Electronically Filed 03/18/2013 10:49:23 AM ET

RECEIVED, 3/18/2013 10:53:47, Thomas D. Hall, Clerk, Supreme Court

IN THE SUPREME COURT OF FLORIDA

THOMAS FORD MCCOY IV,

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

REPLY BRIEF OF APPELLANT

NANCY A. DANIELS
PUBLIC DEFENDER
SECOND JUDICIAL CIRCUIT

DAVID A. DAVIS
ASSISTANT PUBLIC DEFENDER
FLORIDA BAR NUMBER 0271543
LEON COUNTY COURTHOUSE
SUITE 401
301 SOUTH MONROE STREET
TALLAHASSEE, FLORIDA 32301
(850) 606-8500
David.davis@flpd2.com
ATTORNEY FOR APPELLANT

TABLE OF CONTENTS

TABLE OF CITATIONS

CASES **PAGE(S)**

TABLE OF CITATIONS

(Continued)

CASES **PAGE(S)**

CONSTITUTIONS AND STATUTES

ISSUE I:

DEATH IS A PROPORTIONATELY UNWARRANTED SENTENCE.

On page 19 of the Initial Brief, McCoy noted that comparing his case with others "becomes supremely difficult because of the highly unusual, almost unique, scenario presented here." The State's answer on this issue does nothing to challenge the accuracy of that statement. As its Answer Brief demonstrates there are very few cases, in fact none, in which the defendant was so psychotic, extraordinarily depressed, and under the influence of an extreme mental or emotional disturbance, to compare with the facts of this case. In none of the cases cited by the State, was the defendant so mentally ill that both the defense and state mental health experts agreed that at the time of the murder the defendant should have been civilly committed.

This last point is particularly significant because the State's expert, Dr. Harry McClaren, as mentioned in the Initial Brief on pages 27-28, is no friend of criminally charged defendants. That experts from opposing camps could agree that the defendant was under the influence of an extreme mental or emotional disturbance and had other, specific problems is "most notabl[e]." *Green v. State*, 975 So. 2d 1081, 1086 (Fla. 2008).

Even in the cases cited by the State to support its argument the similarities that do exist with this case are hardly significant. For example, in *Diaz v. State*, 860 So. 2d 960 (Fla. 2003), the defendant wanted to kill a former girlfriend ostensibly because she had broken up with him a month earlier, but he murdered her father when his intended victim fled after being shot by him. Diaz had plotted for at least a week and maybe longer to kill her, and he was repeatedly frustrated in trying to buy a gun because the required waiting period and background checks prohibited him from immediately getting the weapon he had bought from a pawn shop.

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

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

When the victim's wife (who was a quadriplegic and was in the bed in the master bedroom) asked why Diaz had shot her husband, he told her that he had

deserved it. He then shot the husband again and waited in the house until the police arrived and arrested him.

The jury, by a vote of 9-3, recommended death, which the court imposed, and only four members of this Court affirmed. In doing so, it rejected the trial court's finding the murder was especially heinous, atrocious, or cruel, but agreed that it was cold, calculated, and premeditated, and Diaz had a prior conviction for a violent felony.[1] It also found a death sentence proportionately warranted apparently because the two remaining aggravators had greater significance than the three statutory mitigators and other mitigation the trial court had found but gave only moderate or very little weight.

Diaz hardly compares with the facts of this case. Here, McCoy nursed his hatred for Brown and Jackson, not for a month, but for years. And he did not impatiently wait the required three days to get a weapon, he already had his arsenal. His animosity arose not out of some supposed domestic relationship, but for slights that no rational person would have perceived and credited as such, and then held onto for three years. And not simply held onto, but nursed and fed, as the testimony of James Leddon, a former co-worker, clearly revealed (12 R 235-41).

