IN THE SUPREME COURT OF FLORIDA

CASE NO. SC12-676

THOMAS FORD MCCOY, JR.,

vs.

THE STATE OF FLORIDA,

Appellee.

ON APPEAL FROM THE CIRCUIT COURT OF THE FIRST JUDICIAL CIRCUIT IN AND FOR WALTON COUNTY, CRIMINAL DIVISION

BRIEF OF APPELLEE

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STATEMENT OF CASE AND FACTS

Defendant was employed with the Coca Cola company as a service technician from the early 1990s until 2006. (Vol. 12 at 252-55) Before 2005, the Coca Cola company had a policy under which employees were paid for the time they spent going to and from work. (Vol. 12 at 254-55) Sometime in 2005, the Coca Cola company changed this policy, and that made Defendant upset. (Vol. 12 at 252-56, Vol. 13 at 429-30, Vol. 13 at 415) As a consequence, in June of 2006, Defendant decided to resign in order to pursue other business opportunities. (Vol. 12 at 252-56, Vol. 13 at 429-30, Vol. 13 at 415)

Sometime in 2007, Defendant attempted to get rehired by the Coca Cola company. (Vol. 12 at 253-54) Defendant called his former supervisor, Ralph King, on numerous occasions asking to be rehired, but there was no position available. (Vol. 12 at 254-55)

Ray Jackson and Curtis Brown were Defendant's co-workers and colleagues, and Ralph King was their supervisor. (Vol. 11 at 121-27, Vol. 12 at 251-52) Defendant was under impression that his co-workers, Jackson and Brown, treated him unkindly by mocking him when one of them allegedly made a comment, approximately three years before the murder, about Defendant not having a family. (Vol. 18 at 18-19, Vol. 12 at 267-68, Vol. 11

at 179) As a consequence, Defendant developed feelings of anger towards them. (Vol. 18 at 15-19) Defendant thought that King, Jackson and Brown (or one of them) had caused him not to be rehired at the Coca Cola company. (Vol. 18 at 18-19) Defendant was also upset with Jackson because Jackson allegedly laughed at Defendant after he had lost his job and eventually decided to kill him. (Vol. 12 at 233-24, Vol. 18 at 21-22)

Sometime around November of 2008, Defendant started making plans to kill Jackson and had announced his plans to other people. (Vol. 12 at 230-34, Vol. 11 at 177-78, Vol. 15 at 599)

In November of 2008, Defendant told another former co-worker, James Leddon, that he was going to kill Jackson and announced that he had already bought a gun and materials to build a silencer. (Vol. 12 at 233-34) Defendant told Leddon that he intended to shoot Jackson in his knees, and once Jackson was screaming in pain, he would shoot him between the eyes. (Vol. 12 at 233-34) Leddon informed Jackson, and a complaint was filed with the police. (Vol. 12 at 223-24, 232-33, Vol. 11 at 154-55)

A few days before the murder, Defendant informed a former Coca Cola colleague, Wendell Kilgore, that he had something big planned and that Kilgore might see him on CNN. (Vol. 11 at 177-78, 184) Kilgore informed the company and the police. (Vol. 11 at 177-78, 184)

A few days before the murder, Defendant placed a fake service call regarding a Wal-Mart (which he knew was Jackson's area) attempting to lure him and kill him. (Vol. 18 at 23-24, Vol. 15 at 628-29) Defendant spent some time at the store waiting for Jackson to show up. (Vol. 18 at 24) When Jackson finally showed up, Defendant followed him but decided to abandon his plan because there were too many people around. (Vol. 18 at 24, Vol. 15 at 628-29)

Subsequently, on April 9, 2009, Defendant made a fake service call to Carley's Car Care in DeFuniak Springs in order to lure Jackson. (Vol. 15 at 629-30, Vol. 11 at 131-32) Defendant waited for Jackson in the parking lot of Carley's, but Jackson did not show up because he knew that there was no Coke machine there. (Vol. 11 at 130-38, 150, Vol. 15 at 626-30)

Finally, on April 10, 2009, Defendant made a fake service call regarding Northwest Florida State College. (Vol. 15 at 630) Defendant used to service the college and thought that it would be a good place to murder Jackson. (Vol. 15 at 630, Vol. 11 at 135-40, 163-67) During his conversation with the dispatcher, Defendant presented himself as a student and reported that two coke machines, the one inside the break room and the other one outside of the building, were broken. (Vol. 11 at 163-67) Jackson was too busy to respond to the service call at the

college, and Brown volunteered to replace him. (Vol. 11 at 136-40)

Defendant waited for Jackson in the parking lot observing the vehicles pulling over while carrying his gun in a white plastic bag. (Vol. 11 at 60, Vol. at 18 26-29) Defendant then moved to the entrance at the front of the building from where he was also able to see vehicles pulling off the highway into the parking area. (Vol. 11 at 58-60) While observing the parking lot from that position, Defendant noticed that Brown came instead of Jackson and decided that Brown would be good enough to kill instead of Jackson. (Vol. 18 at 26)

Defendant then went to the room where the coke machine was located carrying a gun concealed in a bag. (Vol. 18 at 26-27, Vol. 15 at 630) Defendant waited for Brown to show up in the room. (Vol. 15 at 630-32) When Brown opened the door, Defendant shot him six times with his Glock. (Vol. 18 at 27-28, Vol. 15 at 630-33) Defendant stepped over Brown on his way out and left the scene. (Vol. 18 at 26-29)

Soon thereafter, Defendant threw away his cell phone and belongings, spray painted his vehicle in order to alter the appearance, and fled to Tampa. (Vol. 18 at 26-29)

The police located Defendant in Tampa area. (Vol. 13 at 275) Defendant was noticed walking through the parking lot of

Holiday Inn Express hotel. (Vol. 13 at 278-81) Defendant passed by his vehicle and continued walking along the sidewalk, right by the pool. (Vol. 13 at 278-79) The police was positioned behind Defendant, approximately ten to twelve yards away. (Vol. 13 at 280-81) The police told Defendant to show his hands and get on the ground. (Vol. 13 at 280-82) However, Defendant turned around with a gun in his hands and fired at the police. (Vol. 13 at 282-87, 306-10) The bullet fired from Defendant's .380 semi-automatic gun went through the pool area, struck two metal fence railings, and dropped down to the ground in the patio area of the pool. (Vol. 13 at 308-09, 315-16) The police fired back at Defendant hitting him two times. (Vol. 13 at 281-87)

As a result, Defendant was charged by indictment for the first degree premeditated murder with a weapon of Curtis Brown, on or about April 10, 2009, by shooting him. (Vol. 1 at 15-16)

On May 29, 2009, Defendant entered a plea of not guilty. (Vol. 1 at 32) Thereafter, on July 26, 2011, Defendant entered a guilty plea to one count of First Degree Premeditated Murder with a weapon, waived the guilt phase and proceeded to the penalty phase of the trial. (Vol. 5 at 947-50, Vol. 7 at 3-21)

Pre-trial, Defendant filed a Motion to Declare Florida's Death Penalty Unconstitutional under Ring v. Arizona, 536 U.S. 584 (2002). (Vol. 1 at 44-76) On June 8, 2011, the trial court

entered the written order denying the motion as contrary to the settled Florida law. (Vol. 2 at 280, Vol. 6 at 3-27)

At the penalty phase, Jerry Hall, a fireman with DeFuniak Springs Fire Department, testified that on April 10, 2009, he responded to a call and proceeded to Northwest Florida State College. (Vol. 11 at 43-44) He entered the building on his right and found a gentleman lying on the floor, unresponsive. (Vol. 11 at 45-46) Hall testified that he was accompanied by a fellow firefighter Nathan Hickingbottom and a volunteer, Mike Naro, who helped him pull out the man from under the table and check his vital signs. (Vol. 11 at 46) At first, Hall did not see any signs of blood, but after he started chest compressions, he noticed that there were blood and shell casings present. (Vol. 11 at 47-48) Hall determined that the victim was deceased and cleared the scene until the law enforcement came. (Vol. 11 at 48-49)

Sergeant Chuwan Boros testified that on April 10, 2009, he arrived at the scene, observed a deceased man with two entry wounds on his body and located two spend round casings. (Vol. 11 at 53-54) Boros further stated that he secured the scene for the investigation. (Vol. 11 at 55)

Cheryl Hall, an employee at Northwest Florida State College, testified that earlier on the day of the murder, she

noticed a person surveying the parking lot. (Vol. 11 at 58) Hall described the person as a white male, five-six to five-eight with dark hair that was beginning to gray, wearing shorts and a short sleeved shirt and carrying a white plastic bag in his hand. (Vol. 11 at 59) The man was standing at the front of the parking lot facing the highway from which point he could observe vehicles pull off the highway into the parking area. (Vol. 11 at 60)

Allison Gipson, a forensic specialist, testified that she processed the crime scene and found four projectiles and four cartridge casings. (Vol. 11 at 70-77) She attended the autopsy and found out that two projectiles were recovered from the body. (Vol. 11 at 100-01) She recovered five shell casings from the crime scene and could not locate the sixth one, but it was possible that it got stuck in someone's boot. (Vol. 11 at 101) Gipson opined that Defendant could have been hiding between Coca Cola machine and filing cabinet at the time he fired the shots. (Vol. 11 at 110-11)

Ray Jackson testified that he was employed with Coca Cola for thirty years, that he knew Curtis Brown since Brown started working for the company and that they were friends. (Vol. 11 at 120-21) Jackson described Brown as a happy, free-spirited man who loved his family and Jesus Christ and liked to help others.

