IN THE SUPREME COURT OF FLORIDA

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THOMAS FORD McCOY, JR.

Appellant,

v. **CASE NO. SC12-676**

STATE OF FLORIDA,

Appellee.

______________________________/

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

INITIAL BRIEF OF APPELLANT

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INITIAL BRIEF OF APELLANT

I. PRELIMINARY STATEMENT

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

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

STATEMENT OF THE CASE

An Indictment filed in the Circuit Court for Walton County on May 5, 2009, charged Thomas McCoy, with one count of first-degree murder (1 R 15-16). The State also filed a notice that if he were convicted of that crime, it would seek to have a sentence of death imposed (1 R 22). The defendant pled not guilty and filed several death penalty related motions (1 R 32, see generally volume I of the record).

McCoy later changed his plea and pled guilty to the murder charge (7 R 2-3). The court, after conducting a voluntariness inquiry, accepted it (7 R 19). He then proceeded to the penalty phase of the trial before Judge Kelvin Wells. A jury was selected, and evidence, argument, and instructions on the law presented. The jury returned a recommendation of death by a vote of 11-1 (4 R 654).

The court, following that recommendation, sentenced McCoy to death. In aggravation, it found:

1. McCoy had a prior conviction for a violent felony.[1]

2. He committed the murder in a cold, calculated, and premeditated manner without any pretense of moral or legal justification.

(5 R 955-56)

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[1] McCoy was convicted on November 19, 2010 of aggravated assault on law enforcement and obstructing or opposing an officer arising from an incident with the police officers who arrested him in Tampa for the murder (13 R 296).

In mitigation it found,

1. McCoy was under the influence of an extreme mental or emotional disturbance at the time of the murder (moderate weight).

2. He has no significant history of prior criminal activity (moderate weight).

3. His family has a history of depression and mental illness (moderate).

4. His family has a history of alcoholism (little weight).

5. He was raised in a dysfunctional family that suffered mental illness, psychological and emotional abuse (little weight).

(5 R 957-59)

STATEMENT OF THE FACTS

A. The events leading to the murder of Curtis Brown

Thomas McCoy had worked as a service technician for the Coca Cola Company in the northwest part of Florida since sometime in the early 1990s (11 R 126, 129, 12 R 235, 260). He was a good worker, who did a good job, took pride in his work, showed up on time, rarely took time off or missed days, needed little supervision, and got along with customers and other employees (11 R 155, 153, 186, 12 R 260). The company trusted him so that it gave him a vehicle to use for calls(that he kept in meticulous condition (12 R 261)), and, as mentioned, left him alone to go about his work district answering service calls to repair coke machines that may have broken and needed repair. He enjoyed his job and working for Coca Cola, and the company recognized his satisfactory or superior work and said so by way of letters of appreciation or awards for a number of years of good work and service (11 R 171, 12 R 261, Defense exhibit 1).

McCoy worked as part of a five man team (12 R 252). It was a friendly group that enjoyed playing practical jokes and teasing and aggravating each other (11 R 154-55). Ray Jackson and Curtis Brown were part of this group, and, like McCoy, they were good employees who got along with each other and their customers. Jackson liked McCoy, and he had had him over to his home for dinner

several times over the years (11 R 128, 153). They also had attended the annual Christmas parties and apparently had had good times together (11 R 128-29). In Jackson's mind neither he nor Brown had ever mistreated or denigrated McCoy (11 R 129-30).

On a personal level, by 2009 McCoy was a 42 year old single man who had lived with his mother for several years (14 R 468). He wanted to get married, have a family, and generally have his wife stay at home to take care of the children (13 R 412, 14 R 468). Eventually he bought or built a house of which he was very proud and kept in very good condition (13 R 398). Also in his personal and professional appearance he was always well or appropriately dressed and groomed (12 R 261).

There was, however, a darker side to the defendant. His father had been mean, verbally abusive, dominating, controlling and critical of his wife and children (15 R 511). This apparently was a generational characteristic, as McCoy's grandmother had been physically and verbally abusive to her children (15 R 541-42). As a result McCoy's father was mean and abusive as well (15 R 542).

Also possibly generational, he had bouts of depression. But McCoy was able to control the depression when on medication, and he felt that it helped (12 R 246). McCoy also had problems relating with women (12 R 247).

Although he liked working for Coca Cola, in 2006 he resigned to see if he could strike out on his own, and he apparently got a job at the hospital at Eglin Air Force Base (11 R 144, 12 R 263). By all accounts he left on good terms, and he and Jackson would speak on occasion afterwards (11 R 144).

Life after that, however, became more difficult. While at Coca Cola he had health benefits that included him being able to get medications to treat his depression (14 R 472). After leaving Coke he no longer had health insurance, and he only sporadically could afford or was given Zoloft to help him deal with this mental health problem (14 R 470).[2]

By 2009 his mental condition had significantly deteriorated, and he was having suicidal and homicidal thoughts (15 R 512, 546, 548, 553, 555; 18 R 55, 74). Accentuating his depression, he was also becoming psychotic (15 R 533, 537, 546; 18 R 34-35, 37). His business had not prospered as he had hoped, and although he had dated some, there were no marriage prospects on the horizon (13 R 413-14).[3]

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[2]When McCoy could not afford to buy the medication, he would on occasion get samples of the drugs from his doctor, and with the doctor's knowledge and permission (14 R 470).

[3]He had gone out with a woman 13 years older than him for several months, and was liked or "loved" by her family (14 R 462, 464). The relationship, however, never developed, and after a while they agreed to go their separate ways (14 R 463).

He also feared losing the house he loved, and his financial situation had deteriorated to the point he was possibly facing bankruptcy (15 R 509).

He repeatedly called the Coca Cola Company to see if they would rehire him, but it had low turnover, and no positions were open (12 R 254).

While at Coca Cola, McCoy had attended a meeting at which company health benefits were discussed. During the discussion Curtis Brown, apparently talking to McCoy, said that he had to pay more than McCoy because he had a family and McCoy did not (11 R 179; 12 R 267). That comment upset McCoy because he did not have a wife and children (11 R 179).

Sometime later, during the annual Christmas party, McCoy brought a date with him, and when some of those at the party, including Ray Jackson, saw McCoy with his friend, they made the comment that "he did have a girlfriend after all." (11 R 180, 14 R 467).

Until 2006 or so, the Coca Cola Company had a policy that technicians would be paid for their work as soon as they left home and went to their first call (11 R 181). In that year, the Atlanta headquarters changed it so that they would not be paid until they got to their first work site. That also upset McCoy (12 R 255-56).

As mentioned, by the first part of 2009 McCoy's mental state had seriously deteriorated. In the latter part of November 2008, he ran into a former Coca Cola

employee, Jamie Leddon, and during the ensuing conversation, McCoy told him that he had recently lost his job with Gulf Ice because he "didn't fit in." (12 R 232). From his demeanor, it was obvious to Leddon that McCoy was still very upset, so to calm him down his friend asked him if he had seen Ray Jackson (12 R 233). The defendant said he was very upset with Ray and wanted to kill him because the defendant had called him after he had lost his job and "Ray laughed at him." (12 R 233)[4] As Leddon recalled, McCoy's face was flush and the blood vessels in his neck were bulging (12 R 238). He said, "he was laughing at me because I am going to lose everything." (12 R 233). He had bought a gun and materials to make a silencer, and he was "going to shoot him in one knee and shoot him in the other and then when he was screaming in pain he was going to walk up and laugh at him in his face and shoot him between the eyes." (12 R 233) Leddon, who saw no rational reason for this anger and thought he might be having "some kind of mental issues" (12 R 241),[5] told Jackson, who, after talking with his supervisor, called the Valparaiso Police Department and Okaloosa County Sheriff's Office and filed a complaint (11 R 143). They made a "welfare check" on McCoy, but otherwise did

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[4]By all accounts Ray Jackson was not simply a "good guy," but a "great guy." (12 R 239). Similarly everyone like Curt Brown (12 R 239).

[5]Leddon had never seen or heard of either Jackson or Brown mistreating McCoy in any way (12 R 244).

nothing (11 R 184, 12 R 224). He told the police that he was taking Zoloft because of his financial struggles, and he had lost a friend (12 R 226). He admitted "he didn't like Ray," even though he had at one time considered him a friend, but he told the police to tell Ray that if he saw McCoy, not to approach him. "He would take this as a warning not to contact him." (12 R 226)

In the first week or so of April 2009, the defendant talked with Wendell Kilgore, another employee of Coca Cola, and told him that "he had something big planned and I may see it on CNN." (11 R 178).[6] Kilgore thought this was more than the normal depression a person has when looking for work, and he reported it to the police (11 R 190).

By April 9, 2009, McCoy had decided he wanted to kill Ray Jackson, but Curtis Brown and Ralph King were also possible targets (15 R 599, 631).[7] He talked to a Keith Hobbs, another Coca Cola employee, and told him, Hobbs, he was

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[6] McCoy would later tell Dr. James Larson, a psychologist, that "I wanted to go out in a blaze, a ring of fire." (15 R 595). He also told Dr. Harry McClaren, another psychologist, "he wanted to be taken out in a blaze and a shootout with law enforcement, which accounted for some of the weapons that he had with him." (18 R 21-22)

[7]Ralph King was a service manager for Coca Cola when McCoy worked for the company, and the defendant blamed him, Jackson, and Brown for not being rehired (15 R 639). He also thought King had made fun of him, even though others who worked with and knew both men were unaware of any hard feelings Mr. King had towards McCoy (12 R 248, 250). King, for his part, never saw McCoy make threats or exhibit any hostility to any other employee (12 R 261).

a "good guy" who took people for who they were. This was unlike some people, and he was mad at Curtis Brown and Ray Jackson, apparently because of what they had said three years earlier about the health insurance and his relationship with women (12 R 267-68). Someone placed a call to Coca Cola Service Center that day reporting a broken machine at "Carley Car Care" in DeFuniak Springs (11 R 132). No one responded to the call, and a truck similar to the one the defendant drove was captured on the facility's security camera driving by several times (11 R 148).

