IN THE SUPREME COURT OF FLORIDA

RYAN THOMAS GREEN,

Appellant,

v.

CASE NO. SC06-211
L.T. No. 03-81-CF

STATE OF FLORIDA,

Appellee.
_____/

ON APPEAL FROM THE CIRCUIT COURT
OF THE FIRST JUDICIAL CIRCUIT
IN AND FOR ESCAMBIA COUNTY, FLORIDA

INITIAL BRIEF OF APPELLANT

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PRELIMINARY STATEMENT

References to the three volumes containing the lower court clerk=s records, pretrial and post-trial materials will be designated with the prefix AR.@ The trial transcripts will use the prefix AT.@ A supplemental record will be referenced with the prefix ASR.@

STATEMENT OF THE CASE AND FACTS

Procedural Progress of the Case

On March 11, 2003, an Escambia County grand jury indicted Ryan Thomas Green charging three offenses occurring on February 23, 2003: first degree premeditated murder for the death of James Hallman, attempted first degree premeditated murder of Christopher Phipps, and robbery of Christopher Phipps while carrying a firearm. (R1:1-3) On February 3, 2004, the trial court adjudged Green incompetent to proceed and committed him to a mental health treatment facility. (R1:84-87) Green returned from the mental health facility, and on October 26, 2004, the court found Green competent. (SR:439) Green filed a notice of intent to rely on the defense of insanity on May 4, 2005. (R1:128) A jury rejected the insanity defense and found Green guilty as charged on October 20, 2005, and after a penalty phase proceeding, the same jury recommended a death sentence by a ten to two vote. (R2:227, 233) The court conducted a Spencer hearing on December 22, 2005. (R2:275-311)

Circuit Judge John P. Kuder adjudged Green guilty and imposed sentence on January 11, 2006. (R3:316-388) The court sentenced Green to death for the murder, life imprisonment for the attempted murder and for the robbery. (R3:379-388) In the sentencing order in support of the death sentence, the court

found two aggravating circumstances: (1) the defendant was previously convicted of another violent felony based on the contemporaneous conviction for the attempted murder charged in this case (great weight); and (2) the homicide was committed for the purpose of avoiding arrest(great weight). (R3:350-369) In mitigation, the court found four statutory and three nonstatutory mitigating circumstances: (1) the defendant had no significant history of prior criminal activity (moderate weight); (2) the homicide was committed while the defendant was under the influence of extreme mental or emotional disturbance (substantial weight); (3) the homicide was committed while the defendant=s capacity to appreciate the criminality of his acts were substantially impaired (substantial weight); (4) the defendant acted under extreme duress or under the substantial domination of another person (moderate weight); (5) the defendant=s mental illness went without treatment for years before this crime (substantial weight); (6) the defendant had significant problems with drug abuse leading up to the time of the crime probably the result of his mental illness(substantial weight); (7) the defendant has not been a discipline problem since his arrest (moderate weight). (R3: 369-376) A copy of the sentencing order is attached as an appendix to this brief. (App.)

Green filed notice of appeal to this Court on January 24, 2006. (R3:390)

Facts B- Prosecution=s Case

John Bailey and Ryan Green had been friends since childhood. (T5:860) Green had recently returned to Pensacola from Mississippi where he had been living with his father. (T5:870) Bailey and Green were returning from an odd job they had helping a woman move. (T5:864) On the way, Bailey noticed a cat running loose that he knew belonged to Henry Cecil, whom Bailey had known for a couple of years. (T5:865) He stopped, tried to get the cat back into Cecil=s yard and called Cecil about his cat. (T5:866) Cecil arrived along with Christopher Phipps. (T5:866-867) Phipps was Cecil=s 26-year-old nephew who lived at Cecil=s house. (T5:875-876) They all went inside Cecil=s house and sat at dining table where Cecil began some paperwork. (T5:867) When Cecil opened his briefcase, there was a pistol inside, it was silver with a black handle. (T5:868) Green notice the gun, commented on it and asked to hold it. (T5:868-869) Cecil refused and told Green it was not a toy. (T5:869) After a short time, Bailey and Green left. (T5:873) Bailey said that in the past, Green had mentioned something about wanting a gun. (T5:869) According to Bailey, Green was always a quiet person,

and on that day, Bailey noticed Green mumbling to himself. (T5:870-872)

On Sunday morning, February 23, 2003, Henry Cecil went to a nearby convenience store while his nephew, Phipps, remained home. (T5:876-877) He was gone about ten minutes. (T5:878) As he returned home, Cecil saw Phipps' white Thunderbird making a turn off the street where he lived. (T5:879) When he realized the Thunderbird was his nephew=s, he turned around and followed it. (T5:879-880) A white male with red hair was driving the car. (T5:879) After a time, Cecil lost the car, and he returned home. (T5:882) He thought that Phipps had probably called the police to report his car had been stolen. (T5:882) Upon entering the house, Cecil found Phipps on the living room floor with a head wound. (T5:883-884) Cecil ran to a neighbor=s house for help. (T5:884, 901-902) The neighbor, Christopher Dohl, called 911 for assistance. (T5:903) Officer Phillip Martine arrived on the scene and determined that Phipps had been shot and was unconscious. (T5:905) Ultimately, Phipps survived his wound. (T5:893-894)

Cecil determined that his briefcase and pistol, a .40 caliber semi-automatic Beretta, were missing from his bedroom. (T5:844**B**890)

He had money and marijuana on a night stand which was still present. (T5:894-895) Although Cecil knew J.D. Bailey, he did not know Ryan Green, and he did not recall ever meeting him. (T5:892) Crime scene investigator, Haley Hill, collected a number of items from the house including the marijuana, pipe, rolling papers and a spent .40 caliber cartridge case. (T5:907-914)

James Hallman lived near Kingsfield Road and took a daily walk which included that road in his route. (T5:921) His wife, Dianne Hallman, said he left for his walk on the morning of February 23, 2003, wearing a maroon shirt, blue jeans and an Alabama hat. (T5:921) He also carried a golf club and a yellow Walkman.(T5:921-922) Dawn Welch was with her son, her mother and her father driving to church on Kingsfield Road on February 23, when they came upon a man, later identified as Hallman, lying in the roadway. (T5:940-942) Hallman was bleeding from the head and alive but unable to speak. (T5:941-942) They thought he might have been hit with the golf club found beside him. (T5:941) Welch found an empty bullet casing on the ground which she showed to the police who arrived at the scene. (T5:942, 945, 954) Hallman was hospitalized and he died on March 2, 2003. (T5:922) Dr. Eugene Scheuerman, a pathologist, conducted an autopsy on Hallman. (T5:963-966) Hallman had suffered a single

gunshot wound to the left side of the forehead which caused his death. (T5:967-968)

Dennis Carlson and Timothy Stephens lived on Kingfield Road. (T5: 924, 935) The morning of February 23, 2003, they both saw a white car on the road and heard gunshots. (T5:924-926, 935-936) Carlson was working in his pasture, heard a gunshot and then saw a white car squealing tires as it sped off. (T5:924-925) A short time later, Carlson heard a second gunshot. (T5:925-926) Stephens was sitting in a chair in his home which faced a window looking toward Kingsfield Road. (T5:935-936) His house was elevated with bushes along the front and several yards away from the road. (T5:935)He heard a gunshot and when he looked toward his driveway, he saw a white Thunderbird speed away. (T5:936) Later, the police and ambulance arrived. (T5:936) Stephens walked down to the road and saw a man lying in the road. (T5:937-938) A few weeks later, Carlson assisted in examining one of his neighbor=s bulls. A round wound was found on the bull=s neck and a lump in the back side of the bull=s neck muscle. (T5:926-930)

Ryan Green and his brother, Aaron Green, both lived in their mother=s apartment. (T6:974) On the weekend of February 23, 2003, Aaron=s girlfriend, Sarah McRevy, and a friend, Brian Lockwood, were there visiting from Mississippi. (T6: 996-997, 1003-1004)

On the morning of February 23, 2003, Ryan left the apartment. (T5: 857-558; T6:974,-975, 997, 1004) Aaron said he heard Ryan in the shower, saw him dressed, and after hearing a honking horn outside, Ryan left. (T6:974-975) Ryan=s mother, Cynthia Green, heard Ryan answer a telephone call and talk to someone before leaving the apartment. (T5:857-858) Ryan did not have any means of transportation. (T5:858)