(Vol. 11 at 121-25) Jackson knew Defendant as a coworker and friend and was unaware of any difficulty between Defendant and Brown. (Vol. 11 at 127)

Jackson testified that Defendant resigned in 2006 and that neither he nor Brown had anything to do with Defendant's resignation. (Vol. 11 at 127) He never mistreated Defendant in any way and was never mean or derogatory to him. (Vol. 11 at 129) Jackson stated that Defendant was not married, that he did not have a steady relationship and that he never spoke improperly with Defendant about his relationships with women. (Vol. 11 at 130)

Jackson testified that in November of 2008, another co-worker, James Leddon, told him that Defendant informed him of his intention to shoot Jackson. (Vol. 11 at 142-43) Jackson went to his supervisor and to the police and filed a complaint. (Vol. 11 at 142-43)

On cross, Jackson testified that he, on occasion, used to tease Defendant, that the technicians all used to tease each other and that some people took it better than the others. (Vol. 11 at 154-55)

Clyde Hall, a Coca Cola employee, testified that in 2009, he worked as a sales manager in Valparaiso and that he knew Defendant, Jackson and Brown and had interactions with them.

(Vol. 11 at 157-59) Hall was asked to listen to the Northwest Florida State College service call and recognized Defendant's voice. (Vol. 11 at 160-61) Hall stated that during the service call, it seemed unusual that Defendant had all types of information for various machines and tried to refer to the specific machine where the shooting eventually took place. (Vol. 11 at 161-62) The audio recording of the Northwest Florida State service call was introduced and published before the jury. (Vol. 11 at 163-67)

On cross, Hall testified that on April 9, 2009, he had a conversation with other co-worker, Wendell Kilgore, about the fact that Defendant called and said that he would be on CNN one day. (Vol. 11 at 170-74) Hall contacted the security department. (Vol. 11 at 170-74)

On redirect, Hall explained that he was concerned because he was aware that in November of 2009, there was a police investigation regarding Defendant's threats toward Jackson. (Vol. 11 at 175-76)

Dr. Andrea Minyard testified that on April 13, 2009, she conducted the autopsy of Curtis Brown. (Vol. 12 at 196-98) Brown had suffered six entrance gunshot wounds and four additional defects in the skin that represented exit wounds. (Vol. 12 at 198-99) The cause of death of Brown was multiple gunshot wounds

and the manner of death was homicide. (Vol. 12 at 203) Minyard opined that considering that Brown suffered six gunshot wounds, the attack was not survivable. (Vol. 12 at 209)

Minyard further testified that the first wound entered the chest. (Vol. 12 at 200-201) The second wound entered the shoulder. (Vol. 12 at 201) The third wound entered the areola. (Vol. 12 at 201) The fourth wound entered the left shoulder, pierced the aorta and struck a portion of the vertebrae. (Vol. 12 at 201-02) The fifth wound entered the left upper back. (Vol. 12 at 201-02) The sixth wound entered the left lower back. (Vol. 12 at 202-203)

On cross, Minyard testified that these six fatal wounds could have caused loss of consciousness within seconds or minutes. (Vol. 12 at 221-22)

Matt Willingham testified that in November of 2008, he was working as a captain with Valparaiso Police Department. (Vol. 12 at 223-24) On November 21, 2008, Ralph King and Ray Jackson came to him and wanted to make a complaint of an alleged threat that was made by Defendant against Jackson. (Vol. 12 at 223-24) Jackson was informed that Defendant threatened to shoot him to James Leddon. (Vol. 12 at 224) Willingham called Defendant that same day and informed him of the substance of the complaint. (Vol. 12 at 225-26) Defendant responded by saying that he had

been taking Zoloft and that his statement had been taken out of context. (Vol. 12 at 225-26) He added that he did not like Jackson anymore because Jackson never checked on him when he was going through some bad times. (Vol. 12 at 225-26) He stated he needed the Zoloft because he had financial difficulties and had lost a friend. (Vol. 12 at 225-26)

James Leddon testified that in November of 2008, Defendant told him that he was fired by Gold Ice Company because he did not fit in. (Vol. 12 at 232-33)

On cross, Leddon testified that Defendant's comments about Jackson were unusual. (Vol. 12 at 240-41) He was also concerned that Defendant might have some mental health issues. (Vol. 12 at 240-41)

Joe Bridges testified that he has been employed with Coca Cola for thirty years and that he knew Defendant, Jackson and Brown very well. (Vol. 12 at 242-43) Bridges testified that he listened to the audio recording of the fake Northwest Florida State College service call and identified Defendant as a person who placed the call. (Vol. 12 at 243) Bridges testified that in 2008, Defendant told him that he was taking medication for depression and that he felt it was helping him. (Vol. 12 at 245-46)

Ralph King testified that he worked for Coca Cola for 39

years and was a supervisor for Defendant, Jackson and Brown. (Vol. 12 at 251-52) King was not aware of any mistreatment of Defendant by other employees and opined Brown was a good employee who would volunteer to help whenever it was needed. (Vol. 12 at 256-57)

On cross, King testified that Defendant was a good employee, always had good performance, and was never hostile towards other employees. (Vol. 12 at 261-62)

Keith Hobbs, a Coca Cola employee, testified that on April 9, 2009, he received a phone call from Defendant. (Vol. 12 at 267-68) Defendant told Hobbs that he liked him but that he was mad at Jackson and Brown because one of them said something about Defendant not having a family. (Vol. 12 at 267-68) Hobbs told Defendant to let it go because Defendant was talking about something that happened three years ago. (Vol. 12 at 267-68)

Christopher Kipp, a supervisory deputy United States Marshal, testified that in April of 2009, he was a member of Florida Regional Fugitive Task Force and was working on the arrest of Defendant because he was located in Tampa area. (Vol. 13 at 273-74) Kipp was told after Defendant's arrest that Defendant had fired his gun, but no officer was harmed. (Vol. 13 at 287, 294) Defendant was arrested by Tampa Police Department for aggravated assault on a law enforcement officer and

obstructing or opposing an officer and later convicted of those crimes. (Vol. 13 at 293-96)

Kevin Durkin, a police detective, testified that he investigated the crime scene at the Holiday Inn Express. (Vol. 13 at 306-08) He found three .40 caliber shell casings on the sidewalk in the pool deck area. (Vol. 13 at 307-08) He also found an expended .380 caliber shell casing in the pool deck area. (Vol. 13 at 307-08) Durkin determined that a bullet fired from Defendant's .380 semi-automatic gun went through the pool area, struck two metal fence railings and dropped down to the ground in the patio area of the pool. (Vol. 13 at 308-09, 315-16) Durkin found the bullet hole in the rear of the van located in the parking lot north of where the gunfight had taken place. (Vol. 13 at 309, 314) Durkin determined that this bullet was fired from Deputy Marshall Kipp's gun. (Vol. 13 at 308-09)

Durkin identified photographs that showed three .40 caliber shell casings in the pool area consistent with Deputy Kipp's firearm. (Vol. 13 at 312) Durkin also identified a photograph showing a .380 caliber casing near the back of the lounge chair by the pool consistent with Defendant's firearm. (Vol. 13 at 312)

Durkin testified that he searched Defendant's hotel room and found a pistol case that contained two handguns, a .45

caliber Glock and a nine millimeter handgun. (Vol. 13 at 320-21) The magazines of the guns were loaded with bullets. (Vol. 13 at 320-21) Durkin identified a photograph from the crime scene that showed two .40 caliber shell casings that belonged to Deputy Kipp and .380 casing that belonged to Defendant's firearm. (Vol. 13 at 312)

Beth Kelley, Curtis Brown's mother, testified that Brown was a joyful child and never made any problems. (Vol. 13 at 325-27) Brown loved people and had many friends. (Vol. 13 325-27) Kelley never knew her son to be mean, cruel or derogatory to anyone. (Vol. 13 at 329)

Susan Brown, Curtis Brown's wife, testified that they got married when they were both nineteen years old. (Vol. 13 at 335-37) Everybody loved her husband. (Vol. 13 at 335-37) He volunteered at the church and went on a mission trip to Africa to help friends with orphanage, and helped others as well. (Vol. 13 at 335-37) Brown testified that she and Curtis had two kids, 15 and 11 years old, who worshiped their father. (Vol. 13 at 338-39) Her husband never acted cruelly or was derogatory to anyone. (Vol. 13 at 341)

John Ryan, Jr., a crime laboratory analyst and firearms examiner, testified that he examined five fired cartridge cases collected in the death investigation of Curtis Brown and

determined that all five casings were fired from Glock .45. (Vol. 13 at 354-57) Ryan also examined six projectile fragments from the crime scene and determined that these projectiles were .45 caliber projectiles and consistent with having been fired from .45 caliber Glock. (Vol. 13 at 357-59) Ryan identified a firearm laboratory report from Tampa F.D.L.E prepared by firearms analyst Stephanie Stewart and stated that Ms. Stewart examined .40 caliber Glock and some projectiles and casings, and a Kel-Tec .380 caliber firearm, projectiles and casings, which were all seized in Tampa. (Vol. 13 at 360-61) Ms. Stewart found that three fired .40 Glock caliber cartridge cases were fired from the Glock firearm, that one fired .380 caliber cartridge case and .380 caliber projectile was fired from the Kel-Tec .380. (Vol. 13 at 363) Ryan examined a Coca Cola uniform shirt and determined that there was gun powder residue consistent with multiple shots that could have been fired within five feet. (Vol. 13 at 364-66)

Bill Joseph McCoy, Defendant's brother, testified that his family was not affectionate and everybody did things on their own because they had different interests. (Vol. 13 at 393-94) His father used to beat him quite a bit, but he had never witnessed his father beating his brothers. (Vol. 13 at 393-94) His parents did not have close friends within the community.