McCoy called the Coca Cola Service Center during the morning April 10, 2009 to report a broken machine at the student lounge on the campus of Northwest Florida State College in DeFuniak Springs (11 R 75, 141, 163). Ray Jackson normally would have gone there, but he was a bit busy, and Curtis Brown said he would do it for him (11 R 139). He showed up with his tool bag to make the repair. By then McCoy was in the lounge, and when Brown showed up, he realized it was not Jackson, but he decided that Brown would do (15 R 638). He shot him six times, killing him (12 R 198).

McCoy left and drove to Tampa where he took a room at a local hotel using his name (13 R 275). Eleven days later, a Florida Regional Fugitive Task Force in Tampa learned that he was staying there, and a team of men went to the hotel (13 R 276-78, 305). They saw the defendant, and one of the agents called out to him that

they were the police and he was to put his hands up (13 R 280). McCoy, who had returned from a fast food restaurant and had some food in his hand, turned to face the officer, turned away, then turned back. It is not clear who shot first, but the defendant had a gun and he shot towards the officer (13 R 282-83). The officer either opened fire or returned fire, and he hit the defendant in the back and buttocks (13 R 283). None of the Task Force members were hit by the defendant's single shot (13 R 286).

B. The psychologist's testimony

As part of his penalty phase defense, McCoy called Dr. James Larson, a psychologist who had examined and diagnosed him regarding the homicide of Curtis Brown. At the Spencer hearing, the State called Dr. Harry McClaren, also a psychologist, who had similarly examined and diagnosed the defendant.

1. Dr. Larson's opinion.

Thomas McCoy comes from a family that had a generational history of severe depression. His grandmother was extraordinarily cruel and mean, and she instilled those traits in her son, the defendant's father. He was, like his mother, very cruel, domineering and controlling (15 R 511). He was an alcoholic and verbally abusive, criticizing and making fun of his son (13 R 394, 439; 15 R 511). He told the defendant when he was a child that he was stupid (15 R 511). As a result, the boy

grew to be a man without a good, positive self-concept, careful not to offend anyone and particularly attuned to the subtle signs his father was angry or about to become angry (15 R 512). Consequently, he "over interpreted social situations in a negative way." (15 R 512).

However, in one respect he became like his father. He was also an alcoholic (15 R 516, 536, 616, 18 R 34). But, he became more. He became depressed, seriously, mentally ill depressed (15 R 500). As Dr. Larson explained, on a scale of 1-10 (with 10 being catatonic, staying in bed depressed) he was at most times an 8, but at the time of the murder he was a 10 (15 R 546).

But, he was more than simply seriously depressed. He also displayed symptoms of psychosis (15 R 501). As a result, this serious depression and psychotic breaks with reality, including auditory hallucinations (15 R 512, 549, 587, 649-50, 18 R 22, 35), led to suicidal and homicidal thoughts (15 R 512-13, 549).

Now, Dr. Larson was not the only one to recognize McCoy had significant mental problems. The defendant had gone to two general practitioner medical doctors, and even they had prescribed medications (Zoloft and Lamentil, both

antidepressants) for him because one thought he was bipolar and the other as depressed (15 R 519-20, 523).[8]

Hence, he had taken Zoloft, an antidepressant medicine, but he frequently was noncompliant in taking it as prescribed. He would, for example, occasionally not take it periodically as required, and when he realized this he would take more than prescribed, hoping to "catch up." (15 R 529). All it did, however, was make him sick and possibly damage his liver (15 R 530).

But, he had more problems than simple noncompliance. After he left working for Coca-Cola he lost his medical insurance, and could afford neither the medicine, nor visits to the doctor (14 R 470, 472, 15 R 530). He effectively stopped taking the medication, and only on occasion could he get samples from his doctor, who was willing to give him some (14 R 470).

Instead, McCoy would use alcohol to self-medicate his depression and anxiety (15 R 515-16, 646). Apparently, it works well to treat psychotic people who hear voices (15 R 515-16), but ultimately alcohol is a depressant, so he simply made his bad situation worse (15 R 515). That McCoy needed or used alcohol excessively became evident when the police searched his motel room in Tampa at

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[8]Dr. Larson said that it was common for doctors to make different diagnoses within a short time, particularly in this case where depression and bipolar disorder are "kissing cousins" of one another (15 R 520).

the time of his arrest and found it littered with beer cans (15 R 589). He also was drunk at the time of the murder, which had merely replicated his pattern of heavy drinking in the months before (15 R 516).

Thus, at the time of the murder, McCoy not only was extraordinarily depressed (15 R 546), he was also under the influence of alcohol, and had psychotic breaks with reality with voices telling him to kill Brown (15 R 512, 549, 587, 649-50, 18 R 22, 35). He did so, and also wanted to kill Jackson, because of the perceived insults both had made years earlier, which he had not forgotten (11 R 180, 12 R 233, 14 R 467).

Consequently, Larson found that both statutory mental mitigators applied. Although he had the capacity to appreciate the criminality of his conduct at the time of the homicide his ability to conform his conduct to the requirements of the law was substantially impaired (15 R 602). Also, at the time of the murder, he was under the influence of an extreme mental or emotional disturbance (15 R 550-52). §921.141(6)(b),(e) Fla. Stats. (2009).

2. Dr. McClaren.

As mentioned, Dr. McClaren testified at the Spencer hearing, and in many respects his testimony echoed that of Dr. Larson.[9] Like Dr. Larson he believed that at the time of the murder, McCoy was under the influence of an extreme mental or emotional disturbance (18 R 34). He did not believe, however, that his capacity to appreciate the criminality of his conduct at the time of the homicide or his ability to conform his conduct to the requirements of the law was substantially impaired (18 R 43-44).[10]

In most other aspects, however, he agreed with Dr. Larson's analysis and conclusion. Depression often runs in families (18 R 58), McCoy's father had badly, emotionally abused him (18 R 20). He also found the defendant to be suffering from a major depression with a "probable psychosis and probable alcohol dependence." (18 R 34)[11] This extreme level of depression contributed to him

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[9]When he met with Dr. McClaren, McCoy had twisted his eyebrows up like a "devil's horns." After meeting with him for a while, they took a break for lunch, and when they resumed, the defendant had only one of the eyebrows twisted. He was, as he said, "half as horny." (18 R 38). The psychologist thought "he was a little odd there." (18 R 38)

[10]He could conform his conduct to the requirements of the law, Dr. McClaren said, because he chose not to kill Ray Jackson before killing Brown (18 R 44).

[11]Auditory hallucinations or delusions were evidence of the break with reality, and McCoy used earplugs to "help him not hear things." (18 R 35) He heard drums beating, the devil growling (18 R 37). When he killed Brown, he heard a voice telling him to "Do it; go ahead and do it. I wish you'd do it," or, "Come on; let's do it; do this thing; you've already got the gun." (18 R 22, 27).

being both homicidal and suicidal, the suicidal aspect occurring after the homicide and being more of a desire to be killed by the police when they tried to confront him (18 R 51, 63).[12]

Dr. McClaren also found that McCoy had taken antidepressant drugs such as Thorazine (18 R 37, 54, 75). Like Dr. Larson, he concluded that he may have been non-compliant at times in taking them (18 R 59-60).

At the time of the homicide, McCoy had had some trouble buying his medications, and he was depressed, feeling as if he had lost everything, he had no relationships with women, he was about to lose his house, and he could not keep a job (18 R 18). He blamed this turn of events on Ray Jackson, Ralph King, and Curtis Brown (18 R 18), but he singled out Jackson and because as his situation with work deteriorated, he became depressed, hopeless and believed that Jackson was actively working to keep him from getting his old job (18 R 18-19).

Thus, he wanted to kill Jackson, and he originally planned to do so at a Wal-Mart. That effort never materialized, however, so he settled on killing him at the college. When Brown showed up instead, he "reprogrammed" himself to kill

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He also had possible visual hallucinations (18 R 47).

[12]McCoy believed that if he killed himself he would go to hell whereas if someone else killed him he would go to heaven (18 R 64).

him. "He would be good enough. I went into a panic attack. I thought I heard a voice, 'Come on; let's do this thing; we've already got the gun.' I decide to go back in to kill him." (18 R 49) Justifying himself, he noticed that Brown had left his tool bag unattended; which, in McCoy's mind, was a major sin (18 R 27-28). Moreover, when he confronted Brown with the gun, the latter had simply said "McCoy," and bowed up. Had he begged, reminded him of his wife and kids, he would not have shot him. Instead, he blocked him and said "McCoy." (18 R 49-50) So he shot the hypocrite (18 R 27) six times, very fast (18 R 66).

As to his relationship or animosity towards these men, Dr. McClaren agreed that the defendant's feelings were abnormal because most people would have considered their comments as innocuous (18 R 69). Instead, he felt that they had treated him unkindly, were mocking him because he did not have a wife and family and keeping him from being rehired by Coca Cola (18 R 18, 20). He thus had a very high level of anger, perhaps hatred, towards them (18 R 19). Depressed people, however, tend to dwell on their anger and become homicidal and suicidal, seek vengeance, and "pretty much let the chips fall where they may as far as apprehension, as suggested by the contents of his truck." (18 R 69)

Indeed, like Dr. Larson, the State's expert believed that McCoy should have been civilly committed[13] at the time of the murder, and he would have done so had he seen him (15 R 553-55, 18 R 71).

[13] The Florida Mental Health Act, also known as the Baker Act, appears in part I of chapter 394, from sections 394.451 to 394.4789. *See* § 394.451, Fla. Stat. (2011).

