty be found by a jury and not by the sentencing judge.

In Schriro v. Sumerlin, 124 S.Ct. 2519, 2522 (2004), the United States Supreme Court said, "When a decision of this Court results in a 'new rule,' that rule applies to all criminal cases still pending on direct review." The new rule in question in Schriro was the Ring rule that, "because Arizona law [like Florida law] authorized the death penalty only if an aggravating factor was present, Apprendi required the existence of such a factor to be proved to a jury rather than to a judge." Shriro, at 2522. Thus, the new rule of Ring v. Arizona must be applied to Ballard's case.

CERTIFICATE OF SERVICE

I certify that a copy has been mailed to Scott A. Browne, Concourse Center #4, 3507 E. Frontage Rd. - Suite 200, Tampa, FL 33607, (813) 287-7900, on this _____ day of April, 2005.

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Respectfully submitted,

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