(Vol. 13 at 393-94) After his family moved to Florida (and he did not move with them), he had a distant relationship with Defendant, but Defendant did visit him a few times. (Vol. 13 at 395-98) He was proud of Defendant for having his own home. (Vol. 13 at 395-98) Defendant never talked to him about being depressed. (Vol. 13 at 395-98)

On cross, McCoy testified that his father had problems with alcohol before he married his mother and that, after he married her, he went to a hospital and stopped drinking. (Vol. at 13 400) McCoy testified that he and his father simply did not get along. (Vol. 13 at 400) He was beaten by his father occasionally, but sometimes he did deserve a beating. (Vol. 13 at 402-04)

Brian Montgomery testified that he became friends with Defendant in high school. (Vol. 13 at 407-08) Kids in school teased Defendant by calling him "Elvis" because he looked like Elvis, which upset Defendant. (Vol. 13 at 407-08) However, Defendant never teased anyone else. (Vol. 13 at 407-08) Montgomery testified that Defendant was depressed whenever they talked about the old times. (Vol. 13 at 410) Defendant loved his job at Coca Cola so much that he would not go anywhere where Pepsi was served. (Vol. 13 at 410) Defendant sometimes appeared depressed when they spoke over the phone and talked about being

suicidal. (Vol. 13 at 411)

Montgomery further testified that he started talking more frequently with Defendant from 2007 and through 2008. (Vol. 13 at 411-14) Defendant mentioned that he was looking for a wife and taking Zoloft for depression. (Vol. 13 at 411-14) The last time he spoke to Defendant was in September or October of 2008, and Defendant looked like he was doing well and was excited about his new business. (Vol. 13 at 415) Montgomery joked very little with Defendant because he took jokes more seriously than other people. (Vol. 13 at 415-16) Defendant had a good heart and cared about other people's feelings. (Vol. 13 at 415-16) He took pride in doing his job. (Vol. 13 at 415-16)

On cross, Montgomery testified that when he spoke to Defendant over the phone, he could tell by the sound of Defendant's voice if he had been drinking. (Vol. 13 at 420)

John Ulerick testified that Defendant was one of his best friends. (Vol. 13 at 425) Defendant struggled to fit in with people and had trouble letting go if somebody teased him. (Vol. 13 at 425) Defendant moved to Florida sometime after graduating from the high school. (Vol. 13 at 425-26) Ulerick and Defendant stayed in touch, and Defendant called Ulerick on a regular basis. (Vol. 13 at 426) When Defendant called Ulerick late at night, Defendant was depressed. (Vol. 13 at 426-27) However,

Defendant never told Ulerick anything about being suicidal. (Vol. 13 at 427) In 1988, Defendant's mother called Ulerick because she wanted him to call Defendant as she was afraid that Defendant was going to commit a suicide. (Vol. 13 at 428) In 2008, Defendant told him he was on medication and began calling him during the day because he was doing better on medication. (Vol. 13 at 428-29) However, Defendant continued to be depressed when he called him in the nighttime hours. (Vol. 13 at 428-29)

Ulerick last spoke to Defendant in December of 2008. (Vol. 13 at 429-30) Defendant's business was struggling a bit at that time, but he was still trying to make it work. (Vol. 13 at 429-30) Defendant told Ulerick that he had left Coca Cola because two gentlemen were teasing him. (Vol. 13 at 430) Defendant told Ulerick that he was trying to find the right woman through dating services. (Vol. 13 at 430)

Robert Clendenon, III, Defendant's friend, testified that he did not know of people teasing Defendant. (Vol. 13 at 438) Back in high school, Defendant was called "Elvis" and did not like it. (Vol. 13 at 438) In 2008, Clendenon last spoke to Defendant. (Vol. 13 at 440) Defendant was upset because Clendenon did not send him a Christmas card. (Vol. 13 at 440) Clendenon had maintained his contact with Defendant over the phone, and Defendant did not discuss being depressed with him.

(Vol. 13 at 443)

On cross, Clendenon testified that he heard that Defendant punched a man who called him "Elvis." (Vol. 13 at 448)

Robert Clendenon testified that he knew Defendant as his son's friend. (Vol. 13 at 451-53) Defendant used to spent time at their house frequently. (Vol. 13 at 451-53) He did not know Defendant's parents. (Vol. 13 at 451-53) Defendant fit in well with Clendenon family. (Vol. 13 at 451-53) Clendenon considered Defendant a friend. (Vol. 13 at 459)

Sue Bryan testified that she had dated Defendant from 1993 to 1995, but they never lived together. (Vol. 14 at 462-63) Because she was 13 years older than Defendant and could not give him children, they mutually decided to break up. (Vol. 14 at 462-63) Defendant treated Bryan with respect, and they never argued. (Vol. 14 at 463-64) Bryan's family loved Defendant. (Vol. 14 at 464-65)

Bryan testified that Defendant mentioned that some people were teasing him at Coca Cola but never told her any details. (Vol. 14 at 465-66) Bryan lost contact with Defendant after they broke up, but they started talking again in 2005. (Vol. 14 at 469-70) At that time, it seemed to her that Defendant was depressed. (Vol. 14 at 469-70) In fact, Defendant told her that he was diagnosed with depression and was taking Zoloft. (Vol. 14

at 469-70) In 2008, Defendant called Bryan and asked her to come to his house because he needed to talk to someone. (Vol. 14 at 471) Defendant was depressed, did not want to live and wanted beer. (Vol. 14 at 471) Defendant was never violent to anyone. (Vol. 14 at 472)

On cross, Bryan testified that Defendant complained that he was not rewarded properly by Coca Cola. (Vol. 14 at 475-76)

Dr. James Larson, a psychologist, testified that he was retained to examine Defendant's mental health. (Vol. 15 at 493-94) He met with Defendant personally five times for a total of ten hours. (Vol. 15 at 493-94) Larson also reviewed investigative documents, the autopsy report, medical records, employment records, military records and educational records. (Vol. 15 at 495-96) He conducted interviews with Defendant's mother, aunt, brother, pastor and a former teacher. (Vol. 15 at 495-96) Dr. Larson administered the following tests to Defendant: MMPI, MMI-3, V-RAG, WAIS, WRAT-3, TOMM. (Vol. 15 at 496-500)

Dr. Larson diagnosed Defendant with a major depressive disorder, recurrent, with psychotic features, which is an Axis I diagnosis. (Vol. 15 at 500-01) Dr. Larson opined that Defendant had a severe personality disorder consisting of paranoid personality traits, self-defeating personality traits and

schizoid personality traits. (Vol. 15 at 501) Dr. Larson explained that Defendant did not have a well developed personality structure and that he was paranoid because he misperceived that people were picking on him. (Vol. 15 at 506)

Dr. Larson believed that Defendant's tendency to misperceive things was a result of heredity and environmental factors. (Vol. 15 at 510-12) He described the environmental factors as being raised by an alcoholic father who was dominating and controlling and who criticized and put down Defendant by calling him stupid. (Vol. 15 at 510-12)

Dr. Larson opined that Defendant had delusional thinking, which caused him to become homicidal, lose contact with reality and feel justified in committing homicide. (Vol. 15 at 512) Dr. Larson also found signs of auditory hallucinations, during which the voices conveyed negative messages such as, "You're no good," which is consistent with severe depression. (Vol. 15 at 512-13) Defendant told Dr. Larson him that he heard a voice saying "Go ahead and do it," at the time of the murder. (Vol. 15 at 513) But, there was no way of knowing for sure that he had had these hallucinations on the day of the incident. (Vol. 15 at 513) Defendant was also drinking at the time of the murder and had been abusing alcohol in the preceding months. (Vol. 15 at 516)

Dr. Larson testified that Defendant was treated with anti-

psychotic medication at the jail, which caused Defendant's condition to improve. (Vol. 15 at 513-15) The last time Dr. Larson saw Defendant, Defendant's mental status exam was within normal limits. (Vol. 15 at 513-15)

Dr. Larson reviewed medical records from Dr. Patel, a general family practitioner who treated Defendant, and noted that, sometime in 2006, Dr. Patel diagnosed Defendant with a bipolar disorder. (Vol. 15 at 518-19) Dr. Larson also reviewed medical records from Dr. Campbell and noted that, in 2006 or 2007, he diagnosed Defendant with depression. (Vol. 15 at 519-20) Defendant was prescribed the Zoloft for the depressive disorder and Lamentil for the bipolar disorder. (Vol. 15 at 522-23) Defendant told Dr. Larson that he did not comply with the instructions for taking Zoloft. (Vol. 15 at 529-30) Defendant took more pills when he felt stressed. (Vol. 15 at 529-30) When he felt good, he would not take any. (Vol. 15 at 529-30) After he lost his insurance, Defendant was taking samples if they were available. (Vol. 15 at 529-30)

Defendant's employment records from Coca Cola revealed that he was a good employee but was considered slow sometimes. (Vol. 15 at 531) Defendant's military records revealed that he did not have any major problems. (Vol. 15 at 531) There was no indication of psychiatric problems. (Vol. 15 at 531) Defendant

was honorably discharged from the military. (Vol. 15 at 531)

Dr. Larson opined that Defendant did not fall into a group that would offend violently in the future. (Vol. 15 at 536) Defendant fell high on the depression scale but not the highest. (Vol. 15 at 545-46) Although there was no actual measurement, Defendant would have been 8 out of 10 point scale. (Vol. 15 at 545-46) At the time of the murder, Defendant was close to 9 or 10 on a ten point scale. (Vol. 15 at 545-46) Dr. Larson opined that people diagnosed with depression have both suicidal and homicidal ideations. (Vol. 15 at 548) Defendant had both around the time of the crimes. (Vol. 15 at 548)

Dr. Larson opined that Defendant was under extreme mental or emotional disturbance at the time of the crime. (Vol. 15 at 550-52) He believed that this mitigator applied because Defendant had a major depressive disorder, had financial difficulties, was upset because he could not have a family and was drinking excessively. (Vol. 15 at 550-52)

Dr. Larson also opined that Defendant's capacity to conform his conduct to the requirements of the law was substantially impaired. (Vol. 15 at 552-53) This mitigator was directly caused by Defendant's depression disorder. (Vol. 15 at 552-53)

