IN THE SUPREME COURT OF FLORIDA

THOMAS THEO BROWN,

Appellant,

v. CASE NO. SC11-2300

STATE OF FLORIDA,

Appellee.
_____/

ON APPEAL FROM THE CIRCUIT COURT
OF THE FOURTH JUDICIAL CIRCUIT
IN AND FOR DUVAL COUNTY, STATE OF FLORIDA

ANSWER BRIEF OF THE APPELLEE

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PRELIMINARY STATEMENT

Appellant, THOMAS THEO BROWN, appeals his convictions and sentences to death. He raises four (4) penalty phase issues and one (1) guilt phase issue in a seventy-one (71) page initial brief.

References to appellant will be to “Brown” or “Appellant,” and references to appellee will be to “the State” or “Appellee.” The record on appeal consists of nineteen (19) record volumes and one supplemental volume.

The State will refer to the record on appeal as “TR” followed by the appropriate volume and page number. The State will refer to the supplemental volumes as “TR Supp” followed by the appropriate page number. Brown’s initial brief will be referenced as “IB” followed by the appropriate page number.

STATEMENT OF THE CASE

Thomas Theo Brown was 27 years old when he murdered 22 year-old Juanese Miller. (TR Vol. I 1-2). Both Brown and Miller worked at a Wendy's restaurant in Jacksonville, Florida. Brown shot Miller multiple times, including once in the back of the head as Ms. Miller lay on the floor, helpless and mortally wounded. (TR Vol. I 1-2).

On August 20, 2009, a Duval Grand Jury indicted Brown for one count of premeditated murder and one count of possession of a firearm by a convicted felon. (TR Vol. I 34-36). On September 2, 2009, the State provided Brown notice it intended to seek the death penalty for the murder of Juanese Miller. (TR Vol. I 47).[1]

Brown was represented by Assistant Public Defenders, Fred Gazaleh and Ian Weldon. Mr. Gazaleh has been a member of the Florida Bar since 1982. Mr. Weldon has been a member of the Florida Bar since 2000.[2]

[1] On March 2, 2010, the defendant filed a motion for determination of mental retardation as a bar to execution. (TR Vol. I 71). Brown averred that he had been examined by Dr. Harry Krop and that Dr. Krop had given a preliminary opinion that Brown was mentally retarded. On April 5, 2010, at the request of the State, the court appointed Dr. Riebsame to examine the defendant to determine whether he is mentally retarded. (TR Vol. I 79). Both experts ultimately concluded Brown was not mentally retarded. On April 27, 2011, the defendant withdrew the motion. (TR Vol. IV 647).

[2] www.flabar.org--/find a lawyer

Brown pled not guilty and proceeded to trial on May 23, 2011. The only charge the State brought forward to trial was first-degree murder.

At opening statement, Brown did not deny that he had shot and killed Ms. Miller. Instead, Brown's defense at trial was that he was guilty only of second-degree murder because he lacked the premeditation necessary to sustain a conviction for first-degree murder. (TR Vol. XV 337-344).

The State called seventeen (17) witnesses and then rested its case. After the State rested its case, Brown made a motion for a judgment of acquittal. Brown argued that, when viewing the evidence in the light most favorable to the State, there was no evidence of premeditation. Brown asked the Court to grant a motion for a judgment of acquittal down to second-degree murder. (TR Vol. XVII 645). The trial judge denied the motion. (TR Vol. XVII 645).

The defense advised the judge that Brown would call no witnesses. Brown also decided not to testify on his own behalf. The Court advised Brown that he had the right to testify, or not, on his own behalf. Brown advised the court that he did not wish to testify. (TR Vol. XVII 646-648).

The defense rested and then renewed its motion for a judgment of acquittal on the same grounds as it had just minutes before. (TR Vol. XVII 649). The trial judge denied the renewed motion. (TR Vol. XVII 649).

On May 25, 2011, contrary to his plea of not guilty, a Duval County jury found Brown guilty of first-degree murder. (TR Vol. V 683). The jury also found that, in the course of the murder, Brown actually possessed and discharged a firearm. (TR Vol. V 683).

The penalty phase commenced on June 14, 2011. During the penalty phase, the State called five witnesses, four in its case in chief and one in rebuttal. The defendant called six witnesses; five lay witnesses and Dr. Harry Krop. Relevant to both the prior violent felony and the under a sentence of imprisonment aggravator, the parties stipulated that Brown had been previously convicted of robbery in Georgia. (TR Vol. XVIII 795).

After both sides had presented closing arguments, the trial court instructed the jury on three aggravators: (1) under a sentenced of imprisonment; (2) prior violent felony; and (3) CCP. (TR Vol. XIX 1012-1013). The trial judge instructed the jury on two statutory mitigators; age and extreme emotional distress as well as the catch-call mitigator. (TR Vol. XVIII 1015). The trial judge also instructed the jury that in order to consider the death penalty as a possible penalty, the jury was required to determine that at least one aggravator had been proven. (TR Vol. XVIII 1010). At the conclusion of the penalty phase, the jury recommended Brown be sentenced to death by a vote of 7-5. (TR Vol. XVIII 1023).

On July 5, 2011, the trial court held a Spencer hearing. (TR Vol. XI 1854-1861). The State called no additional witnesses to testify at the Spencer hearing. The defendant offered some documents into evidence but called no witnesses.

On August 1, 2011, the State submitted a sentencing memorandum. (TR Vol. XI 1758-1765). The defendant submitted a sentencing memorandum as well. (TR Vol. XI 1766-1783).

On October 28, 2011, the trial judge entered her sentencing order. In following the jury's recommendation and sentencing Brown to death, the trial court found the following aggravators had been proven beyond a reasonable doubt: (1) Brown had previously been convicted of a violent felony (great weight); (2) at the time of the murder, Brown was under a sentence of imprisonment (great weight); and (3) the murder was cold, calculated, and premeditated (great weight). (TR Vol. XI 1799-1803).

The trial court found and weighed two statutory mitigators; (1) at the time of the murder, the defendant was under the influence of an extreme emotional disturbance (some weight) and (2) age (slight weight). (TR Vol. XI 1804-1809). The trial court also considered and weighed several non-statutory mitigators suggested by the defendant: (1) the defendant experienced a difficult childhood, including but not limited to, a lack of parental guidance as a child (some weight); (2) the defendant has a borderline IQ (some weight); (3) the defendant admitted culpability

for the murder of Juanese Miller (no weight); (4) appropriate courtroom behavior (no weight); (5) the defendant offered to plead guilty before trial (little weight); (6) the defendant suffers from a mental illness (some weight); (7) a kind of catch-all including a finding the victim did not suffer (little weight). (TR Vol. XI 1809-1815).

On November 21, 2011, Brown filed a notice of appeal. (TR Vol. XI 1830). On May 21, 2012, Brown filed his initial brief raising four penalty phase issues. On May 29, 2012, Brown filed an amended initial brief adding a single guilt phase issue. This is the State's answer brief.

RELEVANT TIMELINE

DATE/TIME	EVENT
Sunday, June 14, 2009	Ms. Miller puts salt and ice down Brown's back in a horseplay event in the workplace
Monday, June 15, 2009	Meeting takes place between management, Brown and Miller to resolve Sunday's incident between Brown and Miller.
Thursday, June 18, 2009 sometime around 12:00 noon	Brown and franchise owner Mike Enami get into verbal altercation.
Thursday, June 18, 2009 sometimes shortly after 12:00 noon	Brown leaves the restaurant after his confrontation with Mr. Enami. Brown threatens Enami that he will kick his ass and it ain't going to be no more Wendy's.
Thursday, June 18, 2009 about 1:00 p.m. to 1:15 p.m.[3]	Brown returns to Wendy's armed with a handgun. Asks for Mike. Brown is told Mike is not in the store. After initially leaving the restaurant, Brown returns, walks up to where Miller is standing at the counter, with her back to him. Brown pulls a semi-automatic pistol from his waistband and shoots Ms. Miller multiple times.

[3] Times are approximate. Mike Enami testified that he left the restaurant about 15 minutes after Brown left. (TR Vol. XV 400). Alona Bush testified that Brown returned around 1:00-1:15 p.m. forty five minutes to an hour after Brown left after his confrontation with Mike Enami. (TR Vol. XVI 420). Witness accounts varied as to time but none could say with certainty the exact time that the relevant events occurred. The police were dispatched to the shooting at approximately 1:38 p.m. (TR Vol. I 2).

STATEMENT OF THE FACTS

Both the victim, Juanese Miller, and the defendant, Theo Brown, worked at the same Wendy's Restaurant in Jacksonville, Florida. The relationship between Miller and Brown was strained. The conflict between Miller and Brown seemed to stem from three incidents between Miller and Brown, all of which happened in a two day time period.

Ms. Razekiah Williams testified that on the Sunday before the murder, Brown became upset when Ms. Miller, who was playing with ice and salt, poured the ice and salt down Brown's back. (TR Vol. XV 348). Brown did not want Ms. Miller playing with him. He did not like her. (TR Vol. XV 365).

The second incident occurred when management scheduled a meeting with both Brown and Miller on the Monday after the Sunday ice and salt incident. According to Ms. Williams, Miller walked by Brown and was "rapping" a song.[4] Ms. Williams told the jury that Miller taunted Brown by directing a racially derogatory term toward him, a term that also called his manhood into question. (TR Vol. XV 350). Ms. Angelette Harley testified that Ms. Miller was making these comments right before the meeting. (TR Vol. XVI 493).

