

IN THE SUPREME COURT OF FLORIDA

JOHN LOVEMAN REESE,

Appellant,

v.

CASE NO. 91,411

STATE OF FLORIDA,

Appellee.

_____ /

INITIAL BRIEF OF APPELLANT

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SECOND JUDICIAL CIRCUIT

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IN THE SUPREME COURT OF FLORIDA

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

STATEMENT OF THE CASE AND FACTS

This is an appeal of a judge-only resentencing.¹

On May 14, 1992, the Duval County Grand Jury indicted appellant, JOHN LOVEMAN REESE, for the first-degree murder of Sharlene Austin, sexual battery, and burglary with assault. R 14.

Reese was tried by jury March 18-25, 1993. The evidence presented at trial, as summarized in this Court's prior opinion, was as follows:

Reese dated Jackie Grier on and off for seven years; the victim had been Grier's best friend for approximately two and a half years. Reese was extremely possessive and disliked Austin because of the amount of time Grier spent with her. Grier and Austin had begun making trips to Georgia where, unknown to Reese, both had met new boyfriends. They returned from the last of these trips on

¹References to the one-volume record on appeal, titled "Supplemental Volume I," are designated by "SR," followed by the page number. References to the original record on appeal are designated by "R" (record) or "T" (transcripts), followed by the page number. All proceedings were before Duval County Circuit Judge L. Page Haddock.

Monday, January 27, 1992. On Wednesday of the same week, Grier was concerned because she could not reach Austin by phone, and she and a neighbor went to Austin's house and entered through the unlocked back door. They found Austin lying face down in the bedroom, covered with a sheet. She had been strangled with an electrical extension cord that was doubled and wrapped around her neck twice with the ends pulled through the loop.

Reese was questioned by police after his palm print was found on Austin's waterbed. He confessed to breaking into her home around noon on Tuesday, January 28. He said he waited for her to return home because he wanted to talk to her about Grier, but when he saw Austin coming home from work around four o'clock he got scared and hid in a closet. Reese said that after Austin went to sleep on the sofa, he came out of the closet but panicked when she started to move. He grabbed her around the neck from behind and dragged her into the bedroom. He raped her, then strangled her with the extension cord. He was arrested after his confession.

Reese . . . testified on his own behalf at the guilt phase, detailing an intensely troubled childhood and his emotional relationship with Grier. He claimed to have killed Austin out of panicked emotion. Grier also testified. She claimed that Reese never liked Austin, and said that she (Grier) had in fact broken up with Reese before Austin was killed. Two detectives testified that Reese responded "yes" when he was asked if he had decided to hurt the victim while waiting for her to come home.

Reese v. State, 694 So. 2d 678, 680 (Fla. 1997)(**Appendix A**).

The jury found Reese guilty as charged. TR 1146.

At the penalty phase on May 14, 1993, Reese presented seven witnesses.

Dr. Harry Krop, a forensic psychologist, conducted an

initial evaluation, which included an interview with Reese and a battery of psychological tests. He interviewed Reese a second time and administered additional tests. Dr. Krop also reviewed the depositions of seven or eight police officers and of Jackie Grier. He reviewed Grier's and Reese's trial testimony. He also personally interviewed Grier. He reviewed the psychiatric records of Reese's father, and adoption, marriage, and school records from Virginia and Alabama. He interviewed family members and reviewed Reese's jail records. He talked to Reese about the murder itself on two occasions. T 1202-1204.

Dr. Krop found no evidence of major mental illness or personality disorder. T 1206-1208. Reese's childhood experiences helped make sense of the homicide, however, which was "out of character" for Reese. T 1208, 1212, 1251. Reese was adopted into a loving home, but his father, a paranoid schizophrenic, became severely mentally ill and murdered Reese's mother. Reese's father was put in mental hospital, and Reese never saw him again. Reese went to live with an uncle, who raised him in a very strict, very rigid environment and did not allow him to live as a child. At age 14, Reese went to live with another aunt and uncle, who provided him with a caring environment. He was with this family for two or three years before he joined the Job Corps. The day after he returned, his uncle died of a heart attack. T 1208-1210.