On cross, Dr. Larson testified that a major depressive disorder is treatable. (Vol. 15 at 558) Defendant had a major

depressive disorder when Drs. Campbell and Thigpen saw him years prior to the incident. (Vol. 15 at 560) In December of 2006, Defendant reported for the first time to Dr. Campbell that he felt depressed. (Vol. 15 at 560) Defendant reported to Dr. Campbell that he was feeling depressed for two months and associated it with his resignation from Coca Cola. (Vol. 15 at 560-61) Defendant had never before reported to Dr. Campbell that he felt depressed. (Vol. 15 at 561-62) He had never before reported having psychiatric problems or problems with alcohol. (Vol. 15 at 561-62)

Dr. Larson opined that Dr. Campbell could have diagnosed Defendant for depression. (Vol. 15 at 563) Dr. Campbell had met with Defendant many times. (Vol. 15 at 561-62) In December of 2006, Dr. Campbell prescribed Cymbalta to Defendant. (Vol. 15 at 563-64) A couple of weeks later, Dr. Campbell met with Defendant and noted that Defendant was getting better and was compliant with his dosage regimen. (Vol. 15 at 563-66) On February 12, 2007, Dr. Campbell saw Defendant and noted that Defendant was compliant with his dosage regimen and his condition had improved. (Vol. 15 at 563-66) On May 29, 2007, Dr. Campbell saw Defendant again and noted that Defendant changed to Zoloft and reported that it worked. (Vol. 15 at 566-69) On January 16, 2008, Defendant reported that he was compliant with instructions

for taking the Zoloft and that he felt his condition was improving. (Vol. 15 at 566-69) On May 13, 2008, Dr. Campbell noted that there was "no associated alcoholism." (Vol. 15 at 566-69)

Dr. Larson further testified that Dr. Patel diagnosed Defendant with bipolar disorder. (Vol. 15 at 570-74) On November 6, 2006, Dr. Patel saw Defendant, and Defendant complained of depression. (Vol. 15 at 570-74) Defendant denied having homicidal ideations. (Vol. 15 at 571) Dr. Patel prescribed Lamentil, an antidepressant, and Seroquel, an antipsychotic. (Vol. 15 at 573-74) On November 13, 2006, Dr. Patel proscribed Lamentil again. (Vol. 15 at 570-74)

Dr. Larson testified that Defendant had never witnessed any violence by his grandmother or aunt, as reported by paternal aunt, Evelyn O'Brian. (Vol. 15 at 585-86) Defendant reported having hallucinations only to Dr. Larson and the physician at the jail. (Vol. 15 at 587-88) Dr. Larson listened to the tape in which Defendant asked the Coca Cola dispatcher to send somebody to the college. (Vol. 15 at 589) Dr. Larson opined that Defendant did not have any slurred speech nor did he appeared confused, which indicated that he had not been drinking. (Vol. 15 at 589-90)

Dr. Larson testified that Defendant did not meet the test

of legal insanity. (Vol. 15 at 599-600) Defendant was not found mentally incompetent during the proceedings. (Vol. 15 at 599-600)

Dr. Larson opined that Defendant was under extreme mental or emotional disturbance at the time of the crime. (Vol. 15 at 600-604) Defendant had the capacity to appreciate the criminality of his conduct but did not have the capacity to conform his conduct to the requirements of the law. (Vol. 15 at 600-604)

Evelyn O'Brien, Defendant's paternal aunt, testified that her mother was extremely abusive and mean. (Vol. 15 at 614-15) Defendant's father was petrified of his mother. (Vol. 15 at 614-15) As an adult, Defendant's father was mean, hostile and unhappy. (Vol. 15 at 614-16) O'Brien suffered from depression. (Vol. 15 at 614-16) Defendant's father had a problem with alcohol. (Vol. 15 at 614-16)

Andrew Beccue testified that he was a pastor of Harvest Life Church from 1997 to 2005. (Vol. 15. at 660) During this time, Beccue and Defendant developed a friendship. (Vol. 15 at 660) Beccue also counseled Defendant as part of his duties as a pastor. (Vol. 15 at 665-66) Defendant was lonely and had a hard time fitting in. (Vol. 15 at 665-66) Defendant used to misinterpret other people's intentions. (Vol. 15 at 665-66)

Defendant never told Beccue he felt depressed. (Vol. 15 at 667)

After deliberating, the jury recommended that the trial court impose a death sentence upon Defendant by a vote of 11-1. (Vol. 17 at 826)

At the Spencer hearing, Dr. Harry McClaren, a forensic psychologist, testified that he reviewed police reports, depositions and jail medical records in connection with an evaluation of Defendant's mental health. (Vol. 18 at 8) On November 29, 2011, Dr. McClaren interviewed Defendant. (Vol. 18 at 8) He performed some psychological testing, but the results were invalid due to Defendant's inconsistent responding. (Vol. 18 at 8) Dr. McClaren considered the medical reports and diagnoses by Dr. Patel and Dr. Campbell. (Vol. 18 at 10) Dr. McClaren gave Defendant MMPI-2, but the results came back invalid. (Vol. 18 at 11-12) Dr. McClaren did not know why the test was invalid, but it was not internally consistent. (Vol. 18 at 11-12) He did not administer tests for malingering due to the short time that was available for the examination (Vol. 18 at 12)

During the interview, Defendant told Dr. McClaren that he was treated for depression. (Vol. 18 at 15-17) Defendant reported that, on the day of the murder, he consumed six beers. (Vol. 18 at 15-17) Dr. McClaren opined that Defendant was

probably not extremely impaired because he had developed an alcohol tolerance due to longtime consumption. (Vol. 18 at 15-17) Defendant told Dr. McClaren that he was treated poorly by his father and was emotionally abused. (Vol. 18 at 20) Defendant's father passed away in 1986. (Vol. 18 at 20)

Defendant told Dr. McClaren that he felt angry and depressed because he was getting bad jobs. (Vol. 18 at 21-22) Defendant was primarily thinking about killing Jackson but later changed his mind and decided to kill Brown. (Vol. 18 at 21-22) After the murder, Defendant wanted to be "taken out in a blaze and a shootout with law enforcement." (Vol. 18 at 21-22) Defendant told Dr. McClaren that before the murder, he heard a voice telling him, "Do it; go ahead and do it; I wish you'd do it." (Vol. 18 at 22) However, Dr. McClaren stated that the first time Defendant claimed he heard this voice was in December of 2010. (Vol. 18 at 23)

Defendant told Dr. McClaren that had the police tried to stop him, he would have killed them because he wanted the adventure and fight. (Vol. 18 at 30) Defendant then stated that in Tampa, he wanted to provoke the police to kill him. (Vol. 18 at 31)

Dr. McClaren opined that at the time of the murder, Defendant was under the extreme mental or emotional disturbance.

(Vol. 18 at 33-34) At the time of the murder, Defendant suffered from a major depression, probable psychosis and probable alcohol dependence (as opposed to alcohol intoxication). (Vol. 18 at 34) Defendant may have had some auditory hallucinations at the time of the murder, but Dr. McClaren could not say for sure. (Vol. 18 at 34-35) Dr. McClaren opined that, due to the fact that Defendant had mentioned hearing voices at the time of the murder for the first time almost 18 months after the fact, there was a possibility that he reported the auditory hallucinations falsely. (Vol. 18 at 36-37)

Dr. McClaren opined that Defendant's capacity to appreciate the criminality of his conduct or to conform his conduct to the requirements of the law was not substantially impaired. (Vol. 18 at 40-50) Defendant showed control of his actions by choosing not to kill Jackson at Wal-Mart, by choosing to kill Brown instead of Jackson, by making multiple calls to different sites trying to lure Jackson, by hiding the gun in the bag, by spray painting his truck and tossing away his phone so that he could not get located, and by leaving for Tampa after the murder. (Vol. 18 at 40-50) Defendant knew that his conduct was illegal and that the police would respond to the crime he committed. (Vol. 18 at 40-50)

On cross, Dr. McClaren testified that he did not talk to

any third parties regarding Defendant. (Vol. 18 at 50-51) Defendant told Dr. McClaren that he did not want to provoke a confrontation with the police in Tampa and did not want to hurt them. (Vol. 18 at 67-68)

On redirect, Dr. McClaren testified that from his recollection, neither family members nor anyone else had any knowledge of events surrounding the murder. (Vol. 18 at 72-74)

The trial court agreed with the jury's recommendation and imposed a death sentence upon Defendant. (Vol. 19 at 17, Vol. 5 at 952-63) The court found two aggravators applicable in this case: the capital felony was committed in a cold, calculated, and premeditated manner without any pretense of moral or legal justification (CCP) and previous conviction of a felony involving the use or threat of violence to another person. (Vol. 5 at 952-63) The trial court accorded great weight to each of the aggravators. (Vol. 5 at 952-63)

The trial court found the no significant history of prior criminal activity statutory mitigator and accorded it moderate weight. (Vol. 5 at 952-63) Regarding the mitigation concerning Defendant's mental state, the trial court found:

> 1) The capital felony was committed while the defendant was under the influence of an extreme mental or emotional disturbance.
>
> Dr. Larson testified that the defendant was not insane at the time of the murder. The defendant's

comments to Dr. Larson, Dr. McClaren, and to other people indicated that he was suffering from a heightened mental or emotional disturbance when he committed the murder. In particular, the experts agreed that the defendant suffered from depression, although they did not reach the same specific diagnosis. However, depression was the major element that both experts agreed the defendant suffered from at the time of the murder. The defendant's medical records indicate that his previous physicians, Dr. Campbell and Dr. Patel, diagnosed him with depression and bipolar disorder, respectively.

After the defendant realized that Curtis Brown had arrived at the campus instead of Ray Jackson, the defendant stated that he heard a "voice" encouraging him to go ahead with murdering Curtis Brown. Dr. Larson considered this "voice" to be part of his diagnosis for the defendant. Dr. McClaren indicated that the defendant did not express any previous experience of hearing voices before he murdered Curtis Brown. Additionally, Dr. McClaren stated that he did not consider the "voice" to be the main component of his diagnosis. Both experts agreed that the defendant was under the influence of an untreated depressive disorder at the time that he committed the murder. The experts also agreed that the defendant intended to "go out in a blaze of glory" by engaging in an exchange of gunfire with law enforcement officers. This plan is further supported by the fact that multiple firearms were found in the defendant's possession when he was apprehended in Tampa, Florida. This statutory mitigating circumstance is given moderate weight.