[4] During a psychological interview, Brown claimed to be a rapper who performed in certain clubs in the Jacksonville area. (TR Vol. XIX 946).

The third incident came about, on the same day as the meeting, when a near fight broke out in the Wendy's parking lot between Brown and a man that Miller was with. Ms. Williams saw Brown take off his shirt and get ready to fight. (TR Vol. XV 351). Management stepped in to end the confrontation. (TR Vol. XV 351).[5]

After the meeting between the management, Brown and Miller, Ms. Williams was under the impression the problems between Brown and Miller were resolved. (TR Vol. XV 352-353). She was mistaken.

On Thursday, June 18, 2009, Miller and Brown were working together at Wendy's. Ms. Williams, who was also working, did not see any problems between Miller and Brown on that day. (TR Vol. XV 354).

Brown did have a problem with someone that morning; Mike Enami. Mr. Enami was the franchise owner. Mr. Enami also owned other Wendy's franchises in the Jacksonville area. (TR Vol. XV 389).

On the day of the murder, Mr. Enami was at the Wendy's franchise where Brown and Miller worked. Mr. Enami saw no problems between Brown and Miller. Brown, however, came to Mr. Enami's

[5] No one asked specifically when this near-fight occurred. Ms. Alona Bush testified that, after the meeting with Brown and Miller, she saw an exchange between Brown and a man that was with Ms. Miller, inside the restaurant. She did not perceive it to be violent. (TR Vol. XVI 474). Ms. Williams saw Brown have a near confrontation with the man in the parking lot. It is logical to conclude that Ms. Bush saw the front end of the near confrontation and Ms. Williams saw the back end.

attention twice on the day of the murder. Ms. Mosley, the manager on duty, told Mr. Enami that Brown was upset about his schedule. (TR Vol. XV 394). Ms. Mosley told Mr. Enami that Brown was upset that his hours had been cut. Mr. Enami told Ms. Mosley to pass on to Brown that he needed to talk to the store manager because Mr. Enami did not do the schedule. Mr. Enami told Ms. Mosley that if Brown and the store manager could not resolve it between them, he would step into help. (TR Vol. XV 394).

After his conversation with Ms. Mosley, Mr. Enami went up front to oversee operations. Mr. Enami also went up front because he routinely stepped in to help if the store was particularly busy. (TR Vol. XV 395).

Mr. Enami testified that, as he was observing, he noticed that Brown was having trouble keeping up with the demand for sandwiches. The store manager stepped in, took Brown off sandwiches and put Brown to work behind the front cashier. (TR Vol. XV 395). Brown had been at his new station for a few minutes when Mr. Enami noticed that Brown was working very slowly. (TR Vol. XV 395).

Mr. Enami decided to pull Brown to the back of the store for a talk. Mr. Enami asked Brown what was wrong and asked about his attitude. (TR Vol. XV 396). Brown got very upset. Mr. Enami testified that Brown got very loud. Brown was yelling and screaming. Brown also put his hand in Mr. Enami’s face. (TR Vol. XV 396). Mr. Enami told Brown to leave. Mr. Enami testified that

Brown started walking up to the front of the store and then came back. Mr. Enami told Brown that if he did not leave, he would call the police. While Brown was still there, Mr. Enami picked up the phone and dialed 911. Brown left and Mr. Enami put the phone down. (TR Vol. XV 397). Although Mr. Enami testified that he was not really paying attention to what Brown said, other witnesses testified that Brown told Mr. Enami that "it ain't going to be no more Wendy's" and "someone was going to kick his ass." (TR Vol. XV 354: TR Vol. XVI 418). Ms. Williams told the jury that Mr. Enami told Brown several times not to come back. (TR Vol. XV 367-368).

About 45 minutes to an hour later, Brown returned to the Wendy's restaurant. (TR Vol. XVI 420). Witness accounts varied as to Brown's exact movements. All agreed that Miller had her back to Brown when he came into the restaurant, pulled a gun from his waistband and shot Miller at point blank range multiple times.

Ms. Alona Bush, who witnessed the entire event, testified that when Brown came into the restaurant, he asked for Mike Enami. When Brown was told he was not there, Brown walked out of the restaurant and back to his car. (TR Vol. XVI 423). Ms. Bush testified that Brown reached into the car (she did not see him retrieve anything) and then came back into the restaurant. When Brown came back in, Ms. Miller was standing at the counter, in front of the register. She had her back to Brown. Brown walked up to Miller, stopped

about 2-3 feet from her, pulled a gun from his waistband, and shot her. (TR Vol. XVI 426). Ms. Miller never saw it coming.

Angelette Harley, a Wendy's manager and Brown's girlfriend at the time of the shooting, testified that she was in the Wendy's restaurant when she saw Brown pull into the parking lot. She was expecting him. Ms. Harley had talked with Brown's mother shortly before his arrival. Because of their conversation, Ms. Harley expected Brown to come back to Wendy's. Indeed, she was keeping an eye out for him. (TR Vol. XVI 480).

When Brown pulled into the parking lot, Ms. Harley went out to meet Brown and suggested they talk. (TR Vol. XVI 482). Brown was not interested in talking. (TR Vol. XVI 482). He told her that he did not want to talk. (TR Vol. XVI 482). Ms. Harley did not see a gun. (TR Vol. XVI 484). She tried to stop him from going in. (TR Vol. XVI 485).

Brown asked Ms. Harley whether Mike Enami was inside. She told him no. According to Ms. Harley, Brown walked out of the restaurant and out to his car. Ms. Harley told the jury that Brown started his car and put the car in reverse. Brown stopped, got out and went back into Wendy's. Ms. Harley tried to stop him. (TR Vol. XVI 487). When that proved unsuccessful, Ms. Harley followed Brown into the store. By the time she got into the restaurant, Brown was pulling the trigger. (TR Vol. XVI 487). Ms. Harley ran. (TR Vol. XVI 488).

In addition to Ms. Bush and Ms. Harley, customers in the store witnessed the shooting. David Boyd had eaten his lunch and was reading when he heard three loud pops. When Mr. Boyd slid out of his booth to see what was happening, he saw Brown with a gun in his hand, standing over Ms. Miller. As Brown stood over Ms. Miller, Mr. Boyd heard Brown emphatically say "I told you I'd kill you bitch." (TR Vol. XVI 502). Brown sounded angry. (TR Vol. XVI 506).

Terrance Cherry was standing right next to Juanese Miller when he heard a loud boom. It was so loud, Mr. Cherry covered his ears. (TR Vol. XVI 514). When he turned toward the source of the sound, Mr. Cherry saw Brown standing over Ms. Miller. Mr. Cherry saw Brown fire at least two more shots at Ms. Miller. Mr. Cherry told the jury that after Brown shot Miller, he started to leave. Brown stopped, turned, and came back to where Miller was lying on the floor. Brown told Miller "I told you I was going to kill you" and fired again. (TR Vol. XVI 516).

Mr. Skeen testified that he heard several gunshots and saw Brown standing over the top of Ms. Miller. Brown had a gun in his hand. (TR Vol. XVI 526). Mr. Skeen told the jury that he heard Brown say, as he stood over the victim, "I told you I would kill you, you fucking bitch." (TR Vol. XVI 527).

Brett Thomas also witnessed the murder. Mr. Thomas heard two shots and then saw Brown standing over Miller. Mr. Thomas

testified that he heard Brown say “mother fucker” and saw Brown shoot Miller again as she lay on the ground. Brown looked angry. (TR Vol. XVI 533).

Finally, Derek Byerly testified that he witnessed the shooting. Mr. Byerly saw Brown reach down underneath his shirt and pull a gun from his waistband. Mr. Bylerly saw Brown shoot Ms. Miller and then shoot her again a couple more times after she was on the ground. (TR Vol. XVI 539).

Police found four shell casings at the murder scene. Brown was arrested the next day at a Jacksonville hotel. (TR Vol. XVI 569).

Police officers effecting Brown’s arrest found a Smith and Wesson semi-automatic handgun lying on the dresser in Smith’s hotel room. (TR Vol. XVI 590). The gun was loaded. A .40 caliber live round was discovered in Brown’s pocket. A firearms examiner testified that the shell casings found at the murder scene were fired from the gun found in Brown’s hotel room. (TR Vol. XVII 641).

Police also found a notebook in Brown’s car. In the notebook, Brown had written that he “just offed a bitch because she was the cause of life being fucked up this time. If she ain’t dead, then she will learn how serious words can be. I wanted Mike, the owner, to be there, but I guess it ain’t his time yet…(TR Vol. XVI 596).

At trial, the medical examiner testified that Ms. Miller was shot four times. Three of the wounds were to the back of her body including one fatal bullet wound that impacted several vital organs, including her right lung, trachea, the aorta, and the left lung. (TR Vol. XVII 616). One other bullet was fired into the back of Ms. Miller's head. (TR Vol. XVII 620).[6]

During closing statement, Brown persisted with his claim he was guilty only of second-degree murder. The jury rejected Brown's theory that he was guilty only of second-degree murder. Brown was convicted as charged of premeditated first-degree murder. (TR Vol. V 683).

