IN THE SUPREME COURT OF FLORIDA

ROY PHILLIP BALLARD,

Appellant,

v. **CASE NO. SC08-2041**
L.T. No. CF06-007863-XX

STATE OF FLORIDA,

Appellee.
_____/

ON APPEAL FROM THE CIRCUIT COURT
OF THE TENTH JUDICIAL CIRCUIT
IN AND FOR POLK COUNTY, STATE OF FLORIDA

ANSWER BRIEF OF THE APPELLEE

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PRELIMINARY STATEMENT

The record on appeal consists of 28 volumes, and 5 volumes of evidence. Citations to the record on appeal will be referred to by the appropriate volume number followed by the page number "V__:__," and citations to the evidence volumes will be referred to as "EV_:___."

STATEMENT OF THE CASE AND FACTS

On October 19, 2006, a grand jury indicted Appellant for the first degree premeditated murder of his adult step-daughter, Autumn Traub. (V2:122-23). Appellant was initially represented by the Public Defender's Office, but that office conflicted off the case and Byron Hileman and Stephen Fisher were appointed to represent Appellant. (V2:144-47; V5:710-12). Judge Susan Roberts was assigned the case, but the State moved to disqualify her after she made comments at a pretrial conference that "reflected a prejudgment on the issue of whether it would be appropriate to impose the death penalty in Mr. Ballard's case." State v. Ballard, 956 So. 2d 470, 473 (Fla. 2d DCA 2007). The case was reassigned to the Honorable Judge Donald Jacobsen.

Prior to trial, Appellant filed numerous motions attacking the constitutionality of Florida's capital sentencing scheme, including motions to bar the death penalty based on Ring v. Arizona, 536 U.S. 584 (2002). (V6-7:889-1078; 1084-90). After hearing argument on the motions at numerous stages of the proceedings, the trial court denied Appellant's motions to bar the imposition of the death penalty based on Ring. (V7:1143-65; V8:1208-18; V14:777-79; V27:2893-96; 3051-52).

On February 21, 2008, the State filed a notice of intent to offer evidence of other crimes, wrongs, or acts at trial

regarding Appellant's conduct of engaging in sexual misconduct with his step-granddaughter, S.H., a minor. As will be discussed in more detail infra, S.H. was living with Appellant and his wife from 2002-2006 before she abruptly moved back in with her mother, Autumn Traub, in August, 2006. Prior to the victim's murder, Appellant unsuccessfully attempted to obtain custody of S.H. from the victim.

On May 30, 2008, Appellant filed a motion in limine to exclude the evidence of Appellant's sexual misconduct with S.H. (V7:1078-83). At the hearing on the motion, the State argued that its theory of prosecution at trial was that Appellant murdered the victim so that he could regain custody of S.H. and continue his sexual relationship with her. The State asserted that the evidence regarding the sexual misconduct was going to come primarily from three sources: S.H. herself would testify to the misconduct, Appellant's neighbors who observed some of the misconduct would testify, and there would be forensic evidence relating to a dildo found in Appellant's vehicle's trunk containing S.H.'s DNA profile. (V7:1091-1142). The State had previously indicated that the evidence would not become a feature of the trial, and if Appellant was not contesting the allegations, it would be extremely limited. (V5:772-75). The trial court ultimately issued an order denying Appellant's

motion in limine, finding the evidence of the sexual misconduct was relevant to the State's case regarding motive and premeditation, and was "inextricably intertwined" with the entire context of the murder of Autumn Traub. (V8:1204-06). The court further noted that while "the evidence is certainly prejudicial, its probative value outweighs any unfair prejudice to the Defendant." (V8:1205).

At the jury trial, the State presented testimony from forty (40) witnesses during its case-in-chief. The victim's husband, John Traub, testified that he met Autumn Niles in 2001, and they were married on January 19, 2003. (V14:828-29). Autumn Traub had two children from her previous marriage, S.H. and Scott Niles, Jr. (V14:830). At the time of their marriage, John, Autumn, and the two children lived in a trailer down the street from Autumn's mother and step-father, Kathy Ballard and Appellant. A few months after their marriage, the Traub family moved to Lakeland. (V14:831). Prior to the marriage, Autumn Traub was receiving Social Security benefits from the death of her first husband, Scott Niles, Sr., but after she married John Traub, she switched the benefits and began receiving disability benefits due to her history of seizures[1] and her slow learning disability. (V14:832-33; V15:871).

[1] Autumn Traub took an anti-seizure medication three times a day. (V15:871).

In 2004, both John and Autumn Traub were placed in jail for violating probation by failing to pay restitution. (V14:835-36). Both Scott Niles, Jr., and S.H. were visiting Appellant's home at the time, and after the Traubs' arrests, the children remained at the Ballards' trailer. (V14:835). Both John and Autumn were released from jail after a month and Scott Niles, Jr. moved back to their home,[2] but S.H. remained at Appellant's house. (V14:836; V17:1298-99). S.H. testified that she stayed with the Ballards because she was mad at her mother. (V21:1939-51). S.H. lived with Appellant for the next two and a half years.

On May 4, 2006, Autumn Traub was released from prison after another violation and she and John Traub soon moved into a duplex in Lakeland, Florida, while S.H. remained at Appellant's house in Zephyrhills, Florida. (V14:838-41). On August 4, 2006, Kathy Ballard contacted Autumn Traub for the first time in years in order to obtain some custody paperwork for S.H. so they could get a learner's driving permit for S.H. (V14:841; V17:1309-10). When Autumn Traub came to the Ballards' home in early August to sign the paperwork, arrangements were made for S.H. to stay the weekend with Autumn Traub. (V17:1310-13). After the weekend visit, on Monday, August 7, 2006, Autumn and

[2] Scott Niles, Jr., soon thereafter went to live with his parental grandparents.

S.H. returned to the Ballards' to obtain all of S.H.'s possessions because S.H. had made the decision to move back in with John and Autumn Traub.[3] (V17:1313-14; V21:1951). According to S.H., her mother had promised to change her behavior, and S.H. noticed the change over the weekend she stayed there. (V21:1949-51).

On August 10, 2006, only a few days after S.H. moved in with her mother and John Traub, Appellant came to the duplex and attempted to take S.H. back with him.[4] Appellant came inside and woke S.H. up and told her to come with him because she was no longer staying there. S.H. ran and hid behind her mother and said that she was not going back. (V14:842-43; V21:1955-58). Appellant said that he had signed, notarized paperwork granting him custody of S.H., and eventually called the Lakeland Police Department and had them respond to the scene. Appellant informed law enforcement officers that John Traub had allegedly

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[3] When Autumn and S.H. were obtaining all of her belongings, Kathy Ballard sat on the couch watching television and was uninterested. (V17:1315-16; V21:1952).

According to John Traub, either on August 7th or 8th, Appellant assisted in moving S.H.'s belongings to the duplex in Lakeland and picked him up from work, and it was the first time he had ever been to their home. (V14:845). Kathy Ballard testified that Appellant arrived home from work on August 7th at around 5:30 – 6:00 p.m., his normal time, and she did not recall him going out after returning home. (V17:1318).

[4] Appellant's wife, Kathy Ballard, was unaware of this incident and did not know about it until the trial. (V17:1322-23).

sexually abused S.H.[5] The law enforcement officers informed Appellant that his paperwork was not legally binding and that he needed a court order to obtain custody of S.H. because Autumn Traub was her legal guardian. (V14:843; V20:1787-90). Appellant told the law enforcement officer that "he wasn't going to give up until his granddaughter was back in his custody." (V20:1790).

Kathy Ballard testified that she did not have any contact with her daughter, Autumn Traub, or her granddaughter, S.H., after they moved out on August 7, 2006, until early September when Appellant was hospitalized for seizures. (V17:1316-24). When S.H. left to move back in with Autumn and John Traub, Kathy Ballard never told her daughter that, while S.H. had been living with her and Appellant, S.H. had accused John Traub of sexually abusing her and law enforcement officers had been contacted. According to Kathy Ballard, both she and Appellant were concerned with S.H. living with Autumn and John Traub because

[5] While John Traub was incarcerated in 2005, the Department of Children and Families interviewed him based on S.H.'s allegation of sexual abuse reported by Kathy Ballard. (V14:843; V15:876). During Appellant's trial, John Traub testified that he "was not aware of" ever engaging in any sexual conduct with his step-daughter, S.H. (V15:871). Kathy Ballard testified that while S.H. was living with her and Appellant in late 2005, early 2006, S.H. informed her that she had been sexually abused by a number of adult relatives, including John Traub. (V17:1300-01). S.H. testified at trial that John Traub sexually abused her on one occasion when she was eleven years old. (V21:1987-89).

they felt S.H.'s education would suffer.[6] Although she did not talk with her daughter or S.H. immediately after S.H. moved out, Kathy Ballard eventually contacted her daughter seeking support after Appellant was hospitalized on September 4, 2006, for seizures. (V17:1324-31).

While Appellant was in the hospital in early September, S.H. visited him alone in his room and he told her that he wanted her to move back with them, that he loved her, and wanted to marry her. (V21:1961-62). Kathy Ballard testified that she was in the room when S.H. visited Appellant and she could hear their conversation. (V18:1410-11). S.H. testified that the conversation with Appellant "freaked her out." She further testified that while she was living with Appellant and Kathy Ballard, Appellant had sexual intercourse with her on the weekends when Kathy Ballard was at work. Additionally, Appellant utilized a dildo on her during their sexual encounters.[7] (V21:1993-94). S.H. acknowledged that she and

[6] Autumn Traub planned to have S.H. home schooled rather than attending the local high school. (V21:1965-67).

[7] As will be discussed infra, the dildo was recovered from the trunk of Appellant's car after the victim's murder. The State introduced evidence that DNA on the dildo matched S.H. (V22:2093). When law enforcement officers discovered the dildo in the trunk of Appellant's car in the presence of his wife, Appellant stated, "you weren't supposed to find that." Appellant's wife asked Appellant what he was doing with a dildo, and he responded that it was none of her business. (V16:1078-80). A few days later in his taped-statement with detectives,

Appellant engaged in kissing, hugging, and petting while in the Ballards' yard.[8] (V21:2045).