From that point on, Reese was searching for stability in

relationships. He married a woman, found out she was a drug addict, and that relationship broke up. He subsequently met Grier, whom he perceived as his fate. He believed he had finally found somebody who loved him, and with whom he could develop a stable family life. T 1211. This was not a realistic perception on Reese's part, however, as the relationship was dysfunctional or pathological. Grier had asked Reese to leave and had called the police a few times. Reese felt the relationship could work, though, and was desperate to find an explanation for why it was not working. His frustration and desperation to hold on to the relationship is what led up to the murder. T 1211-1213.

Dr. Krop testified that Reese's coping skills were not effective. He tended to be dependent on alcohol and drugs, had started using crack cocaine regularly four or five months before the homicide, and was using a lot of crack cocaine the day of the offense. T 1212.

Reese also had difficulty accepting things that were going on in his life. That is why he went to Austin's house that day. He was frustrated because he felt like he could not get answers from Grier, and so he decided to talk to Austin about it. Instead, he lost control, and his rage and violence came out. T 1213, 1236. He was scared and frustrated, and all the anger, frustration, and rejection he had experienced in his life came out at once. T 1214. The manner of killing reflected that he was enraged. T 1236. When asked if he could rule out the

possibility that the rape and murder was a cold-blooded conscious decision thought-out beforehand, Dr. Krop said he had confidence in his opinion. T 1251.

Dr. Krop noted that Reese was insecure, felt inadequate, and was very sensitive to rejection. He also had difficulty expressing the way he really felt at a given time. T 1214-1215. Thus, the frustration, anger, and resentment that came out when he confronted Austin had been building up over his lifetime, not just during his relationship with Jackie. T 1215. Dr. Krop explained that although his mother's murder had occurred twenty years earlier, that traumatic event "absolutely" contributed to the murder of Sharlene Austin. He noted that there was no dispute in psychological theory that such traumas shape an individual's personality over time. T 1248-1249. When a child experiences something as traumatic as what Reese experienced, the child grows up feeling helpless, and often develops a need to control. When Reese got into the relationship with Grier-- someone he loved very much--he felt a desperate need to hold on to it, no matter what was going on in the relationship. T 1216.

In Dr. Krop's opinion, Reese's mental state was seriously impaired when he killed Austin because of his distressed emotional state combined with the effects of the alcohol and cocaine. T 1217. Krop explained that crack has a very acute, very immediate, very dramatic effect, intensifying whatever emotions are already present. T 1218. Both crack cocaine and

the accumulation of emotional stress result in poor impulse control. Although Reese's impulse control generally was good, he tended to lose control when under considerable stress, such as the stress caused by fear of losing a high-priority relationship. T 1219-1220.

When asked if Reese's behavior after the crime was consistent with someone who had committed a cold-blooded murder, Dr. Krop said Reese's behavior after the crime was more 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.

Dr. Krop said Reese would have "no problem whatsoever" functioning in a prison environment. Although he usually could not say this with such conviction, he was convinced in Reese's case because of Reese's lack of a significant criminal history, his good conduct in jail, his cooperation with Dr. Krop, and his acceptance of responsibility for what he had done. T 1216-1217. Krop noted that it was very unusual for a person charged with first degree murder to admit what he had done, including the gruesome details, even in a confidential evaluation. T 1255. From the first time he spoke with Reese, Reese had accepted responsibility for what he had done. He was still very much in love with Grier and was very ashamed of what he had done. T 1256. Even his initial denials to the police were more related

to his fear of losing Grier than a failure to accept responsibility for what he had done. T 1260-1261.

Several family members and former schoolteachers also testified. Two of Reese's maternal aunts said his adoptive parents were loving. T 1295. When Reese was seven, his father had a mental breakdown, however, and murdered his mother. T 1296-1297. Reese was the one who found her body. His father was sent to a mental institution. T 1271-1272.

After his mother's death, Reese was brought from Virginia to Alabama. T 1270, 1297. The oldest brother, Marvin Smith, and his wife took custody. T 1299. They met Reese's physical needs but were very strict. They whipped him, did not allow other children in the home, and did not allow him to play. They had no parenting skills. T 1300-1303.