At the penalty phase, the State presented the testimony of Linda Davis and Joby Duncan. Both testified to the underlying facts of the September 17, 1999 armed robbery for which Brown was convicted. (TR Vol. XVIII 767-791). The State also offered the testimony of Kelly Aiken, Brown's parole officer. Ms. Aiken is an experienced parole officer with 28 years of experience. (TR Vol. XVIII 804).

Ms. Brown testified that Brown was on parole at the time of the murder. Two days before the murder, on June 16, 2009, Ms. Aiken met with Brown. Brown seemed stable, was working, and was

[6] Photos of the body introduced into evidence show Ms. Miller lying on her back. However, immediately after the shooting a woman in scrubs attempted to come to Ms. Miller's aid and checked her. (TR Vol. XVI 503).

trying to get his life together. (TR Vol. XVIII 805). Brown did not complain of any troubles at work. Indeed, Brown was always pleasant, respectful, and easy to deal with. (TR Vol. XVIII 803). Brown would walk Ms. Aiken to her car after his home visits. Brown told her the area where he lived was not a good neighborhood. He told her he wanted to make sure she was okay. (TR Vol. XVIII 804). In her opinion, Brown showed no signs of deteriorating mental health. (TR Vol. XVIII 803-804).

The State also presented the testimony of one victim impact witness. Juanese Miller's mother, Dolores Frazier, testified that Ms. Miller was 22 years old at the time she died. She had a three-year-old daughter. (TR Vol. XVIII 8220). Ms. Frazier read a statement to the jury. Ms. Frazier told the jury that her daughter was a dedicated mother who had overcome bipolar disorder. Ms. Frazier testified that Ms. Miller was a very compassionate person. (TR Vol. XVIII 825-826).

Brown put on several witnesses who testified in mitigation. His father, Johnny Isadore Brown, testified that he and Brown's mother, Katherine Brown split up when Brown was about 2½ years old. Although he tried to have a good relationship with his son, it did not work out too good. Brown's mother did not want him to be brought up the way that Mr. Brown would bring him up. Mr. Brown characterized this way as the "right way." (TR Vol. XVIII 832). Mr. Brown told the jury that Ms. Brown was "too much street." She

wanted to bring Brown up as a "hard rock street person." (TR Vol. XVIII 832). Mr. Brown saw his son very little as he was growing up. (TR Vol. XVIII 833). When he did see him, Brown thought his son was a good boy, a nice kid. (TR Vol. XVIII 834). He never got into any trouble when he was around Mr. Brown. (TR Vol. XVIII 834). Brown did not seem to have any trouble learning and showed no problems with his mood. (TR Vol. XVIII 835).

When Brown discovered the police were looking for him in Georgia in connection with the robbery for which he was convicted, Brown voluntarily returned to Georgia. When he was in prison, Brown wrote to his father and even made a drawing for his father for his 65th birthday. (TR Vol. XVIII 837).

Mr. Brown loves his son. He will maintain his relationship with his son when he is in prison. (TR Vol. XVIII 839). Mr. Brown perceived that Brown's mother did not show him a lot of love. (TR Vol. XVIII 843).

Cynthia Brown is married to Johnny Brown. She has known Thomas Theo Brown since he was 17. (TR Vol. XVIII 845). Brown was normally a friendly, happy, good boy. (TR Vol. XVIII 845). Brown's demeanor changed when he was around his mother. He was aggravated and frustrated. He seemed sad. (TR Vol. XVIII 845).

When Brown got out of prison in Georgia, he came back to Jacksonville and spent time with her and Brown's father. He looked for a job. When he got one, it made him happy. (TR Vol. XVIII

848). He lost that job and then got the job at Wendy's. He was not too happy about losing the first job. It made Brown feel good when he got the job at Wendy's.

She will maintain her relationship with Brown even though he will spend the rest of his life in prison. (TR Vol. XVIII 849). She and her husband were always there for Brown if he needed anything. Brown always knew they were there for him. (TR Vol. 850).

Rodney Gillis works for the Department of Children and Family Services. He got to know Brown's mother when he was in the Navy and stationed in Jacksonville. Mr. Gillis spent time at Ms. Brown's home and around her three children. At the time, Brown was about four or five. (TR Vol. XVIII 856).

Mr. Gillis believed that Ms. Brown's children had little adult guidance. The kids were left alone and there was no structure. (TR Vol. XVIII 857). Their older sister, who was probably 8, 9 or 10 years old at the time, cared for Brown and his sister. (TR Vol. XVIII 857).

Despite the lack of adult supervision, the kids were all good kids. He and his friends filled in where Ms. Brown did not. (TR Vol. XVIII 858). It was clear Ms. Brown was not doing what she needed to do for her children. (TR Vol. XVIII 859). Mr. Gillis believes the children were in distress. (TR Vol. XVIII 859). He

also believes that Ms. Brown let her children down. (TR Vol. XVIII 860).

Mr. Gillis fed the kids on occasion. He supplemented what was lacking as a result of Ms. Brown's parenting. (TR Vol. XVIII 860). Mr. Gillis never called the authorities to intervene. He just chipped in to help.

Brown was a happy-go-lucky kid. Mr. Gillis' friends got him involved in T-Ball and things like that. Mr. Gillis saw no other problems with Brown other than the neglect of his mother. Mr. Gillis has not seen Brown in the last 21 years. (TR Vol. XVIII 862).

Mr. Dante Ursin told the jury that he is a high school teacher. (TR Vol. XVIII 863). He and Mr. Gillis were in the Navy together. (TR Vol. XVIII 863). Mr. Ursin knew Ms. Brown through Navy friends. (TR Vol. XVIII 864).

Ms. Brown loved to party. She was in love with another sailor. That love consumed her entire being and she did not have time for her kids. (TR Vol. XVIII 865). As such, Mr. Ursin and his Navy buddies took turns stopping by the Brown house making sure the kids were fed and clothed and to provide anything else they needed. Mr. Ursin also took Thomas Brown to T-Ball.

Sometimes when Mr. Ursin would take over food, the kids acted as if they had not eaten in a while. (TR Vol. XVIII 867). The

sailors' caretaking took place over a period of two or three years. (TR Vol. XVIII 858).

Although Mr. Ursin is not a psychologist and not really trained, he perceived that Brown was a little slower and harder to understand than other kids. In Mr. Ursin's view, Brown had difficulty thinking out complex situations. (TR Vol. XVIII 869). What Brown lacked in understanding though, he absolutely made it up in love. (TR Vol. XVIII 867).

Brown was a mannerly, affectionate, and obedient child. (TR Vol. XVIII 868). Nonetheless, Mr. Ursin believes his mother's lifestyle affected him. Brown wanted to be loved. (TR Vol. XVIII 869). Mr. Ursin has not had any personal contact with Brown in the last 20 years. (TR Vol. XVIII 870).

Angelette Harley testified that she was Thomas Brown's girlfriend. (TR Vol. XVIII 911). She helped Brown get the job at Wendy's. (TR Vol. XVIII 912). She liked Brown's good looks. Brown was mannerly and very polite. (TR Vol. XVIII 912). He called her Ms. Harley when he applied for the job. Brown worked hard. He was reliable, he was always on time, and his uniform was always ironed and clean. (TR Vol. XVIII 913). Brown worked for minimum wage. (TR Vol. XVIII 914).

During the course of their relationship, Brown said "weird stuff" to her. She remembered once, that Brown's fan was making a terrible noise. When Ms. Harley said something about it, Brown

told her that, with every third click, the fan was answering a question of his. (TR Vol. XVIII 915).

Brown treated her very well. (TR Vol. XVIII 915). Even though Brown did a terrible thing, Ms. Harley stood by him. (TR Vol. XVIII 916). In the 30 days before the murder, it seemed to her that Brown was deteriorating. His hair was out and his beard was growing. (TR Vol. XVIII 918). However, when Brown came into the restaurant to shoot Juanese Miller, he was cold. (TR Vol. XVIII 917).

During cross-examination, Ms. Harley testified that prior to the murder, she had been dating Brown for 4½ months. (TR Vol. XVIII 919). She knew he was on parole. (TR Vol. XVIII 919). Through this whole thing, she has supported Brown 100%. She has visited Brown in jail and is still talking to him on the phone. (TR Vol. XVIII 921). She thinks he just "snapped" on the day of the murder. She does not see him as a bad person. Although she tried to stop Brown when he went into Wendy's, she did not think he was about to commit a crime. Brown did not seem like the type of person to pull out a gun and shoot a 22 year-old woman in the back four times. (TR Vol. XVIII 923).

Dr. Harry Krop testified that he saw Brown on five occasions. (TR Vol. XVIII 874). He administered various types of testing to assess Brown's mental state in terms of competency. (TR Vol. XVIII

875). Brown was competent to proceed. Brown was sane at the time of the murder. (TR Vol. XVIII 876).

Dr. Krop also evaluated Brown for mental retardation. He is not mentally retarded. (TR Vol. XVIII 906).[7]

Dr. Krop believes that Brown came from a pretty dysfunctional family. He did not have any positive or significant role models in his life. His mother was a major contributor to Brown's lack of emotional development. (TR Vol. XVIII 894).