Appellant was released from the hospital on Friday, September 8, 2006, and returned to work on Monday, September 11, 2006. (V21:1335-36). Appellant worked in Tampa at Atlantic Metal Industry as a maintenance supervisor, and worked a normal day on September 11; arriving at 5:30 a.m. and leaving at 4 p.m.[9] (V16:1179). On Tuesday, Appellant went to work at 5:43 a.m., and his supervisor saw him that morning and, because Appellant was not feeling well, his boss suggested that he go home. Appellant left that morning, and his boss clocked him out at the end of the day. (V19:1636-38).

According to Kathy Ballard, Appellant came home that evening at his normal time and did not report feeling bad. (V17:1342-43). Appellant did not tell his wife that he took off from work early that morning. (V17:1343). Kathy Ballard also stated she was unaware of any reason that Appellant would be in

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Appellant stated that he could not explain how the dildo got in his car and he did not recall where he found it. Appellant also denied using the dildo on anyone. (EV2:305).

[8] The State presented brief testimony from four neighbors who witnessed the inappropriate contact between Appellant and S.H. in the yard. (V15:914-21, 938-44, 958-61, 977-79).

[9] Kathy Ballard testified that Appellant routinely left his house in Zephyrhills around 4:45 a.m. in order to get to his job in Tampa by 5:30 a.m. (V17:1337-38). She called Appellant at 11:16 a.m. as she routinely did to check on him. (V17:1340-41; V20:1857).

Polk County on that afternoon. (V17:1343). The State introduced Appellant's cell phone records indicating that he was in Lakeland (Polk County) on Tuesday, September 12, 2006, at 6:08 p.m. (V20:1859-62).

The following morning, Wednesday, September 13, 2006, Appellant left for work at his normal time early in the morning, wearing his work-issued uniform.[10] According to his statement to law enforcement officers, Appellant decided while driving to work to visit the victim, Autumn Traub, to discuss S.H. (EV2:273-74). Appellant rarely missed work, but he did not show up to work on September 13, nor did he ever call in to report his absence.[11] (V19:1638-39).

On Wednesday, September 13, 2006, John Traub left for work at 7:00 a.m. and took the family car because Autumn Traub told him she did not need the car that day because she had a headache. (V14:848). When he left the house, Autumn and S.H. were home, and he testified that they were not expecting any visits from Appellant on that day. (V14:850). Autumn Traub had

[10] After his arrest, Appellant failed to turn in one of his work-issued uniform tops and was docked pay as a result. His company's uniform policy was that any shirt could be returned, no matter how soiled, to avoid the charge. (V16:1180-83).

[11] Appellant returned to work the next day and worked the rest of the week as scheduled. Appellant even made an appearance at work on Saturday, September 18, and worked for a few hours. (V19:1638-41).

gone to the Department of Revenue the previous evening shortly before closing time and scheduled an appointment for 8:45 a.m. on September 13th so that she could start receiving child support benefits for S.H. (V15:898-904).

Shortly after John Traub left the house, Appellant arrived and knocked on the door. S.H. woke up and hid in the bathroom. (V21:1968-70). Autumn Traub came in and told S.H. that Appellant wanted to get a soda with her and she would be back in a few minutes. (V21:1971). The victim gave S.H. her cell phone and told S.H. to call John Traub and tell him that she was leaving with Appellant. S.H. never saw her mother again after she left the house with Appellant. (V21:1970-77).

After Autumn Traub failed to return, S.H. began calling John Traub to alert him of the situation.[12] S.H called John Traub about every hour until he came home at lunch time and they began searching for the victim, including checking the local hospital. (V15:851-55; V21:1975-78). After unsuccessfully searching for the victim that afternoon, John Traub contacted law enforcement and reported Autumn Traub missing. (V15:855-57). John Traub also called Appellant that evening and

[12] John Traub testified that the victim called him when he arrived at work at 7:15 a.m., and S.H. called him at 7:45 a.m. and told him that Autumn left with Appellant to get a soda. (V15:851-52). Around 8:30 a.m., S.H. called John again and told him that her mother had not returned yet.

Appellant stated that he dropped the victim off at a store about 45 mintues after picking her up.[13] (V15:858-59).

On Friday, September 15, 2006, the Polk County Sheriff's Office informed John Traub that the case was not within their jurisdiction and that he needed to report his missing wife to the Lakeland Police Department. (V15:861). The next day, Saturday morning, Appellant and Kathy Ballard came to John Traub's house and demanded custody of S.H. (V15:890-91). Appellant called law enforcement officers to the house, but they informed him that S.H. could legally stay with John Traub. (V15:891; V18:1370; V20:1794-1802).

Later on Saturday, September 16, John Traub and S.H. met with Lakeland Police Department Detective Mingus regarding the missing person report. (V15:863). After speaking with John Traub and S.H., Detective Mingus called Appellant on the phone and asked him about his involvement with the victim on September 13th. (V15:1019-20). Appellant told Detective Mingus that he picked up Autumn Traub around 7:00 a.m., drove to a Citgo convenience store and bought a Mountain Dew and Diet Pepsi, and

[13] Kathy Ballard overheard the conversation and that was the first time she had heard that Appellant had been with her daughter that day and had not gone to work. (V18:1365). On September 13, Kathy Ballard testified that Appellant had left the house for work at his normal time and Kathy Ballard talked to him on the phone around 11:00 a.m., as usual, and Appellant did not mention that he was not at work, nor did he mention that he had been with Autumn Traub that morning. (V18:1366).

they continued driving around the Lakeland area talking about their different opinions on who should have custody of S.H. (V15-16:1020-23). Appellant detailed his route of travel and told Detective Mingus that he dropped the victim off at Walgreens, and that was the last time he had seen her. (V15:1020-24). Appellant then stated he went directly home.

On September 18, 2006, Lakeland Police Department detectives went to Appellant's home to interview him face-to-face. Appellant appeared to be annoyed with the officers' presence because he had already told "everything" to Detective Mingus. (V16:1042-45). Appellant told the detectives that on his way to work, he decided to go to Autumn Traub's house so he could speak with her about S.H.[14] He arrived at Autumn's house around 7:00 a.m., and the vehicle John and Autumn shared was still there so Appellant went down a few streets and parked. (V16:1046). Appellant walked to the Traub's house and watched from some bushes and overheard a conversation between Autumn and John. After John Traub left for work by himself, Appellant retrieved his car and drove up to the house and met Autumn Traub. (V16:1046-48). Appellant told the detectives that he

[14] Appellant stated that he left home around 6:30 a.m., but Kathy Ballard, who was present during the interview, corrected him and informed him that he left before she left at 5:30 a.m. (V16:1054). Appellant thought about it for a few seconds and then agreed with her that he had left before 5:30.

took Autumn to the Citgo station across the street from Walgreens and bought her a Diet Pepsi and bought a Mountain Dew for himself. Appellant detailed the route they traveled after leaving the Citgo. According to Appellant, he drove east on Memorial Highway until about 8:15 a.m., and then he turned around and retraced his route, eventually stopping in the street to let Autumn out in front of the Walgreens store. (V16:1049-51). Appellant stated that he and Autumn did not have any argument or confrontation, but simply discussed the living conditions for S.H. (V16:1051). After dropping Autumn off in front of Walgreens, Appellant stated that he drove straight home to Zephyrhills and got home around 9:00 a.m. (V16:1051-53).

After speaking with Appellant inside the residence, Detective Brian Wallace received permission to search the vehicle Appellant drove that day, a silver Saturn. (V16:1055-59). Inside the trunk of the vehicle, detectives found about 30 Wal-Mart shopping bags scattered about, a brand new tarp, a dirty shovel with the head of the shovel wrapped in a bag, a Lowe's shopping bag containing a roll of used duct tape and a receipt dated September 2, 2006. (V16:1061-71, 1095). In addition to the purchase of the roll of duct tape, the Lowe's receipt reflected a purchase of a 3/4 inch by 18 inch black iron

pipe.[15] Finally, as discussed in footnote 7, supra, detectives found a large dildo in a plastic bag. (V16:1077-81). Appellant also had a large cooler in his trunk with half cement blocks in it. (V16:1084). When asked what he used these items for, Appellant explained that he used duct tape at work and the shovel was also used at his job to dig a lift station. (V16:1082-83). Detectives seized the shovel, duct tape, dildo, and the Lowe's bag and receipt, and left the Ballards' home and met up with other detectives at the Traub's house. (V16:1085-86).

The State introduced voluminous evidence contradicting Appellant's statements regarding his actions on September 13, 2006. The State introduced evidence from the Citgo station that established that a Mountain Dew and Diet Pepsi were not purchased on the morning of September 13, 2006.[16] (V16:1133-49). Law enforcement officers obtained videotaped surveillance tapes from Walgreens and a school on the same street corner, neither

[15] The State introduced the Lowe's surveillance videotape showing Appellant's purchase of the lead pipe and duct tape. (V18:1465-77; V19:1548-51, 1610-22). Medical examiner Steven Nelson testified that a metal pipe similar to the one purchased by Appellant could easily kill someone if utilized to strike their head. (V19:1597-1606).

[16] The Citgo receipt reflected purchases from 6:00 a.m. through 10:00 a.m. The store's surveillance tape was on a daily loop and had been erased by the time detectives requested it. (V16:1149).

of which showed Appellant's vehicle or Autumn Traub.[17] (V18:1443-56; 1495-1510; V20:1774-78, 1803-15, 1829-36). Cell phone records and testimony were introduced that showed Appellant received a call from Kathy Ballard at 11:16 a.m. while Appellant was north of the Lakeland Square Mall, and not at his home as he claimed when speaking to detectives.[18] (V20:1850-67). Additionally, the State presented evidence from FBI forensic geologist Jodie Webb that the soil samples from the shovel found in Appellant's trunk did not match the soil samples taken from the work site where Appellant dug a pump in May, 2006. (V19:1587-93, 1652-54).

The State also introduced forensic test results on the items found in Appellant's trunk. Specifically, blood stains were located on the Saturn's driver's side door panel, the rear

[17] The defense introduced evidence for a Walgreens cashier, Wilma Grenert Jones, who claimed she observed the victim in the Walgreens on September 13, 2006, around 9:00 a.m. purchasing cigarettes. (V24:2460-80). Grenert's description of the victim was similar to the description contained in the flyer placed at the Walgreens which prompted her report, and Grenert testified that the victim was in the store in the company of two other women. In his closing argument, the prosecutor detailed the evidence that showed Grenert worked the register at Walgreens on September 13, 2006, but the videotape of that morning did not show Autumn Traub buying any cigarettes, nor did it show the other two women described by Grenert. (V26:2728-32).

