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, FLORIDA

AMENDED INITIAL BRIEF OF APPELLANT

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I. PRELIMINARY STATEMENT

THOMAS THEO BROWN was the defendant in this capital case, and he will be referred to in this brief as either "appellant," "defendant," or by his proper name.

References to the 19-volume Record on Appeal will be by the volume number in Arabic numbers followed by the appropriate page number, all in parentheses.

STATEMENT OF THE CASE

An Indictment filed in the Circuit Court for Duval County on August 21, 2009, charged Thomas Brown, with one count of first-degree murder and one count of possession of a firearm by a convicted felon (1 R 34-36). The State later filed a notice that it would seek a death sentence for the murder if he were convicted of that crime (1 R 47). Brown filed several death penalty related motions (See generally volumes 1-4).

Brown proceeded to trial before Judge Elizabeth Senterfitt, and was found guilty as charged (5 R 683-4). At the subsequent penalty phase part of the trial, the jury, by a 7-5 vote, recommended the court sentence the defendant to death (11 R 1799-1815, 1817-1819). It followed that verdict, and justifying its sentence of death, the court found in aggravation:

1. Brown had a prior conviction for robbery with a firearm.
2. Brown was on probation at the time he committed the murder.
3. Brown committed the murder in a cold, calculated, and premeditated manner without any pretense of legal or moral justification. (11 R 1801-1803)

Mitigating a death sentence, the court found the statutory mitigators that:

1. The murder was committed while the defendant was under the influence of an extreme mental or emotional disturbance.

2. The age of Brown at the time of the murder.

As nonstatutory mitigation, the court found

1. The defendant has a borderline IQ

2. The defendant suffers from mental illness.

3. The victim did not suffer.

The court rejected the claim that death was not proportionate as a mitigating factor. (11 R 1804-1815)

The State declined to prosecute Brown for the charge of possession of a firearm by a convicted felon (12 R 2098).

This appeal follows.

STATEMENT OF THE FACTS

By Thursday, June 18, 2009, Thomas Theo Brown had worked at a Wendy's Restaurant in Jacksonville for about 5 or 6 months (18 R 801). He enjoyed the work, and had seemed to have found his niche in life as a hamburger flipper (16 R 431). He generally got along with the other employees, but for some reason Juanese Miller, a co-worker, either did not like him, or saw him as an easy mark to make fun of (15 R 384, 16 R 433).

On the previous Sunday and for no apparent reason, she poured ice water and salt down his back (15 R 348). That obviously upset him, and he did not want her bothering him (15 R 348, 366). Yet, she did even though she was sent home for doing that (15 R 366). Later, and repeatedly, she would walk past him, taunting him with the words "pussy nigger" from a rap song. (15 R 350) She repeatedly sang the "pussy nigger" phrase, or just said "pussy, pussy, pussy" in his presence, and she did so even when the manager was present, heard her, but did nothing (15 R 366-67; 16 R 493). On one occasion, Brown almost got into a fight with Miller, but the store's management "sort of" calmed things down (15 R 351), and on Monday, Angelette Harley, the manager[1] of the store met with Brown and

[1] Angelette Harley was the manager, and she and Brown had a boyfriend/girlfriend relationship (15 R 352).

Miller and tried to resolve the problem (15 R 353, 16 R 471).[2] He was still upset a bit and wondered why he was getting into trouble when Miller had created the incident (16 R 472). Harley said it was because of the incident (16 R 472), and although neither were fired, both were "written up." (16 R 473). As a partial solution to this personnel problem Miller did not work on Tuesday, and Brown was told not to show up on Wednesday (16 R 475).

On Thursday both were working at the restaurant (15 R 353). Mike Emami, a regional manager of the Wendy's restaurants, walked in, and he noticed that Brown was "working very slow," and could not keep up with the demand of the business (15 R 394-95). Emami knew that the defendant's work hours had been reduced perhaps because of the ice down the back incident (16 478), but he pushed him off onto the store manager when Brown approached him, wanting to discuss this change in his hours (15 R 394, 16 R 406)[3]. Nonetheless, after watching Brown's slow performance for a few minutes, Emami decided to talk with him (15 R 395-96). Almost immediately the defendant got "very, very upset," yelling and screaming (15 R 396). Emami, who had no concern about people's feelings (15

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[2] Miller had had troubles with other co-workers in the past (16 R 494).

[3] Brown worked at minimum wage (15 R 406). Although Harley denied favoring Brown, he seemed to be scheduled to work more than other employees, who became mad and complained about that (15 R 352, 16 R 432, 469).

R 367), got into a shouting match with Brown who pointed a finger at Emami's face and said "you don't fucking know me. . . . it ain't going to be no more Wendy's." (15 R 354, 376) Emami told the defendant to "get off my property," "don't come back," and he was calling the police (15 R 355, 368).[4]

Mad and frustrated, Brown left (15 R 356, 377). A short time later, Emami also left. Brown returned 45 minutes or an hour later, still wearing his store uniform and wanting to know where Emami was (15 R 363; 16 R 420, 423). Angelette Harley twice tried to stop him from coming inside, but he told her "she the reason why I don't have my job." (16 R 485). By then Miller had finished her shift, but now stood in front of a cashier to buy some food (15 R 358). As Brown came inside, her back was to him (15 R 358). He walked to within three or four inches of her (or maybe two or three feet away (16 R 428)), took out a gun, and shot her three times (15 359). He then said, "Where the fuck Mike at?" (15 R 360).[5] He turned to leave, but as he did so, he stopped and returned to Miller and shot her again, angrily saying, "I told you I would kill you, bitch" (16 R 502, 516, 518, 542). He then left (15 R 383).

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[4] Another worker heard Brown say he was going "to kick his ass." (16 R 418). When the police contacted him in response to his 911 call, Mr. Emami told them everything had calmed down (15 R 396-97).

[5] Others heard Brown say, "Now, you can go and tell Mike, tell Mike thanks." (16 R 427)

The police were called, and a day later they had arrested Brown without any further violence, or resistance (16 R 573, 579).

Miller had been shot four times, once in the arm and three times in the back (17 R 613-14). Two of the latter wounds were fatal (17 R 614, 617, 621).

Thomas Brown was 27 years old when he killed Miller (1 R 1, 16 R 490). He was one of three children born to Katherine Brown. Within three years of his birth, she was a single mother, the father having left and becoming largely out of her and her children's life (18 R 833-34). While a mother, she was not much of one at least in his early years, preferring instead to spend her time partying and generally ignoring her two daughters and son (18 R 866); and the oldest sister, for the most part, raised her younger brother (18 R 857).

As Brown grew, he developed mental problems, and even Katherine's friends recognized he was not developing normally (18 R 869). An evaluation made at the end of 1998, when he was 16 years old, concluded that he had a "full scale IQ" of 82, and suffered from schizophreniform,[6] paranoid schizophrenia, attention deficit hyperactivity disorder, a learning disorder not otherwise specified,

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[6] "Schizophreniform disorder is a short-term type of schizophrenia, a serious mental illness that distorts the way a person thinks, acts, expresses emotions, perceives reality, and relates to others. Like schizophrenia, schizophreniform disorder is a type of "psychosis" in which a person cannot tell what is real from what is imagined." http://www.webmd.com/schizophrenia/guide/mental-health-schizophreniform-disorder.

and an incipient bipolar disorder (10 R 1729, 1735). He was also developing paranoid personality traits (10 R 1735). The evaluation concluded that

> he is a very depressed, paranoid, at times overtly psychotic young man who needs intensive long-term treatment of a psychiatric sort and who may tend to deteriorate even further if his psychiatric needs are not fully addressed. Thomas' depression and feelings of paranoid distrust are associated with some periodic suicidal and homicidal ideation. . . . [H]e needs to continue to be closely monitored for the presence of any further suicidal or homicidal ideation or intent. An intensive program of psychiatric treatment is strongly recommended at this time.

(10 R 1736)

The following September, Brown, who was now 17 years old, and two other boys robbed a convenience store clerk in Columbus, Georgia. He did so by grabbing the clerk's hair, putting a gun to her head, and walking her to the cash register where he took about $275 (18 R 772, 782). He was soon arrested, and after pleading guilty to one count of robbery, he was sentenced to prison for 10 years (10 R 1699; 18 R 795, 797).

When released in April 2008, he was sent to Florida, and he was on probation at the time of the homicide in this case (18 R 798). As a condition of that probation, he participated in a mental health counseling evaluation (18 R 800). He also regularly reported to his probation officer, and the latter "felt that he was a young man trying to get his feet on the ground and get his life together because was - - everything was stable, his employment and his residence." (18 R 805)

She visited Brown at Wendy's two days before the homicide and saw nothing unusual about him (18 R 803).

Dr. Harry Krop and Dr. William Reibsame, both psychologists, examined Brown in connection with this case. Dr. Krop, the defense expert, noted the defendant's long history of mental illnesses dating from his early childhood (18 R 877-78, 903). This expert administered IQ tests, which revealed the defendant had an IQ of "around" 67 (18 R 880). He discounted those results, however, because he and Dr. Reibsame believed Brown was probably significantly depressed and possibly malingering when he took that exam (18 R 881).[7] He did, however, diagnose him as having a psychotic disorder not otherwise specified, being depressed not otherwise specified, having impulse control problems not otherwise specified, having a learning disorder, and abusing marijuana (18 R 883-84). Dr. Krop also concluded that "it's pretty evident that he needed to be in treatment" in part because the "people from Georgia" and the "people in prison" either thought he should have treatment, or he was in some sort of therapy (18 R 885). He also

[7] Another Psychologist, Dr. James Valley was appointed to determine Brown's competency to be tried. In his report of August 24, 2010, he concluded that the defendant was competent, and contrary to Dr. Reibsame's malingering conclusion, specifically found that the "intellectual assessment was not the product of malingering." (9 R 1564)

noted that when Brown took prescribed psychotropic medication "he's a lot calmer and a lot more lucid." (18 R 908)

Dr. Krop also concluded that Brown had poor impulse control, was hypersensitive to criticism and being picked on,[8] and that he probably had a mild neuropsychological impairment (18 R 887-90). He perceived the world with mistrust, suspicion and paranoia, and he heard voices, all of which had a significant impact on his perception of reality at the time of the homicide (18 R 890).