SUMMARY OF THE ARGUMENTS

ISSUE I: Death is a disproportionate sentence in this case. It is not among the most aggravated and least mitigated ones this Court has faced. Specifically, his extreme, extraordinary level of depression, which was laced with psychotic symptoms permeates what happened on April 10, 2009 and later to such an extent that the two aggravators the court found hardly make this case among the most aggravated. On the other hand, the mental mitigation is so significant that both the State and defense psychologists who examined McCoy diagnosed him as severely depressed with symptoms of psychosis, and they agreed that at the time of the murder he was under the influence of an extreme mental or emotional disturbance. They also believed that on April 10, 2009 he should have been civilly committed because his depression caused him to pose a danger to others. Hence, this case becomes one of the most mitigated this Court has considered. As such, death is not a warranted punishment for this defendant.

ISSUE II: The trial court found that McCoy committed the murder in a cold, calculated, and premeditated manner without any pretense of any moral or legal justification. While he admits that he killed Brown with calculation and premeditation, he did not do so with the coldness this Court has required for this aggravator to apply. He says this because the friends who knew him, and the

mental health experts that examined him agreed that in the days, weeks, and months before the murder, McCoy was a volcano of seething, irrational hatred for Ray Jackson that exploded when Curtis Brown rather than Jackson showed up to fix an allegedly broken vending machine. This rage, as irrational as it appeared, simmered but grew with the months and years, so that by April 10, 2009 it erupted into a calculated and premeditated murder, but not one that had been coldly executed.

ISSUE III: Although McCoy never argued the constitutionality of executing a person who is severely mentally ill, he does so now. Drawing on the reasoning used by the United States Supreme Court to preclude the execution of youths and the mentally retarded, he argues that those who, like himself, suffer severe psychotic depressions lack the moral culpability to justify execution.

However correct and brilliant that argument may be this Court has already rejected it, and the defendant raises it now to encourage it to re-examine its reasoning for doing so, and to preserve it for future review by other courts.

ISSUE IV: Similarly, McCoy recognizes this Court has concluded that the United States Supreme Court's ruling in Ring v. Arizona, 536 U.S. 584 (2002) has no application to Florida's death sentencing scheme. He raises this issue here in the hopes that the clearly correct argument he makes will convince it to reverse its

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

ISSUE I: DEATH IS A PROPORTIONATELY UNWARRANTED SENTENCE.

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

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

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

Applying these principles to this case shows that it is neither the most aggravated nor the least mitigated instance for which death is unwaveringly the only appropriate sentence. Comparing it with others becomes supremely difficult because of the highly unusual, almost unique, scenario presented here. In other cases involving circumstances arguably similar to those presented here this Court has held the death penalty disproportionate.

I. The most aggravated and least mitigated analysis

The court found two aggravators justified a death sentence for McCoy: (1) He had a prior conviction for a violent felony - the aggravated assault in Tampa of the police officer with the Florida Regional Fugitive Task Force, and (2) He committed the murder in a cold, calculated, and premeditated manner without any moral or legal pretense. When closely examined they do not become so strong that the murder in this case is among the most aggravated this Court has considered. This is especially so when viewed in the light of the defendant's mental state that pervades and limits the significance of these aggravators.

1. CCP

McCoy has attacked trial court's finding the Cold, Calculated, and Premeditated aggravator in ISSUE II. If this Court rejects his argument that

McCoy lacked the requisite coldness for it to apply, it should, nonetheless, have great hesitation in giving it much significance in its proportionality analysis.

What is immediately striking about this case is McCoy's extraordinary, perhaps psychotic touchiness at the perceived insults that Jackson and Brown had made years earlier. McCoy interpreted a throw away comment that Brown had a higher health insurance premium because he had a family as making fun of him because he did not have a wife and children. Jackson saw McCoy at a Christmas party and noted that he did have a girlfriend, which the defendant interpreted as an insult. No one in their right mind would have (a) remembered this chatter, (b) recalled it years later, (c) interpreted them as death worthy insults, and (d) laid in wait to kill whichever of the men happened to show up. No matter how calculated and premeditated the defendant may have acted, his thoughts clearly revealed a deeply irrational, psychotic person; one who had lost contact with reality. How else can we explain an animus towards Jackson so extreme that he wanted to kill him, but when Brown fortuitously showed up McCoy reprogrammed himself so that this unanticipated victim "will do." How else can we explain McCoy's warped thinking that Brown deserved to be killed because he left his tool bag unattended for a minute or so? McCoy's meticulousness in his work and work habits and Brown's sloppiness (in McCoy's eyes) became a justification for vengeance (15 R 631, 18 R 27, 49).

Unsurprisingly, both Drs. McClaren and Larson clearly recognized not only McCoy's unstable mind, but believed he could become dangerous because of it. Both believed McCoy should have been civilly committed (15 R 554-56, 18 R 71). He had a mental illness and because of it, as the events unfortunately proved, he was a danger to others. Even the trial court at sentencing recognized that at the time of the murder McCoy was under the influence of an extreme mental or emotional disturbance (5 R 956-57).

Now, what happened on April 10, 2009 was the result of a slow, steady decline in McCoy's mental stamina. While he worked for Coca Cola, he could get the medicine he needed to control his depression. He was prescribed Zoloft, an antidepressant, and he said he felt better when he took it. But even when he could afford this medicine, he frequently became forgetful and would take it erratically and become noncompliant (15 R 529-30). That was significant because one cannot "catch-up" and take several doses at once. He had to take Zoloft at a steady rate for at least two to three weeks before effects became observable. Taking super doses only tended to make him sick and possibly damage his liver (15 R 530, 645).

But, at least he had the medication. After leaving Coca Cola he had no health benefits, and without them he could not afford the medicine or to see a doctor (15 R 530). Ad hoc, a nurse who was a friend would give him samples that one of two

doctors that had seen him had. But that was unreliable and erratic, and by the time of the murder he had probably not taken anything for a long time. As a result, he had slid into a deep depression with its psychotic symptoms. His depression had not only deepened but had become extremely debilitating. On a scale of 1-10, McCoy rated an 8 for daily living. At the time of the murder he was a 10 (15 R 546). More than "simply" depressed, McCoy was, according to both Drs. McClaren and Larson, depressed with psychotic symptoms. At the time of the murder he had breaks with reality.

Depression is a common condition for almost everyone, and we feel depressed at times - the Gators lose (or win), we bounce a check, we lose a case. But healthy people rebound from the disappointments of life and are not overwhelmed by them or alter their lives because they are sad. Depression is a common experience and this occasional bout with the blues can mislead normal people when faced with those who are clinically depressed to offer the useless advice to just "snap out of it." They have a serious mental debilitation that can last months, years, and a life time. And, on occasion, as in this case, it can lead to homicide.[14] Medication may help and psychotherapy can also relieve the mood

[14] Among the most heartbreaking examples of homicidal depression are those of women who, because they suffered from post partum depression, killed one, more, or all of their children. Lacey Cole Singleton, "After Andrea: Increased Recognition of Post Partum Depression and the

disorder, but the significant point is that the clinically depressed are creatures of a different sort from those who face the occasional disappointments of life, and the two conditions are as similar as a wolf and a lap dog.

In capital cases, defendants have occasionally been diagnosed as suffering depression. Typically, the mental health expert includes this diagnosis because the defendant is depressed about being in jail for murder, or it is part of a larger mosaic of mental problems.

Defendants who suffer severe, extreme depression, the type where he or she also exhibits psychotic symptoms are much rarer, and accordingly much more significant in a proportionality analysis. That is the diagnosis McCoy had, and it is one of the aspects of this case that is unusual.

Another is that both experts agreed with that diagnosis. This is noteworthy because Dr. McClaren, the State's psychologist, habitually testifies for State, and almost as often, is very skeptical of claims of mental illnesses defendants in other cases have made. Hoskins v. State, 75 So.3d 250, 256 (Fla. 2011) ("At the post

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Implications for Child Custody Disputes," 9 *Journal of Law and Family Studies* 189 (2007); See especially, Jennifer Bard, "Re-Arranging Deck Chairs on the Titanic: Why the Incarceration of Individuals with Serious Mental Illness Violates Public Health, Ethical, and Constitutional Principles and therefore Cannot be Made Right by Piecemeal Changes to the Insanity Defense," 5 Hous. J. Health L. & Pol'y 1 (2005), f.n. 19 which gives an extensive bibliography discussing the case of Andrea Yates, a woman suffering from post partum depression who killed her five children.

conviction hearing, however, the State presented the expert testimony of Dr. Harry McClaren, who disagreed with this diagnosis and testified that [Intermittent explosive disorder]was 'rare.'"); State v. Herring, 76 So.3d 891, 893 (Fla. 2011); Bailey v. State, 998 So.2d 545, 550-51 (Fla. 2008). ("The State introduced a second expert, Dr. Harry McClaren, who came to the same conclusions as Dr. Prichard and emphasized how Bailey planned the murder shortly before it happened."); Jones v. State, 998 So.2d 573, 584 (Fla. 2008) ("Dr. McClaren ultimately concluded that Jones did not suffer from brain impairment or a major mental illness, but he likely suffered from antisocial personality disorder."). In Green v. State, 975 So. 2d 1081, 1086 (Fla. 2008), this Court found it "most notabl[e]" that the State's mental health expert agreed with the defense experts that both statutory mental mitigators applied to Green.

Defendants and prosecutors, on the other hand, have relied on Dr. Larson. Robinson v. State, 95 So.3d 17, 174 (Fla. 2012) ("At the penalty phase, trial counsel presented the testimony of Dr. James Larson, a psychologist . . ."); Mahn v. State, 714 So.2d 391, 395 (Fla. 1998) ("The State's rebuttal expert witness, Dr. James Larson, a clinical psychologist, testified that Mahn did not have any type of mental disease or infirmity.")

Despite these arguably different perspectives on the human condition, these experts largely agreed with how they viewed McCoy at the time he killed Brown. He was extremely depressed, suffered psychotic symptoms along with depression, was under the influence of an extrēme mental or emotional disturbance, could have and should have been civilly committed (15 R 501, 512, 546, 550-52, 553-55,602, 18 R 34, 5, 63, 71)

Thus, McCoy's severe mental breaks with reality diminish the significance of the CCP aggravator. But it does more. It also creates problems with the prior violent felony conviction aggravator, which the court found and gave great weight (5 R 956).