[18] Appellant's cell phone records indicated that this same tower was utilized the previous evening for a phone call at 6:08 p.m.; the day Appellant had left work in the morning because he allegedly was not feeling well.

passenger door trim, Wal-Mart plastic bags in the trunk, the cardboard portion of the duct tape roll,[19] and the Lowe's receipt. (V19-20:1674-1724). As previously discussed, S.H.'s DNA profile was located on the dildo. FDLE crime lab analyst Dr. Mary Pacheco also testified that she was able to obtain DNA profiles from the bloodstains on the Wal-Mart bags and these matched Autumn Traub's DNA, but the bloodstain on the cardboard duct tape did not result in a full profile. The cardboard bloodstain was consistent with Autumn Traub's DNA profile, but did not have the same astronomical odds as the stains on the Wal-Mart bags. (V22:2082-96).

Michael Needham, a cellmate of Appellant's during his incarceration at the Polk County Jail, testified to conversations he had with Appellant over a period of time. Needham testified that he was unaware of what Appellant was charged with until Appellant told him he killed his stepdaughter by striking her in the head with a lead pipe. (V23:2237-40). Needham testified that Appellant told him he grinded the pipe down at his work,[20] and put the victim in acidic water and held her down with concrete blocks so as to eliminate any

[19] Appellant's fingerprint was also found on the cardboard. (V20:1701-02).

[20] Atlantic Metal had a pipe threading machine at Appellant's workplace that could cut up pieces of pipe. (V19:1634, 1651).

fingerprints. Appellant stated he also struck the victim in her mouth to knock out her teeth so dental records could not identify her. (V23:2401-41). Needham testified that Appellant also refused to eat his meals in jail so that he would lose weight and look smaller and the jury would not think he could physically move the victim. (V23:2243). Appellant also told Needham about his sexual relationship with his step-granddaughter, and stated that he was the "biggest one" she would ever see. (V23:2245-46). At the time of his testimony, Needham only had a few more months remaining on his prison sentence and had not received any promises or benefits from the State. (V23:2244).

After the State rested its case-in-chief, Appellant moved for a judgment of acquittal which was denied by the trial court. (V23:2263-74). Thereafter, the defense presented testimony from Walgreens' cashier, Wilma Grenert Jones, and presented medical testimony from neuropsychologist Dr. Joseph Sesta, and neurologist Dr. John Tanner. Dr. Sesta reviewed Appellant's medical records and examined him while he was incarcerated and awaiting trial. (V23:2297-99). Appellant had mild to moderate brain damage, vascular dementia, a history of seizures and strokes which resulted in his left side being weaker and his balance and coordination impaired. (V23:2299-2313). Although

Appellant's strength on his left side was less than his right, Dr. Sesta opined that Appellant would be capable of swinging a lead pipe with his right hand. (V23:2317). Dr. Tanner's testimony supported Dr. Sesta's findings regarding Appellant's brain damage to the right side of his brain. Dr. Tanner further testified that Appellant may have had toxic levels of his seizure medicine shortly after being released from the hospital on September 8, 2006. (V25:2563-75). Dr. Tanner opined that he did not think it was likely, given Appellant's health, that he would have been able to beat the victim to death with the lead pipe and dispose of her body. (V25:2580-84).

In rebuttal, the State presented testimony from Dr. Rohitmar Vyas, the treating physician at Florida Hospital who was responsible for treating Appellant during his hospital stay on September 4-8, 2006. Dr. Vyas testified that Appellant had seizures and numerous mini-strokes while hospitalized and was Baker Acted early on during his stay because he wanted to leave the hospital against medical advice. (V24:2409-20). Dr. Vyas testified that Appellant did not display any signs of neurological weakness at the time of Appellant's discharge on September 8, 2006, and Dr. Vyas told Appellant he could return to work on September 11, 2006, but instructed him not to drive or operate heavy machinery because of his history with seizures.

(V24:2420-24).

After closing arguments and instructions to the jury, the jury returned a verdict finding Appellant guilty as charged of murder in the first degree of Autumn Traub. (V26:2878). At the outset of the penalty phase proceedings, the State informed the trial court that it would rely on the guilt phase evidence in support of the aggravating factor of cold, calculated and premeditated murder (CCP), and defense counsel renewed his motions challenging the constitutionality of the death penalty statute. (V27:2890-96). Appellant again presented medical testimony from Drs. Sesta and Tanner, who opined that because of Appellant's brain damage and history of strokes and other ailments, he was under the influence of an extreme mental or emotional disturbance and he could not conform his conduct to the requirements of the law. (V27:2913-32, 2959-71). In rebuttal, the State presented the testimony of the medical examiner, Dr. Nelson, an expert in neuropathology. Dr. Nelson examined Appellant's MRI results which only showed several small acute infarcts on the brain. The doctor further opined that there would not be any residual functioning impairment based on Appellant's seizures. (V27:3014-20). The State also presented evidence from Appellant's supervisor at Atlantic Metal that Appellant did not have any drop off in his job performance after

he returned from his hospitalization in September, 2006, but did appear to be a little more tired when he first returned. (V27:3044-48).

The jury recommended that Appellant receive the death penalty by a vote of nine to three. (V28:3110). After conducting a Spencer hearing where no additional evidence was presented, the trial court issued a detailed order sentencing Appellant to death for the murder of Autumn Traub. (V9:1398-1415). The trial court found one aggravating factor, CCP, and three statutory mitigating factors: (1) the capital felony was committed while Appellant was under the influence of extreme mental or emotional disturbance (slight weight); (2) Appellant's capacity to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was substantially impaired (slight weight); and (3) the age of Appellant at the time of the crime (little to slight weight). (V9:1408-11).

The court also found a number of nonstatutory mitigating factors raised by Appellant and assigned them various amounts of weight. The court found: (1) Appellant has a close relationship with wife, and (2) could continue this relationship while in prison (very little to no weight); (3) Appellant has a strong work ethic (slight weight); (4) Appellant was charitable to his step family (no weight); (5) Appellant has numerous medical

and/or mental health issues (very slight weight); (6) Appellant has a lack of impulse control (very little weight), and (7) lack of societal inhibition (little weight); (8) Appellant suffered from an obsession to regain custody of S.H. (no weight); (9) Appellant had in the past a domestic relationship with Autumn Traub and S.H. (no weight); and (10) Appellant was involved in an ongoing quarrel with the Traubs over S.H.'s custody (no weight).

SUMMARY OF THE ARGUMENT

The trial court acted within its discretion in denying Appellant's motion in limine to exclude evidence of Appellant's sexual misconduct with his step-granddaughter. The trial court properly found that the evidence of Appellant's sexual misconduct was relevant and inextricably intertwined with the context of the murder of his step-daughter. The evidence of Appellant's sexual relationship with his step-granddaughter was relevant to establish his motive and premeditation to murder his step-daughter so that he could regain custody of his step-granddaughter and resume his sexual relationship with her. In determining whether to admit the evidence, the trial court properly conducted a balancing test as set forth in Florida Statutes, section 90.403 and determined that the probative value of the evidence was not substantially outweighed by the danger of unfair prejudice. Because Appellant has failed to carry his burden of establishing that the trial court abused its discretion in admitting this evidence, this Court should affirm the trial court's ruling.

Appellant's claim that his death sentence is unconstitutional because it violates his Sixth Amendment rights as set forth in Ring v. Arizona, 536 U.S. 584 (2002), is without merit. In Florida, unlike Arizona, the maximum penalty for

first degree murder is death. A defendant in Florida is eligible for a death sentence upon conviction by a jury at the guilt phase. The additional procedures set forth in the penalty phase proceedings govern the issue of whether a defendant will be selected for an already-authorized sentence of death. Because death is the maximum sentence for first degree murder, Appellant's claim based on Ring must fail as his sentence has not been enhanced.

The trial court properly found that the instant murder was committed in a cold, calculated and premeditated murder without any pretense of moral or legal justification. Appellant planned the murder of his step-daughter well in advance by purchasing the murder weapon prior to the murder. Appellant then proceeded to lure the victim to a remote area where he could commit the murder without detection. As the trial court properly found, the murder was the product of cool and calm reflection and was not prompted by any heated passion; was the result of a careful plan and premeditated design; and exhibited heightened premeditation. Furthermore, although this case involves only the single aggravating circumstance of CCP, the court afforded the mitigation evidence very little weight. As such, the State submits that Appellant's death sentence is proportional to other death cases.

ARGUMENT

ISSUE I

THE TRIAL COURT ACTED WITHIN ITS DISCRETION IN ADMITTING EVIDENCE OF APPELLANT'S SEXUAL MISCONDUCT WITH THE VICTIM'S DAUGHTER AS THIS EVIDENCE WAS RELEVANT AND INEXTRICABLY INTERTWINED WITH THE VICTIM'S MURDER.

Prior to trial, the State filed a notice of intent to introduce evidence of other crimes, wrongs, or acts regarding Appellant's conduct of engaging in sexual misconduct with his step-granddaughter, S.H., a minor. S.H. had lived with Appellant for over two years before her mother's murder, and had recently left Appellant's home to move back in with her mother. The State's theory at trial was that, because Appellant had been unsuccessful in his attempts to regain custody of S.H., he murdered S.H.'s mother so that he would regain custody of S.H. and be able to continue his sexual relationship with her.

Appellant subsequently filed a motion in limine to exclude the evidence of Appellant's sexual misconduct with S.H. (V7:1078-83). At a hearing on the motion, the State asserted that the evidence regarding the sexual misconduct was going to come primarily from three sources: S.H. herself would testify to the sexual misconduct, Appellant's neighbors who observed inappropriate contact between Appellant and S.H., and forensic evidence relating to a dildo found in Appellant's vehicle's

trunk that contained S.H.'s DNA. (V7:1091-1142). The State had previously indicated that the evidence would not become a feature of the trial, and if Appellant was not contesting the allegations, the testimony would be extremely limited. (V5:772-75). The trial court denied Appellant's motion in limine and found that the evidence of the sexual misconduct was relevant to the State's case regarding motive and premeditation, and was "inextricably intertwined" with the entire context of the murder of Autumn Traub. (V8:1204-06). The court further noted that while "the evidence is certainly prejudicial, its probative value outweighs any unfair prejudice to the Defendant." (V8:1205).

