IN THE SUPREME COURT OF FLORIDA

ROY BALLARD,	:	
Appellant,	:	
vs.	:	Case No. SC08-2041
STATE OF FLORIDA,	:	
Appellee.	:	
	:	

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

INITIAL BRIEF OF APPELLANT

JAMES MARION MOORMAN
PUBLIC DEFENDER
TENTH JUDICIAL CIRCUIT

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STATEMENT OF THE CASE

Roy Ballard, age 65, was charged in Polk County with first degree murder of his adult stepdaughter Autumn Traub (2/122-23). The prosecution moved to disqualify Judge Susan Roberts on the basis of her comment at a pretrial hearing that the state might want to reevaluate its decision to seek the death penalty in light of Ballard's advanced age (2/158-59,164-70,187). The Second DCA found that the motion to disqualify was legally sufficient, in that the state could reasonably conclude that Judge Roberts' remarks "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). Judge Villanti, concurring, noted that in order for old age to be considered a significant mitigator, "the defendant's age must be tethered to another factor such as mental health, retardation, or senility." Therefore, by prematurely commenting without having heard the evidence, "the trial judge's suggestions may or may not have been an accurate anticipation of whether his age could be significant mitigation." 956 So.2d at 475.

The case was reassigned to Circuit Judge Donald Jacobsen (2/213). At a status hearing less than four months before trial, in the midst of a discussion of penalty phase discovery, the prosecutor, Cass Castillo, acknowledged that "it is no secret that this is not an overwhelming death penalty case" (5/765). Mr. Castillo indicated that the State Attorney's Office was open to reconsideration of its decision to pursue the death penalty

(5/752-53); therefore, “if there is significant mitigation out there, we need to know about it so that we don’t waste everybody’s time” (5/765).

In the next hearing, a week later, the prosecutor further conceded that “this is not an overwhelming case, for a variety of reasons, on guilt” (5/800):

> MR. CASTILLO: So I’m more focused on the guilt phase of this thing, and I think that’s where the state’s greater interest lies here.
>
> So it’s not to say I don’t want to - - I’m not at all concerned about it [the penalty phase]. I am. But I’m primarily concerned with the guilt phase. (5/800)

Mr. Castillo reiterated that “[t]here doesn’t need to be a whole lot of mitigation, from my perspective, from a medical perspective, you know, medical testimony” that could very well change the state’s decision on the death penalty (5/800).

On June 5, 2008, Judge Jacobsen denied the defense’s motion in limine to exclude evidence relating to the defendant’s alleged prior sexual misconduct against Suny Houghtaling (8/1204-06).

The case proceeded to trial before Judge Jacobsen and a jury in June 2008. The state’s case was entirely circumstantial, except for the testimony of a jailhouse informant. No body or murder weapon was ever found. The state’s theory was that Roy Ballard was the last person seen with Autumn Traub; that his motive to kill her was to re-obtain custody of his stepgrandaughter Suny; and that the sole or primary reason he wanted custody was to resume having sexual relations with Suny. The defense contended that there was no proof that Autumn was dead or that Roy Ballard killed her; that due to his age and severe medical infirmities (including

a stroke the week before Autumn disappeared) he was not physically capable of murdering the much younger and much heavier Autumn, and then successfully transporting and disposing of her body; and that a Walgreen's clerk saw Autumn alive at a time after Roy said he dropped her off at the store.

The jury returned a verdict finding Roy Ballard guilty as charged (8/1253;26/2879).

In the penalty phase three weeks later, before the same jury, the only aggravating factor relied on by the state to establish death eligibility was the "cold, calculated, and premeditated" (CCP) aggravator. The defense had previously filed (and repeatedly renewed) motions challenging, based on Ring v. Arizona, 536 U.S. 584 (2002), various aspects of Florida's death sentencing procedure, specifically asserting a violation of Ring and the Sixth Amendment in that Florida is the only state which does not require a unanimous jury finding of at least one aggravating circumstance necessary to make the defendant death eligible.[1] (6/889-920;7/1041-76;see 2/138-40;6/969-71,979;7/1098,1143-64; 8/1183-86,1196-97,1208,1211-12;14/778-79;27/2893-96,3051-52). The existence of the CCP aggravator was vigorously contested by the defense, on grounds of legal insufficiency (27/3052-54;28/3055) and in its argument to the jury (28/3080-81,3085-87). The prosecutor concluded his argument to the jury by urging that CCP was a "very, very powerful aggravator" (28/3075), and emphasizing

[1] See State v. Steele, 921 So.2d 538 (Fla. 2006), quoted in the defense's motions (6/893-95,7/1050-52).

the lack of a requirement of unanimous agreement (28/3075-76).

The focus of the penalty phase testimony was on medical and mental issues. Drs. Tanner (a neurologist) and Sesta (a neuropsychologist), for the defense, discussed Ballard's history of strokes and seizures, resulting in cerebral vascular dementia and mild to moderate frontal lobe brain damage, which would have caused him difficulty in conforming his conduct to the requirements of law (27/2911-3010). The state called Dr. Nelson, a medical examiner and neuropathologist, who does not treat live patients and never examined Roy Ballard. He reviewed the scans and radiology reports from an MRI administered in September 2006 (during Ballard's hospitalization for seizures). Dr. Nelson acknowledged that "the MRI would not indicate brain functioning, it would just indicate any king of structural abnormality to the brain." Dr. Nelson saw no significant structural abnormalities, apart from several small acute infarcts in the right subcortical white matter (27/3014-21). The state also called Tom Witzigman, Ballard's supervisor at work, who didn't notice any drop-off in Ballard's job performance during the weeks after his hospitalization. However, he looked very tired when he came back to work so Witzigman told him to take it a little easy, and (on the second day after his return) suggested that he go home (27/3044-50).

The jury, by a 9-3 vote, recommended a death sentence (8/1281,28/3110).

On October 20, 2008, Judge Jacobsen entered a written order imposing the death penalty. The sole aggravating factor was CCP.

Three statutory mitigating circumstances (extreme mental or emotional disturbance, impaired capacity, and age) were found; however, each was accorded "slight" or "little to slight" weight (9/1398-1415, see 1389-96).

STATEMENT OF THE FACTS

A. Pretrial

On May 31 and June 6, 2007, an Arthur[2] bond hearing was held, during which the state and defense presented much of their anticipated trial evidence (3/315-473;4/474-659); including the testimony of Suny (pronounced Sunny) Houghtaling (Roy Ballard's then 15 year old step-grandaughter)(4/497-559), as well as other testimony relating to Suny's accusations of sexual abuse by Roy and by a number of other men (including her current stepfather John Traub)(3/355-56,362,385-86,394-98,440,454-45). [The purpose of Suny's testimony, according to the state, was to establish a motive for the charged homicide of Autumn Traub].

Sunny testified at the Arthur hearing that the sexual experiences (including intercourse) with Roy Ballard began a couple of months after she moved in with her grandparents, and happened "like every other week", continuing throughout the entire two-and-a-half years she lived with the Ballards (4/501,505-06,546). Suny acknowledged that she had lied under oath when she gave a statement to Detectives Newsome and Dyess on September 19, 2006, and told them that nobody had sexually absued her (4/532-33,539-41). She testified that she was afraid and didn't want them

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

to know (4/532-33). In addition to her testimony accusing Roy Ballard, she now stated that she had sex with her current stepfather John Traub one time (before she moved in with her grandparents), and she had sexual experience prior to that with a boyfriend (4/503-05,546).

Suny did not remember, when she was living with the Ballards, telling her grandmother Kathy that she had been molested by several different people, including John Traub (4/558). Nor did Suny remember whether she ever made any complaint that she'd been molested by her first stepfather Scott Niles, or by Scott's brothers (4/543-44). She did, however, recall talking to DCF investigators while she was living with her grandparents (4/558-59).

Detective Brian Wallace testified at the Arthur hearing that when he talked to Kathy and Roy Ballard they told him that Suny was very manipulative, and she had made many statements in the past, playing one against the other, including prior allegations against both Roy and John and a couple of other people (3/394-95)

On February 21, 2008, the state filed a notice of intent to offer evidence of other crimes, wrongs, or acts; specifically, that between 2002 and 2006 "the Defendant engaged in various acts of a sexual nature with Suny Houghtaling, a child less than 16 years of age, which included but not limited to acts of sexual battery" (5/739). Defense counsel indicated at a status hearing that he planned to file a motion in limine to exclude such evidence (5/774). The prosecutor said he intended to introduce the sexual molestation evidence to establish motive; he recognized

that it would be “very emotional” and “prejudicial if it’s overdone” (5/775;see also 7/1125). The prosecutor expressed concern about crossing the line to where it might be viewed as a feature of the case; and suggested that if the defense would concede that the acts of sexual abuse occurred and were committed by Roy, then he wouldn’t have to call so many witnesses to corroborate Suny’s accusation (5/771-76;see alo 7/1119-21,1125).

On May 30, 2008, the defense filed a motion in limine, seeking to exclude accusations of sexual misconduct involving Suny Houghtaling, on the grounds that (1) the state had not met its burden of showing by clear and convincing evidence that the collateral crimes occurred, or that they were committed by Roy Ballard; (2) that whatever probative value the sexual abuse evidence might have was substantially outweighed by its explosive and overwhelming prejudicial impact (Fla. Stat. §90.403); and (3) that the collateral sexual crimes would inevitably become a feature of the trial, and would in fact “dominate the trial” (7/1078-82). In a hearing held two weeks before trial, defense counsel elaborated on each of those grounds (7/1101-14,1136-41), and pointed out that over the course of time (beginning well before Autumn Traub’s disappearance) Suny Houghtaling had made multiple accusations and inconsistent statements involving a number of older males (7/1105-09,see 1079-80).

The prosecutor had filed his notice of intent to rely on other crimes, wrongs, or acts pursuant to Fla.Stat. §90.404, and he still suggested to the judge that “the proper analysis is 404” (5/739;7/1115), but he agreed that either way - - whether the

collateral crime evidence is offered under §90.404 or §90.402 - - it is always going to be subject to the prejudice vs. probative value balancing test of §90.403 (7/1115,1123-24). The prosecutor also agreed with defense counsel that the state has the burden of proving by clear and convincing evidence that the defendant committed the collateral act (7/1115). He further acknowledged that Suny had made inconsistent statements; hence, according to the prosecutor, her credibility was central and needed to be corroborated by other testimony and evidence (e.g., the neighbors' observations and the police officers' discovery of a dildo) (7/1118-21). Nevertheless, the prosecutor's position was that the sexual abuse evidence was relevant to establish motive and context (7/1121-22,1126-33,1142), and if it became a feature of the case it would be the defense's own doing (7/1119-21,1125).

Judge Jacbosen took the matter under advisement (7/1141); then issued a written order denying the motion in limine (8/1204-06).

B. Trial – State's Case

John Traub married Autumn Houghtaling Niles in 2003, after they'd been dating for two years. Autumn had previously been married to Scott Niles, Sr., who was deceased. Autumn had two children, Suny Houghtaling and Scott Niles, Jr. (14/828-32;15/886). John Traub described Autumn as a large woman; about 5'6" 225 pounds (15/870-72,894). She received disability payments for seizures and slow learning, and she was on medication (Depacote) to control the seizures (15/871,886-87).

Autumn's mother and stepfather, Kathy and Roy Ballard, lived

in Zephyrhills in Pasco County. After Autumn and John got married, they and the children lived with the Ballards for a while, and then just down the street from them in a rented mobile home (14/830-32,15/868-69). Autumn and her stepfather Roy got along okay, “just like stepfather/father and daughter” (15/868). In July 2004, the Traubs “got kicked out” of their rental unit and they and the children had to move to Lakeland (14/832).

John and Autumn were both on felony probation for embezzling from their respective employers, and after they moved to Lakeland there ensued a series of VOPs which (after a period of “house arrest” for each) culminated in John doing a month and then two months in county jail; and Autumn also being jailed for a month, and later being sentenced to a year and a day in state prison (14/834-39). The first time both parents were simultaneously incarcerated (in 2004), the children had been visiting the Ballards, so they stayed there for the whole month. After the Traubs were released, Scott, Jr. came home (ultimately being placed in the custody of his paternal grandparents when Autumn was imprisoned and John rearrested) but Suny decided she wanted to remain with her grandparents (14/835-36).

Autumn was released from prison in May 2006, and she and John got a cottage on Vermont Avenue in Lakeland (14/839-40). In early August, Kathy Ballard got ahold of Autumn and asked her to sign some papers so Suny could get her learner’s permit, and soon afterward Suny returned to live with the Traubs (14/841,844-45). Roy Ballard came down a few days later to move Suny’s belongings, and “everything seemed perfectly fine” (14/844-45). Because the

house was so small (a combined living room/bedroom with a kitchen and bath), Suny slept on a pallet on the floor (14/848-49). Althouhg Autumn herself had only a ninth grade education, she was planning on home schooling Suny (15/887). Also, Autumn had stopped taking her seizure medication (15/885).

On August 10, according to John, Roy came to get Suny and bring her back to his house, but she refused to go with him (14/842-43,15/893). Roy said he ahd a paper, signed and notarized by Autumn, giving him custody (14/843). Roy called the Lakeland police, who arrived and told him the paperwork had no legal effect because it was not signed by a judge (14/842-43). While the police were there, Roy and John each accused the other of having sexual contact with Suny (14/843-44).

[John Traub testified that when he was in jail a year prior to this confrontation he had been questioned by DCF investigators, who said that Kathy Ballard had reported him for sexually abusing Suny 914/843;15/876-77). Asked by the prosecutor on direct if he ever had sexual contact with Suny, John replied “Not that I’m aware of.”

> Q: That sort of sounds like maybe you did but you forgot about it?
>
> A: I don’t know of anything ever happening that I’m aware of. (15/871)

In his closing argument to the jury, the prosecutor emphasized that his own witness John Traub’s testimony on this point was both absurd and self-serving. At the time of trial, John was living in Alabama with his new girlfriend, their newborn child, and the girlfriend’s son (14/827-28); the prosecutor

pointed out that John could lose custody and/or be prosecuted for the crime if he admitted having sexually abused a child in the past (26/2741). The prosecutor's contention to the jury was that, although he recognized that there were "credibility issues with Suny Houghtaling [and] frankly Suny has been inconsistent in her statements" (26/2841), she was now "telling you the absolute truth"; i.e., that both John and Roy had abused her (26/2741)].

During the first week of September, John learned that Roy Ballard had been hospitalized (14/846).

The Traubs had one car; Autumn usually drove John to and from work so she'd have the car the rest of the day. On Wednesday morning, September 13, she told John to take the car because she had a bad headache (14/847-48;15/880). Autumn called John at work at 7:15 a.m.; that was the last contact he had with her (15/851-52). At 7:45 Suny called and said that Autumn told her to call; Grandpa (Roy) was here and Autumn was going to the store with him to get something to drink (15/852). Throughout the rest of the morning, Suny called every hour or so to say that Autumn had not yet returned, so John left his workplace at lunchtime to find out what was going on (15/853-54). He and Suny went to the Lakeland hospital to see if Autumn had been in an accident, and he asked a couple of friends if they'd seen her. He didn't call Roy Ballard at that time, because he didn't have his phone number and didn't think to ask Suny (15/854-55). After 5 p.m. John called the Sheriff's Department to advise them that Autumn was missing, and later that evening, after Suny mentioned she had Roy's number, they called the Ballards. Roy said he'd been with Autumn for about

45 minutes that morning, and then dropped her off at the store. John didn't ask him which store (15/856-59,889-90).

John testified that Autumn had never before stayed out overnight without telling him, and there were no problems between the two of them. Her cell phone, wallet, driver's license, social security card, medicine, and clothing were all still at the house. Neither of the Traubs had any money, having just paid their bills. John believed that Autumn had a doctor's appointment scheduled for September 13 (15/867-74). He testified that he did not kill Autumn and to the best of his knowledge she did not run away (15/896).

Two days after he reported Autumn's disappearance, the Sheriff's office called back and said it was out of their jurisdiction, and he should contact the Lakeland police. The next morning (Sept. 16), Roy and Kathy Ballard showed up at the house and said they were taking Suny with them. When John asked why, the Ballards said it was because John had been molesting her. John replied that Autumn was missing, he as her husband was next of kin, and Suny wasn't going anywhere. The Ballards called LPD and officers came out and talked to all concerned; they confirmed that John had custody and told the Ballards they had to leave (15/863-65,890-91).

Nellie Chanatry, a clerk with the Department of Revenue, Child Support Enforcement, testified that Autumn Traub came into her office just before closing on September 12 and requested the first available appointment, which was then scheduled for 8:45 a.m. on the 13th. She was seeking to enforce the support obligation for Suny Houghtaling from her biological father

(Brink). Autumn did not keep the appointment on the 13th (15/898-908).

The state next called four witnesses who were neighbors of the Ballards in Zephyrhills. Nancy Welch, her nephew Randy, and Randy's son Robert, each testified that between 2004 and 2006 (mostly toward the later part of that period) they independently observed what they felt was inappropriate contact between a grandfather (Roy) and a granddaughter (Suny)(15/913-70). Nancy, on three or four occasions, saw "[a] prolonged embrace, kiss" which she didn't feel was appropriate (15/921,932-33). To Randy, who observed the behavior about a dozen times, it appeared as if the two of them were "making out"; Suny would sit in Roy's lap and they would hug and kiss (15/942,946,950-51,957). Robert, on at least two occasions, saw inappropriate touching and kissing (15/960-61). None of the Welches reported what they'd seen (until contacted by the police after Roy's arrest), because they like to mind their own business (Nancy, Robert) or because "it would be their word against [mine]" (Randy) (15/925-26,933-35,953-55,965-68). The fourth neighbor, Angela Thurston, saw Roy and Suny "embracing in a not normal way you would see an older man with a young child", and she believed she saw them kiss on one occasion (15/977-79).

Gordon Niles, Sr. is the father of nine, including Scott Niles, Sr. (Autumn's former husband, who was killed in a car crash), Gordon Niles, Jr. (known as "Gike"), and Bruce. After Scott, Sr's. death, Autumn, Suny, and Scott, Jr. lived for a while with Autumn's brother-in-law Bruce Niles (15/980-87). Later, when

Autumn went to prison, Gordon, Sr. got custody of his grandson. After her release, Autumn would visit her son occasionally and talk to him on the phone; she wanted to regain custody, which was fine with his grandfather as long as she satisfied the authorities she could take care of him (15/983-85).

Beverly Rousseau of Florida's Department of Revenue brought records showing no wages reported under the name and social security number of Autumn Traub after the third quarter, 2006. (In the second quarter of 2006, ending June 30, wages in the amount of $32 were recorded)(15/1007-12). Ms. Rousseau agreed on cross that if Autumn was working in a state other than Florida, or under an assumed name or false social security number, or if she were paid under the table, that wage information would not appear in the Department's data base (15/1012-14).

Detective Eddie Mingus interviewed John Traub and Suny Houghtaling regarding the missing person investigation on September 16; later that night Mingus telephoned Roy Ballard (15/1017-19;16/1026-29). Roy said he'd met with Autumn at 7:00 a.m. on the 13th to iron out their difference of opinion regarding custody of Suny. They drove toward Auburndale and back, stopping at Citgo where he bought drinks (a Mountain Dew and a Diet Pepsi) for himself and Autumn. He dropped her off at Walgreen's, saw her walking toward the parking lot, and continued southbound. Then he went home (15/1020;16/1021-24). Roy was not familiar with Lakeland streets, but Mingus deduced from the landmarks and spatial relationships that the Citgo and Walgreen's must have been the stores located on Memorial Blvd (16/1022-24,1030-34).