After killing Brown, the defendant drove his truck to Tampa, where he registered at a motel using his name (13 R 275-78, 305). About 11 days later, a Florida Regional Fugitive Task Force showed up to arrest him. As luck would have it, McCoy was returning to his room carrying some fast food he had bought. When the police told him who they were the defendant turned toward one of the officers, turned away, then turned back to him and shot in his general direction. At the same time, one of the officers shot McCoy hitting him twice. Significantly the defendant fired only once and did not hit anyone. This is important because the defendant bragged that he could fire six shots from his gun in five seconds. He had

also competed with the firearm, and was a good marksman (12 R 154, 15 R 662). In short, if he had wanted, McCoy could have rapidly fired several shots, and he would have hit the arresting officer.

But he did not want to hurt anyone. To the contrary, because he had killed Brown, he wanted to die, or, as Dr. Larson said, and Dr. McClaren agreed, he wanted to commit suicide by cop (15 R 547-48, 551, 18 R 63). To provoke the police to shoot him he, therefore, fired a shot in their general direction with no intent to hit anyone (15 R 652). Predictably, they shot or returned fire, but despite his desire "to go out in a blaze, a ring of fire," (15 R 595) they only wounded him (13 R 283).

Thus, McCoy is guilty of an aggravated assault on a law enforcement officer (13 R 296), but his deteriorating mental fitness reduces any significance it has as an aggravator.

While the trial court found two aggravators, their significance diminishes in the light of the powerful mitigation it also found. His depression and psychotic symptoms increasingly pervaded his reality in the months and years after he left Coca Cola. His use of alcohol on the day of the murder (18 R 17) only made his condition worse. When viewed in this light, Brown's murder simply is not one of the most aggravated and least mitigated murders this Court has ever considered.

II. Comparison with other, factually similar cases

Further weakening the justification for a death sentence this case presents an unusual, if not unique, scenario that is so at odds and mitigated with what this Court routinely considers that death is not warranted for McCoy. That is most homicides typically show little, if any, significant premeditation of the sort presented here. Of course, many have the heightened premeditation required for the CCP aggravator, but very few defendants have nursed hurts and stings, especially inconsequential ones, for months and years to the point where they want to kill any unwitting victim(s). Rarely has this Court seen defendants deliberately laying in ambush not once, but multiple times, hoping that one victim will show up. Thus, if there are the required similar cases for this Court to conduct its proportionality review, they form a very narrow or small class.

The types of homicide that eventually come to mind are those styled as (1) revenge or vengeance killings, or, (2) ambush killings. Wickham v. State, 593 So. 2d 198 (Fla. 1991); Zakrzewski v. State, 717 So. 2d. 488 (Fla. 1998).

In Wickham, Jerry Wickham and his group of gypsies had run low on money and needed to buy gas for their car. Wickham hatched and executed a plan whereby one of the women and the children in the group would stand by their car pretending to be stranded on a road near Tallahassee. The rest would hide in some nearby

brush. Within a short while a good Samaritan stopped to see if he could offer some help. Wickham came out of the woods, brandishing a gun. He shot the man and went through his pockets, finding less than 5 dollars.

He was eventually arrested, tried for and convicted for one count of first degree murder. The jury recommended death, and the court imposed that sentence. It found six aggravating factors, one of which was the CCP aggravator.[15] Specifically, as to it, this Court said, "While the murder of Fleming may have begun as a caprice, it clearly escalated into a highly planned, calculated, and prearranged effort to commit the crime. It therefore met the standard for cold, calculated, premeditation . . . . even though the victim was picked at random." Id. at 194 (citations omitted.)

The trial court found nothing in mitigation, even the statutory mental mitigators, although he had some long standing mental problems and alcohol addiction. It discounted that, and this Court affirmed the imposition of the death sentence in part because on the day of the murder he "had not been hospitalized for

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[15]The six aggravating circumstances were: (1) under a sentence of imprisonment; (2) prior violent felony; (3) during the commission of a robbery; (4) avoid arrest; (5) the murder was committed in a cold, calculated, and premeditated manner without any pretense of moral or legal justification (CCP); and (6) the murder was committed in a heinous, atrocious, or cruel manner (HAC). Wickham v. State, 998 So.2d 593, 595 (Fla. 2008). This Court found that the murder was not HAC, but otherwise approved the courts finding of aggravation.

mental illness for many years and was not drinking at the time the murder was committed." *Id.* at 194.

This case is distinguishable on several levels. First, in this case, unlike in Wickham, the trial court found two statutory mitigators, including the mental one that at the time of the crime he was under the influence of an extreme mental or emotional disturbance. It gave that significant mitigator "moderate weight." (5 R 957). It also recognized that until his criminal episode, McCoy had no history of significant criminal behavior, which was untrue of Wickham, who had served several years in prison for armed robbery and theft of a car.

Moreover, although Wickham spent a large part of his life in mental hospitals and suffered from brain damage and alcohol abuse, his schizophrenia was in remission, and he had not drunk anything on the day of the murder. There was, in short, no causal or explanatory connection between Wickham's mental problems and the murder.

In this case, to the contrary, McCoy, while not hospitalized for his mental problems was so mentally unbalanced that both Dr. Larson and Dr. McClaren would have civilly committed him as a danger to others (15 R 553-55, 18 R 71). Both also had diagnosed him as suffering from an extreme depression with psychotic symptoms on the day of the murder(15 R 512, 549, 587, 649-50, 18 R 22, 35).

While on a scale of 1-10, McCoy's depression routinely scored an "8," Dr. Larson believed that at the time of the murder it was a "10." "Well, no, I think [his mental condition was] worse at the time of the actual homicide. I think when you get to the point you're willing to kill yourself, kill others, commit suicide by cop, that's real close to a nine or a ten on a ten point scale." (15 R 546). Moreover, both he and Dr. McClaren believed that.

The severity of his mental illness is reflected in the aggravators the court found - CCP and prior conviction for aggravated assault - the Tampa shootout. In Wickham, the trial court legitimately found five aggravators and no mitigation. It specifically found that the murder arose out of the ambush whose goal was robbery and to avoid lawful arrest. In this case, McCoy had no similar motives. He took nothing from Brown, and wanted the police not only to find him, but kill him as well (18 R 21-22). Moreover, the statutory mitigator that McCoy had no history of significant criminal behavior contrasts with Wickham's being under sentence of imprisonment at the time of the murder and conviction for a prior violent felony (robbery), aggravators the trial court found applied to Wickham.

Thus, although both murders have some factual similarities in that they were ambush killings and the CCP aggravator applied, McCoy's situation presents such a significantly more mitigated case, and mitigation that explains McCoy's actions on

April 10, that this Court should reduce his death sentence to life in prison. *C.f.* Bright v. State, 90 So. 3d 249, 264 (Fla. 2012) ("[N]o evidence that at the time of the murders Bright was hallucinating, delusional, or intoxicated to the point of substantial impairment, or that he lacked the ability to conform his conduct to the requirements of the law.")

In Zakrzewski, Zakrzewski believed his marriage was on the verge of collapse, and, in a warped sense, concluded that he needed to kill his wife and two children (ages 5 and 7) to save them from the pain of divorce. On at least two occasions he had said as much to a neighbor. On the day of the murders, he bought a machete during his lunch break, and after work returned home and hid the weapon in the bathroom. His wife and children came home some time later. As she sat alone in the living room, he struck her twice with a crowbar, drug her body to the bathroom where he hit her again and strangled her. He then called his son into the bathroom to brush his teeth. When he appeared he saw his father about to strike him with the machete, and he tried to ward off the blow. He was killed by machete blows to the head, neck, and back. Zakrzewski then called his daughter into the bathroom to brush her teeth, and as she knelt over the bathtub, he killed her.

The defendant fled to Hawaii where he later turned himself in when it became evident he would soon be arrested. He pled guilty to the murders, and the penalty

phase jury recommend death for the murders of the wife and son (by votes of 7-5), but life for the daughter. The court sentenced him to death for each murder, finding three aggravators: (1) The contemporaneous murders, (2) They were cold, calculated, and premeditated, and (3) They were especially heinous, atrocious or cruel. In mitigation, the court found that he had no history of significant criminal activity, and at the time of the murders he was under the influence of an extreme mental or emotional disturbance. *Id.* at 491.

The court also found a significant amount of nonstatutory mitigation that presented a picture of a young sergeant in the Air Force who had an exemplary career record, worked hard at work, at home, and in his college classes. He was, however, under a considerable amount of stress from his work, college, and home duties, and was sleep deprived. Among this and other nonstatutory mitigation, the court also found that he suffered from a "major depressive episode," and was "impaired by alcohol at the time of the offense." *Id.* at 491 fn. 1.

While Zakrzewski had the same statutory mitigators and the CCP aggravator as present in this case, the other two aggravators distinguish Zakrzewski's hideous murders from McCoy's scenario. Of course, McCoy also has a prior conviction, but it was for aggravated assault, which pales into insignificance when compared with the Zakrzewski's prior convictions not simply of three people, but of his wife and

two young children. On the other hand, the jury, only by the slimmest of votes, recommended death for the murders of the wife and son, and amazingly recommended life for the murder of the daughter. So, the mitigation, and particularly the extreme mental or emotional disturbance mitigator must have had a powerful impact on the jury. And it also impressed the sentencing court because it gave it significant weight.

Zakrzewski, while having some similarities with this case, also has significant distinctions. First, and most important, in that case there were three murders. And they included the killing of the defendant's helpless, young children. In this case, there is only a single homicide of a former co-worker. Second, the murders, and particularly those of the children, were especially heinous, atrocious, or cruel. Here, Brown was killed by six gunshots rapidly fired by the defendant. Death was almost instantaneous, and the victim could not have been aware of his impending death, if at all, for more than a fleeting moment. This was not the case for Zakrzewski's 7 year old son, who had raised his arm to futilely ward off the machete blows by his father. Moreover, McCoy had no or very little emotional link with his victims, other than a work place friendship. That distinction is relevant because it highlights and accentuates his mental sickness that elevated the slights made by these slight friends years earlier to total irrationality on the day of the murder.