The State submits that the lower court properly found that the sexual misconduct evidence was relevant and admissible. This Court reviews a trial court's ruling admitting collateral crime evidence under an abuse of discretion standard. Sexton v. State, 697 So. 2d 833, 837 (Fla. 1997); Heath v. State, 648 So. 2d 660, 664 (Fla. 1994). As this Court has stated on numerous occasions, "[d]iscretion, in this sense, is abused when the judicial action is arbitrary, fanciful, or unreasonable, which is another way of saying that discretion is abused only where no reasonable man would take the view adopted by the trial court." Huff v. State, 569 So. 2d 1247, 1249 (Fla. 1990) (quoting

Canakaris v. Canakaris, 382 So. 2d 1197, 1203 (Fla. 1980)).

This Court has repeatedly described the related concepts of "similar fact" evidence of collateral crime evidence admissible pursuant to the seminal case of Williams v. State, 110 So. 2d 654 (Fla. 1959), and Florida Statutes, section 90.404 and evidence of other crimes which may be "dissimilar" but nonetheless relevant to the prosecution of the offense charged, pursuant to section 90.402. See e.g., Bryan v. State, 533 So. 2d 744 (Fla. 1988); Sexton v. State, 697 So. 2d 833, 837 (Fla. 1997); Zack v. State, 753 So. 2d 9, 16-17 (Fla. 2000).

Inextricably intertwined or inseparable crime evidence is a form of dissimilar relevant evidence which is admitted under section 90.402 and does not constitute Williams rule evidence. See e.g., Conde v. State, 860 So. 2d 930, 948 (Fla. 2003) ("Here ... the G.M. incident was relevant to explain the context in which evidence connecting Conde to the murders was discovered."); Sexton v. State, 697 So. 2d 833, 836-38 (Fla. 1997) (finding that the trial court did not abuse its discretion in admitting evidence of defendant's incestuous relationship with his daughter because it was relevant to show his motive for the charged murder of his son-in-law); LaMarca v. State, 785 So. 2d 1209, 1212-14 (Fla. 2001) (holding trial court did not err in admitting testimony that defendant raped his daughter because it

put into context the defendant's statements and was relevant to prove premeditation and motive for the murder of the defendant's son-in-law); Hunter v. State, 660 So. 2d 244, 251 (Fla. 1995) ("Among the purposes for which a collateral crime may be admitted is establishment of the entire context out of which the criminal action occurred. . . . Inseparable crime evidence is admitted not under 90.404(2)(a) as similar fact evidence but under section 90.402 because it is relevant.") (citations omitted); Bryan v. State, 533 So. 2d 744, 746 (Fla. 1988).

Appellant asserts in his brief that the trial court abused its discretion in admitting the sexual misconduct evidence as inextricably intertwined evidence or otherwise relevant evidence pursuant to Florida Statutes, section 90.402 because: (1) the State failed to establish by clear and convincing evidence that Appellant committed the collateral crime evidence; (2) the probative value of the evidence was greatly outweighed by its inflammatory impact on the jury; and (3) the evidence became a feature of the trial. The State submits that Appellant's allegations are without merit.

Appellant first contests the relevancy of the evidence and claims that the State failed to carry its burden of showing by clear and convincing evidence that Appellant committed the sexual misconduct against S.H. Appellant notes that S.H. gave

conflicting statements regarding the sexual abuse and has accused other adult males of molesting her in the past. Appellant correctly notes that S.H. has accused other adult males of sexual abuse, namely John Traub, Appellant, and other family members. Unfortunately, however, there is no evidence to establish that S.H.'s accusations are false. In fact, the State would submit that, at least with regard to John Traub and Appellant, the accusations are clearly true.[21] As the prosecutor noted at trial, S.H. had unfortunately suffered from sexual abuse by numerous family members. (V25:2715-18). Simply put, the fact that S.H. was abused by a number of adult males does not impact the credibility of her allegations against Appellant.

Admittedly, S.H. initially denied to law enforcement officers that Appellant had sexually abused her. After Lakeland Police Department Sergeant Gary Gross confronted S.H. with his suspicion that she was withholding information, S.H. acknowledged that Appellant and John Traub had sexually abused her. (V17:1234-43, 1256-58). S.H. was subsequently interviewed

[21] While living with Appellant and his wife, S.H. reported that she had been sexually abused by her two step-fathers, John Traub and Scott Niles, and also by Scott Niles' two brothers, Bruce Niles and Gike Niles. S.H. did not mention any sexual abuse by Appellant at this time. (EV5:691). At trial, S.H. testified that she had been sexually abused by Appellant, John Traub, Scott Niles, and Bruce Niles, but denied any sexual contact with Gike Niles. (V21:1984-95, 2030). John Traub testified at trial that he could not remember any incidents of sexual contact with S.H. (V15:871).

by an investigator with the State Attorney's Office assigned to child abuse cases, and at this time, S.H. acknowledged that Appellant had sexually abused her. Prior to trial, at the Arthur[22] bond hearing, S.H. testified that she began living with the Ballards when she was 12 years old and her mother and John Traub were arrested. She testified that she thought Appellant began sexually abusing her a couple months after she moved in. She testified that she had sexual intercourse with Appellant and he used a dildo on her. (V4:500-06). S.H. acknowledged that she did not initially tell law enforcement the truth regarding the sexual abuse allegations because she was afraid and did not want them to know about it. (V4:532-33). At the Arthur hearing, S.H. also reported that the sexual abuse began months after she moved in with Appellant and occurred about every other week, continuing throughout the entire two and a half years she lived there. (V4:506). On cross-examination, she testified that she did not recall telling the state attorney investigator that she had sexual intercourse with Appellant three times, but she thought it was between five to ten times. (V4:547). At trial, she gave similar testimony that the abuse occurred "like every other weekend," but on cross-examination, she testified that she didn't know exactly how long the abuse lasted, but she

[22] Arthur v. State, 390 So. 2d 717 (Fla. 1980).

thought it happened when she was in the eighth grade. (V21:1993-95; V22:2041-42).

Appellant relies on a number of cases from the lower district courts of appeal to support his assertion that the State failed to establish by clear and convincing evidence that Appellant sexually abused S.H., but these cases are clearly distinguishable from the instant case. See e.g., Alsfield v. State, 22 So. 3d 619 (Fla. 4th DCA 2009) (victim's allegation of sexual abuse to police were inconsistent with her trial testimony and victim had previously signed a waiver of prosecution); Zerbe v. State, 944 So. 2d 1189 (Fla. 4th DCA 2006) (collateral crime evidence regarding incident with five-year-old child was in conflict); Audano v. State, 641 So. 2d 1356 (Fla. 2d DCA 1994) (collateral crime evidence was improperly admitted when the crime occurred eight years before charged crime and the victim did not immediately report allegation and the real reason victim fled defendant's home was because she stole items). In the instant case, the victim of the sexual abuse did not report it at the time because she was living at Appellant's home and was afraid to report the abuse. She eventually reported the abuse and specifically detailed that Appellant had sexual intercourse with her and placed a dildo inside her vagina. The fact that a young girl initially gave

inconsistent statements regarding sexual abuse is not dispositive, especially when other reliable evidence corroborates her allegations. Unlike the cases relied on by Appellant, the State introduced other unrebutted evidence that corroborated S.H.'s allegations. Here, four neighbors of Appellant testified that they observed Appellant and S.H. engaged in inappropriate kissing and petting in the Ballards' yard. S.H. corroborated this testimony at trial. Furthermore, law enforcement officers found a dildo in Appellant's trunk with S.H.'s DNA profile on it. S.H. testified that Appellant utilized the dildo on her. Given the unrebutted evidence corroborating S.H.'s allegations, there is no question that the State established by clear and convincing evidence that Appellant sexually abused S.H. See Slomowitz v. Walker, 429 So. 2d 797, 800 (Fla. 3d DCA 1983) (holding that "clear and convincing evidence requires that the evidence must be found to be credible; the facts to which the witnesses testify must be distinctly remembered; the testimony must be precise and explicit and the witnesses must be lacking in confusion as to the facts in issue. The evidence must be of such weight that it produces in the mind of the trier of fact a firm belief or conviction, without hesitancy, as to the truth of the allegations sought to be established.").

Appellant next argues that the trial court abused its discretion in admitting the sexual abuse evidence because its probative value was substantially outweighed by its unfair prejudice and the State improperly made it a feature of the trial. Initially, as this Court has repeatedly acknowledged, "all evidence that points to a defendant's commission of a crime is prejudicial. The true test is relevancy." Ashley v. State, 265 So. 2d 685, 694 (Fla. 1972); Bryan v. State, 533 So. 2d 744, 747 (Fla. 1988); Smith v. State, 866 So. 2d 51, 61 (Fla. 2004). Clearly, the evidence of Appellant's sexual abuse of S.H. was relevant and probative to show motive and premeditation for the murder of S.H.'s mother and legal guardian. The State's theory at trial was that Appellant murdered Autumn Traub because he was obsessed with regaining custody of S.H. so that he could continue his improper sexual relationship with S.H.[23]

Although evidence of sexual abuse on a child is certainly prejudicial, its probative value was not substantially outweighed by the danger of unfair prejudice. The instant case is similar to Sexton v. State, 697 So. 2d 833 (Fla. 1997), and

[23] Kathy Ballard informed law enforcement officers that Appellant was obsessed with regaining custody of S.H. (V19:1372, 1434-37). Additionally, although Kathy Ballard testified that she and Appellant had not had sexual relations in the last twelve years due to his health problems (V18:1386-90), Appellant admitted to law enforcement officers that he and his wife engaged in sexual intercourse while S.H. lived with them. (EV2:269).

LaMarca v. State, 785 So. 2d 1209 (Fla. 2001). In Sexton, this Court found that the trial court acted within its discretion in admitting evidence that Sexton had engaged in sexual intercourse with his biological daughter and had fathered her children because it was relevant to prove that Sexton had a motive to kill his son-in-law after the victim discovered the incestuous relationship. Id. at 836-37 (noting that "as a practical matter, almost all evidence introduced during a criminal prosecution is prejudicial to a defendant," but the trial court properly performed the weighing process and admitted the evidence). Similarly, in LaMarca, this Court upheld the admission of evidence that the defendant raped his daughter because it was relevant to show the defendant's motive to murder his daughter's husband so that he could have his daughter to himself. LaMarca, 785 So. 2d at 1212-13.