---

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

Diaz, of course, was angry, as was McCoy, but their angers differed. Where we can understand but not excuse Diaz's fury, McCoy's was simply bizarre. He was depressed to the point of being psychotic, and his barely controlled rage fueled a deviousness and careful, patient plotting alien to Diaz and those defendants in the cases cited by the State. For example, in *Mann v. State*, 420 So. 2d 578 (Fla. 1982), Larry Man was in the midst of a pedophilic rage when he randomly snatched a 10 year old girl who just happened to be on the street riding her bicycle as he drove past her. He savagely crushed her skull, cut and stabbed her, and left her to die in a fruit orchard. He then attempted suicide (15 R 546).

That significantly differs from what McCoy did, even the manner in which they tried to commit suicide. Mann tried to kill himself, McCoy tried to have the police do it for him (15 R 547-48, 551, 18 R 63).

In the other cases cited by the State, *Spencer v. State*, 691 So. 2d 1062 (Fla. 1996); *Lemon v. State*, 456 So. 2d 885 (Fla. 1984) and *Silvia v. State*, 60 So. 3d 959 (Fla. 2011), the defendants killed wives or girlfriends. In a sense they are like Diaz because we can understand what drove these defendants to commit their crimes. Even though there is no domestic killing exception to the death penalty See *Turner v. State*, 37 So. 3d 212, 224 (Fla. 2012); *Lynch v. State*, 841 So. 2d 362, 377 (Fla. 2003), this Court nonetheless has recognized the intense emotions created by

domestic relationships can drive some defendants to kill. See, *Farinas v. State*, 569 So. 2d 425 (Fla. 1990); *Wright v State*, 586 So. 2d 1024, 1031 (Fla. 1991)(" This Court repeatedly has recognized that inflamed passions and intense emotions of an ongoing domestic dispute . . . are mitigating in nature and may render the death sentence disproportional punishment."); *Porter v. State*, 564 So. 2d 1060, 1065 (Fla. 1990) (Barkett, J., dissenting).

Thus, while we may understand what drives those defendants to homicide, we do not understand how a man such as McCoy could nurse his hatred over slights so slight that no rational person would have remembered them and remained in a rage for men who were only casual co-workers and friends. Nothing they had done rose to any level of understandable animosity that in any way excused, much less raised even a pretense of justification to the point that they deserved to die. McCoy clearly, as demonstrated by the murder of Curtis Brown, had a sustained break with reality. He was depressed to the point of being psychotic in a far more pervasive and extreme degree than *Lemon*, *Silvia*, and *Spencer*.

ISSUE II:

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.

In its brief, the State says the standard of review is one of "competent, substantial evidence." (Answer Brief at page 45). While that is correct as far as it goes, it does not go far enough. A more complete and accurate statement is that the standard of review is one of competent, substantial evidence based on a totality of the circumstances. That is, a sentencing court can provide competent evidence to justify a finding, but unless the totality of the circumstances justify that finding, there is not substantial evidence to do so. Applying this more accurate statement of the standard of review in this case means that as to the cold element of the CCP aggravator, there is, from a totality of the evidence presented, an insubstantial amount to justify finding it.

In his Initial Brief, McCoy readily conceded that he had the required calculation and heightened premeditation necessary to justify finding the CCP aggravator. He disagreed, however, with the trial court's unanalyzed conclusion that he also had the requisite coldness for that aggravator to apply. In its Answer Brief, much of the State' argument on this issue establishes what McCoy has agreed was proven. For example, on pages 50-52, the State says the "Defendant acted on his plan," "Admitted how this murder occurred, . . .that he had developed

a plan to murder Jackson," and that the evidence showed "the existence of a deliberate plan."

What it does not discuss is the evidence relevant to the coldness of that plan. It says nothing about James Leddon's testimony that when the defendant talked about Jackson, McCoy's "face was flushed, and you could see his blood vessel were bulging on his neck,." and he was angry at Jackson." (12 R 233-35) It said nothing about Dr. Larson's and Dr. McClaren's testimony that McCoy had heard voices and that he was very upset and angry, and the voices told him to "go ahead and do it," or that when Brown showed up for the service call instead of Jackson, he "reprogrammed" himself to kill a Brown – the hypocrite (15 R 512-13, 18 R 27, 48-49).