Ryan returned to the apartment around noon. (T6: 975-976) He asked Brian to go downstairs with him, and he showed Brian a white Thunderbird. (T6:1005) Ryan drew Brian close and told him that he had killed two people that day. (T6:1005) He showed Brian a brief case and a gun. (T6:1005) At some point, Ryan came inside with a briefcase to show his brother. (T6:975-976) He opened the case and produced a pistol wrapped in a red bandanna. (T6:977, 998) Ryan said the gun was his new gun, and he had to do a favor for J.D. Bailey for it. (T6:978-980, 999-1000,1007-1008) The favor was to shoot Chris Phipps because Phipps had been stealing drugs and money from Bailey and Henry Cecil. (T6:980, 1008-1009) Both Bailey and Cecil wanted Phipps shot. (T6:980) Ryan indicated to Aaron that Cecil picked him up at the apartment, drove him to his house, showed Ryan where the briefcase was located and then left the house. (T6:982) Ryan told Brian that Bailey drove him to the house. (T6:1008) Ryan

said he put the gun to Phipps' head, asked for the car keys, shot Phipps and left in the car. (T6:983, 1009-1010) Cecil followed him for a time. (T6:983) Ryan ended up on a country road where he said he came upon some wild animals and shot an "oxen". (T6:983-984, 1010) He continued to drive and saw a man walking with a cane and wearing a ball cap. (T6:984-985, 1010-1012) Ryan asked the man for directions, but became concerned because the man looked somewhat suspicious and looked in the car. (T6: 985, 1011-1012) Ryan shot the man because the man had seen him driving the car and shooting the gun. (T6:986, 1011) He said he did not want any witnesses. (T6:986) Ryan said the shootings gave him a rush and the gun did not sound like guns in the movie *Scarface* sounded. (T6:988) As Ryan told this to his brother, Ryan was pale, had purple circles under his eyes and was shaky. (T6:993) Brian did not know whether to believe Ryan or not because for the previous year, Ryan talked about a lot of Anonsense@ and Acrazy things.@ (T6:1013)

Around 7:00 p.m. on February 23, 2003, Green was arrested and questioned at the apartment. (T6:1024-1028) Investigator John Sanderson conducted the interview. (T6:1024-1028) Green said he had been at the apartment all day, had not been in a vehicle and had not driven in months. (T5:1024) He did say that Henry came over and offered Green Xanax to clean out his car.

(T6:1025) Green stated he took a briefcase from the car. (T6:1025) He hid the case behind a dresser in his room. (T6:1025) Additionally, Green admitted that Henry and J.D. showed him a pistol and that it was hidden in the apartment in an air vent. (T6:1026-1027) Green made other statements about stopping at an Albertson=s to find his uncle=s address. (T6:1027)

A search of the apartment where Green lived disclosed a .40 caliber Beretta pistol in an air vent and a briefcase behind a dresser. (T5:955-957) Cecil Henry identified the pistol as the one taken from his house. (T5:887) Another expended cartridge casing was found in a search of the white Thunderbird. (T5:912-913) A firearms expert concluded that the three expended cartridge casings, one from each of the shooting scenes and one from the automobile, were consistent with having been fired from the pistol recovered in the apartment. (T5: 908,912-913, 944-945; T6: 1014-1020)

Facts B**- The Defense Case**

In support of the insanity defense, Green presented the testimony of his mother, brother and two mental health experts. Cynthia Green and Aaron Green testified about Ryan=s history of mental and behavioral problems. (T6:1042, 1063) Dr. James Larson and Dr. Brett Turner testified about their respective

evaluations and opinions about Ryan Green=s mental state at the time of the shootings. (T6:1093, 1134)

Cynthia Green said Ryan began having problems in school when he was 13-years-old. (T6:1043-1044) Ryan was depressed and suicidal. (T6:1044) The school provided four sessions with a child psychologist, but Ryan refused to go into the psychologist=s office. (T6:1044) His family doctor prescribed Prozac which helped, but Ryan would refuse the medication after he began to feel better. (T6:1044) At age 15 or 16, Ryan began smoking marijuana. (T6:1045) He remained physically active in school and played football. (T6:1045) Although Ryan was not taken to a doctor, he continued to exhibit erratic behavior. (T6:1045-1046) He would stay in bed for weeks at a time. (T6:1046) He would not go to school. (T6:1046) He would not speak. (T6:1046) Although depressed, Ryan refused to see a psychologist or psychiatrist. (T6:1046) At age 16, the decision was made for Ryan to go to Mississippi to live with his father. (T6:1046-1047) Cynthia Green and Ryan=s father had divorced when Ryan was five-years-old. (T6:1046) After a period of depression, Ryan adjusted and improved. (T6:1047) He finished high school, had a girlfriend, volunteered at church and worked for his father in a restaurant where he was awarded employee of the month. (T6:1047) His brother, Aaron, moved to his father=s for

the summer to be with Ryan. (T6:1047) Aaron and Ryan came to their mother=s for Christmas 2001.(T6:1048) Ryan seemed moody and trembled. (T6:1048) He told her he had been under stress at his father=s because of responsibilities he had been given. (T6:1048-1049) Ryan and Aaron left to go back to Mississippi on New Year=s Day. (T6:1049) Around midnight, they were back. (T6:1049) Their father would not let them in the house, even to get their clothes, and they came back to their mother=s. (T6:1049)

Upon returning to Pensacola, Ryan attempted to register at the community college, but he was not mentally stable enough to proceed. (T6: 1050) Cynthia Green noted that Ryan finished high school in Mississippi **B**- he did not graduate high school. (T6:1047) Ryan tried to work, but he was unable to hold a job for more that six weeks before having Aone of his bad spells.@ (T6:1050) During these spells, Ryan would hear voices and lock himself in his room.(T6:1050) At one point, Ryan had lined his window sill with potting soil and planted his mother=s jewlrey and a statute of the Virgin Mary so that he could grow crystals. (T6:1050) He had also placed her necklaces and earrings on a lamp shade and the ceiling fan. (T6:1050) Ryan stopped responding to his name saying that that was not his God given name. (T6:1051) He claimed to be talking to God, a goddess he

called Mother Nature, and to the devil. (T6:1051-1052) One time he disappeared for a couple of days and ended up in the Baldwin County Jail where they were helping him because he was lost and had no identification. (T6:1052-1053)

Attempts were made to get help for Ryan during 2002. (T6:1050) His mother used the Baker Act to get him in Lakeview treatment facility in August 2002. (T6:1051) He was there through October and came home taking medication with a prescription for Risperdal. (T6:1053) However, by December, Ryan had stopped his medication and refused to return for his doctor=s appointment. (T6:1053) Ryan=s behavior deteriorated. (T6:1053) He threw things, broke his mother=s dining room set and carved a picture of a brain on the seat of a chair. (T6:1053-1054) Ryan told his mother that he had lost his ability to feel love. (T6:1054) He went without sleeping for days in a highly manic state. (T6:1055) Ryan locked himself in his room and prayed to various entities. (T6:1055) His mother had to hide the car keys because Ryan would take the car and drive it. (T6:1056) He would pump gas and drive off without paying. (T6:1056) Ryan told his mother that they did not understand who he was and that he did not have to pay because someone else took care of that for him. (T6:1056) He told his mother that God had a name for him that no one knew and that he had wings on his back. (T6:1056) Cynthia

Green worked nights. (T6:1057) She and Ryan=s younger brother Aaron took turns watching out for Ryan. (T6:1057)

On Friday, February 21, 2003, before the shootings which occurred on Sunday, February 23rd, Ryan and Aaron had friends from Gulfport Mississippi come to visit for the weekend. (T6:1055) Ryan had been asking his uncle to cosign a loan to by a car since his old car would no longer run. (T6:1057) His mother and uncle did not want Ryan to have a car, and on that same Friday, Ryan finally realized that his uncle was not going to cosign a loan. (T6:1058) Ryan Aabsolutely snapped.@ (T6:1058) He screamed, cursed, cried, threw things and banged his head on the wall. (T6:1058) Cynthia Green=s mother came to help watch Ryan, and he finally calmed down. (T6:1059) With his friends visiting, Ryan seemed in better spirits on Saturday. (T6:1060-1061)

Aaron Green is eighteen months younger than his brother, Ryan. (T6:1063-1064) They were close. (T6:1065) Aaron said Ryan=s behavior for the few weeks in 2002 after moving back to their mother=s in Pensacola was normal. (T6:1064-1065) A noticeable difference in Ryan=s behavior began in March 2002. (T6:1065) Ryan started reading people=s minds. (T6:1066) He asked Aaron why he was thinking certain things about him and to stop thinking it. (T6:1066) Ryan did the same thing to some of their friends

during spring break in March 2002. (T6:1066) His behavior became strange to the point Aaron started to avoid him. (T6:1067) They did not connect anymore **C**- the bond they had was gone. (T6:1067) Ryan would Aspace out@ when Aaron talked to him. (T6:1067-1068) His ideas about things became unusual. (T6:1068) Ryan once asked Aaron to feel how rough his hand was and Aaron told him it felt normal. (T6:1068) Ryan told him his hand felt like the devil=s hand. (T6:1068) Sometimes, Ryan would go outside and talk to the birds. (T6:1069) Aaron and Ryan shared a room, and Aaron said that Ryan used marijuana and Ecstasy that he got from his friend J.D. Bailey. (T6:1069) Ryan referred to getting high on Ecstasy as Arolling.@ (T6:1073) Ryan once worked at a Sabarro=s in the Cordova Mall where Aaron=s friend worked. (T6:1070) When he came home, Ryan was so stressed from having to talk to people at work that he would be delusional and talk to himself. (T6:1070) Aaron was present when Ryan hung their mother=s jewelry around the room, carved a brain in the dining room chair and exploded in anger when he learned that his uncle would not cosign a loan for a car. (T6:1072-1073)