Like the trial judges in LaMarca and Sexton, the trial court in the instant case engaged in the proper weighing analysis set forth in section 90.403 and found the evidence of Appellant's sexual misconduct with his step-granddaughter was relevant and while "the evidence is certainly prejudicial, its probative value outweighs any unfair prejudice to the Defendant." (V8:1205).

Finally, the State submits that Appellant's contention that the evidence of sexual misconduct became a feature of the trial is meritless. In Conde v. State, 860 So. 2d 930 (Fla. 2003), this Court explained that it is not solely the quantity but also the quality and nature of collateral crimes evidence in relation to the issues to be proven that determines whether its admission has "transcended the bounds of relevancy to the charge being tried". Id. at 946. This Court approvingly cited Snowden v. State, 537 So. 2d 1383, 1385 (Fla. 3d DCA 1989), and Townsend v. State, 420 So. 2d 615, 617 (Fla. 4th DCA 1982), for the proposition that more is required for reversal than a showing that the evidence is voluminous and that the number of transcript pages and exhibits is not the sole test when such quantity is the result of there being numerous crimes. Conde, 860 So. 2d at 947.

In the instant case, Appellant correctly notes that the State elicited testimony regarding aspects of Appellant's sexual misconduct with S.H. from thirteen of its forty witnesses:

> (1) John Traub (briefly mentioned that he told law enforcement officers of S.H.'s report that Appellant had sexually abused her) (V14:843-44);
>
> (2-5) Angela Thurston, Nancy Welch, Randy Welch, and Robert Welch (brief testimony from four of Appellant's neighbors that witnessed inappropriate kissing and petting between Appellant and S.H.) (V15:914-79);
>
> (6) Detective Brian Wallace (found dildo in Appellant's car and Appellant stated that he was not

supposed to find that) (V16:1077-80);

(7) Dr. Mary Pacheco (obtained S.H.'s DNA profile on dildo) (V22:2081, 2093);

(8) Sergeant Gary Gross (brief testimony that S.H. acknowledged sexual abuse by Appellant and John Traub) (V17:1234-43);

(9) State Attorney investigator Beverly Cone (brief testimony on direct examination regarding her interview with S.H.) (V21:1893-1900);

(10) Michael Needham (direct evidence of Appellant's statement regarding his sexual relationship with S.H.) (V23:2245-46);

(11) Detective Scott Kercher (detective who took Appellant's taped statement; Appellant states that he doesn't know where he obtained dildo from and he never used it on anyone) (EV2:305);

(12) Kathy Ballard (Appellant's statement to her when Detective Wallace found dildo in his trunk) (V18:1375); and

(13) S.H. (discussing sexual intercourse with Appellant and use of dildo and statements made by Appellant that he loved her and wanted to marry her) (V21:1961-62, 1993-94).

The State only elicited brief testimony regarding the sexual misconduct from these witnesses, whereas defense counsel's cross-examination went into further details. Prior to trial, the prosecution informed the trial court that if Appellant was not contesting the evidence, the presentation of evidence regarding the sexual misconduct would be greatly reduced. When Appellant indicated that he would vigorously challenge the evidence, the trial court conducted its weighing process under section 90.403 and found that the relevant evidence regarding the sexual misconduct was admissible because its probative value was not substantially outweighed by the danger of unfair

prejudice. Because Appellant has failed to establish that the lower court abused its sound discretion in this regard, this Court should affirm the trial court's ruling denying Appellant's motion in limine.

Although Appellant does not contest the sufficiency of evidence at trial, this Court has an independent obligation to review the record for sufficiency of the evidence. See Fla. R. App. P. 9.142(a)(6); Rodgers v. State, 948 So. 2d 655, 673-74 (Fla. 2006); Blake v. State, 972 So. 2d 839 (Fla. 2007). In sentencing Appellant to death for the murder of his step-daughter, the trial court summarized the facts which establish Appellant's guilt beyond a reasonable doubt:

> The evidence supporting the Jury's Verdict and Recommendation for the imposition of the Death Penalty is primarily circumstantial but does include the testimony of Michael Needham (currently an inmate in State Prison), who is a former cell mate of the Defendant and who testified that the Defendant told him that he committed the crime, how he committed it, and how he disposed of Autumn Traub's body.
>
> The evidence presented by the State proves that on September 13, 2006, Autumn Traub disappeared. She was last seen in the company of the Defendant, Roy Ballard. Indeed, in his statement to the police, Roy Ballard acknowledged that he was with Autumn Traub on the morning of September 13, 2006.
>
> The Lakeland Police initially investigated this case as a Missing Persons case but it quickly turned into a murder investigation. Further investigation uncovered a series of facts and circumstances that led police to the conclusion that Roy Ballard murdered Autumn Traub and disposed of her body.

The time line of the case against the Defendant begins four years ago, in 2004. At that time, Autumn Traub was on probation, violated the terms of her probation and was sent to prison. Autumn's daughter, S.H. (approximately 12 years old at that time) moved in with Roy Ballard (S.H's maternal step-grandfather) and his wife, Kathy Ballard (S.H.'s maternal grandmother) at their Zephyrhills home.

Autumn Traub was eventually released from prison but S.H., having had a falling out with her mother, decided to remain with the Ballards. In August 2006, S.H. reconciled with her mother and, on August 7, 2006, moved to Lakeland to live with her mother (Autumn Traub) and her step-father (John Traub).

The Defendant, Roy Ballard, was upset with S.H.'s decision to move in with Autumn and, on August 10, 2006, he confronted Autumn in his attempt to have S.H. returned to his home in Zephyrhills. The police were called and intervened and advised that the "custody paperwork" held by the Defendant was insufficient to cause the police to transfer custody of S.H. back to the Ballards. The Defendant stated to the responding police officer that he would do anything he needed to get his granddaughter back.

Through the evidence presented, it became evident that the Defendant's underlying motive, in seeking return of S.H., was that the Defendant had been engaging in regular sexual activity with S.H., who was then 14 years old.

Thereafter, on September 2, 2006, the Defendant is depicted in a surveillance video at a Lowe's hardware store purchasing an 18" metal pipe and some duct tape. He was provided a receipt for these items that was later found in the Defendant's automobile trunk. During the Defendant's taped statement to the police (taken on September 21, 2006), he acknowledges buying some duct tape but couldn't remember why he purchased the 18" metal pipe, even though it appears that the primary purpose for his trip to Lowe's was the purchase of that particular pipe. The 18" metal pipe is an unusual piece of hardware that would have a

very specific, and limited, purpose. While the Defendant still had the receipt and the duct tape, he told the police he could not remember what he had done with the pipe.

On September 4, 2006, the Defendant was rushed to the hospital having experienced a series of seizures and being in obvious need for hospitalization. During the course of the Defendant's hospitalization, it was determined that he had suffered a number of small multiple strokes that led to the seizures and some confusion. By September 6, 2008, Dr. Vyas found that the Defendant's mind had cleared up. He was later discharged from the hospital on September 8, 2006.

On September 11, 2006, the Defendant returned to his job as Maintenance Supervisor at Atlantic Metals in Tampa, Florida. According to his supervisor, Tom Witzigman, there were no observable changes in the Defendant when compared to his pre-hospitalization condition other than the Defendant appeared somewhat tired.

On September 12, 2006, the Defendant reported to work at Atlantic Metals at approximately 5:40 am. but, later in the morning, advised Mr. Witzigman that he wasn't feeling well, and Mr. Witzigman sent the Defendant home early. The Defendant did not show up for work on September 13, 2006 and did not contact his employer to indicate that he would not be in. He returned to work on September 14, 2006, and continued working regularly thereafter, with no observable physical or mental problems.

Ty Alford, an Engineer from ATT, provided evidence and testimony concerning cell phone towers in and around the Polk County area. Records kept in the normal course of the phone company's business indicate that the Defendant's cell phone accessed and utilized a phone tower located off of Highway 98 in North Lakeland on September 12, 2006, at 6:08 p.m. That same tower was utilized by the Defendant's cell phone on September 13, 2006, at 11:16 a.m., which coincides with Kathy Ballard's testimony that she called the Defendant during her break, sometime after 11:00 a.m. on September 13, 2006. The significance of this

testimony is that the tower utilized by the Defendant's cell phone services an area in North Lakeland and North Polk County, which is well away from any route the Defendant would have been traveling on September 12, 2006 (between his home in Zephyrhills and his work in Tampa), or on September 13, 2006 (between his home in Zephyrhills and Autumn Traub's residence in Lakeland). This evidence established that Mr. Ballard's cell phone (and presumably Mr. Ballard) was in North Lakeland/North Polk County on both the evening of September 12, 2006 and the late morning of September 13, 2006.

During the course of the continuing investigation, searches were conducted in the trunk of the Defendant's car. These searches resulted in the discovery of, among other things, two Wal-Mart bags that had spots of blood on them. DNA tests were performed on the spots of blood and compared to Autumn Traub's DNA profile. The DNA from the blood on the Wal-Mart bags is a statistical certain match to Autumn Traub's DNA. There was also some blood found on the duct tape located in the Defendant's trunk, from which experts were able to obtain a partial DNA profile that is consistent with Autumn Traub's DNA.

The Defendant provided a statement to Detective Brian Wallace, the Lakeland Police Department, on September 18, 2006, and in it he described what he had done on the morning of September 13, 2006, instead of going to work. He admits to getting up at his normal time and leaving for work but then deciding to go to Lakeland to meet with Autumn and discuss S.H.'s future. He admits to parking his vehicle somewhat removed from Autumn's residence and then concealing himself while watching Autumn's residence until her husband, John Traub, left for work. Finally, he admits that Autumn Traub got into his vehicle and rode around with him.

Aimed with a statement describing the Defendant's route and activities, the police went about searching for evidence that would either corroborate or refute the Defendant's statement. No evidence was found to corroborate the Defendant's statement but, to the contrary, the evidence collected disproves the

> Defendant's description of what he and Autumn did that morning.
>
> The State then introduced the testimony of Michael Needham, a former cell mate of the Defendant. Mr. Needham testified that he is not receiving any benefit for his testimony and has no ulterior motive to testify against the Defendant. Mr. Needham testified that he and the Defendant periodically and generally discussed the crime committed by the Defendant. Mr. Needham specifically testified that, on occasion, the Defendant talked about his granddaughter and the sexual relationship he had with her. The Defendant also told Mr. Needham that he had hit Autumn on her head with a pipe and then knocked her teeth out (in order to eliminate any comparison to dental records) and then placed Autumn's body in some type of acidic water pit and made sure she was held down by concrete blocks. Autumn Traub's body has never been found.

