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

REPLY BRIEF OF APPELLANT

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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.

A problem that occurs in administering Florida's death penalty arises when a sentencing judge analyzes the facts of a particular case and sorts out those that support or defeat a particular aggravator or mitigator. This is a problem, in part, because section 921.141, Florida Statutes, requires written sentencing orders, and this Court has required such orders to be of "unmistakable clarity." Mann v. State, 420 So. 2d 578, 581 (Fla. 1982) This unmistakable clarity can be achieved only when the order has clearly considered all the evidence supporting or negating a particular factor. A selective picking and choosing of evidence to justify, say, a specific aggravator does not achieve this goal. An order that finds the CCP aggravator by only looking at the facts supporting it lacks the unmistakable clarity required when it has ignored those that weaken not only whether it should be found but also the weight given it. This selective choosing affects the confidence this Court can accord such orders that will invariably give the found aggravators "great weight."

Moreover, as demonstrated by the State's Answer Brief on pages 38 and 41 of the brief, there is a tendency for aggravators and mitigators to merge with other concepts in the criminal law. For example, the mental mitigator that at the time of the homicide the defendant was under the influence of an extreme mental or emotional disturbance, Section 921.141(6), Florida Statutes (2011), is nothing more than the §4.01 of the Model Penal Code's definition of insanity. United States v. Brawner, 471 F.2d 969 (D.C. Cir. 1972).

Likewise, this Court has gone to great lengths to make sure that the premeditation required for a murder to have been cold, calculated, and premeditated, is a "heightened" level of premeditation to distinguish it from and elevate it from the premeditation required for a first-degree murder. Jackson v. State, 648 So. 2d 85, 89 (Fla. 1994).

In this case, the State, on page 38 of its brief, has fallen into the trap of confusing or blending the argument against finding the CCP aggravator with the substantive "heat of passion" defense. It says on that page "There is a huge difference between being angry and revengeful and being in the throes of a near uncontrollable fit of rage at the time of the murder." If being in a near uncontrollable fit of rage is required to negate the cold aspect of the CCP aggravator then the defendant would not be guilty of first-degree murder. That is, homicides committed in that "heat of passion" justify convictions for either second-

degree murder or manslaughter. Johnson v. State, 969 So. 2d 938, 952 (Fla. 2007). If so, then some emotional disturbance less than a heat of passion defeats finding the CCP aggravator, and a defendant does not need to be "in the throes of a near uncontrollable fit of rage" to negate the cold element of this factor.

Similarly, on page 41 the State says that the State's mental health expert said "Brown was able to appreciate the criminality of his conduct and to conform his conduct to the requirements of the law." If he could not do so, he likely would have raised an insanity defense. That he could appreciate criminality of his conduct, or that he was sane, converts a presumption of the law, or absence of a mitigator, into an nonstatutory aggravator, something this Court has specifically said is impermissible. Wike v. State, 596 So. 2d 1020, 1025 (Fla. 1992)

In this case, the trial court picked its evidence to support the CCP factor but in its analysis it ignored the uncontroverted evidence that Brown was "very, very angry," or in a rage at the time of the murder (15 R 369,386,396). As such the court's sentencing order lacks the unmistakable clarity this Court has required because a totality of the circumstances paints a murkier picture of the defendant's mental state when he shot Miller . This failing also does not justify the finding of "great weight" that it gave to the CCP aggravator. Or, rather, to find it so, it had to consider the totality of the circumstances surrounding this murder and then explain

why, notwithstanding the evidence to reduce the weight it might be given it still deserves great weight.

Without such findings, analysis, and explanations the trial court's sentencing order lacks the "competent, substantial" evidence necessary for this Court to approve it.

On page 41 of its brief, the State says "This Court should reject any notion that Brown's mental health history or low IQ defeats CCP in this case." Whether this Court should reject any notion is not the issue. The problem is that the sentencing court should have done so, and it should have explicitly done so in its order. If this Court is going to give trial judges' findings deference then what they say or write should clearly justify that respect. This Court should not be in the business of doing the trial court's work for it, particularly in this area of the law.

ISSUE II

DEATH IS A PROPORTIONATELY UNWARRANTED SENTENCE

By way of footnote 11 on page 42 of its brief, the State says "It defies law and logic to suggest [the murder in this case] is '"almost accidental."' To clarify Brown's intent when he used that phrase in his Initial brief, he did not mean it in the sense that the murder was by mistake or misfortune, such as he tripped, dropped the gun, and it discharged, the bullet hitting Miller. Instead, he intended to use that phrase in the sense that it was a chance, fortuitous event that was not planned or that Miller was deliberately hunted down. Instead, he was in a fugue, a horrible fantasy of Miller's taunting insults that had become reality with Emami firing him, not because of anything he had done, but the only person she could harass.

In its brief, the State cites two cases, Jackson v. State, 25 So. 3d 518 (Fla. 2009); Diaz v. State, 860 So. 2d 960 (Fla. 2003), as "good comparator" cases with this case. Not so.