This evidence hardly exhibits any cold, rational thinking. Months and years after Jackson and Brown had insulted him, McCoy could become so instantly angry that his face got red at the mere mention of their names. He had laid and executed careful, detailed plans of how he was going to kill Jackson, but in a truly insane moment he could instantly change victims when Curtis Brown showed up rather than Jackson. What drove him to that point was crazy thinking. It was not the "product of cool and calm reflection." It was, instead, evidence of a psychotic

mind reacting to the voices in his head that drove him to kill in a demented rage. *Jackson v. State*, 648 So. 2d 85, 89 (Fla. 1994).

Now, McCoy reiterates the point he made in his Initial Brief, "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." (Initial Brief at page 41).

The totality of the evidence shows this, and as a result the court's finding of facts, although relying on competent evidence, was not substantial. The murder thus was not cold, and the court erred in finding the CCP aggravator applied to the murder McCoy committed.

On page 49 of its brief, the State says the "record is devoid of any evidence that Defendant acted out of frenzy, panic, or rage." To the contrary, as pointed out and quoted in the Initial Brief, James Leddon agreed that McCoy was angry at Ray Jackson, "aggravated about that," was "getting very upset. His face, his neck, the blood vessel - - he was just very upset." (12 R 233-41).

Dr. Larson said that McCoy told him that at the time of the murder, he had hallucinations commanding him to kill Brown, "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'"

(15 R 512-13). He "became increasingly angry . . .And also he was drinking excessively." (15 R 550-51)

Even Dr. McClaren noted that that the defendant was angry and depressed at the time of the shooting. "He said he remembered being angry."(18 R 27) McCoy told him that when Jackson, the intended victim did not show up to repair the coke machine, "I reprogrammed to kill [Brown]. He would be good enough. I went into a panic attack. I thought I heard a voice, come on; let's do this think; we've already got the gun. I decided to go back in to kill. I got angry because he was wasting my time." (18 R 48-49)

The evidence clearly shows that at the time of the murder, McCoy acted in a rage or anger. There is no evidence he did so coolly or with any calm reflection.

In *Peterson v. State*, 94 So. 3d 514 (Fla. 2012), relied on by the state on pages 53-54 of its brief, Peterson may have been "highly addicted to cocaine," but there was no evidence that at the time of the murder he was under its influence. *Cf. Wickham v. State*, 593 So. 2d 191, 194 (Fla. 1991) (Although Wickham had spent several years in a mental hospital, his schizophrenia was in remission at the time of the murder.)

Unlike Conde in *Conde v. State*, 860 So. 2d 930, 954 (Fla. 2003), who had only "feelings of sadness" when he killed his wife, McCoy was angry, the blood

vessels on his neck and face were bulging, and he was very upset. This, contrary to Conde, provided evidence of a high "level of intensity of emotion."

Finally, cases like *Occhicone v. State*, 570 So. 2d 902, 905 (Fla. 1990) and *Silvia v. State*, 60 So. 3d 959, 971 (Fla. 2011) are inappropriate because McCoy presents a radically different sort of illness than in any of those cases. For example, in Silvia, this Court approved the CCP aggravator because "despite Silvia's personality disorder and alcohol dependence, his actions do not "suggest a frenzied, spur-of-the-moment attack." If "spur-of-the-moment attack" is the operative phrase then, yes, McCoy did have the requisite coldness to justify this aggravating factor.

But, he argues that the "cold" analysis looks beyond the spontaneity of the murder. If, because of his psychosis, his extraordinarily deep depression, and his drunkenness at the time of the murder (15 R 515-16), he killed in a rage, because he was very angry, and very upset then he did not kill Curtis Brown with the necessary coldness for the CCP aggravator to apply.

In that sense, then, the "domestic" killings he cited in his Initial Brief, and which the State dismisses because they are such, captures better the idea the defendant here is trying to convey. While there is no "domestic killing" exception

to the death penalty as there is for, say, mental retardation and youth, this Court has, nonetheless, recognized that domestic situations can produce extraordinarily tense or high emotions. These feelings frequently develop over a long time, and can result in the "explosion of total criminality," *State v. Dixon*, 283 So. 2d 1, 10 (Fla. 1973) for which a death sentence may be inappropriate.

