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

REPLY BRIEF OF APPELLANT

JAMES MARION MOORMAN
PUBLIC DEFENDER
TENTH JUDICIAL CIRCUIT

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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.

Appellant will rely on his initial brief for this Point on Appeal.

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.

The state's entire argument in this rare "pure Ring" case is based on the demonstrably false assumption that in Florida (supposedly unlike pre-Ring Arizona) a defendant becomes death eligible as soon as he is found guilty of first degree murder (state's answer brief, p.22-23,42-43,47-48). As the state summarizes its argument:

> In Florida, unlike Arizona, the maximum penalty for first degree murder is death. A defendant in Florida is eligible for a death sentence upon conviction by a jury at the guilt phase. The additional procedures set forth in the penalty phase proceedings govern the issue of whether a defendant will be selected for an already-authorized sentence of death.

(SB22-23, emphasis supplied).

Therefore, according to the state, appellant's claim "collapses" because there is nothing to trigger the Ring and Apprendi holdings[1] (SB43).

The state's understanding of capital sentencing law is seriously flawed. Under the United States Constitution a death sentence is not permissible unless there is a finding of at least one additional fact (whether termed an aggravating circumstance, a sentencing factor, or - - as Justice Scalia phrased it - - Mary Jane) to genuinely narrow the class of persons eligible for a death sentence. Tuilaepa v. California, 512 U.S. 967,971-72

[1] Ring v. Arizona, 536 U.S. 584 (2002); Apprendi v. New Jersey, 530 U.S. 466 (2000).

(1994); Lowenfield v. Phelps, 484 U.S. 231,244 (1988); see Zant v. Stephens, 462 U.S. 862, 878 (1983) ("[S]tatutory aggravating circumstances play a constitutionally necessary function at the stage of legislative definition: they circumscribe the class of persons eligible for the death penalty").

See Carter v. State, 980 So.2d 473,481 (Fla. 2008); Blanco v. State, 706 So.2d 7,11 (Fla. 1997); Zommer v. State, 31 So.3d 733,755 (Fla. 2010)(Pariente, J., specially concurring); see also Williams v. State, 273 S.W.3d 200,223 n.82 (Tex. Crim. App. 2008) (recognizing that finding of at least one aggravating circumstance to justify death penalty is constitutionally required).

While it is true that the finding of a death-qualifying aggravator may constitutionally be made at either the guilt phase or penalty phase (Tuilaepa; Lowenfield; see State v. Scott, 183 P.3d 801,838 (Kans. 2008)), even when found in the guilt phase the aggravator must genuinely narrow the class of persons eligible for the death penalty; i.e., it cannot be automatic. This Court recognized as much in Blanco v. State, 705 So.2d at 11:

> Blanco next argues that Florida's capital felony sentencing statute is unconstitutional because every person who is convicted of first-degree felony murder automatically qualifies for the aggravating circumstance of commission during the course of an enumerated felony. We disagree. Eligibility for this aggravating circumstance is not automatic: The list of enumerated felonies in the provision defining felony murder is larger than the list of enumerated felonies in the provision defining the aggravating circumstance of commission during the course of an enumerated felony. A person can commit felony murder via trafficking, carjacking, aggravated stalking, or unlawful distribution, and yet be ineligible for this particular aggravating circumstance. This scheme thus narrows the class of death-eligible defendants. See Zant v. Stephens, 462 U.S. 863,103 S.Ct. 2733, 77 L.Ed.2d 235 (1983).

(Emphasis supplied, footnotes omitted).

[In the instant case, neither the "course of a felony" nor the "prior conviction of a violent felony"[2] aggravator was at issue. The only aggravating factor urged by the prosecution was CCP, which requires proof in the penalty phase of four elements beyond that which is necessary to establish simple premeditation in the guilt phase. See state's answer brief, p.50. Whether or not this aggravator was proven was a vigorously contested issue in Ballard's penalty phase].