When Reese was 15, he went to live with Grover Reese, his father's brother, and Grover's wife, Ernestine. T 1317. Johnnie and Grover developed a father-son relationship. Ernestine was like a mother to him. Ernestine testified that Reese was very affectionate, played a lot, and loved kids. He participated in football, track, and weight-lifting in high school. He helped around the house by cutting the grass, mopping, and doing dishes. He was very well-mannered and respectful towards older people. He helped take care of his elderly grandmother. T 1325-1326. In 1983, Reese witnessed Grover's death of a massive heart attack, and it was like he had lost another father. T 1320.

Ida Romaine, Reese's coach at Anniston High School, said John was a hard worker and a leader who helped other students. T 1348. He was very respectful, and she never had any disciplinary problems with him. T 1352-1353.

Reese's second-grade teacher said he was a bright and happy student, respectful towards adults and popular with classmates. T 1379. She remembered his great sadness when his mother was murdered. T 1380.

The jury returned an advisory verdict recommending the death sentence by a vote of 8 to 4. TR 1492.

On June 24, 1993, the defense submitted a sentencing memorandum in support of a life sentence. R 368-373 (**Appendix B**). The next day, the trial judge sentenced Reese to death, finding three aggravating circumstances (HAC, CCP, and committed during a burglary/sexual battery), and one mitigating circumstance, no significant criminal history. R 382-384.

On March 20, 1997, this Court vacated the death sentence because the trial judge sentenced Reese to death without addressing "mitigation offered in the record which was apparently unrebutted." Reese, 694 So. 2d at 684. 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.

Ten days later, on March 31, 1997, the prosecuting attorney filed a memorandum in support of the death sentence. SR 12-23

(**Appendix C**). On April 17, 1997, the trial judge, without holding a hearing, entered an order resentencing Reese to death. SR 29 (**Appendix D**).

In its April 17 sentencing order, the trial court reaffirmed the three aggravating factors it previously had found and reaffirmed that no statutory mitigation was established. The trial court found the following nonstatutory mitigating factors established but entitled to little, minimal, or no weight: 1) minimal criminal record (petty theft and trespassing); 2) good record in jail; 3) childhood difficulties; 4) Reese's support of Jackie Grier and her children; 5) Reese's possessive relationship with Jackie Grier. The trial court found the following factors were not established: 1) Reese's truthful testimony; 2) mental impairment at the time of the crime; 3) potential for being a good prisoner; 4) emotional immaturity. SR 24-29.

On April 25, 1997, Reese filed a motion asking the trial judge to withdraw his April 17 order as premature, as mandate had not yet issued, which the judge denied. SR 30-33.

On May 27, 1997, this Court denied Reese's motion for rehearing, SR 33A, and on June 26, 1997, issued its mandate.

On July 16, 1997, the trial court, without holding a hearing, entered a one-paragraph order, adopting its April 17 order. SR 35-36 (**Appendix E**).

On August 22, 1997, defense counsel filed an objection to both the April 17 and July 16 orders, asserting that (1) before

neither order did the trial court never schedule the case for a hearing or give Reese an opportunity to be heard; and (2) the April 17 order tracked the state's sentencing memorandum, to which Reese was not given an opportunity to respond. SR 37-39.

Notice of appeal was filed August 26, 1997. In the notice, defense counsel reiterated that no hearings were held below and noted further that he was never provided a copy of the July 16, 1997, order and had no knowledge of its existence until August 21, 1997. SR 40-41.

SUMMARY OF ARGUMENT

I. Reese was deprived of due process of law when the trial court sentenced him to death without a hearing. Sentencing is a critical stage of the criminal proceedings at which the defendant has the right to be present, to be represented by counsel, and to present evidence. These procedural protections attach at all sentencing proceedings, whether the defendant is being sentenced immediately after adjudication of guilt or after a prior sentence has been held invalid. Although this Court recently has held in several recent cases that a defendant in a capital case is not entitled to

present evidence at a judge-only resentencing, those cases erroneously distinguished a long line of cases to the contrary and are inconsistent with the requirements of due process and the Eighth Amendment.