2) The capacity of the defendant to appreciate the criminality of his or her conduct or to conform his or her conduct to the requirements of law was substantially impaired.

Dr. Larson opined that that the defendant's capacity to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was substantially impaired. However, this opinion was directly contradicted by Dr. McClaren through his testimony and his review of the facts and his interview with the defendant. The defendant's actions support the findings of Dr. McClaren as it regards

this statutory mitigating circumstance. The defendant clearly made the decision of who he wanted to kill by first targeting Ray Jackson and then changing to Curtis Brown. The defendant clearly decided when and how to kill by luring the victim to him. The defendant made decisions as to where the murder would occur, by first passing on the DeFuniak Springs Wal-Mart and then considering Karley's Car Care and Car Wash before settling on the campus. The defendant stated to Dr. McClaren that he knew killing Curtis Brown was illegal. Dr. McClaren also stated that the defendant knew law enforcement would respond to the campus if he killed Curtis Brown. The defendant clearly acted to avoid arrest after the killing by spray painting his truck and fleeing to Tampa, Florida. All of this testimony tends to prove that the defendant appreciated the criminality of his conduct and also choose not to conform his conduct to the requirements of law. Therefore, this statutory mitigating circumstance was not proven.

NON-STATUTORY MITIGATING CIRCUMSTANCES

1) The defendant had a long-term struggle with depression.

The witness testimony and evidence indicated that the defendant has a documented history of depression and treatment for mental illness. The defendant's history of depression and mental illness was included in the first statutory mitigating circumstance and has already been considered and weighed by the Court.

(Vol. 5 at 956-59)

It also found as non-statutory mitigators Defendant has a family history of depression and mental illness-moderate weight; Defendant has a family history of alcoholism-little weight; Defendant was raised in a dysfunctional family that suffered from mental illness, psychological abuse, and emotional abuse-little weight; despite his dysfunctional upbringing, Defendant

was able to achieve a modicum of success for a period in his adult life-little weight; Defendant served in several branches of the military-little weight; Defendant adjusts well to a structured environment-little weight; Defendant is at low risk to reoffend or to create a threat to anyone in the future-little weight; Defendant is remorseful and ashamed of his conduct and has accepted responsibility for his crime-moderate weight; and Defendant has many positive characteristics-moderate weight. (Vol. 5 at 952-63) The trial court found that the mitigating circumstances are insufficient to outweigh the two aggravating circumstances, which have been proven beyond a reasonable doubt. (Vol. 5 at 961)

This appeal follows.

SUMMARY OF THE ARGUMENT

Defendant's death sentence is proportionate. In conducting a proportionality review this Court does not reweigh the aggravating and mitigating circumstances. There is no legal error in the trial court's findings with regard to the prior felony mitigator. When the facts, as found by the trial court are considered, this Court has affirmed death sentences in similar cases.

The CCP aggravating circumstance was proven beyond a reasonable doubt. Defendant's actions established the cold nature of the murder, and there was no evidence in the record that Defendant acted out of frenzy, panic or rage. The record indicates that Defendant lured the victim to the crime scene, waited for the victim to show up, shot the victim six times, stepped over the victim, disposed of his cell phone and belongings, repainted his truck in order to alter his appearance and went to Tampa.

Defendant's claim that the execution of the mentally ill is unconstitutional is unpreserved. The execution of capital defendants who suffer from mental illness is not unconstitutional.

The Ring claim was properly denied.

Defendant's conviction is supported by competent, substantial evidence.

ARGUMENT

I. DEFENDANT'S SENTENCE IS PROPORTIONATE.

Defendant argues that his sentence is disproportionate. Defendant also disputes the coldness element of the CCP aggravator, suggesting that in light of the mental health mitigation the trial court found, this Court should have great hesitation in giving this aggravator great significance in its proportionality analysis. While not directly disputing the trial court's finding of the prior violent felony aggravator, Defendant suggests that the trial court did not properly weigh this aggravator in light of the mental health mitigation it found. However, this claim is wholly without merit.

"Proportionality review compares the sentence of death with other cases in which a sentence of death was approved or disapproved." Palmes v. Wainwright, 460 So. 2d 362 (Fla. 1984). The Court must "consider the totality of circumstances in a case, and compare it with other capital cases. It is not a comparison between the number of aggravating and mitigating circumstances." Porter v. State, 564 So. 2d 1060, 1064 (Fla. 1990), cert. denied, 498 U.S. 1110 (1991).

In conducting a proportionality review, this Court does not reweigh the aggravating and mitigating circumstances. "Absent demonstrable legal error, this Court accepts those aggravating

factors and mitigating circumstances found by the trial court as the basis for proportionality review." State v. Henry, 456 So. 2d 466,469 (Fla. 1984).

Here, Defendant argues that his sentence is disproportionate based on his own finding and weighing of the evidence. However, this is improper as there is no legal error in the trial court's findings.

With regard to Defendant's assertion that the trial court improperly found and weighed the CCP aggravator, Appellee refers this Court to the argument contained in Argument II of this brief, in order to avoid the repetition. The trial court's findings are supported by the evidence and should be affirmed.

With regard to the prior violent felony aggravator, the trial court found:

> The defendant fled from the DeFuniak Springs murder scene of Curtis Brown and drove to Tampa, Florida. On the way, he purchased spray paint and painted his truck to conceal the identity of his vehicle. He stockpiled his vehicle and later his hotel room with an arsenal of assault weapons and hundreds of rounds of ammunition. The defendant stated to Dr. Larson and Dr. McClaren that he intended to "go out in a blaze of glory." This intention was evidenced by the defendant's actions in Tampa, Florida. The defendant checked into a Holiday Inn Express in Tampa, Florida while heavily armed and awaited his captors.
>
> When law enforcement officers confronted the defendant and attempted to arrest him outside of his room near the hotel's pool, the defendant drew his pistol, discharged his weapon in the direction of the officers, and endangered the officers. Although the defendant told Dr. Larson that he aimed his pistol

> high and intended only to provoke the officers into shooting him, the evidence of the bullet's path contradicts this claim. Instead, the evidence supports the fact that the defendant intended to harm the responding officers and to have the responding officers harm him. Witness testimony and evidence indicates that the defendant's bullet traveled across the hotel's pool area, pierced two metal fence railings near the pool's perimeter, and stopped after striking a vehicle parked in the nearby lot. For the bullet to travel this path, it had to pass by the responding officers' bodies. The officers returned fire and wounded the defendant. After the gunshots ended, the defendant was arrested. This event resulted in the defendant being convicted of aggravating assault on a law enforcement officer with a firearm and obstructing or opposing an officer with violence. This conviction occurred on November 19, 2010. The defendant did not enter his plea and was not adjudicated guilty of the murder in the instant case until after his criminal case was conducted in Tampa, Florida. Consequently, the defendant had a prior conviction for a felony involving the use or threat of violence to another person to-wit the law enforcement officer. Therefore, the state has proven this aggravating circumstance beyond a reasonable doubt. Accordingly, the Court gives it great weight.

(Vol. 5 at 955-56)

Since the record contains competent, substantial evidence to support these findings, the prior violent felony aggravator was properly found, and weighed, by the trial court. After the murder, Defendant fled to Tampa. (Vol. 18 at 26-29) He got rid of his cell phone and concealed the identity of his vehicle. (Vol. 18 at 26-29) He was heavily armed. (Vol. 13 at 308-312) When the police attempted to arrest Defendant, he shot at them, which was confirmed by the ballistic report. (Vol. 13 at 280-87,

308-09, 315-16) This directly contradicts Defendant's assertion that he had shot in the air, and only wanted to provoke the police into shooting him and did not want to hurt them. (Vol. 18 at 67-68) As such, this Court should accept the aggravating and mitigating factors as found by the trial court as the basis for the proportionality review. Henry, 456 So. 2d at 469.

A comparison of this crime and its circumstances, based on the trial court's findings, to other cases reveals that the sentence of death is warranted here. For example, in Diaz v. State, 860 So. 2d 960 (Fla. 2003), this Court upheld the sentence of death for killing an ex-girlfriend's father by shooting him. The murder occurred more than one month after the defendant had last spoken to his ex-girlfriend so this Court found that this case did not involve a heated domestic confrontation nor was it an incident resulting from a domestic dispute. The defendant purchased a gun several days before the murder, drove to ex-girlfriend's house, waited outside the house for ex-girlfriend to leave for work, shot his ex-girlfriend while she tried to drive away, went back into the house and shot the father five times. Aggravating factors were CCP and the defendant was previously convicted of another capital felony or of felony involving use or threat of violence to the person. The mitigation consisted of the defendant was under the influence of

extreme mental or emotional disturbance, the defendant's capacity to appreciate the criminality of his conduct or to conform his conduct to the requirements of the law was substantially impaired, the defendant had no significant history of prior criminal activity, the age of the defendant and family history of violence.

Similarly, in Zakrzewski v. State, 717 So. 2d 488 (Fla. 1998), the defendant murdered his wife and two children from an ambush, by setting up a murder scene in the bathroom before his family arrived home. This Court upheld the sentence of death. The trial court found three aggravators for murders of two children-HAC, CCP and the contemporaneous murders and two aggravators for the wife's murder-contemporaneous murders and CCP. The court found two statutory mitigators-no significant prior criminal history and the murders were committed while the defendant was under the influence of extreme mental or emotional disturbance. The court also found 24 nonstatutory mitigators including that the defendant was suffering from a major depressive episode and was impaired by alcohol at the time of the murder.