Detective Brian Wallace was assigned as lead investigator in the missing person case on September 18. Late that afternoon, he and other officers arrived unannounced at the Ballard's residence. Roy gave Wallace essentially the same information he'd told Detective Mingus, with a little more detail (16/1045-53). Initially, Roy said he'd left his house around 6:30 a.m. on the 13th, but his wife corrected him that he'd actually left before she went to work at 5:30. According to Wallace, Roy seemed confused, and then conceded that his wife was right. [Wallace was aware that Roy had been hospitalized from September 4-8 for seizures and possible stroke. Wallace testified that, other than the one instance, he didn't observe any confused or disoriented behavior on Roy's part] (16/1054,1108-10).

Roy told Wallace that he went to Lakeland to discuss Suny's custody with Autumn. Their disagreements concerned such matters as the living conditions at the Traubs' house and the crime and drug problems in their neighborhood; the Traubs' decision to home school Suny; and the fact that John Traub was just released from house arrest (16/1049,1051,1115-16). To Detective Wallace "[i]t seemed like trivial stuff"; "small details" (16/1051). Both Kathy and Roy Ballard also told Wallace that Suny had made allegations of sexual abuse against a number of people, including John Traub, Roy, and "a Gike and a Bruce" (16/1121-22,1130-32). [Wallace was unable to identify Gike and Bruce at that time; however, these are the names of Suny's step-uncles, and she and her family lived with Bruce Niles for a period of time after her first stepfather's death (16/1130,see 15/986-87)].

When he arrived at the Traubs' house, Roy waited some distance away for John to leave, and then knocked on the door. He asked Autumn if she wanted to go for a ride to talk about Suny. After driving for about an hour (with the stop at Citgo), he dropped Autumn off at Walgreen's at about 8:15 and returned to his home, arriving about 9:00 (16/1046-53).

Wallace asked for and received Roy's consent to look in the interior of his vehicle and to look inside the trunk. The car was a small, silver Saturn, with a proportionately small trunk (16/1055-60,1117-20). Wallace saw nothing of significance in the driver and passenger compartment (16/1057). In the trunk he saw a "sea of bags"; about thirty scattered Walmart shopping bags, most of them empty (16/1060-62). One bag contained the spade end of a shovel, with some dirt adhering to the shovel and loose dirt inside the bag. Asked about this, Roy said it was his own shovel, but he used it at work to dig lift stations (16/1061-63,1082-83). Some of the other Walmart bags contained half cement blocks, which appeared to be used for stabilizing the cooler which was also inside the trunk (16/1084-85). There was one shopping bag from Lowe's, which contained a roll of duct tape and a receipt. The duct tape was not inside its cellophane packaging, and the tape had a frayed end, indicating that at least one piece had been torn from the roll (16/1063-67,1123-24). The bag also contained a receipt from Lowe's indicating the purchase of a roll of duct tape and a three-quarter inch by 18 inch black iron pipe at 4:16 p.m. on September 2, 2006 (16/1063,1067-71). [Although Detective Wallace did not take note of it at the time, no pipe of that

description or any description was found in the vehicle (16/1071,1083)]. Wallace asked Roy why he had duct tape in his trunk; Roy said, again, it was for work, nothing specific (16/1083). There was also a tarp (brand new and unopened, still in its cellophane packaging with a Big Lots price tag), as well as some "random household tools" and a pair of gardening gloves (also brand new and unused) (16/1084-85,1095).

Before the next item of evidence came in, defense counsel renewed his motion in limine to exclude evidence relating to the alleged sexual abuse of Suny Houghtaling; counsel further reasserted that this was becoming a feature of the trial. The judge, adhering to his prior rulings, overruled the objection (16/1071-73,1080).

Detective Wallace then testified that he next found inside a Lowe's plastic bag[3] "a sex toy, dildo" (16/1077-78). Wallace asked Roy what it was for, and Roy said "You weren't supposed to find that". His wife Kathy interjected, "Yes, Roy, what is that for", and Roy told her it was none of her business (16/1079-80).

According to Wallace, the discovery of the dildo changed the entire focus of the missing person investigation, and they asked for and received Roy's consent to seize several of the items (the Lowe's bag, duct tape, receipt, shovel head, and dildo) "in the event that something larger was happening here" (16/1081-82, 1085,1120-22). The officers then returned to Lakeland and went to the Traubs' house, where Wallace obtained personal items of

[3] Wallace may have misspoken as to the dildo being in a Lowe's bag, because he later reiterated that there were multiple Walmart bags in the trunk but only one Lowe's bag (16/1097).

Autumn's (T-shirt, underwear, toothbrush) for DNA testing (16/1086-93; see 15/867).

Detective Nona Dyess went to the Citgo at 316 E. Memorial, where she purchased a large and a small Diet Pepsi and a large and a small Mountain Dew. Her purpose was to compare those receipts with the register tape from September 13, 2006 (6 am-10 am), to see if there was evidence of any similar transaction on that date. She did not find any such transaction. The Citgo store had no video tape (16/1132-49).

Frances Valverde, the HR manager at Atlantic Metal (Roy Ballard's employer) brought payroll records showing that Roy worked on Monday (Sept. 11). He worked on Tuesday (Sept. 12) but went home early; the supervisor Tom Witzigman "wrote him out" so he'd be paid for the full day. He did not work on Wednesday (Sept. 13), but he did work on Thursday and Friday (16/1170-80,1186-87). Roy began working for the company in July 2005, and he was issued eleven uniform shirts and eleven pants. When his employment was terminated after his arrest, his October 2006 final paycheck showed a deduction for one unreturned shirt (16/1182-82,1188-91).

Sgt. Gary Gross supervised the distribution of missing person fliers with Autumn Traub's picture (17/1226). On Sept. 18 he went to the Traub residence to inspect and photograph it (17/1229-34). On the 22nd there was to be a bloodhound search of the Saddle Creek Park area, so Gross returned to the Traubs' to obtain items of Autumn's clothing for their scent (17/1237-38,1241,1255-56). Suny Houghtaling was home alone at the time (17/1238). She still seemed quiet and withdrawn (17/1235,1239,1261), and Sgt. Gross

(who was head of the LPD's Crimes Against Children unit) had a feeling that "there may be something that she wanted to get off her chest, and that is how I threw it out there" (17/1261). Gross told Suny that it appeared there was something else she wanted to say, and now would be a good time to say it (17/1239). Gross denied pointing out to Suny that she'd been under oath when she was previously interviewed by Detectives Wallace and Newsome, or telling her that she could go to jail or be prosecuted for lying under oath (17/1257-58,1262). However, he acknowledged confronting her with his suspicion that she was withholding information, and that there was more she needed to say (17/1256-59). [Gross had earlier obtained an investigative subpoena for Suny's MySpace account, and had printed out some messages or photographs from her on-line activities, but he didn't recall bringing that up with her (17/1254-55)].

Sgt. Gross specifically asked Suny if she had been involved in a sexual relationship with either John or Roy, and she responded yes and nodded up and down, without specifying which person she meant (17/1239-40,1257). Gross asked a "second follow-up question", and that was when she indicated she meant both men (17/1257).

Based on Suny's age (14), Gross decided she should be interviewed by the State Attorney's office rather than the Child Protection Team, so he set up an interview with Beverly Cone (17/1240-41,1258-59,1262). He also, as required by law, contacted Florida's child abuse hotline to report the allegations (17/1242).

Detective Phil Cheshire was one of many LPD officers who

conducted a “rolling surveillance” of Roy Ballard on 9/22. Cheshire, in plainclothes and an unmarked car, traveled to Atlantic Metals in Tampa. Roy left work at 3:15 p.m. (driving a Kia), and Cheshire followed him for 50 minutes until he arrived at his mobile home in Zephyrhills. From a concealed position, Cheshire used binoculars to observe the front door. Roy went inside, changed his shirt, and came back outside, where he picked up a blue tarp, looked at it briefly, and laid it on the ground. Cheshire’s view was partially obscured, and he had no idea whether the tarp had any significance; “our mission was solely surveillance of movement.” An older white female emerged from the trailer. Roy opened and then shut the Kia’s trunk. [Cheshire never saw a Saturn on the property]. The woman (driving) and Roy got in the Kia, and Cheshire followed them to a barbeque restaurant, where they ate dinner and then returned home (17/1263-79).

Kathy Ballard was the state’s next witness. At age 52, she had been married to Roy for 13 years. Kathy had been 16 and unmarried when her daughter Autumn was born in 1973. Due to Kathy’s youth, poverty, lack of education, and her inability to cope with Autumn’s severe and increasing medical problems (including brain damage and seizure disorder resulting from a bout of meningitis when Autumn was six months old), Kathy relinquished custody and Autumn was primarily raised by her grandparents. Nevertheless, Kathy felt she had a good relationship with Autumn, as did Roy (17/1282-85,1316;18/1391-94,1405-06).

After Autumn’s first husband’s death in a car crash (in which Autumn herself was seriously injured), Autumn and her children

went to live with her brother-in-law Bruce (17/1291-93;18/1395). Then Autumn met John Traub (which, in Kathy's view, is when her criminal troubles began) and moved to Lakeland (17/1291-93;18/1395-98).

When Autumn first went to jail in 2002 or 2003, Suny and Scott, Jr. stayed with the Ballards. After Autumn's release, the boy went back to live with the Traubs, while Suny (who was angry and upset with Autumn, and told Kathy she hated her mother) remained with her grandparents for the next several years (17/1297-1300). During this time - - including the year she spent in state prison - - Autumn had no contact with either her mother or her daughter (17/1305-09;18/1401-05).

In 2005, Suny told her grandmother that she had been sexually abused by four different men; her first stepfather Scott Niles, Sr., his brothers Bruce and Gike, and her current stepfather John Traub (17/1300-02,1347;18/1402). This disclosure did not come as a complete surprise to Kathy. Suny seemed to have no friends of her own age; instead she would use the Internet or her cell phone to talk to older men (17/1301-02;18/1379-80,1425-28). [One time Kathy received a phone call from an angry woman whose husband Suny had been calling, and it turned out that Suny was pretending to be 18 and working at a golf course and a bar (18/1426)]. When Kathy asked Suny why she was contacting men instead of boys her own age, she said "Grandma, I can't tell you." Kathy told Suny she could tell her anything, and that was when Suny disclosed having been molested by these four men (17/1301-02).

Kathy immediately contacted the Pasco County Sheriff's

Office. Investigators came out and talked to Suny in Kathy's presence, and Suny told them the same things she'd told Kathy. However, the case was ultimately dropped (as to all four individuals) because Suny didn't want to pursue it; and she specifically balked at the suggestion made by the Lakeland police (who had taken over the investigation regarding John Traub) that she call John and try to get him to confess while they monitored the conversation (17/1303-04;18/1400-02).

[Kathy Ballard was a state witness, and her testimony regarding Suny's claims of sexual molestation by John Traub and Scott, Bruce, and Gike Niles was elicited by the prosecutor in his direct examination (17/1300-04,1347); then briefly addressed during the defense's cross-examination (18/1402). Kathy's testimony on this point was later corroborated by the investigative report (child safety assessment) of the Florida Department of Children and Families introduced (without objection) as Defense Exhibit 1 (Evidence Vol V, p.691, see 689)(25/2644). The narrative, dated October 7, 2005, states that Suny reported that the incidents with her two stepfathers (Scott and John) and one of the uncles (Bruce) included sexual intercourse; while with the other uncle (Gike) it was just inappropriate touching. Scott started molesting her when she was five; she didn't know how many times it occurred. With Bruce it happened "a whole bunch of times"; with Gike only once at a cousin's house. When she was in the sixth grade, John Traub twice touched her inappropriately and sexual intercourse took place. Suny reported that she felt safe at her grandma's house; the only thing she was worried about was that

her mother could come and get her any time. Kathy indicated that she found out about the abuse when she asked Suny why she was attracted to older men. Both Sunny and Kathy told the investigators that Suny's mother didn't care about her and didn't provide for her, and Kathy believed that Suny's mother was well aware of the sexual abuse. Suny's stepgrandfather (Roy) told the investigator that he learned about the sexual abuse from his wife. The report states that Suny refused to go to counseling "and if she was made to go she wouldn't cooperate". (Evid V/691][4]

In early August 2006, Kathy contacted Autumn in order to obtain authorization for Suny to get a learner's permit to drive (17/1305-09;18/1401-05). Autumn came up to Zephyrhills on Friday Aug. 4 to sign the document and have it notarized. She and Suny ignored each other at first, but after a while their attitudes thawed, and it was mutually decided that Suny would spend the weekend with her in Lakeland (17/1310-14). Autumn returned by herself on Saturday to play bingo with Kathy; then on Monday she returned with Suny. Suny told Kathy she wanted to move back in with her mother. Suny packed up her belongings and left with Autumn (17/1315-19). Both Kathy and Roy were okay with her decision at first (17/1316,1319), but they were both concerned that Suny's education would suffer due to lack of supervision. [Suny had potential to be a good student, especially at math, and Kathy had established a college fund for her]. Their misgivings grew when they learned of Autumn's plan to home school Suny;

[4] More comprehensive DCF reports were filed for identification but not introduced into evidence (Evid. V/754-84; see 25/2620-31).

Autumn herself could barely read, and her abilities in reading and math were on a first grade level (17/1321-22;18/1372-73,1409-10, 1421,1429-32,1435-37). The Ballards were also concerned about the possibility of further sexual abuse by John Traub (17/1322; 18/1407-09). However, Kathy did not say anything to Autumn abut Suny's sexual allegations against John. Kathy rationalized that she didn't want to hurt Autumn's feelings (Autumn being prone to seizures when she was upset), and that Suny wouldn't be alone with John anymore because Autumn was now at home (17/1306-09,1316-22,1334,1348-49;18/1405-06).

The night before Labor Day [Sept. 4], Kathy awoke to find the bed shaking; Roy's whole body was shaking and his head and eyes were turned to the left. She twice called 911; the first time Roy sent them away, insisting there was nothing wrong with him, but the symptoms continued. The second time Roy was taken to Florida Hospital, where he had another seizure in the emergency room (17/1324-28). Roy had eight seizures in less than two hours. When Kathy saw him on Monday he was in restraints, because he was uncooperative and wouldn't take his medicine. He believed that Kathy had put him in a nursing home (18/1410-12). Toward the end of his four day hospitalization, Autumn and Suny accompanied Kathy to visit him. Autumn did not go in his room (Kathy was afraid seeing him in that condition would provoke her to have a seizure herself), but Suny went in the room for five minutes (17/1331-33;18/1410-11). Roy was released from the hospital on Friday [Sept. 8], and had to go to work the next Monday (17/1335-36). During his first week home, Roy told Kathy he felt "jittery", and

she observed that his balance wasn't good. When he stood up from his recliner, "his body went back to the left and his feet went to the right" (18/1419-20).

Roy typically left for work before 5 a.m. in order to get there by 5:30 (17/1337-38). He wore a uniform to work. It was not unusual for him to be missing shirts or pants, because the laundry his employer used wasn't reliable (17/1338-42,1350;18/1413-14, 1440-41). It was Kathy's habit to call Roy at the beginning of her lunch break (11 am) to see how he was doing. That first week back she had an additional reason for calling; to check on his health. On Monday, Tuesday, and Wednesday, Roy left for work at the usual time and she called at 11 (17/1340-42,1349-51). On Tuesday the 12th, Kathy thought Roy came home at the regular time. He didn't say he was feeling bad, and he didn't say whether he'd been in Polk County; she didn't remember if he said Tom Witzigman had sent him home (17/1342-43;18/1420). On Wednesday the 13th, when she called at 11, Roy said the day was going good; he did not tell her he wasn't at work. He didn't report any problems or health issues, other than that he felt jittery, which she interpreted as his loss of balance (17/1349-51;18/1419). When Kathy got home that afternoon (3:30 or 3:45), she was surprised to find Roy lying on the bed. He told her he'd left work around 2, because he wasn't feeling well. He did not tell her he hadn't been at work at all that day (17/1352,1356-57).

That evening the Ballards received a phone call from Suny, which resulted in a conversation between Roy and John Traub. Kathy heard Roy tell John that he'd dropped Autumn off at Walgreen's.

This phone call was when Kathy became aware that Autumn was missing, and that Roy had not gone to work that day (17/1358-59;18/1361-66). Afterwards, Roy told Kathy about buying the sodas at the Citgo (18/1376-78).

On Saturday [Sept. 16], Kathy and Roy went to the Traubs' house in an unsuccessful effort to get Suny and bring her back to live with them. While they were there, Roy called the police, and he and John exchanged accusations of sexual abuse of Suny (18/1370-71,1406-09).

Kathy acknowledged having said that Roy was "obsessed" with getting Suny to move back, but that word was suggested by one of the detectives. She testified that she and Roy were equally concerned with getting Suny back, and that both of them were mainly focused on her education (18/1372-73,1410,1421-22,1434-37).[5]

When the police officers came to their house and found, among other things, a dildo in the trunk of Roy's car, Roy said it was none of her business. Later he told her he'd found it in Suny's dresser drawer after she moved out (18/1374-76,1424).

Kathy testified that, because of the various allegations of sexual abuse Suny had made, and because Suny was hanging around Roy, Kathy had asked both of them whether they were having a sexual relationship. Both Suny and Roy said they were not (18/1428-29,1435-36).

[5] Detective Ivancevich confirmed that it was he, during his questioning of Kathy Ballard, who first used the word "obsessed" (19/1538-40). The detective further stated that Kathy told him that Roy talked more frequently than she did about getting Suny back, though not on a daily basis (19/1541-42).

Kathy testified that she and Roy had not had sexual relations for the past twelve years; Roy had erectile dysfunction due to low testosterone, and Viagra didn't help (18/1387,1389-90). His other medical problems included diabetes and blocked arteries (18/1390-91).

The assistant manager of the Walgreen's on East Memorial at the corner of Massachusetts testified that videotapes (for September 13, 2006 and other dates) taken by the store's interior and exterior security cameras were provided to the police. Cameras were focused on the various cashier stations (including the one by the entrance where Mrs. Grenert worked), and others showed views of the parking lot and drive-through, although not the street. There is only one entrance to the store, with a left and right door (18/1442-64). [Surveillance video from the neighboring Life Skills charter school, showing the entrance to Walgreen's, was also obtained by police (20/1774-85,1805-17,1834,1840-43)].

James Woody, security and loss prevention manager for Lowe's in Zephyrhills, provided the FDLE with surveillance tape showing a transaction which occurred at 4:16 p.m. on September 2, 2006. The receipt indicated that the items purchased were a roll of utility duct tape and a three quarter inch by eighteen inch black iron pipe. Woody located an identical pipe displayed on a rack in the store, and gave it to FDLE agent Paul Ligman (18/1465-76;19/1548-52;1612-22).

Sergeant Michael Ivancevich took over the investigation into Autumn Traub's disappearance on September 19, 2006 (18/1495-98). He "determined that we needed to do a search of Saddle Creek

Park", and on the 22nd a land and air search conducted by 60-70 officers took place (18/1499). [No evidence indicated that anything pertaining to this case was found]. The news media "converged on the scene", and the police decided to utilize the media in its efforts to locate Mrs. Traub (18/1498-1500). A BOLO containing her photograph, physical description, and a description of the clothing she was believed to be wearing was given to the newspapers and television (18/1499-1500,1505-07). As a result of this publicity, Ivancevich became aware of two leads which were developed (18/1522-23). One was a possible sighting of Autumn Traub in a Bradenton music store on September 26, but the person turned out to be someone else (18/1502-03,1519-23). The other response was from a Walgreen's employee, Grenert, who (in response to the flier) contacted the police and told them she'd seen that person in her store on the morning of September 13 purchasing cigarettes, in the company of two other individuals (18/1502,1518).