II. The trial judge erred in sentencing Reese to death without independently reviewing and weighing the evidence.

III. The trial court's evaluation of the mitigating evidence was legally and factually erroneous.

IV. The trial court's sentencing order reflects bias, rendering Reese's sentence fundamentally unfair and a violation of due process.

ARGUMENT

ISSUE I

REESE WAS DEPRIVED OF DUE PROCESS OF LAW WHEN HE WAS SENTENCED TO DEATH WITHOUT A HEARING.

On March 20, 1997, this Court vacated Reese's death sentence and remanded for entry of a new sentencing order. The trial court entered a new order, again sentencing Reese to death. No hearing was held or scheduled before the trial court imposed the new death sentence. This sentencing "proceeding" violated Reese's due process rights under the Fourteenth Amendment of the United States Constitution, and Article 1, sections 9 and 16, of the Florida Constitution.

Under the Florida Rules of Criminal Procedure, every sentence must be pronounced in open court; the defendant must be given an opportunity to show legal cause why a sentence should

not be pronounced; and the defendant must be given an opportunity to present mitigating evidence. Fla. R. Crim. P. 3.700, 3.720.²

These rules are mandatory, Mask v. State, 289 So. 2d 385 (Fla. 1973); Small v. State, 371 So. 2d 532 (Fla. 3d DCA 1979), and the denial any of these basic protections is a violation of due process under the Florida and United States Constitutions.

²Rule 3.700. Sentence Defined; Pronouncement and Entry; Sentencing Judge

(a) Sentence Defined. The term sentence means the pronouncement by the court of the penalty imposed on a defendant for the offense of which the defendant has been adjudged guilty.

(b) Pronouncement and Entry. Every sentence or other final disposition of the case shall be pronounced in open court. The final disposition of every case shall be entered in the minutes in courts in which minutes are kept and shall be docketed in courts that do not maintain minutes.

(c) Sentencing Judge.

(1) *Noncapital Cases.* In any case, other than a capital case, in which it is necessary that sentence be pronounced by a judge other than the judge who presided at trial or accepted the plea, the sentencing judge shall not pass sentence until the judge becomes acquainted with what transpired at the trial, or the facts, including any plea discussions, concerning the plea and the offense.

(2) *Capital Cases.* In any capital case in which it is necessary that sentence be pronounced by a judge other than the judge who presided at the capital trial, the sentencing judge shall conduct a new sentencing proceeding before a jury prior to passing sentence.

Rule 3.720. Sentencing Hearing

As soon as practicable after the determination of guilt and after the examination of any presentence reports, the sentencing court shall order a sentencing hearing. At the hearing:

(a) The court shall inform the defendant of the finding of guilt against the defendant and of the judgment and ask the defendant whether there is any legal cause to show why sentence should not be pronounced. The defendant may allege and show as legal cause why sentence should not be pronounced only:

(1) that the defendant is insane;

(2) that the defendant has been pardoned of the offense for which he or she is about to be sentenced;

(3) that the defendant is not the same person against whom the verdict or finding of the court or judgment was rendered; or

(4) if the defendant is a woman and sentence of death is to be pronounced, that she is pregnant.

(b) The court shall entertain submissions and evidence by the parties that are relevant to the sentence.

State v. Scott, 439 So. 2d 219 (Fla. 1983); Neering v. State, 164 So. 2d 29 (Fla. 1st DCA 1964).

Furthermore, these rules apply with equal force at a resentencing proceeding. Indeed, Florida law has long recognized that defendants are entitled to the same rights at resentencing to which they were entitled when initially sentenced. Scott; Westberry v. Cochran, 118 So. 2d 194 (1960); McCrae v. State, 400 So. 2d 175 (Fla. 5th DCA 1981); Walker v. State, 284 So. 2d 415 (Fla. 2d DCA 1972); Thacker v. State, 185 So. 2d 202 (Fla. 3d DCA 1966); Neering.

Rules 3.700 and 3.720 expressly apply to capital and noncapital proceedings. An additional rule, Rule 3.780, applicable only to capital cases, specifically requires the trial judge to allow both parties to present evidence and argument at "all proceedings based on section 921.141, Fla. Stat."³ (emphasis added).