Dr. Krop reviewed Brown's extensive medical records and found that Brown had been diagnosed with various mental illnesses. Brown's jail records reflected that, after his arrest, Brown was put on psychotropic medication and also given medication for depression. (TR Vol. XVIII 879). Records also reflect that Brown had some self-inflicted razor cuts and reported he was having auditory hallucinations. (TR Vol. XVIII 878).

Brown was seen as an outpatient between 1994 and 1999 and was also an inpatient for "crisis stabilization." During that time, Brown's records reflect several diagnoses including bipolar

[7] Brown was IQ tested when he was under 18 and tested at an IQ of 81 and 82. After he was arrested, he scored significantly lower, from 64-67. Dr. Krop and one other doctor believed the lowered scores were a result of Brown's "emotional issues." (TR Vol. XVIII 881). Dr Riebsame, on the other hand, thought Brown was likely malingering. (TR Vol. XVIII 881). According to Dr. Krop, Brown is in the 7th or 8th percentile in intelligence. (TR Vol. XVIII 892).

disorder, manic with psychotic features, psychotic disorder NOS, and dysthymia (serious chronic depression). When Brown was a child, he was diagnosed with oppositional defiant disorder. (TR Vol. XVIII 879).

In December 1998, Brown was evaluated by Dr. Robert Beilefeld and diagnosed with ADHD. Dr. Beilefeld described him as having paranoid distrust. Brown projects blame onto others for his own perceived mistakes and shortcomings. (TR Vol. XVIII 879). Dr. Beilefeld described Brown as having an air of pseudo-confidence or a mild bravado. (TR Vol. XVIII 879).

In September 2000, Brown was seen at the West Georgia Regional Hospital. Brown was described as having suspicious thinking and daily marijuana use. It was noted Brown had a paranoid distrust of women. It was also thought that Brown was developing paranoid personality traits and tended to blame others for his problems. (TR Vol. XVIII 879).

Dr. Krop told the jury that at times during his evaluation, Brown was exaggerating or trying to use the fact he was mentally ill to avoid responsibility. (TR Vol. XVIII 884). In Dr. Krop's view, Brown needed mental health treatment in the past. (TR Vol. XVIII 885).

Dr. Krop could not conclude that Brown had any type of organic brain damage. However, in his opinion, there certainly appears to

be some compromising in certain areas of the brain that are responsible for impulse control, judgment, planning and things like that. Dr. Krop believes there probably is some mild neuropsychological impairment. (TR Vol. XVIII 887).

When asked how Brown's mental health issues impacted his conduct on the day of the murder, Dr. Krop told the jury that Brown was hypersensitive. Dr. Krop pointed to Brown's mother as a likely source of Brown's hypersensitivity.

Around the time of the murder, Brown felt like he was being picked on. Brown liked his job at Wendy's but he perceived people were picking on him. Brown believed he was being singled out and blamed for some of the problems that were happening at Wendy's. Dr. Krop believes that Brown had a serious emotional disorder at the time of the murder that impacted his judgment, which in turn led to this tragedy. (TR Vol. XVIII 891).

Ms. Miller's derogatory rap song to Brown got to Brown's sensitivity to racial issues and not standing up. Ms. Miller's taunt reinforced his perception he was being discriminated against. (TR Vol. XVIII 892). Both Ms. Miller and Mr. Brown are African-American.

Dr. Krop testified that, in his opinion, Brown was seriously emotionally disturbed at the time of the murder. Dr. Krop testified that Brown was, however, capable of appreciating the criminality of his conduct and to conform his conduct to the

requirements of the law. (TR Vol. XVIII 893, 907). Dr. Krop believes Brown is an exceptionally immature individual and his mental age is lower than his chronological age. (TR Vol. XVIII 893).

During cross-examination, Dr. Krop told the jury that one of Brown's coping mechanisms is blaming others. Brown was able to give Dr. Krop a very detailed account of the murder. Although Brown told Dr. Krop he was hearing voices at the time, Dr. Krop does not know whether he was hearing voices. Dr. Krop does not believe the voices contributed to his behavior at the time of the murder. (TR Vol. XVIII 900). Dr. Krop did not diagnose Brown with a delusional disorder. (TR Vol. XVIII 900). At the time of the murder, Brown was dating Angelette Harley, living with his fiancée, and was arrested in a hotel where he was shacked up with a third woman. (TR Vol. XVIII 901). Dr. Krop told the jury that Brown has a significant problem controlling his temper. (TR Vol. XVIII 903).

Brown also had been diagnosed with anti-social personality disorder. (TR Vol. XVIII 904). Brown actually was referred for psychiatric treatment because Brown stabbed his sister when he was five or six years old. (TR Vol. XVIII 905). Brown also stabbed someone else during an altercation. (TR Vol. XVIII 905). Dr. Krop did not agree that Brown's history of violence was indicative of anti-social personality disorder. He did believe Brown has a history of problematic behavior. Dr. Krop told the jury that

Brown's conduct is indicative of anti-social behavior. To Dr. Krop, Brown's explosive behavior is a matter of impulse control. He admitted, however, that Brown had engaged in anti-social behavior. (TR Vol. XVIII 906).

To rebut Dr. Krop's testimony, the State called Dr. William Riebsame to the witness stand. Dr. Riebsame evaluated Brown both before and after trial. Before trial, Dr. Riebsame evaluated Brown to determine whether he is mentally retarded.

During his evaluation, Dr. Riebsame reviewed hundreds of pages of records, including psychiatric records, medical records, school records, and records from the Georgia Department of Corrections. (TR Vol. XVIII 928). Dr. Riebsame also reviewed Dr. Krop's testing. (TR Vol. XIX 932).

Dr. Riebsame told the jury that Brown's school records reflect that on two separate IQ tests administered by school psychologists, Brown scored in the low average range of IQ. (TR Vol. XIX 932). Brown's significantly poorer performance on post-arrest assessments points strongly in the direction of faking bad, malingering, and exaggerating the psychopathology. (TR Vol. XIX 936-937).

In Dr. Riebsame's opinion, Brown is not mentally retarded. (TR Vol. XIX 936). Brown is well-spoken, had more than an adequate vocabulary, and presented himself in a neat organized manner. Brown talked about his work history and his history within the jail

system in a manner that reflected knowledge and comprehension. (TR Vol. XIX 936). Brown speaks coherently and logically. He writes very well and is articulate. (TR Vol. XIX 942).

After Brown was convicted, Dr. Riebsame was given access to even more material with which to evaluate Brown. Dr. Riebsame reviewed volumes of materials focusing on Brown's mental health history from childhood forward, material from Dr. Krop, correspondence from Dr. Krop to Brown's attorney as to his opinion about the case, and Dr. Krop's notes that he had taken during his interview of the defendant. (TR Vol. XIX 940).

Dr. Riebsame believes Brown has a depressive disorder and a psychotic disorder, NOS. (TR Vol. XIX 937). Brown's records reflected that Brown reported hearing voices and responded to voices. Dr. Riebsame did not see that happening during his interview with Brown, but Brown did describe them. (TR Vol. XIX 937).

During Dr. Riebsame's interview with Brown, after the guilt phase of the trial had been completed, Brown claimed no memory of the murder. However, Brown had a very detailed memory of the shooting when he spoke with Dr. Krop. (TR Vol. XIX 943).

Dr. Riebsame told the jury that Brown suggested that one of his four personalities assumed control of his behavior at the time of the murder. Brown claimed the "take-over" was the reason why he had no memory of the murder. (TR Vol. XIX 943).

Brown told both Dr. Krop and Dr. Riebsame about his multiple personalities. Brown could not keep his story straight when he did so, however, as Brown conflated the "violent" personalities between the two interviews. With Dr. Krop, Brown alleged that one of his personalities, "Jason" was destructive, violent, and aggressive. To Dr. Riebsame, Brown described "Jason" as a good guy. Brown explained to Dr. Riebsame that his dark side, named "Knight," was responsible for the shooting. (TR Vol. XIX 945). Brown also described another personality that he called "Firo" in two separate ways to Dr. Krop and Dr. Riebsame. (TR Vol. XIX 945).

In Dr. Riebsame's opinion, Brown is exaggerating psychiatric problems. (TR Vol. XIX 946). Brown has had emotional and behavioral problems; that is clear from his history. Dr. Riebsame believes, however, that Brown is exaggerating them in order to sidestep some responsibility for the murder. (TR Vol. XIX 946).

Dr. Riebsame testified that Brown's personality contributed to the crime. Specifically, Brown's sensitivity to criticism, the resentfulness, the jealousy, the quick to anger, is all there with Brown at the time of the murder. In Dr. Riebsame's view, however, Brown was controlling his own actions around the time of the murder. (TR Vol. XIX 946-947). Brown was living with his mother, he has a couple of different girlfriends, he is employed full time, he is able to pay his bills, he has a vehicle of his own, he is performing in certain clubs around town, is going on social outings

with friends and is not having difficulty with the police. Brown told Dr. Riebsame that he had lessened, or stopped altogether, using marijuana because he doesn't want to get a positive test while on parole. (TR Vol. XIX 947).

Dr. Riebsame told the jury that Brown is anti-social. (TR Vol. XIX 947). Brown has an impulse control disorder. Brown understands the difference between right and wrong and decides to do wrong. He won't, however, admit to his responsibility for his actions. (TR Vol. XIX 948).