McCoy also, at the time of the murder, was deeply mentally ill. Not simply depressed, he was depressed to the level of civil commitment and had a psychotic break from reality. The same could not be said of Zakrzewski.

Thus, Wickham and Zakrzewski, despite some similarities with this case, ultimately provide little guidance for this Court. Perhaps cases in which the defendant was severely depressed and exhibited psychotic symptoms gives some direction.

Even among them, significant distinctions exists that further constrict the category of comparable cases. Snelgrove v. State, Case No. (Fla. –2012) (two homicides, depression and delusional paranoid thinking, 5 aggravators, one statutory mental mitigator and other mitigation).

Most similar, in Green v. State, 975 So. 2d 1081 (Fla. 2008), Green killed a stranger from whom he had asked directions. This stranger happened to be taking his daily walk and was wearing a cap with a University of Alabama logo on it, which Green thought stood for "Antichrist." He had earlier shot another man, stolen his car, and then shot a bull he saw in a pasture.

Green was charged with first degree murder, attempted murder, and robbery of a car with a firearm. Although found incompetent to stand trial, he was eventually restored to competency. He raised an insanity defense, which the jury

rejected, and after finding him guilty of all the charges, recommended death by a vote of 10-2. The court imposed that sentence, finding in aggravation that Green had a contemporaneous conviction for another violent felony, and the murder was committed to avoid lawful arrest. The court found the two statutory mental mitigators, no significant history of criminal activity, and he was under extreme duress or the substantial domination of another.

More specifically, Green suffered from depression, impulse control disorder, and schizoaffective disorder. He refused to treat these diseases, preferring instead to quiet the voices he heard and cope with his depression by smoking marijuana and taking ecstasy. Immediately before the murders, he was, as the three mental health experts who examined him agreed, "fully immersed in a drowning pool of mental illness." As a result, this Court found "without question, Green's mental health significantly contributed to the murder" and concluded that death was a disproportionate sentence. *Id.* at 1089.

Similarly, in this case, both Drs. Larson and McClaren believed the defendant was so significantly mentally ill at the time he killed Brown that he should have been civilly committed. Like Green's mental illness, McCoy's aberrational mental problems went largely untreated, and further like Green he sought to self medicate and control the homicidal voices he heard, not with drugs, but with alcohol (15 R

515-16, 646ff if). Unquestionably, in the days before and after the murder, McCoy, like Green, was drowning in a pool of mental illness. As in Green, death is proportionally unwarranted in this case.

Thus, when similar cases this Court has decided and affirmed are compared with the one presently before the Court, their dissimilarities are so significant, the aggravation much more weighty, and the mitigation in this case so compelling that they have little or no persuasive force. Or, said more appropriately, this case, when compared with those arguably factually close to his, is not one of those that is the most aggravated and least most mitigated. Ballard v. State, 66 So. 3d 912, 919-20 (Fla. 2011).

This Court should, therefore, reverse the trial court's sentence of death, and remand for imposition of a life sentence.

ISSUE TWO: THE COURT ERRED IN FINDING AND GIVING GREAT WEIGHT TO THE AGGRAVATING FACTOR THAT McCOY COMMITTED THE MURDER IN A COLD, CALCULATED, AND PREMEDITATED MANNER WITHOUT ANY PRETENSE OF MORAL OR LEGAL JUSTIFICATION.

On first blush, and even on second, there is a sense of incredulity that McCoy can, with a straight face, argue that the murder of Curtis Brown was not cold, calculated, and premeditated without any pretense of moral or legal justification. And, the court's order, without specifically engaging in any analysis to support this aggravator, certainly puts forth a factual scenario from which this Court can find that the CCP aggravator and perhaps likewise justify the great weight the trial court gave it.

Yet, we must pause and respectfully disagree because as mentioned in the proportionality argument, this is not only a different case from the typical capital murder, it is almost unique in the combination of the bizarre facts surrounding the actual murder, the events leading up to it, and the extraordinary level of mental instability and craziness that drove McCoy to kill a man who by all accounts was not only a "good guy," but a genuinely nice one as well. Not only that, but Jackson, his intended victim, as well had a friendly relationship with the defendant, and to the rational eye had done nothing to merit not getting a Christmas card much less being shot. We must, moreover, linger longer than we might have paused because the

court's order supporting this aggravator does nothing more than recount the facts without engaging in the specific factual analysis this Court has said it should undertake. Whether the court correctly found this aggravator should be reviewed under a competent, substantial evidence standard of review. Williams v. State, 37 So. 3d 187 (Fla. 2010).

Perhaps, however, its factual summary is adequate because to begin with, and to remain in the realm of plausible arguments, McCoy admits that he committed that murder with the required calculation and heightened premeditation required to justify the CCP aggravator. In that respect, the court's telling of the murder and the events leading up to it are correct. It is, however, deficient in what it said, or more correctly, failed to say, regarding the required element of coldness. And that is, as Sherlock Holmes would say, the rub because the State must prove that element as well as the calculation and premeditation beyond a reasonable doubt to establish this aggravator.

In Jackson v. State, 645 So. 2d 84, 89 (Fla. 1994), and more recently in Kaczmar v. State, No. SC10–2269 (Fla. Oct. 4, 2012), this Court provided the analytical approach for the sentencing judge to use in applying the CCP aggravator:

> In order to establish the CCP aggravator, the evidence must show that: (1) "the killing was the product of cool and calm reflection and not an act prompted by emotional frenzy, panic, or a fit of rage (cold)"; (2)

> "the defendant had a careful plan or prearranged design to commit murder before the fatal incident (calculated)"; (3) "the defendant exhibited heightened premeditation (premeditated)"; and (4) "the defendant had no pretense of moral or legal justification." *Franklin v. State*, 965 So.2d 79, 98 (Fla.2007) (citing *Jackson v. State*, 648 So.2d 85, 89 (Fla.1994)). " 'CCP involves a much higher degree of premeditation' than is required to prove first-degree murder." *Deparvine v. State*, 995 So.2d 351, 381–82 (Fla.2008) (quoting *Foster v. State*, 778 So.2d 906, 921 (Fla.2001)). "A court must consider the totality of the circumstances when determining whether a murder was committed in a cold, calculated, and premeditated manner." *McGirth v. State*, 48 So.3d 777, 793 (Fla.2010), cert. denied, — U.S. ——, 131 S.Ct. 2100, 179 L.Ed.2d 898 (2011). The State is required to establish the existence of an aggravating circumstance beyond a reasonable doubt. See *Williams v. State*, 386 So.2d 538, 542 (Fla.1980). To satisfy the burden of proof, circumstantial evidence must be inconsistent with any reasonable hypothesis which negates the aggravating factor. *Eutzy v. State*, 458 So.2d 755, 758 (Fla.1984).

Jackson v. State, 648 So. 2d 85, 89 (Fla. 1994); *accord*, Lynch v. State, 841 So. 2d 362 (Fla. 2003) Specifically, the Court in this case must determine whether McCoy's acts were cold and "not an act prompted by emotional frenzy, panic, or a fit of rage." That will prove impossible because as cool and calm as they may appear, they were the product of a long festering, irrational hatred of Jackson/Brown.

At the sentencing hearing, the evidence showed that in the days and weeks before the murder McCoy was a seething cauldron of anger that focused on those with whom he had worked with years earlier. Even non mental health experts saw this. James Leddon, a friend and former co-worker, for example, recognized that

McCoy was becoming increasingly hostile and irrational when he talked about Jackson.

> Q. did y'all's conversation turn to Mr. McCoy's prior employment with the company by the name of Gulf Ice?
> **A** Yes, sir.
> Q. And did Mr. McCoy indicate to you that he had been let go or fired by Gulf Ice?
> A. Yes, sir.
> Q. At some point, did you bring up the name Ray Jackson during that conversation?
> A. Yes, sir, ... he had gotten let go[from Gulf Ice] because he didn't fit in. And he said, Do you know what that means, not fitting in? And he was getting very upset. His face, his neck, the blood vessels-- he was just very upset. And I tried to get him off of it. I knew that he and Ray were friends, so I said, Hey, have you seen or talked to Ray lately? I haven't got to talk to him. ... He told me he was very upset with Ray and that he was going to kill him. ...he had called Ray after he had lost his job and that Ray laughed at him. And I explained to him that—I said, Tom, that doesn't sound like the Ray that I know. Do you think maybe he just didn't know what to say and just laughed? And he said, No, he was laughing at me because I'm going to lose everything.
> Q. Okay. And then did he volunteer to you what he intended to do about Ray Jackson?
> A. He said he had already bought the gun and the materials to build a silencer. ... It was a.45 and he had bought the materials to make a silencer with it. He was going to shoot him in one knee and shoot him in the other and then when he was screaming in pain he was going to walk up and laugh at him in his face and shoot him between the eyes.
>
> **Q.** Now, as we've heard you reported that to your management at Coca-Cola
> **A.** I called Ray, yes, sir. . . .
> **Q.** Did you ever see or even hear of Ray Jackson mistreating

Thomas McCoy?
A. No, sir.
Q. Did you ever see or hear of Curtis Brown mistreating Thomas McCoy?
A. No, sir. . . . Ray and I are extremely close. Good friends. ... I was around Curt quite a bit. Curt was always a great person. . . .[H]e was in a good attitude, good mood. Just a happy go lucky person.

