

IN THE SUPREME COURT OF FLORIDA

JOHN LOVE MAN REESE,

Appellant,

v.

Case No. 91,411

STATE OF FLORIDA,

Appellee.

_____ /

ON APPEAL FROM THE CIRCUIT COURT
OF THE FOURTH JUDICIAL CIRCUIT,
IN AND FOR DUVAL COUNTY, FLORIDA

INITIAL BRIEF OF APPELLANT

NANCY A. DANIELS
PUBLIC DEFENDER

NADA M. CAREY
ASSISTANT PUBLIC DEFENDER
FLORIDA BAR NUMBER 0648825
LEON COUNTY COURTHOUSE
SUITE 401
301 SOUTH MONROE STREET
TALLAHASSEE, FLORIDA 32301
(850) 488-2458

ATTORNEY FOR APPELLANT

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IN THE SUPREME COURT OF FLORIDA

JOHN LOVEMAN REESE, :
Appellant, :
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STATE OF FLORIDA, :
Appellee. :

PRELIMINARY STATEMENT

This is an appeal from a resentencing without a new jury. The resentencing record consists of one volume, titled Supplemental Volume II. References to the resentencing record are designated by "SRII." The previous record on appeal consists of a three-volume record on appeal, a fifteen-volume trial transcript, and a one-volume supplemental record, titled Supplemental Volume I. References to the original record are designated by "R" (record), or "T" (trial transcripts). References to Supplemental Volume I are designated by "SRI." References to the Appendix to this brief are designated by "Appendix," followed by the reference letter to the exhibit and page number. All proceedings were before Duval County Circuit Judge L. Page Haddock. This brief has been prepared using 12 point Courier New, a font that is not proportionately spaced.

STATEMENT OF THE CASE AND FACTS

Procedural History of the Case

On May 14, 1992, the Duval County Grand Jury indicted John Reese for sexual battery, burglary, and the first-degree murder of Charlene Austin. R 14. Reese proceeded to jury trial on March 18, 1993, and was convicted as charged. The penalty phase trial was held May 14, 1993, and following deliberations, the jury returned with an advisory verdict recommending the death sentence by a vote of 8 to 4. T 1492. Judge Haddock followed the jury's recommendation and on June 25, 1993, sentenced Reese to death for the first degree murder. Trial 508-151 Fairles 382-384. On appeal, the first degree murder trial judge failed to expressly evaluate the mitigating evidence as required by Campbell v. State, 571 So.2d 415 (Fla. 1990). Reese v. State, 694 So.2d 678, 684 (Fla. 1997)(**Appendix A**). Noting mitigation was offered "which was apparently un rebutted," the Court remanded for "entry of a new sentencing order expressly discussing and weighing the evidence offered in mitigation according to the terms we outlined in cases like Campbell." Id.

Judge Haddock resentenced Reese on April 17, 1997, by entering a new written sentencing order, without holding a hearing. The judge received a sentencing memorandum from the state but not from the defendant before sentencing the new order. On appeal, this Court again remanded, directing the trial court "to conduct a new hearing, giving both parties an opportunity to present argument and submit sentencing

memoranda before determining an appropriate sentence." Reese v. State, 728 So.2d 727 (Fla. 1999)(**Appendix B**).

On April 28, 1999, Judge Haddock held a new sentencing hearing at which both parties presented argument. Prior to the hearing, the state and the defense submitted sentencing memoranda. SRII 12-41. On June 16, 1999, the judge reconvened the parties and issued a new sentencing order resentencing Reese to death. SRII 50-67, 118-155 (**Appendix C**). In aggravation, the court found three circumstances: 1) the homicide was committed during a burglary and sexual battery; 2) the homicide was especially heinous, atrocious, or cruel; 3) the homicide was committed in a cold, calculated, and premeditated manner. The court found no statutory mitigators. As for nonstatutory mitigation, the court: 1) rejected the mitigator that the defendant was adaptable to prison life; 2) found the defendant had a good jail record (minimal weight); 3) rejected the evidence of childhood trauma other than the death of the defendant's mother (little weight); 4) found the defendant had positive character traits (minimal weight); 5) found defendant supported Jackie Grier and her children (very little weight); 6) found the defendant's possessive relationship with Jackie Grier (very minimal weight); 7) rejected the mitigator that the defendant was emotionally or mentally impaired at the time of the murder; 8) found the defendant was emotionally immature (little weight); 9) rejected the mitigator that the defendant was using crack cocaine

at the time of the murder; 10) found the defendant may have been using drugs and alcohol around the time of the murder (little weight); 11) found the defendant had no significant record of prior criminal convictions (very slight weight).

Facts: Prosecution Case

The murder victim, Charlene Austin, was a close friend of John Reese's girlfriend, Jackie Grier. Jackie testified at trial that at the time of the murder, Jackie and John had been together for about seven years. They met in Anniston, Alabama. Jackie was older than John, was married, and had four children. They dated for a short time, but John broke it off when he found out Jackie was married. After Jackie left her husband, they resumed dating and began living together a few years later. T 642.

As the relationship developed, John became increasingly possessive. The couple often had long talks about John's possessiveness and jealousy. T 645. Jackie testified that she could tell John was looking for someone he could love and who would love him back, and that as time went on, he attached to her as that person. T 647. She cared for John but at times talked about leaving him and on occasion did leave him. When John thought he might lose her, he felt quite threatened. He became emotional and cried a lot. Sometimes he became so emotional Jackie had to hug him to calm him down. T 648. Sometimes, if she did not listen to him, he would shake her, push her down on the bed, lock the door,

and not let her out. He would become enraged and call her names.
T 700.

In Anniston, they both worked, and John helped support Jackie and her children. When Jackie lost her job, John's paycheck was not enough, so Jackie decided to move to Jacksonville where she had family. T 649. Jackie felt John should be on his own for a while, so John stayed in Anniston. T 650. After Jackie got settled in Jacksonville, John joined her there, and they tried to get a fresh start. The relationship flourished for a while, then the old problems resurfaced. Jackie also suspected John was using drugs. T 651-652.

In Jacksonville, Jackie met Charlene Austin, and they became very close friends. Charlene was very popular with men. Jackie and Charlene began spending a lot of time together, seeing each other every day. They frequently went to clubs together. T 652. When Charlene visited, John usually said hello, then went to another room or left the house. John and Charlene were on speaking terms, but Jackie could tell there was tension on John's part and that he felt threatened by her relationship with Charlene. T 653, 655-656. John did not like going to clubs and told Jackie he preferred for her to stay home with him. He often voiced concerns about her going out with Charlene. T 654. When Jackie asked John to go with them, he always said no. T 655. Jackie was bothered by John's attitude towards Charlene and eventually confronted him about it. He told her he was afraid the men hanging around Charlene at the

clubs would become interested in Jackie and that he might lose her. T 655. At one point, Jackie told John not to talk to Charlene anymore so Jackie could "see if it couldn't get resolved, if that was really what the problem was in the relationship." T 656.

Jackie testified that during the three-and-a-half years they lived together, John hit her several times a month, and she had called the police on a few occasions. He also forced sexual intercourse on her, whenever he got upset that she was going out. When he got upset, he would grab her and refuse to let her leave the room. She would holler for the children but they could not get in because the door was locked. She was violent, too, but only when he attacked her. She hit him and did whatever it took to get him off her. She threw hot grease on him and cut him but only to keep him from hurting her. T 1002-1004.

In October 1991, Jackie decided to look for a new boyfriend, and she and Charlene started going to the Officer's Club in Fort Stewart, Georgia, on the weekends. T 657. When John asked her where she was going, she led him to believe she was going to visit Charlene's family. T 658-660. Meanwhile, Jackie met a soldier named Rick, and Charlene met a soldier named Nick. Jackie and Charlene began spending their weekends with Rick and Nick. T 660-661. Jackie did everything she could to keep her involvement with Rick a secret. She was afraid John would explode with jealousy and become violent. She continued to see John during the week during

this time period but saw less of him as the relationship with Rick developed. T 661.

Jackie and Charlene went to Georgia the weekend before Charlene was killed. They left on Saturday, January 25, 1992, and returned on Monday, January 27. T 619. On Tuesday, January 28, Jackie received a phone call from John around 3 o'clock in the afternoon. He asked if she had a good time and sounded sarcastic. T 662. About an hour later, she got a call from Charlene. After chatting a while, Charlene said she was going to take a nap. Charlene called again about 7:40 p.m. and said she was about to get up. T 663. When Jackie asked if anyone was with her, Charlene said no and abruptly hung up. T 667. Jackie did not remember seeing John that night. T 1002.

On Wednesday, January 29, Jackie became worried when she was unable to reach Charlene by phone. She went to Charlene's house and found the back door unlocked. She found Charlene's body in the bedroom, face down on the floor, covered only with a bedspread. T 629-633. After the police arrived, Charlene's parents drove Jackie home. Jackie called home before leaving Charlene's house, and her children told her John was coming over that night. T 668. When she got home, John was in her bedroom. He would not come out and meet Charlene's parents. 635-637. John kept trying to talk to Jackie that night, but she put him off because she was so upset. He told her he loved her very much. He also told her something was going on and she needed to stick by him. Even so, a calm seemed to

have come over him. T 669.

Thereafter, John moved back in with Jackie and the relationship flourished once again. T 670.

At trial, Allen Miller, a crime scene investigator, said he found signs of a struggle in Charlene's living room and bedroom. T 717. Press-on nails were found on the coffee table, the living room floor, and under the body. T 719. An electric extension cord was around her neck. The cord was folded in half, looped twice around the neck, then fed through the loop and pulled. T 740. A palm print was lifted from the footboard of the bed. T 742-743.

Dr. Arruza, a forensic pathologist, performed the autopsy. Charlene had been dead 24 to 36 hours before the body was discovered. T 788. She died of strangulation. T 779. In addition to the extension cord around the neck, there were superficial scrapes on the neck, above and below the cord. The scrapes were manual-type injuries and could have been made either by the attacker or by Charlene in an effort to release the pressure. T 761, 769-770. When the cord was removed, there was a mark from the cord, indicating the cord had moved up and down. T 762, 766. Dr. Arruza found extensive internal hemorrhaging in the neck area and a thyroid fracture, T 762, indicating the strangulation involved extensive manual manipulation. T 794. Charlene would have lost consciousness in thirty to sixty seconds. Three to five minutes of additional pressure would have caused death. T 787. Dr. Arruza also found bruises on the eyelids, the

temple, and the right side of the mouth. T 759. The bruises were consistent with banging into walls or objects during a struggle or with being hit. T 760, 790-791. Because the eyelids were bruised but not the organ of the eye, those injuries were more consistent with being hit than injury due to a fall. T 796. Intact sperm, probably deposited within six hours of death, were found in the vagina. There were no injuries to the vaginal areas. T 772-775.

Three-and-a-half months later, the palmprint found on Charlene's bed was identified as belonging to John, and on April 15, 1992, John was brought in for questioning. T 807. To get him to the police station, Detective Thowart contacted Jackie and told her they had lost John's prints and needed another set. Jackie accompanied John to the station. T 671.