Consequently, on the day of the murder, the pervasive and underlying mistrust and sensitivity combined with his other emotional, mental, and psychological impairments led him to believe he had been picked on, that he was being singled out and unfairly fired from a job he liked. As a result he had a "serious emotional disorder at the time in question which impacted his judgment, which led to this tragedy." (18 R 891)[9] With his paranoid type of personality "it

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8 Although mental health counseling was recommended after he was released from the Georgia prison in April 2008, he received during the next 14 months, and until June 2009 when the homicide occurred (18 R 813). When he was 5 or 6 years old he stabbed his sister because he believed she was picking on him (18 R 905). As a juvenile, he also had problems with his explosive behavior and impulse control that led to several run-ins with the law (18 R 905-906).

[10] Both Drs. Krop and Reibsame did not believe the statutory mental mitigator that at the time of the murder Brown was substantially unable to conform his conduct

didn't take much for him to believe that people were out to get him in some way." (18 R 901) He also concluded that his mental age is significantly lower than his chronological age. "Well, given his functioning both intellectually, emotionally, and psychologically, he certainly is an extremely immature individual." (18 R 893)

Dr. Reibsame agreed with many of Dr. Krop's conclusions, but he had the opinion that Brown malingered when given tests to determine his IQ (19 R 936).[10] He, nonetheless, accepted that the defendant suffered from an impulse control disorder, and diagnosed him as having a psychotic disorder not otherwise specified (19 R 937). He also suffered from an antisocial personality disorder, he has a "very paranoid type of perspective, mistrust of others that is long-standing." (19 R 947). He may have borderline characteristics and problems controlling his anger, he believes he is being unfairly treat, and he "quickly becomes enraged" when he perceives others as mistreating him (19 R 950).

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to the requirements of the law applied (18 R 893, 19 R 952).

[10] When Dr. Reibsame examined Brown he was taking Trilafon, an anti psychotic drug (19 R 954)

Dr. Reibsame concluded that although Brown knew what he was doing, "he's certainly very, very, angry." (19 R 950)

SUMMARY OF THE ARGUMENTS

ISSUE I: The trial court found that Brown committed the murder in a cold, calculated, and premeditated manner without the pretense of any legal or moral justification. While Brown may have had the heightened premeditation to justify the court's finding, he lacked the coldness and calculation also required for this aggravator to apply.

As to the cold element, when Brown left Wendy's he obviously, and without any contradiction, was upset, mad, and frustrated, and he was a man prone to emotional outbursts. His world, as limited as it was, was collapsing, and it had all started with Miller's juvenile prank and even more juvenile taunting with obscene and vulgar "pussy" and "pussy nigger," and management's doing nothing.

There was also no calculation because there was as much luck as calculation to Brown's plan to kill Miller, who just happened to still be at the restaurant when Brown returned looking for Emami.

Moreover, the totality of the defendant's acts showed no careful planning or deliberation. He never disguised himself or made any effort to hide his identity. He made no efforts to way hide the murder. He did nothing to make sure no one saw or witnessed what he had done. Other than leaving the restaurant, no evidence showed Brown planned how to avoid arrest.

Further negating the coldness and calculation of this murder, the Court found that at the time of the murder Brown was under the influence of an extreme mental or emotional disturbance. While as a general observation of possibilities, a court may find a murder CCP and the defendant acted under the influence of an extreme mental or emotional disturbance, it does not follow that if this mental mitigator applies in a particular case it has no relevance, as a matter of law, to the CCP aggravator. A defendant can be one step short of being totally crazy, and that mental condition can very well have had some impact on the CCP aggravator. The trial court could not simply ignore without any reason the impact of this statutory mental mitigator on the CCP aggravator.

ISSUE II. A sentence of death is disproportionate when compared with other cases having facts similar to the ones in this case. This tragedy was the result of an emotional disaster that had been building for several days, initiated by the victim's childish prank, and her insulting, demeaning "fighting words," of "pussy nigger," and repeated chanting of "pussy, pussy, pussy" when she was around Brown. Management not only did little to punish Miller but reduced Brown's work hours. With this provocation working inside his slow churning mentally ill mind in the days immediately before June 18, the unfairness of what had happened and the inevitable loss of income could only have raised Brown's emotional tensions. For a man with significant psychological and impulse control problems

life reached a breaking point the day that ended with him being fired. His life, never one of ease and safety nets, now took a disastrous turn, and with some logic, he could trace this downfall from Emami to Miller.

As the court found Brown was under the influence of an extreme mental or emotional disturbance at the time of the murder, and having neither an average intelligence nor a normal emotional development, he left and returned to the restaurant and shot Miller while under the substantial influence of an extreme mental or emotional disturbance. Likewise, having an emotional and mental age significantly lower than his chronological age of 27, and having spent his early adult years in prison meant he had never had much time or to learn how to be an adult.

Other mitigation found by the court also is significant: Brown was mentally ill at the time of the murder. He has a borderline IQ, and Juanese Miller obviously sensed this slowness and made fun of Brown by taunting and insulting him as a "pussy nigger," or "pussy, pussy, pussy," and dumping ice down his back. Brown also had a deprived childhood. Significantly, each of these specifically found nonstatutory mitigators had a direct impact on the murder Brown committed. And, they provide compelling reasons to reduce his sentence of death to life.

When viewed on a larger screen, moreover, and compared with other cases in which this Court has reversed death sentences on proportionality grounds, such punishment is clearly disproportionate.

The killing of Juanese Miller resulted from an emotional explosion during which Brown only briefly engaged in any specific reflection. Also, more so than what this Court has seen before, the two uncontested aggravators in this case have little direct relevance to the facts of this case. Unlike the mitigation that has direct pertinence and explains, if not justifies, what Brown did, it merely reflects his status as an ex-convict on parole.

Comparing the facts of this case with other cases clearly shows this Court has reduced death sentences in instances involving worse crimes and equally or more culpable defendants.

ISSUE III. Within the space of four pages of the court's penalty phase instructions, the trial judge told the jury eleven times that its recommendation was just that, a recommendation. Doing so diminished the role of the jury in sentencing the defendant to death, and that was error.

ISSUE IV. Although this Court has concluded that the United States Supreme Court's ruling in Ring v. Arizona, 536 U.S. 584 (2002) has no application to Florida's death sentencing scheme, Brown raises this issue here in the hopes that the brilliance of the argument he makes will convince it to reverse its courts, and if

it does not, he has preserved the issue so that perhaps he can convince another court of this Court's error.

ISSUE V. Under the rationale of this Court's opinion in Chestnut v. State, 538 So. 2d 820 (Fla. 1989), the trial court prevented Brown from presenting any evidence in the guilt phase part of his trial that because of his mental infirmities he lacked the specific intent to kill Juanesse Miller. That was error because the evidence that he lacked such intent was admitted in the penalty phase of the trial to challenge the allegation that he had committed the murder in a cold, calculated, and premeditated manner. If this Court in Chestnut justified excluding such evidence in the guilt phase of a capital trial because it tended to mislead the jury then it is hard to understand why it no longer, as a matter of law, did so in the penalty phase, the proceeding this Court said it should be considered. Under that case's logic misleading evidence should be misleading evidence regardless of when it is admitted. Yet, such proof has particular pertinence when its relevance tends to negate the heightened premeditation required to prove the CCP aggravator.

This Court should limit the reach of Chestnut in capital cases where the State intends to prove that aggravator, or any other one that requires proof of some type of intent.

ARGUMENT

ISSUE I

THE COURT ERRED IN FINDING BROWN COMMITTED THE MURDER IN A COLD, CALCULATED, AND PREMEDITATED MANNER WITHOUT ANY PRETENSE OF LEGAL OR MORAL JUSTIFICATION, A VIOLATION OF HIS EIGHTH AND FOURTEENTH AMENDMENT RIGHTS.

The court justified sentencing Brown to death because he killed Juanese Miller in a cold, calculated, and premeditated manner without any pretense of legal or moral justification. In doing so, it found:

> 1) The ongoing dispute between Ms. Miller and the Defendant that began in earnest on June 14, 2009, provided ample time for reflection, planning and premeditation. At a minimum, even if the Defendant decided to commit murder on June 18, 2009, approximately one hour passed from the time the Defendant left the Wendy's, returned armed, and committed 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 Harley, after inquiring as to Mike Emami's whereabouts, stated "I am done talking," walked inside of the Wendy's, did not see Mike Emami, left the store, got into his car and began backing out, only to abruptly stop the car, get out, and walk back inside of Wends shooting and killing Ms. Miller;
>
> 3) Angelette Harley described the Defendant's demeanor as "cold" when he walked back inside of the Wendy's to commit murder;
>
> 4) The Defendant entered the Wendy's on June 18, 2009, with a .40 caliber semiautomatic handgun (advance procurement of a 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 was 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 shots 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 that customers approach to purchase food), walked to the exit of the Wendy's, began to leave, 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 hand wrote the following statements into his journal: "I just offed a Bitch cause 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 finds it is illuminating as to the Defendant's thoughts prior to committing the murder of Juanese Miller.

(11 R 1802-1803)(Footnotes with cites omitted.)

The court erred in finding this aggravator for several reasons:

1. The evidence does not support the cold and calculated elements of this aggravator.

2. It did not consider all the evidence presented at the guilt and sentencing phase of Brown's trial.

3. It summarily dismissed its finding that Brown was under the influence of

an extreme mental or emotional disturbance at the time of the murder as having no relevance to whether the CCP aggravator existed.

This Court should review this issue under a competent substantial evidence standard of review. Williams v. State, 37 So. 3d 187 (Fla. 2010); Conde v. State, 860 So. 2d 930, 953 (Fla. 2003); Smith v. State, 28 So. 3d 838 (Fla. 2009). Although this is a deferential standard, it has tempered it by closely scrutinizing the evidence used to justify this aggravator to ensure it supports the trial court's finding. Tai A. Pham v. State, 70 So. 3d 485, 498-99 (Fla. 2011).

This Court has aided a trial judge faced with the task of evaluating and applying the statutorily created cold, calculated and premeditated aggravator (CCP). In Jackson v. State, 645 So. 2d 84, 89 (Fla. 1994), and more recently in Lynch v. State, 841 So. 2d 362, 372 (Fla. 2003), it provided the analytical approach for the sentencing judge to use:

> Thus, in order to find the CCP aggravating factor under our case law, the jury must determine 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 (cold), ...that the defendant had a careful plan or prearranged design to commit murder before the fatal incident (calculated), ... that the defendant exhibited heightened premeditation (premeditated), and that the defendant had no pretense of moral or legal justification.