This, in a bizarre, psychotic way happened here. Over several years, McCoy nursed his hatred for Brown and Jackson for reasons that are as equally bizarre. He resolved to kill Jackson, but when Brown showed up, he decided he would do. Why? Because the latter had left his tool bag unattended (18 R 27-28). Again, a bizarre reason but it was enough to get this mentally deranged man instantly angry and very upset. And it was enough to defeat finding this murder to have been coldly done.

The totality of the evidence thus shows an insubstantial amount of competent evidence to support the trial court's conclusion that McCoy committed the murder coldly.

ISSUE III:

IT IS CRUEL AND UNUSUAL, A VIOLATION OF DUE PROCESS AND EQUAL PROTECTION 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.

In his Initial Brief, McCoy acknowledged that he had not raised or preserved this issue at the trial level. (Initial Brief, p. 53) Predictably, and correctly, the State argues that because of that failure he cannot raise the question of the constitutionality of executing him now. (Answer Brief at p. 58). In Reply, he points out that fundamental errors, errors that go to the foundation of the case, can be raised on appeal even if not raised and preserved at trial. Paraphrasing slightly this court's observation in *Bell v. State*, Case No. SC10-916 (Fla. Feb. 7, 2013) Fundamental error is that which "reaches down into the validity of the [sentencing proceeding] such that a [death sentence] ... could not have been obtained without the assistance of the alleged error." *Wade v. State*, 41 So. 3d 857, 868 (Fla. 2010).

Certainly, if McCoy had raised this issue at the trial level, and the court had granted it, we would not be here now arguing against executing him The trial court, however, could not have granted this motion, as a matter of law, because this Court, as the State also noted, has found no constitutional impediment to executing the mentally ill. (Answer Brief at p. 59) This Court can consider this issue.

To make an argument significantly different and more compelling that those this Court has rejected when other defendants have challenged the constitutionality of executing the mentally ill, McCoy significantly narrows the focus of the mental illness definition. Rather than arguing that anyone who has a tic or twitch in their eye should be spared a death sentence, he said that "we should no longer executed those who are significantly and seriously mentally ill." (Initial Brief at p. 53). Further limiting this special class, McCoy relied on what this Court had said in *Diaz v. State*, 945 So. 2d 1136, 1151 (Fla. 2006) that the mentally ill were those "under the influence of extreme mental or emotional disturbance" at the time of the murder. McCoy further constricted that definition to those who "exhibit psychotic symptoms or had a diagnosed for of psychosis-which includes depression." (Initial Brief at p. 57). Such persons typically have delusions, command hallucinations and disoriented thinking. They are on the fringes of sanity, and while they can premeditate murders, like the mentally retarded, they are at least as dysfunctional as the intellectually disabled, who are spared execution because of their reduced moral culpability. They form a statistically very small group of the much larger population of people who might be mentally ill as defined by DSM IV.

To that part of the defendant's argument on this issue, the State says nothing. Yet, if McCoy expects this Court to seriously consider his argument, such a

limiting definition is essential. Otherwise, he has to concede that this Court's observation in *Lawrence v. State*, 969 So. 2d 294 fn. 9 (Fla. 2007) is correct that mental illness is such a broad, ill-defined category that it would include virtually everyone who had ever seen a psychologist.

In his Initial Brief on page 58, McCoy acknowledged that the traditional or standard 8th Amendment analysis []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). He also noted that in determining that standard of decency regarding a particular issue, the United States Supreme Court had taken a snapshot of what the 50 state legislatures had said regarding that issue at a specific time. Under that approach, he also conceded on page 59 of his brief that he "will have a particularly difficult time showing this because so few states prohibit the execution" of the mentally ill.

An evolving standard of decency, however, suggests an historical examination of what the states are doing rather than the static one employed by the nation's high court. That it preferred such an analysis is understandable because analyzing what 50 states had done since they had become states regarding their treatment of the mentally retarded or youth within their boundaries would have been a researcher's nightmare.