After reading John his constitutional rights, Detectives Thowart and Hinson asked John if he had ever been in Charlene's house, ever helped her move, or ever had sex with her. John answered no to each question and signed a statement to that effect. T 869-870. Thowart then told John they had found his prints inside the house. John asked what would happen if he told the truth and asked to see Jackie. T 876-877, 917. Thowart brought Jackie to the door of the interview room. John stood up, held his hand out, and asked her to come here. Jackie told him to tell the truth. T 878, 918. John was somewhat emotional after Jackie left the room. T 918. Hinson got him a glass of water and tissues. John then confessed the details of the crime to the two detectives. He said he went to

Charlene's house around noon to talk to her about going off with Jackie all the time and leaving him watching the kids and the problem this was causing in his relationship with Jackie. When he got there, no one was home. He jimmied the back door lock with a pocket knife. T 879, 920. He waited in the back bedroom, in the closet. Charlene got home around 4 o'clock, and he waited for her to go to bed. They asked if that was when he decided to hurt her, and he said yes. The longer he waited, the madder he got. T 920. She went to sleep around 10 o'clock. T 920. She was sleeping unclothed on the couch in the living room, covered with a blanket. He waited about an hour, then came up behind her and grabbed her around the neck. They struggled into the bedroom. He admitted he had sex with her but asked them not to tell Jackie. T 883-884, 922. He pulled her to the floor and choked her with an extension cord that was on the floor. T 886. He covered her with some bedclothes and left through the back door. He went to a store to get some food, then went home to Jackie. T 887, 923.

Facts: Defense Case

John testified during the guilt phase of his trial. He said he was raised in Alexander, Virginia, by his adopted parents, Calvester and John Reese, Sr., until he was seven. T 935-936, 939. They had a loving family home. When he was seven, his father got sick and went to the hospital. He came home on a Monday night, they watched Gunsmoke, then John went to bed. The next morning,

John called out to his parents. When they did not answer, he went to their bedroom. Clothes were all over the floor and the dresser drawers were open. A butcher knife lay on the floor, broken into two pieces. He went downstairs and found his mother on the floor, stabbed to death. He could not find his father. He went to a neighbor's house and told them his mother was dead. The police came. They found his father the next day. T 941-942. He found out later his father was sent to a mental hospital. T 947. He never saw his father again. T 948.

After his mother's death, John went to live with his mother's brother, Marvin Smith, in Anniston, Alabama. T 948. His aunt and uncle argued all the time. He got whipped a lot. He was not allowed to play sports or have friends. He was kept at home and not allowed to see his father's family, who lived in Anniston and Birmingham. T 949.

When he was in high school, he went to live with his father's brother, Grover Reese, and his wife, Ernestine. Uncle Grover had always wanted to spend time with him. After he moved in with Grover, he had somebody to help him and a chance to get a better education. He played sports, had friends, and got to go places. After high school, he went to the Job Corps in Kentucky and learned a trade, painting. After graduating from the Job Corps, he returned to Anniston. T 950-951.

He met Jackie Grier at a night club. T 951. The relationship started off wonderful and was what he had always been looking for

in a relationship. Jackie did things for him nobody had ever done for him. He often told her she reminded him of his mother. She was always there for him, and they were close. T 952.

But, over the years, things got bad. They argued a lot. He did not know if it was about the money he was bringing in or something else. Whenever he brought home a paycheck, he gave it to Jackie. He took care of the kids. He loved her and made sure she was well. T 952.

They moved to Jacksonville in late 1989 or early 1990. It went alright in the beginning. He did not have any differences with Charlene. Jackie and Charlene were very close, closer than he and Jackie were. They went off and did things he and Jackie did not have the opportunity to do. T 953. They went to clubs excessively. He did not like Jackie going to clubs because he wanted her home with the kids. Every now and then was all right, but every weekend got to be a strain on him. He asked her to stay home with him and the kids, go to the movies, or to a restaurant, but she always had something planned with Charlene. He was left with the responsibility of caring for the children.

Jackie asked him to go a few times, but she knew he would not want to go. He had been to clubs since he was young and he did not care for them anymore. He wanted to stay home, take care of the house. T 954-955.

John learned about Jackie and Charlene going to Georgia about a month before it all started. He was trying out for the

Jacksonville Blazers football team. Jackie had been telling him she was going to Georgia to see Charlene's mother. T 955. He would come home from practice and find her gone. On a Friday evening, he would come home, and the kids would tell him Jackie had gone to Charlene's mother's house in Georgia. He would wait Friday night, Saturday night, Sunday night. She would get back on Monday morning. At first, he would just wait in the bedroom to see if she would come back there and gave him some kind of explanation, but she never did. After three months of this, he was very upset and began to ask her where she had been, what was going on. She told him she was at Charlene's mother's house, at church, or just going to a friend's house. She never told him she was seeing someone else. T 956. He began wondering if Jackie was seeing other men but did not want to accept that. She said she was just going out, and he believed her. He did not know she had been seeing another man until after his arrest, when his lawyer told him. T 958.

They never had very good communication. Towards the end, they got in bad arguments. John would get so upset he would speak harshly to her, something he never did before. He would apologize but she would still be upset. He would leave the house, go live somewhere else. Then, he would call her, see how she was doing, see if she missed him. She always wanted him to come back, and he always came back. During the time Jackie was going to Georgia, he left and stayed with a friend for about a month. He came back

after that and they talked about trying to do the right thing. T 956-957.

In the months before the homicide, he was upset. He did not know what to think. People were asking him why he was letting it happen, why he did not find out what was going on. He would say maybe she is doing what she is saying she's doing. But every time she came back home and he asked her, she told him something different. T 958.

He decided to talk to Charlene, to try to get her to tell him what was going on. He wanted to ask her why Jackie was staying out on the weekends, why she was not telling him anything when they were supposed to be getting back together. T 959. He got in the house by opening the back door with his pocket knife. T 959. He did not wait outside because he was scared someone would call the police on him. His intent when he went in the house was to wait until Charlene got there and talk to her, to try to get some information to ease his mind. He could not get his mind eased about Jackie. He felt like Charlene was interfering in their relationship because Jackie and Charlene were always together. He felt like Charlene was taking the person he loved away from him. T 960.

After he got inside, he turned on the TV. It was about twelve o'clock. He watched TV and thought about what he should say. He kept looking out the window. Around 4 o'clock, he looked out the window and saw her car pull up. He got scared then because he was in her house and had broken in. He hid in the bedroom. She went

in the bathroom, and he closed the door and hid. She was on the phone for three or four minutes. He could not tell who she was talking to. She said she was going to lie down, try to sleep, she had a hard day's work. She hung up, then turned on the TV. She watched a program, half a program, turned the TV off, and lay down. T 961.

At the time, he was still debating about how to leave. He could not leave through the bedroom because of the burglar bars. He waited until she went to sleep, and when he thought she was asleep, he opened the door. It was dark in the living room but daylight outside. As he walked through the room, between the couch and love seat, she moved, and he got more scared. He ran to her and grabbed her around the neck to keep her from seeing him. But he was so upset, he did not let go. They struggled from the living room to the bedroom, onto the waterbed. They had sex, and after that, he killed her. He put her on the floor with his arms still around her. He found an extension cord, put it around her neck, pulled twice, and let go. T 962.

He went to Winn-Dixie and called Jackie to see if she needed anything. She said yes, so he got some groceries. He got home around 7:30, when the game program was still on Channel 12. He ate dinner Jackie had prepared. He sat down on the sofa and told Jackie he loved her. She told him she loved him, too. T 963.

When asked what was in his mind when he was killing Charlene, he said, "Everything. I was very emotional mentally, I done lost it.

To me, it seemed like I had blacked out, just lost control. Lost control of the situation." T 963. Even after he admitted to the police he had sex with Charlene, he did not tell Jackie. He did not want her to find out because he knew how much it would hurt her. T 964.

On cross-examination, John said during the first part of the relationship, he gave his paychecks to Jackie whenever he had a job. When things started getting out of proportion, he "slacked up" but still gave her money. At the end, when he got upset about what was going on, he took the money and left. T 965-966.

He never beat Jackie though he had hit her. T 967. She called the police, not because he hit her, but because he would not leave when she asked him to leave. He wanted to stay and try to work things out. T 968. During the seven-and-a-half years they were together, he hit her about four times. He never locked her in the house. He first grabbed Charlene about a month after she got home, sometime after 5 o'clock. When asked why he raped her, he said, "I don't know, sir. Sir, I don't know how my reaction was, sir. I was lost, okay, I was lost, I can't say what--." T 976. After that, he was still choking her around her neck. After she was choked out, he put her on the floor on her stomach, and put the cord around her neck. T 980. She was not moving. T 982. He jerked it twice for maybe three seconds each time. T 987. He got home before 8 o'clock. He was staying at Jackie's. T 984. She had

made dinner but everyone had eaten by the time he got there. She watched TV while he ate. T 985.

Dr. Harry Krop, a forensic psychologist, testified during the penalty phase of the trial. Krop examined John initially and conducted a battery of psychological tests, which took about five hours. Krop later conducted a second interview and administered additional tests. Krop also reviewed the depositions of the seven or eight police detectives and of Jackie Grier, as well as Jackie's and John's trial testimony. He personally interviewed Jackie. In addition, Krop reviewed the psychiatric records of John's father, and adoption, marriage, and school records from Virginia and Alabama. He interviewed John's family members and reviewed the jail records since John's arrest. He conducted tests to assess overall intellectual ability and to obtain psychosexual information. T 1202-1204.

Krop testified that John was of somewhat below average intelligence. He did not have antisocial personality disorder or other major mental illness. T 1206-1207. The homicide was essentially out of character for John but could be explained by a number of factors related to John's traumatic childhood. T 1208, 1212, 1251.

John never knew his biological parents but was adopted by two persons who cared for him. He lived in a loving home for seven years. His father was mentally ill, however, paranoid schizophrenic. He eventually became so severely mentally ill that

he stabbed John's mother to death. John found his mother's body the next morning. His father had fled and eventually was placed in a mental hospital. John never saw him again. After his release, he lived as a homeless person and froze to death in an abandoned house. John was taken by relatives from to Alabama, where he lived with an uncle in a very strict, very rigid environment. He was not allowed friends or to have children over to the house and had to come home from school every day right after school. He was not allowed to live as a child. At age 14, he went to live with another aunt and uncle, who provided a loving, caring environment. He was with this family for two or three years before he joined the Job Corps. He came back to help his uncle financially. The day after he returned, his uncle died of a heart attack. T 1208-1210.

From that point on, John was searching for stability, looking for relationships. He married a woman, found out she was a drug addict, and that relationship broke up. He was married for one week. He subsequently met Jackie, whom he perceived as his fate, that is, he believed he finally had found someone who loved him. He had a family and felt this was his chance to develop a stable family life. T 1211. Unfortunately, this was not a realistic perception on John's part. There was poor communication, and the relationship was dysfunctional or pathological. Jackie had asked John to leave, had told him it was over, and had called the police a few times. John wanted to stay in the relationship and was very desperate. His continued frustration and desperation to hold on to

that stability is what led up to the murder. He was desperate to find an explanation for why the relationship was not working. T 1211-1213.

But his coping skills were not effective. He tended to be dependent on alcohol and drugs and had started using crack cocaine regularly four or five months before the homicide. He was using quite a lot of crack cocaine the day of the offense. T 1212. Krop explained that when John told him about the drugs, he did not view the drugs as an excuse for what he had done. From the first time Krop spoke with him, John accepted full responsibility for what he had done. He did not blame alcohol and drugs but was searching for a way to understand how he could have done what he did. It was hard for him to believe he had done it. T 1212.