Jackson v. State, 648 So. 2d 85, 89 (Fla. 1994); accord, Lynch v. State, 841 So. 2d 362 (Fla. 2003)(Citations omitted, emphasis in opinion.) Additionally, and

particularly important in this case, if the Court uses this aggravator to justify a death sentence, the proof must establish it beyond a reasonable doubt. Specifically, as to each of the four elements of this aggravator, each one must be proven beyond a reasonable doubt. State v. Dixon, 283 So. 2d 1, 9 (Fla. 1973). See Geralds v. State, 601 So. 2d 1157, 1163 (Fla.1992)("The State is required to establish the existence of all aggravating circumstances beyond a reasonable doubt."). Particularly significant, the totality of the circumstances must establish the cold and calculated element beyond a reasonable doubt. In this case, the State failed to carry that burden as to those elements. Tai A. Pham, cited above at 498.

Initially, Brown admits the State provided sufficient evidence to support the court's finding that Brown had a heightened premeditation when he murdered Miller. Items 1, 2, 7, 8, 9, 10, and 11 of the quoted part of the order justify that conclusion. As to the concomitant requirement of coldness and calculation, however, it provided scant, and ultimately insufficient, factual support.

A. The coldness of the murder.

As to the requirement that CCP murders must be the product of cool and calm reflection and not be an act prompted by emotional frenzy, panic, or a fit of rage only item #3 - - Harley's observation that Brown appeared "cold" when he walked into the restaurant-supports a conclusion that he coolly and calmly killed

Miller. Besides that, there is absolutely no evidence that after being fired and ordered off the property, he was ever cool and calm. To the contrary, the totality of the circumstances that came from witness after witness shows that from then until he left after shooting Miller, the defendant was a man in an emotional frenzy.

When he left Wendy's he obviously, and without any contradiction, was upset. His meeting with Emami had been a disaster - - he and the manager had gotten into a shouting match with Brown being "really upset. He was very, very upset." (15 R 396) It ended when he became very loud, Emami fired him, and ordered him off the property (15 R 375-76; 16 R 411, 418). His world, as limited as it was, was collapsing, and it had started with Miller's juvenile prank and even more juvenile taunting with obscene and vulgar "pussy" and "pussy nigger," and management's doing nothing (15 R 367).

So he left the restaurant mad and frustrated (15 R 377), and he told Emami that "someone was going to kick his ass." (16 R 418). When he returned 45 minutes to one hour later (16 R 420), another witness noted, "[H]e seem really angry. . . . with a blank look on his face." (15 R 369, 370) Another said he returned in a rage and "just snapped." (15 R 386)

Contrary to Angelette Harley's description of the Defendant's demeanor as 'cold' the totality of the evidence from the others who testified at trial uniformly described him differently. Rakezian Williams, a co-worker with Brown, and one

who saw the murder, said that at the time of the shooting "he seemed really angry" (15 R 369) even though he had a "blank look on his face." (15 R 370) Another worker who witnessed the shooting, Dequan Vaughn, said Brown "just snapped" and "went into a rage." (15 R 386) Even Harley, when pressed, said that when he returned to the store a second time, he was "just blank," and immediately after shooting Miller he said, "I told you I would kill you, bitch." (16 R 502, 516, 518, 542; 16 R 496) That does not sound cold; instead a close scrutiny of what happened exhibits a man who was "really angry" and in a rage. There was no coldness, no cool and calm reflection that was not prompted by an emotional frenzy. To the contrary, Brown was a man prone to emotional outbursts (18 R 906), and what happened at the Wendy's gave proof to that diagnosis.

In Wright v. State, 19 So. 3d 277, 298-301 (Fla. 2009) this Court said, "The cold element is generally found in those murders that are not committed in a heat of passion. See Looney v. State, 803 So. 2d 656, 678 (Fla. 2001) (quoting Walls v. State, 641 So. 2d 381, 387–88 (Fla.1994))."[11] Affirming the lower court's finding that the CCP aggravator applied, this Court found, in that case, "The record is devoid of any evidence that Wright acted out of frenzy, panic, or rage." Id. Here,

[11] If the defendant committed the homicide in the "heat of passion," he would not be guilty of first-degree murder but second-degree murder or manslaughter. Johnson v. State, 969 So. 2d 938, 952 (Fla. 2007).

contrary to the facts in Wright, the totality of the evidence shows only that Brown was either "very, very angry," or in a "rage." (15 R 369, 386, 396).

Moreover, Miller provoked this psychotic rage when she poured ice and salt down his back, and then taunted him calling him a "pussy nigger" or simply walking around him singing "pussy, pussy, pussy." Such uncontroverted evidence refutes the application of this aggravator when the defendant "receives absolutely no resistance or provocation on the part of the victim." McCoy v. State, 853 So. 2d 396, 407 (Fla. 2003); Wright v. State, 19 So. 3d 277, 298 (Fla. 2009)("The CCP aggravator pertains specifically to the state of mind, intent, and motivation of the defendant."). Miller's insults and harassment provide clear evidence that she had provoked Brown. The shouting match that resulted in him being sacked only added fuel to the fire simmering inside the defendant.

Clearly, the trial court selectively chose the only fact available to support a finding that Brown coldly killed Miller. A close scrutiny of the totality of the evidence before it, however, must force this Court to conclude that it was wrong.

B. The lack of calculation.

Points 4, 5, and 6 of the court's sentencing order provide the only support that the murder was done with "a careful plan or prearranged design to commit murder before the fatal incident." Summarized, they were that the defendant

brought a gun with him to the restaurant, which he did not take from the waistband of his pants until he was next to Miller, and he singled her out from among the other employees and patrons.

First, the advanced procurement of a weapon is somewhat speculative, because there is no evidence when or where Brown got the gun. It may have been at the place he lived, or he may have kept it in his car, or he may have had it with him all the time. We simply do not know, so the advance procurement, as a factor justifying this murder as calculating, and the weight it deserved, should be discounted because it was never proven beyond a reasonable doubt.

More significant, there was as much luck as calculation to Brown's plan to kill Miller. That is, Brown returned to the restaurant forty-five minutes to an hour after storming out (16 R 420), and when he did he was looking for Emami, not Miller, who had, in any event, apparently just finished her shift at Wendy's (16 R 452). Normally, people leave work then, but because Wendy's employees got a discount on food she stayed to order lunch (16 R 425, 434, 452). No evidence exists that Brown knew she would do that; indeed, until he came into the store the first time, it is likely he did not know she was still there. If he had, he would have shot her then rather than leaving but returning. What happened looks more like Ms. Miller had the unfortunate luck to simply to have been at the wrong place at the wrong time. When Brown returned he intended to shoot Emami, as the court

itself recognized (11 R 1803). Only when he learned that Mike was not there did he notice and shoot Miller. While a murder can be CCP even when there is a transferred intent, Kopsho v. State, Case No. SC09-1383 (Fla. March 1, 2009), this Court has also said, "the 'plan to kill' cannot be inferred solely from a plan to commit another felony. . ." Wright, cited above at 300. Although after shooting Miller he told no one in particular that he said he would kill her, there is no evidence that he had planned to do so as his initial intent was to shoot Emami.[12]

Now, the court cited this Court's opinion in Carter v. State, 980 So. 2d 473 (Fla. 2008) to support this element of the CCP aggravator, but its analysis of that case was incomplete. While, as the court noted, "Carter procured a weapon in advance and concealed the weapon until retrieving it to commit the murders," Carter had done much more planning and preparation than that. For days and weeks before the murders he had watched his estranged girlfriend's house. On the day and evening of the murders he drove by the victim's house and before going there, he called to make sure she was home. When he confronted her and her new boyfriend he demanded answers to his questions about their relationship. Those clearly planned and executed acts supported the determination he acted with

[12] There is no evidence when, and if he had ever told Miller, or anyone for that matter, that he planned to kill her.

calculation. Tai. A. Pham, cited above. (Pham binds victim and hides her phone.) Moreover, he killed his intended victims, which, in this case, was not necessarily true. When Brown came into the store he had planned to murder Emami. Only when he could not do that did his attention then focus on Miller. There is no evidence he planned to kill both of them at the same time.

In Davis v. State, 2 So. 3d 952, 960-62 (Fla. 2008), this Court, relying on Carter, also found the murder to be CCP:

> The cases are similar in that both defendants knew their victims and deliberately went to their homes. Both defendants armed themselves in advance. Just as Carter concealed his rifle by placing it against his leg, Davis testified that as he knocked on the victims' door he held the knife in his hand but "not like where [Wren] could see it." Also like Carter, Davis refrained from violence long enough to ask a few questions of one of the victims. Davis's heightened premeditation and his prearranged design to kill are further evidenced by his wearing extra clothes and taking a bag in which to place clothes that became bloodied.

Here, Brown was angry and in a rage when he returned to kill Emami (15 R 369, 370, 386; 16 R 462, 506, 542). But unlike the situations in Davis and Carter, his intended victim had left. Moreover, unlike those cases, he had not shown any rational thinking by questioning his victim or anyone else, before shooting them. He immediately shot Miller. Further unlike Davis, Brown wore easily recognizable clothes (15 R 363; 16 R 481, 525), and brought nothing to change into or otherwise hide his identity.

Unlike Davis and Carter, this case presents no evidence of a defendant calmly and with a careful plan deliberately killing his victim.

C. Other facts or factors relevant to the CCP analysis

If the trial court and this Court must use a totality of the circumstances analysis in determining if the CCP aggravator applies, and it "focuses on the defendant's state of mind and how he planned the murder," Jackson v. State, 25 So. 3d 518, 535 (Fla. 2009); Wright v. State, 19 So. 3d 277 (Fla. 2009), the trial court omitted several relevant facts or factors in its analysis, and this a significant failure.

1. The totality of the defendant's acts showed no careful planning or deliberation.

The evidence showed that on June 18, Brown was already upset because of the ice down the back incident, that he was taking the blame for it, his work hours had been reduced, and Emami had just fired him. He stormed out of the restaurant and returned later and shot Miller. There was no evidence he ever considered any advantage in killing her, or calmly did so. She did not stand between him and some money he might have stolen or felt entitled to. She was not about to tell the police he had committed some crime. Apparently, the only reason for killing her was the satisfaction he would have knowing that she would suffer for what she

had done.