(V9:1398-1401). The State submits that the direct and circumstantial evidence outlined above by the trial court is sufficient to support Appellant's conviction for the first degree murder of Autumn Traub. See Crain v. State, 894 So. 2d 59 (Fla. 2004) (affirming death sentence in circumstantial evidence case where the victim's body was never discovered). As the trial court properly noted, the evidence refutes Appellant's story of his actions with the victim on the morning of September 13, 2006. Accordingly, this Court should affirm Appellant's conviction for first degree murder.

ISSUE II

APPELLANT'S DEATH SENTENCE IS CONSTITUTIONAL AND DOES NOT VIOLATE RING V. ARIZONA, 536 U.S. 584 (2002).

Prior to trial, Appellant filed numerous motions attacking the constitutionality of Florida's death penalty statutory scheme, including motions to bar the death penalty based on Ring v. Arizona, 536 U.S. 584 (2002). (V6-7:889-1078, 1084-90). After hearing argument on the motions at numerous stages of the proceedings, the trial court denied Appellant's motions to bar the imposition of the death penalty based on Ring. (V7:1143-65; V8:1208-18; V14:777-79; V27:2893-96, 3051-52). Appellant argues on appeal that his case presents a "pure" Ring issue because the only aggravating factor was CCP and the jury's recommendation was not unanimous, and thus, his death sentence violates the holding of Ring. The State submits that Appellant's argument is without merit and should be rejected based on this Court's prior precedent.

In Apprendi v. New Jersey, 530 U.S. 466, 490 (2000), the United States Supreme Court held that "[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." In Harris v. United States, 536 U.S. 545 (2002), the Court made clear that

Apprendi did not apply to all factors that are used to determine an appropriate sentence. It only applied to those facts that increased the statutory maximum for the offense. In Ring v. Arizona, 536 U.S. 584 (2002), the Supreme Court applied Apprendi to Arizona's capital sentencing scheme. This application was based upon the Arizona Supreme Court's determination that the maximum sentence to which a defendant was exposed by a conviction for first degree murder was life imprisonment. See State v. Ring, 25 P.3d 1139, 1151 (Ariz. 2001).

In contrast to Arizona's statutory scheme, this Court has held, both before and after Ring, that the maximum sentence to which a Florida defendant is exposed by a conviction for first degree murder is death. Porter v. Crosby, 840 So. 2d 981, 986 (Fla. 2003); Mills v. Moore, 786 So. 2d 532, 536-37 (Fla.), cert. denied, 523 U.S. 1015 (2001). Because death is the statutory maximum for first degree murder in Florida, Apprendi and Ring do not apply to Florida. In Florida, the determination of death-eligibility is made upon conviction for first degree murder at the guilt phase, and not at the penalty phase as in Arizona. See Bottoson v. Moore, 833 So. 2d 693, 699-701 (Fla. 2002) (Quince, J., concurring) (noting that Ring does not affect Florida's capital sentencing scheme because a defendant is exposed to the maximum sentence of death upon conviction for

first degree murder). Because death is the maximum sentence for first degree murder in Florida, Appellant's claim collapses because nothing triggers the Apprendi/Ring holdings.

Florida's sentencing procedures govern the selection determination, resolving whether the defendant will be selected for an already-authorized sentence of death under proscribed procedures ensuring individualized sentencing. Under Florida law, as this Court has held, first degree murder is a capital felony; as such, it may be punished by death or life imprisonment. The fact that a separate statute exists which requires procedures above and beyond the jury's verdict of guilt does not affect the statutory maximum for first degree murder. See Bottoson v. Moore, 833 So. 2d 693, 699-701 (Quince, J., concurring) ("Thus, in both capital and noncapital cases there is a separate sentencing proceeding after the verdict of guilty. The fact that there is a separate sentencing proceeding does not negate the fact that the Legislature has delineated a statutory maximum sentence which cannot be exceeded without proceeding beyond what is provided for under chapter 921.") The jury's verdict at the guilt phase exposes a defendant to a possible sentence of death and authorizes the additional procedures required for the subsequent imposition of a death sentence. Florida uniquely chose to provide defendants with additional

protections against improper death sentences by affording double checks against both the jury and judge findings; these added safeguards guarantee compliance with the Eighth Amendment without sacrificing any Sixth Amendment rights.

Prior to penalty phase deliberations, as in the instant case, the jury is instructed that it must follow the law and determine, first, whether a sufficient aggravating circumstance exists to support the imposition of the death sentence. Thus, even if Ring were implicated in this case, the trial court's instructions to the jury ensured that the jury found the existence of the CCP aggravating factor, and the jury's nine to three vote was merely a reflection of the jury's weighing of that aggravating factor versus the mitigating evidence. Compare Butler v. State, 842 So. 2d 817, 837 (Fla. 2003) (Pariente, J., concurring and dissenting in part) (noting uncertainty regarding whether the jury's recommendation reflected a finding of the existence of the single aggravating factor based on the judge's jury instructions); State v. Steele, 921 So. 2d 538, 555 (Fla. 2005) (Pariente, J., concurring and dissenting in part) ("To alleviate any concern that a juror may recommend death even if he or she has not found an aggravator to exist, the court could instruct the jury that a juror may recommend death only after finding the existence of one or more aggravating circumstances.

In the vast majority of cases, . . ., jurors will agree on the existence of one or more aggravators, satisfying Ring.").

In the instant case, the judge instructed the jury that CCP was the only aggravating to consider and they must determine whether it existed and if it had been established beyond a reasonable doubt. (V28:3103-05). Once the decision was made that CCP had been established beyond a reasonable doubt, the jury had to consider whether sufficient mitigating factors existed which outweighed the aggravating factor. The jury undoubtedly followed the trial court's instructions and their recommendation of death by a vote of nine to three in this case reflects their weighing process. Thus, even if Ring applied to Florida's capital sentencing scheme, the court's instructions on the law establish that the jury found the existence of the aggravating factor beyond a reasonable doubt.

Finally, as this Court noted in Bottoson v. Moore, 833 So. 2d 693 (Fla. 2002), "the United States Supreme Court repeatedly has reviewed and upheld Florida's capital sentencing statute over the past quarter of a century, and . . . has specifically directed lower courts to 'leav[e] to [the United States Supreme] Court the prerogative of overruling its own decisions.'" Id. at 695 (quoting Rodriguez de Quijas v. Shearson/American Express, 490 U.S. 477, 484 (1989)). The fact the Supreme Court has

declined to disturb its prior decisions upholding the constitutionality of Florida's capital sentencing scheme, and that only it may overrule its precedent also shows that Appellant is not entitled to relief based on Ring.[24] See Cox v. State, 819 So. 2d 705, 724 n.17 (Fla. 2002) (noting prior decisions on these issues need not be revisited "unless and until" the United States Supreme Court recedes from Proffitt v. Florida, 428 U.S. 242 (1976)).

In State v. Steele, 921 So. 2d 538, 540 (Fla. 2005), this Court stated that it has yet to forge a majority view about whether Ring "applies in Florida; and if it does, what changes to Florida's sentencing scheme it requires." Contrary to this Court's statement, the Ring issue has been squarely put before this Court and rejected by a majority of the Court. See Butler v. State, 842 So. 2d 817 (Fla. 2003) (rejecting Ring claim in first degree murder case where court found only one aggravator,

[24] Appellee recognizes that the denial of certiorari by the United States Supreme Court does not carry any precedential value. However, the State notes that the Supreme Court has denied certiorari in numerous Florida cases raising a constitutional attack to Florida's capital sentencing scheme based on Ring. See e.g., Bottoson v. Moore, 833 So. 2d 693 (Fla.), cert. denied, 537 U.S. 1070 (2002); King v. Moore, 831 So. 2d 143 (Fla.), cert. denied, 537 U.S. 1067 (2002); Cox v. State, 819 So. 2d 705 (Fla. 2002), cert. denied, 537 U.S. 1120 (2003); Pagan v. State, 830 So. 2d 792 (Fla. 2002), cert. denied, 539 U.S. 919 (2003).

HAC, and jury's recommendation of death was not unanimous).[25] Like the instant case, Butler was on direct appeal and his sentence of death was imposed without any of the factors, such as a prior violent felony or contemporaneous enumerated felony conviction, or a unanimous jury recommendation, which would take it outside the purview of Ring. The denial of Butler's claim was consistent with precedent from this Court and the United States Supreme Court. See also Coday v. State, 946 So. 2d 988 (Fla. 2006) (rejecting Ring claim in single aggravator case, HAC, and non-unanimous jury recommendation, but reversing death sentence for other reasons) (plurality opinion).

As previously noted, this Court has repeatedly held that under Florida law, a defendant becomes death eligible once he is convicted of first degree murder. Mills v. Moore, 786 So. 2d 532, 538 (Fla. 2001) (holding that "when section 775.082 (1) is read in *pari materia* with section 921.141, Florida Statutes, there can be no doubt that a person convicted of a capital felony faces a maximum possible penalty of death"); Porter v. Crosby, 840 So. 2d 981, 986 (Fla. 2003) ("we have repeatedly held that the maximum penalty under the statute is death");

[25] Appellant attempts to minimize this Court's decision in Butler by asserting that the issue was only before this Court based on a motion for rehearing and was not fully briefed. Although that may be the case, this Court had no reservations about addressing the merits of the issue.

Shere v. Moore, 830 So. 2d 56 (Fla. 2002) (stating that a Florida defendant is eligible for a sentence of death if convicted of a capital felony); Mann v. Moore, 794 So. 2d 595, 599 (Fla. 2001) (finding the plain language of section 775.082(1) is clear that the maximum penalty available for a person convicted of a capital felony is death). Because a jury must unanimously vote to find a defendant guilty of first degree murder beyond a reasonable doubt, every person on death row has been placed there by a unanimous vote. Under Florida law, the sentencing phase is for the judge and jury to consider the possible sentences for which the defendant has already been found eligible and is not to make factual findings that enhance a sentence. Thus, because Ring does not apply to Florida's capital sentencing scheme, this Court should deny Appellant's claim that his death sentence is unconstitutional.

ISSUE III

THE TRIAL COURT PROPERLY FOUND THAT THE MURDER WAS COMMITTED IN A COLD, CALCULATED AND PREMEDITATED MANNER WITHOUT ANY PRETENSE OF MORAL OR LEGAL JUSTIFICATION, AND APPELLANT'S DEATH SENTENCE BASED ON A SINGLE AGGRAVATING FACTOR IS PROPORTIONATE GIVEN THE SLIGHT MITIGATIION PRESENT IN THIS CASE.