In fact, that was part of his whole personality. John had difficulty accepting and understanding some of the things that were going on in his life. That is why he went to Charlene's house that day. He was frustrated because he felt like he could not get answers from Jackie, so he decided to try to talk to Charlene about it. Instead, he lost control. T 1213. He was scared and frustrated, and all the anger, frustration, and rejection he had experienced in his life came out at once. T 1214.

Although John did not have a major personality disorder, certain personality characteristics were significant. John was insecure, felt inadequate, and was very sensitive to rejection. John also was a very non-assertive person, meaning he had difficulty

expressing the way he truly felt at a given time. T 1214-1215. Dr. Krop analogized the non-assertive person's burden to walking around with a knapsack full of boulders. Each time the person holds on to a strong feeling, it is like putting a boulder on his back and carrying it around. At some point, whether provoked or not, the boulders may come flying out and violence may occur totally out of proportion to the situation. In John's case, the frustration, anger, and resentment that came out at Charlene had been building up over the years, not just because of his relationship with Jackie but because of what had happened to him throughout his life. T 1215.

When a child experiences something as traumatic as John did, the child typically grows up feeling helpless and feels a need to maintain some control in life. When John got into a relationship with someone he loved very much, he felt a desperate need to hold on no matter what was going on. T 1216.

Krop concluded John's mental state was seriously impaired when he killed Charlene, based upon his emotional distress plus the effects of the alcohol and cocaine. T 1217. Krop testified that crack cocaine has a very acute, very immediate, and very dramatic effect on a person's thinking, intensifying whatever emotions are already present. T 1218. Both crack cocaine and the accumulation of emotional stress result in poor impulse control. Although John's impulse control generally was good, when under stress caused by fear of losing a high-priority relationship, his impulse control

could be impaired. T 1219-1220. In Krop's opinion, the manner of killing reflected the homicide was a crime of rage--John was enraged and his rage and his violence came out. T 1236.

In Krop's opinion, John would have no problem "whatsoever" functioning very well in an open prison environment. Krop did not usually say this in such an absolute way, but he was convinced in John's case because of his lack of a significant criminal history, his good conduct in jail for over a year, his cooperation with Krop, and his acceptance of responsibility for what he had done. T 1216-1217. Krop said it was very unusual for someone charged with first-degree murder to admit what he had done, even in a confidential evaluation. T 1255. Krop recognized John had been reluctant to acknowledge the sexual assault to Jackie and was particularly ashamed of that aspect of it. He was still very much in love with Jackie and very ashamed of what he had done. T 1256.

His initial denial of the murder when he first spoke to the police was related to his fear of losing the relationship with Jackie. After he killed Charlene, he faced the very real possibility that he would be arrested and lose the relationship. He had mixed feelings: He felt very guilty and remorseful but also was scared of being arrested. T 1260-1261.

When asked if Jackie had told him John habitually beat her or forced himself on her sexually after arguments, Krop responded that was not consistent with what Jackie had told him. T 1244. Krop

testified he asked Jackie specifically about discrepancies between her report of the relationship and what John had told him. Jackie said she had several times asked John to leave and told him she was through, but he would not leave. He became verbally abusive, sometimes shoved her around, and she called the police. When Krop asked Jackie if there was any type of beating or forced sexual activity on John's part, she said no. She said that sometimes when they argued, though, John felt the only way he could show his love was to have sex, and he would pressure her, try to talk her into having sex, and was insensitive to the fact that she was not interested. But he did not force her to have sex. T 1246. Even if John had beaten Jackie or forced sex on her, Krop's findings would be the same. Such behavior would be consistent with John's non-assertive personality, since a non-assertive person can in stressful situations act out in a hostile or violent manner. T 1245.

Krop testified that the murder of his adoptive mother by his adoptive father was traumatic and "absolutely" contributed to the rape and murder of Charlene. Such traumas shape an individual's personality over time and there was no dispute about that in psychological theory. T 1248-1249.

John's behavior after the crime, going on with his life, was consistent with his personality trait of dealing with things as if they were not really there. He coped by going on with his life as if nothing had happened. When asked if he could rule out the

possibility that the rape and murder was a cold-blooded conscious decision thought-out beforehand, Krop said he had sufficient information upon which to base his opinion and had confidence in it. T 1251.

Several members of John's family testified during the penalty phase of his trial. Christan Cunningham and Dorothy Robinson, John's maternal aunts, described his early years. Christan testified that Johnnie was John, Sr. and Calvester's third attempt at adoption and they were very proud of him. T 1267. They were a loving family. T 1295. The night before Calvester was killed, John, Sr. called Christan four times, talking about blackouts and seeing people he had killed in Vietnam. T 1268-1269. He had taken a bottle of sleeping pills but could not sleep. He wanted Calvester and Johnnie to leave because he felt like something was going to happen. T 1269. Christan's brothers decided to go get him but before they left Alabama, he had killed Calvester. T 1270. This was in January of 1973. Johnnie was seven. John's father was sent to a mental institution and later froze to death in an abandoned house. T 1271-1272. When Johnnie kept saying his daddy killed his mama, the family told him Calvester was not his real mother, that he was adopted. They thought this would make him feel better.

Dorothy Robinson, Calvester's younger sister, spoke to Calvester several hours before she died. Calvester said John was having a breakdown and she had called the police but they said they could

not do anything. The next day, Calvester was dead. T 1296-1297. Dorothy and her brothers brought Johnnie to Alabama. T 1297. The oldest brother, Marvin Smith, took physical custody of Johnnie. T 1299. The Smiths met his physical needs but were "super strict." Other children were not allowed in the home. They had "no parenting skills." Johnnie was whipped. T 1303.

When John was about 15, he went to live with Grover and Ernestine Reese. T 1317. Ernestine testified that she had not seen Johnny while he was living with Marvin Smith except at his father's funeral. T 1311. Johnnie and Grover developed a father-son relationship. Ernestine was like a mother to him. He was an affectionate boy, he kissed and hugged, played a lot, and loved kids. He participated in football, track, and weight-lifting at his high school. He helped around the house by cutting the grass, mopping, and doing dishes. In 1983, John was present when Grover died of a massive heart attack. John performed CPR on him, then saw him die. It was like he had lost another father. T 1320. Ernestine never knew Johnnie to be violent or to get into a fight. He was very well-mannered and respectful towards older people. He helped take care of his grandmother, who was 100 years old. T 1325-1326.

Ida Romaine coached Johnnie in track and field for two years at Anniston High School. T 1347. He also played football for three years. T 1352. John was a hard worker and a leader. He listened well and helped other students with their training. T 1348. She

also knew John outside of school because he lived nearby and the neighborhood kids often congregated at her house. John was very respectful towards her and she never had any disciplinary problems with him. T 1352-1353.

Allene Taylor was John's second-grade teacher. His parents were active in PTA and school functions. T 1377-1378. He was a great student, one of the brightest, and very happy. He was respectful towards teachers and other adults and popular with his classmates. T 1379. She remembered him because he was such an outstanding child and because his parents were so supportive. She also remembered him because of the trauma he suffered when his mother was murdered. He came to school a few days afterwards to get his records and books. He was very, very sad. He said he was going to Alabama on a train, and his mama was going, too, on a different train. T 1380.

SUMMARY OF ARGUMENT

I. The trial court abused its discretion in rejecting the mitigating circumstances of Reese's traumatic childhood, his possessive relationship with his girlfriend, his mental impairment at the time of the murder, and his adaptability to prison life. These mitigating circumstances were proved by the greater weight of the evidence, including expert testimony. The trial judge's

reasons for rejecting this mitigating evidence were speculative, conclusory, and based on his own personal opinions. Furthermore, the sentencing order does not even mention most of the expert testimony offered in support of these mitigating factors. The trial court's rejection or diminution of the weight of these mitigating factors was not supported by substantial, competent evidence. Because the trial court failed to expressly evaluate all of the mitigation proposed by the defense, and failed to properly find and weigh un rebutted mitigating circumstances, appellant's death sentence was unconstitutionally imposed and must vacated and reversed for resentencing.

II. The trial court erred in finding and giving the jury an unconstitutional jury instruction on the cold, calculated, and premeditated aggravating factor where the state failed to prove beyond a reasonable doubt appellant had a prearranged design to kill or was the product of cool and calm reflection. Appellant presented ample evidence, including expert testimony, showing his mental state was highly emotional, that he killed the victim in a rage, and that the crime was not preplanned. The state did not present any positive evidence to refute an unplanned, emotional killing. Because the undisputed evidence was susceptible of divergent interpretations, one of which negated the aggravating factor, the state failed to prove this aggravator beyond a reasonable doubt. Because the trial court gave the jury an

unconstitutional jury instruction on this aggravator, this error requires reversal for a new penalty phase before a new jury.

III. Appellant's death sentence is disproportionate. Appellant was 27 years old when he committed this crime and had no significant prior criminal history. He was acting out of a profound state of emotional agitation when he murdered the victim, which, according to the expert witness, was produced by a combination of (1) the murder of appellant's mother by his father when he was 7 years old; (2) his father's subsequent institutionalization; (3) appellant's placement in a home until he was 14 that was devoid of warmth or nurturing; (4) the loss of a second father figure when appellant was 18. This Court consistently has vacated death sentences where the murder resulted from violent emotions precipitated by a failing love relationship and the defendant had no significant criminal history. This murder is not one of the most aggravated and least mitigated of murders. The ultimate penalty is not warranted for this single explosion of criminality. This Court should reverse the death sentence and remand for imposition of life imprisonment with no possibility of parole for twenty-five years.

ISSUE I

THE TRIAL COURT ERRED IN REJECTING THE MITIGATING CIRCUMSTANCES OF REESE'S TRAUMATIC CHILDHOOD, POSSESSIVE RELATIONSHIP WITH JACKIE GRIER, MENTAL IMPAIRMENT AT THE TIME OF THE CRIME, AND AMENABILITY TO PRISON LIFE, FOR

**REASONS THAT WERE CONCLUSORY, SPECULATIVE, AND
NOT SUPPORTED BY THE RECORD.**

This Court reversed the trial court's previous sentencing decision because the sentencing order summarily rejected the mitigating circumstances without explanation. Reese v. State, 694 So.2d 678 (Fla. 1997). The trial court's previous order rejected the mitigation without discussing or referring to the testimony of Dr. Krop, a forensic psychologist, who testified Reese was seriously mentally impaired when he killed Charlene Austin, that Reese's impairment and loss of control was attributable in part to his traumatic childhood, and that Reese would function well in a prison setting.

In the present case, the trial court has provided explanations for rejecting these and other mitigating circumstances. The trial judge's reasons are speculative and conclusory, however, and are based upon misapprehensions of fact and law or upon his own personal opinions about human behavior and psychology. Moreover, the sentencing order again fails to mention, much less provide a comprehensive analysis of Dr. Krop's testimony regarding these mitigating factors.¹ There is no competent, substantial evidence in the record to justify the court's rejection of these mitigating circumstances. Because the trial court erroneously rejected the

¹Dr. Krop's testimony in its entirety is attached herein as **Appendix D**.

substantial mitigation in this case, Reese's death sentence was unconstitutionally imposed and must be reversed.