Prior to the murder, Brown had a conversation with his mother. Brown's mother called the restaurant and warned them not to let him in. Dr. Riebsame described Brown's state of mind. Dr. Riebsame told the jury that Brown was aware of what he was doing. He planned his getaway. Even so, Brown is very, very angry and he may be feeling sorry for himself as well. Brown is going to take out some sort of vindictive action against someone who is responsible for this and he shoots Ms. Miller. (TR Vol. XIX 951).

Dr. Riebsame does not believe that Brown was suffering from any kind of psychotic symptoms at the time of the murder. (TR Vol. XIX 951). Dr. Riebsame testified that, in his opinion, Brown was able to appreciate the criminality of his conduct, conform his conduct to the requirements of the law, and to stop himself from committing the crime. He had time to do so and chose not to stop. (TR Vol. XIX 952). While there is mental illness and a mental

health history in Brown's case, Brown's emotional behavior problems were not what was steering Mr. Brown's decision making and behavior at the time of the murder. (TR Vol. XIX 952).

SUMMARY OF THE ARGUMENT

Claim I: In this claim, Brown claims there is insufficient evidence to support the CCP aggravator. The state disagrees. Brown's primary argument rests on the notion he was provoked by the victim's behavior toward him. However, the conflict that arose between Brown and Ms. Miller occurred three full days before the murder. Any notion that Brown was acting in a fit of rage is refuted by the passage of time between the alleged provocation and the murder.

In addition to provocation, Brown claims his history of mental illness negates CCP. However, both the defense expert and the State's expert testified that Brown's capacity to appreciate the criminality of his conduct and to conform his conduct to the requirements of the law were unimpaired.

The evidence proved that Brown coldly gunned down Miller with calculation and heightened premeditation. There was sufficient evidence to support the CCP aggravator and this Court should affirm.

Claim II: In this claim, Brown avers his sentence to death is disproportionate. Cases from this Court support a conclusion that

Brown's sentence to death is proportionate and the cases to which Brown cites are distinguishable.

Claim III: In this claim, Brown avers that the trial judge impermissibly instructed the jury that its role was to recommend a sentence and that the trial judge would make the final decision. Brown claims the court's instructions violate the dictates of Caldwell v. Mississippi, 472 U.S. 320 (1985). This Court has repeatedly rejected the same claim that Brown makes here. Moreover, this Court has consistently held that Florida's standard jury instructions accurately advise the jury of its role in Florida's sentencing scheme and does nothing to diminish the jury's sense of responsibility in fulfilling their role.

Claim IV: In this claim, Brown claims his sentence to death is unconstitutional under Ring v. Arizona. At the time of the murder, Brown had previously been convicted of a violent felony and was under a sentence of imprisonment. This Court has repeatedly rejected Ring claims when the defendant has previously been convicted of a violent felony and was under a sentence of imprisonment.

CLAIM V: In this claim, Brown alleges the trial judge erred in precluding diminished capacity testimony. This claim can be denied on three grounds. First, the error was not preserved. Brown failed to proffer any actual evidence that his alleged diminished capacity negated his ability to premeditate. Failure to proffer

the evidence means Brown failed to preserve the issue for appeal. Second, this Court has consistently ruled that diminished capacity evidence, in the absence of insanity, is not admissible. In accord with this Court's well-established precedent, the trial judge committed no error. Finally, any error is harmless because neither expert opined, when they testified during the penalty phase, that Brown's capacity to premeditate was diminished. Indeed, both experts agreed that Brown's capacity to appreciate the criminality of his conduct and to conform his conduct to the requirements of the law were unimpaired.

ARGUMENT

CLAIM I

WHETHER THERE IS SUFFICIENT EVIENCE TO SUPPORT THE TRIAL JUDGE'S FINDING THE MURDER WAS COLD, CALCULATED, AND PREMEDITATED (CCP)[8]

In his first claim, Brown alleges there is insufficient evidence to support the CCP aggravator. The standard of review is competent, substantial evidence. Guardado v. State, 965 So.2d 108, 115 (Fla. 2007).

When applying a competent, substantial evidence standard of review, it is not this Court's function to reweigh the evidence to determine whether the State proved the aggravator beyond a

[8] In the supplemental record on appeal, the sentencing order is out of page order. Pages 10 and 11, which appear, at first glance, to be missing from the sentencing order, can be found at pages 24 and 25 of the supplemental record after the sentencing order's signature page.

reasonable doubt. Nor is it appropriate to consider whether the evidence might support an alternate view of the case. Instead, on appeal, this Court reviews the record to determine whether the trial court applied the right rule of law and if so, whether competent substantial evidence supports its finding. If the trial court's finding is supported by competent substantial evidence, this Court must affirm. Aguirre-Jarquin v. State, 9 So.3d 593, 608 (Fla. 2009).

In finding the CCP aggravator, the trial court found (footnotes omitted):

> ...The state must prove the following to establish this aggravating circumstance: 1) the killing was the product of cool and calm reflection rather than an act prompted by emotional frenzy, panic, or fit of rage (cold); 2) the defendant had a careful plan or prearranged design to commit murder before the fatal incident (calculated); 3) the defendant exhibited heightened premeditation (premeditated) and 4) the defendant had no pretense of moral or legal justification. Jackson v. State, 648 So.2d 85, 89-90 (Fla. 1994). This aggravating factor can be "indicated by circumstances showing such facts as advance procurement of a weapon, lack of resistance or provocation and the appearance of a killing carried out as a matter of course." Swafford v. State, 533 So.2d 270, 277 (Fla. 1988).
>
> Several aspects of this case, *sub judice,* support a finding beyond a reasonable doubt that the murder of Juanese Miller was cold, calculated, and premeditated:
>
> 1) The ongoing dispute between Ms. Miller and the Defendant that began in earnest on June 14, 2009, provided ample time for reflections, planning and premeditation. At a minimum, even if the defendant decided to commit the murder on June 18, 2009, approximately one hour passed from the time the

defendant left Wendy's, returned armed and committed the murder;

2) After arriving at the Wendy's at the time of the murder, the Defendant exited his car, pushed past his girlfriend and manager, Angelette Hartley, after inquiring as to Mike Enami's whereabouts, stated "I am done talking" walked inside Wendy's, did not see Mike Enami, left the store, got into his car and began backing out, only to abruptly stop the car, get out, and walk back inside of the Wendy's shooting and killing Ms. Miller;

3) Angelette Hartley described the Defendant's demeanor as "cold" when he walked back inside Wendy's to commit the murder;

4) The defendant entered the Wendy's on June 18, 2009, with a .40 caliber semi-automatic handgun (advance procurement of the weapon);

5) Although the Wendy's was full of employees and patrons, the Defendant singled out Ms. Miller;

6) The .40 caliber handgun was hidden in the waistband of the Defendant's pants and was not retrieved by the Defendant until he got within a few feet of Ms. Miller;

7) There were no reported problems or disputes between Ms. Miller and the Defendant on the day of the murder, although they had worked together that morning (lack of provocation);

8) The .40 caliber handgun was loaded and ready to fire prior to the defendant returning back inside of the Wendy's;

9) The Defendant fired all four shorts into the back of Ms. Miller (lack of resistance);

10) After firing three shots into Ms. Miller's back, the Defendant walked away from Ms. Miller's body (located at the counter where customer's approach to purchase food), walked to the exit of the Wendy's, began to leave, but then returned to fire a final shot into the back of Ms. Miller's head.

11) The Defendant stated to Ms. Miller just prior to firing the last shot; “I told you I would kill you, you fucking bitch;”

12) The day following Ms. Miller’s murder, the Defendant handwrote the following statements into his journal; “I just offed a bitch because she was the cause of my life being fucked up this time. If she ain’t dead, then she will learn how serous (sic) words can be. I wanted ‘mike the owner’ to be there, but I guess it ain’t his time yet.” While the defense argues the journal is merely evidence of post-meditation, the Court found it illuminating as to the Defendant’s thoughts prior to committing the murder of Juanese Miller.

While it does not appear that Ms. Miller was the intended target of the defendant when he arrived at Wendy’s, this does not prevent the Court from finding the Defendant’s murder of Juanese Miller was cold, calculated, and premeditated. Provenzano v. State, 497 So.2d 1177, 1183 (Fla. 1986) (holding that the heightened premeditation necessary for the CCP circumstance does not have to be directed toward a specific victim and that the focus of the CCP aggravator is the manner of killing, not the target. Diaz v. State, 860 So.2d 960, 969 (Fla. 2003).

In addition, the finding by this Court, *infra*, that the Defense presented evidence the murder was committed while the Defendant was under the influence of extreme mental or emotional disturbance does not prevent the Court from finding the murder was cold, calculated, and premeditated. Evans v. State, 800 So.2d 182, 192-193 (Fla. 2010) (holding that “While the events leading up to the murder may have made Evans emotionally charged, his actions do not suggest a frenzied, spur of the moment attack.”). Finally, and in need of no further commentary, the Court finds that nothing Juanese Miller did would provide a legal or moral basis for the Defendant’s crime in this particular case. This aggravating circumstance has been given great weight in determining the appropriate sentence to be imposed.

(TR Supp, 9, 24-25, 10).