Sergeant Ivancevich testified that he reviewed videotape from Walgreen's labeled September 13, 2006 (6:30 a.m.-11:00 a.m.) and did not see anyone fitting Autumn Traub's description (18/1503-04,1507,1516-17). He also reviewed videotape for the same morning hours on different dates (September 6,7,8,9,14,16), and did not see anyone matching Autumn's description on those dates either (18/1508-10,1516-17). [His reason for viewing these other tapes was to see if Ms. Grenert had been mistaken as to the date 918/1518)]. Ivancevich acknowledged that he was mainly relying on size, height, weight, and clothing; when asked if the tape was

clear enough to identify an individual's face, he said "it would be kind of tough to do" (18/1524-25).

FBI forensic geologist Jodie Webb testified that the soil samples from the shovel head seized from the trunk of Roy Ballard's car were different in color, texture, and composition from the soil samples obtained from Roy's work site, and could not have originated from the same location (18/1587-97;see 19/1661, 1681-84,1695-96;20/1752;22/2184-86).

Chief medical examiner Steven Nelson was shown a pipe identical to the one described in the Lowe's receipt. Dr. Nelson agreed that such an implement would be capable of inflicting head injury and possibly death. While scalp is "a very vascular tissue", whether or not such an injury would cause significant bleeding would depend on many variables, including the force of the blow or blows, and the location on the head where inflicted (19/1597-1609). Dr. Nelson did not examine a body in this case; he was simply addressing a hypothetical situation (19/1607-08).

Tom Witzigman was the plant manager at Atlantic Metals in Tampa, a manufacturer of office cabinets. Roy Ballard had been an employee there for about a year and a half. Atlantic Metals had machines to cut, bend, weld, and paint metal, and Roy was in charge of maintenance of the machinery (19/1632-35). Witzigman described Roy as a good, reliable employee (19/1635,1647). Witzigman was not concerned about whether Roy could lift heavy objects because Roy's assistant was a big fellow who could do any heavy lifting that needed to be done (19/1646,1649-51).

Although Roy rarely missed work, in early September 2006 he

was out for a week due to seizures (19/1637,1647-48). When he returned to work, he appeared tired and weak, so Witzignman had him doing lighter duty such as updating maintenance books (19/1848-49). Nevertheless, on Tuesday morning (Sept. 12) - - his second day back - - Witzigman observed that Roy wasn't feeling well and suggested he take the rest of the day off. Roy left before lunchtime, but Witzigman (aware that he'd missed a lot of time when he was in the hospital) clocked him out for the regular time of 4:00 p.m. (19/1636-38,1648). Roy didn't come to work on Wednesday (Sept. 13). He didn't call in, and Witzignman assumed he was still sick (19/1638-39,1641). Roy came in and worked normal hours on Thursday and Friday, and he also came in for a few hours on Saturday morning (19/1639-40).

Atlantic Metals has a Lowe's credit card, kept in Witzigman's desk, to which Roy had access to make work-related purchases (19/1641-43). Tools necessary for maintenance are kept in a bin cage at the plant; Roy also had his own personal tools which he used on occasion at work (19/1645-46,1651). There is a pipe threader in the tool shop; this, Witzigman explained, is a machine used to cut larger lengths of pipe into smaller pieces and put threading on them (19/1651).

In the spring of 2006, a sewage pump at the plant was replaced (19/1652-54).

Crime scene supervisor Tracy Grice lifted four latent prints from the cardboard interior of the roll of duct tape obtained from the trunk of Roy Ballard's vehicle. Three were inconclusive; the fourth matched Roy's left middle finger (19/1697-1700;20/1701-02).

Lakeland police officer Virgil Carden, on August 10, 2006, responded to the Traub residence on Vermont in regard to a custody dispute. An older man had a handwritten, notarized letter of custody which he was trying to enforce. Carden explained to him that the letter was not enforceable without a court order. The man (who was calm and spoke in a reasonable tone of voice) said he wasn't going to give up until his granddaughter was back in his custody. He asked Carden if he should apply for a court order in Polk County, or in Pasco County where he resided (20/1786-93).

Lakeland police officer Todd Edwards, on September 16, 2006, responded to the Traub residence, where he met with Roy and Kathy Ballard who were outside by their car. They were seeking custody of their granddaughter, Suny Houghtaling. They told Edwards that Suny's mother, Autumn, was missing, and they didn't feel that Suny should remain with her stepfather, John Traub, because they believed she had been sexually abused by John. Officer Edwards then went inside the house and spoke with John and Suny, while the Ballards remained outside. He then returned and informed the Ballards that he was not giving them custody, and that they needed a court order. According to Edwards, Roy's demeanor was quiet and relatively calm, while Kathy was visibly upset (20/1794-1802).

Detective Nicole Cain canvassed the neighborhood and distributed fliers during the search for Autumn Traub (20/1830-33,1837-39). One of the places she left a flier was Walgreen's. Cain did not recall whether a lady named Mrs. Grenert was present (20/1839).

Detective Cain viewed the film taken by the security cameras

at Life Skills (9/13/06, 7:00-11:30 a.m.). She would fast forward the video, and slow it down or stop it when she saw something she needed to examine more closely. Cain did not see anyone matching the description of Autumn Traub, nor did she see a silver Saturn stopping and letting anyone out, in the footage which was captured by Like Skills (20/1834-36,1843-47).

Through Ty Alford, an engineer with AT&T, the state introduced phone records showing (1) an outgoing call made from Roy Ballard's cell phone, at 6:08 p.m. on Tuesday, September 12, 2006, which utilized a phone tower located off Highway 98 north of the Lakeland Square Mall; and (2) an incoming call to Roy's cell phone, at 11:16 a.m. on Wednesday, September 13, 2006 [coinciding with Kathy Ballard's testimony that she called Roy during her break] which utilized the same tower in North Lakeland. According to Alford, a service tower accepts and transmits calls from within approximately a three mile radius, although which tower handles a particular call can be affected to some degree by factors such as lightning, topography, and volume of phone traffic (20/1848-70;21/1871-86; see 9/1400;22/2178-83;23/2224-29).

Beverly Cone is an investigator with the State Attorney's sexual and physical child abuse unit (21/1889-92). She interviewed Suny Houghtaling at the Lakeland Police Department for an hour on September 22, 2006 (21/1893-95,1898-99). Suny was driven to the police station by her stepfather John Traub. Ms. Cone did not interview Mr. Traub (21/1899-1900). At the outset, Ms. Cone was aware that Suny had been interviewed three days earlier by Detectives Wallace and Newsome, and Suny had denied that any

sexual abuse had occurred (21/1894-95;1902). Subsequently, in a conversation with Sergeant Gross, Suny had indicated that she hadn't been entirely forthcoming in the first interview, and there were some sexual things that had happened (21/1895,1903-04).

Ms. Cone described her interview with Suny as "one of the more tough interviews I have tried to do". There were a lot of pauses and one word answers, and it was hard to get her talking (21/1896-97). It was hoped that Ms. Cone could establish a connection with Suny; Detective Wallace was also present, but he did not participate in the questioning until the end, when the subject changed from sexual matters to Autumn Traub's disappearance (21/1896-97,1907-08). Ultimately, Suny "started disclosing", and she named two people (21/1909). At the conclusion of the interview, Ms. Cone contacted DCF and the Sheriff's Department as required under the reporting laws (21/1900,1909-10).

Ms. Cone indicated that at the time of the interview she did not have access to DCF or law enforcement records pertaining to other investigations concerning prior accusations which might have been made by Suny (21/1904-05).

The State's next witness was Suny Houghtaling. She was born on April 28, 1992 and was sixteen at the time of the trial (21/1924). After her first stepfather, Scott Niles, was killed in a car accident, Suny (then age 8) and her mother and brother moved in with Scott's brothers Bruce and Gike and their relatives (21/1933-36,1987,2009-10). That year Suny's mother Autumn met John Traub. Autumn, Suny, and Scott, Jr. moved to Lakeland with John, and soon afterward Autumn married John (21/1935-38).

Although Autumn and John got along fine, Suny did not get along with her mother. Autumn neglected Suny and her brother and didn't seem to care about them; she wouldn't do anything for herself; the house was trashed and she expected Suny to clean it. Suny (from age nine) did all the housework, while her mother and stepfather would spend money on video games instead of groceries. Most of the time Suny and her brother ate pot pies and rice (21/1936-40). John Traub was physically abusive to Suny; he would back hand her in the mouth and her mouth would start bleeding. Another time he yanked her by the wrist and ankle from the top bunk of her bed. Autumn did nothing to protect her (21/1941-42).

Autumn and John were both arrested for theft from their employers, and when Autumn violated probation Suny (now 11) and Scott went to live with their grandparents, Kathy and Roy Ballard, in Zepyrhills (21/1942-43,2011). [While Roy was not her blood relative, she called him her grandfather (21/1942-43)]. Scott only stayed for a month or so, but Suny was mad at her mother and preferred to remain with the Ballards. She lived there for the next two and a half years (21/1943-44,2011-12).

At first, Suny spoke to her mother on the phone a few times, but Autumn showed little interest, and soon there was no contact between them at all - - not even birthday or Christmas cards - - until August, 2006 (21/1945-48).

Friction arose during the latter part of Suny's stay with the Ballards. She had no friends in the neighborhood, and she began missing a lot of school (almost half of the year). Kathy and Roy, who wanted her to get a good education, were pretty upset when

they learned of her absences. Suny was staying home alone while the Ballards were at work, talking to people her own age on the computer [she denied talking to older men online] and running up the cell phone bill. The Ballards tried without much success to withhold her privileges; they told her she couldn't go on the computer but she continued to do it anyway (21/1990-91,2017-20,2023-24).

In August 2006, Suny and her grandparents contacted Autumn Traub to get some custody papers signed so Suny could get a learner's permit (21/1946-48,2021). Autumn came up to the Ballards' house; Suny was still angry at her at first, but gradually observed that Autumn seemed to have changed, and wanted to do better. Suny was willing to give her a chance, so she accepted her invitation to spend the weekend. At the end of the weekend, Suny decided to move back with her mother and stepfather (21/1948-51,2022). Her decision was based partly on seeing positive signs in Autumn's behavior, and partly because she felt that the Ballards were too strict and had too many rules (21/1950-51,2024).

Suny and her mother went back to Zephyrhills to pack up Suny's belongings, and Suny moved into the Traubs' one-room house on Vermont St. in Lakeland (21/1951-54). A few days later Roy Ballard showed up at the house, woke Suny up, and told her come on, let's go. Suny went behind her mom, and one of the Traubs told Roy to leave the house. Roy was showing them a paper and telling them he had custody. Suny told her mom she didn't want to go back. The police came, and Suny told the officer she didn't want to

leave. Roy and the police then left (21/1954-58).

One night in September, Kathy Ballard called Autumn and informed her Roy was in the hospital. Autumn, John, and Suny drove to Zephyrhills to keep Kathy company; everyone was getting along well. The next night, Autumn and Suny went back to Zephyrhills, got Kathy, and the three of them visited Roy in the hospital. At one point, when Autumn and Kathy were in the waiting room, Suny was alone in the hospital room with Roy. Roy said he wanted her to come back to live with him, that he loved her and wanted to marry her. This freaked Suny out, and she left the room; she thought it was crazy. He had never said anything like that before. Suny did not know if Roy was on any medication (21/1958-63,2027-29).

That same fall, Suny had started at Lakeland High School, but she didn't like it and she only went for one day. She talked to Autumn about being home schooled. In the meantime, Suny stayed at home with Autumn (21/1965-67).

On the morning of September 13 (Wednesday), Suny heard a knock on the door. Autumn looked out the window and said it was Roy. Suny went in the bathroom because she didn't want to see Roy and because it was a school day. Autumn came in and told Suny she was going to get a soda with Roy and she'd be back in a few minutes. She handed Suny her cell phone and told her to call John and let him know. Autumn did not seem afraid or concerned (21/1968-72).

When Autumn didn't return, Suny called John every hour or so. John came home around noon. They drove around the neighborhood looking for Autumn, and they checked the hospital. That evening it

occurred to John to call the Ballards to see if they knew where Autumn was. Suny testified that she was present when John made the phone call, but she did not dial the number, nor did she talk to either of the Ballards (21/1975-80).

During the state's direct examination, the prosecutor asked Suny "to go back in time for [a] little bit now", and he asked her if she had ever had sexual contact with her first stepfather's brother, Bruce Niles. Suny stated that there was no sexual activity during the time she lived with members of that family, but later on - - when she was 10 or 11 and was living with Autumn and John Traub - - she would go back to visit Bruce Niles. Autumn would take her there and drop her off. It began one weekend when Bruce started touching her, and progressed to "regular sex". This happened on several occasions; Suny didn't know any specific number. Prior to Bruce, Suny had not had sexual contact with anyone else. Asked by the prosecutor why she didn't try to stop Bruce or avoid him, Suny answered "I have no idea." She didn't tell her mother about what Bruce was doing, nor did she tell her she didn't want to go to his house (21/1984-87).

The prosecutor asked Suny if there was ever any type of sexual contact between her and her stepfather Scott Niles, or with a third Niles brother, Gike. Suny answered no to both questions (21/1987).

The prosecutor next asked Suny if there was ever any sexual contact between her and her second stepfather, John Traub. Suny answered that one time when she was about 11 (when she was living with the Truabs before she moved in with her grandparents) she had

regular sex (which she described as [l]ike his private part in mine) and oral sex with John. John didn't force her. Asked why she did it, she replied "I have no idea". Suny didn't tell her mom what happened; she had no idea why she didn't tell her (21/1987-89).

The prosecutor asked Suny whether she later told her grandmother, Kathy Ballard, about what happened with Bruce Niles and John Traub. Suny said she didn't remember saying anything to her grandmother, but she did remember DCF people and Pasco County police coming to talk to her about sexual contact with Bruce and John. Suny didn't know where they got this information (21/1989-90).

[On cross-examination, Suny was asked which individuals she identified, during the 2005 Pasco County investigation, as having sexually molested her. Initially she said she believed she told them about Bruce Niles, she wasn't sure or didn't remember if she'd named John Traub or Scott Niles, and she didn't think she'd named Gike Niles (21/2012-14). When shown the document which was eventually admitted as Defense Exhibit 1 (Ev. V, p.691) to refresh her memory, she recalled that she did tell the investigators about John Traub, but she still didn't remember mentioning Gike (21/2015-16). Suny acknowledged that in August or September 2005 she talked to DCF investigators and named a number of people that had molested her, and she did not name Roy Ballard as being one of them (22/2042-43,2060)].

The prosecutor asked Suny if, while living at the Ballards', she ever had sexual contact with Roy (21/1993). Suny answered yes,

they had regular sex [the same way she said earlier (regarding John); i.e., Roy's private part in hers], and he also used a penis-shaped sexual device (21/1993-94,see 1988). Asked how often this sexual activity occurred, Suny answered "Like every other weekend", within a time frame of a couple months when she was in the eighth grade (21/1993;22/2041-42). Suny wasn't sure how long she'd been living with the Ballards when the sexual activity started. The last time she had sexual contact with Roy was a few weeks before she moved back with the Traubs in August 2006 (21/1994-95). There was no force or threat involved, and Suny made no effort to stop him. Asked why not, she replied "I have no idea" (21/1994).

Suny acknowledged that when, after her mother's disappearance, she was questioned about sexual activity, she initially denied it because she didn't want to talk about it (21/1999-2000). Asked what changed her mind, Suny said:

> Because a detective came out to the house and I was home alone, and um, he scared me and I told him.
>
> MR. CASTILLO [prosecutor]: He frightened you?
>
> SUNY: Yes.
>
> MR. CASTILLO: He frightened you in what sense? How?
>
> SUNY: Because he said that if I don't tell him the truth then he can arrest me.
>
> MR. CASTILLO: You felt you might get into trouble?
>
> SUNY: Yes. (21/2000)

When asked whether her testimony at trial was truthful, Suny answered that it was (21/2000-01,2034).

On cross-examination, defense counsel further explored the

series of statements leading up to Suny's accusation against Roy (21/2031-40). About five days after Autumn's disappearance, Suny spoke with a male and a female detective (Wallace and Newsome) and she denied that anyone had ever sexually abused her (21/2031). The next day, Suny went to the Lakeland Police Department for a formal, tape-recorded interview by Detectives Newsome and Dyess, in which she was sworn to tell the truth (21/2031-32). The detectives asked her about sexual abuse, specifically by Roy Ballard and John Traub, and again Suny denied having been sexually abused by either of those people (21/2032).

A few days later, on September 22, Suny had a conversation with the police detective she'd referred to on direct; he was a big guy and he scared her (21/2032-33, see 2000). [Suny did not recall the detective's name, but in the context of the officer's own testimony, it was Sergeant Gary Gross (21/2032-34;see 17/1235-39,1256-62)]. The detective frightened her by telling her he didn't think she was telling the truth, and that since she'd been placed under oath she could be charged with a crime called perjury and go to jail (21/2033). Suny felt pressured and threatened, and she could tell by the way he asked his questions that the police officer wanted her to say that she'd been sexually molested by Roy Ballard (21/2033-34). That was the first time Suny had ever mentioned Roy's name as a person who had sexually abused her (21/2034).

The next person Suny talked to was Beverly Cone, to whom she gave a second tape-recorded statement (21/2034-35). She told Ms. Cone that she had sex with John Traub once, when she was 11 and a

half or 12, and that she had sex with Roy Ballard three times (21/2035,2037-38). In a deposition in February 2008, Suny stated that she had sex with Roy on more then three occasions (21/2038-40). At trial, she testified that sexual activity with Roy occurred about every other weekend, and continued until a few weeks before she moved out of the Ballards' house and moved back in with her mother in August 2006 (21/1993-95,2040;22/2041). Asked if she told Beverly Cone and Detective Wallace that she stopped having sex with Roy when she was 13 [Suny turned 14 in April 2006], Suny initially said she didn't remember. When her memory was refreshed with the transcript of her taped statement, she testified that she did tell the interviewers that she was 13 the last time she had sex with Roy Ballard (22/2059).

Similarly, Suny initially testified that she didn't know whether she'd told Ms. Cone and Detective Wallace that she'd never seen any sex toy or dildo, but when her memory was refreshed she acknowledged that she told the investigators that she had never seen a sex toy shaped like a penis, and that Roy Ballard had never used such a device during sex with her (22/2043-44,2054-56).

FDLE crime lab analyst Dr. Mary Pacheco developed DNA profiles from buccal swabs obtained from Roy and Kathy Ballard and Suny Houghtaling (22/2072-77). She also developed a DNA profile from swabs from Autumn Traub's toothbrush; that profile was female, and was consistent with being the mother of Suny and the daughter of Kathy (22/2083-84,2091-92,2113-16). Dr. Pacheco compared those DNA profiles with swabs from presumptive blood spots on two of the Walmart bags, and a piece of cardboard from

the roll of duct tape, obtained from the trunk of Roy Ballard's Saturn (22/2079-82; see 19/1673-75,1688-91,1696-97;20/1704,1714-23,1726-28,1755-56). Dr. Pacheco also compared the DNA samples with a swabbing obtained from the dildo (21/2081).[6]

Dr. Pacheco concluded that the DNA from the Walmart bags matched the profile from Autumn's toothbrush (astronomical statistical odds), while the DNA from the cardboard portion of the duct tape - - which was not a full profile - - was consistent with (1 in 15 odds) and did not exclude the profile from Autumn's toothbrush (22/2092-96,2104,2109-11). The DNA from the dildo matched Suny Houghtaling's profile in 12 of 13 loci; the thirteenth was inconclusive (22/2093,2096). Again, according to Dr. Pacheco, the odds of it matching anyone else were astronomical (22/2096).