A. Standard of Review

In a capital case, both the trial court and this Court are constitutionally required to consider any mitigating evidence found anywhere in the record. Parker v. Dugger, 498 U.S. 308, 111 S.Ct. 731, 112 L.Ed.2d 812 (1991). This Court defined the trial judge's duty to find and consider mitigation in Rogers v. State, 511 So.2d 526, 534 (Fla. 1987):

[T]he trial court's first task in reaching its conclusions is to consider whether the facts alleged in mitigation are supported by the evidence. After the factual finding has been made, the court then must determine whether the established facts are of a kind capable of mitigating a defendant's punishment, i.e., factors that, in fairness or in the totality of the defendant's life or character may be considered as extenuating or reducing the degree of moral culpability for the crime committed. If such factors exist in the record at the time of sentencing, the sentencer must determine whether they are of sufficient weight to counterbalance the aggravating factors.

In Campbell v. State, 571 So.2d 415 (Fla. 1990), this Court reiterated the duties outlined in Rogers and added the requirement that the trial court provide a written explanation of its evaluation of each mitigating factor. The written evaluation does not satisfy Campbell unless "it truly comprises a thoughtful and comprehensive analysis of any evidence that mitigates against the death penalty." Walker v. State, 707 So.2d 300, 319 (Fla. 1997);

accord Hudson v. State, 708 So.2d 256, 259-260 (Fla. 1998). The process is not a matter of merely listing conclusions: "Unless the written findings are supported by specific facts, this Court cannot be assured the trial court imposed the death sentence based on a 'well-reasoned application' of the aggravating and mitigating factors." Rhodes v. State, 547 So.2d 1201, 1207 (Fla. 1989)(quoting State v. Dixon, 283 So.2d 1, 10 (Fla. 1973), cert. denied, 416 U.S. 943, 94 S.Ct. 1950, 40 L.Ed.2d 295 (1974)).

A mitigating circumstance need only be proved by a preponderance of the evidence. Campbell; see also Fla. Std. Jury Inst. (Crim.) at 81. Accordingly, the trial court must find that a mitigating circumstance has been proved if it is supported by a reasonable quantum of competent, uncontroverted evidence. Nibert v. State, 574 So.2d 1059 (Fla. 1990).

Though a trial court has discretion to reject a mitigating circumstance, the trial court can reasonably exercise that discretion only where the record contains competent, substantial evidence refuting the mitigating circumstance:

A trial court may reject a defendant's claim that a mitigating circumstance has been proven, however, provided that the record contains "competent substantial evidence to support the trial court's rejection of these mitigating circumstances." Kight v. State, 512 So.2d 922, 933 (Fla. 1987), cert. denied, 485 U.S. 929, 108 S.Ct. 1100, 99 L.Ed.2d 262 (1988); Cook v. State, 542 So.2d 964, 971 (Fla. 1989)(trial court's discretion will not be disturbed if the record contains "positive evidence" to refute evidence of mitigating circumstance); see also Pardo v. State, 563

So.2d 77, 80 (Fla. 1990)(this court is not bound to accept a trial court's findings concerning mitigation if the findings are based on a misconstruction of undisputed facts or a misapprehension of law).

Nibert, 574 So.2d at 1062.

The same rule applies when a mitigating circumstance is supported by the opinion of an expert witness. The sentencing judge can reject the mitigating circumstance only if the record contains substantial, competent evidence refuting the mitigating circumstance. Although opinion testimony that is unsupported by factual evidence can be rejected, Johnson v. State, 660 So.2d 637, 647 (Fla. 1995), expert opinion testimony cannot be rejected "if the record discloses it to be both believable and uncontradicted, particularly where it is derived from unrefuted factual evidence." Santos v. State, 591 So.2d 160, 164 (Fla. 1991).

B. The Trial Court Erred in Rejecting the Mitigating Circumstance that Reese was Seriously Impaired at the Time of the Homicide.

Dr. Krop expressed the opinion that while Reese did not meet the statutory definition of extreme mental or emotional disturbance, his mental state was "seriously impaired" at the time of the offense, due to his desperation to stay in the relationship with Jackie, fear and anxiety, and the effects of cocaine and alcohol. Krop concluded the murder was an impulsive act--an explosion of fear, frustration, and rage--not a cold decision planned in advance. T 1213, 1217-1220, 1251.

The trial court rejected mental impairment as a mitigating circumstance, stating:

Although the defendant has argued that his actions were the product of rage and passion, this claim is contrary to the actual credible evidence in this case. The defendant broke into the victim's home, and then proceeded to calmly wait for a period of of from eight to ten hours, like a predator waiting for prey beside a water hole in the jungle, anticipating the victim's return home. Even after the victim was in her home, believing herself to be safe and secure, the defendant hid in a closet and waited for the victim to fall asleep. The defendant clearly planned to take full advantage of a victim in her most vulnerable situation, so that he could rape and murder her more easily. This was the act of a calm and calculating person with a plan, not a person filled with uncontrollable rage. Dr. Krop testified that the defendant was not insane, that the defendant knew the difference between right and wrong, and that he understood the nature and quality of his acts. Dr. Krop also testified that the defendant had no major mental illness or personality disorder. Dr. Krop did not testify that the defendant met the requirements of either of the statutory mental mitigators. On cross-examination, Dr. Krop admitted that he relied heavily on the defendant's self-reporting in forming his opinion, that knowing the actual facts in the case would aid him in forming an opinion, and that "[i]t's not up to me to determine the facts" Dr. Krop acknowledged that under the facts of this case the defendant's acts of raping and murdering the victim could be consistent with the defendant having made a conscious decision in advance to commit those crimes. The Court finds that the evidence establishes that the defendant's acts were, in fact, the result of a conscious decision to commit the acts of rape and murder, and they were not the result of an extreme mental or emotional disturbance that existed at the time of the offense.

SRII 63.

The trial court's explanation for rejecting the mental mitigation is conclusory and speculative and based on a misreading of the record and a misapprehension of law. The court's explanation fails to even mention the key portions of Dr. Krop's testimony offered in support of this mitigating circumstance. The court's evaluation of the proposed mitigating evidence is deficient under Campbell and its rejection of Reese's mental impairment at the time of the murder is not supported by competent, substantial evidence. The trial court abused its discretion in rejecting this mitigating circumstance.

The initial portion of the trial court's discussion of this mitigator--that Reese "calmly" waited for Charlene to return home, "like a predator waiting for prey beside a water hole in the jungle," is pure speculation. The court does not point to any "specific facts," see Rhodes, to support its conclusion that Reese was calm rather than intensely emotional while he waited to talk to Charlene. The trial court's next statement--"this was the act of a calm and calculating person with a plan, not a person filled with uncontrollable rage"--is nothing more than a bare conclusion for which the court provides neither a logical nor a factual basis.

The trial court's next reason for rejecting the mental mitigation is that Reese had no major mental illness or personality disorder, and Dr. Krop acknowledged the facts of the crime could be consistent with the defendant having made a conscious decision in

advance. On this basis, the court concluded the evidence established Reese's acts were the result of a conscious decision and not the result of an extreme mental or emotional disturbance. First, the trial court seems to be saying a conscious decision to commit the crime and mental or emotional impairment are mutually exclusive. A conscious decision to kill is nothing more than simple premeditation, though, Roberts v. State, 510 So.2d 885 (Fla. 1987), cert. denied, 485 U.S. 943, 108 S.Ct. 1123, 99 L.Ed.2d 284 (1988), and a person can commit premeditated murder while that person's capacity to control his behavior is impaired or while he is under the influence of a mental or emotional disturbance. E.g., Nibert. Furthermore, the trial judge's conclusion that Reese's acts were not the result of an extreme mental or emotional disturbance indicates he did not consider evidence of impairment not rising to the level of "extreme." The trial court erred in rejecting the mental mitigation because it did not rise to the level of an extreme disturbance. It is well settled, however, that "any emotional disturbance relevant to the crime must be considered and weighed by the sentencer." Cheshire v. State, 568 So.2d 908, 912 (Fla. 1990). The trial judge's evaluation of this mitigator thus was based upon faulty reasoning and a misapprehension of law.

The trial judge also has misread the record with respect to Dr. Krop's testimony on cross-examination. Krop did not base his opinion primarily on Reese's self-reporting. In addition to two clinical interviews with Reese and six and a half hours of

psychological testing,² Krop reviewed all the state's evidence in the case, including the depositions of six or seven different police detectives, the deposition of the medical examiner, and Jackie Grier's deposition and trial testimony. Krop personally interviewed Jackie Grier, interviewed Reese's family members, and reviewed Reese's birth, adoption, public school records, and jail records, and reviewed the psychiatric records of Reese's adoptive father. T 1202-1204. Second, the statement referenced by the trial judge--"[i]t's not up to me to determine the facts . . ."--was taken out of context, incorrectly suggesting Krop was unconcerned with and unaware of the facts of the murder. The record makes clear, though, that Krop was aware of all the details of the crime. On direct examination, Krop testified in detail about the information he had about the murder. Krop emphasized that corroborative information was particularly important to clinical assessment in a forensic case. T 1202. Nonetheless, the prosecutor attempted on cross-examination to demonstrate that Krop was not aware of the "actual" facts and was only aware of what Reese had told him:

BY MR. BATEH:

²Krop interviewed Reese twice, first on December 16, 1992, then again on May 5, 1993. During the first meeting, Krop conducted a two-hour clinical interview and five hours of psychological testing. At the second meeting, he interviewed Reese for about an hour and a half, then administered an additional hour and a half of testing.

Q Dr. Krop, you stated earlier in your testimony that the defendant gave you an explanation of the facts, or you were provided with information that allowed you to determine the facts surrounding this murder, is that correct?

A If you put it that way, I said that I received a history from Mr. Reese with regard to his perception of his own history and background. It's not up to me to determine the facts, it's up to me to make a determination, and in terms of any kind of clinical entity or clinical diagnoses based on any information that I have.

Q Would a knowledge of the facts surrounding the burglary rape and murder in this case, would it be informative to you in reaching your opinions about the defendant?

A About the defendant? Yes, certainly.

Q All right, Dr. Krop, would you explain to the members of this jury what was the factual basis? What knowledge did you have regarding the facts surrounding this burglary, this rape and this murder, what facts did you have at your disposal that you understood the facts, what was your understanding of the facts surrounding this case that led you to reach the conclusions and opinions you've reached regarding the defendant, explain that to the jury?

A Okay. Let me ask for clarification. Are you asking me what knowledge I had of the facts or are you asking me what information I received from the defendant with regard to what happened?

Q No, what knowledge you had regarding the facts, whether they came from the defendant.

A What knowledge I had was the defendant's report of what happened, I had depositions from the police officers, I've had --

Q I am not trying to cut you off, what I ask for, what factual scenario you had.

MR. COFER: Your Honor, I ask that he be allowed to complete his response. He's cutting him off.

THE COURT: Well, if he's answering something that wasn't the question. Mr. Bateh gets to decide what the questions are.

BY MR. BATEH:

A I understand what your --

Q Answer my question, I didn't mean to confuse you.

A That's why I asked for clarification, you asked me what knowledge I had. What information I had with regard to the scenario, I would be glad to share that.

A Sure.

T 1230-1232. Thereafter, Krop gave a complete description of the the murder, demonstrating he was well aware of the facts of the case. T 1232-1238.