Furthermore, a defendant's right to be present, to be heard, to be represented, and to present evidence are even more critical when the defendant is facing the death penalty. In a death penalty case, the trial judge's sentencing discretion is

³**Rule 3.780. Sentencing Hearing for Capital Cases**

(a) Evidence. In all proceedings based on section 921.141, Florida Statutes, the state and defendant will be permitted to present evidence of an aggravating and mitigating nature, consistent with the requirements of the statute. Each side will be permitted to cross-examine the witnesses presented by the other side. The state will present evidence first.

(b) Rebuttal. The trial judge shall permit rebuttal testimony.

(c) Argument. Both the state and the defendant will be given an equal opportunity for argument, each being allowed one argument. The state will present argument first.

circumscribed by the requirements of section 921.141, Florida Statutes (1995). Resentencing involves much more than "cleaning up the language of the order." See Lucas v. State, 417 So. 2d 250 (Fla. 1982)Lucas II). Resentencing because of incomplete factual findings, as here, requires the trial judge to reconsider the evidence, make new findings of fact, draw legal conclusions, and perform de novo the process of weighing aggravating and mitigating factors. The judge must rethink the decision, not merely provide an after-the-fact rationale for his constitutionally deficient initial decision.

In a capital case, then, at the least,⁴ a defendant is entitled to the same protections at resentencing to which he was entitled at his original sentencing. This Court set forth the procedure to be followed by the judge, after the jury's advisory verdict has been rendered, in Spencer v. State, 615 So. 2d 688 (Fla. 1993). On resentencing before the judge only, then, as here, a defendant is entitled to the procedural protections set forth in Spencer. Under Spencer, once the jury has rendered its advisory verdict, the trial judge must hold a separate hearing at which the defendant, his counsel, and the state must be allowed to present additional evidence and argument and the defendant

⁴ If anything, defendants facing the death penalty are entitled to more expansive procedural protections. Compare Huff v. State, 622 So. 2d 982 (Fla. 1993)(holding Huff's due process rights were violated when the circuit judge entered an order denying Huff's rule 3.850 motion without a hearing and without giving Huff an opportunity to be heard) and Scott, 439 So. 2d at 220 (noncapital defendant not entitled to be present or represented during trial court's consideration of merits of 3.850 motion).

must be given an opportunity to be heard in person. Id. at 690-91. The trial judge must then recess the proceedings to consider the appropriate sentence, and hold another hearing to impose sentence and contemporaneously file the written sentencing order. Id.

In the present case, the trial court sentenced Reese to death without even holding a hearing. This procedure thus violated his due process rights under the Florida Rules of Criminal Procedure and the state and federal constitutions to be present, to be represented by counsel, and to present evidence and argument before being sentenced.

Appellant recognizes this Court has held in several recent cases that a defendant is not entitled to present new evidence at a judge-only resentencing. Crump v. State, 654 So. 2d 545 (Fla. 1995); Davis v. State, 648 So. 2d 107 (Fla. 1994), cert. denied, 116 S.Ct. 94, 13 L.Ed.2d50 (1995); Lucas v. State, 613 So. 2d 408 (Fla. 1992)(Lucas V), cert. denied, 510 U.S. 845, 114 S.Ct. 136, 126 L.Ed.2d 99 (1993). These decisions, however, failed to acknowledge or distinguish a long line of precedent to the contrary. See Scull v. State, 569 So. 2d 1251 (Fla. 1990)(expressly directing that both sides be permitted to present new evidence at judge-only resentencing); Lucas v. State, 490 So. 2d 943 (Fla. 1986)(Lucas III)(holding trial court erred in refusing to allow defendant to present new evidence at judge-only resentencing); Oats v. State, 472 So. 2d 1143 (Fla.)(approving

sub silentio judge-only resentencing procedure at which state was permitted to present new evidence to prove aggravator not found at original sentencing), cert. denied, 474 U.S. 865, 106 S.Ct. 188, 88 L.Ed.2d 157 (1985); Mann v. State, 453 So. 2d 784 (Fla. 1984)(approving judge-only resentencing at which state was allowed to prove aggravator it failed to prove at originals sentencing), cert. denied, 469 U.S. 1181, 105 S.Ct. 940, 83 L.Ed.2d 953 (1985); Menendez v. State, 419 So. 2d 312 (Fla. 1982)(approving judge-only resentencing procedure at which both sides were permitted to present new evidence; reducing sentence to life based in part on new evidence).