(12 R 233-35)

Q. Okay. So he was searching for some reason why he was let go [from Gulf Ice].
A. Correct.
Q. While he was talking about this you observed his physical features, his face was flushed and you could see his blood vessels were bulging in his neck; is that correct?
A. Correct.
Q. He appeared obviously agitated to you?
A. Yes, sir. . . .
Q. And how long have you known Ray Jackson?
A. Close, I guess for the last 20 years,...
Q. And Ray Jackson is a good guy, isn't he?
A. A great guy.
Q. And Mr. McCoy said he was going to kill Ray Jackson, right?
A. Yes, sir....
Q. All right. And so he was angry at Ray Jackson, correct?
A. Correct.
Q. He was angry at Gulf Ice employment? He was all aggravated about that, correct?
A.Yes. . . . He said he had already bought the gun and the materials to build the silencer with.
Q. So he openly discussed this murder plan with you, right
A. Yes. . . .
Q. **[D]**id you feel that this is quite unusual comments coming from a person against these individuals that are good people?
A. Yes, sir....
Q. Did it concern you that maybe he was having some kind of mental

health issues.
A. Yes, sir, I guess.
Q. Didn't you think that there's no rational basis for this anger against these people?
A.Yes

(12 R 235-241)

Putting a professional mental health expert perspective on Leddon's observations,

Drs. Larson and McClaren confirmed McCoy's building rage

> **DR. LARSON:** And these voices were of the negative type. Like, 'You're no good' or he said even in good times when things were going well for him, said... 'Well, things aren't going to go well for you.' And that's actually common in severe depression that people have negative hallucinations. ... Sometimes, he thought it was the voice of the devil, ... [S]ometimes there were what we call command hallucinations. That is, they would tell him to do certain things. ... His heart was racing and he was very upset and angry and heard a voice, 'Go ahead and do it. Go ahead and do it.' ... It's also documented He's currently being treated with anti-psychotic medication .... It's called Thorazine. ... [H]e was showing numerous - - multiple, I think the word they used, multiple of psychotic symptoms.
>
> (15 R 512-13)
>
> His life had gone downhill since then economically. He was very upset because he couldn't have a family. He didn't have a wife. He didn't have a family. He wanted to have children. Have a stay at home wife. Be the man of the household. He was very proud of his home. ...[H]e was having economic difficulty. His own business he started up wasn't doing well. He was afraid he was going to lose his home and not make a go of his own business. He became increasingly angry and preoccupied with those that made him - - had broken his marriage. Made him quit Coca-Cola. And so these kind of stressors on him.

And also he was drinking excessively. And so with all these factors in place, he developed a concept of committing homicide and suicide by cop.

(15 R 550-51)

Q. What—what did you glean that he considered a major part of what is mental state at the time was; what the underlying factors were.
DR. MCCLAREN: Well, that due to this treatment that – and his getting worse and worse jobs made him become angry, depressed, hopeless, and to think about killing Ray Jackson primarily. And he told me eventually, any of the three—Mr. King, Mr. Jackson, Mr. Brown--would have sufficed. And as it turned out, Mr. Brown was the victim that was finally killed.
(18 R 21)

Dr. McClaren: Talked about having a panic attack. Said he thought he heard a voice; Come on; let's do it; do this thing; you've already got the gun. He decided—He said at that point, he decided to go back and kill him. He said that he remembered feeling angry; thinking that Mr. Brown was wasting time because he had been berated about wasting time in his work. He also mentioned seeing a - - a tool holder or - - ... - - tool bag that he thought was bad practice to leave your Coca-Cola tools unattended in your work. He talked about being angry about that.
He said that he remembered thinking about him being - - the victim, Mr. Brown - - being a hypocrite. ... And at the time that he was standing in that room looking at the tool bag, he hadn't completely made up his mind.
(18 R 27)

[He made]a choice to go through with the murder of Curtis Brown, even though that was not the expected victim. ... He turned and went back to his truck. ... Then I reprogrammed to kill him. He would be good enough. I went into a panic attack. I thought I heard a voice, come on; let's do this thing; we've already got the gun. I decided to go back in to kill him. I got angry because he was wasting time. He had

> criticized me for the same thing. He was a hypocrite for standing there looking through his tool bag. I hadn't made up my mind. He could have left; I wouldn't have followed him. If he'd not mocked me – Blocked with a B. If he had not blocked me, begged, reminded me of wife and kids. But he bowed up and said, Mr. McCoy. And then he shot. And then he said he can shoot six bullets in under five seconds.

(18 R 48-49)

Now, how can a man who "suffered" a slight slight such as that Jackson inflicted carry this hurt for so long? Maybe a rational, mentally sound person cannot or does not. Yet, weeks, months, and years later McCoy was so angry that his face got red at the mere mention of Ray Jackson. He had laid careful, detailed plans of how he was going to kill him. That was crazy thinking.

As cool as he may have appeared when he rapidly fired the gun, sub rosa the defendant was a veritable volcano of suppressed, irrational rage that finally exploded in what this Court said was an "explosion of total criminality." State v. Dixon, 283, So. 2d 1, 10 (Fla. 1973) What he did exactly fits the "fit of rage" this Court has repeatedly said lifts a homicide out of the CCP category. Santos v. State, 591 So.2d 160, 163 (Fla.1991)

In Cannady v. State, 620 So. 2d 165 (Fla. 1993), the defendant murdered his wife and Gerald Boisvert, the man he suspected had raped her months earlier. He also tried to kill a third person. He was convicted of the murders and attempted

murder, and the trial court found the CCP aggravator applied to both killings That was error as to the Boisvert homicide, this Court said, because

> it is uncontroverted that Cannady believed Boisvert had raped his wife. . . . Under the circumstances, the murder of Boisvert was not "cold," although it may have been "calculated." On the facts of this case, "[t]here was no deliberate plan formed through calm and cool reflection, only mad acts prompted by wild emotion." *Santos v. State,* 591 So.2d 160, 163 (Fla.1991) (citation omitted). The emotional distress apparent from this record mounted over a two-month period, during which time Cannady continued to believe that Boisvert had raped his wife, causing her physical and emotional pain. It reached a pinnacle after Cannady killed his wife and set out to kill the apparent cause of her suffering. The trial court's findings that Cannady was under the influence of mental or emotional disturbance at the time of the murders and that he was an alcoholic suffering from brain atrophy were supported by expert testimony and further support the conclusion that Boisvert's murder was not the result of "cold" deliberation. Consequently, we conclude that this aggravating factor was not established for Boisvert's murder.

Cannady v. State, 620 So.2d 165, 170 (Fla. 1993)

In Spencer v. State, 645 So.2d 377, 384 (Fla.1994), Spencer murdered his wife because he believed she was trying to steal their shared business. Although the trial court found the CCP aggravator this Court rejected it. The required "coldness" was lacking. His mental status, including an inability to cope with emotions while under stress, negated the "coldness" component. It was not so even though the defendant had attacked her two weeks before finally killing her, and he

had told her son, "You're next; I don't want any witnesses." *Id.* at 379. Although the homicide involved some degree of planning and premeditation, this Court, nevertheless, rejected the CCP aggravator because the murder was the product of an irrational and passionate rage, which was directly the opposite of "cold." *Id.*at 384. *See also* Maulden v. State, 617 So.2d 298 (Fla.1993); Richardson v. State, 604 So.2d 1107 (Fla.1992)

Similarly, here, McCoy's acts, as calculated and premeditated as they may have been, simply lacked the coldness required for the CCP aggravator to apply in light of his psychotic depression. What he apparently calmly did was the product of a frenzied, alcohol influenced mind driven to an extreme irrational and emotional disturbance during the months before the killing and triggered by Brown's negligence in leaving his tool bag unattended.

The required coldness for the CCP aggravator simply was missing.

But, if it was present, the same argument that McCoy made against this aggravator even applying applies as strong for the proposition that the court erred in giving it "great weight." Even if a frenzied mind of one who commits a murder in a fit of rage can do so in a cold, calculated, and premeditated manner, that frenzy and

fit reduce the significance of the CCP aggravator. Hence, the court in this case should not have given it anything close to the "great weight" it did.

Thus, the trial court erred first in finding this aggravator, but if it correctly did so, it erred in giving it great weight.

Now, if this Court agrees with either argument, it is faced with deciding whether the single remaining aggravator supports a death sentence with enough strength to justify affirming that punishment. Generally, this Court has refused to uphold such punishment, especially when significant mitigation is also present. Bevel v. State, 983 So.2d 505, 524 (Fla.2008); Almeida v. State, 748 So.2d 922, 933 (Fla. 1999). In this case, those cases should preclude imposition of a death sentence because we have only one aggravator (prior conviction of a violent felony) placed in the balance against several significant statutory and nonstatutory mitigators.

This Court should, therefore, reverse the trial court's sentence of death and remand for imposition of a life sentence.

ISSUE III: IT IS CRUEL AND UNUSUAL TO EXECUTE A PERSON WHO IS SO SEVERELY MENTALLY ILL THAT HE IS DEPRESSED WITH PSYCHOTIC SYMPTOMS, AS PROVIDED FOR IN THE EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND ARTICLE I SECTION 17 OF THE FLORIDA CONSTITUTION.

Thomas McCoy, by all accounts, is severely, extraordinarily depressed. Dr. James Larson, the defense mental health expert, made that diagnosis, and significantly, Dr. Harry McClaren, the State's expert, agreed not only that the defendant was depressed but that he also had psychotic symptoms (15 R 501, 18 34). These experts further agreed that at the time of the murder he was under the influence of an extreme mental or emotional disturbance, one of the statutorily defined mental mitigating factors (15 R 550-52, 18 R 34). §921.141(6)b Fla. Stat. (2009). Finally, both men said they would have had him civilly committed under Florida's "Baker" Act on April 10, 2009 (15 R 553-55, 18 R 71). That is, when he killed Curtis Brown he was mentally ill and because of that condition a danger to others.

At trial, McCoy did not plead not guilty by reason of insanity. Even though he may have suffered from severe depression, he knew, as Dr. Larson testified, what he was doing when he killed Brown, and he knew it was wrong (15 R 602). Nonetheless, as mentioned, Drs. Larson and McClaren found the mental mitigator

that at the time of the murder he was under the influence of an extreme mental or emotional disturbance. The trial court agreed, and found, as a matter of fact and law, that that statutory mental mitigator applied, and gave it moderate weight (5 R 957).