As to any disadvantages, the only one of significance was that he would face life in prison or death sentence for killing her.

2. He never disguised himself or made any effort to hide his identity.

In fact, he returned to the place where all the employees knew him, and they should because he was wearing his Wendy's uniform (15 R 363). Moreover, several patrons got such a good enough look at his face (which was not covered with a mask) that they unequivocally identified him at trial (16 R 526, 536). Banks v. State, 46 So. 3d 989, 999 (Fla. 2010)(Banks removed his outer clothes before entering the victim's apartment and stabbing her.)

3. He made no efforts hide the murder.

Brown shot Miller in the Wendy's Restaurant in the area where customers stand or wait to order. He never abducted and took her to some remote location. After killing her he left the body there rather than putting it in his car and dumping it in some remote location. Moreover, he shot her in this public place and made no effort to hide that fact. Wright v. State, 19 So. 3d 277, 298 -301 (Fla. 2009) (Abducting and executing the victims does "not suggest a frenzied, spur-of-the-

moment attack.")

4. Just as he did nothing to hide the fact of the murder, he did nothing to make sure no one saw or witnessed what he had done.

To the contrary, the State presented an abundance of witnesses, either employees or patrons of the restaurant, who saw the murder and readily identified Brown as the person who had shot Miller.

5. The escape plan.

Other than leaving the restaurant, no evidence shows Brown planned how to avoid arrest. Indeed, the police easily found him the next day in a local motel, and when confronted he quietly surrendered.

6. Hiding or destroying the murder weapon.

When the police searched the motel room they located the murder weapon laying in plain sight. In Carter v. State, supra, Pinckney Carter shot and killed his former girlfriend, her daughter, and her new boyfriend after he had returned to the house he had shared with her. After committing the three murders, Carter fled to Mexico, and as he crossed the Rio Grande River, he threw the gun into the river. He was arrested some months later in Kentucky working under an assumed name.

This Court found the CCP aggravator applied. After the murder he left the state and fled to a neighboring country, and while enroute he "lost" the gun. In this case, we have no similar flight and effort to get rid of the murder weapon.

In Caylor v. State, 78 So. 3d 482 (Fla. 2011), Caylor fled the Panama City motel where he was staying after he had sexually battered, strangled, and hid the body of his 13-year-old victim. That did not happen here.

Thus, either by analyzing the facts of the case and the factors Brown has suggested or the cases he has presented, this Court can only concluded that as premeditated as the murder may have been, it was not done with the required calculation. The trial court erred, therefore, in finding the CCP aggravator applied.

D. The impact of the court's finding that Brown committed the murder while under the influence of an extreme mental or emotional disturbance.

Besides finding the CCP aggravator, the court found, as a statutory mitigator, that at the time of the murder Brown had murdered Miller while under the influence of an extreme mental or emotional disturbance. It negated the impact of the obvious implications on the CCP aggravator by simply and only saying that finding this mitigation "does not prevent the Court from also finding the murder was cold, calculated, and premeditated." (11 R 1803). It cited this Court's opinion in Evans v. State, 800 So. 2d 182, 192-93 (Fla. 2001) to support that conclusion.

In that case, this Court said, "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." Evans relied on Sexton v. State, 775 So. 2d 923, 934 (Fla. 2000) for the proposition that "evidence established heightened premeditation, lengthy and careful planning and prearrangement, and an execution-style killing to support CCP aggravator despite "great weight" given to the defendant's mental impairment."

Now, this Court gave no reason, legal or otherwise, why that is true, and it simply, as a matter of fiat, ruled as it did in Evans. And, while as a general observation of possibilities, a court may find a murder CCP and the defendant acted under the influence of an extreme mental or emotional disturbance, it does not follow, as the trial court seemed to think, that if this mental mitigator applies in a particular case it has no relevance, as a matter of law, to the CCP aggravator. A defendant can be one step short of being totally crazy, and that mental condition can very well have had some impact on the CCP aggravator. For example, if Brown had killed Miller in the "heat of passion," he would not be guilty of first-degree murder, but manslaughter. Johnson v. State, 969 So. 2d 938, 952 (Fla. 2007). In short, while as a matter of law, the CCP aggravator and under the influence mental mitigator may peacefully coexist, as a matter of fact and ordinary experience, the defendant's mental state in a particular case may very well negate

the required coldness, calculation, and premeditation required to find the CCP aggravator.[13] Considering the obvious illogicality of saying a defendant acted under the influence of an extreme mental or emotional disturbance but nevertheless committed a cold, calculated and premeditated murder, more is required to explain why it is logical than simply citing a case. Whether it does or not requires a specific factual analysis and compelling facts to explain and justify why both factors can exist together. In order to satisfy this Court's mandate that sentencing orders have "unmistakably clarity," Mann v. State, 420 So. 2d 578, 581 (Fla. 1982), the trial court must provide compelling reasons supported by strong facts that the defendant's significant mental mitigation did not preclude finding the CCP aggravator.

This Court in Woods v. State, 733 So. 2d 980 (Fla. 1999) recognized that the facts in a particular case may make the CCP aggravator and under the influence mitigator incompatible. In that case, the defendant, while not mentally retarded,

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[13] The under the influence mitigator traces its origins to the Model Penal Code, and its provision that a murder may be mitigated to manslaughter if the defendant committed it under the influence of an extreme mental or emotional disturbance:

> 10.3 Manslaughter -
>
> 1. Criminal Homicide constitutes manslaughter when …
>
> B. A homicide which would otherwise be murder is committed under the influence of extreme mental or emotional disturbance for which there is reasonable explanation or excuse.

had a low IQ, and acted irrationally at the time of the murder. Under those facts, this Court rejected a finding that Woods committed the murder with a cold, calculated, and premeditated intent.

In this case, as in Woods, Brown has a low IQ (82), which places him in lowest 12 percent of the American population (18 R 880, 892).[14] Had he been mentally retarded with an IQ lower than 70, he would have been intellectually disabled, so the difference, while enough to make him eligible for a death sentence was not, as a practical matter, enough to greatly differentiate him from more intellectually challenged people.

As in Woods, he also acted irrationally on the day of the murder, storming out of the restaurant leaving a trail of threats and returning sometime later to carry them out.[15]

This Court should reverse the trial court's sentence of death and remand for a new sentencing proceeding before a jury. Bradley v. State, 787 So. 2d 732, 738

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[14] The State's and defendant's mental health experts both determined that Brown had an IQ of 64 or 65, which would have placed in him the mentally retarded range (18 R 880). Those tests results were discounted, however, because the defendant either had emotional issues or was malingering (18 R 880-83).

[15] There may be some question that Emami had fired Brown when he ordered him off the restaurant's property after their heated argument. At trial he said never told the defendant he no longer had a job, or that he was fired (15 R 400). If so, Brown's subsequent acts would seem even more irrational and bizarre.

(Fla. 2001)(In determining sufficiency of evidence the question is whether a rational trier of fact could have found that fact in question was established beyond a reasonable doubt). It should do because if there was insufficient evidence the CCP aggravator applied, the jury should not have considered it. That the court erred in instructing them on it means that this Court must consider whether that mistake was nonetheless harmless. Given that the jury had only two other aggravators to consider and consider, strong mitigation to weigh, this Court cannot say beyond a reasonable doubt that the court's error had no effect on the jury's death recommendation. State v. DiGuilio, 491 So. 2d 1129 (Fla. 1986).

ISSUE II:

DEATH IS A PROPORTIONATELY UNWARRANTED SENTENCE

This Court has long recognized that the law of Florida reserves the death penalty for "only the most aggravated and least mitigated" of first-degree murders. State v. Dixon, 283 So. 2d 1, 7-8 (Fla. 1973)(finding a "legislative intent to extract the penalty of death for only the most aggravated, the most indefensible of crimes"), cert. denied, 416 U.S. 943 (1974); see also Urbin v. State, 714 So. 2d 411, 416 (Fla. 1998); Cooper v. State, 739 So. 2d 82, 85 (Fla. 1999); Almeida v. State, 748 So. 2d 922, 933 (Fla. 1999).

In deciding the proportionality of a death sentence for a particular case, this Court has said:

> [W]e make a comprehensive analysis in order to determine whether the crime falls within the category of both the most aggravated and the least mitigated of murders, thereby assuring uniformity in the application of the sentence. We consider the totality of the circumstances of the case and compare the case to other capital cases. This entails a qualitative review by this Court of the underlying basis for each aggravator and mitigator rather than a quantitative analysis. In other words, proportionality review is not a comparison between the number of aggravating and mitigating circumstances.

Williams v. State, 37 So. 3d 187, 198 (Fla. 2010)(quoting Offord v. State, 959 So. 2d 187, 189 (Fla. 2007)(internal quotations and citations omitted)). The standard of review is de novo. See Larkins v. State, 739 So. 2d 90 (Fla. 1999); Ellerbee v. State, Case No. SC10-238 (Fla. March 1, 2012)

Applying these principles to this case shows that it is neither the most aggravated nor the least mitigated instance for which death is unwaveringly the appropriate sentence. In other cases involving circumstances similar to those presented here - - an intensely emotional, spur-of-the-moment, almost accidental violent encounter - - this Court has held the death penalty disproportionate. If this Court accepts that the CCP aggravator does not apply to this case then it involves only two aggravating factors: Brown committed the murder while on felony probation, and he has a prior conviction for that robbery that eventually

resulted in the felony probation. When those aggravators are contrasted with the two statutory mitigators found by the court and the additional significant nonstatutory mitigation it also considered, this Court, when it conducts its proportionality review, must conclude that death is an inappropriate sentence for Brown.

First, as to the aggravation of prior violent felony and under sentence of imprisonment aggravators, though they are serious, they must be viewed under the particular circumstances of this case. Specifically they have no direct, explanatory relevance to this case, as would, for example, the aggravators especially heinous, atrocious, or cruel; or during the course of a robbery; or to avoid lawful arrest. In the latter instances, those aggravators, if they applied, would do so because they explained in some manner the defendant's motives in or manner of killing. The prior violent felony and under sentence of imprisonment simply relate to the defendant's status at the time of the killing, and while legitimate considerations, carry little inherent weight because of that.[16] They do nothing to explain why or how Brown killed Miller, and for those reasons simply lack the quality of other,

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[16] Indeed, the under sentence aggravator may be considered as mitigation because after being released from prison in 2008, he diligently worked at complying with the terms of his probation. And, except for this tragedy, he was largely successful. As his probation officer noted, she "felt that he was a young man trying to get his feet on the ground and get his life together because was – everything was stable, his employment and his residence." (18 R 805)

more relevant aggravating circumstances. They describe only his status at the time.