Wickham v. State, 593 So. 2d 191 (Fla. 1992) is also factually similar to the case at hand. In Wickham, the defendant planned and executed a roadside ambush designed to lure the

victim to believe he was helping stranded woman and children. In Wickham, since the trial court did not find any mitigation, the defendant argued that the trial court erred in failing to find and weigh the mitigating evidence of defendant's abusive childhood, alcoholism and history of hospitalization for mental disorders including schizophrenia. This Court found that this mitigation should have been found and weighed by the trial court, but that the error was harmless where the State controverted some of the mitigating evidence, the defendant had not been hospitalized for mental illness for many years, he was not drinking at the time of the murder, he was not insane and he was able to appreciate the criminality of his conduct at the time of the murder. Id. at 194. This Court held that the death penalty was proportional considering the weighty aggravation- under a sentence of imprisonment, prior violent felony, during the commission of a robbery, CCP and avoid arrest. Id. at 595; see also Spencer v. State, 691 So. 2d 1062 (Fla. 1997)(sentence of death upheld. Two aggravators were prior violent felony and HAC. The mitigating factors were the defendant was under the influence of extreme mental or emotional disturbance, the defendant's capacity to appreciate the criminality of his conduct or to conform his conduct to the requirements of the law was substantially impaired, and a number of nonstatutory

mitigators including drug and alcohol abuse and paranoid personality disorder); Rodgers v. State, 3 So. 3d 1127 (Fla. 2009) (upholding the sentence of death where two aggravators were found: CCP and prior violent felony. One statutory mitigator found was the defendant's age. The court found numerous nonstatutory mitigation including an extensive history of mental illness, sexual abuse that the defendant suffered from his mother and physical abuse that the defendant suffered from his father, and a family history of suicide; Mann v. State, 453 So. 2d 784 (Fla. 1984)(sentence of death upheld. Three aggravators were found: prior conviction of violent felony, during the course of kidnapping and HAC; mitigating circumstance was that the defendant suffered from psychotic depression and feelings of rage); Lemon v. State, 456 So. 2d 885 (Fla. 1984)(upholding the imposition of the death penalty where the defendant was convicted of stabbing a woman and the trial court found two aggravators-HAC and a prior violent felony conviction and one mitigator-that the defendant was acutely emotionally disturbed at the time of the offense); Silvia v. State, 60 So. 3d 959 (Fla. 2011) (sentence of death upheld. The defendant murdered his estranged wife. Approximately five hours before the murder, the defendant purchased the shotguns and shells. The defendant arrived to his wife's home hoping to reconcile with

her. When his wife walked away after speaking with defendant, defendant remarked, "You will be sorry," walked back to his truck, retrieved the shotgun and shot both the wife and her mother. Aggravating factors were prior violent felony, knowingly creating a great risk of death to many persons and CCP. There was no statutory mitigators found. These three aggravating factors were balanced against several nonstatutory mitigators, including the emotional distress from the loss of the defendant's job and his wife, chronic personality disorder with paranoid, antisocial and schizoid features and alcohol dependence and dysfunctional family setting when growing up with domestic violence).

The case relied upon by Defendant does not show that his sentence is disproportionate. Green v. State, 975 So. 2d 1081 (Fla. 2008), included the sole aggravator-the defendant had been contemporaneously convicted of another violent felony. The trial court found four statutory mitigators related to the mental health-the defendant was under the influence of extreme mental or emotional disturbance, his capacity to appreciate the criminality of his conduct or to conform his conduct to the requirements of the law was substantially impaired, no significant history of prior criminal activity, the defendant acted under extreme duress or under the substantial dominion of

another person. This Court noted that the defendant had a history of intermittently treated mental illness dating back to at least age 13, and that he was diagnosed as suffering from depression, impulse control disorder and schizoaffective disorder. He had refused to treat his illness and instead resorted to marijuana and ecstasy. Unlike in Green, here, there were two aggravators found-CCP and prior violent felony. Further, here, the trial court found that Defendant suffered from a depressive disorder at the time of the offense so that he was under the influence of an extreme mental or emotional disturbance. However, unlike in Green, here, the trial court did not find that Defendant's capacity to appreciate the criminality of his conduct or to conform his conduct with the requirements of the law was substantially impaired nor that he was under duress or substantial dominion of another. As such, this case does not show Defendant's sentence is disproportionate. It should be affirmed.

II. THE TRIAL COURT PROPERLY FOUND THAT DEFENDANT COMMITED THE MURDER IN A COLD, CALCULATED, AND PREMEDITATED MANNER WITHOUT ANY PRETENSE OF MORAL OR LEGAL JUSTIFICATION AND DID NOT ABUSE ITS DISCRETION IN ASSIGNING THE CCP AGGRAVATOR GREAT WEIGHT.

Defendant complains that the trial court erred in finding the CCP aggravator because the murder was not cold. While conceding that the trial court correctly found that Defendant committed the murder with required calculation and heightened premeditation, Defendant challenges only one prong: whether the murder was committed coldly. In particular, Defendant contents that the murder was committed in a fit of rage due to the psychotic, depressive disorder he suffered from and that this mental factor made it impossible to characterize his action as cold. Further, Defendant contends that even if the CCP aggravator applies, the trial court erred in giving it great weight because the murder was committed in a fit of rage. Finally, Defendant asserts that if this Court finds that the CCP aggravator is not applicable, the sentence of death should be reversed in light of one aggravator and substantial mitigation. However, this issue is meritless.

This Court's review of a trial court's finding regarding an aggravator is limited to whether the trial court applied the correct law and whether its findings are supported by competent, substantial evidence. Willacy v. State, 696 So. 2d 693, 695

(Fla. 1997); see also Cave v. State, 727 So. 2d 227, 230 (Fla. 1998). The weight to be given to aggravating factors is within the discretion of the trial court, and it is subject to the abuse of the discretion standard. Blake v. State, 972 So. 2d 839, 846 (Fla. 2007). As the trial court's findings here did apply the correct law and are supported by competent, substantial evidence, they should be affirmed.

With regard to the CCP aggravator, the trial court found:

> The defendant worked as a machine technician for the Coca-Cola company until 2006. Curtis Brown, the victim, also worked at the Coca-Cola company along with Ray Jackson and Ralph King. The defendant, Curtis Brown, and Ray Jackson all worked at the Valparaiso, Florida location, and their supervisor was Ralph King. In 2006, the defendant resigned from his position at the Coca-Cola company and pursued other employment opportunities.
>
> The defendant started his plan to kill Ray Jackson or Curtis Brown before April 10, 2009. The defendant became enraged at Ray Jackson for his perception of Ray Jackson's comments concerning the defendant's lack of a girlfriend. The defendant began to form a hatred of Curtis Brown from a conversation about insurance premiums for Coca-Cola Company employees. Witness testimony indicated that the defendant was easily offended, that he took events or comments out of context, and that no one could joke with him. The witnesses also described some of the events and comments that the defendant had overreacted in the past. The defendant blamed Ray Jackson and Curtis Brown for not being able to be rehired at the Coca-Cola Company. He also blamed Ralph King for not being re-employed.
>
> In a conversation a few days before the murder, the defendant first learned of how to lure a Coca-Cola Company technician, after he heard another Coca-Company employee make a comment regarding such a plan. After considering the comment for a while, the

defendant made a false service call for Wal-Mart in DeFuniak Springs, Florida because he knew it was in Ray Jackson's area. However, the defendant decided not to kill Ray Jackson at the Wal-Mart location because too many innocents were present. The defendant followed Ray Jackson with the intent to kill him in a safer area, but he eventually abandoned that attempt.

The defendant's comments to third parties indicated that he planned or intended to commit a murder. The defendant told Wendell Kilgore that "you might see me on CNN." The defendant also told James Leddon that he intended to kill Ray Jackson. The defendant even told James Leddon that he had already purchased the gun and materials needed to build a silencer.

On April 9, 2009, the defendant placed a false service call concerning a Coke machine at Karley's Car Care and Car Wash that was previously located in Ray Jackson's assigned region, but no one responded to that call. The defendant made another false service call regarding a Coke machine at Northwest Florida State College ("NWFSC" or "campus"). The defendant made this call on the morning of April 10, 2009. The defendant was cool and calm during this call. After making this call, the defendant drove to the campus and prepared to commit the murder. The defendant brought his handgun and ammunition with him to the campus. After he arrived on the campus, the defendant placed his pistol inside a bag and proceeded to wait for his intended victim to arrive. The defendant's reason for carrying the murder weapon in the bag was to prevent anyone else on the campus from seeing the firearm. The defendant told one of the mental health experts who testified that he did not want to scare anyone. The defendant realized Curtis Brown responded to the campus instead of Ray Jackson. The defendant stated that instead of leaving the campus, he decided that Curtis Brown would be a sufficient victim because the defendant also hated him. The Defendant told Dr. James Larson [FN2] that the hated Curtis Brown, and he told Dr. Harry McClaren [FN3] that he thought about killing Ray Jackson but that any of the three would do, meaning Curtis Brown and Ralph King.

Curtis Brown entered the room where the Coke machine was located, placed his machine repair tools in the room, and proceeded to leave the room. During

this short absence, the defendant entered the room and waited for Curtis Brown to return. Once Curtis Brown returned to the room, the defendant shot him with every bullet in his handgun without any provocation or justification on the part of Curtis Brown. After Curtis Brown fell to the ground, the defendant stepped over him, left the room, and drove away from the area. Curtis Brown received six gunshot wounds and died from his wounds.

The facts demonstrate a lack of moral or legal justification for killing Curtis Brown. Multiple witnesses testified during the penalty phase proceeding that the defendant hated Ray Jackson and Curtis Brown because of events that occurred years earlier. The defendant also blamed them and Ralph King for his inability to regain employment at the Coca-Cola Company. Therefore, the Court finds that the cold, calculated, and premeditated aggravating circumstance has been proven beyond a reasonable doubt. Accordingly, the Court gives it great weight.

* * * *

[FN2] Mental health expert who testified for the defendant at the penalty-phase proceeding.
[FN3] Mental health expert who testified for the state at the Spencer hearing.