On the other hand, when we look at what Florida has done, it is a far more doable project to look at the historical evolution in its consideration of the mentally ill. In *LeCroy v. State*, 533 So. 2d 750 (Fla. 1988) this Court, rather than taking a "snapshot" of the current status of the issue in the states, followed more faithfully the method implied in *Trop*, and it examined the legislative history of Florida's treatment of juveniles charged with crimes to detect this state's evolving sense of decency in this area. It concluded that "legislative action through approximately thirty-five years has consistently evolved toward treating juveniles charged with serious offenses as if they were adult criminal defendants." *Id*, at 757 Justice Barkett dissented from that conclusion but not the analytical, historical approach, and broadened her focus to include legislative actions regulating youth outside the criminal arena, such as setting minimum ages to drink alcohol, have an abortion, and vote. *Id.* at 759.

Using the approach utilized in *LeCroy*, McCoy argued in the Initial Brief that Florida's sense of decency has evolved so that this State has shown an increasing compassion for its mentally ill.

As to the analysis McCoy made under that approach the State again says nothing; instead it relies on Article I, Section 17 of the Florida Constitution, which requires conformity of Florida law with decisions of the United States Supreme

Court. While McCoy has no quibble with that requirement, he points out that the nation's high court has never ruled on the constitutionality of executing the mentally ill, so there is nothing for this Court to conform to. Hence there is no limiting restriction from that court to limit this one.

On page 62 of its brief, the State cites *Lightbourne v. State*, 969 So. 2d 326, 334 (Fla. 2006) and *Valle v. State,* 70 So. 3d 530, 538-39 (Fla. 2011) to support that limiting argument. Those case dealt, however, with the method of execution and the burden of proof a defendant had to carry in challenging the Department of Corrections lethal injection procedures. Following the command of Article I, Section 17 this Court said that the procedures are governed by the Supreme Court's plurality decision in *Baze v. Rees*, 553 U.S. 35, 128 S. CT. 1520, 170 L.ED.2D 420 (2008), which defined the contours of a condemned inmate's burden of proof for mounting a successful Eighth Amendment challenge to a state's lethal injection protocol. Neither this Court, nor the United States Supreme Court in *Baze* said anything about the constitutionality of executing the mentally ill.

On the other hand, the national high court has said we do not execute those who are insane at the time of their execution. *Ford v. Wainwright*, 477 U.S. 399 (1986), and if we adopt a loose application of Article I, Section 17 that the State

urges with its references to *Lightbourne* and *Valle* then *Ford* would have a closer application to this case than those.

The conformity requirement imposed by Article I section 17 of our constitution, therefore does not limit the argument McCoy makes here.

This Court should, therefore, as a matter of constitutional law, prohibit the execution of the mentally ill as he has defined that phrase.

CONCLUSION

The Appellant, Thomas McCoy, therefore respectfully asks this Honorable Court to reverse the trial court's sentence of death and remand for a life sentence without the possibility of parole.

Respectfully submitted,

NANCY DANIELS
Public Defender
Second Judicial Circuit

DAVID A. DAVIS
Assistant Public Defender
Florida Bar No. 0271543
Counsel for Appellant
301 South Monroe Street, Suite 401
Leon County Courthouse
Tallahassee, FL 32301
davidd@leoncountyfl.gov
(850) 606-8500

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was furnished by Electronic transmission and U.S. Mail to **TAMARA MILOSEVIC**, Assistant Attorney General, Counsel for the State, at capapp@myfloridalegal.com; and by U.S. Mail to **THOMAS FORD MCCOY, IV**, Florida State Prison, 7819 NW 228th Street, Raiford, FL 32026, on this 8th day of March.

CERTIFICATE OF FONT SIZE

I HEREBY CERTIFY that, pursuant to Florida Rules of Appellate Procedure 9.210(a)(2), this brief was typed in Times New Roman 14 point..

DAVID A. DAVIS
Assistant Public Defender