Moreover, as this Court has recognized, "[t]he death penalty is not permissible under the law of Florida where...no valid aggravating factors exist. § 921.141(3), Fla. Stat. (1985)". Banda v. State, 536 So.2d 221, 225 (Fla. 1988) (emphasis supplied); see Richardson v. State, 604 So.2d 1107,1109 (Fla. 1992); Elam v. State, 636 So.2d 1312,1314 (Fla. 1994); Hamilton v. State, 678 So.2d 1228,1232 (Fla. 1996).

So the question may be asked of the state, just how is Florida's capital sentencing scheme so different from Arizona's as to make Ring apply there but not here?

In fact, the state's argument in the instant case is virtually identical to the one unsuccessfully advanced by the Arizona Attorney General in Ring. Arizona had contended that since Ring was convicted of first degree murder, a crime for which Arizona law specifies "death or life imprisonment" as the only sentencing options, Ring was therefore sentenced within the range of punish-

[2]A finding of a prior violent felony conviction is a recognized exception to Ring.

ment authorized by the jury's guilty verdict. 536 U.S. at 603-04. [See the state's answer brief in the instant case, p.22-23,42-43,47-48]. The U.S. Supreme Court, rejecting this argument, observed that it would reduce Apprendi to a "meaningless and formulaic" rule of statutory drafting. The relevant inquiry is one not of form but of effect, and it is the required finding of an aggravating circumstance which exposed Ring to a greater punishment than that authorized by the jury's guilty verdict alone. 536 U.S. at 604. In Arizona, the Court observed, a death sentence may not legally be imposed unless at least one aggravating factor is found to exist beyond a reasonable doubt. 536 U.S. at 597. [As is equally true in Florida. Banda]. Therefore, based solely on the jury's guilty verdict, the maximum punishment Ring could have received was life imprisonment. 536 U.S. at 597. [As is equally true of Roy Ballard in the instant case]. The question presented in Ring, as framed by the Supreme Court, was whether the Sixth Amendment's jury trial guarantee, made applicable to the States by the Fourteenth Amendment, requires that the determination of such an aggravating factor, making the defendant death-eligible, be entrusted to the jury. 536 U.S. at 597. And the Supreme Court - - with seven of the nine Justices joining the opinion of the Court or concurring - - held in Ring that it does.

Justice Scalia's concurring opinion in Ring is particularly instructive, because (while recognizing that his view regarding the constitutional necessity of aggravating circumstances has not prevailed) he does not believe that states should be required to employ a system in which aggravating factors are used to narrow

the class of persons eligible for a death sentence. [Justice Scalia recognizes, of course, that states are free to use aggravating factors if they choose to do so; but he believes that the Court's decisions requiring aggravating factors (or narrowing factors called by some other name) may have coerced states into adopting this approach when they might otherwise have chosen a different capital sentencing scheme. Ring, 536 U.S. at 610-11 (Scalia, J., concurring). Lamenting the line of decisions emanating from Furman v. Georgia, 408 U.S. 238 (1972), Justice Scalia observes that he is confronted with a difficult choice:

> I am therefore reluctant to magnify the burden that our Furman jurisprudence imposes on the States. Better for the Court to have invented an evidentiary requirement that a judge can find by a preponderance of the evidence, than to invent one that a unanimous jury must find beyond a reasonable doubt.

536 U.S. at 610 (Scalia, J., concurring).

Having said that, Justice Scalia makes it clear that as long as a finding of an aggravating factor is deemed necessary to make a defendant eligible for a death sentence:

> ...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 that 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 (Scalia, J., concurring).

[Justice Scalia further recognizes that this is true whether the state has chosen to use aggravating factors to determine death eligibility, or whether - - in his view - - it has been "erroneously coerced" into using them. 536 U.S. at 611 (Scalia, J., concurring)].

In the instant case, the state has shown no meaningful difference between Arizona and Florida to justify applying the Sixth Amendment principles of Apprendi and Ring there but not here.