Detective Scott Kercher interviewed Roy Ballard at the Zephyrhills Police Department on September 21, 2006. Although Roy had spoken previously with other detectives, Kercher felt it was important to formalize it with a tape-recorded statement (22/2175-77). [The taped statement was introduced into evidence as State Exhibit 127 A and B; a transcript was provided to the jurors as a guide, but it was not introduced as evidence (22/2187-91;Ev2/256-Ev3/401)].

Although the interrogation became increasingly accusatory and confrontational (see Ev3/330-33,338-42,345-56,363-77,381-401), Roy came to the police station and spoke with Kercher voluntarily, and

[6] There was also a very small presumptive bloodstain on the Lowe's receipt, but not enough material present for Dr. Pacheco to get a DNA profile (22/2097;see 19/1691-91;20/1703-04).

he was informed that he was free to leave (22/2177;23/2213; Ev2/258).

In the early part of the interview, Roy reiterated his account of where he and Autumn drove; that he bought soft drinks at Citgo, they rode for about 30-45 minutes discussing Suny's schooling and where she would live, and he eventually dropped Autumn off on the street by Walgreen's (Ev2/277-93,307-09;Ev3/329-30;see22/2168-70). Autumn wanted to home school Suny. Roy said he'd rather have Suny at his house and going to school there. They disagreed, but the disagreement was not angry or confrontational. Autumn said she wanted to try the home schooling and see how it worked out, and Roy didn't press it (Ev2/282-83,292). After dropping Autumn off, Roy drive directly home (Ev2/292-94).

Later in the interview, Detective Kercher repeatedly told Roy he didn't believe he dropped Autumn off near Walgreen's because the videos didn't show it. Roy insisted that that is where he dropped her off, whether the video cameras captured it or not (Ev2/313-17,321;Ev3/330-32,341,346,351-53,394-95;see22/2209-10;23/2211).

When he got back home, Roy wasn't feeling well so he laid down on the bed (Ev2/296). Kercher asked him what was wrong; Roy answered that he'd recently had a bunch of seizures and a stroke (Ev2/296). Kercher (who already knew Roy had been hospitalized) asked him if he remembered a statement made when Autumn and Suny came to visit him. Roy remembered them being there, but he didn't remember talking to them. Kercher said, "O.K., well let me tell you what was said alright, Suny says you told her you wanted to

marry her". Kercher also referred to "a comment made by you sometime in there in the hospital where you talk about killing yourself and killing your wife, or killing Autumn". Roy told Kercher he didn't remember making any such statements; "I can tell you I was delirious, I mean...they had me tied to a bed" (Ev3/333-35). Kercher asked Roy if he was presently on any medications. Roy answered yes; he was taking meds for seizures, diabetes, and cholesterol, but nothing that makes you high. Asked if he was on anything that affected his mind or memory, Roy replied "Age does that" (Ev2/298). [Kercher testified at trial that he did not notice any physical manifestations of impairment (22/2183-84;23/2214-17). He acknowledged that Roy "had lapses of memory, whether they were voluntary or involuntary I don't know" (23/2216)].

In the interview, Kercher questioned Roy about the items seized from the trunk of his car. Roy said he uses duct tape for everything. He might have had that particular roll for a month or so; one day he was in the store and he realized he needed another roll of duct tape, and he just bought one (Ev2/300-01,304,321-22;Ev3/323-25). He didn't remember buying a metal pipe, even after Kercher showed him the receipt from Lowe's. If he needed a metal pipe at work he would buy it at Lowe's, but he had no recollection of doing so (Ev3/323-25). Roy had used the shovel to dig some lift stations (similar to a septic tank) at work (Ev2/302-04,317-18). The dildo he found somewhere, and never used it. He meant to throw it away so his wife wouldn't see it, but he'd put it in the trunk and it got covered with Walmart bags (Ev2/305).

Toward the end of the interview, Detective Kercher kept insisting that Roy was obsessed with regaining custody of Suny (Ev3/336-37,347,356-59,371-77,383-84,398-99). Kercher expressed the opinion that Autumn was dead or that some harm had come to her, and that Roy knew where she was (Ev3/336,381-82,389;see 22/2165;23/2219). Kercher suggested that Roy lost his temper with Autumn or something set him off (Ev3/355-56). He asked Roy if he could have choked her in a fit of anger and then realized what he'd done. Roy said no, and pointed out that Autumn's weight is nearly 300 pounds, and he wouldn't even be physically capable of doing that (Ev3/342).

Kercher testified at trial that when he mentioned the metal pipe, Roy's "demeanor, I guess his facial expression, the impression I got is that he was shocked when I said the word metal pipe" (22/2194). Therefore, after the interview was over, Kercher ordered police surveillance of Roy's movements, and (with court authorization) installed a GPS device on Roy's vehicle. Kercher did this because he believed Roy might go back and retrieve the pipe, or lead the police to where Autumn might be (22/2195-96). Also, based on Roy's description of where he and Autumn drove, the day after the interview Kercher coordinated a massive day-long search (with 70 law enforcement officers, aerial assistance, canines, and ATVs) of the entire Saddle Creek Park area (22/2166-68;see Ev2/311-13). [No evidence was introduced at trial suggesting that Roy made any unusual trips, or that he made any attempt to retrieve a pipe or anything else. No evidence was introduced that the search of Saddle Creek Park yielded any

evidence pertaining to this case].

On October 25, 2006, Detective Kercher collected personal items from Autumn Traub's residence (including her purse, driver's license, social security card, and debit card), in order to show that she left the house without them (22/2173-75).

Michael Needham (at the time of trial incarcerated in the Florida state prison system) was an inmate in the Polk County jail from early March to mid-May 2008, where he shared a cell with Roy Ballard, Matthew Fitez, and Glenn Forsgren (23/2237-39,2242). Needham has 40 or 41 prior felony convictions, mostly for bad checks, along with one or two grand thefts involving forgery (23/2250,2255). While Needham and Roy were sitting around, Roy would from time to time start talking about his case (23/2239, 2241,2248). [Fitez and Forsgren were present for maybe one or two of these conversations (23/2248)]. Roy said he was in for premeditated murder, charged with killing his stepdaughter (23/2240). According to Needham, Roy told him he killed his stepdaughter by hitting her in the back of the head with a pipe. He also hit her in the mouth to knock out all her teeth, so there would be no dental records. Then he put her in acidic water (held down with some blocks), in order to destroy fingerprints (23/2240-41). Asked if he ever said where, Needham said, "[T]he only place we came up with was a mine and...he won't give us a direct answer to that but he said it did have a rubber coating on the bottom of it" (23/2241). Afterwards, according to Needham, Roy took the pipe to work and grinded it down, put it through a shredder (23/2240).

Asked if Roy said anything regarding his stepgranddaughter,

Needham testified that he indicated he had a sexual relationship with her, and that he was “the biggest one that she would ever see”; referring to the size of his anatomy (23/2245-46).

Needham denied reading Roy’s discovery. He further denied that Matthew Fitez made notes from Roy’s discovery, or that he [Needham] read (or listened to Fitez’ reading of) such notes (23/2243,2252-53).

According to Needham, Roy lost weight during the time they were cellmates. Instead of eating his meals, he was giving them to Fitez. Needham asked him why, and Roy said he wanted to look small for the jury so they wouldn’t think he could pick up or move a person (23/2243,2250). Needham was aware that Roy was on a special diet for diabetics. He would eat once a week, on Mondays, the day they checked his blood sugar (23/2250).

Needham testified that nobody from the State Attorney’s office or the Lakeland police ever talked to him prior to the month (June 2008) the trial took place, and that he had received no promises or benefits (23/2244, see 2260-61). He expected to “max out” and finish his prison sentence in December 2008 (23/2244). Asked by the prosecutor why he was testifying, Needham replied, “Personally I think she needs to be buried properly. If she could be found, that’s good. He don’t need to be out on the street to do another one” (23/2244).[7] Asked why he waited to come forward, then, until he was actually brought here and questioned about it, Needham said he wanted to do his time without being transferred back and forth, which causes him to lose gain time

[7] No objection was made to this last gratuitous remark.

(23/2245).

C. Trial – Defense Case

Wilma Grenert (now Jones) worked as a cashier at the Walgreen's on Memorial at Massachusetts (24/2461-62,2481-82). A missing person flier was posted in the store, with the name and photo of Autumn Traub. Around the same time, she saw a newspaper article also containing Autumn's name and photo (24/2462-63,2485). Mrs. Grenert recognized her as a customer who had been in the store several times, most recently on the morning of Wednesday, September 13, 2006, between 7 and 9 a.m. (24/2463-66,2477,2486-87). Mrs. Grenert was positive it was the same person; no doubt at all (24/2473). She told one of the managers that she recognized the person in the flier, and asked if she should call the police. He said no, because the police had already picked up the videotape. Evidently someone contacted the police, however, because they called Mrs. Grenert at home, and subsequently - - on September 21 - - took her tape recorded statement (24/2462,2473-75).

It was Wednesday of the previous week - - September 13 - - when she saw the woman in the flier (24/2464-65). [Mrs. Grenert testified that she knew it was Wednesday because of her work schedule. She worked Wednesday through Saturday, 6:00 a.m. – 2:30 p.m., and it was on her first day back after three days off that the woman came in (24/2464-66,2486)]. Mrs. Grenert did not know her name at the time, but she had been in the store on several occasions. Mrs. Grenert would say "How are you" or "Have a nice day", and the woman would reply, but nothing more personal that

that (24/2463,2472,2477,2496).

On the 13th, the woman bought a pack of Marlboro cigarettes, which surprised Mrs. Grenert because she usually bought cheaper brands. She paid with cash which she had in her hands; Mrs. Grenert did not see a purse. Then she exited the store (24/2467-69,2487-89,2492-94). She was a tall, overweight woman with shoulder-length hair; she was wearing red sweat pants with paint on them, a white t-shirt, and flip-flops (24/2467-69,2476-77,2489-90,2497-98).

In addition to the woman in the flier, there were two other ladies (one black, one white) in the store. Mrs. Grenert assumed the three of them were together, though she hadn't seen them enter, because she'd seen all three together before. The black lady had had a stroke and had difficulty walking and talking; the white lady had severe breathing problems and no teeth. One of them bought a soda, and as they approached the register, the black lady asked her companion, "Where's Autumn?" and the white lady said "She has a ride" (24/2470-73,2479,2491-96). [At the time, Mrs. Grenert did not know any of the three women by name. When she saw the name Autumn Traub in the flier and the newspaper she put two and two together (24/2470,2472,2496-97)].

Two expert witnesses were presented by the defense, and one in rebuttal by the state, on the issue of whether Roy Ballard would have been physically capable of killing Autumn Traub and successfully disposing of her body in the manner hypothesized by the state. [The defense subsequently recalled Drs. Sesta and Tanner in the penalty phase, to establish the mental mitigating

factors and to correlate Roy's age with his cognitive and behavioral problems. The state did not recall Dr. Vyas, but instead recalled the pathologist Dr. Nelson, and Roy's work supervisor Tom Witzigman].

Dr. Joseph Sesta, a neuropsychologist, reviewed Roy's medical records and evaluated him at the jail (23/2293-2303). Roy had a longstanding history (pre-dating his September 2006 hospitalization) of seizure disorder and stroke, as well as a "signigicant accumulation of atherosclerotic plaques or fatty plaques inside his artery, particularly the right carotid" (23/2298-2303). Dr. Sesta's physical testing (along with his review of the neuro-imaging evidence (MRI) and an independent neurological consultation received from Dr. John Tanner) confirmed that there was mild to moderate impairment to the right hemisphere of Roy's brain (23/2300-05;24/2382,2388). There was no question in Dr. Sesta's mind that Roy was brain damaged to the extent that it affected his motor skills (24/2388). The right side brain damage corresponds to physical deficits on the left side of the body. As a result, while Roy's muscular strength on the right side of his body is "borderline impaired" (he is much weaker even in the "good" hand than most men his age), he has clear impairment on the left side; much worse than on the right (23/2301-02,2316-18,2343,2368-71,2378-79). In addition to weakness, Roy's balance and dexterity are adversely affected by his brain impairment (23/2301,2369-71). Dr. Sesta believed Roy would be capable of picking up a metal pipe and swinging it (although not as hard as someone with normal strength, and swinging it might cause him to

lose his balance), and he would be able to grip a concrete block and lift it off the ground. However, Dr. Sesta thought it highly unlikely that Roy would be able to move or drag any object weighing 200 pounds or more, even with the aid of a wheelbarrow or a tarp (23/2317-18,2369-71).

Dr. Sesta testified that Roy suffers from vascular dementia, which means an impairment in memory plus one other brain function (23/2309-10,2313). He loses a tremendous amount of information in a relatively short time span (85% of information in four hours) (23/2310). Like many stroke patients, Roy tends to compensate for his memory deficits by filling in “facts” which he doesn’t actually remember (confabulation)(23/2311-15;24/2387-88). This can affect a person’s ability to accurately report information to the police (24/2387).

Medical records showed that throughout his hospitalization in September 2006, a week before the charged crime, Roy had continuing seizures, including one while he was hooked up to the EEG machine (24/2394-95). After a seizure or stroke, a patient can have psychotic symptoms, including delusions and paranoia, and his thinking and judgment can be severely confused (24/2393). At one point during his hospitalization , Roy was insisting on leaving, and to prevent him from doing so he was Baker Acted (24/2385-88,2391-93). This means that his doctor, or someone in authority, “thought that his judgment and reasoning was so severely impaired” as to justify holding him against his will; it is a pretty stringent standard (24/2385-86). The Baker Act certificate, electronically signed by Dr. Rohitkumar K. Vyas, states that there

is reason to believe that Roy Ballard suffers from a mental illness as defined by Florida Statute; i.e. Psychotic Disorder N.O.S. (Not Otherwise Specified), DSM-IV code 298.9 (23/2393; Ev5/668).

Dr. John Tanner is an M.D. specializing in adult neurology. He is medical director of a brain injury rehabilitation center in Clearwater; an inpatient and outpatient facility treating people who have acquired brain damage from trauma or illness (including strokes)(24/2530-33). Dr. Tanner reviewed Roy Ballard's medical and jail records, and examined him in person (24/2533-34,2550; 25/2551-54). Like Dr. Sesta, he determined that Roy has right side brain damage, which correlates with left body signs and symptoms (24/2535;25/2553-54).

Roy experienced multiple seizures during his hospitalization in early September 2006. His confusion and agitation (resulting from a postictal state following the seizures, or the effect of the antiseizure medication Dilantin, or a combination of the two) led to a psychiatric consult, and a brief involuntary continuation of his hospitalization under the Baker Act (25/2560-63). When the seizures stopped and the situation was considered resolved due to the medication, the Baker Act order was rescinded (25/2563). Dr. Tanner explained that if the dosage of Dilantin is too low it will not be effective and the patient will continue to have seizures, and if the dosage is too high the seizures will stop but there will be a whole list of side effects occurring. The target "is what we call the therapeutic range". Based on his review of medical and jail records, Dr. Tanner was of the opinion that Roy

was prescribed an excessively high dosage of the drug, and (assuming he was taking his medication as prescribed) he would have been experiencing symptoms of Dilantin toxicity from shortly after his discharge from the hospital (on September 8, 2006) until the dosage was lowered after he fell in the jail in November 2006 (25/2563-74,2614-15). “Beyond a reasonable medical certainty that would be true” (25/2615). Dr. Tanner thought it was unlikely, during the week after his hospital stay, that Roy would have had the physical ability or stamina to beat somebody with a pipe and knock out all their teeth, or to maneuver or dispose of a body weighing 225 pounds (25/2574,2580-83).

In addition, Dr. Tanner reviewed diabetic records from the Polk County Jail. The records indicated that Roy’s blood sugar ranged from a low of 112 (in the normal range) to a high of 234 (for which he received two units of insulin to bring it back down into the normal range). If Roy didn’t eat, his blood sugar “would drop below 80 or 90, he would have symptoms of hypoglycemia with symptoms of fainting, passing out. It can actually kill people if it goes on too long” (24/2536-39). Dr. Tanner testified that it was clear from the records that for the last 20 months the jail was repeatedly monitoring Roy’s blood sugar levels, and they never dropped that low (24/2537-38,2550).

The state’s rebuttal witness, Dr. Rohitmar Vyas, is an internal medicine specialist at Florida Hospital in Zephyrhills. He was Roy Ballard’s treating physician during his September 2006 hospital stay (24/2408-10). Because Roy did not have a primary physician, Dr. Vyas had no opportunity to familiarize himself with

Roy's medical history (24/2410,2426-27). When Roy was brought in, he had a seizure witnessed by the staff in the emergency room, and he had several more seizures throughout the night (24/2411). Physical restraints were used (24/2444). By the time Dr. Vyas saw Roy, he was no longer having active seizures but he was still a little confused (24/2411). Dr. Vyas testified that this confusion dissipates with time (24/2411).

The MRI showed that Roy had suffered multiple small strokes in his right cerebellum. These strokes were likely vascular or embolic, meaning that somewhere in his body some plaque or a clot broke off, traveled in his vascular system until it became lodged in a vessel in his head, blocking the blood supply to his brain. According to Dr. Vyas, Roy had several such blockages (24/2413, 2428-32). The MRA (an angiogram done with the same machine as the MRI) showed a narrowing of Roy's carotid arteries in his neck. These are usually the source for clots to dislodge and travel to the brain, causing a stroke (24/2414-15,2431-32). The proper treatment for Roy's degree of blockage is medication rather than surgery. Accordingly, Dr. Vyas prescribed what he determined to be a therapeutic dosage of Dilantin, for treatment and control of the seizures (24/2415-16,2437-41). Although Dilantin can produce numerous side effects, especially in the long term, Dr. Vyas did not observe any side effects or signs of toxicity while Roy was in the hospital (24/2416-17,2437-39). An array of other medications were prescribed for Roy's diabetes, hypertension, and high cholesterol (24/2421-22;Ev5/653).

When Roy was first admitted, Dr. Vyas anticipated that his

confusion would go away after a couple hours, but he was still confused the next day and he was trying to leave the hospital. This raised the question of whether Roy had any psychotic abnormality. After a consultation with a psychiatrist (Dr. Jacobs) "[w]e had to do what we call Baker Act which means we could force the patient to stay in the hospital against his will." According to Dr. Vyas, the psychiatrist "was not concerned. His report said he may have psychosis and he was not concerned. He said if everything clears out he doesn't need to see the patient anymore" (24/2418-19,2435-37). [The Baker Act certificate reports a diagnosis of Psychotic Disorder N.O.S. (Not Otherwise Specified) (Ev5/668)].

By September 8, Roy's condition had stabilized and his seizures had stopped, so his Baker Act status was lifted and he was released (24/2420,2437,2455). Dr. Vyas testified that on the day of Roy's discharge he did not observe any type of neurological deficits (24/2422,2434-35). Dr. Vyas acknowledged that he is not a neurologist, and his examination was relatively brief and superficial compared to the testing a neurologist might do (24/2434-35). He further acknowledged that the hospital's nursing assessments reported observations by Roy's attending nurses that there was drooping on the left side of his face and mouth, that his left arm was weaker than his right, and that the patient was "neglectful" of his left arm (insisting he was moving it when he wasn't)(24/2445,2451-53). When shown the nursing notes, Dr. Vyas recalled that he too had noticed weakness of Roy's upper left arm, which was quite consistent with the location of the strokes

(24/2452).