The CCP aggravator has four components. First, the murder must have been "cold," in the sense that the killing was "the product of cool and calm reflection and not an act prompted by emotional frenzy, panic, or a fit of rage." Lynch v. State, 841 So.2d 362, 371 (Fla. 2003). The "cold" element "generally has been found wanting only for 'heated' murders of passion, in which the loss of emotional control is evident from the facts." Walls v. State, 641 So.2d 381, 387–88 (Fla. 1994). An execution style killing is by its very nature a "cold" murder. Lynch, 841 So.2d at 372.

Second, the murder must be "calculated." In order to meet the calculated element of CCP, the defendant must have had a careful plan or prearranged design to commit murder before the fatal incident." Lynch, 841 So.2d at 371. In finding a murder to be calculated, this Court has considered evidence the defendant armed himself in advance, killed without provocation or resistance, killed the victim execution style, and killed the victim as a matter of course. Lynch v. State, 841 So.2d 362, 372 (Fla. 2003). *See* also Wright v. State, 19 So.3d 277, 299 (Fla. 2009). The State need not present evidence that a defendant planned the murder, days or even hours before the murder. The CCP aggravator is present even when the decision to kill occurs within minutes of the murder. *See* Durocher v. State, 596 So.2d 997 (Fla. 1992)(affirming the trial court's finding of CCP where only a few minutes passed

between the defendant's decision to merely rob the store and his decision to shoot the clerk).

Third, the State must prove the murder was committed with a heightened premeditation. To prove the element of heightened premeditation, the evidence must show that the defendant had a careful plan or prearranged design to kill. Heightened premeditation exists where the defendant has the opportunity to leave the crime scene with the victim alive, but instead commits the murder. Wright v. State, 19 So.3d 277, 300 (Fla. 2009).

Finally, the murder must have been committed without any pretense of moral or legal justification. Lynch v. State, 841 So.2d 362, 371 (Fla. 2003). "[A] pretense of moral or legal justification is any colorable claim based at least partly on uncontroverted and believable factual evidence or testimony that, but for its incompleteness, would constitute an excuse, justification, or defense as to the homicide." Walls v. State, 641 So.2d 381, 388 (Fla. 1994).[9]

Each of these four components of the CCP aggravator is supported by competent substantial evidence. Contrary to Brown's suggestion, the evidence in this case was more than sufficient to support the CCP aggravator.

[9] Brown does not claim the State failed to prove this last component of CCP.

Brown's argument rests on two primary assertions. First, Brown claims the "cold" element of CCP was not proven because he was really angry when he shot Ms. Miller. According to Brown, his "rage" defeats the cold element of CCP because Ms. Miller "provoked" him when she poured ice and salt down his back and then taunted him by calling him a demeaning name. (IB 24).

CCP is not defeated because the defendant is angry at someone or wishes to exact revenge on someone he believes has disrespected him. There is a huge difference between being angry and revengeful and being in the throes of a near uncontrollable fit of rage at the time of the murder. *See generally* Gill v. State, 14 So.3d 946 (Fla. 2009). Although Brown claims that Miller provoked him by pouring ice and salt down his back and by calling him names, the evidence in the case demonstrated the "ice and salt" incident and Ms. Miller's subsequent name calling last occurred three days before the murder. Indeed, on the day of the murder, no one saw or heard Miller and Brown have any sort of conflict, although they were working in close proximity to each other.

This is not a case where Brown and Miller got into a heated argument and Brown, being hypersensitive, pulled out a gun he was carrying and shot her on the spot. Instead, days after their workplace conflict, Brown walked up to Ms. Miller, whose back was turned, pulled out a gun he had earlier concealed under his shirt and, without a word, shot her in the back. Only after shooting Ms.

Miller three times, did Brown say to her that he had accomplished that which he had promised ("I told you I would kill you, you fucking bitch."). After that, Brown shot Ms. Miller execution style in the back of the head. Brown's own girlfriend described Brown's demeanor as "cold." There is competent substantial evidence to support a conclusion the murder was sufficiently cold to warrant a finding the murder was CCP.

Brown's second assertion is that the murder was devoid of calculation and heightened premeditation. Brown points to various things that, in his mind, defeat calculation and heightened premeditation. (IB 24-31). However, as noted above, the fact the defendant can point to contrary views of the evidence does not defeat an aggravator. Instead, the relevant question is whether there is competent substantial evidence to support the aggravator.

In this case, Brown left Wendy's restaurant and returned 45 minutes to an hour later. In the meantime, Brown armed himself with a .40 caliber handgun and concealed it under his shirt.

Even assuming that Brown did not decide to kill Miller until Brown first got into his car to leave after being told that Mike Enami was not at the restaurant, both the calculated and heightened premeditation element was satisfied in those minutes when Brown had the opportunity to leave the Wendy's parking lot but did not. Instead of leaving, Brown stopped his car, got out, walked back through the door into the Wendy's restaurant, walked right up to

where Miller was standing with her back turned to him, pulled the gun out from where it was concealed, and shot Miller three times. Additionally, after starting to leave, Brown turned and walked back to Miller, told her that he had fulfilled his promise to kill her, and shot her again.[10] Miller offered no contemporaneous provocation and certainly no resistance. Brown's actions support the trial judge's finding the murder was CCP. *See* Durocher v. State, 596 So.2d 997 (Fla. 1992)(affirming the trial court's finding of CCP where only a few minutes passed between the defendant's decision to merely rob the store and his decision to shoot the clerk).

This Court should reject any notion that Brown's mental health history or low IQ defeats CCP in this case. Nor should the fact the trial court found that Brown was under an extreme mental or emotional disturbance negate CCP. This Court has, on many occasions, held a defendant can be mentally ill or emotionally and mentally disturbed but still have the ability to experience cool and calm reflection, make a careful plan or prearranged design to commit murder, and exhibit heightened premeditation. Kopsho v. State, 84 So.3d 204 (Fla. 2012). Evans v. State, 800 So.2d 182, 193 (Fla. 2001); *see also* Owen v. State, 862 So.2d 687, 701 (Fla.

[10] Brown claims there was no evidence that Brown ever told Miller, prior to the murder, that he would kill her. (IB 26). The State disagrees. Brown's own statement that "I told you I would kill you…" is evidence that he had previously told her he would kill her.

2003)(relying on Evans to reject defendant's claim that his mental illness must negate the CCP aggravator).

In this case, both Brown's mental health expert and the State's mental health expert testified that Brown was able to appreciate the criminality of his conduct and to conform his conduct to the requirements of the law. (TR Vol. XVIII 893, 907: XIX 952). Dr. Riebsame testified that Brown had time to stop himself from committing the crime but chose not to stop. (TR Vol. XIX 952). Dr. Riebsame also told the jury that while there is mental illness and a mental health history in Brown's case, Brown's emotional behavior problems are not what was steering Mr. Brown's decision making and behavior at the time of the murder. (TR Vol. XIX 952).

There is competent substantial evidence to support the trial court's conclusion the murder was CCP. This Court should reject Brown's first claim on appeal.

CLAIM II

WHETHER BROWN'S SENTENCE TO DEATH IS PROPORTIONATE

In this claim, Brown alleges his sentence to death is disproportionate because Miller's murder was "an intensely

emotional, spur-of-the-moment, almost accidental violent encounter." (IB 36).[11] The State disagrees.

In this case, the trial judge found three aggravators to exist: (1) the murder was CCP; (2) Brown had previously been convicted of a violent felony (robbery with a firearm); and (3) at the time of the murder, Brown was under a sentence of imprisonment. The trial court gave great weight to each of the three aggravators. (TR Vol. XI 1801-1803).

The trial court found and weighed two statutory mitigators: (1) at the time of the murder, the defendant was under the influence of an extreme emotional disturbance (some weight) and (2) age (slight weight) (TR Vol. XI 1804-1809). The trial court also considered and weighed several non-statutory mitigators suggested by the defendant: (1) the defendant experienced a difficult childhood, including but not limited to, a lack of parental guidance as a child (some weight); (2) the defendant has a borderline IQ (some weight); (3) the defendant admitted culpability for the murder of Juanese Miller (no weight); (4) appropriate

[11] It defies law and logic to suggest a murder is "almost accidental" when: (1) there was no confrontation between the defendant and the victim on the day of the murder; (2) the defendant left the location where the victim was working and returned some time later armed with a firearm; (3) Brown walked up to the victim whose back was turned and fired four shots into the back of her body and head; and (4) as Brown fires a last shot into the victim, Brown stated "I told you I would kill you, bitch." (TR Vol. XVI 502, 516, 518, 542).

courtroom behavior (no weight); (5) the defendant offered to plead guilty before trial (little weight); (6) the defendant suffers from a mental illness (some weight); (7) a kind of catch-all including a finding the victim did not suffer (little weight). (TR Vol. XI 1809-1815).[12]

In arguing his sentence to death is not proportionate, Brown cites to several cases from this Court. Each is distinguishable from the case at bar.