More significant, the circumstances of this murder militate against the death penalty. This tragedy was the result of an emotional disaster that had been building for several days, initiated by the victim's childish prank, and her insulting, demeaning "fighting words," of "pussy nigger," and repeated chanting of "pussy, pussy, pussy" when she was around Brown. Management may have sent her home for the day, but it did not fire her. Then what he must have seen as punishment for the incident Miller had created, his work hours were reduced. With this provocation working inside his slow churning mind in the days immediately before June 18, the unfairness of what had happened and the inevitable loss of income could only have raised Brown's emotional tensions. For a man with significant, lifelong psychological and impulse control problems life reached a breaking point that day. For a minimum-wage worker, on probation, this must have created a tremendous crisis of survival. Then he got into the shouting match with Mike Emami, a man not noted for his compassion or understanding (15 R 367)[17] that, to

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[17] One of the jurors had worked for Emami, and when she realized he would be a witness she told the court of that. When questioned about her ability to set that aside, she said he had fired her, and she still had hard feelings in part because "he doesn't talk to you with respect, he just talks to you like he's the boss, what he says goes and don't try to get your side of the story." (16 R 438-39)

his horror, resulted not with an increase in hours, but being fired. His life, never one of ease and safety nets, now took a disastrous turn, and with some logic, he could trace this downfall from Emami to Miller. Unsurprisingly, Dr. Krop, the psychologist, later testified, and the court found, that at that point, Brown was under the influence of an extreme mental or emotional disturbance at the time of the murder (18 R 891).

Now, perhaps a person of average intelligence and emotional maturity would have marked the firing as simply a bad experience. Brown, however, had neither an average intelligence nor a normal emotional development. To the contrary, his IQ of 81 or 82 (18 R 879-80) places him among the slowest persons in intellectual capacity, and just a few IQ points above being classified as mentally retarded. What makes this deficiency so particularly dangerous in this case was that his emotional development was also substantially below average. Specifically, as Dr. Reibsame, the State's expert concluded, he is impulsive, has an unspecified psychotic disorder, and has a "very paranoid type of perspective, mistrust of others that is long-standing." (19 R 947)

Thus, the events of the past several days and in particular the firing triggered his explosive, impulsive personality with the inevitability that the murder of Miller, if not absolutely predictable, could have been foreseen with some certainty.

Logically, then the statutory mental mitigator that at the time of the murder Brown was under the influence of an extreme mental or emotional disturbance is substantial, significant mitigation.[18] This Court long has recognized statutory mental mitigation as among the most compelling factors justifying a life sentence. See Miller v. State, 373 So. 2d 882 (Fla. 1979)("A large number of the statutory mitigating factors reflect a legislative determination to mitigate the death penalty in favor of a life sentence for those persons whose responsibility for their violent actions has been substantially diminished as a result of mental illness, uncontrolled emotional state of mind, or drug abuse"); Kramer v. State, 619 So. 2d 274 (Fla. 1993)(reducing sentence to life despite aggravating factors of prior violent felony and HAC where defendant under extreme emotional distress and had severely impaired capacity to conform his conduct to requirements of law at the time the crime was committed). As it has found in other cases, this Court can only find the extreme mental or emotional disturbance mitigator particularly compelling in this case.

Besides finding and giving some weight to this statutory mental mitigator, the court found that although Brown was 27 when he killed Miller, his "mental age

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[18] The trial judge gave this mitigating factor "some weight."

is significantly lower than his chronological age." (11 R 1808)[19] This becomes particularly significant because in the critical "early adult" years when most people are establishing themselves, going to school, learning a trade or skill, serving in the military, getting jobs, and becoming married and starting a family. Brown by being in prison during this critical time was subject to its unique rules, regulations, and confining environment. C.f., Muhammad v. State, 494 So. 2d 969, 976 (Fla. 1986)(" A prisoner on death row lives in a world of extremely limited options.") In a sense, it was as if he were in a time bubble, emerging from that severely restricted life, not as a young man of 27 ready to make his mark in the world, but as a 17-year-old kid coming into an alien society.

But he was not simply a normal 17-year-old boy. The other compelling nonstatutory mitigating circumstances the court found paint a much more dismal

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[19] The court gave this mitigator only slight weight because at the time of the killing he "had stable living conditions, was involved in more than one intimate relationship, was employed full-time, had his own vehicle, and until he committed the crime, had been able to comply with the numerous conditions of his parole." (11 R 1809) Being in more than one intimate relationship at the same time (in fact, he was in three (18 R 901)) hardly shows a person of normal maturity or the "most appropriate adaptive functioning." (18 R 902). Additionally, the fact is that when he murdered Miller he had just been fired, and obviously did so with a gun, which we presume he already had. These facts showed that he had not complied with the conditions of his parole. Moreover, Dr. Krop based his conclusion of the defendant's substantially lower emotional age on the fact that he functioned not simply as an immature adult, but because of his intellectual, emotional, and psychological dysfunctioning, as an "extremely immature" adult (18 R 893).

picture of a mentally challenged, emotionally disturbed, and troubled youth. First, as the court acknowledged and found, Brown was mentally ill at the time of the murder (11 R 1813). The court discussed Brown's mental illnesses when it concluded he was under the influence of an extreme mental or emotional disturbance, but it found, as a separate mitigator, that he was mentally ill at the time of the murder.[20] Dr. Reibsame, the psychologist called by the State, knew Brown had been diagnosed with an impulse control disorder. In addition, he "offered a diagnosis of a psychotic disorder, not specified." (19 R 937) Thus, we have a defendant who, at the time of the murder, is under the influence of an extreme mental or emotional disturbance, which is exacerbated by some form of psychosis and impulsivity. But that is not all.

Second, Brown has a borderline IQ. The evidence presented at the penalty phase hearing showed that at best the defendant has an IQ of 82. (10 R 1731)[21] This places him among the intellectually dullest persons in the United States (10 R 1731; 18 R 892), which means that the overwhelming majority of the American

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[20] The court gave this mitigator slight weight because his parole officer saw no mental deterioration in the days before the murder, and the defense and state psychologists who examined the defendant believed he was "malingering to some extent." (11 R 1813)

[21] The court admitted that determining the defendant's "actual I.Q. appeared to be somewhat of a challenge for mental health experts." (11 R 1811)

population is brighter than he is. This is a significant mitigator, even if his "adaptive skills at the time of murder" take the edge somewhat off this mitigation (11 R 1811) Regardless of them, and they are questionable, being not simply slower, but much slower than one's associates is a significant disability. A low IQ means more than it takes him longer to understand the punch line of a joke, or that it would take him six years rather than three to earn a law degree. People with lower intelligence may never get the punch line and may never graduate from high school, much less college or law school, no matter how much time they take. They have a much more difficult, and in some cases, impossible, time processing facts, understanding social cues, and communicating. They tend to be impulsive, have incomplete or immature concepts of blameworthiness, know less and be less motivated than normal persons. Cf., James Ellis and Ruth Luckason, "Mentally Retarded Criminal Defendants," 53 George Washington Law Review, 414, 427-31 (1985).

Juanese Miller obviously sensed this slowness and made fun of Brown by taunting and insulting him as a "pussy nigger," or "pussy, pussy, pussy," and dumping ice down his back. Whatever "adaptive skills" Brown may have had to deal with the daily stresses of his life, they did not prepare him to deal with

Miller's bullying and Emami's firing.[22]

Third, Brown had a deprived childhood. To say Brown had a deprived childhood, as the court found, assumes, of course, that he had a childhood at all. From the court's sentencing order and the record, that assumption is questionable. Katherine and Johnny Brown, the mother and father of Thomas Brown, stayed together as a couple of some sort for only 2½ years after the birth of the defendant. When he left, Katherine, or "Peaches" as she was known to her friends (18 R 856), virtually abandoned any mothering responsibility for her children. Instead of assuming a loving, nurturing role that would have seen to the growth of her son into a responsible young man, she raised him applying the mantra of his becoming a "hard rock street person." (18 R 832) Now what that meant is left to the

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[22] While Brown does not argue that the statutory mitigator that "The victim was a participant in the defendant's conduct or consented to the act," §921.141(6)(c) Fla. Stats. (2009) applies, Miller does not have entirely clean hands. Just as a defendant "takes his victim as he finds him." See Swan v. State, 322 So. 2d 485 (Fla. 1975); Weir v. State, 777 So. 2d 1073, 1076 (Fla. 4th DCA 2001); Miller is presumed to have known of the defendant's psychosis and impulsive personality when put the match to the fuse with her taunts and insults.

imagination,[23] but it certainly does not bring up memories of her reading Dr. Seuss to a young son at bedtime or her having him wash the dishes and take out the trash. Instead, as witnesses testified, she "never showed . . . a lot of love for the Defendant." (11 R 1810) She constantly belittled and criticized him, and rarely had any time for him (18 R 889). This is particularly tragic because Brown "really loved his mother," and "they were inseparable." (18 R 843)

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23 In the well known Johnny Cash song "A Boy named Sue," a man laments that his father had named him "Sue." He had done so because he knew he would not be around to help the boy grow, so the only thing he could do was give him a name that would force him to grow up hard. After a chance encounter years later that results in the two men fighting, the father says:

> Son, this world is rough
> And if a man's gonna make it, he's gotta be tough
> And I knew I wouldn't be there to help ya along.
> So I give ya that name and I said goodbye
> I knew you'd have to get tough or die
> And it's the name that helped to make you strong.

After the two men reconcile Sue then says

> I got all choked up and I threw down my gun
> And I called him my pa, and he called me his son,
> And I came away with a different point of view.
> And I think about him, now and then,
> Every time I try and every time I win,
> And if I ever have a son, I think I'm gonna name him Bill or George!
> Anything but Sue! I still hate that name!