Dr. James Larson, a psychologist, evaluated Ryan Green. (T6:1083-1095) Larson first saw Green shortly after his arrest on February 27, 2003, and a total of ten times throughout the case proceedings. (T6:1095) The evaluations included the

gathering of information from a number of sources about Green, the alleged crimes and psychological testing. (T6:1096-1100) Larson=s conclusion was that Ryan was psychotic with a manic state. (T6:1101) He suffered bizarre thinking, delusions and hallucinations, both auditory and visual. (T6:1101-1103) Regarding the shooting of Christopher Phipps, Green told Larson that he believed that Phipps wanted to commit suicide and that he thought he should help him. (T6:1104) There was a red rag hanging up which Green took as a symbol that Phipps wanted to die. (T6:1104) Larson explained that it is common for psychotic individuals to attach meaning to certain colors or numbers. (T6:1104-1106) Colors also played a role for Green in the shooting of James Hallman. (T6:1108) Hallman=s cane coordinated with the interior of the car Green drove and the color of Hallman=s shirt was also of significance. (T6:1108) When Green asked Hallman for directions, Hallman bent his head down which also meant to Green that Hallman wanted to die. (T6:1108) Larson said, AIt was just a random killing because he believed in his sick mind that the man wanted to be killed at that time.@ (T6:1108) Larson stated that at the time of these shootings, Green should have been in a psychiatric facility or on anti-psychotic medications. (T6:1108)

Larson chose not to give a specific opinion on whether Green was sane or insane at the time of the offense since he thought that was a decision for the jury. (T6:1114-1117) He did state that there was no disagreement that Green was mentally ill and psychotic on the day of the shootings. (T6:1115-1116) Additionally, Larson testified that Green=s hallucinations and delusions Agrossly impacted his behavior@ at the time of the shootings and that the shootings would not have happened if Green had been treated for his mental illness.(T6:1117)

Dr. Brett Turner, a psychologist with expertise in neuropsychology, evaluated Ryan Green and diagnosed him with a severe chronic mental illness. (T6:1134-1141) Green=s history showed a lack of consistent treatment and subsequent deterioration of his condition.(T6:1141) Over the year preceding the shootings, Green became more manic and grandiose and out of touch with reality. (T6:1141) Turner said the first shooting of Phipps may have made Green=s condition worse since an adrenaline rush could have made him more psychotic, out of touch with reality and more impulsive. (T6:1141-1142) Consequently, Green=s mental state was likely worse when he shot Hallman. (T6:1141-1142) Turner concluded that Green was legally sane at the time of the shooting of Phipps.(T6:1143-1144) However, Turner could not make a determination if Green was sane or insane at the time

of the shooting of Hallman because there were some inconsistencies in the information available. (T6:1143-1144) Turner did conclude that Green suffered from delusions and hallucinations at the time. (T6:1144)

The prosecution presented one expert in rebuttal. Dr. Lawrence Gilgun, a psychologist, evaluated Green. (T7:1161-1163) He reached the conclusion that Green was legally sane at the time of the shootings. (T7:1163)

Although he had earlier indicated that he did not want to testify, Ryan Green changed his mind, and the court allowed the defense to reopen its case to allow his testimony. (T7:1182-1221)

Ryan Green stated that he changed his mind and decided to testify after praying all night. (T7:1222-1223) He looked at the Rosary and it looked like a AT@ on the wall which Green took as representing testimony meaning he should testify so the jury could hear the truth. (T7:1223) Green stated that he was then taking Risperdal for his psychosis which included his racing thoughts, hallucinations and delusions. (T7:1223) He also took Prozac for depression, Vistraril for anxiety and Synthroid for his thyroid condition. (T7:1223) Since he was thirteen-years-old, Green suffered depression and suicidal thoughts. (T7:1223) While growing up, Green would try to stab himself with a knife

or broken glass. (T7:1224) He stated he hears voices and feels like people express their thoughts to him. (T7:1224) He acknowledged that this might be a delusion or the devil deceiving him, since the Bible said the devil is the prince of power and air. (T7:1224-1225) The first time he remembered hearing voices was when he took Ecstacy in December 2001. (T7:1225-1227) Green had been smoking marijuana for some time and it helped to calm him down. (T7:1228-1229)

Green testified about some of his behaviors others had discussed. He said he planted the Acrystal garden@ to germinate seeds to grow buds.(T7:1230) This was his Apot of gold@ since he planned to sell any buds for money to buy things he needed. (T7:1230) Green did sometimes talk to God, felt like he had no worries and that he had wings. (T7:1230-1231) When he drove away from a gas station without paying, Green thought the clerk nodded to him which meant he could take the gas. (T7:1232) People directed their thoughts to him. (T7:1232-1233) Green associates the voices he hears with individuals he sees. (T7:1233) He said the medications do help some. (T7:1233)

Before the day of the shootings, Green went to Henry Cecil=s house a couple of times with his friend J.D. Bailey. (T7:1234-1235) The first time, Phipps was not present. (T7:1235-1236) On the second occasion, Bailey went there to buy marijuana from

Cecil. (T7:1237) Both Cecil and Phipps were present. (T7:1237-1238) Cecil was angry about something. (T7:1237) During this time, Green saw the gun in a briefcase, and noted that is was a nice gun. (T7:1238) Cecil let Green hold the gun. (T7:1238) They drank some bourbon and Green smoked some marijuana. (T7:1238) Green and Bailey left. (T7:1238) This was Wednesday before the day of the shooting on Sunday. (T7:1236-1238)

During this time, Green had been working at a pizza place and had asked his uncle to cosign a car loan. (T7:1240-1242) He also wanted to enroll in the community college. (T7:1241) On Thursday, Green was fired from his job. (T7:1241) His uncle would not cosign for a car loan. (T7:1241-1242) By Friday, Green had a breakdown as he realized his life was not going as planned. (T7:1241-1242) This was a period of time when he thought he was an angel. (T7:121239-1240) He decided he wanted to go to heaven, and he knew he had to die to go there. (T7:1240) He remembered the gun at Cecil Henry=s house and decided he would take his own life. (T7:1242) On Saturday, he looked at a Sports Illustrated magazine which he noted was volume 23 and had a picture of Michael Jordan wearing a Bull=s jersey. (T7:1243-1244) He thought the number 23 on the magazine was a symbol that he was to end his life the next day which was the 23rd. (T14:1243)

On Sunday morning, February 23rd, Green heard a car horn which to him was a signal from God for him to leave the apartment.(T7:1244-1245) He made his way to Cecil Henry=s house.(T7:1245) Chris Phipps answered the door and let Green inside.(T7:1245) Green noticed the Thunderbird outside, but he did not particularly like that kind of car. (T7:1245-1246) He asked Phipps about marijuana, and Phipps said that Cecil had gone to the store. (T7:1246) Green asked for a glass of water, and Phipps, who was watching television in the livingroom, told him he could get some from the kitchen.(T7:1246) Green walked into the bedroom where he saw the gun on the floor and the briefcase with a pill bottle inside. (T7:1247) He picked up the gun and checked the chamber. (T7:1247-1248) At this time, Green was hearing voices **C**- he did not know if they were angel voices or demonic voices. (T7:1247-1248) He turned on a radio to just try to get himself to shoot himself. (T7:1249). He had the gun pointed at his temple, but he could not shoot himself in someone else=s house. (T7:1249) With the gun and the briefcase, Green started to walk out the door. (T7:1250) He also took a red bandanna he found in the bedroom which he felt was a symbol that they thought he was the devil and wanted to kill him. (T7:1250-1251) Phipps glanced at Green as he had the gun, Green told him to get up and then, he shot Phipps and left. (T7:1250)

He grabbed the car keys from the dining table as he went out the door.(T7:1251) Green did not look for drugs or money. (T7:1252) He sped away in the white car, looking for a place to kill himself. (T7:1252-1253)

Green was driving around looking for a place to kill himself. (T7:1254) He saw a man, James Hallman, walking down the road. (T7:1253-1254) Hallman wore a red jumpsuit, a red cap and carried a cane. (T7:1254) Green called Hallman=s dress an Alabama suit. (T7:1254) Initially, Green thought it was Sunday, the man wore red like the devil and the AA@ stood for Antichrist. (T7:1254) Green slowed down to ask directions from Hallman, but before he stopped, Green said Hallman pointed to the end of the road. (T7:1254) At the end of the road, Green saw a cow in the pasture.(T7:1254) No one was around, and Green shot the cow to see how much the shot would hurt he cow. (T7:1254-1255) Green wanted to know how much the gunshot would hurt when he shot himself. (T7:1254) The cow stood up and said AI love you.@ (T7:1256) Green drove away and again saw Hallman walking. (T7:1256) He stopped to ask him directions. (t7:1256-1257) Green thought God put him at that place at that time because Hallman=s cane was silver and black like the gun, and Hallman=s suit was red like the bandanna from Cecil=s house. (T7:1257) Green thought that Hallman believed that he was the Anitchrist just like Green

thought he was the devil. (T7:1257) When he asked Hallman directions, Green asked God if this man wanted to die, and God told him that he did. (T7:1257) Hallman put his head down and Green shot him. (t7:1257) Green drove away, tossing the gun in the backseat of the car. (T7:1258) He ultimately drove back to the apartment, played basketball with a neighbor and put the gun in an air vent to be available when he decided to kill himself. (T7:1259-1264)