SUMMARY OF THE ARGUMENT

The trial court abused his discretion in allowing the prosecution to turn this case into a "trial within a trial" on the explosive uncharged accusation of child sexual abuse. The collateral crime evidence should have been excluded because (1) the state failed to meet its burden of showing by clear and convincing evidence that Suny Houghtaling's accusation against Roy Ballard was truthful, where she made numerous inconsistent statements (many of them under oath) as to every material aspect of her testimony; (2) the unfair prejudice due to the inflammatory nature of the collateral accusation greatly outweighed its probative value, and (3) it became - - qualitatively as well as quantitatively - - a feature of the trial rather than an incident [Issue I]. This case presents a "pure" Ring issue, in that the only aggravating factor proposed by the state to establish death-eligibility was CCP, and the jury recommended death by a non-unanimous (9-3) vote. This Court has never forged a majority view as to whether Ring applies in Florida, but there is no constitutionally sound reason why Florida should be the only state where Ring doesn't apply. [Florida is presently the only state in the country which allows a jury to decide that aggravators exist and to recommend a sentence of death by a nonunanimous vote]. [Issue II]. The sole aggravating factor (CCP) in this case was based on speculation, and was not proven beyond a reasonable doubt; therefore, even apart from the proportionality analysis, death is not a permissible sentence. Even assuming arguendo that CCP were

proven, however, this is at best a single aggravator case, meaning that the death penalty is disproportionate unless there is "nothing or very little" in mitigation. In the instant case, there were three statutory mitigators (both mental mitigators, and advanced age linked to an assortment of mental and physical disabilities shown by the evidence), and the state's rebuttal evidence was weak and tangential. The prosecutor acknowledged before trial that it is "no secret" that this is not an overwhelming death penalty case. In light of the medical evidence presented in the guilt and penalty phases, it is clearly not a death penalty case at all [Issue III].

ARGUMENT

ISSUE I

THE TRIAL COURT ABUSED HIS DISCRETION IN ALLOWING THE PROSECUTION TO TURN THIS CASE INTO A "TRIAL WITHIN A TRIAL" ON THE INFLAMMATORY UNCHARGED ACCUSATION OF CHILD SEXUAL ABUSE.

The trial court abused his discretion[8] in allowing the prosecution to turn this case into a "trial within a trial" on the explosively inflammatory uncharged accusation of child sexual abuse [see United States v. Ham, 998 F.2d 1247,1252 (4th Cir. 1993)], where (1) the child victim, Suny, had over time accused at least five different men of molesting her; she never named Roy

[8] The standard of review for evidentiary rulings, including the introduction of collateral crime evidence and the determination of whether its probative value is outweighed by the danger of unfair prejudice, is abuse of discretion. However, the trial court's discretion is limited by the rules of evidence. See, e.g., McDuffie v. State, 970 So.2d 312,326 (Fla. 2007); Rich v. State, 2009 WL 3189367 (Fla. 4th DCA 2009); Zerbe v. State, 944 so.2d 1189,1193 (Fla. 4th DCA 2006).

Ballard until she felt pressured by the threat of going to jail herself; and she made numerous inconsistent statements, including many under oath; (2) therefore the state failed to meet its burden - - in order to establish relevancy - - of showing by clear and convincing evidence that the collateral crime was committed or that Roy Ballard committed it; (3) even if the child sexual abuse evidence was relevant to the state's theory of motive, its probative value was greatly outweighed by its inflammatory impact on the jury, both in the guilt phase and in regard to its decision whether to recommend a death sentence; and (4) the prosecution (not the defense) - - as a result of Suny's acknowledged credibility problems and inconsistent statements (see 7/1118-21;26/2841) - - turned the child molestation accusation into a trial within a trial and a major feature of the case.

As a threshold requirement, in order to show that evidence relating to a collateral crime is material and relevant to the offense being tried, the state must prove by clear and convincing evidence that the collateral crime was actually committed by the defendant. See McLean v. State, 934 So.2d 1248,1256 (Fla. 2006); Alsfield v. State, 2009 WL 3108761 (Fla. 4th DCA 2009); Zerbe v. State, 944 So.2d 1189,1194 (Fla. 4th DCA 2006); Henrion v. State, 895 So.2d 1213,1216-17 (Fla. 2d DCA 2005); Acevedo v. State, 787 So.2d 127,129-30 (Fla. 3d DCA 2001); Audano v. State, 641 So.2d 1356,1359 (Fla. 2d DCA 1994). Absent such a showing, whether analyzed under §90.402 or §90.404, the evidence of an uncharged crime is simply not relevant. [The prosecutor offered the child molestation evidence under the Williams Rule statute (§90.404) and

contended that “the proper analysis is 404”, but he agreed that either way - - whether collateral crime evidence is offered under §90.404 or the general relevancy statute (§90.402) - - the state has the burden of proving by clear and convincing evidence that the defendant committed the collateral act. The prosecutor further agreed that “regardless of whatever theory [the] evidence may be offered under, it is always going to be subject [to] 403” (prejudice vs. probative value balancing test) (5/739;7/1115,1123-24). The trial judge concluded in his written order that since the “evidence of the alleged collateral crime (sexual abuse of a minor by the Defendant)” was not similar fact evidence, its admissibility should be determined under §90.402 (8/1205)].

For purposes of allowing the introduction of uncharged crimes, Florida appellate courts have adopted a strict definition of the clear and convincing standard. As the Fourth District Court of Appeal stated in Acevedo, 787 So.2d at 130, quoting the Third District’s opinion in Slomowitz v. Walker, 429 So.2d 797,800 (Fla. 3d DCA 1983):

> 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.

Accordingly, Florida courts have reversed convictions for the erroneous admission of collateral crime evidence, holding that the clear and convincing standard was not met where the alleged victim of the collateral offense told inconsistent stories, Alsfield,

2009 WL 3108761; Audano, 641 So.2d at 1359, or where the evidence pertaining to the collateral crime was in conflict, Zerbe, 944 So.2d at 1194.

In the instant case, Suny Houghtaling's accusation of sexual abuse fails the clear and convincing test. Not only did she make a series of inconsistent statements as to nearly every material aspect of her alleged sexual activity with Roy Ballard, she made many of those statements under oath. Moreover, Suny has a documented history of accusing adult males of molesting her: Scott Niles, Sr. (her first stepfather); Bruce Niles and Gike Niles (two of Scott's brothers); John Traub (her second stepfather); and finally Roy Ballard (her step-grandfather). In light of the morass of accusations, retractions, failure to remember, failure to cooperate with investigators, and inconsistent statements, we have no way of knowing whether Suny's accusations are true or false or some of each. (Except perhaps in the case of John Traub, whose response to the prosecutor's question whether he'd ever had sexual contact with Suny was "Not that I'm aware of"; an answer which even the prosecutor found ridiculous and unbelievable (15/871; 26/2741)). From the testimony of her grandmother Kathy Ballard (a state witness), we know that Suny was a troubled adolescent who had no friends her own age, and who communicated inappropriately with older men on the Internet. When, while Suny was living with her grandparents in the fall of 2005 (one year before the disappearance of Autumn Traub), the DCF and police were investigating her accusations against John Traub and the three Niles brothers, Suny never accused Roy Ballard of molesting her.

(See 22/2042-43,2060). (To the contrary, she told the investigators she felt safe at her grandma's house; the only thing she was worried about was that her mother could come and get her at any time). See Evid V/691. Yet Suny testified under oath at the Arthur bond hearing that her sexual experiences (including intercourse) with Roy Ballard began a couple of months after she moved in with her grandparents, and the sexual activity happened "like every other week", continuing throughout the entire two-and-half years she lived with the Ballards (4/496,501,505-06,546). This of course would raise serious questions as to why - - if Suny was being regularly molested by her grandfather throughout this period of time - - she would accuse four other men and not her grandfather. [The state might suggest that perhaps she was afraid, or perhaps she was not (at the time) unhappy with the situation, but it is at least equally plausible that her grandfather was not molesting her].

At trial, Suny's testimony continued to be that she and Roy engaged in sexual activity "[l]ike every other weekend", but now - - instead of the whole two and a half years duration which she was certain of at the Arthur hearing (4/506,546) - - the time frame had conveniently shrunk to just a couple of months when she was in the eighth grade, with the last sexual contact occurring a few weeks before she moved back in with her mother and John Traub in August 2006 (21/1993-95;22/2041-42). However, when asked on cross whether she told Beverly Cone and Detective Wallace that she stopped having sex with Roy when she was 13 [Suny turned 14 in April 2006], she initially said she didn't remember. When her

memory was refreshed with the transcript of her taped statement, Suny acknowledged that she did tell Cone and Wallace she was 13 the last time she had sex with Roy Ballard (22/2059).

In the Arthur hearing and at trial, Suny acknowledged that she had been under oath when she told Detectives Newsome and Dyess that she had not had any sexual contact with Roy Ballard (4/532-33,539-41;21/2031-32). At the Arthur hearing, Suny didn't remember if she told Beverly Cone (the State Attorney's child abuse investigator) in a tape recorded statement that she had sex with Roy on only three occasions (4/547). At trial, Suny remembered telling Ms. Cone that she had sexual relations with Roy three times (21/2038-40).

Suny was not an inexperienced child. It appears from the record that she was, unfortunately, familiar with sexual matters before she ever went to live with her grandparents, and that she had become a troubled and manipulative teenager. The difference between no times, three times, multiple times over a couple months period, and multiple times over a two-and-half year period is not indicative of a child's confusion, but instead indicates a series of lies, including lies under oath. The prosecutor's argument that she initially denied having sex with Roy because she was embarrassed or afraid does not explain why she accused four other men but not Roy in the fall of 2005, nor does it explain her inability to give a coherent account of the time frame or the frequency of the alleged occurrences after she began accusing Roy.

Moreover, Suny acknowledged that she never mentioned Roy's name as a person who had sexually abused her until she was

confronted by Sergeant Gross (who had already focused on Roy as the prime suspect in the disappearance of Autumn Traub). Gross was a big guy, and he came out to the house when Suny was home alone. He frightened her by telling her he didn't think she was telling the truth, and that since she'd been placed under oath she could be charged with a crime called perjury and go to jail. Suny felt pressured and threatened, and she could tell by the way Sergeant Gross asked his questions that he wanted her to say she'd been sexually molested by Roy Ballard (21/2000,2032-34;see17/1235-39,1256-62).

Suny testified at trial that she and Roy had regular sex and he also used a penis-shaped sexual device (21/1988,1993-94). She initially testified that she didn't know whether she'd told Beverly Cone and Detective Wallace that she'd never seen any sex toy or dildo, but when her memory was refreshed by the transcript of the taped interview she acknowledged that she had told the investigators that she had never seen a sex toy shaped like a penis, and that Roy Ballard had never used such a device with her (22/2043-44,2054-56).

Suny's statements and testimony regarding every material aspect of her accusation against Roy were flagrantly inconsistent, and her narrative of the claimed sexual activity between herself and Roy Ballard was incoherent. Therefore, the threshold requirement for the introduction of her testimony regarding uncharged criminal acts was not met. See Ahlsfield; Zerbe; Acevedo; Audano; Slomowitz. In fact, the prosecutor knew Suny's credibility was weak, and that is essentially how he justified

turning this case into a trial within a trial on the uncharged child sexual abuse crimes. (See 7/1118-21;26/2841).

The second and third prongs of defense counsel's objection to the child sexual abuse evidence were that under §90.403 its prejudicial and inflammatory impact outweighed its probative value, and that it became a feature of this trial.

As the prosecutor correctly agreed (7/1115,1123-24), any evidence of uncharged crimes - - whether characterized as "similar fact" evidence under the Williams Rule, or dissimilar criminal acts under the general relevancy provision of the Evidence Code, or even as criminal activity "inextricably intertwined" with the charged offense - - is subject to the balancing test of Florida Statute §90.403. See McDuffie v. State, 970 So.2d 312,326-27 (Fla. 2007); Sexton v. State, 697 So.2d 833,836-37 (Fla. 1997); Farrell v. State, 682 So.2d 204,206 (Fla. 5th DCA 1996). §90.403 protects the accused's due process rights [Zerbe v. State, 944 So.2d at 1194]; it provides that even "[r]elevant evidence is inadmissible if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of issues, misleading the jury, or needless presentation of cumulative evidence."

"Unfair prejudice" has been described as "an undue tendency to suggest decision on an improper basis, commonly, though not necessarily, an emotional one." Brown v. State, 719 So.2d 882,885 (Fla. 1998), quoting Old Chief v. United States, 519 U.S. 172,180 (1997). Therefore, §90.403's rule of exclusion "is directed at evidence which inflames the jury or appeals improperly to the jury's emotions." McDuffie v. State, 970 So.2d at 327; Steverson

v. State, 695 So.2d 687,688-89 (Fla. 1997); State v. McClain, 525 So.2d 420,422 (Fla. 1988), quoting 1 C.Ehrhardt, Florida Evidence §403.1 at 100-03 (2nd Ed. 1984).

It is hard to imagine anything more apt to inflame a juror's anger and disgust than hearing that a man in his sixties was sexually abusing his thirteen or fourteen year old stepgrand-daughter on a regular basis, subjecting her to intercourse as well as penetration with a dildo. See Unites States v. Ham, 998 F.2d 1247,1252 (4th Cir. 1993) ("Indeed, no evidence could be more inflammatory or more prejudicial than allegations of child molestation"); Abunaaj v. State, 502 S.E.2d 135,140 (Va. App. 1998)(citing Ham for its holding that evidence of child moles-tation and homosexuality was so inflammatory as to outweigh its value providing a motive for murder); Camm v. State, 812 N.E.2d 1127,1140 (Ind. App. 2004)(recognizing "highly inflammatory nature" of child molestation evidence, and advising trial court on remand to carefully consider whether the danger of unfair pre-judice substantially outweighs its probative value in prosecution for triple murder; see Camm v. State, 908 N.E.2d 215, 224-25 (Ind. 2009).

In McLean v. State, 934 So.2d 1248,1256 (Fla. 2006) - - in the context of a prosecution for lewd molestation - - this Court observed, "[b]ecause of the commonly held belief that individuals who commit sexual assaults are more likely to recidivate as well as societal outrage directed against child molesters, the admis-sion of prior acts of child molestation has an even greater potential for unfair prejudice than the admission of other

collateral crimes."

The inflammatory nature of child sexual molestation is so powerful that a limiting instruction to the jury to consider it only as to the issue of motive is an exercise in futility. See Ham, 998 F.2d at 1253-54; Abunaaj, 502 S.E.2d at 140. The federal Third Circuit Court of Appeals said:

> As the Supreme Court has recognized, ...courts must take a realistic view of the capabilities of the human mind and must, therefore, acknowledge that there are situations in which the risk that jurors will not follow the court's instructions is unacceptably high [citation and quotation omitted]. Given the emotionally charged content of Jamila's testimony, we conclude that this is such a situation. See [United States v. Fawbush, 900 F.2d 150,152 (8th Cir. 1990)](in prosecution for sexual molestation of a child, testi-mony of defendant's children that he had sexually abused them as children found so "inflammatory" that instructions limiting its use to "motive, intent, preparation, plan or absence of mistake or accident" did not significantly reduce the risk of use for an improper purpose).

Government of the Virgin Islands v. Pinney, 967 F.2d 912,918 (3d Cir. 1992).

In addition to the overwhelmingly prejudicial impact in the guilt phase, it should also be considered that in a capital trial such as this one, due process demands a heightened degree of reliability in the penalty determination, and there is significant danger that the jurors' dispassionate judgment might be swayed by their revulsion for an elderly man repeatedly having sexual relations with his 13 year old step-granddaughter. In this case, where there was (at most) only a single valid statutory aggravating factor (CCP) to be weighed against the mitigators arising from Ballard's mental and physical infirmities, the risk that the voluminous evidence of child sexual abuse may have weighed into

the jury's death penalty recommendation shows that the introduction of this evidence was also harmful error as to sentencing. See Castro v. State, 547 So.2d 111,114-16 (Fla. 1989).

Regarding the probative value of the child sexual abuse evidence, the prosecutor contended that it was relevant to show the existence of a motive for Ballard to kill Autumn Traub. Motive is not a required element of first-degree murder, but it can be a circumstantial factor tending to show identity or premeditation. See Norton v. State, 709 So.2d 87,92 (Fla. 1997); Belcher v. State, 961 So.2d 239,249 (Fla. 2007); Bedoya v. State, 779 So.2d 574,578 (Fla. 5th DCA 2001). When collateral crime evidence is introduced on the issue of motive, either under §90.404 or §90.402, there is no requirement that the uncharged crime be similar to the charged offense. See Craig v. State, 510 So.2d 857,863-64 (Fla. 1987); Nicholson v. State, 10 So.3d 142,145 (Fla. 4th DCA 2009); State v. Andrews, 875 So.2d 686,692 (Fla. 4th DCA 2004); Chaudoin v. State, 707 So.2d 813,815 (Fla. 5th DCA 1998). Therefore, Ballard is not contending on appeal, and did not contend at trial, that the accusation of sexual molestation of Suny is entirely without probative value regarding the charged murder of Autumn; only that its probative value was substantially outweighed by the danger - - the virtual certainty - - of unfair prejudice.

It is worth noting that, even under the state's hypothesis (assuming arguendo that Suny's accusation were truthful), the child sexual abuse would be a two-step motive; i.e., that the reason for killing Autumn was to obtain custody of Suny, while the

reason for wanting custody was to regain the opportunity to molest her. It was undisputed that Roy and Kathy Ballard both wanted Suny to come back and live with them rather than stay with Autumn and John Traub. Kathy Ballard - - a state witness - - testified that they were very concerned about Autumn's plan to home school Suny (a task for which Autumn was completely unequipped), and also that Suny might be sexually molested by John Traub. (Suny had a year earlier told her grandmother Kathy that John Traub, as well as the three Niles brothers, had molested her, and the prosecutor expressed to the jury that - - notwithstanding his evasive answers - - John had indeed molested Suny). The fact that there was an ongoing custody dispute between the Ballards and the Traubs was certainly relevant and admissible, but that doesn't justify presenting collateral crime evidence from thirteen state witnesses on the reasons underlying the custody dispute. §90.403 provides that even relevant evidence "is inadmissible if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of issues, misleading the jury, or needless presentation of cumulative evidence." In this case, the prosecutor asserted that a desire to obtain custody in order to continue sexual activity with Suny would provide a stronger motive for murder than would a desire to obtain custody to provide Suny was a reasonable education or to protect her from molestation by John. However, whatever probative value the child sexual abuse evidence may have had in this context, it was greatly outweighed by both its inflammatory impact and it tendency to distract the jury from the issues of the charged crime; i.e., whether the state proved

that Autumn Traub was dead, whether she was murdered, and whether Ballard was responsible.

One of the purposes of §90.403 is to guard against the presentation of a trial within a trial on collateral issues, and that is exactly what happened in this case. See Slocum v. State, 757 So.2d 1246,1251 (Fla. 4th DCA 2000); Correia v. State, 654 So.2d 952,956 (Fla. 4th DCA 1995), see also United States v. Pepin, 514 F.3d 193,206 (2d Cir. 2008)("it is possible that the admission of the evidence would necessitate a 'diversionary trial within a trial' as to whether Pepin's sexual relationship with Mendez' daughter was consensual and whether he abused her"; also evidence would likely inflame passions of jurors so as to inhibit their careful consideration of future dangerousness factor). Other state and federal jurisdictions which have similar "prejudice vs. probative value" provisions in their rules of evidence have also emphasized the importance of preventing collateral issues from becoming a "trial within a trial". See, e.g. Soller v. Moore, 84 F.3d 963,968 (7th Cir. 1996); Hager v. United States, 791 A.2d 911,914 (D.C. 2002); State v. Tarrats, 122 P.3d 581,588-89 (Utah 2005); State v. McDonald, 956 P.2d 1314,1318 (Idaho App. 1998); Hoey v. State, 689 A.2d 1177,1180 (Del. 1997); State v. Boggs, 588 N.E.2d 813,817 (Ohio 1992); State v. Shepard, 654 S.W.2d 97,99 (Mo. App. 1983); State v. Bennett, 416 A.2d 720,723 (Me. 1980).