Indeed, the structure so essential to raising good, decent children was predictably absent. This mother routinely left her three children alone late into the night, and his sister, who was not much older than him, had to fill in while their mother partied (11 R 1810). The only apparent adult concern came, by Brown's good fortune, from Katherine's male friends, two of whom were in the Navy. These sailors, who obviously had been raised in good homes, visited the Brown residence and saw hungry, confused, and love starved children. Exhibiting more concern for these youth than their mother, they would bring food and clothes, and "provide them with anything else they needed." (11 R 1811). These young men, who had no obligation to these children, had such a natural love and concern that they would check on them when they were in port to make sure they had what they needed (18 R 866). As one of them said, "[I]t would probably break my heart sometimes when I would take food by there because they would act like they hadn't eaten in a while." (18 R 867) They did more than Brown's mother, who was neither stable nor maternal (18 R 866).

Now Brown does not argue that he should be spared a death sentence because his mother did not give him enough hugs. But undeniably, a man's, and in this case, a young man's, future can often be foretold by his youth. Nibert v. State, 574 So. 2d 1059, 1062 (Fla. 1990). Indeed, "As the twig is bent, so grows the

tree."[24] His stepmother, who like his father, saw little of her stepson, summarized his youth as sad, aggravated, and frustrated (18 R 845).

Thus, it should be no surprise that the "hard street person" who emerged from his chronological childhood should have serious mental and emotional problems, and it should be no surprise that he soon picked up a criminal record. That is what happened to this hard street person, who developed a criminal propensity and viewed the world through the lens of hunger, mental and emotional starvation, psychosis and an impulsive disorder.

Thus, when viewed in the totality, we have here a young man who deserves a life sentence because of his serious mental and emotional problems.

Significantly, each of these specifically found nonstatutory mitigators had a direct impact on the murder Brown committed, and that is important. Mitigation frequently just shows the defendant was a nice person, such as he was a good son, or loved animals, or was a good artist. While such facts may in some ethereal, generalized way reduce a defendant's moral culpability and hence mitigate a death sentence, Ault v. State, 53 So. 3d 175, 193 (Fla. 2010), they have little significance because they do little explain why the defendant murdered, or reduce his moral

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[24] Alexander Pope, 1734, Epistle to Cobham, 149-50.

culpability. But, in this case, Brown's mental illnesses, low intelligence, and deprived childhood join with the statutory mitigators to explain why this defendant acted the way he did. And, not only explain but provide compelling reasons to reduce his sentence of death to life.

In Crook v. State, 908 So. 2d 350, 359 (Fla. 2005). Crook fatally stabbed and sexually battered a bar owner during a robbery. Justifying a death sentence, the trial court found that he had committed the murder during a sexual battery, he had killed the victim for pecuniary gain, and the murder was especially heinous, atrocious, or cruel. In mitigation, the court found three statutory mitigators, age (he was 20 years old but had the personality development of a three or four year old), extreme mental or emotional impairment, and substantially impaired capacity. The court also found nonstatutory mitigation of brain damage, borderline intelligence, and an abusive childhood. This latter mitigation was especially compelling in reducing the defendant's sentence of death to life in prison.

> Most persuasive in the mitigation evidence is the unrefuted testimony of Drs. McCraney, McClain, and McMahon directly tying Crook's impairments to his functioning at the time of the murder-which clearly supports the trial court's attribution of "significant weight" to the statutory mitigators involving Crook's diminished mental capacity. These circumstances, especially the testimony linking the combination of Crook's brain damage and substance abuse to his behavior at the time of the murder, counterbalance the effect of the aggravating factors. . . . As our cases demonstrate, the existence of this mitigation, and especially that evidence connecting the mental

> mitigation to the crime, prevents us from classifying this case as among the most aggravated and least mitigated.

Id. at 359.

As in Crook, the mitigation presented in Brown's case connects the mental mitigation to Brown's murder. And, as in Crook, it is not among the most aggravated and least mitigated.

Brown's death sentence, thus, becomes unjustified and disproportionate just by the facts of this case. When viewed on a larger screen, moreover, and compared with other cases in which this Court has reversed death sentences on proportionality grounds, such punishment is clearly disproportionate. See Farinas v. State, 569 So. 2d 425 (Fla. 1990); Ross v. State, 474 So. 2d 1170 (Fla. 1985); White v. State, 616 So. 2d 21 (Fla. 1993); Douglas v. State, 575 So. 2d 165, 167 (Fla. 1991)

This larger view must, however, initially acknowledge what this case is not. It is not a case whose facts justify a death sentence. Here, we have only a simple killing. There was no rape, robbery, kidnapping, or other violent felony accompanying the murder. Overton v. State, 801 So. 2d 877 (Fla. 2001)(Husband strangled and eight month pregnant wife sexually battered and strangled) It was not especially heinous, atrocious, or cruel. Blackwood v. State, 777 So. 2d 399 (Fla. 2000)(Strangulation and smothering of defendant's ex-girlfriend while she

was conscious). Miller was not bound or tortured, or aware of her impending death for any length of time. Brown did not kill Miller to eliminate her as a witness or to avoid arrest. Philmore v. State, 820 So. 2d 919 (Fla. 2002)(Car owner killed to eliminate her as a witness to a carjacking.) Nor did he do so because he had been involved in some sort of domestic relationship with her. He did not kill several people. The murder also was quickly done. He did not strangle, stab, or beat Miller to death. She was shot in the back and was never aware of her impending death. This was, as already said, a simple murder.

If this case presents none of those scenarios for which death was appropriate, the facts presented in other cases have led this Court to reduce death sentences even though they had more aggravation, even serious aggravation, and less mitigation than existed here.

In Ross v. State, supra, this Court vacated the Ross' sentence for killing his wife even though he had done so in an especially heinous, atrocious, or cruel manner. Mitigating that aggravator this Court found that he had committed the murder while under the influence of an extreme mental or emotional disturbance because he was an alcoholic and had been drinking when he killed her.

Similarly, in Robertson v. State, 699 So. 2d 1343, 1347-48 (Fla. 1993), despite the presence of two aggravators, this Court reduced Robertson's death sentence in light of the substantial mitigation he presented: (1) He was 19 years

old, (2) He had an impaired capacity at the time of the murder, (3) He had an abused and deprived childhood, (4) He had a history of mental illness, and (5) He had a borderline intelligence.

In Farinas v. State, supra, this Court vacated the death sentence where the defendant shot his former girlfriend three times, first paralyzing her and then shooting her twice in the head. The murder was heinous, atrocious, and cruel and was committed during a kidnapping, but the mitigating evidence showed the defendant under the influence of an extreme emotional disturbance at the time of the killing and that sufficiently mitigated a death sentence.

Similar to these cases, the killing of Juanese Miller resulted from an emotional explosion during which Brown only brief engaged in any specific reflection. Also, more so than what this Court has seen before, the two uncontested aggravators in this case have little direct relevance to the facts of this case. Unlike the mitigation that has direct pertinence and explains, if not justifies, what Brown did, it merely reflects his status as an ex-convict on parole.

This Court also has found the death sentence disproportionate in cases that involved some level of planning. In White, supra, the defendant's relationship with the victim had ended badly, and months later, he assaulted the victim's date with a crowbar. While in jail for that incident, White swore he would kill his former girlfriend. When released, he got a shotgun, drove to where the victim

worked and shot her in the parking lot after she had turned to run. He approached her and fired a second shot into her back, saying, "I told you so." He then left. After considering the presence of the two statutory mental mitigators and the emotional circumstances of the killing, this Court concluded that the death sentence was disproportionate.[25]

Comparing the facts of this case with those clearly shows this Court has reduced death sentences in instances involving worse crimes and equally - - or more - - culpable defendants. Brown killed Miller, who was not his initial target, in an emotional outburst, which was the product of uncontrolled emotions arising from being fired, bullied, humiliated, and unjustly(in his mind) punished.

In the pantheon of capital crimes, this is not one of the most aggravated and least mitigated. Brown has found no other case with comparable facts which has less aggravation and more substantial mitigation in which this Court affirmed a death sentence. Death is a disproportionate penalty for Brown, and this Court should reverse his death sentence and remand for imposition of a life sentence with no possibility of parole.

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[25] In this case, after shooting Miller, Brown said, "I told you I would kill you, bitch." (16 R 502, 516, 518, 542). There is no evidence when he had previously told her that, if he had, in fact, ever done so.

ISSUE III

THE TRIAL COURT ERRED IN REPEATEDLY INSTRUCTING THE JURY THAT THEIR RECOMMENDATION WAS JUST THAT, A RECOMMENDATION, A VIOLATION OF BROWN'S SIXTH, EIGHTH, AND FOURTEENTH AMENDMENT RIGHTS.

Before trial Brown filed a "Motion to Prohibit any Reference to the Jury's Role at the Penalty Phase as being 'Advisory' or to the Jury's Penalty Verdict as being a Recommendation." (4 R 504-507) The gist of this request was that the penalty phase instructions diminished the role of the jury in sentencing the defendant to death . The court apparently denied that motion (19 R 1003).

This request took legal strength from the United State Supreme Court's opinion in Caldwell v. Mississippi, 472 U.S. 320 (1985). In that case,

> [T]he State sought to minimize the jury's sense of responsibility for determining the appropriateness of death. Because we cannot say that this effort had no effect on the sentencing decision, that decision does not meet the standard of reliability that the Eighth Amendment requires. The sentence of death must therefore be vacated.

472 U.S. at 341. This issue involves a pure question of law, which should be reviewed de novo.

This Court has repeatedly and recently held that the standard penalty phase jury instructions comply with Caldwell. This Court will note that the Florida Standard Jury Instructions have been determined to be in compliance with the requirements of Caldwell. Burns v. State, 699 So. 2d 646, 654 (Fla.1997); Sochor

v. State, 619 So. 2d 285, 291-92 (Fla.1993); Thomas v. State, 838 So. 2d 535 (Fl. 2003).

Despite these rulings, Brown asks this Court to reconsider its rulings in those cases in light of Justices Lewis' and Pariente's concurring opinion in Bottoson v. Moore, 833 So. 2d 693, 723, 731-34 (Fla. 2002). In that case, Justice Lewis had great trouble approving those instructions because of their tendency to minimize the role of the jury,

> and the trial court's added explanation of Florida's death penalty scheme. A question whether a jury in situations such as this can have the proper sense of responsibility with regard to finding aggravating factors or the true importance of such findings as now emphasized in Ring [v. Arizona, 536 U.S. 584 (2002)].