Finally, Krop's response on cross-examination that the facts of the case could be consistent with a preplanned decision does not negate the mental mitigation or dilute Krop's testimony. When asked whether the facts of the case were consistent "with this defendant having sat down and decided: I am going to rape her, and then, I am going -- I can't leave her, I am going to kill her, aren't the facts in this case consistent with that?," Krop responded, "I would say the facts of this case could be consistent with that, but also consistent with exactly the way Mr. Reese

described what happened." T 1248. In other words, Krop merely acknowledged that absent his clinical assessment, the facts were consistent with premeditated murder.

When asked again whether Reese could have preplanned the murder and rape in a cold-blooded fashion, Krop firmly stated he had confidence in his professional opinion to the contrary:

Q Doctor, is the fact that the defendant, after he committed this rape and murder, that he went shopping, and then went on with his life, aren't those facts also consistent with an individual who was ruthless and committed a cold-blooded murder, that had no real concern for the murder that he had done, because you indicated the defendant, in your opinion, knew that what he was doing was wrong at the time he raped and murder [sic] Charlene Austin?

A You or someone can speculate that it was consistent with ruthless behavior. Again, from my evaluation and my personal and professional observations in the case, it was more consistent with the kind of personality that Mr. Reese has, and that is again, an attempt, I won't say pretend, but attempt, to try and deal with things as if they really weren't there.

This man was trying to, because in my opinion, this is out of character for him, he was trying to go on with his life and trying to deal with that in a manner to cope as if nothing had happened.

Q Doctor, I understand that's your opinion, but you cannot rule out the possibility that this was cold-blooded, this whole rape and murder was a conscious decision on the part of the defendant, was thought out beforehand in a ruthless and cold fashion, you can't rule that out, say my opinion's always right?

A I just believe I have sufficient information in the case and confidence in my opinion.

T 1250-1251.

In sum, the trial court's explanation for rejecting Dr. Krop's testimony that Reese was mentally impaired when he committed the crime is conclusory, speculative, and not supported by competent substantial evidence. Krop's opinion, on the other hand, was unrebutted, uncontradicted, and supported by other evidence, including (1) Reese's statements to police and at trial indicating an emotional killing, (2) Jackie Grier's testimony describing Reese's intensely emotional reaction when faced with the possibility of losing her, and (3) Jackie's testimony that she suspected Reese of using drugs in the months before the murder. The trial court abused its discretion in rejecting this mitigating circumstance.

C. The Trial Court Erred in Rejecting as a Mitigating Circumstance Reese's Possessive Attachment to Jackie Grier.

Dr. Krop testified the attack on Charlene was precipitated by Reese's jealous attachment to Jackie Grier and fear of losing his relationship with her. Dr. Krop's testimony on this point was unrebutted, uncontradicted, unequivocal, and supported by Reese's life history and psychological profile. Moreover, Reese's fear of losing Jackie and childlike reaction when she tried to leave him were supported by the state's evidence. Jackie testified that when she talked about leaving Reese, he became extremely emotional, oftentimes so distraught she had to hug him to calm him down. T

648. All the evidence in this case showed this murder was the result of Reese's pathological attachment to Jackie Grier and profound fear of losing her. There was no evidence to the contrary.

Nonetheless, the trial court rejected this mitigator, concluding the murder had little to do with Reese's relationship with Grier:

The evidence in this case establishes that this murder had very little, if anything, to do with the defendant's 'possessiveness, jealousy, and fear of losing Grier.' The defendant's relationship with Jackie Grier had already ended-more than three months prior to this murder. The relationship was ended by *Ms. Grier*, as a result of *their* arguments over money. The defendant did not murder Ms. Grier, nor did he murder her new boyfriend. The evidence established that Charlene Austin had absolutely no influence on the termination of the defendant's relationship with Jackie Grier. The murder of Charlene Austin was solely the result of the defendant's failure to acknowledge his own blame for the actual termination of his relationship with Ms. Grier and his desire [to] take revenge on someone for that termination. Given the evidence of the defendant's efforts to possess and control Ms. Grier through violence and rape, and the fact that the defendant committed this rape and murder when he could no longer possess and control Ms. Grier, the Court finds the defendant's alleged motivation for committing this murder to be of very minimal weight, at best. Indeed, the Court finds that this murder was solely a crime of misdirected revenge, which is not of a mitigating nature at all.

SRII 14.

The trial judge's conclusion that the murder was an act of revenge is pure speculation.

The trial judge also has misread the record in concluding the murder had little to do with Reese's fear of losing Jackie because the relationship had ended. Jackie may have wanted and tried to end the relationship but she had not done so entirely, and in John's mind, at least, the relationship still had a chance. Jackie testified that although she was spending her weekends in Georgia with another man, she continued to see John during the week, and did everything she could to keep the new relationship from him. She saw John the Friday before the last trip to Georgia. She saw John the day Charlene's body was discovered. And, after Charlene was killed, Jackie and John resumed living together. Ironically, according to Jackie, they no longer experienced the problems they had been having before Charlene's death.

What the record shows is that John still felt the relationship had a chance. John's explanation of why he went to Charlene's house that day--to try to find out what was going on with Jackie--was supported by Dr. Krop's testimony and opinion, and by Jackie's description of her relationship with John, and was not refuted by any other evidence.

Passionate obsession or jealous attachment, when relevant to the defendant's character, record, or circumstances of the offense, has been recognized as mitigating in numerous cases. Douglas v. State, 575 So.2d 165 (Fla. 1991); Farinas v. State, 569 So.2d 425 (Fla. 1990); Cheshire v. State, 568 So.2d 908 (Fla. 1990); Blakely v. State, 561 So.2d 560 (Fla. 1990); Fead v. State, 512 So.2d 176

(Fla. 1987), receded from on other grounds in Pentecost v. State, 545 So.2d 861 (1989); Irizarry v. State, 496 So.2d 822 (Fla. 1986); Ross v. State, 474 So.2d 1170 (Fla. 1985); Herzog v. State, 439 So.2d 1372 (Fla. 1983); Blair v. State, 406 So.2d 1103 (1981); Phippen v. State, 389 So.2d 991 (Fla. 1979); Chambers v. State, 339 So.2d 205 (Fla. 1976); Halliwell v. State, 323 So.2d 557 (Fla. 1975).

A defendant's reduced moral culpability is predicated on the intense emotions that arise in the context of a failing or troubled love relationship. Reese was desperate to hang on to Jackie and felt Charlene might have the answer to why the relationship was unraveling. Reese's distress over his estranged relationship with Jackie and his jealousy of Charlene led to his ill-fated decision to confront Charlene. As Dr. Krop testified, "this whole thing, to some degree, is related to [Reese's] fear of losing the relationship that he had with Ms. Grier." T 1260.

The trial court's rejection of this mitigator is not supported by substantial, competent evidence. The judge's conclusion that this killing was an act of revenge rather than the product of violent emotions has no support in the record.

D. The Trial Court Erred in Rejecting and Minimizing the Weight Given the Mitigating Circumstance of Reese's . . Traumatic Childhood.

At the resentencing hearing, Reese asked the trial court to assign significant weight to his troubled family history, including

his father's mental illness, the stabbing death of his mother by his father when he was seven, his father's subsequent placement in a mental hospital, and Reese's placement with an uncle who kept him in a very restrictive, isolating environment and provided no emotional nurturing. The trial court rejected most of Reese's history either as unproved, not mitigating, or of little weight. The only event in Reese's childhood the court found of a mitigating nature was the stabbing death of Reese's mother. The court gave this event little weight, however, because it happened long ago, did not cause the present murder, and was not the result of years of domestic violence. SRII 59-61.

The trial court's evaluation of this mitigator is legally and factually erroneous and based not upon the evidence but upon the trial judge's personal beliefs and opinions about human behavior.

Evidence of Reese's childhood history was presented through the testimony of family members, former schoolteachers, and Dr. Krop. Krop testified the traumatic loss of both parents when he was seven, the restrictive, nonnurturing environment in which lived for the next seven years, and the loss of a beloved uncle were all significant factors in the development of Reese's personality. Krop testified his mother's murder was indeed traumatic for Reese and absolutely contributed to the present murder. Such traumas shape a person's personality and there was no dispute about that in psychological theory. Krop further testified that when a child experiences something as traumatic as Reese did, the child often

grows up feeling helpless and therefore feeling a need to maintain some control of his life. When Reese got into a relationship with someone he loved very much, he felt a desperate need to hold on, no matter what was going on. When Reese went to talk to Charlene about the relationship, he was scared and frustrated, and all the anger, frustration, and rejection he had experienced in his life came out at once--anger and resentment not just because of his relationship with Jackie but because of what had happened to him throughout his life.

In his sentencing order, the trial judge summarized the Reese's childhood history until his mother was murdered but did not mention or evaluate Dr. Krop's testimony. SRII 59. The order goes on:

The defendant went to live with Calvester Reese's brother, Marvin Smith, in Anniston, Alabama. The majority of the defendant's relatives lived in Anniston. Dorothy Reese, Calvester Reese's sister, testified that Marvin Smith provided the defendant with a home, clothes, food, and ensured that the defendant went to church and to school. Dorothy Reese also testified that the defendant would come down to her mother's house and play with her children. Further, although several witnesses described Marvin Smith as being strict or even very strict, no one, *including the defendant*, ever testified that Smith "beat him." Although the defendant testified that he got plenty of whippings, it is clear from the defendant's testimony that the whippings were punishment for things he had done wrong, and not that Smith had maliciously beaten the defendant for no reason. Moreover, no evidence was presented that Smith's wife did not provide additional caring and nurturing. When the defendant was approximately sixteen years old, he ran away

from this strict environment and went to live with Ernestine Reese and Grover Reese, John Reese Sr.'s brother. The defendant found living with Grover and Ernestine to be much more to his liking. They provided the defendant with the caring and nurturing that he needed, as well as emotional support and moral guidance. Therefore, this Court finds most of the defendant's assertions under this claim to be contrary to the evidence.

The only truly traumatic childhood occurrence experienced by the defendant was the death of Calvester Reese when he was seven years old. However, this event occurred twenty years prior to the defendant's commission of the murder in this case, and as even Dr. Krop acknowledged, it did not cause the defendant to commit the instant murder (even though it may have been an influencing occurrence in the defendant's life). Calvester Reese's death was not the culmination of years of domestic violence, of which the defendant was aware. If anything, Calvester's death should have taught the defendant that death is a very sad thing, and that life should not be snuffed out simply because he blamed his victim for his own failure. Accordingly, the Court assigns this factor little weight.

SRII 61.