In his third issue, Appellant asserts that the evidence did not establish beyond a reasonable doubt that the murder was committed in a cold, calculated, and premeditated manner, and further asserts that even if the trial court properly found CCP, his death sentence is disproportionate. Contrary to Appellant's position, the trial court properly found the existence of the CCP aggravating circumstance, and his death sentence is proportionate to other capital cases.

This Court has previously held that the issue of whether an aggravating circumstance exists is a factual finding reviewed under the competent, substantial evidence test. This Court's function is not to reweigh the evidence, but rather to determine whether the trial court applied the right rule of law for each aggravating circumstance and, if so, whether competent, substantial evidence supports its finding. Alston v. State, 723 So. 2d 148, 160 (Fla. 1998). In this case, competent, substantial evidence supports the trial court's finding of CCP. As the trial court noted, "the evidence presented by the State

in this case clearly establishes beyond and to the exclusion of any reasonable doubt that the existence of the cold, calculated and premeditated (CCP) aggravator." (V9:1405).

In order to establish that a murder was cold, calculated, and premeditated (CCP), the State must show that the murder was (1) the product of a careful plan or prearranged design; (2) the product of cool and calm reflection and not an act prompted by emotional frenzy, panic, or a fit of rage; (3) the result of heightened premeditation; and (4) committed with no pretense of moral or legal justification. Rodriguez v. State, 753 So. 2d 29 (Fla. 2000). In the instant case, the trial court analyzed each of these factors in detail, and competent, substantial evidence supports his findings. In support of CCP, the trial court stated:

> (1) **COLD**. The killing must have been the product of cool and calm reflection and not an act prompted by emotional frenzy, panic, or a fit of rage.
>
> Roy Ballard desired to reobtain custody of S.H. for his own sexual gratification and while this motive may have been grounded in passion, the crime committed was not done in the heat of any passion. See DeAngelo v. State, 616 So. 2d 440, 442 (Fla. 1993). Standing in the way of regaining custody of S.H. was Autumn Traub (S.H.'s mother). The Defendant attempted a direct confrontation with Autumn and the use of the "custody papers" (apparently, a Power of Attorney and letter authorizing the Ballards to have custody of S.H. while Autumn was in prison.) This attempt failed as the policemen who intervened indicated that they could not enforce those "custody papers" and that Mr. Ballard would have to go through a court proceeding. It

appears that Mr. Ballard consulted a lawyer, but no further court proceedings were initiated, presumably because he feared that his sexual relationship with S.H. would come to light.

Confronted with the obstacle of Autumn not wanting to voluntarily relinquish custody of S.H., the Defendant came to the conclusion that if Autumn were removed from the scene (as she had been when she was sent to prison), S.H. would be returned to the custody of Kathy Ballard, the Defendant's wife, and therefore to him. The Defendant set upon a course of action to eliminate Autumn Traub, which may have been interrupted by his brief hospitalization, but that culminated in the death of Autumn Traub.

On the morning of September 13, 2006, the Defendant made the trip from his home in Zephyrhills to Autumn Traub's residence. He parked away from her home and calmly met with her after John Traub had left for work. He then talked her into going for a drive with him to discuss S.H.'s future.

This confrontation did not include any heated passion as involved in Santos v. State, 591 So. 2d 160 (Fla. 1991), or a domestic confrontation as involved in Farinas v. State, 569 So. 2d 425 (Fla. 1999); nor was there any hatred or jealously or passionate confrontation. See Santos v. State, 591 So. 2d 160, 163 (Fla. 1991), explaining Douglas v. State, 575 So. 2d 165 (Fla. 1991).

(2) **CALCULATED**. The Defendant must have had a careful plan or prearranged design to commit murder before the fatal incident.

After coming to the conclusion that he could reobtain custody of S.H. by eliminating Autumn Traub, the Defendant set upon a course to accomplish that end.

On September 2, 2006, the Defendant went to a Lowe's hardware store (as established by a receipt and confirmed by video surveillance) to purchase a very unique special purpose item, an 18" metal pipe. When later confronted about the purchase of this pipe, the Defendant could not remember buying it, could not

remember using it, and could not remember what he did with it. This is an incredible statement in light of the very unique nature of the pipe purchased.

On September 12, 2006, the Defendant left work early and traveled from his workplace in Tampa, passed his home in Zephyrhills, to an area in North Lakeland/North Polk County as is evidenced by his cell phone utilizing the cell phone tower in that area. This is an area of Polk County that is rural, undeveloped, and remote. His cell phone is “captured” in that same area on the morning of September 13, 2006, by the same cell phone tower.

It is apparent from this evidence that the Defendant travelled to that area on September 12, 2006, to scout out a remote area where he would be able to commit the murder of Autumn Traub and/or dispose of her body.

On September 13, 2006, instead of going to work, the Defendant drove to Lakeland and parked his vehicle somewhat removed from Autumn Traub’s residence. He then situated himself so as not to be observable from Autumn’s home and waited for John Traub to leave for work so as to isolate Autumn. He then approached Autumn, under the auspices of discussing S.H.’s future, and convinced her to accompany him to get a drink. At 11:16 a.m., several hours after picking Autumn up, the Defendant’s cell phone utilizes a cell phone tower in North Polk County and this coincides with Kathy Ballard’s testimony that she called the Defendant during her break, sometime after 11:00 a.m. on that morning.

Michael Needham (the Defendant’s former cellmate) testified that the Defendant told him that he hit Autumn in the back of her head with the pipe. Then, after killing her, he knocked her teeth out to eliminate any dental records and then placed her body in some form of acidic water and held her down with cement blocks.

According to Mr. Needham, the Defendant then stated that he disposed of the murder weapon, the pipe, by grinding it up at his place of employment, a metal fabrication shop.

This was a well thought out and executed plan.

(3) **PREMEDITATED**. The Defendant must have exhibited heightened premeditation.

Heightened premeditation is more than what is required to prove First Degree Premeditated Murder and includes deliberate ruthlessness, Buzia v. State, 926 So. 2d 1203 (Fla. 2006).

"Heightened premeditation necessary for CCP is established where the Defendant had ample opportunity to release the victim but instead, after substantial reflection, acted out the plan he had conceived during the extended period in which the events occurred. Hudson v. State, ___ So. 2d ___, 33 FLW S465, 471 (Fla. July 3, 2008).

Roy Ballard procured the murder weapon on September 2, 2006, a week and a half before the murder. His plan was interrupted by a hospitalization but was thereafter carried out on September 13, 2006.

On September 12, 2006, the Defendant scouted out an area in North Lakeland to commit the crime and dispose of the body. On September 13, 2006, the Defendant left his home in Zephyrhills at the normal time and, instead of going to work, travelled to Lakeland. He then hid and waited 20 to 30 minutes until John Traub left for work so that he could isolate Autumn Traub.

He confronted Autumn, convinced her to accompany him, let her go inside to tell S.H. she was leaving with the Defendant and walked with Autumn to his car that was somewhat remotely parked. He then drove off with Autumn and eventually took her to rural North Polk County.

The Defendant had ample opportunity to abandon his plan and/or release Autumn on several different occasions on that morning. More specifically, instead of going to work, the Defendant drove from Zephyrhills to Lakeland, at least a 20 to 30 minute trip. This gave him time to reflect upon what he was about to do.

> Upon arriving in Lakeland, he parked and then walked to an area where he could hide and observe Autumn's residence. He waited 20 to 30 minutes in order to isolate Autumn and would have again had time to reflect upon what he was about to do.
>
> After John Traub left the area, Roy Ballard approached and confronted Autumn to talk about S.H.'s future. He could have easily ended the confrontation at that point. Instead, he convinced Autumn to ride with him and even allowed her to go into her residence before leaving. He could have very easily turned and left when Autumn went inside.
>
> Autumn advised S.H. that she was going to the store with the Defendant to get a soda. Autumn voluntarily got into the Defendant's car and accompanied him. The Defendant could have easily left Autumn behind or, at any time during the course of the trip, let her out. Instead, he travelled to rural North Polk County.
>
> Upon arriving in the remote area, the Defendant once again could have abandoned his plan and taken Autumn home. He didn't. Instead, he hit her on the head with the pipe, killed her, and disposed of her body.
>
> These facts constitute heightened premeditation.
>
> (4) **NO JUSTIFICATION**. There must have been no pretense of moral or legal justification.
>
> This crime was committed by the Defendant in order to eliminate Autumn Traub and, thereby, regain custody of S.H. for his own sexual gratification.
>
> There is no justification for this murder.

(V9:1405-08).

As the trial judge properly concluded based on the evidence introduced, the murder was committed in a cold, calculated and premeditated manner. Cold, calculated, premeditated murder can

be indicated by the circumstances showing such facts as advance procurement of a weapon, lack of resistance or provocation, and the appearance of a killing carried out as a matter of course. Swafford v. State, 533 So. 2d 270 (Fla. 1988). Here, Appellant planned the murder in early September when he purchased a "very unique special purpose item," an 18 inch iron pipe, and duct tape.[26] As the court found, his plan was interrupted when he was briefly hospitalized, but he was able to resume his actions once released from the hospital. Appellant made preparations for the murder the day before, as evidenced by the cell phone records, and carried out his plan on the morning of September 13, 2006, when he picked up Autumn Traub after stealthily waiting for her husband to leave the house. Appellant transported the victim to a remote area and killed her with the pipe. Because the direct

[26] Appellant challenges the trial court's finding that the purchase of the pipe was unique and asserts that Appellant's failure to remember purchasing it was more a function of his health issues. Appellant's argument is clearly without merit. In his taped statement to detectives, Appellant's memory problems were confined to his purchase of the pipe and its current whereabouts and his "finding" of the dildo -- he had tremendous recall of numerous other events occurring at the same time. Furthermore, Appellant purchased the pipe on September 2, 2006, and then was hospitalized from September 4-8, 2006, before returning to work on September 11, 2006. Obviously, his opportunity to legitimately utilize the pipe and duct tape was extremely limited; yet he could not recall what he had done with them. Of course, the direct evidence of Appellant's confession from Michael Needham supplied the missing information. Appellant utilized the pipe to kill his step-daughter and then grinded it up at his work.

and circumstantial evidence constitutes competent, substantial evidence supporting the trial court's finding of CCP, this Court should affirm the lower court's finding of CCP.