Id. Justice Pariente, likewise, has concluded that the fact that the jury was told that its role is advisory presents additional concerns in light of Ring ". . . Butler v. State, 842 So.2d 817, 837 footnote 10 (Fla. 2003)(Pariente, concurring)

Brown asks this Court to listen to Justice Lewis' and Pariente's arguments because they were better reasoned than the majorities opinion in Burns. See, State v. Sturdivant, Case No. SC10-1791 (Fla. February 23, 2012)(Stare decisis is not an unbendable rule.) In this case, it has particular resonance because within the space of fifteen pages, the jury was told twenty-five times that their sentence was merely advisory or only a recommendation (19 R 1005-1020). When the judge repeatedly, repeatedly, repeatedly let them know that he had the responsibility to sentence

Brown, never told them that it had to give "great weight" to their decision, and said that they need not reach a unanimous decision on what to recommend, then Justice Lewis' concerns raises to the point of prophesy. Tedder v. State, 322 So. 2d 908 (Fla. 1975). The jury instructions used in the penalty phase portion of a capital trial generally and in this case specifically fail to eliminate the Caldwell problem. This Court should reverse Brown's sentence of death and remand for a new sentencing hearing using jury instructions that properly emphasizes their crucial role as one of the co-sentencers in this capital case. See, Espinosa v. Florida, 525 U.S. 1079 (1992).

ISSUE IV

THIS COURT WRONGLY DECIDED BOTTOSON V. MOORE, 863 SO. 2D 393 (FLA. 2002), AND KING V. MOORE, 831 SO. 2D 403 (FLA. 2002).

To be blunt, this Court wrongly rejected Linroy Bottoson's and Amos King's arguments when it concluded that the United States Supreme Court's decision in Ring v. Arizona, 536 U.S. 584 (2002), had no relevance to Florida's death penalty scheme. Because this argument involves only matters of law, this Court should review it de novo.

In that case, the United States Supreme Court held that, pursuant to Apprendi v. New Jersey, 530 US. 446 (2000), capital defendants are entitled to a jury determination "of any fact on which the legislature conditions" an increase of the maximum punishment of death. Apprendi had held that any fact, other than a prior conviction, which increases the maximum penalty for a crime must be submitted to the jury and proved beyond a reasonable doubt.

In 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), this Court rejected all Ring challenges by simply noting that the nation's high court had upheld Florida's capital sentencing statute several times, and this Court had no authority to declare it unconstitutional in light of that repeated approval.

> Significantly, the United States Supreme Court repeatedly has reviewed and upheld Florida's capital sentencing statute over the past quarter of a century, and although Bottoson contends that there now are areas of "irreconcilable conflict" in that precedent, the Court in Ring did not address this issue. In a comparable situation, the United States Supreme Court held:
>
> > If a precedent of this Court has direct application in a case, yet appears to rest on reasons rejected in some other line of decisions, the [other courts] should follow the case which directly controls, leaving to this Court the prerogative of overruling its own decisions.

Rodriquez de Quijas v. Shearson/ American Express, 490 U.S. 477, 484 (1989); Bottoson, cited above, at 695 (footnote omitted.).

The rule followed in Rodriquez de Quijas, has a notable exception. If there is an "intervening development in the law" this Court can determine that impact on Florida's administration of its death penalty statute. See, Hubbard v. United States, 514 U.S. 695 (1995).

> Our precedents are not sacrosanct, for we have overruled prior decisions where the necessity and propriety of doing so has been established. . . . Nonetheless, we have held that "any departure from the doctrine of stare decisis demands special justification." Arizona v. Rumsey, 467 U.S. 203, 212, 104 S. Ct. 2305, 2311, 81 L.Ed.2d 164 (1984). We have said also that the burden borne by the party advocating the abandonment of an established precedent is greater where the Court is asked to overrule a point of statutory construction. Considerations of stare decisis have special force in the area of statutory interpretation, for here, unlike in the context of constitutional interpretation, the legislative power is implicated, and Congress remains free to alter what we have done. . . .
>
> In cases where statutory precedents have been overruled, the primary reason for the Court's shift in position has been the intervening development of the law, through either the growth of

> judicial doctrine or further action taken by Congress. Where such changes have removed or weakened the conceptual underpinnings from the prior decision, . . . or where the later law has rendered the decision irreconcilable with competing legal doctrines or policies, ... the Court has not hesitated to overrule an earlier decision.

Patterson v. McLean Credit Union, 491 U.S.164, 172-73 (1989); see, Ring, cited above at 536 U.S. at 608. Moreover, the "intervening development of the law" exception has particularly strong relevance when those developments come from the case law produced by the United States Supreme Court. Hubbard, cited above (Rehnquist dissenting at pp. 719-20.). The question, therefore, focuses on whether Ring is such an "intervening development in the law" that this Court can re-examine the constitutionality of this state's death penalty law in light of that in decision.

The answer obviously is that it is a major decision whose seismic ripples have been felt not only in the United States Supreme Court's death penalty jurisprudence, but in that of the states. For example, Ring specifically overruled Walton v. Arizona, 497 U.S. 639 (1992), a case that 12 years earlier had upheld Arizona's capital sentencing scheme against a Sixth Amendment attack. Indeed, in overruling that case, the Ring court relied on part of the quoted portion of Patterson, that its decisions were not sacrosanct, but could be overruled "where the necessity and propriety of doing so has been established." Ring, cited above at p.

608 (Quoting Patterson, at 172) Subsequent developments in the law, notably Apprendi, justified that unusual step of overruling its own case.

Opinions of members of this Court also support the idea that this Court should examine Ring's impact on Florida's death sentencing scheme. Indeed, Justice Lewis, in his concurring opinion in Bottoson, hints or suggests that slavish obeisance to stare decisis was contrary to Ring's fundamental holding. "Blind adherence to prior authority, which is inconsistent with Ring, does not, in my view, adequately respond to or resolve the challenges presented by, or resolve the challenges presented by, the new constitutional framework announced in Ring." Bottoson, cited above at p. 725. Justice Anstead viewed Ring "as the most significant death penalty decision from the United States Supreme Court in the past thirty years," and he believes the court "honor bound to apply Ring's interpretation of the requirements of the Sixth Amendment to Florida's death penalty scheme." Duest v. State, 855 So. 2d 33 (Fla. 2003)(Anstead, concurring and dissenting); Bottoson, cited above, at page 703 (Anstead dissenting. Ring invalidates the "death penalty schemes of virtually all states."[26] Justice Pariente agrees with Justice Anstead "that Ring does raise serious concerns as to potential constitutional infirmities in our present capital sentencing scheme." Id. at p. 719. Justice Shaw

[26] Justices Quince, Lewis and Pariente agree that "there are deficiencies in our current death penalty sentencing instructions." Id. at 702, 723, 731.

concludes that Ring, "therefore, has a direct impact on Florida's capital sentencing statute." Id. at p. 717. That every member of this Court added a concurring or dissenting opinion to the per curiam opinion in Bottoson also underscores the conclusion that Ring qualifies as such a significant change or development in death penalty jurisprudence that this Court can and should determine the extent to which it affects it. Likewise, that members of the Court continue to discuss Ring, usually as a dissenting or concurring opinion, only justifies the conclusion that Ring has weighed heavily on this Court, as a court, and as individual members of it.

Of course, one might ask, as Justice Wells does in his concurring opinion in Bottoson, that if Ring were so significant a change, why the United States Supreme Court refused to consider Bottoson's serious Ring claim. Bottoson, at pp. 697-98. It may have refused certiorari for any reason, and that it failed to consider Bottoson's and King's claims give that denial no precedential value, as that Court and this one have said. Alabama v. Evans, 461 U.S. 230 (1983); Department of Legal Affairs v. District Court of Appeal, 5th District, 434 So. 2d 310 (Fla. 1983). Moreover, if one must look for a reason, one need look no further than the procedural posture of Bottoson and King. That is, both cases were post conviction cases, and as such, notions of finality of verdicts are so strong that new rules generally should not be applied retroactively to cases on collateral review." Teague v. Lane, 489 U.S. 288, 305, 310 (1989). Moreover, subsequent actions by

the nation's high court refutes Justice Wells' conclusion that if Florida's capital sentencing statute has Ring problems, the United States Supreme Court would have granted certiorari and remanded in light of that case. It has done so only for Arizona cases, e.g., Harrod v. Arizona, 536 U.S. 953 (2002); Pandeli v. Arizona, 536 U.S. 953 (2002); and Sansing v. Arizona, 536 U.S. 953 (2002). Moreover, it specifically rejected a Florida defendant's efforts to join his case to Ring. Rose v. Florida, 535 U.S. 951 (2002). Thus, in light of fn. 6 in Ring, in which the Supreme Court classified Florida's death scheme as a hybrid, and thus different from Arizona's method of sentencing defendants to death, it may simply have not wanted to deal with a post conviction case from a state with a different death penalty scheme than that presented by Arizona. See, Bottoson, cited above, p. 728 (Lewis, concurring). While noting several similarities between Arizona's and Florida's death penalty statutes, he also found "several distinctions.")

There is, therefore, no reason to believe the United States Supreme Court will accept this Court's invitation to reconsider this State's death penalty statute without first hearing from this Court how it believes Ring does or does not affect it. This Court should and it has every right to re-examine the constitutionality of this State's death penalty statute and determine for itself if, or to what extent, Ring modifies how we, as a State, put men and women to death

When it does, this Court should consider the following issues:

A. Justice Pariente's position that no Ring problem exists if "one of the aggravating circumstances found by the trial court was a prior violent felony conviction."

Lawrence v. State, 846 So. 2d 440 (Fla. 2003)(Pariente, concurring):

> I have concluded that a strict reading of Ring does not require jury findings on all the considerations bearing on the trial judge's decision to impose death under section 921.141, Florida Statutes (2002).. . . [Proffitt v. Florida, 428 U.S.242, 252 (1976)] has "never suggested that jury sentencing is required".... I continue to believe that the strict holding of Ring is satisfied where the trial judge has found an aggravating circumstance that rests solely on the fact of a prior conviction, rendering the defendant eligible for the death penalty.

Duest, cited above (Pariente, concurring). In this case, the trial court found three aggravating factors, none of which would have satisfied her criteria.

Justice Anstead rejected Justice Pariente's partial solution to the Ring problem, and Brown adopts it as his response to her position.