Crump, Davis, and Lucas V are indistinguishable from Scull, Lucas III, Oats, Mann, and Menendez. All were remanded because of errors in the trial court's findings. All involved resentencing before the judge only. All required the trial judge to make new factual findings and/or reweigh the aggravating and mitigating circumstances.

In Scull, the Court held the defendant's due process rights were violated where the trial court imposed a new death sentence one day after mandate issued and just three days after defense counsel had returned from a Christmas vacation. This Court had remanded for resentencing because the trial court initially had sentenced Scull to death based on aggravating factors the Court determined were unsupported by the evidence. The resentencing in Scull, therefore, was before the judge only. In concluding the

resentencing procedure violated due process, the Court said:

One of the most basic tenets of Florida law is the requirement that all proceedings affecting life, liberty, or property must be conducted according to due process. Art. I, s 9, Fla. Const. While we often have said that "due process" is capable of no precise definition, e.g. Gilmer v. Bird, 15 Fla. 410 (1875), there nevertheless are certain well-defined rights clearly subsumed within the meaning of this term.

The essence of due process is that fair notice and a reasonable opportunity to be heard must be given to interested parties before judgment is rendered. Tibbetts v. Olsen, 91 Fla. 824, 108 So. 679 (1926). Due process envisions a law that hears before it condemns, proceeds upon inquiry, and renders judgment only after proper consideration of issues advanced by adversarial parties. State ex rel. Munch v. Davis, 143 Fla. 236, 244, 196 So. 491, 494 (1940). In this respect the term "due process" embodies a fundamental conception of fairness that derives ultimately from the natural rights of all individuals. See art. I, s. 9, Fla. Const.

569 So. 2d at 1252.

The Court in Scull further held the defendant need not show he was actually prejudiced by the deficient proceeding:

[T]he appearance of irregularity so permeates these proceedings as to justify suspicion of unfairness. This, we believe, is as much a violation of due process as actual bias would be. Accordingly, we must vacate the sentence and remand for another sentencing hearing in compliance with this opinion and with the dictates of due process.

Id. at 1252; see also Huff, 622 So. 2d at 984 (when procedural error reaches level of due process violation, it becomes a matter of substance; overriding concern is appearance of impartiality,

not actual prejudice).

On the state's petition for clarification in Scull, the Court made clear that because the errors requiring remand "did not taint the jury's advisory role," the new proceeding was to be before the judge only, and both parties were entitled to present new evidence:

[O]n remand, the defendant will be entitled to present to the judge any new mitigating evidence he wishes and also will be entitled to rely upon any other mitigating evidence available in the record as it now exists. Likewise, the state will be entitled to present any new aggravating evidence it wishes and also may rely upon aggravating factors already established in the present record. If mitigating or aggravating evidence already exists in this record, there will be no need of either the defense or the state reproducing it through "live" testimony before the judge on remand. Both sides may rely upon the transcript to this end.

569 So. 2d at 1253.

Under Scull, then, a defendant who is being resentenced before the judge only is entitled to a hearing, effective assistance of counsel, and an opportunity to present new evidence. See also Lucas III, Oats, Mann, Menendez.

This Court's cases to the contrary--Lucas V, Crump, and Davis--failed to recognize or erroneously distinguished this precedent. Instead, the Court looked only to the terminology used in the opinion remanding the case, without considering the reason for the remand. Furthermore, in Lucas V, Crump, and Davis, the Court did not address due process or Eighth Amendment

requirements.

In Lucas V, this Court had remanded “for reconsideration and rewriting of the findings of fact” because the trial judge’s findings were not sufficiently clear. On remand, the trial court resentenced Lucas to death. On appeal, the Court held there was no error in the court’s refusal to allow the defendant to present witnesses⁵ at the resentencing proceeding because “we did not direct that a new sentencing proceeding be conducted or that further evidence be received.” 613 So. 2d at 409. The Court also found no error in the trial judge’s having prepared the sentencing order before the hearing because “[w]e told the judge that he ‘may permit’ argument by the parties, but did not direct that he had to do so.” Id.