The trial judge's account of life in the Marvin Smith household is not supported by competent, substantial evidence. First, regardless of whether the term "beat" or "whip" is used to describe the punishment inflicted on Reese,³ the evidence showed he was

³The word "beat" often is used to describe the punishment of a child by an adult. In Nibert, for example, this Court noted that Nibert's sister testified their mother "beat the children with a belt or switch nearly every day." 574 So.2d at 1061. Interestingly, the trial judge objects to appellant's use of the word "beat" to describe the whippings he got but has no problem stating Reese habitually "beat" Jackie when the testimony was that he hit her and shoved her on occasion. See infra, pp. 53-

punished a lot and nurtured little, if at all, during the seven years he lived with Marvin Smith. There also was no testimony about why Reese was whipped. The trial judge's conclusion that he was whipped for things he did wrong is pure speculation. Nor was any evidence presented showing Reese experienced any warmth, support, caring, or encouragement while he lived with the Smiths. As for the trial judge's speculation that Marvin Smith's wife must have provided such caring and nurturing, there was no evidence she did. The testimony was that neither Smith nor his wife had any parenting skills. According to Reese's own testimony, Grover and Ernestine Reese provided him with a caring environment; the Smiths did not. Although Dorothy Robinson did testify Reese had visited her mother's house and played with her children, there was no evidence he visited with any regularity. Dr. Krop, who interviewed all the relatives, testified that while living with Marvin Smith, Reese was not allowed to live as a child. The evidence shows the Smith home was a conflict-ridden, punishing, nonnurturing environment for a small boy who had just suffered the loss of both parents. Dr. Krop testified that this environment contributed to the development of Reese's personality and the desperation he felt about losing Jackie. The trial court's rejection of this mitigating circumstance is not supported by substantial, competent evidence.

The trial judge's diminution of the weight accorded the death of Reese's murder is legally insupportable and represents nothing more than the trial judge's uninformed personal opinion. This Court has recognized that the "passage of time" does not negate the mitigating factor of a traumatic childhood. Walker; Nibert. Furthermore, the trial judge ignored Dr. Krop's testimony explaining the effect of this particular trauma on Reese. In concluding the murder of his mother "should have taught the defendant that death is a very sad thing, and that life should not be snuffed out simply because he blamed his victim for his own failure," the trial judge has improperly substituted his own personal view of human nature and psychology for that of the mental health expert, whose testimony was uncontradicted and unrebutted. Expert witnesses are used to provide information to the court about subjects not within the lay person's understanding or knowledge. Trial judges violate a litigant's right to due process when they substitute their own uninformed personal opinions for that of the experts and use that opinion to reject the expert's testimony. See Alamo Rent-A-Car v. Phillips, 613 So.2d 56 (Fla. 1st DCA 1993); Romero v. Waterproofing Systems of Miami, 491 So.2d 600 (Fla. 1st DCA 1986); Jackson v. Dade County School Board, 454 So.2d 765 (Fla. 1st DCA 1984).

Traumatic events, such as the violent death of a parent, do not teach children that death is sad. In her classic book on the effects of trauma, Dr. Judith Lewis Herman explains that traumatic

events evoke feelings of "intense fear, helplessness, loss of control, and threat of annihilation." Herman, J., Trauma and Recovery 33 (1992). When the traumatic event includes exposure to extreme violence or witnessing grotesque death, the likelihood of harm is increased. Id. at 34.

In sum, the trial court's rejection of Dr. Krop's unrebutted, uncontradicted testimony regarding the traumatic effect of Reese's childhood, and the correlation between his childhood history and the present murder, is not supported by competent, substantial evidence.

E. The Trial Court Erred in Rejecting the Mitigating . . . Circumstance that Reese will Function Well in Prison.

Evidence indicating a potential for rehabilitation and adaptability to a prison setting is a significant factor in mitigation. Pooler v. State, 704 So.2d 1375 (Fla. 1997), cert. denied, 119 S.Ct. 119, 142 L.Ed.2d 96 (1998); Kramer v. State, 619 So.2d 274 (1993); Cooper v. Dugger, 526 So.2d 900 (Fla. 1988).

In the present case, Reese presented evidence of his good conduct in jail prior to and during his trial. Reese also presented the testimony of Dr. Krop, who expressed the opinion that Reese would have "no problem whatsoever" functioning in a prison environment. Krop explained he usually could not say this with such conviction but was convinced in Reese's case because of his good conduct in jail, his acceptance of responsibility for what he had done, his cooperation with Dr. Krop, and the absence of any significant

criminal history. Krop testified that it was very unusual for a person charged with first-degree murder to admit what he has done, even in a confidential evaluation. No more than 25% of the persons he had evaluated admitted what they had done.⁴ T 1257. Reese, however, "does not complain, he does not make excuses. He's accepting responsibility for what he has done." T 1217. From the first time Krop spoke with him, Reese did not try to place blame on anyone or anything. He felt remorse and was ashamed of what he had done. T 1256.

The trial court rejected Krop's testimony, stating:

[I]t was [Dr. Krop's] opinion that the defendant was amenable to prison life because the defendant had no significant history, and because he had a good jail record and was not a management problem for the jail.

However, Dr. Krop also testified that the defendant has a non-aggressive, non-assertive type of personality, and that the defendant committed the instant murder because, "He was scared, frustrated, and all the anger and all the frustration and all the rejection in his life, basically, just came out at one time." (Trial Transcript, page 1214.) When confronted with the fact that the defendant would settle arguments with Jackie Grier concerning their relationship by beating and raping her, and with the fact that the defendant had beaten his wife to the point of sending her to the hospital, Dr. Krop indicated that this information was consistent with the defendant's non-aggressive personality type! Dr. Krop's testimony established that when the defendant is confronted with stressful situations over

⁴At the time of his testimony, Dr. Krop had evaluated approximately 480 persons who had been charged with first-degree murder. T 1193.

which he feels no control, he will act out in a hostile and violent manner. Further, the evidence shows that although all of his living environments as he was growing up were caring and nurturing, the defendant chose to escape from the one environment that he considered to be too strict (the second set of parents) by running away and living with other relatives that were less strict. In sum, the evidence showed that the defendant dealt with an environment that he considered to be strict by escaping from that environment, and that he has come to deal with stress by physically beating and forcibly raping those he is supposed to consider the most dear to him. The Court finds that the evidence not only fails to support this claim of mitigation, it refutes this claim.

SR11 59.

The trial court's evaluation is legally and factually erroneous.

No one testified John beat his first wife. The prosecutor asked Dr. Krop if he was provided with information that John had beaten up his his ex-wife so badly she was sent to the hospital and whether that information would affect his opinion. T 1250. Krop responded no. The state never introduced any evidence showing this event actually had occurred. It was error for the trial judge to rely on the prosecutor's question as evidence.

No one testified John settled arguments with Jackie by "beating and raping" her. During the guilt phase of the trial, the prosecutor had asked Jackie if John had "beaten" her and how often. Jackie said John had hit her and shoved her on occasion. When asked if he ever forced sexual intercourse on her, she responded yes. T 1002-1003. However, later, during the penalty phase, when

the prosecutor asked Dr. Krop if Jackie had told him John habitually beat her or forced himself on her sexually after arguments, Dr. Krop said no, that was not consistent with what Jackie had told him. Krop had interviewed Jackie that morning and had specifically asked her to elaborate and explain some of the discrepancies between what John had said and her own testimony and deposition, which Krop had reviewed. Jackie told Dr. Krop she had asked John to leave several times, that she was through, but he would not leave, became verbally abusive, sometimes shoved her around, and she called the police. When Krop asked her specifically if there was any beating or forced sexual activity, she said no, but that sometimes when they argued, she would want to be left alone, and he felt the only way he could show his love was to have sex even though she did not want to. He would pressure her, try to talk her into it, and was insensitive to the fact that she was not interested, but she did not say he forced her to have sex. T 1245-1246. Therefore, although Jackie initially testified yes in response to the question "did Reese ever force sexual intercourse" on her, she later explained that he did not force her to have sex but pressured her into it when she was not interested. The trial judge's statements that Reese settled arguments by "beating and raping" Jackie and that he dealt with stress by "physically beating and forcibly raping" those he loved is not supported by the record.

Third, contrary to the trial judge's order, Dr. Krop's testimony did not establish that Reese becomes violent and hostile when confronted with any stressful situation over which he has no control. Krop was very clear in saying the kind of stress that could result in a loss of impulse control in Reese was "stress of fear of losing a relationship that had a very, very high priority for him." T 1219.

Last, as discussed above, the record refutes the trial court's conclusion that Marvin Smith's home was a nurturing and caring environment.

The trial judge has violated Reese's due process rights by substituting his own personal view of human behavior and psychology for the opinion of the expert, whose testimony was unrebutted, uncontradicted, and consistent with the facts of the case. See Alamo Rent-A-Car. The trial judge's rejection of this mitigating circumstance is not supported by substantial, competent evidence.

F. The Trial Court Erred in Evaluating Reese's Emotional Inadequacies and Immaturity.

As to this proposed mitigator, the trial court said:

Apparently, the defendant is claiming that because he would cry under certain circumstances, he was emotionally inadequate. The Court cannot and does not find that the demonstration of a human emotion by a man constitutes evidence of emotional immaturity. To the extent that the defendant is claiming that the totality of the facts show that he is emotionally immature, the Court finds that his

alleged emotional immaturity is a creation of his own decisions subsequent to moving out on his own. Accordingly, the Court finds that this factor is entitled to little weight.

T 64.

Reese is not claiming tears in a grown man are a sign of emotional immaturity. This proposed mitigator is based on the testimony of Dr. Krop, which, here, as elsewhere in the sentencing order, the trial court has ignored. Dr. Krop testified Reese has poor coping skills, is very insecure, feels very inadequate, has an abnormal fear of rejection, and is a very non-assertive individual. By non-assertive, Krop meant Reese had difficulty expressing the way he felt at a given time. This attribute explained the frustration, anger, and resentments that had built up over the years, such that when he did lose control, his violence was totally out of proportion to the situation. T 1215. Reese's emotional inadequacies or immaturity were directly related to the circumstances of the crime, and, as such, are mitigating. The judge's second reason for finding this mitigator entitled to little weight--which seems to be that emotional immaturity is created by the individual--is nothing more than the trial judge's personal opinion about human nature and is not supported by any evidence in the record. Using his own personal views to reject those of the expert is a violation of due process. Alamo Rent-A-Car. The trial court abused his discretion in evaluating this mitigating factor.

G. The Trial Court Erred in Rejecting the Mitigating Circumstance that Reese Was Under the Influence of Drugs and Alcohol When He Committed the Crime.

The trial court rejected evidence of Reese's cocaine and alcohol use the day of the murder, stating "the defendant's trial testimony that he used crack cocaine while waiting inside of the victim's home to be contrary to the evidence of his actions." T 64. This statement is nothing more than a bare conclusion. The trial judge did not explain how cocaine use is inconsistent with Reese's actions that day. Dr. Krop, on the other hand, explained that cocaine has an acute and very dramatic effect on a person's thinking and that it would have intensified whatever emotions Reese was experiencing at the time. T 1218. Crack cocaine and emotional stress result in poor impulse control. In Krop's opinion, Reese's impulse control was impaired due to his emotional distress and the effect of the cocaine and alcohol. In Krop's opinion, the drug and alcohol use was consistent with Reese's personality and with the manner in which the crime was committed. The trial judge has improperly substituted his own uninformed personal opinion for that of the expert. See Alamo Rent-A-Car. The trial judge's rejection of this mitigating factor is not supported by competent, substantial evidence. The trial court abused its discretion in rejecting this mitigator.

H. The Trial Court's Evaluation of the Mitigating Circumstances is Constitutionally Flawed and Requires . . . Reversal for Resentencing.

The trial court's reasons for rejecting the mitigating circumstances of Reese's childhood traumas, possessive relationship with Jackie Grier, mental impairment at the time of the crime, and amenability to prison life are conclusory, speculative, and not supported by substantial, competent evidence in the record. Furthermore, the sentencing order is deficient under Campbell and Walker in that it fails to mention, much less comprehensively evaluate in a thoughtful and comprehensive manner, Dr. Krop's testimony and opinion regarding these factors. It cannot be said that a fair weighing of these mitigating circumstances would have made no difference. Appellant's death sentence does not meet the Eight Amendment's standard of reliability, and it must be vacated and the case remanded for resentencing.