(Vol. 5 at 953-55)

The following four requirements must be met in order to find the aggravating factor of CCP: 1) the killing must have been the product of cool and calm reflection and not an act prompted by emotional frenzy, panic, or a fit of rage (cold); 2) the defendant must have had a careful plan or prearranged design to commit murder before the fatal incident (calculated); 3) the defendant must have exhibited heightened premeditation (premeditated); and 4) there must have been no pretense of moral

or legal justification. Lynch v. State, 841 So. 2d 362, 371 (Fla. 2003).

This Court has held that a defendant can be emotionally and mentally disturbed or suffer from a mental illness but still have the ability to execute cool and calm reflection, make a careful plan or prearranged design to commit murder, and exhibit heightened premeditation. See Evans v. State, 800 So. 2d 182, 193 (Fla. 2001)(citing Sexton v. State, 775 So. 2d 923, 924 (Fla. 2000)). Even if a trial court recognizes and gives substantial weight to the mental mitigator, that does not necessarily mean that the murder was an act prompted by emotional frenzy, panic, or a fit of rage. Id. "The 'cold' element generally has been found wanting only for 'heated' murders of passion, in which loss of emotional control is evident from the facts, though perhaps also supported by expert opinion." Walls v. State, 641 So. 2d 381, 387-88 (Fla. 1994).

In the case at hand, the record is devoid of any evidence that Defendant acted out of frenzy, panic, or rage. In fact, the evidence shows that Defendant carefully devised a plan to commit this murder. First, Defendant announced his plan to kill Jackson to Jamie Leddon in November of 2008, months prior to the murder. (Vol. 12 at 233-34) He had already bought a gun and materials to build a silencer and intended to shoot Jackson in his knees and

after Jackson would have started screaming, Defendant would have shot him in the eyes. (Vol. 12 at 232-34)

Second, Defendant acted on his plan to commit a murder days before the incident. Before Defendant made a fake service call to the college that resulted in murdering Brown, Defendant attempted the realization of his plan on two separate occasions by attempting to lure the victim by making two fake service calls: first one at Wal-Mart and second one at Carley's Car Care. (Vol. 11 at 138-40, 160-61, Vol. 15 at 599, 626-29, Vol. 18 at 21-22, 24-29) A few days before the murder, Defendant placed a fake service call at the Wal-Mart. (Vol. 18 at 23-24, Vol. 15 at 628-29) Defendant knew that Wal-Mart was Jackson's area and intended to lure him and kill him. (Vol. 18 at 23-24, Vol. 15 at 628-29) Defendant waited for Jackson, and when Jackson finally showed up, Defendant followed him. (Vol. 18 at 24, Vol. 15 at 628-29) However, Defendant decided to abandon his plan because there were too many people present. (Vol. 18 at 24, Vol. 15 at 628-29) On April 9, 2009, a day before the murder, Defendant made a fake service call at Carley's Car Care in DeFuniak Springs attempting to lure Jackson. (Vol. 15 at 629-30, Vol. 11 at 131-32) Defendant waited for Jackson at the parking lot, but Jackson did not show up. (Vol. 11 at 130-38, 150, Vol. 15 at 626-30)

Third, a couple of days before the murder of Brown, Defendant called Wendell Kilgore and told him that he had something big planned and that he might have seen him on CNN. (Vol. 11 at 177-78,184)

Fourth, Defendant admitted how this murder occurred. In particular, Defendant admitted that he had developed a plan to murder Jackson days before the incident and that before he placed a fake service call at the college, he called Wal-Mart and a car care business, but these attempts did not go through. (Vol. 15 at 599, 626-29, Vol. 18 at 21-22) Defendant further admitted that after he made a fake service call at the college, he waited the victim in the area, and that when Brown showed up instead of Jackson, he decided that Brown was good enough. (Vol. 18 at 26-29) Defendant further admitted that he shot Brown six times and after murdering Brown, stepped over him and left the scene. (Vol. 18 at 26-29) Defendant also stated that after the murder, he threw away his phone, spray painted his truck in order to alter his appearance and left to Tampa. (Vol. 18 at-26-29)

These actions evidence the existence of deliberate plan that is contrary to Defendant's assertion that the murder was not the product of cool and calm reflection. In fact, Defendant's actions are the antithesis to a murder committed

during an emotional frenzy, panic, or a fit of rage. Though it is possible that the events leading up to this murder (Defendant's perception that his former co-workers mistreated him, economical difficulties he suffered after he resigned from Coca-Cola and frustration because he did not get marry and have a family) may have emotionally charged Defendant, his actions at the time of the murder-luring the victim to the murder scene, waiting for the victim to show up and shooting the victim six times-do not suggest a frenzied, a spur-of-the-moment attack.

This Court has upheld CCP under similar circumstances. In Evans v. State, 800 So. 2d 182, 186 (Fla. 2001), the defendant argued that because the trial court found and gave substantial weight to the mitigating factor that the murder was committed while the defendant was under the influence of extreme mental or emotional disturbance, this factor made it impossible for him to be able to formulate a "cold-blooded intent to kill." Further, the trial court in Evans, found as a nonstatutory mitigation that the defendant suffered from a mental or emotional disorder although the experts did not agree as to the type of disorder. Id. at 193. This Court noted that the trial court in the sentencing order recognized that irrespective of the defendant's mental illness at the time of the crime, he was able to control his actions and plan his next steps. The defendant was able to

recover from a sudden break down in his plans to commit a home invasion robbery, managed to get back to Orlando so that he could wait for the victim's arrival, then interrogated the victim, had the victim bound and gagged and then removed the victim from the apartment before finally shooting him. Id. This Court held that "while the events leading up to the murder may have made Evans emotionally charged, his actions do not suggest a frenzied, spur-of-the-moment attack." Id.; see also Conde v. State, 860 So. 2d 930, 954 (Fla. 2003)(The defendant disputed the trial court's finding of the "cold" element of CCP relying on his expert's opinion that at the time of the murder he was in a disturbed stated of mind and suffered from a major depression. This Court upheld the trial court's finding of "cold and calm reflection" element of CCP where "while defendant's mental health experts opined that the defendant acted while in disturbed state of mind and defendant's characterization of the incident in his confession was consistent with that assessment, other evidence suggested his actions were spawned by his ongoing separation from his wife, which in trial court's words involved "feelings of sadness" but no "level of intensity of emotion."); Peterson v. State, 94 So. 3d 514, 532-33 (Fla. 2012)(The defendant challenged that the murder was committed coldly and that the trial court erred in not sufficiently weighing the fact

that the defendant was highly addicted to cocaine which influenced his decision to kill the victim. This Court held that the defendant acted coldly where he lured the victim to the crime scene by pretending that his vehicle broke down, used brass knuckles to beat the victim and then shot the victim twice in the head, disposed of his clothing and weapons, returned to his hotel, took a shower and went to pick up his girlfriend); Occhicone v. State, 570 So. 2d 902, 905 (Fla. 1990)(upholding the CCP aggravating factor where evidence showed that the defendant had contemplated and verbalized the murder for days and weeks prior to the day of the murder and that he made the telephone at residence inoperative before he shot and killed the victim); Silvia v. State, 60 So. 3d 959, 971 (Fla. 2011)(The defendant claimed that he had been diagnosed with a personality and delusional disorder and that this diagnosis precluded the finding that he acted in a calm and reflective manner, as required by the CCP aggravator. This Court held that despite the defendant's personality disorder and alcohol dependence, his actions do not suggest a frenzied, spur-of-a moment attack, where there was no evidence of the impairment or intoxication at the time of the crime and the evidence showed that the defendant calmly purchased a shotgun and ammunition, drove to the victim's home and calmly talked to her, but when the victim did not want

to reconcile, the defendant walked back to his truck, got the shotgun and shot the victim seven times). The finding and weight given to the CCP aggravator in this case is supported by competent, substantial evidence, and it should be affirmed. Moreover, considering the evidence presented, the trial court did not abuse its discretion in assigning the great weight to the CCP aggravator.

None of the cases upon which Defendant relies on negates the trial court's finding that the murder was the product of the cool and calm reflection and not prompted by emotional frenzy, panic, or a fit of rage. Cannady v. State, 620 So. 2d 165 (Fla. 1993), Spencer v. State, 645 SO. 2d 377 (Fla. 1994), Maulden v. State, 617 So. 2d 298 (Fla. 1993) and Richardson v. State, 604 So. 2d 1107 (Fla. 1992), all involved "domestic" killings where passion and emotion was involved in a domestic setting. In particular, in Cannady, the defendant killed a man who he believed had raped his wife, causing her physical and emotional pain. In Spencer, the defendant murdered his estranged wife whom he believed was trying to steal the business they shared. In Maulden, the defendant murdered his ex-wife where his emotional distress grew after the separation and ex-wife's involvement with a new man and the defendant's perception that the new man was replacing him as a father figure to his children. In

Richardson, the defendant shot his girlfriend after a heated argument that involved an intensity of emotion. In all the above referenced cases, this Court held that the murders were not "cold" although it may have been "calculated," where "there was no deliberate plan formed through calm and cool reflection, only mad acts prompted by wild emotion."

Clearly, here, there was no "domestic" dispute where passion and emotion were involved. In particular, here, Defendant murdered his former co-worker (because he believed Jackson and Brown mistreated him and prevented him from regaining his employment with Coca-Cola), after he deliberately planed the murder of Jackson and announced his plans openly months and days before the actual murder. As previously stated, a few days before the murder, Defendant attempted to lure and kill Jackson at the Wal-Mart. When Jackson showed up, Defendant followed him, but decided to abandon his plan because there were too many people around. Then, a day before the murder, Defendant attempted to lure and kill Jackson at Carley's Car Care, but because Jackson did not show up, this plan failed. Finally, Defendant lured the victim at the college, waited for the victim to show up, then after he saw that Brown showed up instead of Jackson, he changed his plan and decided to kill Brown by shooting him six times.