Penalty Phase

The State presented at the penalty phase the testimony of four victim impact witnesses. (T8: 1448-1450, 1457, 1462, 1467) From the beginning of the proceedings, defense counsel expressed concerns about the presentation of the victim impact evidence. (T8: 1416-1420, 1432-1439) After the court denied the defense motion to exclude victim impact evidence and granted the State=s request to introduce a photograph of the victim in his police uniform, defense counsel again expressed concern that the evidence not become inflammatory and beyond the scope of permitted victim impact testimony. (T8:1416-1420, 1425-1426, 1432-1440) Both the court and the prosecutor made assurances that the witnesses and the evidence would be controlled. (T8:1418-1419) The court stated, A... As your victim impact witnesses come on if it appears as though it has become, that is

a springboard for something other than what it is intended to be or if it brings about emotional upheaval in the courtroom, then I may just cut it off....@(T8:1418)

Greg Sievers testified about his relationship with James Hallman. (T8:1451-1456) He read a prepared statement. (T8:1451) Sievers was best friends with Hallman=s son, and when Sievers was 16-years-old, he moved in with the Hallmans and essentially became their son. (T8: 1451-1452) Sievers followed Hallman into the Pensacola Police Department.(T8:1453-1454) Hallman spent most of his career in the Community Relations section of the Police Department, and he was a kind, caring man. (T8:1453) The Hallmans were grandparents to Sievers= 6-year-old daughter who called them ANinny@ and APaw Paw.@ (T8:14554-1455) Sievers ended his statement as follows:

> ... Some days she tells us she wants to go see Ninny because she knows that Ninny is sad and she says that Ninny is happy when she sees her and wants to make her Ninny happy. We know that nothing is going to make Ninny happy thanks to Ryan Green. He stole the heart from our family.
>
> Okay. In closing, I want to thank the state attorney=s office, especially David Rimmer. His hard work and dedication has not gone unnoticed. Dad would be proud of you. He would be happy to know that the system that he had devoted his career to had worked for him in the end. Thank you, all of you, from all of us.

(T8:1455-1456) Defense counsel moved for a mistrial based on the last comment of Sievers, and the court took the motion under advisement.(T8:1456-1457)

Jamie Steyne, Hallman=s daughter, testified. (T8:1457) She read from a prepared statement.(T8:1458) She stated that her father was a loving family man and cared for her and her two children. (T8:1459, 1461) Hallman served 34 years in the police department and made many friends throughout the community. (T8:1459-1460) He was known as the Acandy man@ because he carried candy in his pocket to give the children he came in contact with throughout the day. (T8:1459)

Hallman=s wife, Dianne Hallman, testified about her husband. (T8:1462) She read from a written statement. (T8:1462) She and Hallman were married for 39 years. (T8:1462) Hallman had brothers and sisters in Tuscaloosa, Alabama, where he was raised. (T8:1463) Dianne Hallman missed her husband and regretted the events in the grandchildren=s lives that he missed. (T8:1463-1464) He was a generous, caring man who helped others. (T8:1464-1466)

Hallman=s son, James Hallman, III, testified. (T8:1467) He read from a prepared statement. (T8:1467) The statement included comments on Hallman=s career as a policeman, the family=s loss and the outpouring of concern from people in the community.

(T8:1467-1469) Commenting on Hallman=s quality of helping others, his son=s testimony then gave a detailed, emotional account of Hallman=s medical fight before death, resulting in a description of Hallman=s suffering in the hospital at his death. (R8:1470-1471) The testimony concluded with a plea to the jury and a characterization of the crime:

> I hope that you will give weight to the senselessness of the crime committed upon my father knowing that he made a career out of defending the people and enforcing the very laws you must now consider, knowing that in 34 years as a city police officer he never once shot anyone because he knew the consequences of his action.

(T8:1472) Defense counsel renewed his argument for a mistrial. (T8:1473) The court, again, continued to take the motion for mistrial under advisement. (T8:1475) After the trial, the court held a hearing and entered an written order denying the motion for mistrial. (R2:235-267)

The defense presented four witnesses. Gloria Davis was a guidance counselor who worked with Ryan Green when he was in the sixth grade. (T9:1487) Drs. Brett Turner, Lawrence Gilgun and James Larson were mental health professional who evaluated Green during the criminal proceedings. (T9:1493, 1498, 1508) Each of these mental health experts had testified on the issue of sanity during the guilt phase. (T6:1093, 1135; T7:1161)

Gloria Davis stated that Ryan was referred to her in his first year at middle school. (T9:1487) He presented as a very sad, quiet and distracted child. (T9:1488) Davis suspected that he might have an attention deficit. (T9:1488-1489) Additionally, his parents had recently divorced. (T9:1488-1489) The procedure would have been to have a parent-teacher conference to work out suggestions for the child in school and to refer the child to counseling and a medical doctor for any needed medications. (T9:1489) Attempts to accomplish this for Ryan were unsuccessful because his mother was uncooperative. (T9:1490-1491) Other than working with him in school, nothing else was accomplished for Ryan.(T9:1491) Davis noted that his attendance and grades continued to decline, and when Ryan was in eighth grade, he failed that year. (T9:1492)

Dr. Brett Turner testified to his opinion that Green=s mental state qualified him for the statutory mitigating circumstances involving mental condition at the time of the offense. (T9:1493-1498) Turner summarized his diagnosis of Green as follows:

> The technical or clinical diagnosis is schizoaffective disorder. What that is in real terms is someone who has a significant problem with mode[sic] cycling periods of manic or extremely hyperactive behavior. Something we would call a grandiose sense of self, losing touch with reality, thinking they are invincible alternating with periods of depression bordering on suicidal. His particular syndrome

> includes a number of delusions that he was operating as a different kind of person. For instance, you know, someone associated with the mafia or things of that nature as well as hallucinations both auditory and even visual.

(T9:1494) At the time of the shooting, Turner concluded that Green was in a psychotic state and experiencing a manic episode.(T9:1497) Green was out of touch with reality at the time. (T9:1497)

This diagnosis lead Turner to conclude that Green was under the influence of extreme mental or emotional disturbance at the time of the crime. (T9:1494-1495) Additionally, Green=s capacity to appreciate the criminality of his actions was substantially impaired. (T9:1495) Based on the nature of Green=s delusions, such as the one that he was working for the mafia, Turner concluded that Green could be under duress or substantial domination of another person who might take advantage of Green=s delusional state. (T9:1495-1496)

Dr. Lawrence Gilgun first examined Ryan Green in 2003, and he concluded that Green was incompetent to stand trial because of mental illness. (T9:1499-1500) Green was hospitalized for five months. (T9:1501-1502) Including the time Green spent on medication in the county jail, the medication regime took a considerable amount of time to begin to help Green=s condition. (T9:1504-1505) Gilgun also diagnosed Green with schizoaffective

disorder. (T9:1503) He explained that the Aaffective@ part means mood swings often referred to as manic-depression. (T9:1503) Green=s swings went from grandiose and inappropriate elation to suicidal depression. (T9:1503) The Aschizo@ part means schizophrenia. (T9:1503) Green lost touch with reality and suffered delusions and hallucinations. (T9:1503) Gilgun concluded that Green=s condition qualified for the two statutory mitigation circumstances **B**- he suffered from an extreme mental or emotional disturbance at the time of the offense and his capacity to appreciate the criminality of his conduct was substantially impaired. (T9: 1505-1506)

Dr. James Larson first examined Green in February 2003, and at that time, Green was Agrossly psychotic@ and incompetent to stand trial. (T9:1508) Green was barely able to speak, and when he did, the communication was bizarre and rambling. (T9:1508-1509) He also heard voices and saw things which did not exist. (T9:1509) Green began taking antipsychotic medication and his condition improved somewhat.(T9:1509) Larson saw Green seven times in 2003. (T9:1508) Green remained incompetent for an extended period of time. (T9:1510) When he finally returned from the state hospital, Green had made some marked improvement in his mental condition. (T9:1510-1511) Larson noted that when Green testified at trial, he presented as someone with mental

illness who has partial medical remission of symptoms. (T9:1511) Even though medicated, Green=s testimony showed he continued to have some auditory hallucinations and bizarre thinking. (T9:1511)

Based on Green=s mental illness, Larson believed that Green was subject to being dominated or controlled by another person, particularly if the other person was aware of Green=s mental illness. (T9:1512) Larson also thought the shooting of Phipps and the shooting of Hallman were connected in the sense that Green=s mental illness may have been exacerbated by the first shooting incident. (T9:1513) The adrenaline rush could have increased Green=s mania to the extent that it effected the second shooting. (T9:1513)Larson testified that Green=s mental illness at the time of the offenses would qualify for the statutory mitigating circumstances of being under the influence of an extreme mental or emotional disturbance and having a substantially impaired capacity to appreciate the criminality of his conduct. (T9:1513-1514).

SUMMARY OF ARGUMENT

1. In performing proportionality review, this Court evaluates the totality of the circumstances and compares the case to other capital cases to insure the death sentence does not rest on facts similar to cases where a death sentence has been disapproved. See, e.g., Terry v. State, 668 So.2d 954, 965 (Fla. 1996); Tillman v. State, 591 So.2d 167, 169 (Fla. 1991). Such a review in this case demonstrates that the death sentence is not proportional and must be reversed. Art. I, Secs. 9, 17, Fla. Const.