> In effect, the Court's decision adopts a per se harmlessness rule as to Apprendi and Ring claims in cases that involve the existence of the prior violent felony aggravating circumstance, even though the trial court expressly found and relied upon other significant aggravating circumstances not found by a jury in imposing the death penalty. I believe this decision violates the core principle of Ring that aggravating circumstances actually relied upon to impose a death sentence may not be determined by a judge alone.

Duest, cited above (Anstead, concurring and dissenting). Or, as Justice Anstead said in a footnote in Duest, "The question, however, under Ring is whether a trial court may rely on aggravating circumstances not found by a jury in actually imposing a death sentence." (Emphasis in opinion.)

B. Unanimous jury recommendations and specific findings by it.

Under Florida law, the jury, which this Court recognized in Espinosa v. Florida, 505 U.S. 1079 (1992), had a significant role in Florida's death penalty scheme, can only recommend death. The trial judge, giving that verdict "great weight," imposes the appropriate punishment. Id. This Court in Ring, identified Florida along with Delaware, Indiana, and Alabama as the only states that had a hybrid sentencing scheme that expected the judge and jury to actively participate in imposing the death penalty. Unique among other death penalty states and the sentencing schemes of the other hybrid statutes except Alabama,[27] Florida allows a non-unanimous capital sentencing jury to recommend death. Section 921.141(3), Florida Statutes (2002). Under Ring, Brown's death sentence may be unconstitutional. Bottoson, supra, at 714 (Shaw, concurring in result only); Butler v. State, 842 So. 2d 817 (Fla. 2003)(Pariente, concurring in part).

Pre-Ring, the Florida Supreme Court, relying on non capital cases from this Court that found no Sixth or Fourteenth Amendment problems to non-unanimous verdicts, Apodaca v. Oregon, 406 U.S. 404 (1972); Johnson v. Louisiana, 406

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[27] Alabama, like Florida, allows juries to return a non-unanimous death recommendation, but at least 10 of the jurors must agree that is the appropriate punishment. Ala. Crim. Code. Florida requires only a bare majority vote for death. Section 921.141(3), Florida Statutes (2002). Since Ring, the Delaware legislature passed, and its Governor has signed legislation requiring unanimous death recommendations. SB449.

U.S. 356 (1972), approved non unanimous jury verdicts of death. Even without Ring, that Florida reliance on non-capital cases to justify its capital sentencing procedure would be troublesome in light of this Court's declaration that heightened Eighth Amendment protections guide its decisions in death penalty cases. Simmons v. South Carolina, 512 U.S. 154 (1994) (Souter, concurring); Ford v. Wainwright, 477 U.S. 399 (1986). Ring, with its express respect for the Sixth Amendment's fundamental right of the voice of the community to be heard in a capital case, presents a strong argument that when a person's life is at stake that voice should unanimously declare the defendant should die.

This approval of a non-unanimous jury vote in death sentencing in light of Ring has troubled members of the state court. Indeed, Justice Pariente, has repeatedly had problems with split death recommendations:

> The eleven -to-one vote on the advisory sentence may very well violate the constitutional right to a unanimous jury in light of the holding in Ring that the jury is the finder of fact on aggravating circumstances that qualify the defendant for the death penalty.

See Anderson v. State, 841 So. 2d 390 (Fla. 2003)(Pariente, J. Concurring as to conviction and concurring in result only as to sentence); Lawrence v. State, 846 So. 2d 440 (Fla. 2003); Butler v. State, 842 So. 2d 817 (Fla. 2003) (Pariente, concurring and dissenting); Hodges v. State, Case No. SC01-1718 (Fla. June 19,

2003)(Pariente, dissenting); Bottoson v. Moore, 833 So. 2d 693, 709 (Fla. 2002)(Anstead, dissenting).

This Court should re-examine its holding in Bottoson and consider the impact Ring has on Florida' death penalty scheme. It should also reverse Brown's sentence of death and remand for a new sentencing trial.

ISSUE V:

THE COURT ERRED IN REFUSING TO PERMIT BROWN TO PRESENT EVIDENCE RELEVANT TO HIS MENTAL CONDITION AT THE TIME OF THE HOMICIDE, WHICH WOULD HAVE SHOWN HE DID NOT HAVE THE MENTAL CAPACITY TO COMMIT A PREMEDITATED MURDER, IN VIOLATION OF HIS SIXTH AND FOURTEENTH AMENDMENT RIGHTS.

Before trial, the State filed a motion seeking to prevent Brown from presenting evidence of his diminished capacity at the time of the homicide to prove he lacked the premeditated intent to kill (4 R 667-68). At the hearing on the motion, Brown acknowledged that this Court's opinion in Chestnut v. State, 538 So. 2d 820 (Fla. 1989) controlled the issue (13 R 2127). He also admitted or argued that whilc Chestnut was the "law of the land," other decisions of this Court had eroded the holding of that case, and evidence of "his mental state would be an important thing for the jury to have when they have to decide whether or not he was able to premeditate during the span of this incident." (13 R 2127-28). The court, following Chestnut, granted the State's request, and prohibited him from introducing expert testimony that would have tended to show that when he killed Juanesse Miller he lacked the required premeditated intent to kill (13 R 2129-30). That was error, and this Court should review this issue under an abuse of discretion standard of review.

In Chestnut, this Court held that evidence of an abnormal mental condition not constituting legal insanity was inadmissible to show that the defendant could not or did not entertain the specific intent necessary to prove the charged offense. Id. at 821. It reasoned that such evidence tended to mislead the jury. Dillbeck v. State, 643 So.2d 1027, 1029 (Fla.1994)("[E]vidence of most mental conditions is simply too misleading to be allowed in the guilt phase."). Subsequent cases modified that holding, but this Court has never retreated from the fundamental holding of that case that evidence of the defendant's mental state short of insanity is inadmissible to prove a charged defendant lacked the mental capacity to premeditate a specific intent crime. Id.. Bunney v. State, 603 So. 2d 1270, 1273 (Fla. 1992). This Court continues to adhere to Chestnut to preclude relevant evidence that because of some mental problem the defendant had he could not premeditate a murder. Nelson v. State, 43 So. 2d 20, 30 (Fla. 2010)

In this case, Brown presented a significant amount of evidence during the penalty phase of his trial that he had significant mental problems when he killed Juanesse Miller (See issues I and II). Specifically, Dr. Reibsame, the prosecution's mental health expert, said that at the time of the homicide, Brown had an impulse control disorder, suffered a form of psychosis, an antisocial personality disorder, and had a very paranoid type of perspective and mistrust of others that was long-standing (19 R 947). He had borderline characteristics and

problems controlling his anger, and he believed he was being unfairly treated. He also quickly became enraged when he perceived he was being treated unfairly (19 R 950).

Dr. Krop, the defense expert, agreed with Dr. Reibsame's conclusions, and he added that the defendant probably had a mild neuropsychological impairment (18 R 887-90). He perceived the world with mistrust, suspicion and paranoia, and he heard voices, all of which had a significant impact on his perception of reality at the time of the homicide (18 R 890). Dr. Krop also believed that because of his intellectual, emotional, and psychological impairments, Brown was an "extremely immature individual." (18 R 893).

All this evidence from Dr. Reibsame and Dr. Krop unquestionably was relevant to prove or establish the defendant's intentions or state of mind when he killed Miller. Section 90.401, Fla. Stat. (2009)("Relevant evidence is evidence tending to prove or disprove a material fact.") Only because of this Court's ruling in Chestnut, and its continued adherence to its rationale, Nelson, was the jury prevented from considering it in the guilt phase part of this case. This Court should re-examine the rationale for excluding this proof, that it misleads the jury, because that reason fails to withstand scrutiny.

It does not support the Court's Chestnut holding because parties have the help of experts to bring order to what may, at first blush, appear to be confusing or

misleading. After all, the purpose of expert witnesses is to assist the jury understand the evidence or other facts in issue. Section 90.702, Fla. Stat. (2009). Moreover, if the jury can consider evidence the trial court excluded from the guilt phase as part of the penalty phase evidence it is unfathomable why or how this misleading evidence should have become so clear that it is admissible in the penalty phase. Misleading evidence is misleading evidence regardless of when or where it is presented.

This is particularly true in cases such as this where the State sought to justify a death sentence by proving Brown acted with a cold, calculated, and premeditated intent when he killed Miller. Why evidence of the defendant's diminished capacity somehow had no relevance to show he lacked the premeditated intent to kill in the guilt phase of his trial but did tend to prove he did not have the heightened premeditated intent to kill in the penalty phase splits a hair too fine for logic, reason, and simple fairness. As a result of Chestnut, jurors may well believe the justice system fundamentally unfair when they hear penalty phase evidence that showed the defendant lacked the specific intent to kill, which they were unable to consider in their guilt phase deliberations.

This Court should, therefore, limit Chestnut's reach in capital cases. Unlike noncapital cases, those in which death is a possible penalty are uniquely different because they require a jury's input as to the appropriate sentence, and that is a

critical difference. Ring v. Arizona, 536 U.S. 584 (2002). If, as this Court held in Chestnut, the defendant's mental infirmities short of insanity are irrelevant in the guilt phase part of a trial but they are relevant at sentencing then the jury in the penalty phase of a capital trial will hear the misleading evidence the Chestnut court said it should not hear. More specifically, it will have to consider this evidence when the State seeks to prove the CCP aggravator because it requires a heightened level of premeditation. Expanding Chestnut to capital cases, particularly the guilt phase part of the trial, thus, makes no sense. Lockett v. Ohio, 438 U.S. 586 (1978) (Jury must be allowed to consider all relevant mitigating evidence.)

This Court should, therefore, reverse the trial court's judgment and sentence and remand for a new trial.

CONCLUSION

Based on the arguments presented here, the Appellant, Thomas Brown, respectfully asks this honorable court to reverse the trial court's sentence of death and either remand for imposition of a life sentence or a new sentencing hearing before a jury.

CERTIFICATES OF SERVICE AND FONT SIZE

I HEREBY CERTIFY that a copy of the foregoing has been furnished by electronic transmission to **MEREDITH CHARBULA**, Assistant Attorney General, The Capital, Tallahassee, FL 32399-1050; and by U.S. Mail to **THOMAS BROWN**, #D30662, Florida State Prison, 7819 NW 228th Street, Raiford, FL 32026, on this ____ day of May, 2012. I HEREBY CERTIFY that this brief has been prepared using Times New Roman 14 point font in compliance with the Florida Rule of Appellate Procedure 9.210(a)(2).

Respectfully submitted,

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