In Jackson, the jury recommended death by a vote of 9-3, whereas, in this case, they did so by the much narrower 7-5. In that case, Jackson and a co-defendant, Wooten, kidnapped the victim because she had stolen some drugs and money from the defendant. They took her to an apartment where she was tied and put in the bathtub. When night fell Jackson hefted the victim over his shoulder,

carried her from the apartment, and despite her protests, forced her into the trunk of a car. She was later killed, for which the defendant was convicted of both premeditated and felony murder. Wooten was convicted only of felony murder.

Jackson had prior convictions for robbery, battery on a law enforcement officer and resisting arrest with violence, which the court found aggravated this murder. It also found he had committed that crime during a kidnapping and the murder was done coldly, with calculation and premeditation. Among the mitigation found by the court, it held that he had a severely abused and neglected childhood both while he lived with his family and while in foster care, and he had suffered from a bipolar disorder and had been hospitalized in a mental hospital for several years. It found none of the statutory mitigators.

On appeal, this Court held death proportionately warranted because he was 30 years old, had a high intelligence, and had run some small businesses. Id. at 536.

Contrary to Jackson, in this case, Brown has neither a high intelligence nor any or much real world experience or success, unless his 8 years in prison counts as the real world, and there almost by definition is little success. To the contrary, he never outgrew his childhood. Significantly distinguishing this case from Jackson, the court found two statutory mitigators, under the influence of an extreme emotional disturbance (some weight) and age(slight weight). It also found

that he suffered from a mental illness, and the victim did not suffer (9 R 1804-1815), which is contrary to the facts in Jackson where the victim from almost the beginning of the kidnapping was "upset, like she wanted to cry," beaten, and carried around like a sack of wheat before being further beaten in order to put her in the trunk of a car where she was driven to her death Id. at 523. She must have had some awareness of the seriousness of her plight and impending death, especially when the defendant beat her after dumping her in the trunk of his car despite her pleas not to be put there.[1] In this case, Miller never had such awareness, and was in fact shot in the back as she waited to order some food.

Moreover, unlike Jackson with his "high intelligence," Brown has a borderline IQ of 82, which, while not placing him among the mentally retarded, certainly puts him on the other side of the chasm separating him from Jackson. Brown also has an impulse defect that explains and mitigates his murder far more effectively than the bipolar disorder and neglected childhood Jackson had.

Jackson, therefore, has no significant or substantial similarities with this case that warrants its consideration in a proportionality review.

[1] It is surprising the court did not also find Jackson committed the murder in an especially heinous, atrocious, or cruel manner. This Court has found that this aggravator justified when the victim mentally suffered by being aware of his or her impending death for a some period. Russ v. State, 73 So. 3d 178, 196-97 (Fla. 2011).

In Diaz, Diaz killed the father of the woman with whom he had had a relationship that had ended some months earlier. He wanted to kill the woman but ended up murdering her father, which apparently gives it some similarity to this case. Diaz had plotted for at least a week and maybe longer to kill the female, and he was repeatedly frustrated in trying to buy a gun. The required waiting period and background checks prohibited him from immediately getting the weapon he had bought from a pawn shop.

On the day of the murder, Diaz went to the woman's home, and accosted her in her garage as she tried to back her car out. As she did so, he shot her two times, but she managed to drive away.

Still frustrated, Diaz had a confrontation with her father in the front yard, eventually chasing him throughout the house and into the master bedroom. Despite the father's efforts to calm Diaz he pointed the gun at him, pulled the trigger, but the gun was empty. So, the defendant reloaded the weapon and chased the father into the bathroom where he shot him three times, killing him.

When the victim's wife (who was a quadriplegic and was in the bed in the master bedroom) asked why Diaz had shot her husband, he told her that he had deserved it. He then shot the husband again and waited in the house until the police arrived and arrested him.

The jury, by a vote of 9-3, recommended death, which the court imposed, and only four members of this Court affirmed. In doing so, it rejected the trial court's finding the murder was especially heinous, atrocious, or cruel, but agreed that it was cold, calculated, and premeditated, and Diaz had a prior conviction for a violent felony.[2] It also found a death sentence proportionately warranted apparently because the two remaining aggravators had greater significance than the three statutory mitigators and other mitigation the trial court had found but gave only moderate or very little weight.

In this case, we do not have the impatient waiting for the murder weapon, evidence of any planning, nor a prolonged chase that ended with a frustrated attempt to kill, followed by another chase and a final shooting. Of course, Brown apparently killed someone other than his intended victim, which is similar to Diaz in that aspect, but only in that aspect. The defendant in this case never shot his intended victim, and would have succeeded in killing her but for her flight, as did Diaz and his former girlfriend. Nor is there any evidence of any extensive and prolonged planning, or intent to kill, as in Diaz. Nor did Brown try to kill Miller, fail to do so, but persist until he was successful, as did Diaz with the father.

[2] Justice Pariente, joined by Justices Anstead and Shaw, would have also found the murder not CCP, and a death sentence not proportionately warranted.