2.The aggravating circumstance provided for in Section 921.141(5)(e) Florida Statutes, that the homicide was committed for the purpose of avoiding arrest, is applicable in cases where the victim is not a police officer only where the dominant motive for the crime was to eliminate the victim as a witness. See, e.g.,Urbin v. State, 714 So.2d 411 (Fla. 1998); Perry v. State, 522 So.2d 817 (Fla. 1988); Menendez v. State, 368 So.2d 1278 (Fla. 1979); Riley v. State, 366 So.2d 19 (Fla. 1976). No such dominant motive exists, and the trial court erred in finding and weighing this aggravating circumstance in the sentencing process. Green=s death sentence has been imposed in violation of the United States and Florida Constitutions.

Amend. V, VI, VIII, XIV, U. S. Const.; Art. I, Secs. 9, 16, 17, Fla. Const.

3. Section 921.141(7) Florida Statutes permits the introduction of victim impact evidence in capital cases. In accordance with constitutional requirements, the statute limits the evidence to Ademonstrate the victim=s uniqueness as an individual human being and the resultant loss to the community=s members by the victim=s death@ and specifically prohibits A[c]haracterizations and opinions about the crime, the defendant, and the appropriate sentence.@ Sec. 921.141(7) Fla. Stat.; Amend. V, VIII, XIV, U.S. Const.; Payne v. Tennessee, 501 U.S. 808 (1991); Windom v. State, 656 So.2d 4320 (Fla. 1995). The courts must also be vigilant in not allowing overly inflammatory evidence. ***Ibid***. The trial court failed to protect Green=s penalty phase from such improper evidence. Green=s motion for mistrial should have been granted.

4. The trial court erroneously denied a motion to dismiss the death penalty in this case because Florida=s death penalty statute was unconstitutional in violation of the Sixth Amendment under the principles announced in Ring v. Arizona, 536 U.S. 584 (2002). Green acknowledges that this Court has adhered to the position that it is without authority to declare Section 921.141 Florida Statutes unconstitutional under the Sixth Amendment,

even though Ring presents some constitutional questions about the statute=s continued validity, because the United States Supreme Court previously upheld Florida=s Statute on a Sixth Amendment challenge. See, e.g., Bottoson v. Moore, 833 So. 2d 693 (Fla. 2002), cert. denied, 123 S.Ct. 662 (2002) and King v. Moore, 831 So. 2d 143 (Fla. 2002), cert denied, 123 S.Ct. 657 (2002). Green asks this Court to reconsider its position in Bottoson and King because Ring represents a major change in constitutional jurisprudence which would allow this Court to rule on the constitutionality of Florida=s statute.

ARGUMENT

ISSUE I
THE DEATH SENTENCE IMPOSED IN THIS CASE IS DISPROPORTIONATE.

In performing proportionality review, this Court evaluates the totality of the circumstances and compares the case to other capital cases to insure the death sentence does not rest on facts similar to cases where a death sentence has been disapproved. See, e.g., Terry v. State, 668 So.2d 954, 965 (Fla. 1996); Tillman v. State, 591 So.2d 167, 169 (Fla. 1991). Such a review in this case demonstrates that the death sentence is not proportional and must be reversed. Art. I, Secs. 9, 17, Fla. Const.

The unfortunate shootings in this case were products of Ryan Green=s severe mental illness. As the trial court found in his sentencing order, ADuring the events which gave rise to this prosecution the evidence is persuasive that he was fully immersed in a drowning pool of mental illness.@ (R3:370) Both of the aggravating circumstances the trial court found were based on the circumstances of these shootings **B**- previous conviction for a violent felony based on the contemporaneous attempted murder conviction and the homicide being committed to avoid arrest. (R3:350-369) Moreover, as presented in Issue II, *infra*., the avoiding arrest aggravating circumstance was not

sufficiently proven and was improperly considered in sentencing. In mitigation, the court found four statutory and three nonstatutory mitigating circumstances: (1) the defendant had no significant history of prior criminal activity; (2) the homicide was committed while the defendant was under the influence of extreme mental or emotional disturbance; (3) the homicide was committed while the defendant=s capacity to appreciate the criminality of his acts were substantially impaired; (4) the defendant acted under extreme duress or under the substantial domination of another person; (5) the defendant=s mental illness went without treatment for years before this crime; (6) the defendant had significant problems with drug abuse leading up to the time of the crime probably the result of his mental illness; (7) the defendant has not been a discipline problem since his arrest. (R3: 369-376)

All three mental health experts who testified in this case agreed that nineteen-year-old Ryan Green was, at the time of the shootings, severely mentally ill **B**- psychotic and suffered delusions and hallucinations. Drs. Turner, Gilgun and Larson agreed that Green=s mental condition produced the behaviors leading to the shootings and the two statutory mitigating circumstances concerning extreme mental or emotional disturbance and substantially impaired mental capacity were applicable.

(T9:1492-1498, 1499-1506, 1508-1514) See, Sec. 921.141(6)(b)&(f) Fla. Stat. The trial court found these two mitigating circumstances. (R3:369-373) In the sentencing order, the court quoted the expert=s testimony extensively and concluded these mitigators were established by Athe totality of the evidence including the unrefuted expert testimony presented during the penalty phase by both the State and Defendant.@ (T3:369) As the court also noted, Green was Afully immersed in a drowning pool of mental illness.@ (T3:370)

Comparable Cases Where Death Sentence Was Disproportionate:

On many other occasions, this Court has held a death sentence disproportionate when there is evidence that the defendant=s mental illness was the causal factor in the crimes. The cases discussed below where this court reversed the death sentences are comparable to this case. Ryan Green=s death sentence must also be reversed as disproportionate.

1. Knowles v. State, 632 So.2d 62 (Fla. 1993). Knowles was 38-years-old at the time of the homicides. After an afternoon of drinking beer and huffing toluene, Knowles went to his father=s trailer and obtained a .22 rifle. He then went next door where he shot and killed a ten-year-old girl, Carrie Woods, who was waiting for guests to arrive for her birthday party. He did not know the girl. Knowles walked back to his father=s trailer

as his father entered his truck. Knowles pulled his father out of the truck, said ANo you won=t,@ and shot his father two times in the head. Knowles took the truck and drove 250 miles to a friend=s house to whom Knowles admitted to shooting Aa bunch@ of people and his father. Six weeks earlier, Knowles told someone that his father had a surprise coming and he was going to blow him away. Several months earlier, Knowles told another resident of the trailer park that Athe day might come that he just may loose it@ and start shooting people in the park. Those who saw Knowles the afternoon of the homicides said he was Atorn up@ and Acompletely gone.@ A mental health expert said Knowles suffered neurological problems due to abuse of alcohol and solvents. He was intoxicated and in an acute psychotic state at the time of the crimes. Another expert agreed with the opinion that Knowles suffered organic brain damage and was intoxicated at the time. Both experts said that Knowles did not have the ability to premeditate the homicides. The jury rejected both the insanity and intoxication defenses. This Court reduced the conviction for the murder of the girl to second degree murder. Additionally, this Court held invalid the findings that the father=s murder was to avoid arrest and during a robbery based on the taking of the truck. The trial court=s rejection of the statutory mental mitigating circumstances was found to be

improper. Only the prior violent felony aggravator based on the contemporaneous conviction for the murder of the girl remained.

In reversing the death sentence, this Court found the death sentence disproportionate:

> The only other claim we need to address is Knowles claim that death is not warranted in this case. Since we have held both the during the course of a robbery and the avoid arrest aggravating factors invalid, the only aggravating factor that can be considered in connection with Alfred Knowles murder is the contemporaneous conviction for murder of Carrie Woods. In light of the bizarre circumstances surrounding the two murders and the substantial unrebutted mitigation established in this case, we agree that death is not proportionately warranted.

Knowles, 632 So.2d at 67.

2. McKinney v. State, 579 So.2d 80 (Fla. 1991). McKinney was convicted of murder, unlawful display of a weapon, armed robbery, armed burglary, armed kidnapping and grand theft. The victim stopped his rental car to ask directions when he was abducted, robbed and killed by seven gunshot wounds. During the penalty phase, experts testified that McKinney had mental impairments including organic brain damage, borderline intelligence and drug and alcohol abuse. The trial court found that McKinney had no significant history of prior criminal activity. This Court found invalid the aggravating circumstances of heinous, atrocious or cruel and cold, calculated, and premeditated, leaving only the aggravating circumstance that

the homicide was committed during the commission of violent felonies. This Court concluded the death sentence was disproportionate.

3. Besaraba v. State, 656 So.2d 441 (Fla. 1995). A local bus driver told Besaraba to get off the bus for drinking alcohol. Besaraba left the bus, but he went to another bus stop and waited for the same bus to stop there about a half-hour later. Besaraba pulled a handgun and fired into the side of the bus. He walked to the front of the bus and killed the driver. He also shot a passenger in the back, killing him. After leaving the bus, Besaraba went to a car stopped at a red light, ordered the driver out, shot the driver three times in the back, and took the car. The driver survived. Three days later police in Nebraska arrested Besaraba after a struggle during which he pulled a gun on the officers. A jury convicted Besaraba of two counts of first degree murder, attempted murder, robbery, and possession of a firearm. The court found two aggravating circumstances **B**- previous conviction of another capital felony and the homicide was committed in a cold, calculated and premeditated manner. This Court concluded the CCP circumstance was not proven. Mitigation included no significant prior criminal history, the crime committed while under extreme mental or emotional disturbance, and nonstatutory mitigation. The

evidence showed that Besaraba suffered childhood deprivation and suffered mental illness which included paranoid behavior, delusion and hallucinations. He also was alcoholic, abused drugs and had various physical illnesses. This court reversed the death sentences as disproportionate.