Another way of putting it is that the explosive accusation of child sexual abuse (of Suny) became a feature of the trial for a charge of first degree murder (of Autumn). Florida law is clear that evidence of an uncharged crime - - even where relevant, and

even in cases where the charged and uncharged crimes could be viewed as “inextricably intertwined” - - cannot become a feature of the trial. (This determination is based not only on the quantity of the evidence but also on the quality and nature of the collateral crime evidence in relation to the issues to be proven]. See, e.g. Wright v. State, 2009 WL 2778107, p. 10 (Fla. 2009); Peterson v. State, 2 So.3d 146,155 (Fla. 2009); McLean v. State, 934 So.2d 1248,1256 (Fla. 2006); Steverson v. State, 695 So.2d 687,688-91 (Fla. 1997); Seavey v. State, 8 So.3d 1175,1177-78 (Fla. 2d DCA 2009); Thomas v. State, 959 So.2d 427,430 (Fla. 2d DCA 2007); Morrow v. State, 931 So.2d 1021 (Fla. 3d DCA 2006).

As stated in Steverson, 695 So.2d at 689, and McLean, 934 So.2d at 1256, quoting Randolph v. State, 463 So.2d 186,189 (Fla. 1984), “the prosecution should not go too far in introducing evidence of other crimes. The state should not be allowed to go so far as to make the collateral crime a feature instead of an incident”.

In the present case, the accusation that Ballard was sexually molesting his step-granddaughter Suny was far from an “incident” of the trial. On the contrary, the record shows that it permeated the trial from the first witness in the prosecution’s case in chief (John Traub) to the last (jailhouse informant Michael Needham).

The prosecutor, on notice of the potential problem even before the trial began, took the position that if the child sexual abuse became a feature of the trial it would be the defense’s own doing (7/1119-21,1125). See, e.g., Sias v. State, 416 So.2d 1213,1216

(Fla. 3d DCA 1982); State v. Maisto, 427 So.2d 1120,1122 (Fla. 3d DCA 1983); Snowden v. State, 537 So.2d 1383,1386 (Fla. 3d DCA 1989). However, while it is true that defense counsel vigorously challenged Suny's credibility (and he would have been ineffective if he hadn't), it was the prosecutor - - on direct examination of thirteen witnesses in his case-in-chief[9] - - who initially put before the jury the following matters:

(1) Suny's in-court testimony accusing her step-grandfather Roy Ballard of repeatedly molesting her by regular intercourse and by use of a sexual device.

(2) Suny's pre-trial statements to Sergeant Gross, and later to investigator Beverly Cone, identifying Ballard (along with John Traub) as a person who had molested her.

(3) The discovery of a dildo in the trunk of Ballard's car, and his statements to the police and to his wife that they weren't supposed to find that, and it was none of her business.

(4) The FDLE crime lab analyst's conclusion that DNA on the dildo matched Suny Houghtaling's profile (in 12 of 13 loci).

(5) Observations made by four of the Ballards' neighbors of behavior (kissing, "making out") which they thought inappropriate for a grandfather and granddaughter.

(6) Ballard's remark to Suny (while he was in the hospital for a series of strokes) that he loved her and wanted to marry her.

[9] John Traub; Nancy Welch, Randy Welch, Robert Welch, Angela Thurston (neighbors of the Ballards); Detective Brian Wallace (regarding seizure of the dildo); Sergeant Gary Gross, Kathy Ballard; Investigator Beverly Cone; Suny Houghtaling; Dr. Mary Pacheco (as to DNA on the dildo); Detective Scott Kercher; and Michael Needham.

(7) The testimony of a jailhouse informant that Ballard indicated he had a sexual relationship with his step-granddaughter and (referring to the size of his anatomy) his was “the biggest one that she would ever see.”

Moreover, regarding Suny’s prior accusations that she was sexually molested by a series of other adult males in familial roles (John Traub, Scott Niles, Sr., Bruce Niles, Gike Niles), much of that evidence was also brought up by the prosecutor, in his direct examination of John Traub (14/843,15/871, see also closing argument at 26/2741), of Kathy Ballard (17/1300-04,1347-48), and of Suny herself (21/1984-90).

The various aspects of the collateral child sexual abuse evidence were prominently featured in the prosecutor’s opening statement and closing argument to the jury (14/797-98,801-03,806-07;25/2710-11,2713-18;28/2741-43,2841-44,2848-49,2851-53). The inflammatory nature of the collateral crime evidence was emphasized by the prosecutor’s references to Ballard’s “sexual appetite for Suny Houghtaling” (26/2849;see 25/2718)[10], and by his effort to explain to the jury in a sympathetic manner why he thought Suny behaved as she did:

> She does not know her father. She lives in a completely dysfunctional family. There is financial issues everywhere. Her mother treats her more like a maid than a daughter. ...Mrs. [Kathy] Ballard even tells you that she had no friends when she lived there. Nobody visited. And she didn’t go visit anybody. A teenager, the life of a teenager are their friends. There is almost a loss of perspective by an adolescent as to what is important in life. Their parents oftentimes take a back seat to peer pressure and to acceptance by

[10] On one of those instances, it appears that the prosecutor misspoke, referring to “the sexual appetite of the Defendant for Autumn Traub” (25/2718).

> their friends and a desire to spend more and more and more time with their friends. That is not Suny's life, not how she behaved. Suny was in the business of paying rent. That is what she did, paid rent. And she paid for that rent with her body. She told you when I asked her how is it that you allowed that to happen. I don't know. I don't know. I don't know why I permitted that. You know there is such an issue of self-esteem, of a feeling of self-worth, that is...diminished when you don't have that emotional support by your family. When the nurturing that takes place by your parents and their involvement in day to day life, and you are feeling that they are concerned about you, that when you see the sacrifices that they make on your behalf, they may not say it, but they see it. And that's what shapes their feelings toward you. Not words that are spoken but the behavior that they observe. Suny had none of that. None of that. So when demands are made upon her by John Traub and others, including the Defendant she acquiesces. Where is she going to go? Who is going to help her and be there for her? What's going to happen to me? She is isolated and she has no option. That's her perception. That explains why she allowed others to do what he did to her. That is the context in which you must consider Suny Houghtaling's life.

Unfortunately, this trial became at least as much about Suny Houghtaling's life as about the circumstantial evidence regarding the disappearance of her biological mother[11], Autumn Traub, a person with whom most jurors would be unlikely to identify. [Note also that the prolonged sexual and emotional battering which Suny has experienced throughout her childhood is consistent with her being susceptible to making false or psychologically coerced accusations as well as true ones]. Roy Ballard's rights to due process and a fair trial were compromised by his being forced to defend against an uncharged - - and emotionally explosive - - criminal accusation (primarily a credibility case) on top of the

[11] The term "biological mother" was the prosecutor's own characterization of the relationship between Autumn and Suny; "[s]he wasn't a mother in the sense of the word. There was no bond. There was no sense of responsibility for her" (26/2738).

charged accusation of capital murder (primarily a circumstantial case). It was the state, not the defense, that made the child molestation accusation a feature, rather than an incident, of this trial.

For all of these reasons, Ballard's murder conviction and death sentence should be reversed for a new trial.

ISSUE II

ROY BALLARD'S DEATH SENTENCE - - IMPOSED BY THE JUDGE BASED ON A SINGLE AGGRAVATING FACTOR (CCP) AFTER A NONUNANIMOUS JURY RECOMMENDATION - - VIOLATES THE SIXTH AMENDMENT AND RING V. ARIZONA.

This point on appeal is an extreme rarity, in that it presents a "pure" Ring issue, without any case-specific factors which might bring it outside the scope of Ring. [Undersigned counsel is aware of one pending case, Dane Abdool v. State, SC08-944, which appears to involve a pure Ring issue; he cannot be sure whether there are others].

This Court has never squarely held whether the Sixth Amendment principle of Ring v. Arizona, 536 U.S. 584 (2002) applies in Florida, or whether this is somehow the only state in the union unaffected by Ring. See State v. Steele, 921 So.2d 538,540,546-50,551-52,553-55 (Fla. 2005)(in which all seven Justices, in the opinion of the court and two separate opinions, either expressed doubt as to whether Florida's present capital sentencing scheme complies with Ring (Justices Cantero, Wells, Lewis, Quince, and Bell) or stated the view that it doesn't comply (Justices Pariente and Anstead), and recognized that this Court has not yet forged a majority view as to Ring's applicability);

Johnson v. State, 904 So.2d 400,406 (Fla. 2005)(noting that Ring cast doubt on the constitutionality of "hybrid" death penalty schemes including Florida's; that neither Bottoson v. Moore, 833 So.2d 693 (Fla. 2002) nor King v. Moore, 831 So.2d 143 (Fla. 2002) - - comprising this Court's initial response to Ring - - garnered a majority; and that this Court has not yet determined whether Ring applies to Florida's system).

Because virtually every case which has come before this Court contains one or more factors which either render Ring inapplicable (e.g. waiver of penalty jury; postconviction claim) or a demonstrate that the minimum requirements of Ring were complied with (e.g. prior violent felony conviction; unanimous guilty verdict on underlying felony where homicide committed in the course of a felony; 12-0 jury death recommendation), this Court has never been compelled to address the core constitutional issue head on. In the instant case - - unless Ballard's conviction is reversed for a new trial [Issue I], or unless his sentence is reduced to life imprisonment based on proportionality grounds or on the legal insufficiency of the sole aggravating factor [Issue III] - - the issue will have to be resolved whether Florida (due to its legislature's obstinate inaction in response to Ring, Steele, and the 2006 ABA recommendations[12]) can constitutionally remain the sole "outlier"; "the only state in the country that allows the death penalty to be imposed even though the penalty-

[12] American Bar Assocation, Evaluating Fairness and Accuracy in State Death Penalty Systems: The Florida Death Penalty Assessment Report (2006), discussed by this Court in other contexts in In Re Standard Jury Instructions in Criminal Cases (nos. SC05-960, SC05-1890)(October 29, 2009).

phase jury may determine by a mere majority vote both whether aggravators exist and whether to recommend the death penalty". State v. Steele, 921 So.2d at 548-50 (emphasis in opinion).

Bottoson and King involved successive post conviction claims; both defendants had prior violent felony convictions, and King's death recommendation was unanimous. A Westlaw search of "Ring v. Arizona" and "Ring /3 Arizona" produces (as of December 1, 2009) 270 opinions, about 255 of these are capital direct appeals and postconviction appeals. Only two of these come close to a "pure" Ring claim; and neither decision resolves the issue. Butler v. State, 842 So.2d 817 (Fla. 2003), was decided a few months after Bottoson and King, and relief was denied based on those cases without further discussion (over a vigorous dissent by Justice Pariente, pointing out the critical differences between those cases and Butler's case). Butler was decided more than two years before Johnson and Steele recognized that the Ring issue remains unresolved. Moreover, the issue was not fully briefed or argued in Butler, because it was raised for the first time on motion for rehearing.[13] Coday v. State, 946 So.2d 988 (Fla. 2006) has no

[13] Except in the rare cases of fundamental error, issues raised for the first time on motion for rehearing are not properly before an appellate court. See Romero v. State, 870 So.2d 816,818 (Fla. 2004); Cleveland v. State, 887 So.2d 362,364 (Fla. 5th DCA 2004); Padilla v. State, 905 So.2d 248 (Fla. 3d DCA 2005). Preservation is required for constitutional claims under Ring and Apprendi v. New Jersey, 530 U.S. 466 (2000). See Padilla; Sims v. State, 998 So.2d 494,507 n.12 (Fla. 2008); Evans v. State, 946 So.2d 1,15 and n.26 (Fla. 2006); Marshall v. State, 789 So.2d 969,970 (Fla. 2001).

binding affect on the Ring issue because (1) it is a plurality opinion joined by only three Justices[14], and (2) Coday's death sentence was reversed on other grounds.[15] [See also Justice Pariente's opinion concurring in part and dissenting in part, 946 So.2d at 1021-25]. Therefore, this Court has never affirmed a death sentence over a preserved and fully argued Ring issue, unless one or more of the following circumstances existed:

> (1) One of the aggravators was a prior conviction of a violent felony [see, e.g. Seibert v. State, 923 So.2d 460,474 (Fla. 2006)("the presence of a prior violent felony among the aggravating factors fulfills the mandate of Ring"); Belcher v. State, 851 So.2d 678,685 (Fla. 2003); Almendarez-Torres v. United States, 523 U.S. 224 (1998).
>
> (2) The defendant was convicted by unanimous jury verdict of a contemporaneous homicide or a contemporaneous violent felony against a different victim. See e.g. Weaver v. State, 894 So.2d 178,201 n.21 (Fla. 2004)(if Ring applies in Florida, "the jury's unanimous determination that the defendant committed other violent felonies involving another victim would make [him] eligible for the death penalty, thus complying with Ring"; Salazar v. State, 991 So.2d 364,378 (Fla. 2008); Bevel v. State, 983 So.2d 505,513,526 (Fla. 2008); Doorbal v. State, 837 So.2d 940,963 (Fla. 2003).
>
> (3) One of the aggravators was that the homicide was committed in the course of a designated felony, and the defendant was convicted of that underlying felony by a unanimous jury verdict. See, e.g. Belcher, 851 So.2d at 685; Nelson v. State, 850 So.2d 514,534-35 (Fla. 2003) (Pariente, J., specially concurring); see also Tanzi v. State, 964 So.2d 106,112 n.2 (Fla. 2007)(jury unanimously recommended death and Tanzi pled guilty to kidnapping, robbery, and carjacking, thereby establishing aggravator of murder committed during the course of a felony).
>
> (4) The defendant was previously convicted of a felony, and was under sentence of imprisonment or on community

[14] See Santos v. State, 629 So.2d 838,840 (Fla. 1994); State v. A.R.S., 684 So.2d 1383, 1386 n.1 (Fla. 1st DCA 1996); see also Johnson v. State, supra, 904 So.2d at 406.

[15] Coday was resentenced to death in 2007 and committed suicide in prison in 2008.

control or felony probation at the time of the murder. Smith v. State, 998 So.2d 516,529 (Fla. 2008); Allen v. State, 854 So.2d 1255,1262 (Fla. 2003); but see Davis v. State, 859 So.2d 465,481 (Pariente, J., dissenting).

(5) The jury recommended the death sentence by a unanimous (12-0) vote. Crain v. State, 894 So.2d 59,78 (Fla. 2004); Windom v. State, 886 So.2d 915,930 (Fla. 2004); Grim v. State, 841 So.2d 455,465 (Fla. 2003). [Note that this would demonstrate that all twelve jurors agreed that at least one aggravating factor existed, but would not necessarily show unanimous agreement as to any one specific aggravator].

(6) The defendant voluntarily waived his right to a penalty jury. Bryant v. State, 901 So.2d 810,822-23 (Fla. 2005); Lynch v. State, 841 So.2d 362,366 n.1 (Fla. 2003).

(7) The Ring claim was raised on postconviction motion (as this Court and the United States Supreme Court have held that Ring does not apply retroactively). Johnson v. State, supra, 904 So.2d at 402-12; Walls v. State, 926 So.2d 1156,1174 (Fla. 2006); Schriro v. Summerlin, 542 U.S. 348 (2004).

Many of the direct appeal decisions in which Ring claims were rejected contain multiple factors taking the case outside the scope of Ring. See, e.g. Hudson v. State, 992 So.2d 96,117-18 (Fla. 2008); Lugo v. State, 845 So.2d 74,119 n.79 (Fla. 2003); Salazar, 991 So.2d at 378; Crain, 894 So.2d at 78; Belcher, 851 So.2d at 685.

The central holding of Ring is that in capital sentencing aggravating factors (or at least one aggravating factor necessary to make a defendant death-eligible) are elements, or the functional equivalent of elements, of a greater offense of capital murder. The U.S. Supreme Court concluded that "[c]apital defendants, no less than noncapital defendants . . . are entitled to a jury determination of any fact on which the legislature

conditions an increase in their maximum punishment". 536 U.S. at 589. Ring overruled Walton v. Arizona, 497 U.S. 639 (1990), which in turn had been based on the reasoning of Hildwin v. Florida, 490 U.S. 638 (1989). The Court wrote:

> In [Walton], we upheld Arizona's scheme against a charge that it violated the Sixth Amendment. The Court had previously denied a Sixth Amendment challenge to Florida's capital sentencing system, in which the jury recommends a sentence but makes no explicit findings on aggravating circumstances; we so ruled, Walton noted, on the ground that "the Sixth Amendment does not require that the specific findings authorizing the imposition of the sentence of death be made by the jury". Id, at 648, 110 S.Ct. 3047 (quoting Hildwin v. Florida, 490 U.S. 638,640-41, 109 S.Ct. 2055,104 L.Ed. 2d 728 (1989)(per curiam)). Walton found unavailing the attempts by the defendant-petitioner in that case to distinguish Florida's capital sentencing system from Arizona's. In neither State, according to Walton, were the aggravating factors "elements of the offense"; in both States, they ranked as "sentencing considerations" guiding the choice between life and death. 497 U.S. at 648, 110 S.Ct. 3047 (internal quotation marks omitted).

Ring, 536 U.S. at 598.

The Ring Court found that Walton's holding (which by necessary implication must include Hildwin's as well) was inconsistent with the reasoning of Apprendi v. New Jersey, 530 U.S. 466 (2000). Rejecting Arizona's reliance on the Walton/Hildwin distinction between elements of an offense and sentencing factors, the Court recognized that Apprendi renders that argument untenable: "Apprendi repeatedly instructs . . . that the characterization of a fact or circumstance as an 'element' or 'sentencing factor' is not determinative of the question" of who decides, judge or jury. 536 U.S. at 604-05. Apprendi held that the Sixth Amendment does not permit a defendant to be exposed to a penalty exceeding the maximum he would receive if punished accord-

ing to the facts reflected in the jury's guilty verdict alone, even if the State characterizes the additional findings made by the judge as "sentencing factors" rather than "elements". 536 U.S. at 588-89.

Therefore the Ring Court concluded:

> For the reasons stated, we hold that Walton and Apprendi are irreconcilable; our Sixth Amendment jurisprudence cannot be home to both. Accordingly, we overrule Walton to the extent that it allows a sentencing judge, sitting without a jury, to find an aggravating circumstance necessary for imposition of the death penalty. See 497 U.S., at 647-49, 110 S.Ct. 3047. Because Arizona's enumerated aggravating factors operate as "the functional equivalent of an element of a greater offense," Apprendi, 530 U.S. at 494, n.19, 120 S.Ct. 2348, the Sixth Amendment requires that they be found by a jury.

536 U.S. at 609.

Justice Scalia (joined by Justice Thomas), concurring in Ring, made the same point more colorfully:

> ...I believe that the fundamental meaning of the jury-trial guarantee of the Sixth Amendment is that all facts essential to imposition of the level of punishment the defendant receives – whether the statute calls them elements of the offense, sentencing factors, or Mary Jane – must be found by the jury beyond a reasonable doubt.