Moreover, there is no meaningful difference between Florida's system and the pre-Ring capital sentencing scheme in Delaware. Delaware's procedure, in fact, was modeled after Florida's. [State v. Cohen, 604 A.2d 846,851 n.4 (Del. 1992); Garden v. State, 844 A.2d 311,314 (Del. 2004)]. When the Delaware Supreme Court was presented with a unique "pure Ring" case remarkably similar to the instant situation (the only aggravating factor was Delaware's equivalent of CCP, and the jury's death recommendation was nonunanimous), the court correctly held that Ring does apply, and reversed for a new jury penalty proceeding. Capano v. State, 889 A.2d 968 (Del. 2006). The Capano decision opened no floodgates, because "pure Ring" cases are so rare, and because the constitutional problem was so easily fixed. Indeed, Delaware's legislature had already fixed it; in 2002, in compliance with Ring, the General Assembly amended Delaware's death penalty statute, providing that the judge may not impose a death sentence unless the jury, unanimously and beyond a reasonable doubt, finds the existence of at least one statutory aggravating circumstance. See appellant's initial brief, p. 87-90.

In Florida, in State v. Steele, 921 So.2d 538 (Fla. 2005), all seven Justices of this Court, in three separate opinions, either expressed doubt as to whether Florida's present capital sentencing scheme complies with Ring, or stated the view that it

does not comply. All seven Justices called for legislative reevaluation in light of Ring, and in light of Florida's current status as the only "outlier" state; "the only state in the country that allows the death penalty to be imposed even though the penalty-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).

[Contrary to what the state seems to be arguing at p.44-45 of its brief, the standard jury instructions didn't cure the Ring problem in the instant case. Under Florida's current penalty-phase procedure, each juror is a free agent and no meeting of the minds is required during deliberations. While it is possible that all twelve jurors might have found that CCP was proven beyond a reasonable doubt and simply split 9-3 on weighing that 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].

In any event, in contrast to Delaware, the Florida legislature's non-response to Ring and Steele has been deafening. It is by now apparent that the legislature will not address even the simple constitution defect in the statute (much less the broader issues involving a unanimity requirement for the death recommendations itself) until this Court tells it is has to - - and maybe not even then. In the meantime, this Court should reverse every "pure Ring" case which comes before it (which experience shows will be few and far between). It can start with this one.

[The oral argument in Dane Abdool v. State, SC08-944, took place on June 8, 2010, the same date this reply brief is being filed. While Abdool appears to have a "pure Ring" issue, it was not brought up at all in the oral argument. In the 2-page Ring argument in Abdool's initial brief (p.94-96), it was assumed that Bottoson v. Moore, 833 So.2d 693 (Fla. 2002) and King v. Moore, 831 So.2d 143 (Fla. 2002) are controlling, and this Court was simply requested to reconsider them. Ballard's argument in the instant case is entirely different. As he pointed out in his initial brief (p.76), Bottoson and King were successive postconviction cases (to which Ring does not apply), and each involved the "prior violent felony" aggravator (a recognized exception to Ring). Moreover, King's death recommendation was unanimous. Also, Bottoson and King were decided prior to State v. Steele, 921 So.2d 538 (Fla. 2005), in which it was recognized that neither Bottoson nor King garnered a majority; that this Court has not yet forged a majority view as to Ring's applicability to Florida's capital sentencing scheme; and that it is doubtful (at best) whether Florida's system complies with Ring. (See initial brief, p.74-75).

This Court may not need to address the Ring issue in Abdool's case, if he wins on his guilt-phase issues or has his sentence reduced to life imprisonment on proportionality grounds. (The same is true in Ballard's case). But in the event Abdool's death sentence is affirmed, it should be recognized that the superficial Ring argument raised in his case is not the same argument which is presented here, and should not control the outcome].

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.