4. Santos v. State, 629 So.2d 838 (Fla. 1994). Santos shot to death his long-time girlfriend and their 22-month-old daughter. There had been emotional distress in the relationship between Santos and his girlfriend. Initially, Santos was found incompetent to stand trial. He was later convicted and sentenced to death for both murders. This Court held invalid the HAC and CCP aggravating factors which left one aggravator for a violent felony conviction related to the homicides. See, Santos v. State, 591 So.2d 160 (Fla. 1991)(reversing for to the trial court to properly consider mitigation). In mitigation, the State conceded that the two statutory mental mitigators applied and that Santos had no significant prior criminal activity. Santos had a history of childhood abuse and the experts noted that he slipped into psychotic episodes during emotional stress.

This Court held both of the death sentences disproportionate:

> There can be no possible conclusion other than that death is not proportionally warranted here, because the mitigation is far weightier than any conceivable case for aggravation that may exist here.

Santos, 629 So.2d at 840.

5. White v. State, 616 So.2d 21 (Fla. 1993). White and his former girlfriend, Melinda Scantling, had some altercations after the end of the relationship resulting in a restraining order on White. A few months later, White broke into Scantling=s apartment and attacked her companion with a crowbar. White was subdued and arrested. While still detained in jail, White told another inmate that if released on bond he was going to kill Scantling. The next day after White=s release, he redeemed a shotgun he had earlier pawned. He approached Scantling in a parking lot as she left work around 5:00 p.m. and killed her in front of eyewitnesses. White told one of the eyewitnesses, ADeke, I told you so@ and then he drove away. The following day he was arrested, and while in jail three days later, a psychiatrist interviewed him. White told the psychiatrist that during the six days preceding the homicide, he had consumed five ounces of cocaine, heroin, valuim, and over 50 marijuana cigarettes. A friend testified that he saw White smoking crack cocaine and taking valiums between 3:30 and 4:30 p.m. The psychiatrist said that White was exhibiting withdrawal symptoms consistent with a six-day drug binge and that White was under extreme mental and emotional disturbance and his capacity to appreciate the criminality of is conduct was impaired at the time of the homicide. Other evidence confirmed White=s history

of drug addiction and that his addiction had intensified during the time before the homicide. This Court held the CCP aggravating factor was invalid, leaving only the prior violent felony convictions for the burglary and assault occurring a few days before the murder as aggravators. Mitigation included the statutory mental mitigators and some nonstatutory factors. This Court reversed the death sentence as disproportionate.

6. Farinas v. State, 569 So.2d 425 (Fla. 1990). Farinas was convicted of the shooting death of his estranged girlfriend, Elsidia Landin, who was also the mother of his child. Angry over the belief that Landin had reported to the police that Farinas was harassing her and her family, Farinas followed Landin=s car occupied by Landin and her sister. He approached Landin=s stopped car, reached inside and took the keys. Over Landin=s and her sister=s pleas, Farinas took Landin from her car and left with her in his car. At a stoplight, Landin jumped from the car and ran screaming for help. Farinas shot her in the lower back immediately paralyzing her from the waist down. He then approached her as she lay on the ground, and after his gun jammed three times, he shot her twice in the head. Two aggravating circumstances were approved: homicide during a kidnaping and burglary, and HAC. The trial court found that Farinas was under mental and emotional disturbance but that it

was not extreme. There was evidence that Farinas was intensely jealous, obsessed with having the victim return to live with him and they were having a heated, emotional confrontation. This Court held the death sentence was disproportionate.

7. DeAngelo v. State, 616 So.2d 440 (Fla. 1993). DeAngelo murdered Mary Anne Price who rented a mobile home with DeAngelo and his wife, Joy. DeAngelo and Price had frequent arguments about Price=s drug use, drinking, failing to pay rent and promiscuous life-style. One time, DeAngelo forced Joy to accompany him to Price=s room where she lay passed out and directed Joy to put a blanket over Price=s head as DeAngelo strangled her. However, after a few minutes, DeAngelo backed out of the plan. He told his wife not to tell anyone. A few days later, DeAngelo did go into Price=s room and strangled her both manually and with a ligature. This Court approved the cold, calculated and premeditated aggravating circumstance. Although the State argued that the trial court should have found the HAC factor, this Court rejected the argument because the evidence was that the victim may have been unconscious before the strangulation. The mitigation included that DeAngelo suffered from brain damage, hallucinations, delusional paranoid beliefs and mood disorders. This Court held the death sentence was disproportionate.

8. Kramer v. State, 619 So.2d 274 (Fla. 1993). Kramer was convicted of murder for the beating death of Walter Edward Traskos. The body was found along the interstate and had evidence of a beating with a blunt object. A large rock was near the body. Kramer said he threw a rock at the victim after the victim pulled a knife. The victim=s injuries indicated he had been attacked while in a passive position. In aggravation, the trial court found: (1) a prior conviction for a violent felony **B**- an attempted murder **B**- and (2) the homicide was heinous, atrocious or cruel. The mitigation included: (1) Kramer was under the influence of emotional stress; (2) Kramer=s capacity to conform his conduct was severely impaired; (3) alcoholism and drug abuse; (4) model prisoner. This Court held the death sentence was disproportionate.

Ryan Green=s death sentence is disproportionate. Green was nineteen-years-old with no criminal history. (R3:369, 374) All the mental health experts agreed, and the trial court found, that Green was severely mentally ill **C**- suffering delusions and hallucinations during the time of these shootings. (R3:369-375) The two aggravating circumstances the trial court found were the products of these same series of events surrounding these crimes while Green was suffering this mental illness. (R3:350-

369) As this Court did in the above discussed cases, the death sentence in this case must also be reversed.

ISSUE II

THE TRIAL COURT ERRED IN IMPROPERLY CONSIDERING AS AN AGGRAVATING CIRCUMSTANCE THAT THE HOMICIDE WAS COMMITTED TO AVOID ARREST.

The aggravating circumstance provided for in Section 921.141(5)(e) Florida Statutes, that the homicide was committed for the purpose of avoiding arrest, is applicable in cases where the victim is not a police officer only where the dominant motive for the crime was to eliminate the victim as a witness. See, e.g.,Urbin v. State, 714 So.2d 411 (Fla. 1998); Perry v. State, 522 So.2d 817 (Fla. 1988); Menendez v. State, 368 So.2d 1278 (Fla. 1979); Riley v. State, 366 So.2d 19 (Fla. 1976). No such dominant motive exists, and the trial court erred in finding and weighing this aggravating circumstance in the sentencing process. Green=s death sentence has been imposed in violation of the United States and Florida Constitutions. Amends. V, VI, VIII, XIV, U. S. Const.; Art. I, Secs. 9, 16, 17, Fla. Const.

For an aggravating circumstance to be affirmed on appeal, there must be substantial competent evidence upon which the trial court could find the existence of the circumstance proved beyond a reasonable doubt. See, e.g., Geralds v. State, 601 So.2d 1157, 1164 (Fla. 1992); State v. Dixon, 283 So.2d 1, 9 (Fla. 1973). When the proof relies on circumstantial evidence, the circumstances must consistent with the existence of the

circumstance and inconsistent with any reasonable hypothesis that the circumstance does not exist. See, Geralds v. State, 601 So.2d at 1163; Eutzy v. State, 458 So.2d 755, 758 (Fla. 1984). The avoiding arrest aggravating circumstance is proved, when the victim is not a law enforcement officer, only if there is strong evidence establishing avoiding or preventing an arrest as the dominant motive for the homicide. See, e.g., Urbin v. State, 714 So.2d 411 (Fla. 1998); Menendez v. State, 368 So.2d 1278 (Fla. 1979); Riley v. State, 366 So.2d 19 (Fla. 1976). Evidence in this case does not meet these requirements. The trial court=s findings failed to prove the avoiding arrest circumstance.