ISSUE II

THE TRIAL JUDGE ERRED IN FINDING THE HOMICIDE WAS COMMITTED IN A COLD, CALCULATED, AND PREMEDITATED MANNER AND IN GIVING THE JURY AN UNCONSTITUTIONAL JURY INSTRUCTION ON THIS AGGRAVATING CIRCUMSTANCE.

In the first appeal of this case, this Court upheld the trial court's finding of the cold, calculated, and premeditated aggravating circumstance (CCP). Reese v. State, 694 So.2d 678 (Fla. 1997). Nevertheless, in the new sentencing order now before this Court, the trial judge made new findings relevant to the CCP factor. SRII 56-57, Appendix C. Since the sentence now imposed on

John Reese is the one that can be carried out and not the previously imposed sentence, see, e.g., Lucas v. State, 417 So.2d 251 (Fla. 1982), the propriety of the trial court's new findings regarding CCP are again subject to review by this Court. See Mann v. State, 453 So.2d 784 (Fla. 1984). This Court is now constitutionally required to review these findings of fact in reviewing the propriety of the death sentence. See Amends. V, VIII, XIV, U.S. Const.; Parker v. Dugger, 498 U.S. 308, 111 S.Ct. 731, 112 L.Ed.2d 812 (1991)(appellate review of death sentence constitutionally infirm where appellate court relied on erroneous view of what trial judge found).⁵

Furthermore, since this Court did not reach a final decision regarding the sentence in the previous appeal, the law of the case doctrine is not applicable, and this Court's previous decision

⁵Appellant also points out that this Court's prior affirmance of the CCP aggravator was based upon its review of a sentencing order deficient in its evaluation of evidence critical to the issue of whether this murder was committed in a cold, calculated, and premeditated manner. Despite affirming CCP, this Court agreed with Reese in the previous appeal that "there was mitigation offered in the record which was apparently un rebutted." Reese, 694 So.2d at 684. As argued in Issue I, supra, the un rebutted mitigation included Dr. Krop's testimony and opinion that Reese's capacity to control his actions was seriously impaired by emotional distress, drugs, and alcohol at the time of the crime, and that the murder was a crime of rage, not an act of cold calculation. Dr. Krop's opinion and testimony obviously bears directly on the question of whether the state proved the cold, calculated, and premeditated aggravator. Because the trial court failed to evaluate or make findings as to this evidence in its initial sentencing order, this Court's review of the CCP aggravator in the first appeal of this case was premature and constitutionally infirm.

regarding the CCP factor does not bar review of the CCP circumstance in the current appeal. See Wells Fargo Armored Services v. Sunshine Security and Detective Agency, 575 So.2d 179 (Fla. 1991).

The trial court's current findings reveal that the trial court's finding of CCP was not supported by record evidence and improperly relied on speculation. The cold, calculated, and premeditated aggravating circumstance was improperly found. Reese's death sentence has been unconstitutionally imposed and must now be reversed. Since it was error to instruct the jury on CCP, and an unconstitutional jury instruction was given,⁶ the jury's advisory verdict also is tainted and unreliable. Accordingly, a new penalty phase proceeding is required.

A. Legal Standards

The CCP aggravating factor requires proof beyond a reasonable doubt that the homicide (1) was "the product of cool and calm reflection and not an act prompted by emotional frenzy, panic or a fit of rage," Jackson v. State, 648 So.2d 85, 89 (Fla. 1994); (2) was the product of "a careful plan or prearranged design to commit murder before the fatal incident," id.; and (3) was committed after heightened premeditation, which is to say, "premeditation over and

⁶In the first appeal of this case, this Court held the CCP instruction given to the jury was unconstitutional. Reese, 694 So.2d at 684, Appendix A.

above what is required for unaggravated first-degree murder." Walls v. State, 641 So.2d 381, 388 (Fla. 1994).

The state must prove each of these elements beyond a reasonable doubt. State v. Dixon, 283 So.2d 1 (Fla. 1973), cert. denied, 416 U.S. 943, 94 S.Ct. 1950, 40 L.Ed.2d 295 (1974). When circumstantial evidence is used, the defense is entitled to the benefit of any reasonable inference from the evidence which negates the CCP aggravating circumstance. E.g., Geralds v. State, 601 So.2d 1157 (Fla. 1992); Santos. Accordingly, a trial court cannot rely on speculation to provide proof of an aggravating circumstance. See, e.g., Hartley v. State, 686 So.2d 1316 (Fla. 1996); Geralds. Moreover, when expert testimony is involved, the trial court is not free to reject the expert's uncontradicted opinion without record support for rejecting it. Santos; Nibert.

B. The Evidence

In the present case, the state introduced Reese's pre-arrest statements describing the circumstances of the crime. The defense introduced Reese's guilt phase trial testimony and the testimony of Dr. Krop, who interviewed and evaluated Reese for the penalty phase of the trial. In his statements to police, at trial, and to Dr. Krop, Reese said he went to see Charlene to talk to her about going off with Jackie all the time, leaving him watching Jackie's kids, and the problem this was causing in his relationship with Jackie. He was upset about Jackie's weekend trips, was frustrated and

confused, and wondered if she was being unfaithful. He went to talk to Charlene to get some information to try to "ease his mind" about Jackie. Charlene was not home, so he jimmed the back door open with a pocket knife. She arrived home around 4 o'clock. He got scared about being in her house, so hid in the back bedroom. He waited for her to go to sleep, and while he waited, he got "madder and madder." After Charlene fell asleep on the couch, he waited a while longer, then came out of the bedroom. He grabbed her to keep her from seeing him, but did not let go. Reese testified that when he attacked her, "I was very emotional mentally. I done lost it. To me, it seemed like I had blacked out, just lost control." T 963. He struggled with Charlene in the living room and bedroom, then he sexually assaulted her. After that, he was still choking her. When she was choked out, he strangled her with an extension cord he found lying on the floor.

Dr. Krop concluded Reese was seriously impaired when he attacked Charlene due to emotional stress and his use of drugs and alcohol in the hours preceding the attack. In Krop's opinion, the crime was not preplanned or thought out in advance but was the product of rage, frustration, and fear. In Krop's opinion, the method and manner of the killing reflected that Reese was enraged, that he lost control, and a lifetime of rage came out.

C. The Trial Court's Sentencing Order

In his sentencing order, the trial judge had this to say about the CCP aggravator:

By the defendant's own statements and testimony, it is clear that the defendant's attack upon Charlene Austin was motivated by his erroneous *belief* that his relationship with Jackie Grier had ended because Ms. Austin had come between Ms. Grier and him. Ironically, Jackie Grier testified that she had broken up with the defendant because he was abusive; he would settle arguments by beating her and forcibly raping her; and because he did not contribute to their mutual support when he stayed in her home. Blaming Charlene Austin rather than himself, the defendant broke into the victim's home around twelve o'clock in the afternoon while she was at work, and lay in wait for a substantial period of time for his victim to come home, undress, lie down, and eventually fall asleep before he commenced his attack. The defendant not only had at least three months since his relationship with Jackie Grier had ended in which to decide in a cold, calculated and premeditated manner to murder Charlene Austin, he had four hours inside of the victim's home in which to further consider his intentions, and another few hours of lying in wait even after the victim got home, before he commenced his attack, in which to coldly and calmly consider his murderous plan. The defendant's only pretense of moral justification is his unfounded belief that Ms. Austin was responsible for the termination of his relationship with Ms. Grier. Accordingly, the Court finds that the instant murder was committed in a cold, calculated and premeditated manner without any pretense of moral or legal justification. The Court assigns this factor great weight.

SRII 56-57.

D. The Trial Court's Ruling is Not Supported by

Competent Substantial Evidence in the Record

The trial court's ruling is little more than a bare conclusion. The court's only basis for concluding Reese planned the crime in advance is that he had time to do so. In fact, the court never made a finding as to when John Reese planned this crime or decided to kill Charlene; the court merely stated there was sufficient time for him to do so. Nor did the court point to specific facts in the record that showed Reese's mental state while he waited was contemplative or reflective rather than highly emotional.

Conspicuously absent from the court's sentencing order is any discussion of Reese's statements and testimony, or Dr. Krop's testimony and opinion, regarding whether this crime was preplanned and "cold." Apparently, the trial judge rejected Dr. Krop's testimony regarding the applicability of the CCP aggravating factor for the same reasons he rejected his opinion regarding the mental mitigation. The argument presented in Issue I, supra, regarding the treatment of the mental mitigating evidence is equally applicable here and appellant incorporates those arguments by reference. [summarize]

There is no competent, substantial evidence in the record to support this aggravator. In Geralds v. State, this Court held that where one hypothesis can support premeditated murder, but another cohesive reasonable hypothesis is inconsistent with heightened

premeditation, the state has failed to meet its burden of establishing the CCP aggravator beyond any reasonable doubt. In Geralds, the state hypothesized that Geralds had interrogated the children to find out when family members would be home, planned the murder for a week, brought gloves and ties with him to the victim's house, and parked his car away from the house so no one would see it. Geralds argued this evidence was equally consistent with an unplanned killing in the course of a planned burglary because he could have gained information about the family's schedule to avoid them and he could have tied the victim's wrists in order to interrogate her about the location of money hidden in the house. Geralds also pointed out there was evidence of a struggle prior to the killing and the knife used was a weapon of opportunity from the kitchen rather than one brought to the scene. The Court reasoned that although one hypothesis supported heightened premeditation, other reasonable hypotheses were that after the victim refused to reveal where the money was located, Geralds became enraged and killed her in sudden anger, or she could have struggled to escape and been killed during the struggle. The Court concluded that because the evidence was susceptible to these divergent interpretations, the state had failed to establish beyond any reasonable doubt that the homicide was committed in a cold, calculated, and premeditated manner. 601 So.2d at 1163-64.

Here, too, the evidence is susceptible of two divergent interpretations, one of which is inconsistent with the CCP

aggravator. The state hypothesized that Reese decided to kill Charlene, went to her house in the middle of the day, then calmly waited ten hours, then struggled with her, raped, and strangled her. The state presented no positive evidence to support this theory, however, nor any positive evidence that refuted Reese's version of what occurred. Although the state argued the long period of time in which Reese waited inside Charlene's house was evidence of a cold, preplanned killing, the length of time Reese waited cuts both ways. If Reese went to Charlene's house intending to kill her, he easily could have killed her when she walked in the door. That Reese waited, that he hid from Charlene, suggests he was scared and had no idea what he was going to do now that she was home. In addition, the method by which the killing occurred shows no clear plan or design. Reese did not take a lethal weapon with him. The only weapon he had was the penknife he used to jimmy the door, which he did not use in the assault. The weapon he ultimately used to kill was an extension cord at the foot of the bed, a weapon of opportunity. The circumstances are equally consistent with Reese sitting in the back bedroom, stewing over his relationship with Jackie, getting more and more furious and frustrated, until he reached his breaking point. The state failed to meet its burden of proving the aggravator beyond any reasonable doubt.