Additionally, contrary to Appellant's assertion that his death sentence in disproportionate, the State submits that his sentence in this single aggravator case is proportionate when considering the very little mitigation found by the trial court. This Court has previously stated that its proportionality review does not involve a recounting of aggravating factors versus mitigating circumstances but, rather, compares the case to similar defendants, facts and sentences. Tillman v. State, 591 So. 2d 167 (Fla. 1991). In conducting the proportionality review, this Court compares the case under review to others to determine if the crime falls within the category of both (1) the most aggravated, and (2) the least mitigated of murders. Almeida v. State, 748 So. 2d 922, 933 (Fla. 1999). This Court's function is not to reweigh the aggravators and mitigators, but to accept the jury's recommendation and the judge's weighing of the evidence. Bates v. State, 750 So. 2d 6 (Fla. 1999).

While it is true this Court has required there to be little or no mitigation for a case to withstand proportionality review

with a single aggravator,[27] it also has stressed that it is the weight of the aggravation and mitigation that is of critical importance. See Windom v. State, 656 So. 2d 432, 440 (Fla. 1995) (finding in single aggravator case, the number of aggravating and mitigating circumstances is not critical, but rather the weight given them). In the instant case, the trial judge indicated that he was aware of this Court's precedent in single aggravator cases (V9:1404), but after weighing the "single strong aggravator" of CCP against the "very little" mitigation established, the court found that the aggravating circumstance "far outweighs" the mitigating circumstances. (V9:1414).

At the guilt and penalty phase, Appellant presented evidence from Drs. Sesta and Tanner regarding Appellant's health issues. These witnesses testified that Appellant had vascular dementia as a result of his history of strokes, mild to moderate brain impairment in the right cerebral hemisphere, type 2 diabetes, hypertension, and high cholesterol. In rebuttal, the State presented testimony from medical examiner Dr. Nelson who examined Appellant's MRI results and did not note any

[27] See Songer v. State, 544 So. 2d 1010, 1011 (Fla. 1989) (noting "[w]e have in the past affirmed death sentences that were supported by only one aggravating factor, but those cases involved either nothing or very little in mitigation." (citation omitted)).

significant brain damage. Additionally, the State presented testimony from Appellant's supervisor at work who did not notice any significant changes in Appellant's behavior after his hospitalization.

In discussing Appellant's proffered statutory mitigating circumstances under section 921.141(6)(b)(f) and (g), the trial court stated:

> (b) The Capital Felony was committed while the Defendant was under the influence of extreme mental or emotional disturbance.
>
> Dr. Sesta and Dr. Tanner both testified that, in their opinion, Mr. Ballard is suffering from mild to moderate brain damage as a result of multiple small strokes he has suffered over a period of years starting in 1995 and culminating in his hospitalization in September 2006. They point to the MRI that shows objective signs of lesions in the brain.
>
> Drs. Sesta and Tanner opine that this brain damage, when combined with the other medical and aging problems affecting the Defendant, has led to behavioral problems that include a lack of inhibition and a lack of reasoning or judgment.
>
> The Defendant further argues that the loss of S.H. was so emotionally traumatic to the Defendant that he set upon an ill conceived course of reobtaining custody of S.H. through the murder of Autumn Traub.
>
> Countering these opinions, Dr. Nelson (on behalf of the State) testified that the MRI findings are not significant and that, if anything, Mr. Ballard suffered only a slight amount of brain damage.
>
> More importantly, there does not appear to be any outward signs of brain damage resulting in behavioral problems according to the observations of Mr.

Witzigman. Mr. Witzigman saw the Defendant on a regular basis both before and after the murder and noticed no change in the Defendant's demeanor or behavior. Indeed, the Defendant worked at his job for several weeks after the murder without any problems being noted by Mr. Witzigman.

This Court has taken into consideration the case of Crook v. State, 813 So. 2d 68 (Fla. 2002) and finds it distinguishable.

In Crook, the uncontroverted evidence presented by numerous doctors demonstrated that Mr. Crook was "borderline mentally retarded," was unable to control himself, was prone to impulsive and aggressive behavior, had an explosive personality, and was severely limited in his frustration tolerance. He also had a history of sustained brain trauma, learning disabilities, severe behavioral problems, drug and alcohol abuse, parental neglect, and socioeconomic deprivation.

In Crook, Dr. McCraney and Dr. Dolente both testified that the murder committed by Mr. Crook was a crime of rage. In addition, Mr. Crook admitted that he had been drinking and using cocaine on the day of the murder.

Here, the Defendant's evidence is controverted by Dr. Nelson's testimony from a medical point of view and significantly diminished by Mr. Witzigman's practical day to day observations of the Defendant and his describing that the Defendant appeared no different after his hospitalization.

The murder of Autumn Traub was not a crime of rage. It was a well thought out and planned murder.

While there is some objective evidence of brain damage (the MRI) and the opinions of the Defendant's doctors (hired to review medical records, briefly examine the Defendant and then testify at trial) do support the Defendant's argument, there is evidence that the Defendant did not demonstrate any outward signs of extreme or emotional disturbance.

In light of the objective findings of brain damage (again, the MRI) and the Defendant's hospitalization for mini-strokes and seizures, the Court attributes slight weight to this mitigator.

(f) The capacity of the Defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was substantially impaired.

The Defendant argues that as a result of the underlying brain damage, when combined with the dementia, memory impairments and other medical problems, the Defendant had reduced inhibitions and was prone to impulsive behavior. The Defendant further argues that the Dilantin toxicity exacerbated the above problems.

In regard to the Dilantin toxicity, Dr. Vyas testified that Dilantin toxicity causes dizziness and a loss of balance, but no confusion. Dr. Tanner testified that the side effects of Dilantin toxicity are jerking eyes, slurred speech, motor skill twitching, uncoordination, and dizziness. None of these conditions would lead to a substantial impairment of a person's ability to conform to the law.

There is no substantive evidence, other than the opinions of the Defendant's retained doctors, to support the Defendant's claim that he could not appreciate the criminality of his conduct or conform to the requirements of the law. The Defendant argues that his relationship with S.H. and the murder of Autumn Traub clearly demonstrate that he could not conform his conduct to the requirements of law, but that really begs the question. He attempts to justify his criminal activity by pointing to the motive for his crime and the crime itself to say he cannot control himself.

Again, the Court turns to Mr. Witzigman's testimony, who did not notice any difference in the Defendant's behavior over the several years he knew him both before and after the hospitalization in September 2006 and/or after the murder of Autumn Traub.

> The Court gives this mitigator a slight amount of weight.
>
> (g) The age of the Defendant at the time of the crime.
>
> The Defendant is 67 years old and was 65 years old at the time of the murder.
>
> The Defendant ties this age factor to the medical problems the Defendant is facing and argues that he has had lifelong diseases, which are slowly eroding his mental functioning.
>
> The evidence presented at trial demonstrates that the Defendant has developed various medical conditions over the years, which coincide with the aging process. However, none of these conditions have so debilitated the Defendant so as to keep him from leading a normal life. He was employed in a meaningful vocation, which required both physical stamina and mental acuity to identify and correct maintenance problems at a metal fabrication plant. He worked long hours, starting before 7:00 a.m., and working full days. His aging did not appear to slow him down.
>
> Another facet of the age mitigator is the length of time that a Defendant has obeyed the law. See, Blackwood v. State, 777 So. 2d 399 (Fla. 2000). The Defendant waived a Presentence Investigation in this case, and the Court has not been made aware of any significant criminal history on the part of the Defendant and, therefore, assumes that he has led a relatively, if not totally, crime free life.
>
> The Court gives this little to slight weight.

(V9:1409-11). In addition to the statutory mitigators discussed above, the trial court also found a few nonstatutory mitigators and gave them little or no weight. (V9:1412-14).

This Court has previously stated that the CCP aggravating circumstance is one of the weightiest aggravating circumstances

set out in Florida's statutory sentencing scheme. See Morton v. State, 995 So. 2d 233, 243 (Fla. 2008); Larkins v. State, 739 So. 2d 90, 95 (Fla. 1999). This aggravator, when compared to the slight mitigation, establishes that Appellant's death sentence is proportionate. Although the trial court found three statutory mitigating circumstances and other nonstatutory mitigators, a review of the substance of the court's findings supports the court's conclusion that this was very weak mitigation.

In LaMarca v. State, 785 So. 2d 1209, 1216-17 (Fla. 2001), this Court discussed single aggravator cases and noted that it has vacated death sentences in single aggravator cases where there is substantial mitigation or when the single aggravating circumstance is weak. As in LaMarca, the instant case does not fall into either of these categories. Here, the single aggravator of CCP is very weighty. Appellant planned his step-daughter's murder for quite some time and took the appropriate actions to carry out his plan in a cool and calm method, by driving her to a remote area and killing her by striking her with a pipe that he purchased two weeks earlier. Furthermore, like LaMarca, the mitigation in this case is weak. See also Songer v. State, 544 So. 2d 1010, 1011 (Fla. 1989) ("We have in the past affirmed death sentences that were supported by one

aggravating factor, but those cases involved either nothing or very little in mitigation."); Burns v. State, 699 So. 2d 646, 648-49 (Fla. 1997) (one aggravator, comprised of three merged factors, supported death sentence when compared to two statutory mitigators of reduced weight and three nonstatutory mitigators); Ferrell v. State, 680 So. 2d 390 (Fla. 1996) (upholding death sentence in single aggravator case where prior violent felony was weighty and mitigation was assigned little weight by trial court); Cardona v. State, 641 So. 2d 361 (Fla. 1994) (death sentence upheld on proportionality grounds where single aggravator of HAC given "enormous" weight versus two statutory mental mitigators), reversed on other grounds, 826 So. 2d 968 (Fla. 2002). As Appellant's case falls into the category of cases where there is a single weighty aggravator versus very little in mitigation, this Court should affirm his death sentence.

CONCLUSION

Based on the foregoing facts, arguments and citations of authority, Appellant's convictions and death sentences should be AFFIRMED.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Regular Mail to Steven L. Bolotin, Assistant Public Defender, Public Defender's Office, P.O. Box 9000 — Drawer PD, Bartow, Florida 33831-9000, on this 9th day of March, 2010.

CERTIFICATE OF FONT COMPLIANCE

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

Respectfully submitted,

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