Defendant further argues that if this Courts agrees with him and strikes the CCP aggravator, then the sentence of death should not be upheld considering the remaining aggravator of prior violent felony conviction and significant mitigation. Assuming *arguendo*, that this Court disapproves the finding of the CCP aggravating circumstance, the death sentence in this case would still be upheld under the circumstances. This Court has upheld the death penalty despite mitigation where the single-aggravator was found. See, e.g., Ferrell v. State, 680 So. 2d 390 (Fla. 1996) (sentence of death upheld where the single aggravator of prior violent felony and several nonstatutory mitigators were found); see also Lemon v. State, 456 So. 2d 885 (Fla. 1984), cert. denied, 469 U.S. 1230 (1985). The CCP aggravating circumstance should be affirmed.

III. DEFENDANT'S CLAIM THAT IT IS UNCONSTITUTIONAL TO EXECUTE THE MENTALLY ILL IS UNPRESERVED, AND THE EXECUTION OF CAPITAL DEFENDANTS WHO SUFFER FROM MENTAL ILLNESS IS NOT UNCONSTITUTIONAL.

Defendant next asserts that his death sentence is unconstitutional because he is mentally ill. However, this argument provides no basis for reversing Defendant's death sentence as it is unpreserved and meritless.

As this Court has held, a defendant cannot raise a claim on appeal unless he properly presented the issue to the trial court for resolution. Evans v. State, 975 So. 2d 1035, 1042 (Fla. 2007)(claim that it is unconstitutional to execute capital defendant because he is physically handicapped and mentally impaired not preserved in appellate proceeding because it was not raised in trial court); see also Phillips v. State, 894 So. 2d 28, 40 (Fla. 2004)(stating that claim that execution of the retarded was unconstitutional was unpreserved where issue was not raised in the trial court). Here, Defendant candidly admits that he never raised the claim that Florida's capital sentencing is unconstitutionally applied to individuals with mental illness below. As such, this issue is unpreserved and should be rejected as such.

Recognizing the claim is barred, Defendant suggests that it is appropriate to raise the claim now to avoid having the State claim that the claim is barred later during post conviction

proceedings. Initial Brief at 53 n.16. However, Defendant offers no explanation of how raising the barred claim now will prevent the State from arguing the claim is barred later. As this Court has recognized, a claim is barred unless it is both pursued at trial and raised on direct appeal. James v. State, 615 So. 2d 668, 669 (Fla. 1993). Thus, raising a claim that was not pursued in the trial court will not prevent the State from arguing this claim is barred later. This is all the more true as Florida law bars not only claims that could have and should have been raised on direct appeal but also claims that were raised on direct appeal. Francis v. Barton, 581 So. 2d 583, 584 (Fla. 1991). Given these circumstances, Defendant's suggestion that it is appropriate to raise this unpreserved issue now to avoid a procedural bar later is meritless. The issue is unpreserved and should be denied as such.

Even if the issue was preserved, the issue should still be rejected. This Court has repeatedly ruled that the execution of the mentally ill is not unconstitutional. Simmons v. State, 2012 WL 4936109, *26-*27 (Fla. Oct. 18, 2012); Johnston v. State, 70 So. 3d 472, 484-85 (Fla. 2011); Seibert v. State, 64 So. 3d 67, 83 (Fla. 2010); Schoenwetter v. State, 46 So. 3d 535, 563 (Fla. 2010); Johnston v. State, 27 So. 3d 11, 26-27 (Fla. 2010); Nixon v. State, 2 So. 3d 137, 146 (Fla. 2009); Power v. State, 992 So.

2d 218, 222 (Fla. 2008); Evans v. State, 975 So. 2d at 1052; Lawrence v. State, 969 So. 2d 294, 300 n.9 (Fla. 2007); Connor v. State, 979 So. 2d 852, 867 (Fla. 2007); Diaz v. State, 945 So. 2d 1136, 1151 (Fla. 2006); Hill v. State, 921 So. 2d 579, 584 (Fla. 2006); see also Gill v. State, 14 So. 3d 946, 965 (Fla. 2009). As such, Defendant's claim that the execution of the mentally ill is unconstitutional is frivolous and should be rejected.

In an attempt to avoid this binding precedent, Defendant suggests that the standard of decency has evolved to the point where execution of the retarded is now unconstitutional. However, this argument is meritless as well. As the United States Supreme Court has held, a court deciding whether a practice violates the evolving standard of decency must consider "objective factors to the maximum possible extent." Atkins v. Virginia, 536 U.S. 304, 312 (2002)(internal quotations omitted); see also Roper v. Simmons, 543 U.S. 551, 564 (2005). It has stated that "the clearest and most reliable objective evidence of contemporary values is the legislation enacted by the country's legislatures." Atkins, 536 U.S. at 312 (internal quotations omitted); see also Simmons, 543 U.S. at 564. While the Court has stated that it is proper for a court to bring its judgment to bear in reaching a final decision on the issue, it

has noted that doing so is only appropriate "in cases involving a consensus," and that the exercise of judgment is used to determine "whether there is reason to disagree with the judgment reached by the citizenry and its legislators." Id. at 313.

Here, Defendant points to no objective evidence of a consensus at all; much less any legislative enactments showing that any state, including Florida, has outlawed the execution of the mentally ill. In fact, he does not point to any new evidence of a consensus at all. Instead, he notes that Atkins and Simmons have outlawed execution of the retarded and juveniles, that incompetent defendants cannot be tried, that an insanity defense is recognized, that insane defendants cannot be executed, that mental illness may provide a basis for statutory mitigation and that the Baker Act exists. However, all of these circumstances existed when this Court first rejected this claim in Hill and Diaz. As such, Defendant has not presented any new evidence, much less new objective evidence, of a consensus that execution of the mentally ill is now unconstitutional. Without such evidence of a consensus, there is no basis for this Court to alter its judgment. Thus, his claim that the evolving standard of decency shows that execution of the mentally ill is unconstitutional is meritless. The issue should be rejected, and Defendant's sentence affirmed.

In an apparent recognition that he cannot met the standard under the Federal Constitution, Defendant asks this Court to ignore the federal standard and decide this issue under the Florida Constitution. However, in making this argument, Defendant ignores that this Court lacks the authority to do so under the Florida Constitution. As this Court has recognized, the Florida Constitution was amended in 2002, to add a conformity clause to Art. I, §17. Lightbourne v. McCollum, 969 So. 2d 326, 334 (Fla. 2006). As a result, this Court has held that it is no longer free to apply a standard different from the United States Supreme Court on Eighth Amendment issues. Id. at 335; see also Valle v. State, 70 So. 3d 530, 538-39 (Fla. 2011). Given these circumstances, Defendant's suggestion that this Court use the Florida Constitution to grant him rights unavailable under the Federal Constitution is meritless. The issue should be rejected, and Defendant's sentence affirmed.

IV. DEFENDANT'S CONSTITUTIONAL CHALLENGE TO FLORIDA'S DEATH PENALTY STATUTE IS WITHOUT MERIT.

Defendant argues that his death sentence violates Ring v. Arizona, 536 U.S. 584 (2002), and Apprendi v. New Jersey, 530 U.S. 446 (2000). Defendant further asks this Court to reconsider its position in Bottoson v. Moore, 833 So. 2d 693 (Fla. 2002), and King v. Moore, 831 So. 2d 143 (Fla. 2002), as to the applicability of Ring to Florida's death penalty act. However, this claim is meritless.

This Court has repeatedly held that Ring does not apply to cases where the prior violent felony aggravating factor is applicable. Here, Defendant's claim is not a basis for relief because one of the aggravating circumstances present is a prior violent felony conviction. See Conde v. State, 860 So. 2d 930, 959 (Fla. 2003); see also Overton v. State, 976 So. 2d 536 (Fla. 2007); Jones v. State, 855 So. 2d 611 (Fla. 2003); Silvia v. State, 60 So. 3d 959, 978 (Fla. 2011); Duest v. State, 855 So. 2d 33 (Fla. 2003); Partin v. State, 82 So. 3d 31 (Fla. 2011); Hodges v. State, 55 o. 3d 515 (Fla. 2010); Miller v. State, 42 So. 3d 204 (Fla. 2010); Peterson v. State, 2 So. 3d 146 (Fla. 2009). Under settled Florida law, there is no basis for relief under Ring.

V. THE EVIDENCE WAS SUFFICIENT TO CONVICT DEFENDANT.

This Court has a duty to address the sufficiency of the evidence in each capital case. Winkles v. State, 894 So. 2d 842, 847 (Fla. 2005). However, when a defendant has plead guilty to the charges resulting in a penalty of death, this Court's review shifts to the knowing, intelligent, and voluntary nature of that plea. Id.; see also Tanzi v. State, 964 So. 2d 106, 121 (Fla. 2007); Gill v. State, 14. So. 3d 946, 950 (Fla. 2009); Lynch v. State, 841 So. 2d 362, 375 (Fla. 2003).

Defendant's plea was knowing and voluntary. The trial court thoroughly informed Defendant about the rights he was waiving, and Defendant indicated both verbally and in writing that he understood. (Vol. 7 at 3-21, Vol. 5 at 947-50) During the plea colloquy, the trial court explained that by waiving the guilt phase of the trial, Defendant would proceed to the penalty phase of the trial and that even if a jury recommended a life sentence, the trial judge would have the authority to impose a death sentence. (Vol. 7 at 3) Defendant expressed an understanding of the consequences of his plea, including an understanding that he could still face the death penalty. (Vol. 7 at 3-21) Defendant also stated that he was not coerced or promised anything in return and that he was not on any medication that would impair his understanding of his decision.

(Vol. 7 at 4-5) Under these circumstances, Defendant voluntarily and knowingly entered his plea, and the trial court properly accepted it.

CONCLUSION

For the foregoing reasons, the judgment and sentence of the trial court should be affirmed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing **BRIEF OF APPELLEE** was furnished by electronic transmission to David A. Davis, Assistant Public Defender, at david.davis@flpd2.com, on this 25th day of February 2013.

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CERTIFICATE OF COMPLIANCE

I hereby certify that this brief is typed in Courier New 12-point font.

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