In finding that the homicide was committed to avoid arrest, the trial judge relied on statements Green made to others after the homicide. The court quoted portions of that testimony in the sentencing order. (R3:351-369) These statements gave varying reasons for the shooting of Hallman. (R3:351-369) Rather than provide a dominate motive for the homicide, these statements merely corroborate what the trial court had already concluded earlier in the sentencing order that the crime was the act of Green=s psychosis and delusional thinking. (R3:351)

Green=s brother, Aaron, testified that Green told him that the victim looked inside the car, and Green shot him because he

thought the man saw him shoot the gun, and he did not want any witnesses to his driving the car and shooting the gun. (R3:353-355) Brian Lockwood spoke to Green around the same time Green talked to his brother, Aaron. (R3:355) Lockwood testified that Green told him that he shot the victim because,AI had to shoot him because I did not want any witnesses.@ (R3:358)

Ryan Green testified at trial and said that after he shot Chris Phipps, he left in the car looking for a place to kill himself. (R3:358) Green thought he was the devil. (R3:358) He noticed a man, Hallman, walking down the road. (R3:359) Green said the man wore an Alabama suit, a red jumpsuit with a red cap. (R2:359) Green first noted that it was Sunday, the man was wearing red like the devil and the AA@ stood for Antichrist. (R3:359) Green slowed down to ask directions, but Hallman pointed toward the end of the road. (R3:359) While at the end of the road, a cul-de-sac, Green thought about killing himself. (R3:359) He saw a cow and decided to shoot it to see how much it would hurt when he shot himself. (R3:359) When he shot the cow, it stood up and said, AI love you.@ (R3:360) Green said he mocked the cow and said, AI love you, too@ and drove away. (R3:360) Green saw Hallman again and slowed down to ask directions. (R3:360) He thought Hallman looked at him funny. (T3:360) Green felt like God had put him there at that moment. (R3:360)

Hallman=s cane matched the gun **B**- chrome with a black handle. (R3:360) The jumpsuit was red like the bandanna Green took from Cecil=s house. (R3:360) He thought God had put him there at that moment to shoot Hallman because Hallman thought he was the Antichrist. (R3:360-361) Green thought he was the devil, and he was put there to relieve Hallman of his burden. (R3:361) Green asked God if this man wanted to die. (R3:361) He felt like there was a voice saying that the man wanted die. (R3:361) Sometimes when Green could not decide things, he would see if his right or left shoulder jumped **B**- the right meant it was the right thing to do, the left meant it was a lie. (R3:361) Hallman bent his head down, and Green shot him. (R3:361) Green told his brother and Brian Lockwood that he wanted to commit suicide and could not have any witnesses to the suicide which was why he shot Hallman. (R3:362-363)

Dr. James Larson evaluated Green=s mental condition. Larson was asked if Green=s statement to his brother and Lockwood that he did not want any witnesses was reflective of Green=s state of mind at the time of the shooting. (R3:364-365) Larson responded,

> It may or may not that is the problem I had in this particular case. Mentally ill people don=t usually like to admit that they are mentally ill. And when they do something crazy they usually like to give a logical explanation to it.

(R3:365)

The evidence had to prove beyond a reasonable doubt that the sole or dominate motive for the shooting of Hallman was to eliminate a witness to avoid arrest. See, e.g., Urbin v. State, 714 So.2d 411 (Fla. 1998). Proof that avoiding arrest was one reason is not enough. *Ibid*. Based on the trial court=s own previous conclusions that the homicide was the product of Green=s mental illness which included psychotic episodes, delusions and hallucinations, the dominate motive for the homicide was the irrational, random, impulsive act of mental illness. See, Knowles v. State, 632 So.2d 62, 66 (Fla. 1994)(avoiding arrest aggravator not proven where mentally ill defendant, after randomly killing a ten-year-old neighbor, killed his father, took his father=s truck and fled); Garron v. State, 528 So.2d 353 (Fla. 1988)(avoiding arrest aggravator not proven where mentally ill defendant, after killing his wife, killed step-daughter as she was on the telephone calling the police).

The improper inclusion of this aggravating circumstance renders the death sentence invalid and in violation of Green=s constitutional rights to due process, a fair trial and to be free from cruel and unusual punishment. Amend. V, VI, VIII, XIV, U.S. Const.; Art. I Secs. 9, 16, 17 Fla. Const. Green asks this Court to reverse his death sentence.

ISSUE III

THE TRIAL COURT ERRED IN DENYING A MOTION FOR MISTRIAL AFTER VICTIM IMPACT WITNESSES TESTIFIED TO INFLAMMATORY INFORMATION WHICH WAS BEYOND THE PERMITTED SCOPE OF SUCH TESTIMONY.

Section 921.141(7) Florida Statutes permits the introduction of victim impact evidence in capital cases. In accordance with constitutional requirements, the statute limits the evidence to Ademonstrate the victim=s uniqueness as an individual human being and the resultant loss to the community=s members by the victim=s death@ and specifically prohibits A[c]haracterizations and opinions about the crime, the defendant, and the appropriate sentence.@ Sec. 921.141(7) Fla. Stat.; Amend. V, VI, VIII, XIV, U.S. Const.; Art. I, Secs. 9, 16, 17, Fla. Const.; Payne v. Tennessee, 501 U.S. 808 (1991); Windom v. State, 656 So.2d 4320 (Fla. 1995). The courts must also be vigilant in not allowing overly inflammatory evidence. *Ibid*. The trial court failed to protect Green=s penalty phase from such improper evidence. Green=s motion for mistrial should have been granted.

A trial court has discretion in when and how to admit victim impact evidence which is within constitutional limits. However, when victim impact evidence is admitted outside the limits of the statute and the constitution, the resultant due process and law violation is reviewed on appeal *de novo*.

Green=s counsel was on guard against the improper admission of victim impact evidence. The only additional evidence the State presented at the penalty phase was the testimony of four victim impact witnesses. (T8: 1448-1450, 1457, 1462, 1467) From the beginning of the proceedings, defense counsel expressed concerns about the presentation of the victim impact evidence. (T8: 1416-1420, 1432-1439) After the court denied the defense motion to exclude victim impact evidence and granted the State=s request to introduce a photograph of the victim in his police uniform, defense counsel again expressed concern that the evidence not become inflammatory and beyond the scope of permitted victim impact testimony. (T8:1416-1420, 1425-1426, 1432-1440) Both the court and the prosecutor made assurances that the witnesses and the evidence would be controlled. (T8:1418-1419) The court stated, A... As your victim impact witnesses come on if it appears as though it has become, that is a springboard for something other than what it is intended to be or if it brings about emotional upheaval in the courtroom, then I may just cut it off....@(T8:1418)

Greg Sievers testified about his relationship with James Hallman. (T8:1451-1456) He read a prepared statement. (T8:1451) Sievers was best friends with Hallman=s son, and when Sievers was 16-years-old, he moved in with the Hallmans and essentially

became their son. (T8: 1451-1452) Sievers followed Hallman into the Pensacola Police Department.(T8:1453-1454) Hallman spent most of his career in the Community Relations section of the Police Department and he was a kind, caring man. (T8:1453) The Hallmans were grandparents to Sievers= 6-year-old daughter who called them ANinny@ and APaw Paw.@ (T8:14554-1455) Sievers ended his statement as follows:

> ... Some days she tells us she wants to go see Ninny because she knows that Ninny is sad and she says that Ninny is happy when she sees her and wants to make her Ninny happy. We know that nothing is going to make Ninny happy thanks to Ryan Green. He stole the heart from our family.
>
> Okay. In closing, I want to thank the state attorney=s office, especially David Rimmer. His hard work and dedication has not gone unnoticed. Dad would be proud of you. He would be happy to know that the system that he had devoted his career to had worked for him in the end. Thank you, all of you, from all of us.

(T8:1455-1456) Defense counsel moved for a mistrial based on the last comment of Sievers:

> MR. LOVELESS: Your Honor, the end of that was exactly what is prohibited and the characterization of my client and of the circumstances of this case, the praises of Mr. Rimmer. That basically **B**- the praises of the jury for doing what they did is totally inappropriate and totally out of line with even any diminution of victim impact and I move for a mistrial.
>
> THE COURT: I=ll take the motion under advisement.
>
> MR. LOVELESS: I would ask that you **B**- can we determine that this will not happen with the other witnesses?

> MR. RIMMER: I have told them not to say **C**- I told them the statute and showed it. As far as any characterization **B**
>
> MR. LOVELESS: This was previously written.
>
> MR. RIMMER: I don:t see **B**
>
> MR. LOVELESS: It could have been reviewed.
>
> THE COURT: Previously read statement is certainly permissible, no question about that. So anyway I:ll take the motion under advisement.

(T8:1456-1457)

Hallman:s son, James Hallman, III, testified. (T8:1467) He read from a prepared statement. (T8:1467) The statement included the family:s loss and the outpouring of concern from people in the community. (T8:1467-1469) Commenting on Hallman:s quality of helping others, his son:s testimony then gave an emotional account of Hallman:s medical fight before death:

> His unreserved acceptance of people and eagerness to help anyone -- his unreserved acceptance of people and eagerness to help anyone in need was seemingly his downfall in the end. It was a gunshot to the head that was more than he could recover from for the damage from the bullet and the many skull fragments that went scattering throughout his brain could not be repaired. Dr. Gill, the trauma surgeon at Sacred Heart Hospital, had explained that the fragments had blasted through the soft tissue of his brain causing irreparable damage to the upper brain and extensive bleeding. The shockwave from the gun blast had caused the brain to swell beyond its normal size causing tremendous pressure in his head. Dr. Gill had explained that the lower brain function would be damaged as well from the pressure it was experiencing. The doctors had inserted drainage tubes in his head to try to relieve

> some of the pressure, but this was not effective. We had been watching my father slowly dying, his body shutting down. Parts of the brain which control the body temperature had been damaged and no longer functioned. He had to be kept on a refrigerated mattress, ice packs under his arms to keep his temperature below 103 degrees. An artificial respirator aided in keeping his lungs working.
>
> The doctors had told us since the beginning they had done all they could and it was in God's hands. His condition was only deteriorating with no medical chance of improvement. I prayed to God for a miracle. I prayed to God for strength. We witnessed the slow, agonizing deterioration of my father. We suffered with him helplessly. His last hours of life were torture. He gasped for every breath with a deep, raspy, gurgling sound.
>
> For my father's -- for the first time, my father's eyes opened for just one moment. He looked around the room as if to see who was there. His hands were still unresponsive to touch. Hours seemed like an eternity and his breathing slowed, each breath becoming more shallow till he breathed no more. My father was dead.