First, Brown cites this Court to Crook v. State, 908 So.2d 350 (Fla. 2005). In Crook, the defendant raped, robbed, and killed 59

[12] Before looking at case law, it is important to wipe clear the lens through which Brown ask this Court to look. For the most part, Brown blames the victim for the murder. For instance, Brown notes that on the Sunday before the murder, the victim, "for no apparent reason" poured ice water and salt down his back. Brown also alleges the victim "repeatedly" would walk past him and use derogatory and racially inflammatory language toward him from a rap song. (IB 4). Later, Brown observes that the victim played a childish prank and used insulting words toward him. The record supports Brown's claim that Ms. Miller poured ice and salt down his back at work and called him an insulting name. However, throughout his initial brief, Brown implies that the victim subjected him to a constant reign of terror. The record does not support such an inference. Rakeziah Williams testified that it was her impression that the "ice and salt" incident came about when Miller was playing with ice and salt. (TR Vol. XV 348). Additionally, the name calling incident occurred at the same time both Miller and Brown were called onto the carpet as a result of the ice and salt incident. Ms. Williams told the jury that it was just before a meeting where both the victim and Brown would be reprimanded for the ice and salt incident, that Ms. Miller walked by Brown "rapping" a song which contained derogatory and insulting language. However, between Monday, the day of the meeting and Thursday, the day of the murder, no one saw any type of conflict between Brown and Miller. (TR Vol. XV 352-353, 385; TR Vol. XVI 450).

year old Betty Spurlock. In its sentencing order, the trial court found three aggravating circumstances: (1) the capital felony occurred during the commission of a sexual battery; (2) the capital felony was committed for pecuniary gain; and (3) the capital felony was especially heinous, atrocious, or cruel ("HAC"). The trial court also found three statutory mitigating circumstances including the two statutory mental mitigators: (1) Crook was twenty years old at the time of the offense (slight weight); (2) the capital felony was committed while Crook was under the influence of an extreme mental or emotional disturbance (moderate weight); and (3) Crook's capacity to appreciate the criminality of his conduct or to conform his conduct to the requirements of the law was substantially impaired (moderate weight). The trial court also considered and weighed seventeen non-statutory mitigators, including evidence of Crook's low IQ amounting to borderline mentally retardation, learning disabilities, and a terrible and unstable home life.

Crook is distinguishable. Of particular import to this Court, in reducing Crook's death sentence to life was evidence Crook was brain damaged and that his brain damage had a direct nexus to the crime. Crook v. State, 813 So.2d 68, 75-76 (Fla. 2002). In Crook, there was unrefuted evidence of frontal lobe brain damage that was directly linked to the crime as well as evidence that Crook was borderline mentally retarded.

In this case, Dr. Krop could not conclude Brown actually has organic brain damage.[13] Moreover, Brown is not borderline mentally retarded. Instead, Brown is in the low average range of intelligence. (TR Vol. XIX 932). This Court should reject any notion that Crook is a good comparator case upon which this Court should rely to set aside Brown's sentence to death.

Brown next cites to Ross v. State, 474 So.2d 1170 (Fla. 1985). In Ross, the defendant killed his wife in, what this Court viewed as, "an angry domestic dispute." Ross was also drinking at the time of the murder and no prior history of violence. Ross, 474 So.2d at 1174. Ross is distinguishable.

In Ross, this Court found, essentially, that Ross killed his wife in the emotion of an on-going argument. In this case, the argument between Miller and Brown had been over for days. There can be no claim that Brown killed Miller in the heat of an on-going argument. Moreover, unlike Mr. Ross, Brown had not been drinking at the time of the murder. Finally, Brown did have a history of violence. Indeed, Brown had previously been convicted of another violent felony. Ross is not a case to which this Court should look in deciding whether Brown's sentence to death is proportionate.

[13] The best Dr. Krop could say is that there probably is some mild neuropsychological impairment. (TR Vol. XVIII 887).

Brown also points to Robertson v. State, 699 So.2d 1343 (Fla. 1993). Brown claims Robertson is good comparator case to the one at bar. The State disagrees.

Robertson murdered Carmella Fuce in September 1991. In aggravation, the trial court found: (1) the murder was committed in the course of a burglary; and (2) the murder was HAC. In mitigation, the trial court found Robertson's age of nineteen and impaired capacity due to drug and alcohol use. The court also found, in non-statutory mitigation, Robertson's abused and deprived childhood, his history of mental illness and his borderline functional intelligence.

This Court found Robertson's sentence to death disproportionate. Of particular import to this Court was that the murder was "an unplanned, senseless murder committed by a nineteen-year-old, with a long history of mental illness, who was under the influence of alcohol and drugs at the time." Robertson v. State, 699 So.2d 1343, 1347 (Fla. 1997).[14]

In this case, Brown was stone cold sober when he killed Ms. Brown. Additionally, Brown was significantly older than Robertson. Unlike Mr. Robertson, Brown had, at the time of the murder, been previously convicted of a violent felony and was under a sentence of imprisonment at the time of the murder. Robertson is not a case

[14] Robertson had also been institutionalized several times and believed to be schizophrenic.

to which this Court should look in considering whether Brown's sentence to death is proportionate.

Brown next asks this Court to look at this Court's decision in Farinas v. State, 569 So.2d 425 (Fla. 1990). In Farinas, the defendant shot to death his ex-girlfriend, with whom he had had a contentious break-up, and with whom he was obsessed. In sentencing Farinas to death, the trial judge found the following aggravating circumstances to be applicable: (1) the capital felony was committed while the defendant was engaged in the commission of kidnapping; (2) the capital felony was especially heinous, atrocious, or cruel; and (3) the capital felony was committed in a cold, calculated, and premeditated manner without any pretense of moral or legal justification. In mitigation, the trial court found that while Farinas was under the influence of a mental or emotional disturbance, it was not of such a nature or degree as to be considered extreme. The trial court also found that although Farinas' capacity to appreciate the criminality of his conduct and to conform his conduct to the requirements of the law was impaired, the impairment was not of such a nature or degree as to be considered total or substantial. Striking the CCP aggravator, this Court found Farinas' sentence to death disproportionate. Farinas v. State, 569 So.2d at 431.

Farinas is not a good comparator case. In Farinas, this Court's decision turned on its conclusion that the murder was

precipitated by an obsessive and jealous rage caused by Farinas' belief the victim was seeing another man. Of particular concern to this Court was that the murder was committed in the course of a "heated domestic confrontation." Id.

Brown did not kill Miller in a heated domestic confrontation. Indeed, on the day of the murder, there was no confrontation at all. Instead, Brown procured a firearm, walked up to Miller, who never saw him coming, and shot her in the back and head four times. This case is not the least bit like Farinas and this Court should reject any notion that Farinas is a good comparator case.

Finally, Brown invites this Court to rely on this Court's decision in White v. State, 616 So.2d 21 (Fla. 1993) to find Brown's death sentence disproportionate. This Court should decline the invitation.

White is a one aggravator case; a prior violent felony committed, against the same victim, three days before the murder. The victim was White's former girlfriend. White was high on cocaine at the time of the murder. Both mental mitigators were found and this Court found White's sentence to death disproportionate.

Although all of the cases to which Brown cites are distinguishable, there are at least two cases from this Court, which support a conclusion that Brown's sentence to death is proportionate. In Diaz v. State, 860 So.2d 960 (Fla. 2003), the

defendant killed the father (his substitute victim) of his former girlfriend when she escaped from his attempt to murder her. After the murder, Diaz told his girlfriend's mother "If that bitch of a daughter of yours, if I could have got her, I wouldn't have had to kill your husband." Diaz v. State, 860 So.2d at 964.

The trial court found three aggravators. The trial court found: (1) the capital felony was especially heinous, atrocious, or cruel (HAC) (great weight); (2) the capital felony was committed in a cold, calculated, and premeditated manner without any pretense of moral or legal justification (CCP) (great weight); and (3) the defendant was previously convicted of another capital felony or of a felony involving use or threat of violence to the person (great weight). This Court struck the HAC aggravator, leaving only CCP and prior violent felony to consider when conducting its proportionality review. Diaz v. State, 860 So.2d 960, 968 (Fla. 2003).

The trial court found four statutory mitigators: (1) the defendant had no significant history of prior criminal activity (very little weight); (2) the murder was committed while the defendant was under the influence of extreme mental or emotional disturbance (moderate weight); (3) the capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was substantially impaired (very little weight); and (4) the age of the defendant at the time of the crime

(moderate weight). In non-statutory mitigation, the trial court found: (1) the defendant was remorseful (very little weight); and (2) the defendant's family had a history of violence (moderate weight).

Diaz is a good comparator case. In Diaz, the court found four statutory mitigtors, including that Diaz had no significant criminal history. Likewise, in Diaz the court found a non-statutory mitigator upon Diaz's history. This Court found Diaz's sentence to death proportionate. In doing so, this Court rejected Diaz's allegation that his sentence to death was disproportionate because the murder was of a "heated and emotional nature." This Court can look to Diaz to find Brown's sentence to death proportionate.

In Jackson v. State, 25 So.3d 518 (Fla. 2009), the 30 year old defendant kidnapped and then killed the victim in retribution for her actions in stealing drugs and money from him. The trial court found three aggravators: (1) prior violent felony; (2) the murder was committed in the course of a kidnapping; and (3) CCP. Although the trial court did not find any statutory mitigation, the court found 12 non-statutory mitigators including that Jackson had a history of mental health issues including a diagnosis of bipolar disorder and that Jackson had been involuntarily hospitalized for several years in mental health hospitals. The trial court also found in mitigation that Jackson had been both abandoned and

severely abused as a child. This Court found Jackson's sentence to death proportionate. Jackson, 25 So.3d at 535.