In Davis, this Court remanded for the trial judge to “reweigh the evidence” because the court had based the death sentence on invalid aggravators. On appeal of the new death sentence, the Court found no error in the trial court’s refusal to permit new evidence⁶ because the Court’s prior opinion had directed “reweighing” rather than “resentencing.” The Court quoted Mann, in which it had said: “Our remand directed a new

⁵The trial court did allow the defendant to submit his prison records and a postsentence investigation report.

⁶The trial court did hold a hearing at which both parties were allowed to present argument and the defendant was allowed to address the court. Appellant has discovered no case in which a new death sentence was imposed without a hearing or without giving the defendant an opportunity to be heard, as occurred here.

sentencing proceeding, not just a reweighing. In such proceeding both sides may, if they chose, present additional evidence.” 648 So. 2d at 109 (quoting 453 So. 2d at 786). The Court did not recognize, however, that Mann itself was remanded because of unclear findings and thus required the exact same kind of “resentencing” as the case before it. Without further analysis, the Court in Davis concluded that “reweighing” does not entitle a defendant to present new evidence. Id. at 110.

The Court relied on the same erroneous distinction in Crump:

As we explained in Davis v. State, 648 So. 2d 107, 109, a reweighing does not entitle a defendant to present new evidence. Thus, our cases holding that a defendant must be allowed to present new evidence when the case is remanded for a new sentencing proceeding do not apply to Crump. See Scull v. State, 569 So. 2d 1251 (Fla. 1990); Lucas v. State, 490 So. 2d 943 (Fla. 1986)[Lucas III].

654 So. 2d at 548.

As discussed above, however, Scull and Lucas III are indistinguishable from Crump and Davis. All involved resentencings before the judge only. Crump and Davis were based on flawed reasoning.

Moreover, as discussed above, due process entitles all criminal defendants to present new evidence at resentencing. A sentence cannot stand if any restrictions were placed on the defendant’s right to present mitigating evidence.⁷ H.B.T. v.

⁷The rule refers to “parties” and thus has been held to include the state. State v. Hohl, 431 So. 2d 707 (Fla. 2d DCA 1983)(refusal to allow state to present evidence at sentencing is

State, 495 So. 2d 919 (Fla. 4th DCA 1986); Hargis v. State, 451 So. 2d 551 (Fla. 5th DCA 1984); Riley v. State, 423 So.2d 576 (Fla. 2d DCA 1982).

In a capital case, the defendant's unrestricted right to present mitigating evidence also is guaranteed by the Eighth Amendment. The sentencer in a capital case may not refuse to consider mitigating evidence. Lockett v. Ohio, 438 U.S. 586, 98 S.Ct. 2954, 57 L.Ed.2d 973 (1978). "[T]he only limitation on introducing mitigating evidence is that it be relevant to the case at hand." King v. State, 514 So. 2d 354, 358 (Fla. 1987), cert. denied, 487 U.S. 1241, 108 S.Ct. 2916, 101 L.Ed.2d 947 (1988). As the Court said in Woodson v. North Carolina, 428 U.S. 280, 304-05, 96 S.Ct. 2978, 2991-92, 49 L.Ed.2d 944 (1976), "consideration of the character and record of the individual offender and the circumstances of the particular offense [is] a constitutionally indispensable part of the process of inflicting the penalty of death."

In Florida, the trial judge is the sentencer. When a defendant stands before the judge for sentencing after a prior death sentence has been invalidated, the trial court cannot, consistent with Lockett, refuse to consider mitigating evidence not previously presented. For example, if a conviction used to establish the prior violent felony aggravator was vacated after the original death sentence was imposed, the defendant should be _____ reversible error).

entitled to present such evidence to the sentencer. If the defendant did a heroic act, such as saving someone's life, after the original sentence was imposed, such evidence would be relevant and admissible. In particular, a defendant being resentenced in a capital case must be permitted to present evidence of good conduct in prison; such evidence is relevant and therefore cannot be excluded. Skipper v. South Carolina, 476 U.S. 1, 106 S.Ct. 1669, 90 L.Ed.2d 1 (1986).