Although it was not raised or argued at the trial level,[16] McCoy now contends that as a matter of state and federal constitutional law, and particularly state constitutional law, his mental illness precludes the State from executing him. Specifically, whether under the Eighth Amendment to the United States Constitution or Article I Section 17 of the Florida Constitution,[17] it would be cruel and unusual punishment for the State to do so. This Court should review this issue *de novo*.

Just as we no longer execute the mentally retarded and youths under the age of 18, our evolving standards of decency as a state dictate we should no longer execute those who are significantly and seriously mentally ill, such as Thomas McCoy. Atkins v. Virginia, 536 U.S. 304 (2003); Roper v. Simmons, 543 U.S. 551 (2005). As classes youth or the intellectually disabled lack that extra moral culpability required for those who deserve a death sentence.

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[16] McCoy raises this issue now to preclude any future claim that he could have or should have raised it on direct appeal. *Johnson v. State*, 27 3d 11, 26-27 (Fla. 2010).

[17] Section 17. Excessive punishments.—Excessive fines, cruel and unusual punishment, attainder, forfeiture of estate, indefinite imprisonment, and unreasonable detention of witnesses are forbidden.

On the other hand, as to the mentally ill, this Court has considered the appropriateness of executing them, and it has rejected it on the merits as well as on procedural grounds. Simmons v. State, Case No. SC10-2035 (Fla. Oct. 18, 2012); Johnson v. State, 27 So. 3d 11, 26-27 (Fla. 2011). In Nixon v. State, 2 So. 3d 137 (Fla. 2009), this Court held:

> Lastly, Nixon asserts that the trial court erroneously denied him a hearing on his claim that mental illness bars his execution. We rejected this argument in *Lawrence v. State,*969 So.2d 294 (Fla.2007), and *Connor v. State,* 979 So.2d 852 (Fla.2007). In *Lawrence,* we rejected the defendant's argument that the Equal Protection Clause requires this Court to extend *Atkins[v. Virginia,* 536 U.S. 304 (2003)] to the mentally ill. *See* 969 So.2d at 300 n. 9. In *Connor,* we noted that "[t]o the extent that Connor is arguing that he cannot be executed because of mental conditions that are not insanity or mental retardation, the issue has been resolved adversely to his position." *Connor,*979 So.2d at 867 (citing *Diaz v. State,* 945 So.2d 1136, 1151 (Fla.) *cert. denied,* 549 U.S. 1103, 127 S.Ct. 850, 166 L.Ed.2d 679 (2006) (indicating that neither the United States Supreme Court nor this Court has recognized mental illness as a per se bar to execution). Accordingly, Nixon is not entitled to relief on this claim.

Id. at 146.

Nixon relied on what this Court said in Connor, which in turn relied on its opinion in Diaz, which rejected the argument McCoy now urges on this Court. Rather than summarily rejecting this argument, this Court should re-examine Diaz because its reasoning in those cases is significantly flawed.

That is, this Court in that case rejected an Atkins and Roper type attack because no evidence showed Diaz was mentally ill and

> Neither this Court nor the Supreme Court has recognized mental illness as a per se bar to execution. Instead, mental illness can be considered as either a statutory mental mitigating circumstance if it meets that definition (i.e. the crime was committed while the defendant was "under the influence of extreme mental or emotion disturbance" or a nonstatutory mitigating circumstance.

Id. at 1151.

The same at one time could have been said at one time of age and mental retardation. Before the Supreme Court ruled on the constitutionality of executing youths and the retarded no decision from that Court or this one precluded their deaths by the State. Youth and mental retardation were considered nothing more than mitigating factors. In hindsight and in light of what the U.S. Supreme Court said in Atkins and Roper, that is a thin reason to ignore this issue. There has to be a first time for everything; there is nothing prohibiting this Court from considering this issue, particularly under Florida's Constitution; and this case presents it with the opportunity to squarely consider whether the Eighth Amendment and Article I Section 17 prohibit executing mentally ill defendants such as McCoy.

In Lawrence, this Court by way of footnote 9 rejected Lawrence's constitutional argument, in part relying on State v. Hancock, 108 Ohio St. 3d 57, 840

N.E. 2d 1032, 1059-60 (2006) which

> "declined to extend *Atkins* to the mentally ill because mental illnesses come in many forms and different illnesses may affect a defendant in different ways and to different degrees, thus creating an ill-defined category of exemption from the death penalty without regard to the individualized balance between aggravation and mitigation in a specific case."

This Court in Chestnut v. State, 538 So. 2d 820 (Fla. 1989) followed essentially the same reasoning in rejecting any mental illness or defect short of insanity as a defense to a specific intent crime, such as first degree murder. Indeed, it reasoned that

> It could be said that many, if not most, crimes are committed by persons with aberrations. If such mental deficiencies are sufficient to meet the definition of insanity, these persons should be acquitted on that ground and treated for their disease. Persons with less serious mental deficiencies should be held accountable for their crimes just as everyone else. If mitigation is appropriate, it may be accomplished through sentencing, but to adopt a rule which creates an opportunity for such persons to obtain immediate freedom to prey on the public once again is unwise.

Id. at 825.

That problem, of an ill-defined category of exemption, however, does not exist in Florida capital sentencing. In Diaz, this Court specifically defined and limited

the "mentally ill" to those for whom the statutory mental mitigator applies, "i.e. the crime was committed while the defendant 'was under the influence of extreme mental or emotional disturbance.'" Section 921.141(6)(b) Fla. Stat. (2012). *Id.* at 1151. Moreover, the definition of the seriously mentally ill can be further limited to those who exhibit psychotic symptoms or have a diagnosed form of psychosis-which includes depression. In re Amendments to the Florida Rules of Juvenile Procedure 952 So.2d 517, 522 (Fla. 2007) (Depression is among the seven most common psychotic disorders.)

While this definition of the mentally ill may not be as easy to determine as age, it is certainly no more diagnostically difficult than evaluating a defendant for mental retardation. The rationale of Atkins and Roper, thus, logically extends to the mentally ill, as that term is used here, i.e. the psychotic and those who are under the influence of an extreme mental or emotional disturbance at the time of the murder. Specifically, the Atkins court justified exempting the mentally retarded from being executed because of their "diminished capacities to understand and process information, to communicate, to abstract from mistakes and learn from experience, to engage in logical reasoning, to control impulses, and to understand the reactions of others." Atkins, at 318. In Roper, the Court said that youths under 18 years old could not be executed for reasons peculiar to youth. As a group they lacked

maturity and a sense of responsibility, they are more susceptible to negative pressures and outside influences, and their characters are not yet fully developed. Roper at 569-70. The same logic, if not the specific reasons, applies to the psychotic or mentally ill. "If anything, the delusions, command hallucinations, and disoriented thought process of those who are mentally ill represent greater dysfunction than that experienced by most "mildly" retarded individuals (defined as having an IQ of between 55 and 70) and by virtually any non-mentally ill teenager." Christopher Slobogin, "Mental Illness and the Death Penalty," 1 Cal. Crim. L.R. 3, 12 (2000).

Moreover, the traditional or standard Eighth Amendment analysis, which requires a determination of the "evolving standards of decency that mark the progress of a maturing society," Trop v. Dulles, 356 U.S. 86, 100-101 (1958) as that standard applies to the mentally ill, support this conclusion. To determine "evolving standards" the United States Supreme Court has suggested but not required that one need only do a snapshot of what the 50 state legislatures have said on the issue to figure out where that "evolving standard" is evolving. Roper at 563. Crucial, however, was the court's judgment, its "independent evaluation," to justify its decision of where the country was going rather than a mechanical legislative nose counting. Atkins, 536 U.S. at 321; Slobogin, cited above at 296.

Thus, if for an Eighth Amendment analysis all that is needed is to determine what the 50 states have said on the issue of executing the mentally ill, McCoy will have a particularly difficult time showing this because so very few states prohibit their execution. Slobogin, at 294-295. Yet it requires more, and for the reasons mentioned above, that the psychotic typically suffer delusions, command hallucinations, and disoriented thought processes, this Court's judgment should be that the Eighth Amendment precludes their execution.

McCoy also argues that under Article I Section 17 of Florida's Constitution it is cruel and unusual to execute the mentally ill, so what other states may have said on the issue of executing the mentally ill as Florida defines it is irrelevant. What makes sense is to see how this State treats these particular citizens, a snapshot approach somewhat similar to that used by the United States Supreme Court for its Eighth Amendment analysis. Thus, under the Florida Constitution's "evolving standards of decency" as shown by its legislative and judicial actions in this arena we must to see how it treats the mentally ill.

Florida has, particularly in the area of criminal law, recognized that the mentally ill should be treated with specific concern and even sympathy. For example, Rule 3.210 Fla. R.Crim. P. prohibits prosecuting anyone who is mentally incompetent to be tried. "A person accused of an offense. . . .who is mentally

incompetent . . . shall not be proceeded against while incompetent." Rules 3.211, 3.212, 3.213, 3.214, and 3.215 Fla. Crim. P. provide procedures to determine competency and dispose of cases involving incompetent defendants.

§775.027 Fla. Stat. (2009) provides a defense of insanity,[18] recognizing that some mental illnesses are so debilitating that persons who suffer from them and as a result cannot distinguish between right and wrong should be held blameless for their otherwise criminal acts. Rules 3.216, 3.217, and 3.218 Fla. R.Crim. P. provide procedures to implement that law.

Moreover, mental illnesses short of insanity are significant sentencing factors for those who are not insane but nevertheless suffer some mental infirmity. Chestnut v. State, 538 So. 2d 820 (Fla. 1989). In the death penalty arena, the legislature has specifically provided two mental mitigating factors to justify a life sentence. This Court, following the legislative lead, has found them among the most serious mitigation a defendant can present and the sentencers consider. Rose v. State, 675 So. 2d 567 (Fla. 1996) (" We have consistently recognized that severe mental disturbance is a mitigating factor of the most weighty order.").

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[18] 775.027 **(1) Affirmative defense.**--All persons are presumed to be sane. It is an affirmative defense to a criminal prosecution that, at the time of the commission of the acts constituting the offense, the defendant was insane.