For the reasons discussed in the initial brief, the trial court's finding of CCP was based on speculation rather than proof, and appellant's death sentence, supported by no valid aggravating factors, cannot stand. Banda. Even assuming arguendo that that single aggravator was established, then the proportionality issue turns on whether it can fairly be concluded by the trial court and this Court, based on the evidence in the record, that there was little or nothing in mitigation. Jones v. State, 705 So.2d 1364,1366 (Fla. 1988)(to ensure constitutional viability of Florida's death penalty, legislature has reserved its application to only the most aggravated and unmitigated first degree murders; while this Court has on occasion affirmed a single-aggravator death sentence, it has done so only when there was little or nothing in mitigation). Contrary to the state's suggestion, this principle does not cease to apply when the single aggravator is CCP or HAC. See, e.g., DeAngelo v. State, 616 So.2d 440 (Fla. 1993)(CCP); Klokoc v. State, 589 So.2d 219 (Fla. 1991)(CCP); Nibert v. State, 574 So.2d 1059 (Fla. 1990)(HAC). As this Court noted in Green v. State, 975 So.2d 1081,1088 (Fla. 2008), the vast majority of cases upholding a single-aggravator death sentence involved the commission of a prior murder.

The state correctly points out that CCP, like HAC, is consi-

dered one of the more significant aggravating factors in the sentencing scheme (SB61-62), but conveniently ignores the fact that impaired capacity and extreme mental or emotional disturbance are two of the more significant mitigators. See Santos v. State, 629 So.2d 838,840 (Fla. 1994). In that context, the state's reliance on LaMarca v. State, 785 So.2d 1209,1216-17 (Fla. 2001) is interesting (SB62). In that case, this Court found the death sentence proportionate in light of the seriousness of LaMarca's prior convictions and the insubstantial nature of the mitigation, and added: "We note that proportionality is supported by the fact that LaMarca committed the instant murder soon after being released from prison." 785 So.2d at 1217.[3]

In the instant case, in sharp contrast, 65 year old Roy Ballard had no prior violent felony convictions, and the murder was not committed after a release from prison. Instead, it was committed five days after Ballard's release from the hospital, after he'd suffered a stroke and numerous seizures, and after his confused and irrational behavior had resulted in his being Baker Acted. [A person cannot be involuntarily committed under the Baker Act merely for refusing treatment; the refusal must be the product of the patient's mental illness. Fla. Stat. §394.467(1); see, e.g., Westerheide v. State, 831 So.2d 93,112 (Fla. 2002)(purpose of Baker Act is to provide intensive short-term treatment to persons with serious mental disorders); Lyon v. State, 724 So.2d 1241 (Fla. 1st DCA 1999); Archer v. State, 681 So.2d 296 (Fla. 1st

[3] The Court also noted that LaMarca's prior crimes of kidnapping and attempted rape occurred shortly after his previous release from prison. 785 So.2d at 1217, n.4.

DCA 1996); Bradley v. Akins, 650 So.2d 1069 (Fla. 2d DCA 1995). In the instant case, according to the state's guilt-phase witness Dr. Vyas, Ballard's state of confusion persisted longer than they thought it would, and he was trying to leave the hospital; this raised the question of whether he had any psychotic abnormality. The Baker Act certificate reports a diagnosis of Psychotic Disorder N.O.S. (Not Otherwise Specified)(24/2418-19,2435-37; Ev5/668)].

In determining whether there is genuinely "little or nothing" in mitigation, it is important to see that the state's rebuttal witnesses actually rebutted almost nothing. This is not a matter of assessing the credibility of conflicting testimony, but rather a recognition of the very limited scope of the rebuttal. See Williams v. State, ____ So.3d ____, 2010 WL 1994465 (Fla. 2010) (single-aggravator case; "[w]e review the mitigation presented that was not rebutted by the State").

In its brief, the state - - not surprisingly - - ignores the trial prosecutor's volunteered comments that "it is no secret that this is not an overwhelming death penalty case" (5/765), and that "[t]here doesn't need to be a whole lot of mitigation, from my perspective, from a medical perspective, you know, medical testimony" to change the state's decision even to seek the death penalty (5/800). Since, for whatever reason, the state did not change its course, the question on proportionality review is whether, in fact, there was significant medical testimony to establish the mental mitigators and to tie them to appellant's advanced age. See also Judge Villanti's concurring opinion in State v. Ballard, 956 So.2d 470,473 (Fla. 2d DCA 2007).