(T8:1470-1471)

The testimony concluded with a plea to the jury and a characterization of the crime:

> I hope that you will give weight to the senselessness of the crime committed upon my father knowing that he made a career out of defending the people and enforcing the very laws you must now consider, knowing that in 34 years as a city police officer he never once shot anyone because he knew the consequences of his action.

(T8:1472)

Defense counsel renewed his argument for a mistrial. (T8:1473) He argued as follows:

> THE COURT: Jury is out of the courtroom. Anything either counsel would like to place at the record?

MR. LOVELESS: Can we do that at the bench, Your Honor?

(At the bench:)

MR. LOVELESS: Particularly by the last witness, but also by some of the others, Your Honor, this has become exactly the type of proceeding that definitely had been feared in all of these situations of victim impact. They have denied my client a fair and impartial hearing required by the 8th and 14th amendment of the U.S. Constitution and by the Florida Constitution. I realize that victim impact has set forth strictly -- does not necessarily by itself create a violation of the 8th amendment, but this proceeding has, Your Honor.

We have heard not only the fact that the statements have been read, that they should have been provided to the State and probably should have been provided to the defense as well, Your Honor, that these issues could have been taken care of earlier. If they would not have been presented in this fashion, it would not have created this problem. That first witness indicated that this stole the heart from our family, this person stole the heart from our family, direct characterization of my client. Then he proceeded to compliment Mr. Rimmer which, you know, he may well feel complimentary towards Mr. Rimmer, but that is totally inappropriate in front of a jury.

The final comment by Mr. Hallman's son, he put the jurors in the position of his own situation in a classic golden rule situation, Your Honor. He described the injuries, he described the death and the suffering, totally inappropriate under these circumstances, Your Honor. There is absolutely no excuse for this having happened. Could have been stopped. It should have been stopped and it put me in a position of having to interrupt these people during that testimony, Your Honor, was unconscionable and I didn't do it because I knew what effect that might have on the jury, Your Honor. This a mistrial and is an absolute necessity in the situation.

(R8:1473-1475]

The court, again, continued to take the motion for mistrial under advisement. (T8:1475) After the trial, the court held a hearing and entered an written order denying the motion for mistrial. (R2:235-267) The court=s basis for denying the mistrial were:

> 1. The entirety of the witness impact testimony presented by the prosecution does not exceed that which is permissible pursuant to Florida Statutes sec. 942. 141 (7). Even assuming arguendo that the permissible scope of that statute had been exceeded any error would be harmless in light or the totality of evidence presented during both the guilt and penalty phases.
>
> 2. Again, even assuming arguendo that the subject testimony impermissible exceeded the scope of the statute thereby resulting in error, the failure of counsel for the Defendant to contemporaneously object ***during*** the testimony at trial did not preserve any such error for appellate review.
>
> 3. Counsel for the Defendant argues that even though he made no contemporaneous objection during the testimony, the content of that testimony was so egregious as to rise to the level of fundamental error. The Court is not persuaded by that argument and finds that even if the scope of the statute had in fact been exceeded it did not constitute fundamental error.

(R2:266-267)

The trial court should have granted a mistrial since the victim impact evidence exceeded the permissible scope. Siever=s testimony expressing an opinion about the defendant, praising the prosecutor and expressing his opinion that the victim would also be proud of the prosecution=s efforts was blatantly improper

testimony. (T8:1455-1456) Testimony from the victim=s son, James Hallman, III, was well beyond the limits of victim impact evidence and was an emotional characterization of the crime and a direct plea to the jury. His account and opinion about his father=s death bed suffering, his characterization of the crime, and his plea to the jury to consider the Asenselessness of the crime@ and to remember his father=s career as a police officer defending the and enforcing the laws was improper and highly prejudicial. Ryan=s Green=s due process right to a fair sentencing proceeding has been violated and his death sentence is unconstitutionally imposed. See, Amends. V, VI, VIII, XIV, U.S. Const.; Art. I, Secs. 9, 16, 17 Fla. Const.; Sec. 921.141(7) Fla. Stat.; Payne v. Tennessee, 501 U.S. 808 (1991); Windom v. State, 656 So.2d 4320 (Fla. 1995).

Although the trial court=s order ruled on the merits of the admissibility of the testimony in question, the court suggested that if his ruling was incorrect the error would be harmless. Additionally, the court suggested that defense counsel=s objection was inadequate as well. (R2:266-267) These positions also lack merit. First, given the significant mitigation in this case as compared to the aggravation, which was completely based on the circumstances of the criminal episode itself, the error, here, cannot be deemed harmless. (Green incorporates by

reference the arguments in Issues I and II, *supra*., in support of this position) Second, the idea that trial counsel=s objections failed to preserve the issue and bring the matter to the trial court=s attention in a timely fashion is flawed. Defense counsel urged the trial court to control and correct the victim impact testimony before and during its presentation. (T8: 1416-1420, 1425-1426, 1432-1439) The court and the prosecutor had made assurances that the witnesses would be in compliance with the proper scope of victim impact evidence limits. (T8:1418-1419) After the first witness, Greg Sievers, testified, counsel promptly objected and move for a mistrial. (T8:1455-1457) See, Roban v. State, 384 So.2d 683 (Fla. 1980). Again, the prosecutor stated that he cautioned the witnesses, although he had not reviewed the witness=s prepared statement. (T8:1457) The court kept the mistrial motion pending under advisement. (T8:1457) When the final witness also testified improperly and beyond permissible limits, defense counsel renewed his argument about the already pending motion for mistrial for the same type of error. (T8:1470-1475) Defense counsel=s actions were more that ample to afford the trial judge with the opportunity to control the admission of the evidence and to make corrections during the trial.

The victim impact evidence presented was beyond the legally permissible scope of such evidence and Green=s penalty phase was prejudiced. He now asks this Court to reverse his death sentence.

ISSUE IV

THE TRIAL COURT ERRED IN NOT DISMISSING THE DEATH PENALTY AS A POSSIBLE SENTENCE BECAUSE FLORIDA=S SENTENCING PROCEDURES ARE UNCONSTITUTIONAL UNDER THE SIXTH AMENDMENT PURSUANT TO RING V. ARIZONA.

The trial court erroneously denied a motion to dismiss the death penalty in this case because Florida=s death penalty statute was unconstitutional in violation of the Sixth Amendment under the principles announced in Ring v. Arizona, 536 U.S. 584 (2002). Ring extended the requirement announced in Apprendi v. New Jersey, 530 U.S. 446 (2000), for a jury determination of facts relied upon to increase maximum sentences to the capital sentencing context.

Green acknowledges that this Court has adhered to the position that it is without authority to declare Section 921.141 Florida Statutes unconstitutional under the Sixth Amendment, even though Ring presents some constitutional questions about the statute=s continued validity, because the United States Supreme Court previously upheld Florida=s Statute on a Sixth Amendment challenge. See, e.g., Bottoson v. Moore, 833 So. 2d 693 (Fla. 2002), cert. denied, 123 S.Ct. 662 (2002) and King v. Moore, 831 So. 2d 143 (Fla. 2002), cert. denied, 123 S.Ct. 657 (2002). Additionally, Green is aware that this Court has held that it is without authority to correct constitutional flaws in the statute via judicial interpretation and that

legislative action is required. See, e.g., State v. Steele, 921 So.2d 538 (Fla. 2005). However, this Court continues to grapple with the problems of attempting to reconcile Florida=s death penalty statutes with the constitutional requirements of Ring. See, e.g., Marshall v. Crosby, 911 So.2d 1129, 1133-1135 (Fla. 2005)(including footnotes 4 & 5, and cases cited therein); State v. Steele, 921 So.2d 538. At this time, Green asks this Court to reconsider its position in Bottoson and King because Ring represents a major change in constitutional jurisprudence which would allow this Court to rule on the constitutionality of Florida=s statute.

This Court should re-examine its holding in Bottoson and King, consider the impact Ring has on Florida=s death penalty scheme, and declare Section 921.141, Florida Statutes unconstitutional. Green=s death sentence should then be reversed and remanded for imposition of a life sentence.

CONCLUSION

For the reasons presented in this initial brief, Ryan Thomas Green asks this Court to reverse his death sentence and remand his case with directions to impose a life sentence.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished by mail to Charmaine Millsaps, Assistant Attorney General, Criminal Appeals Division, The Capitol, PL-01, Tallahassee, Florida, 32399-1050, and to Appellant, Ryan T. Green, #127545, F.S.P., 7819 N.W. 228th St., Raiford, FL 32026, on this ____ day of October, 2006.

CERTIFICATE OF COMPLIANCE

Undersigned counsel certifies that this brief has been prepared using 12 point Courier New, a font that is not proportionately spaced.

Respectfully submitted,

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