While Jackson and this case are not on all fours with each other, they are sufficiently comparable to make Jackson a good comparator case. Jackson and Brown both killed their victims in retaliation for a perceived wrong. Both were close in age to each other (30 and 27 respectively). Both Jackson and Brown had a mental health history that included a major mental illness diagnosis and a history of mental health in-patient treatment. While Jackson did not have a low IQ as did Brown, both shared a difficult childhood. Jackson's childhood was so traumatic he attempted suicide at the age of eight. Too, while Jackson was severely abused and neglected, Brown was neglected. This Court can look to Jackson to find Brown's sentence to death proportionate. *See* also Mungin v. State, 689 So.2d 1026 (Fla. 1997); Pope v. State, 679 So.2d 710 (Fla. 1996)(death sentence proportionate with prior violent felony aggravator and pecuniary gain aggravator, statutory mitigators of mental or emotional disturbance at the time of the crime and impaired capacity to appreciate the criminality of conduct or to conform conduct to the requirements of the law, and non-statutory mitigators including that defendant was intoxicated and was under the influence of mental or emotional disturbance).

CLAIM III

WHETHER FLORIDA'S STANDARD JURY INSTRUCTIONS VIOLATE THE DICTATES OF CALDWELL V. MISSISSIPI

In this claim, Brown alleges the trial judge's instructions to the jury violated the dictates of Caldwell v. Mississippi, 472 U.S. 320 (1985). In particular, Brown complains that the trial court "repeatedly" advised the jury that it was to make a recommendation as to the sentence the court should impose and instructed the jury that its role is advisory.

In this case, the trial court instructed the jury in accord with Florida's standard jury instructions. The trial court also instructed the jury that it was required to give its recommendation great weight and that only in rare circumstances would it impose a sentence other than the sentence it recommended.

This Court has consistently ruled Florida's standard jury instructions do not run afoul of the dictates of Caldwell v. Mississppi. *See* Chavez v. State, 12 So.3d 199, 214 (Fla. 2009). Indeed, this Court has held that informing the jury its recommended sentence is advisory is a correct statement that does not violate Caldwell. Rigterink v. State, 66 So.3d 866, 897 (Fla. 2011); Combs v. State, 525 So.2d 853, 855–58 (Fla. 1988). In accord with well established precedent, this Court should reject Brown's third claim on appeal.

CLAIM IV

WHETHER BROWN'S SENTENCE TO DEATH VIOLATE THE DICTATES OF RING V. ARIZONA

In this claim, Brown argues his sentence to death is unconstitutional pursuant to Ring v. Arizona, 536 U.S. 584 (2002). Brown avers, "bluntly" that this Court wrongly decided Bottoson v. Moore, 833 So.2d 693 (Fla. 2002) and King v. Moore, 831 So.2d 143 (Fla. 2002). Brown also acknowledges the precedent weighing against this claim. Brown requests this Court to recede from those decisions.

This Court should reject any notion that Brown's sentence to death is unconstitutional under Ring. Among the aggravators found to exist in this case was that Brown had previously been convicted of a violent felony. Additionally, Brown was under a sentence of imprisonment at the time of the murder.

Well after Bottoson and King were decided, this Court has consistently ruled that Ring will not disturb a capital defendant's sentence to death when a defendant was under a sentence of imprisonment as a result of a prior felony conviction and had been previously convicted of a violent felony. Kopsho v. State, 84 So.3d 204 (Fla. 2012)(noting that this Court has rejected Ring claims where the prior violent felony aggravator is present); Hodges v. State, 55 So.3d 515, 540 (Fla. 2010)(Ring does not apply to cases where the prior violent felony aggravator exists); Duest v. State,

855 So.2d 33, 49 (Fla. 2003)("We have previously rejected claims under Apprendi and Ring in cases involving the aggravating factor of a previous conviction of a felony involving violence."); Allen v. State, 854 So.2d 1255 (Fla. 2003)(Ring will not act to disturb death sentence when one of the aggravating factors in this case was that the murder was committed while Allen was under a sentence of imprisonment. Such an aggravator need not be found by the jury). In accord with this Court's well-established precedent, Brown's fourth claim on appeal should be denied.

CLAIM V

WHETHER THE TRIAL JUDGE ERRED IN GRANTING THE STATE'S MOTION IN LIMINE PRECLUDING THE DEFENSE FROM INTRODUCING DIMINISHED CAPACITY EVIDENCE DURING THE GUILT PHASE OF BROWN'S CAPITAL TRIAL

In this claim, Brown avers the trial judge erred in precluding him from offering evidence of diminished capacity, through the testimony of a mental health expert, during the guilt phase of Brown's capital trial. The standard of review is an abuse of discretion. Ray v. State, 755 So.2d 604, 610 (Fla. 2000).

This issue arose when shortly before trial when, on May 19, 2011, the State filed a motion in *limine* seeking a ruling prohibiting the defendant from offering a diminished capacity defense. The State noted, in its motion, that Brown had not filed a notice of intent to rely on an insanity defense. The State pointed out, that in accord with this Court's decision in Chestnut v. State, 538 So.2d 820 (Fla. 1989), evidence of Brown's alleged

diminished capacity was not admissible during the guilt phase of Brown's capital trial. (TR Vol. V 667).

On the same day, the court held a hearing on the motion. (TR Vol. XIII 2125-2130). After hearing argument from both sides, the trial court granted the State's motion. (TR Vol. XIII 2130). Although prohibiting Brown from introducing evidence to support a diminished capacity defense, the court ruled the defendant could elicit testimony from witnesses as to what they saw on the day of the murder. (TR Vol. XIII 2130). The trial judge also offered to revisit her ruling if, during the trial, something occurred that would render the defendant's mental condition admissible. (TR Vol. XIII 2130).

This claim may be denied for three reasons. First, the error is not preserved. Brown never proffered the evidence that would support his alleged diminished capacity defense. Although Brown did offer mental mitigation, Brown never proffered evidence that Brown's mental health actually prevented him from premeditating the murder of Juanese Miller. Indeed, Drs. Krop and Riebsame both agreed that, at the time of the murder Brown was able to appreciate the criminality of his conduct and to conform his conduct to the requirements of the law. (TR Vol. XVIII 893, 907: XIX 952). In order to preserve a claim the trial judge wrongly refused to admit evidence, the complaining party must proffer the excluded evidence

to the trial judge. Failure to do so means this error is not preserved. Baker v. State, 71 So.3d 802, 816 (Fla. 2011).

This claim may also be denied because the trial judge correctly followed this Court's precedent in excluding "diminished capacity" evidence, during the guilt phase of Brown's capital trial. In Chestnut v. State, 538 So.2d 820 (Fla. 1989), this Court ruled that evidence of a defendant's diminished capacity, not rising to the level of insanity, is not admissible to negate premeditation. In the twenty plus years since Chestnut was decided, this Court has consistently ruled that diminished capacity is not a recognized defense and that, as such, evidence of a defendant's diminished capacity, in the absence of insanity, is inadmissible. Brown has offered no good reason for this Court to recede from years of precedent. *See* Nelson v. State, 43 So.3d 20, 30-31 (Fla. 2010); Hodges v. State, 885 So.2d 338, 352 n.8 (Fla. 2004)(noting that this Court has held on numerous occasions that evidence of an abnormal mental condition not constituting legal insanity is inadmissible to negate specific intent); Jones v. State, 845 So.2d 55, 70 n. 29 (Fla. 2003)(noting that expert opinion with regard to a defendant's generally diminished lack of capacity, short of insanity, is not admissible in Florida to prove lack of premeditation); Spencer v. State, 842 So.2d 52, 63 (Fla. 2003)(evidence of defendant's disassociative state would not have been admissible during the guilt phase); Maulden v. State, 617

So.2d 298, 302 (Fla. 1993)(agreeing with trial court that expert testimony of murder defendant's psychiatrist concerning defendant's schizophrenia was not admissible, in the guilt phase of Maulden's capital trial, to negate the specific intent required to convict of first-degree premeditated murder).

Finally, any error is harmless. Brown's capacity to know right from wrong and to conform his conduct to the requirements of law is unimpaired. Indeed, both Dr. Krop and Dr. Riebsame testified, affirmatively, in the penalty phase of Brown's capital trial, that Brown was able to appreciate the criminality of his conduct and to conform his conduct to the requirements of the law. (TR Vol. XVIII 893, 907: XIX 952). Dr. Riebsame testified that Brown had time to stop himself from committing the crime but chose not to stop. (TR Vol. XIX 952). Dr. Riebsame also told the jury that while there is mental illness and a mental health history in Brown's case, Brown's emotional behavior problems are not what was steering Mr. Brown's decision making and behavior at the time of the murder. (TR Vol. XIX 952).

Brown offered nor even proffered any evidence that would have supported a diminished capacity defense. Accordingly, even if there were a Chestnut error, which there isn't, the error is harmless.

CONCLUSION

Based upon the foregoing, the State requests respectfully that this Court affirm Brown's conviction and sentence to death.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Mail to David Davis, Assistant Public Defender, Leon County Courthouse, 301 South Monroe Street, Suite 401 Tallahassee, Florida 32301 this 8th day of August 2012.

_____

MEREDITH CHARBULA
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CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that the instant brief has been prepared with 12 point Courier New type, a font that is not spaced proportionately.

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MEREDITH CHARBULA
Assistant Attorney General