Moreover, this Court has disapproved the CCP aggravating circumstance in numerous cases involving much greater evidence of preplanning than was shown here.

For example, in Santos v. State, 591 So.2d 160 (Fla. 1991), the defendant gunned down his ex-girlfriend and their daughter in the street. Santos had acquired the gun in advance and had made death threats. Nonetheless, this Court held the fact that the killing arose from an "intensely emotional" dispute negated that Santos's acts were accomplished through "cold" deliberation. 591 So.2d at 163.

In Richardson v. State, 604 So.2d 1107 (Fla. 1992), the defendant shot to death his girlfriend after threatening to kill her two days earlier. Again, the Court concluded that while there was sufficient evidence to show calculation on Richardson's part, the element of cool, calm reflection was not present because "Richardson's actions were spawned by an ongoing dispute with his girlfriend, one that involved an obvious intensity of emotion." 604 So.2d at 1109.

In Douglas v. State, 575 So.2d 165 (Fla. 1991), the defendant got a rifle, tracked down his former girlfriend and her new husband, forced them to have sex, then murdered him while she watched. Discussing Douglas in Santos, this Court said:

The sheer duration of this torturous conduct, in another context, might have supported beyond a reasonable doubt a conclusion that the killing met the standard for cold, calculated premeditation established

in Rogers, i.e., that it was the product of a careful plan or prearranged design. The opinion in Douglas, however, rested on our conclusion that the killing arose from violent emotions brought on by the defendant's hatred and jealousy associated with the love triangle. In other words, the murder in Douglas was a classic crime of heated passion. It was not "cold" even though it may have appeared to be calculated. There was no deliberate plan formed through calm and cool reflection, see Rogers, only mad acts prompted by wild emotion.

Santos, 591 So.2d at 163.

The Court disapproved the CCP aggravating circumstance in a torture murder in Spencer v. State, 645 So.2d 377 (Fla. 1994). Spencer brutally beat his wife, sexually humiliated her, then stabbed her to death. The evidence showed he parked his car away from her house the day of the killing, wore plastic gloves during the attack, and carried a steak knife in his pocket. 645 So.2d at 381. He had previously threatened to kill his wife and assaulted her twice in the weeks before the murder. A clinical psychologist testified Spencer thought his wife was trying to steal his painting business, a "recapitulation of a similar situation with his first wife." The psychologist said Spencer's ability to handle his emotions when under such stress was severely impaired, he had limited coping ability, and he was impaired to an abnormal, intense degree. Id. at 384. Given this testimony, this Court concluded the murder could not be characterized as cold.

There was considerably less evidence of planned action surrounding the present homicide than in Santos, Spencer, Douglas,

and Richardson. The expert testimony in the present case regarding Reese's emotional stress, impaired mental state, and limited coping abilities is very similar to the testimony and opinion of the psychologist in Spencer. Moreover, in these cases, unlike in the present case, there were prior threats or prior attacks, and the defendants brought with them to the scene the gun that was used as the murder weapon.

The state failed to prove Reese killed Charlene Austin in a cold, calculated, and premeditated manner. The trial judge erred in instructing the jury on and in finding, considering, and weighing this aggravating circumstance in his sentencing decision. Reese's death sentence has been unconstitutionally imposed. Art. I, ss. 9, 16, 17, Fla. Const.; Amends. V, VI, VIII, XIV, U.S. Const. Because the trial court gave the jury an unconstitutional jury instruction on this aggravating circumstance, Reese, 694 So.2d at 684, these errors require reversal for a new penalty phase proceeding before a new jury.

ISSUE III

THE IMPOSITION OF THE DEATH SENTENCE IS DISPROPORTIONATE FOR THIS MURDER COMMITTED WHILE JOHN REESE WAS DESPERATE AND DISTRAUGHT OVER A FAILING RELATIONSHIP WHERE REESE HAD NO SIGNIFICANT PRIOR CRIMINAL HISTORY, THE AGGRAVATING CIRCUMSTANCES ARE NOT NUMEROUS, AND THE MITIGATING CIRCUMSTANCES ARE SUBSTANTIAL.⁷

Reese's actions were those of a man who loved "not wisely but too well." His hopes for reconciliation with Jackie Grier, and the effect the repeated frustration of those hopes had upon him were tragic and ultimately led to tragedy for Charlene Austin. Before that day, Reese had no significant criminal history. If the death penalty is appropriate for only the most aggravated and unmitigated of crimes, and if this Court considers the whole of Reese's life, including the traumatic influences that brought Reese to that point in his life, then death is not appropriate in this case.

The uncontroverted evidence showed Reese was acting out a state of profound emotional agitation when he murdered Charlene Austin. According to the mental health expert, the murder was the result of jealousy, anger, frustration, and rage precipitated by Reese's failing relationship with Jackie Grier. The mental health

⁷Appellant is aware this Court addressed this issue in his previous appeal. Reese v. State, 694 So.2d 678 (Fla. 1997). This Court's prior decision on this issue was premature, however, because the Court reviewed this issue based upon a sentencing order that was constitutionally deficient in its evaluation of evidence critical to this issue. Appellant urges this Court to reconsider this issue on this appeal.

expert also testified that Reese's emotional distress and desperate need to hang on to his relationship with Jackie were attributable to a significant degree to the traumatic losses and lack of stability he experienced as a child.

This Court has reversed the death sentence in numerous cases where the murder resulted from violent emotions in the context of a tormented love relationship, where the defendant had no significant criminal history. White v. State, 616 So.2d 21 (Fla. 1993), cert. denied, 114 S.Ct. 214, 126 L.Ed.2d 170 (1993); Penn v. State, 574 So.2d 1079 (Fla. 1991); Farinas v. State, 569 So.2d 425 (Fla. 1990); Blakely v. State, 561 So.2d 560 (Fla. 1990); Wilson v. State, 493 So.2d 1019 (Fla. 1986); Ross v. State, 474 So.2d 1170 (Fla. 1985); Blair v. State, 406 So.2d 1103 (Fla. 1981).⁸

The death penalty has been found inappropriate in such cases even where there were several aggravating circumstances or the manner of death was torturous. Penn; Farinas; Blakely; Wilson; Ross; Blair.

This case is comparable to the crime of passion cases cited above because Reese killed while in the grip of "violent emotions brought on by . . . hatred and jealousy associated with [a] love

⁸ This Court also has refused to countenance overrides in such cases. Douglas v. State, 575 So.2d 165 (Fla. 1991); Fead v. State, 512 So.2d 176 (Fla. 1987), receded from on other grounds in Penecost v. State, 545 So.2d 861 (1989); Irizarry v. State, 496 So.2d 822 (Fla. 1986); Herzog v. State, 439 So.2d 1372 (Fla. 1983); Phippen v. State, 389 So.2d 991 (Fla. 1979); Chambers v. State, 339 So.2d 205 (Fla. 1976); Halliwell v. State, 323 So.2d 557 (Fla. 1975); Tedder v. State, 322 So.2d 908 (Fla. 1975).

tringle." Santos v. State, 591 So.2d 160, 13 (Fla. 1991). A defendant's reduced moral culpability in such cases is predicated not on the victim's identity but on the intensity of emotions that arise in the context of a failing or troubled relationship. In the present case, Reese was deeply threatened by his estrangement from Jackie, and viewed Charlene as his emotional rival for Jackie's affections. Reese's culpability is no greater than that of the defendants in the above-cited cases.

Although the requirement that death be administered proportionally has several sources in Florida law, its purpose is twofold, to ensure uniformity, and "to ensure that capital punishment is inflicted only in `the most aggravated, the most indefensible of crimes.'" Smalley v. State, 546 So.2d 723 (Fla. 1989). This Court explained:

Our proportionality review requires us "to consider the totality of circumstances in a case, and to compare it with other capital cases. It is not a comparison between the number of aggravating and mitigating circumstances." Porter v. State, 564 So.2d 1060, 1064 (Fla. 1990), cert. denied, 498 U.S. 1110, 111 S.Ct. 1024, 112 L.Ed.2d 1106 (1991). In reaching this decision, we are also mindful that "[d]eath is a unique punishment in its finality and in its total rejection of the possibility of rehabilitation." State v. Dixon, 283 So.2d 1, 7 (Fla. 1973), cert. denied, 416 U.S. 943, 94 S.Ct. 1950, 40 L.Ed.2d 295 (1974). Consequently, its application is reserved only for those cases where the most aggravating and least mitigating circumstances exist. Id.; Kramer v. State, 619 So.2d 274, 278 (Fla. 1993).

Terry v. State, 668 So.2d 954, 965 (Fla. 1996). Accordingly, this Court must "compare this case to others to determine if the crime falls within the category of both the (1) the most aggravated, and (2) the least mitigated of murders." Almeida v. State, No. 89,432 (Fla. July 8, 1999).

As explained in Issue II, supra, the CCP aggravating factor was improperly found. That leaves only two valid aggravators, felony murder and HAC. The mitigating factors, moreover, are substantial and compelling: Reese was mentally impaired when he committed the crime due to emotional distress and the effects of cocaine and alcohol; he has no significant prior criminal history; he is a good candidate for rehabilitation; he suffered a traumatic childhood; he has positive character traits.

Apart from this "one explosion" of criminality, see Dixon, 283 So.2d at 28, Reese has led a relatively law-abiding life. John Reese is not a vicious, hardened, depraved, or irredeemable criminal. He does not fit the profile of a death row inmate. The record contains substantial and compelling mitigating evidence that explains the influences that led him to commit this crime, which was essentially out of character for him. This is not one of the most aggravated and least mitigated of murders. Accordingly, Reese's death sentence is disproportionate. This Court should vacate his death sentence and remand for imposition of a life sentence without possibility of parole for twenty-five years.

CONCLUSION

Appellant respectfully requests this Honorable Court to reverse and remand this case for the following relief: Issue I, remand for resentencing; Issue II, reverse for a new penalty phase proceeding; Issue III, vacate appellant's death sentence and remand for imposition of a life sentence.

Respectfully submitted,

NANCY DANIELS
PUBLIC DEFENDER
SECOND JUDICIAL CIRCUIT

NADA M. CAREY
Fla. Bar No. 0648825
Assistant Public Defender
Leon County Courthouse
Fourth Floor, North
301 South Monroe Street
Tallahassee, Florida 32301
(850) 488-2458

ATTORNEY FOR APPELLANT

CERTIFICATE OF SERVICE

I HEREBY CERTIFY a copy of the foregoing has been furnished to Assistant Attorney General Barbara J. Yates, by delivery to The Capitol, Plaza Level, Tallahassee, Florida 32399-1050, and a copy has been mailed to appellant, **JOHN LOVEMAN REESE**, #123069, Union Correctional Institution, Post Office Box 221, Raiford, Florida 32083-0221, on this ___ day of October, 1999.

Nada M. Carey

IN THE SUPREME COURT OF FLORIDA

JOHN LOVE MAN REESE,

Appellant,

v.

Case No. 91,411

STATE OF FLORIDA,

Appellee.

_____ /

APPENDIX TO INITIAL BRIEF OF APPELLANT

APPENDIX

DOCUMENT

- | | |
|---|---|
| A | <u>Reese v. State</u> , 694 So.2d 678 (Fla. 1997) |
| B | <u>Reese v. State</u> , 728 So.2d 727 (Fla. 1999) |
| C | Resentencing Order |
| D | Dr. Krop's testimony |