536 U.S. at 610 (emphasis supplied).

Although Justice Scalia continued to adhere to his minority view that the constitution does not require states to utilize aggravating circumstances at all in their capital sentencing schemes, he made it clear that where aggravating circumstances are used to determine death-eligibility the Sixth Amendment demands that they be found by a unanimous jury. 536 U.S. at 610.

Could Ring have overruled Walton on this point while somehow leaving Hildwin intact? The answer is no. Hildwin, like Walton, is

premised upon the now obsolete distinction between "elements" and "sentencing factors", 490 U.S. at 640. The Walton opinion relies on and quotes Hildwin for the proposition that "the Sixth Amendment does not require that the specific findings authorizing the imposition of the sentence of death be made by the jury" [Walton, 497 U.S. at 648; Hildwin 490 U.S. at 640-41]; a proposition 180 degrees opposite to the holding of Ring. The now overruled Walton opinion recognized that its conclusion applied equally to "judge only" and "hybrid" capital sentencing systems":

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

497 U.S. at 648 (emphasis supplied).

If Hildwin and Walton applied to both Arizona and Florida when they were thought to be good law, then the overruling of Walton in Ring logically must amount to an overruling of Hildwin as well.

The Hildwin opinion discusses McMillan v. Pennsylvania, 477 U.S. 79 (1986), which "upheld a Pennsylvania statute that required the sentencing judge to impose a mandatory minimum sentence if the judge found by a preponderance of the evidence that the defendant visibly possessed a firearm". In Harris v. United States, 536 U.S. 545 (2002) - - decided the same day as Ring - - the Supreme Court was faced with the question of whether McMillan is still good law in light of Apprendi. The plurality in Harris found that, unlike

Walton, McMillan can be reconciled with Apprendi: "Read together, McMillan and Apprendi mean that those facts setting the outer limits of a sentence, and of the judicial power to impose it, are elements of the crime for purposes of the constitutional analysis. Within the range authorized by the jury's verdict, however, the political system may channel judicial discretion – and rely upon judicial expertise – by requiring defendants to serve minimum terms after judges make certain factual findings". 536 U.S. at 567. See State v. Butler, 706 N.W.2d 1,4 (Iowa 2005). Therefore, McMillan's holding has been limited in such a way that it no longer supports the result in Hildwin. Apprendi and Ring, which apply to the outer limits of sentencing, supersede Hildwin just as surely as they supersede Walton. This is made abundantly clear by the following statement made by the Court in the subsequent case of Blakely v. Washington, 542 U.S. 296,303-04 (2004)(emphasis in opinion):

> Our precedents make clear...that the "statutory maximum" for Apprendi purposes is the maximum sentence a judge may impose solely on the basis of the facts reflected in the jury verdict or admitted by the defendant. In other words, the relevant "statutory maximum" is not the maximum sentence a judge may impose after finding additional facts, but the maximum he may impose without any additional findings.

Under Florida law and the state and federal constitutions, the maximum sentence a judge may impose upon a conviction of first degree murder without any additional findings is life imprisonment. Banda v. State, 536 So.2d 221,225 (Fla. 1988)("The death penalty is not permissible under the law of Florida where...no valid aggravating factors exist"); Elam v. State, 636 So.2d 1312,1314 (Fla. 1994). Therefore, under the constitutional

analysis of Ring, Apprendi, and Blakely, the additional finding or findings (aggravating circumstances) - - whether called elements, sentencing factors, or Mary Jane - - which make a defendant eligible for a death sentence must be found by a unanimous jury.

See Weaver v. State, supra, 894 So.2d at 201,n.21 (if Ring applies in Florida, "the jury's unanimous determination that the defendant committed other violent felonies involving another victim would make [him] eligible for the death penalty, thus complying with Ring"); Capano v. State, 889 A.2d 968,973 (Del. 2006)("Because Capano's eligibility for the death penalty was decided by the sentencing judge without a unanimous jury finding of a statutory aggravating circumstance, we must vacate his death sentence" and remand for a new penalty hearing consistent with Ring); Newton v. State, 2009 WL 3170787 (Ala.Crim.App. 2009); Spencer v. State, 2008 WL 902766 (Ala.Crim.App.2008); Brownfield v. State, 2007 WL 1229388 (Ala.Crim.App.2007)(all holding that jury's unanimous finding of at least one aggravating circumstance making the defendant death-eligible is sufficient to satisfy Ring); Houser v. State, 823 N.E.2d 693,699 (Ind. 2005)(Sixth Amendment requires a unanimous jury to find beyond a reasonable doubt that an aggravating factor making the defendant eligible for the death penalty exists); Overstreet v. State, 783 N.E.2d 1140,1161 (Ind. App. 2003)(finding compliance with Ring and Apprendi mandates, where jury was instructed that it could only recommend death if it unanimously found at least one aggravating circumstance); Commonwealth v. Roney, 866 A.2d 351,360 (Pa. 2005) (case did not implicate the concerns articulated in Ring and

Apprendi because in order to find a defendant eligible for the death penalty a Pennsylvania jury must unanimously find at least one aggravating circumstance beyond a reasonable doubt). In Davis v. Mitchell, 318 F.3d 682,687 (6th Cir. 2003), the Court of Appeals wrote:

> The reason the aggravating factors must be found unanimously is that they are the elements of the murder offense that make the defendant death eligible. See Ring v. Arizona, 536 U.S. 584,122 S.Ct. 2428, 2443, 153 L.Ed.2d 556 (2002)(holding that because Arizona's enumerated aggravating factors operate as the functional equivalent of elements of the offense, the Sixth Amendment requires that they be found by a jury). All of the elements of a criminal offense must be found by a jury unanimously as a matter of constitutional criminal procedure, see Richardson v. United States, 526 U.S. 813,119 S.Ct. 1707, 1710, 143 L.Ed.2d 985 (1999), particularly all elements that make a defendant death eligible, see Ring, 536 U.S. 584,122 S.Ct. at 2431.

As Justice Scalia wrote in the opinion of the Court in Blakely, 542 U.S. at 313-14, "[t]he Framers would not have thought it too much to demand that, before depriving a man of three more years of his liberty, the State should suffer the modest inconvenience of submitting its accusation to 'the unanimous suffrage of twelve of his equals and neighbors', 4 Blackstone, supra, at 343, rather than a lone employee of the State." It follows, then, that since the maximum punishment for first-degree murder absent the additional finding of a death-qualifying aggravating circumstance is life imprisonment, it is not too much to demand that a unanimous jury find that aggravator to exist beyond a reasonable doubt. In Blakely, a noncapital case, the statutory finding which was used to enhance the defendant's sentence was that he acted with "deliberate cruelty", and the

existence of that factor was in dispute. 542 U.S. at 300-01,313. In the instant case, the only statutory aggravating factor asserted by the state in support of a death sentence was that the homicide was "cold, calculated, and premeditated", and the existence of that factor was vigorously disputed by the defense (27/3052-54;28/3055,3080-87,3090). Since the jury made no specific finding on the aggravator [see Steele], and since its death recommendation was nonunanimous (9-3), the state cannot show compliance with the Sixth Amendment requirements of Ring. [While it is possible that all twelve jurors might have found that CCP was proven beyond a reasonable doubt and split 9-3 on weighing the aggravator against the mitigators, it is equally possible that one, two, or all three of the jurors who voted for a life sentence did so because they believed CCP was not proven beyond a reasonable doubt and therefore no valid aggravators existed].

At the time Ring was decided in 2002, five western states had "judge sentencing" death penalty schemes, while four states (Florida, Delaware, Alabama, and Indiana) had "hybrid" schemes. Ring expressly invalidated the former, and called into question the constitutionality of the latter. See Ring, 536 U.S. at 621 (O'Connor, J., dissenting). By the time State v. Steele was decided in early 2006, there were no more "judge sentencing" states and one of the "hybrids" - - Indiana - - had become a jury sentencing state. With the sole exception of Florida, all of the other hybrid states (Delaware, Alabama, and the formerly judge-sentencing states of Montana and Nebraska) had undergone

legislative revision to comply with Ring; "[w]here a special jury finding ha[d] not previously been required, it was added in response to Ring". See Steele, 921 So.2d at 551-52 and footnotes 6,7,8, and 9 (Wells, J., joined by Justices Cantero and Bell, specially concurring). As the Steele majority (five Justices in an opinion authored by Justice Cantero) observed:

> Florida is now the only state in the country that allows a jury to decide that aggravators exist and to recommend a sentence of death by a mere majority vote. Of the 38 states that retain the death penalty, 35 require, at least, a unanimous jury finding of aggravators. Of these, 24 states require by statute both that the jury unanimously agree on the existence of aggravators and that it unanimously recommend the death penalty. Three states require by statute unanimity only as to the jury's finding of aggravators. Seven more states have judicially imposed a requirement at least that the aggravators be determined unanimously. Of these seven states, five (all except Alabama and Kentucky) require that both the aggravators and the recommendation of death be unanimous. Alabama and Kentucky require only that the aggravators be determined unanimously. Although Missouri law is less clear, it appears that a jury at least must unanimously find the aggravators. [Citations omitted].
>
> That leaves Utah and Virginia. In those states, the jury need not find each aggravator unanimously, but the jury must unanimously recommend the death penalty [Citations omitted]. Finally, the federal government, when imposing the death penalty, also requires a unanimous jury. See 18 U.S.C. § 3593(d) (2000).

921 So.2d at 548-49 (footnotes omitted).

See also Justice Wells' concurring opinion in Steele, 921 So.2d at 552 ("I believe that the federal statute's procedures could serve as a model for the Florida revision since those procedures do not appear to have Apprendi-Ring problems").

All three opinions and all seven Justices in Steele expressed grave doubts about the constitutionality of Florida's present system, and called for legislative revision in light of Ring and

in light of Florida's current status as the "outlier" state. See 921 So.2d at 550 (majority opinion). Justice Pariente (concurring in part and dissenting in part, in an opinion joined by Justice Anstead) wrote:

> ...I concur wholeheartedly in the majority's call for legislative reevaluation of Florida's capital sentencing scheme to determine whether jurors should be required to unanimously decide whether death should be imposed as well as make unanimous findings on the existence of aggravating factors.

Notwithstanding this Court's "heads-up" in Steele, and notwithstanding the 2006 American Bar Association recommendations, the Florida legislature has done nothing to bring this state's death penalty scheme into compliance with Ring, Apprendi, Blakely, and the Sixth Amendment. Florida's inaction sharply contrasts with the response of the state which has (or had) the most similar system: Delaware. See State v. Cohen, 604 S.2d 846,851 n.4 (Del. 1992); Garden v. State, 844 A.2d 311,314 (Del. 2004)(Delaware's 1991 death penalty statute was modeled after Florida's). "Prior to 1991, a unanimous jury verdict was required to impose the death penalty [in Delaware]. However, the new statute disposed of the unanimous verdict requirement and placed the ultimate decision-making responsibility in the trial judge." State v. Steckel, 708 A.2d 994,996 (Del. Super. 1996), see Shelton v. State, 652 A.2d 1,6-7 (Del. 1995). However, in 2002 in prompt response to Ring Delaware's General Assembly again amended its death penalty statute, transforming the jury's role from one which was purely advisory into one which is determinative as to the existence of an aggravating circumstance making the defendant death-eligible. The trial judge is now barred from imposing a death sentence unless

the jury (unless a jury is waived by the parties) “first determines unanimously and beyond a reasonable doubt that at least one statutory aggravating circumstance exists.” Brice v. State, 815 A.2d 314,320 (Del. 2003). See also Ortiz v. State, 869 A.2d 285,305 (Del. 2005)(“Ortiz became death eligible under Apprendi and Ring when his jury unanimously found beyond a reasonable doubt the existence of one of the statutory aggravating circumstances alleged by the prosecution”; once that constitutional requirement has been met, the judge can sentence a defendant to death but only if he determines that the aggravating factors outweigh the mitigating factors). The Delaware Supreme Court in Ortiz emphasized the difference between the narrowing (death-eligibility) phase which requires a unanimous jury finding, and the weighing phase which does not; and adhered to its holding in Brice that Delaware’s hybrid sentencing scheme - - in light of the 2002 statutory revision providing for a unanimous jury finding of a death-eligibility aggravator - - complies with the Sixth Amendment as construed in Apprendi and Ring. 869 A.2d at 305. [Similarly, the Alabama Court of Criminal Appeals has held that Ring requires only that the jury unanimously find the existence of an aggravating circumstance in order to make the defendant death-eligible; once this minimum requirement is satisfied the jury’s advisory verdict need not be unanimous. Newton v. State, supra, 2009 WL 902766, quoting Blackmon v. State, 7 So.3d 397,432-33 (Ala.Crim.App. 2005); Brownfield v. State, supra, 2007 WL 1229388)].

Thomas Capano’s case was recognized by the Delaware Supreme Court as “unique” [Capano v. State, 889 A.2d 968,973 n.8

(Del.2006)], for the same reason Roy Ballard's case is unique, or at least extremely rare, in Florida. Capano presented a "pure" Ring issue. In every other case which had come before the Delaware Court which had been tried under the 1991 statute (before the 2002 amendment) either there was a unanimous jury determination of a statutory aggravating factor, or else the jury's unanimous guilt-phase verdict necessarily found the existence of an aggravating factor. 889 A.2d at 973, n.8. In Capano, however, the only aggravator at issue was whether the "murder was premeditated and the result of substantial planning". (Delaware's counterpart to Florida's CCP). After Capano's jury unanimously found him guilty of first-degree murder, the penalty phase commenced. The result was a nonunanimous vote (11-1) finding the aggravating factor, and a 10-2 recommendation that the judge find that the aggravator outweighed the mitigators. The trial judge, after giving substantial weight to the jury's recommendation, sentenced Capano to death. 889 A.2d at 973-74,978.

The Delaware Supreme Court was called upon to address whether, as applied to Capano, the 1991 sentencing procedure met the Sixth Amendment's requirements under Ring, as well the requirements of the state constitution. 889 A.2d at 978. The appellate court rejected the State's contention that Hildwin v. Florida was the controlling authority because Delaware (like Florida) used a hybrid scheme, while Arizona had been strictly a judge-sentencing state:

> The State argues that Ring does not apply in Delaware because the judge does not sit without a jury, but relies on the jury's recommendation. Ring's holding is not so narrow.

889 A.2d at 978.

Accordingly, the Delaware Supreme Court found a fatal constitutional flaw in the application of the 1991 statute to Capano:

> A factual determination of eligibility for the death penalty must be found by a jury because under Ring, eligibility based upon the existence of a statutory aggravating circumstance is no longer merely a sentencing factor but, rather, is an element of the greater offense of capital murder. In Delaware, the elements of any criminal offense, including the greater offense of capital murder, must be found by a unanimous jury. Because Capano's eligibility for the death penalty was decided by the sentencing judge without a unanimous jury finding of a statutory aggravating circumstance, we must vacate his death sentence. This constitutional flaw in the penalty phase does not bar a new penalty hearing under a procedure that comports with constitutional requirements. Accordingly, we remand this matter for a new penalty hearing consistent with Ring and the death penalty statute that was enacted in response to the Ring decision ("the 2002 statute"). [footnote omitted].

While the court in Capano chose to base its unanimity analysis largely on the Delaware constitution, 889 A.2d at 978-80, the same principles apply under the Florida[16] and federal constitutions. In light of its express limitation of its guarded acceptance of nonunanimous jury verdicts to noncapital cases only, it is highly unlikely that the U.S. Supreme Court would find that a nonunanimous finding of a death-qualifying aggravating factor -- an essential element of the capital offense under Ring - - would satisfy the requirements of the Sixth Amendment. While Hildwin v.

[16] Regarding the Florida constitutional right to a unanimous jury finding of the existence of a death-qualifying aggravator, see Butler v. State, 842 So.2d at 837-38 (Pariente, J., concurring and dissenting); Bottoson v. Moore, 833 So.2d at 714-15 (Shaw, J. concurring in result).

Florida, supra, and Spaziano v. Florida, 468 U.S. 447 (1984) allowed nonunanimous jury recommendations as well as judicial overrides of jury life recommendations, those opinions were written long before Ring; before it was understood that the Sixth Amendment requires any jury participation in capital sentencing. In Spaziano, as summarized in Hildwin, 490 U.S. at 639-40, "we rejected the claim that the Sixth Amendment requires a jury trial on the sentencing issue of life or death." Then in Hildwin the Court said, "If the Sixth Amendment permits a judge to impose a sentence of death when the jury recommends life imprisonment...it follows that it does not forbid the judge to make the written findings that authorize imposition of a death sentence when the jury unanimously recommends a death sentence. 490 U.S. at 640 (emphasis supplied). As Justice Pariente, concurring in result only in King v. Moore, 831 So.2d at 152-53, pointed out, Spaziano did not address the precise issue addressed in Ring - - whether the Sixth Amendment requires a jury finding of aggravating factors (emphasis in opinion). Hildwin, on the other hand, did address that issue, and therefore it is difficult to reconcile with Ring.

> However, it should be noted that the ultimiate holding in Hildwin can perhaps be reconciled with Ring to the extent that Hildwin holds that "the Sixth Amendment... does not forbid the judge to make the written findings that authorize imposition of a death sentence when the jury unanimously recommends a death sentence." Hildwin, 490 U.S. at 640, 109 S.Ct. 2055 (emphasis supplied). Indeed, when the jury has made a unanimous recommendation of death, the jury has implicitly found at least one aggravating factor-as occurred in King's case. Thus, Hildwin may still be valid and consistent with Ring to the extent that Hildwin holds that the Sixth Amendment permits the judge to make the written findings of fact that support the death sentence only after the jury has implicitly found at least one

> aggravator with a unanimous death recommendation. This interpretation of Hildwin would not be inconsistent with the Court's holding in Ring.

King v. Moore, 831 So.2d at 153 (Pariente. J., joined by Anstead, C.J., concurring in result only)(emphasis in opinion).

Since, under the constitutional analysis of Ring, a finding of a death-qualifying aggravator is now understood to be an essential element of the capital offense, the Sixth Amendment requires that it be made by the jury, unanimously and beyond a reasonable doubt. In Duncan v. Louisiana, 391 U.S. 145 (1968), the Court (in holding that the Fourteenth Amendment guarantees a state criminal defendant the right to a jury trial in any case which, if tried in a federal court, would require a jury trial under the Sixth Amendment) observed that the penalty authorized for a particular crime may in itself, it severe enough, subject the trial to the mandates of the Sixth Amendment. 391 U.S. at 159. The Court noted that only two states, Oregon and Louisiana, permitted a less-than-unanimous jury to convict for an offense with a maximum penalty greater than one year. 391 U.S. at 158 n.30.

In Williams v. Florida, 399 U.S. 78 (1970), the Supreme Court held that a state statute providing for a jury of fewer than twelve persons in non-capital cases is not violative of the Sixth and Fourteenth Amendments. The Court noted that no state provided for fewer than twelve jurors in capital cases – "a fact that suggests implicit recognition of the value of the larger body as a means of legitimating society's decision to impose the death penalty." 399 U.S. at 103.

The Supreme Court next decided the companion cases of Johnson

v. Louisiana, 406 U.S. 356 (1972) and Apodaca v. Oregon, 406 U.S. 404 (1972). In Johnson, the Court concluded that a Louisiana statute which allowed a less-than unanimous verdict (9-3) in non-capital cases [406 U.S. at 357, n.1] did not violate the due process clause for failure to satisfy the reasonable doubt standard. In Apodaca, the Court decided that an Oregon statute allowing a less-than unanimous verdict (10-2) in non-capital cases [406 U.S. at 406, n.1] did not violate the right to jury trial secured by the Sixth and Fourteenth Amendments.