Further, though the mentally ill can commit crimes and be sentenced to prison and even death, in the latter instance, Florida law prohibits the execution of those so mentally ill that they do not appreciate their execution. Rule 3.811, 3.812 Fla. R. Crim. P.

Outside criminal law, Florida society has taken special and specific steps to protect the mentally ill and society. Those who pose a danger to themselves or others can be voluntarily or involuntarily committed to a hospital for treatment. *See*, § 394.451, Fla. Stat. (2011). The State, moreover, maintains sponsored hospitals to treat those who have significant mental problems.

Thus, Florida has recognized that the mentally ill, and particularly those with serious mental illnesses deserve special, compassionate recognition. As such, whether under the Eighth Amendment to the United States Constitution or Article I Section 17 of the Florida constitution, the evolving standard of decency in this State logically should extend to preclude the execution of the psychotic, those who committed a murder while they were "under the influence of extreme mental or emotion disturbance."

That includes Thomas McCoy. As mentioned at the beginning of this issue, McCoy is severely mentally ill, as this term has been limited. Moreover, this form of psychosis meant that at the time he killed Curtis Brown he was under the

influence of an extreme emotional or mental disturbance. As such, his moral culpability for what he did was so severely compromised that it would be cruel and unusual to execute person with his severe mental disabilities. This Court should, therefore, as a matter of constitutional law, prohibit the State from putting him to death.

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

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

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

In Bottoson v. Moore, 833 So. 2d 693 (Fla. 2002), cert. denied, 123 S.Ct. 662 (2002), and King v. Moore, 831 So. 2d 143 (Fla. 2002), cert denied, 123 S.Ct. 657 (2002), this Court rejected all Ring challenges by simply noting that the nation's high court had upheld Florida's capital sentencing statute several times, and this

Court had no authority to declare it unconstitutional in light of that repeated approval.

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

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

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

> Our precedents are not sacrosanct, for we have overruled prior decisions where the necessity and propriety of doing so has been established. . . . Nonetheless, we have held that "any departure from the doctrine of stare decisis demands special justification." Arizona v. Rumsey, 467 U.S. 203, 212, 104 S. Ct. 2305, 2311, 81 L.Ed.2d 164 (1984). We have said also that the burden borne by the party advocating the abandonment of an established precedent is greater where the Court is asked to overrule a point of statutory construction. Considerations of stare decisis have special force in the area of statutory interpretation, for here, unlike in the context of constitutional

interpretation, the legislative power is implicated, and Congress remains free to alter what we have done. . . .

> In cases where statutory precedents have been overruled, the primary reason for the Court's shift in position has been the intervening development of the law, through either the growth of judicial doctrine or further action taken by Congress. Where such changes have removed or weakened the conceptual underpinnings from the prior decision, . . . or where the later law has rendered the decision irreconcilable with competing legal doctrines or policies, ... the Court has not hesitated to overrule an earlier decision.

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

The answer obviously is that it is a major decision whose seismic ripples have been felt not only in the United States Supreme Court's death penalty jurisprudence, but in that of the states. For example, Ring specifically overruled Walton v. Arizona, 497 U.S. 639 (1992), a case that 12 years earlier had upheld Arizona's capital sentencing scheme against a Sixth Amendment attack. Indeed, in overruling that case, the Ring court relied on part of the quoted portion of Patterson,

that its decisions were not sacrosanct, but could be overruled "where the necessity and propriety of doing so has been established." Ring, cited above at p. 608 (Quoting Patterson, at 172) Subsequent developments in the law, notably Apprendi, justified that unusual step of overruling its own case.

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

penalty schemes of virtually all states."[19] Justice Pariente agrees with Justice Anstead "that Ring does raise serious concerns as to potential constitutional infirmities in our present capital sentencing scheme." Id. at p. 719. Justice Shaw concludes that Ring, "therefore, has a direct impact on Florida's capital sentencing statute." Id. at p. 717. That every member of this Court added a concurring or dissenting opinion to the per curiam opinion in Bottoson also underscores the conclusion that Ring qualifies as such a significant change or development in death penalty jurisprudence that this Court can and should determine the extent to which it affects it. Likewise, that members of the Court continue to discuss Ring, usually as a dissenting or concurring opinion, only justifies the conclusion that Ring has weighed heavily on this Court, as a court, and as individual members of it.

Of course, one might ask, as Justice Wells does in his concurring opinion in Bottoson, that if Ring were so significant a change, why the United States Supreme Court refused to consider Bottoson's serious Ring claim. Bottoson, at pp. 697-98. It may have refused certiorari for any reason, and that it failed to consider Bottoson's and King's claims give that denial no precedential value, as that Court and this one have said. Alabama v. Evans, 461 U.S. 230 (1983); Department of Legal Affairs v.

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19 Justices Quince, Lewis and Pariente agree that Athere are deficiencies in our current death penalty sentencing instructions.@ Id. at 702, 723, 731.

District Court of Appeal, 5th District, 434 So. 2d 310 (Fla. 1983). Moreover, if one must look for a reason, one need look no further than the procedural posture of Bottoson and King. That is, both cases were post-conviction cases, and as such, notions of finality of verdicts are so strong that new rules generally should not be applied retroactively to cases on collateral review." Teague v. Lane, 489 U.S. 288, 305, 310 (1989). Moreover, subsequent actions by the nation's high court refutes Justice Wells' conclusion that if Florida's capital sentencing statute has Ring problems, the United States Supreme Court would have granted certiorari and remanded in light of that case. It has done so only for Arizona cases, e.g., Harrod v. Arizona, 536 U.S. 953 (2002); Pandeli v. Arizona, 536 U.S. 953 (2002); and Sansing v. Arizona, 536 U.S. 953 (2002). Moreover, it specifically rejected a Florida defendant's efforts to join his case to Ring. Rose v. Florida, 535 U.S. 951 (2002). Thus, in light of fn. 6 in Ring, in which the Supreme Court classified Florida's death scheme as a hybrid, and thus different from Arizona's method of sentencing defendants to death, it may simply have not wanted to deal with a post-conviction case from a state with a different death penalty scheme than that presented by Arizona. See, Bottoson, cited above, p. 728 (Lewis, concurring). While noting several similarities between Arizona's and Florida's death penalty statutes, he also found "several distinctions.")

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

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

A. Justice Pariente's position that no Ring problem exists if "one of the aggravating circumstances found by the trial court was a prior violent felony conviction." Lawrence v. State, 846 So. 2d 440 (Fla. 2003)(Pariente, concurring):

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

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

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

> In effect, the Court's decision adopts a per se harmlessness rule as to Apprendi and Ring claims in cases that involve the existence of the

> prior violent felony aggravating circumstance, even though the trial court expressly found and relied upon other significant aggravating circumstances not found by a jury in imposing the death penalty. I believe this decision violates the core principle of Ring that aggravating circumstances actually relied upon to impose a death sentence may not be determined by a judge alone.

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

B. Unanimous jury recommendations and specific findings by it.

Under Florida law, the jury, which this Court recognized in Espinosa v. Florida, 505 U.S. 1079 (1992), had a significant role in Florida's death penalty scheme, can only recommend death. The trial judge, giving that verdict "great weight," imposes the appropriate punishment. Id. This Court in Ring, identified Florida along with Delaware, Indiana, and Alabama as the only states that had a hybrid sentencing scheme that expected the judge and jury to actively participate in imposing the death penalty. Unique among other death penalty states and the sentencing schemes of the other hybrid statutes except Alabama,[20] Florida allows a

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

non-unanimous capital sentencing jury to recommend death. Section 921.141(3), Florida Statutes (2002). Under Ring, McCoy's death sentence may be unconstitutional. Bottoson, supra, at 714 (Shaw, concurring in result only); Butler v. State, 842 So. 2d 817 (Fla. 2003) (Pariente, concurring in part).

Pre-Ring, the Florida Supreme Court, relying on non-capital cases from this Court that found no Sixth or Fourteenth Amendment problems to non-unanimous verdicts, Apodaca v. Oregon, 406 U.S. 404 (1972); Johnson v. Louisiana, 406 U.S. 356 (1972), approved non unanimous jury verdicts of death. Even without Ring, that Florida reliance on non-capital cases to justify its capital sentencing procedure would be troublesome in light of this Court's declaration that heightened Eighth Amendment protections guide its decisions in death penalty cases. Simmons v. South Carolina, 512 U.S. 154 (1994) (Souter, concurring); Ford v. Wainwright, 477 U.S. 399 (1986). Ring, with its express respect for the Sixth Amendment's fundamental right of the voice of the community to be heard in a capital case, presents a strong argument that when a person's life is at stake that voice should unanimously declare the defendant should die.

This approval of a non-unanimous jury vote in death sentencing in light of Ring has troubled members of the state court. Indeed, Justice Pariente, has

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unanimous death recommendations. SB449.

repeatedly had problems with split death recommendations:

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

See Anderson v. State, 841 So. 2d 390 (Fla. 2003) (Pariente, J. , concurring as to conviction and concurring in result only as to sentence); Lawrence v. State, 846 So. 2d 440 (Fla. 2003); Butler v. State, 842 So. 2d 817 (Fla. 2003) (Pariente, concurring and dissenting); Hodges v. State, Case No. SC01-1718 (Fla. June 19, 2003) (Pariente, dissenting); Bottoson v. Moore, 833 So. 2d 693, 709 (Fla. 2002) (Anstead, dissenting).

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

CONCLUSION

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

Respectfully submitted,

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CERTIFICATES OF SERVICE AND FONT SIZE

I hereby certify that a copy of the foregoing has been furnished by electronic transmission to Charmaine Millsaps, Assistant Attorney General, at capapp@myfloridalegal.com; and by U.S. Mail to Thomas Ford McCoy, Jr., DOC # D40377, Florida State Prison, 7819 NW 228th St., Raiford, FL 32026-1000, on this 13th day of December, 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).

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