In the penalty phase of this trial, 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).

None of the state's medical or lay witnesses rebutted any significant aspect of Dr. Tanner's or Dr. Sesta's diagnosis. None disagreed (or was even asked by the prosecutor if they disagreed) with the doctors' finding of substantial impairment. Here is the substance of their testimony:

Dr. Vyas. Dr. Rohitmar Vyas is an internal medicine specialist at Florida Hospital in Zephyrhills. He testified for the state in the guilt phase (on the issue of Ballard's physical ability to have committed the homicide and disposed of the body in the manner claimed by the state), and he was not recalled in the penalty phase. See Johnson v. State, ____ So.3d ____, 2010 WL 121248, p.17 (Fla. 2010)("Unlike the situation in the guilt phase, where the State presented its own mental health experts in rebuttal", the penalty phase mental mitigating evidence "was extensive, consistent and unrebutted"). Dr. Vyas 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, and 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).

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).

Dr. Nelson. The state's only medical expert in the penalty phase was Dr. Steven Nelson, a pathologist who acknowledged that the does not treat living patients, and he never examined Ballard (27/3014-15,3020). His sole involvement consisted of reviewing the medical records (including the MRI) from Ballard's September 2006 treatment at Florida Hospital (27/3015-21). Other than that, Dr. Nelson had no knowledge of Ballard's medical history. From his reading of the Florida Hospital report, Dr. Nelson saw no indication of functional impairment as a result of the seizures (27/3019-20). 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).

Tom Witzigman. The state also recalled Ballard's work supervisor, Witzigman, who testified that 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).

As can be seen, there is a lack of competent, substantial evidence to refute either the mental mitigation or the significance of the age mitigator in relation to Ballard's vascular dementia and cognitive impairment. See Nibert v. State, 574 So.2d 1059,1063 (Fla. 1990). See also Barnes v. State, 29 So.3d 1010,1028 (Fla. 2010)(reviewing Court will not disturb trial judge's determination of weight to be given each established mitigator, as long as that determination is supported by competent substantial evidence). If, as the state seems to suggest, the trial judge's conclusions - - regardless of the evidence in the record - - were dispositive, then proportionality review would become a rubber stamp; an empty exercise in form over substance.

Dr. Tanner (an adult neurologist and medical director of a brain injury rehabilitation center) and Dr. Sesta (a neuropsychologist) were the only specialists in the field who testified in this case. They were the only experts who were familiar with Ballard's longstanding history (before September 2006) of seizure

disorder and stroke; and they were they only experts who examined or tested him after the charged crime was committed. In his guilt-phase testimony, Dr. Vyas - - an internal medicine specialist - - acknowledged that his examination, before releasing Ballard from the hospital on September 8, 2006, was relatively brief and superficial compared to the testing a neurologist might do. While he initially did not recall observing any nuerological deficits, he agreed that the attending nurses reported observing several such symptoms, and he now remembered one himself. Ballard's confusion and irrational behavior while in the hospital resulted in his being Baker Acted.

This is neither one of the most aggravated nor least mitigated of first degree murders. See DeAngelo v. State, 616 So.2d 440 (Fla. 1993)(proportionality reversal where CCP was the sole aggravator); Klokoc v. State, 589 So.2d 219 (Fla. 1991) (proportionality reversal where CCP was the only aggravator); Almeida v. State, 748 So.3d 922,933-36 (Fla. 1999) (proportionality reversal in single-aggravator case; aggravation prong was satisfied by existence of two prior murders, but the case was not among the least mitigated, as there was extensive evidence supporting the mental mitigators and age mitigator). Ballard's death sentence must be reversed for imposition of a sentence of life imprisonment without possibility of parole.

CONCLUSION

Based on the foregoing argument, reasoning, and citation of authority, and that contained in his initial brief, 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 without possibility of parole [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 June, 2010.

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).

Respectfully submitted,

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