To the contrary, in this case, we have a seriously psychotic and impulsive young man (10 R 1729,1735-36; 18 R 883-84; 19 R 937,947), whose world had suddenly collapsed when Emami fired him. And, he could not be blamed if he justifiably saw Miller as the root cause of that disaster. Of course we do blame him for killing her, but his moral culpability certainly is much less than that of Diaz who at best was upset because a girlfriend had dumped him at least a month before he murdered a completely blameless father.

Brown was a young man who had a long history of mental illness. The Georgia prison system recognized and treated him for his psychosis, self-mutilation, and auditory hallucinations (17 R 878). There is no evidence that in the 13 months after his release from his Georgia confinement, and while he was on parole in Florida that it similarly recognized he had any mental problems, or that he took any medication to treat them and help him control the voices and psychotic breaks from reality (17 R 815).

Brown's death sentence is not proportionately justified, and this Court should reverse the lower court's imposition of that sentence and remand for it to impose a sentence of life in prison without the possibility of parole.

ISSUE IV

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

The State, on pages 55-57 of its brief says Brown should lose for three reasons: (1) He never preserved the issue for this Court's review, (2) This Court's ruling in Chestnut v. State, 538 So. 2d 820 (Fla. 1989) has been the law in this state for over 20 years, and therefore, should remain so, (3) Whatever error occurred was harmless. None of those reasons withstand scrutiny.

First, as to preservation, Brown raised the Chestnut issue before trial, presented it to the trial court, which had to follow this Court's ruling and denied it. No one, including Brown, expected anything else, but if he was to have any opportunity present this issue to this Court (which is the only one that can re-examine Chestnut) he had to do exactly what he did below.

Now, did he present evidence to support that argument? If by that is meant, did he have a full blown hearing on this issue in which he called Dr. Krop or Dr. Reibsame to support his position, then no. He did not. But that was not required. In order for an issue to preserved for this Court's review, Brown needed to have raised it at the trial court level and developed the record well enough for this

Court's review. Castor v. State, 365 So. 2d 701, 703 (Fla. 1978). Under that standard, the defendant clearly preserved this issue for this Court to consider. Specifically, by way of a written motion, he raised the Chestnut issue before trial (4 R 667-68). The trial court did not deny this motion because there was no evidence to support it. Instead, it ruled, as a matter of law, that whatever evidence he might have, it was irrelevant for the jury to consider during the guilt phase of his trial (13 R 2129-30). That evidence, as developed at the penalty phase of his trial, raised the issue of the defendant's mental state sufficiently to have justified at least a jury instruction to the effect that that evidence could be considered to show he lacked the necessary intent required for first-degree premeditated murder. Hooper v. State, 476 So. 2d 1253, 1256 (Fla. 1985)(A party is entitled to an instruction on his theory if there is any evidence to support it.)

Thus, because this issue is one of a matter of law, Brown's is presumed to have had evidence to support his position, which, as events show, he did. He has preserved this issue for this Court's review.

As to the merits of the issue, the State says that stare decisis should control. But, as this Court has said: "Fidelity to precedent provides stability to the law and to the society governed by that law. However, the doctrine does not command blind allegiance to precedent. Stare decisis yields when an established rule of law has proven unacceptable or unworkable in practice." State v. Green, 944 So. 2d

208, 217 (Fla. 2006) (citations and internal quotation marks omitted); see also, State v. Sturdivant, Case No. SC10-1791 (Fla. February 23, 2012).

In this case, the rationale of Chestnut has exceeded those limits and proven not only unacceptable in theory but unworkable in practice, as clearly shown by this case. That is, Chestnut prevented Brown from presenting evidence of his mental condition during the guilt phase of his trial. It was, as this Court said in Chestnut, too confusing for the jury to consider. Nonetheless, it was not so confusing in the penalty phase of his trial because it was admissible to negate the heightened premeditation required for the CCP aggravator.

Hence, for the reasons presented in the Initial Brief, this Court should reject Chestnut's continuing viability and reverse Brown's conviction for first-degree murder and remand for a new trial.

Finally, the State says that whatever error may have occurred was harmless beyond a reasonable doubt. But, as discussed above, the court should have instructed the jury on the defendant's mental state less than insanity. He was entitled to an instruction because the evidence when viewed in the light most favorable to giving that guidance justified giving it. The error could not be harmless. That is, matters of a defendant's mental state are almost always a matter exclusively for the jury to determine. Hence, the evidence that Brown suffered mental infirmities that affected his ability to premeditate a murder was for the jury

to consider. And this Court cannot say that this "any evidence" was as a matter of fact or law so minimal to make the defense so weak beyond a reasonable doubt that the jury would have rejected it. That is, if there is "any evidence" to justify giving the instruction then the jury could have considered this "any evidence" and found Brown not guilty of first-degree premeditated murder. Hence, the trial court's error could not be harmless beyond all reasonable doubts.

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 and the Initial Brief, 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 September, 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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