Johnson and Apodaca were 5-4 decisions. Justices Blackmun and Powell were the swing votes, and each wrote concurring opinions emphasizing the narrow scope of the Court's holdings.

Nothing in the development of the U.S. Supreme Court's Sixth Amendment caselaw remotely suggests that a constitutionally-required jury finding of an essential element could be made by a nonunanimous verdict in either the guilt phase or penalty phase of a capital trial. See State v. Daniels, 542 A.2d 306,314-15 (Conn. 1988), cited with approval in this Court's majority opinion in State v. Steele, 921 A.2d at 548-50 ("the functions performed by guilt and penalty phase juries are sufficiently similar so as to warrant the application of the unanimous verdict rule to the latter").

The fact that the Florida's legislature's non-response to Ring has left this state the outlier - - the only state that does not require a unanimous jury verdict to decide either that a death-qualifying aggravator exists or to recommend a death sentence - - is further evidence that the minimum Sixth Amendment

standards are not being met. See Burch v. Louisiana, 441 U.S. 130 (1979) ("We think that [the] near-uniform judgment of the Nation provides a useful guide in delimiting the line between those jury practices that are constitutionally permissible and those that are not").

The Eighth Amendment is implicated here as well as the Sixth. The U.S. Supreme Court has repeatedly recognized that the Eighth and Fourteenth Amendments require a heightened degree of reliability when a death sentence is imposed. Lockett v. Ohio, 438 U.S. 586,604 (1978); Zant v. Stephens, 462 U.S. 862,884-85 (1983); Caldwell v. Mississippi, 472 U.S. 320,329-330 (1985); Sumner v. Shuman, 483 U.S. 66,72 (1987). The importance of unanimity as a safeguard of reliability was recognized by the Supreme Court of Connecticut in Daniels, 542 A.2d at 314-15, which held that jury verdicts in the penalty phase of a capital case must comport with the guidelines that govern the validity of jury verdicts generally, including the requirement of unanimity.

> [W]e perceive a special need for jury unanimity in capital sentencing. Under ordinary circumstances, the requirement of unanimity induces a jury to deliberate thoroughly and helps to assure the reliability of the ultimate verdict. The "heightened reliability demanded by the Eighth Amendment in the determination whether the death penalty is appropriate"; Sumner v. Shuman, 483 U.S. 66,107 S.Ct. 2716,2720, 97 L.Ed.2d 56 (1987); convinces us that jury unanimity is an especially important safeguard at a capital sentencing hearing. In its death penalty decisions since the mid-1970s, the United States Supreme Court has emphasized the importance of ensuring reliable and informed judgments. These cases stand for the general proposition that the "reliability" of death sentences depends on adhering to guided procedures that promote a reasoned judgment by the trier of fact. The requirement of a unanimous verdict can only assist the capital sentencing jury in reaching such a reasoned decision.

Daniels, 542 A.2d at 315, quoted in State v. Steele, 921 So.2d at 550. (Citations omitted).

As stated in Steele, 921 So.2d at 549, "[m]any courts and scholars have recognized the value of unanimous verdict." See United States v. Scalzitti, 578 F.2d 507,512 (3d Cir. 1978)(unlike the historical accident of jury size, the requirement of unanimity "relates directly [to] the deliberative function of the jury"); see also People v. Durre, 690 P.2d 165,172-73 (Colo. 1984); and State v. Hochstein, 632 N.W. 2d 273,281-83 (Neb. 2001), discussing the principle of heightened reliability in the context of jury unanimity in capital sentencing.

In the instant case, Roy Ballard was sentenced to death notwithstanding the fact that the only aggravating factor proposed by the state which might make him death-eligible was CCP. The existence of this factor was contested by the defense (27/3052-54;28/3055,3080-87), and was dependent upon the jury's resolution of circumstantial evidence and inferences. The prosecutor concluded his argument to the jury by urging that CCP was a powerful aggravator, and emphasizing the lack of any requirement of unanimous agreement (28/3075-76). There was no specific jury finding regarding the aggravator [see Steele] and the jury's death recommendation was by a 9-3 vote. Under these unique circumstances, the minimum Sixth Amendment requirements of Ring were not met. Ballard's death sentence must be reversed for a new penalty phase which comports with Ring [see Capano], or for imposition of a sentence of life imprisonment.

ISSUE III

BALLARD'S DEATH SENTENCE MUST BE REDUCED TO LIFE IMPRISONMENT WITHOUT POSSIBLITY OF PAROLE BECAUSE (1) THE STATE'S CIRCUMSTANTIAL EVIDENCE IS INSUFFICIENT TO PROVE BEYOND A REASONABLE DOUBT THE SOLE AGGRAVATING FACTOR RELIED ON BY THE STATE, AND (2) EVEN ASSUMING ARGUENDO THAT CCP WERE PROVEN, THE DEATH SENTENCE IS DISPROPORTIONATE IN A SINGLE AGGRAVATOR CASE WITH SUBSTANTIAL MITIGATION.

"Proportionality review is a unique and highly serious function of this Court." Green v. State, 975 So.2d 1081,1087 (Fla. 2008). The death penalty in Florida is reserved for only the most aggravated and least mitigated of first-degree murders, and both prongs of that inquiry must be satisfied in order for a death sentence to be upheld. Cooper v. State, 739 So.2d 82,85 (Fla. 1999); Almeida v. State, 748 So.2d 922,933 (Fla. 1999); Crook v. State, 908 So.2d 350,357 (Fla. 2005). Accordingly, the death penalty is not proportionally warranted in a single aggravator case, unless there is very little or nothing in mitigation. See, e.g. Green, 975 So.2d at 1088; Almeida, 748 So.2d at 933; Offord v. State, 959 So.2d 187, 191-92 (Fla. 2007); Jones v. State, 705 So.2d 1364,1366 (Fla. 1998); DeAngelo v. State, 616 So.2d 440,443-44 (Fla. 1993); Nibert v. State, 574 So.2d 1059,1063 (Fla. 1990). As this Court said in Jones:

> The people of Florida have designated the death penalty as an appropriate sanction for certain crimes [footnote omitted], and in order to ensure its continued viability under our state and federal constitutions "the Legislature has chosen to reserve its application to only the most aggravated and unmitigated of [the] most serious crimes." State v. Dixon, 283 So.2d 1,7 (Fla. 1973) [footnote omitted]. Accordingly, while this Court has on occasion affirmed a single-aggravator death sentence, it has done so only where there was little or nothing in mitigation. See Nibert v. State, 574 So.2d 1059,1063 (Fla. 1990) ("[T]his Court has

> affirmed death sentences supported by one aggravating circumstance only in cases involving 'either nothing or very little in mitigation.'"); Songer v. State, 544 So.2d 1010,1011 (Fla. 1989) ("We 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."). See also Thompson v. State, 647 So.2d 824,827 (Fla. 1994) (same). To rule otherwise on this issue would put Florida's entire capital sentencing scheme at risk. [footnote omitted].

705 So.2d at 1366.

Moreover, as the Court noted in Green, 975 So.2d at 1088, "[t]he vast majority of cases where we have upheld a death sentence based on a single aggravator have involved a prior murder or manslaughter"; citing as examples Rodgers v. State, 948 So.2d 655 (Fla. 2006)(prior violent felonies included a similar shooting and killing offense); Ferrell v. State, 680 So.2d 390 (Fla. 1996) (prior second-degree murder); Duncan v. State, 619 So.2d 279 (Fla. 1993) (prior second-degree murder). See also Almeida v. State, supra, 748 So.2d at 933-34 (aggravation prong of proportionality test was satisfied by the existence of two prior first degree murders; death sentence was nevertheless reduced to life imprisonment on proportionality grounds in view of substantial mitigating evidence, including both statutory mental mitigators).

In the instant case, before trial, the state moved to disqualify the judge originally assigned on the basis of her comment at a pretrial hearing that the state might want to reevaluate its decision to seek the death penalty in light of Ballard's advanced age (2/158-59,164-70,187). The Second District Court of Appeal found that the motion to disqualify was legally sufficient, in that the state could reasonably conclude that Judge

Roberts' remarks "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). Judge Villanti, concurring, noted that in order for old age to be considered a significant mitigator, "the defendant's age must be tethered to another factor such as mental health, retardation, or senility." Therefore, by prematurely commenting without having heard the evidence, "the trial judge's suggestions may not have been an accurate anticipation of whether his age could be significant mitigation." 956 So.2d at 475. After the case was reassigned to Judge Jacobsen, at a status hearing less than four months before trial, during a discussion of penalty phase discovery, the prosecutor, Cass Castillo, acknowledged that "it is no secret that this is not an overwhelming death penalty case" (5/765). Mr. Castillo indicated that the State Attorney's Office was open to reconsideration of its decision to pursue the death penalty (5/752-53); therefore, "if there is significant mitigation out there, we need to know about it so that we don't waste everybody's time" (5/765).

In the next hearing, a week later, the prosecutor further conceded that "this is not an overwhelming case, for a variety of reasons, on guilt" (5/800):

> MR. CASTILLO: So I'm more focused on the guilt phase of this thing, and I think that's where the state's greater interest lies here.
>
> So it's not to say I don't want to - - I'm not at all concerned about it [the penalty phase]. I am. But I'm primarily concerned with the guilt phase. (5/800)

Mr. Castillo reiterated that "[t]here doesn't need to be a

whole lot of mitigation, from my perspective, from a medical perspective, you know, medical testimony" that could very well change the state's decision on the death penalty (5/800).

The defense presented extensive medical testimony in the guilt phase of the trial, and more medical and psychological testimony in the penalty phase, establishing both statutory mental mitigating factors and tying Ballard's age (65 at the time of the offense) with his assorted physical infirmities, his past and recent strokes (including a series of strokes for which he was hospitalized and Baker Acted a week before the charged crime), and his resulting vascular dementia. The state's rebuttal evidence was tangential at best, and none of the state's witnesses testified that the mental mitigators did not apply.[17]

This case is plainly not one of the most aggravated first-degree murders, nor is it one of the least mitigated, so it fails both prongs of the proportionality test. It is a single aggravator case at best, but even that aggravator - - CCP - - is based largely on speculation and was not proven beyond a reasonable doubt. See Brooks v. State, 918 So.2d 181,206 (Fla. 2005), quoting Hardwick v. State, 521 So.2d 1071,1075 (Fla. 1988)(aggravating factors require proof beyond a reasonable doubt, "not mere speculation derived from equivocal evidence or testimony)"; see also Hoskins v. State, 702 So.2d 202,210 (Fla. 1997)("[m]any of the facts used by the State to support a finding of CCP are based on speculation"; unclear when or where victim was actually killed

[17] Tom Witzigman was a lay witness, and neither Dr. Vyas (a guilt-phase witness) nor Dr. Nelson examined Ballard for this purpose, nor were they asked to give an opinion on the mental mitigators.

and no proof that the murder was planned ahead of time).

In the instant case[18], the only pieces of circumstantial evidence which suggest that the killing may have been planned in advance are Ballard's purchase of an 18 inch metal pipe and a roll of duct tape at Lowe's hardware store on September 2, 2006 (two days before his stroke, eleven days before Autumn's disappearance), and Ballard's presence in northern Polk County (as evidenced by cell phone records) on September 12. [The evidence regarding the custody dispute involving Suny Houghtaling - - even assuming arguendo that the child sexual battery evidence was properly admitted and did not become a feature of the trial - - does not prove that the killing was planned in advance; it is equally consistent with an eruption of violence during an argument or confrontation over Suny's custody]. Piping and duct tape are multi-use hardware items, not primarily made or sold as weapons. The purchase of these items does not prove that Ballard intended at the time he bought them to use them to commit a murder. [Moreover, he already had a shovel and some cement blocks in the trunk of his car, as well as access to any number of metal implements at his workplace]. Ballard's lack of memory of buying the pipe, during his interrogation by Detective Kercher, might have more significance if he had not had a series of strokes in the interim and if he did not suffer from vascular dementia. [See Dr. Tanner's and Dr. Sesta's testimony at 23/2309-15;27/2923-

[18] For purposes of this Point on Appeal, undersigned counsel will assume without conceding that Autumn Traub was murdered by Roy Ballard.

24,2938-43,2953-55,2968-69].[19]

Similarly, the fact that Ballard was in northern Polk County (north of the Lakeland Mall, no great distance from his home in Zephyrhills) on September 12 may be a suspicious circumstance, but it is sheer speculation to assume - - as the trial judge did - - that he was there for the purpose of "scout[ing] out an area in North Lakeland to commit the crime and dispose of the body" (9/1407,see 1406). It is especially speculative in light of the fact that there was absolutely no evidence that Autumn Traub was killed in North Lakeland or that her body was disposed of in North Lakeland. [Detective Kercher was convinced, based on his interrogation of Ballard, that Autumn's body was in the Saddle Creek Park area, east of Lakeland heading toward Auburndale. Although no body and no physical evidence pertaining to the charged crime was found during the massive search of Saddle Creek Park, it is equally true that no body and no evidence was recovered in North Lakeland either, nor was there any testimony that the police ever saw fit to search in the vicinity of the cell phone tower in north Lakeland which handled Ballard's outgoing call on September 12 and his incoming call on September 13].

Apart from the inherently suspect testimony of the jailhouse

[19] The trial judge's comments in his sentencing order suggesting that the pipe was a very unique item (and therefore Ballard would necessarily have remembered buying it) (9/1399,1406) are not supported by the evidence.

informant Needham[20], there was no evidence regarding the immediate circumstances of the killing. And even Needham, while he testified that Ballard told him what he'd done after the fact to avoid detection, never said that Ballard told him he'd planned the murder in advance. [Note also that Needham's testimony that Ballard said he put the body in an acidic body of water with a rubber coating on the bottom is at odds with the state's suggestion that he dug a burial site with the shovel and that that is why the dirt on the shovel was geologically inconsistent with the soil samples from Ballard's workplace]. Absent proof beyond a reasonable doubt that the killing was coldly planned in advance (and was not an impulsive act precipitated in whole or in part by an argument in the car while discussing Suny's custody, or Ballard's recent strokes, or his brain impairment, or the toxic effects of overmedication), the CCP aggravating factor cannot be upheld. Accordingly, there are no valid aggravating factors in this case, and (even apart from the proportionality analysis) the death sentence is not an authorized penalty. Banda v. State, 536 So.2d 221,225 (Fla. 1988); Elam v. State, 636 So.2d 1312,1314 (Fla. 1994).

Even if CCP were proven, however, this is still a single aggravator case and it cannot be fairly stated that there is "nothing or very little in mitigation." Indeed, the record

[20] See Tompkins v. State, 994 So.2d 1072,1094 (Fla. 2008)(Anstead, J., concurring in part and dissenting in part)("Of course, the credibility of such a witness ["jailhouse snitch"] is questionable at best"); Lobato v. State, 96 P.3d 765,772 (Nev. 2004)("in any criminal case, where issues of guilt are close, the testimony of a jailhouse informant should be regarded with particular scrutiny").

establishes the same three statutory mitigating factors (impaired capacity, extreme mental or emotional disturbance, and age) as in Almeida v. State, 748 So.2d at 926 n.7. In the penalty phase, the defense recalled Drs. Tanner and Sesta, each of whom had examined Ballard in person and reviewed his medical history, and each of whom diagnosed Ballard as suffering from vascular dementia (more specifically, multi-infarct dementia) as a result of his older strokes, dating back to 1995, as well as his more recent strokes immediately preceding the charged crime (27/2914-20,2923-24,2950-51,2960-69,3001). Dr. Sesta testified that Ballard has mild to moderate brain impairment, and the right side of his brain is significantly more impaired than the left side (27/2961). The significance of this disparity, Dr. Sesta explained, is that while the left side of the brain can be analogized to the gas pedal, the right side is the brakes (27/2962). Consequently, while people with left hemisphere brain impairment are apathetic, depressed, and "sit there like a bump on [a] log", people such as Ballard with right hemisphere brain impairment are disinhibited, and are likely to act out physically and sexually (27/2961-66,see 2932,2944-45,2957). In addition to vascular dementia, Ballard also suffers from type 2 diabetes, hypertension, and high cholesterol, and the combination of these factors accelerates the disease process and the blockage of his arteries (27/2917). Like Alzheimer's disease, vascular dementia is progressive, but unlike Alzheimer's (which worsens with age in a "relentlessly downward course"), vascular dementia has a "step-wise progression of plateaus" (27/2966-69). Both Dr. Tanner and Dr. Sesta expressed

the opinion that Ballard's ability to conform his conduct to the requirements of law was substantially impaired (27/2923,2947-48,2957,3010).

The prosecution's rebuttal evidence was limited, weak, and tangential at best. The state did not recall its guilt-phase expert, Dr. Vyas (whose testimony regarding the physical manifestations of Ballard's most recent series of strokes was not meaningfully inconsistent with the findings of Drs. Tanner and Sesta). Instead, the state recalled the medical examiner, Dr. Steven Nelson, a pathologist who acknowledged that he does not treat living patients, and he never examined Ballard (27/3014-15,3020). Dr. Nelson reviewed Ballard's records, including the MRI, from his September 2006 treatment of Florida Hospital; those were the only medical records Dr. Nelson reviewed (27/3015-21). The only thing of significance noted on the MRI (by a radiologist named Paul J. Roesler) was "several small acute infarcts in the right subcortical white matter of his brain" (27/3017-18). Asked by the prosecutor whether the MRI indicated any significant damage to Mr. Ballard's brain functioning, Dr. Nelson replied, "Well, the MRI would not indicate brain functioning [;] it would just indicate any kind of structural abnormality to the brain" (27/3018).

The state also recalled Ballard's work supervisor, Tom Witzigman, who essentially repeated a portion of his trial testimony. Ballard, a maintenance man, was a good worker, pleasant to work with. Most of the heavy physical work was done by another employee under Ballard's supervision. Witzigman did

not notice any drop off in Ballard's performance when he returned to work after his medical event in September 2006. However, on his second day back he appeared really tired, so Witzigman suggested he go home (27/3044-47).

In view of the prosecutor's pre-trial acknowledgement that this is not an overwhelming death penalty case, and in view of the essentially unrebutted testimony of a neurologist and a neuro-psychologist establishing Ballard's extensive medical and psychological impairments (and linking those impairments with his advanced age), Ballard's death sentence should be reduced to life imprisonment on proportionality grounds. In this (at best) single aggravator case it cannot be said that there is little or nothing in mitigation; three statutory mitigators were found, and the fact that the trial judge accorded them slight weight is not dispositive of the proportionality analysis. See Almeida v. State, supra, 748 So.2d 924-26 and n.7, 933-34,936, involving the same three statutory mitigators (also given little weight by the Almeida trial judge) as in the instant case, and DeAngelo v. State, 616 So.2d 440,443 (Fla. 1993)(while the trial judge declined to find the statutory mental mitigators, he did find that DeAngelo had the mental health disorders described by the defense's psychologist). This Court has the statutory and constitutional obligation to conduct an independent proportionality review, and the medical evidence in the record establishes that, in this single aggravator case, Roy Ballard's death sentence cannot be upheld.

CONCLUSION

Appellant respectfully requests the following relief: reversal of his conviction for a new trial [Issue I]; reversal of his death sentence for a new jury penalty proceeding [Issue II]; reduction of his death sentence to life imprisonment [Issue III, and alternative relief on Issue II].

CERTIFICATE OF SERVICE

I certify that a copy has been mailed to Assistant Attorney General Stephen Ake, Concourse Center #4, 3507 E. Frontage Rd. - Suite 200, Tampa, FL 33607, (813) 287-7900, on this _____ day of December, 2009.

CERTIFICATION OF FONT SIZE

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

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