Every death sentence must be constitutionally imposed, not just the first one. "After all, it is this sentence and not any prior one which may be carried out." Lucas II, 417 So. 2d at 251. At a resentencing, the trial judge must impose sentence based on the on character and record of the individual that stands before him that day, not the person who stood before him at any earlier sentencing proceeding.

In the present case, Reese was entitled to a full Spencer hearing and all the concomitant procedural protections. Sentencing Reese to death without a hearing and without giving him an opportunity to be heard in person and by counsel was a violation of due process of law under Article I, sections 9 and 16, of the Florida Constitution, and the Fourteenth Amendment of the United States Constitution.

ISSUE II

THE TRIAL COURT ERRED IN FAILING TO CONDUCT
AN INDEPENDENT EVALUATION OF THE FACTS AND

LAW.

In a capital case, the trial judge has an "undelegable duty and solemn obligation" to independently evaluate each mitigating circumstance proposed by the defendant. See Walker v. State, 22 Fla. L. Weekly S537 (Fla. Sept. 4, 1997). The trial judge's evaluation does not satisfy Campbell⁸ unless "it truly comprises a thoughtful and comprehensive analysis of any evidence that mitigates against the death penalty." Id. The judge may not "merely rubber-stamp the state's position." Robinson v. State, 684 So. 2d 175, 177 (Fla. 1996)(quoting Hamblen v. State, 527 So. 2d 800, 804 (Fla. 1988)). The trial court, rather, has an "independent judicial obligation to think through [the] sentencing decision.'" Phillips v. State, 22 Fla. L. Weekly S607 (Fla. Sept. 25, 1997)(Anstead, J., specially concurring)(quoting Gibson v. State, 661 So. 2d 288, 293 (Fla. 1995)).

In the present case, the trial court's sentencing order tracks almost verbatim the state's sentencing memorandum. There are minor differences between the two. There is no indication, however, the trial judge independently evaluated, or even reviewed, the trial or penalty phase transcripts before he sentenced Reese to death. The order itself does not mention what evidence the judge considered before imposing sentence. The order reflects, however, a wholesale adoption of the facts and law as set forth in the state's memorandum. The absence in the

⁸Campbell v. State, 571 So. 2d 415 (Fla. 1990).

record of any indication the trial judge fulfilled his responsibility to independently evaluate the mitigating evidence is reversible error. Cf. Lucas II, 417 So. 2d at 250 (remanded for resentencing where nothing in record demonstrated that trial judge engaged in reasoned consideration as to appropriate sentence); see also Phillips (While trial court may not have actually abdicated its sentencing responsibility, its failure to follow procedure set out in Spencer, coupled with its adoption of the State's sentencing memorandum, create both an appearance of partiality and a failure to carefully consider the contentions of both sides and take seriously independent judicial obligation to think through sentencing decision).

ISSUE III

THE TRIAL COURT'S EVALUATION OF THE MITIGATING EVIDENCE IS INCOMPLETE AND LEGALLY AND FACTUALLY ERRONEOUS.

A. Good Record in Jail/Adaptability to Prison Life

Good conduct in jail prior to and during trial is a mitigating factor. Pooler v. State, 22 Fla. L. Weekly S697 (Fla. November 6, 1997). Such evidence "necessarily implies a potential for rehabilitation and productivity in a prison setting," Kramer v. State, 619 So. 2d 274, 276 n.1 (Fla. 1993), which "unquestionably" is a "significant factor in mitigation." Cooper v. Dugger, 526 So. 2d 900, 902 (Fla. 1988).

In evaluating these mitigators in the present case, the

court said:

Good Record in Jail. The fact that the defendant had no violation reports written on him while he was incarcerated was established. However, given the fact that the defendant was being held in a constant state of high security at the Duval County Jail, facing a first-degree murder charge, the Court finds that this nonstatutory mitigating circumstance is entitled to very minimal weight, at best. SR 27.

Potential for Being a Good Prisoner. This circumstance warrants very little weight in the Court's consideration, and is at most pure speculation on the part of defense counsel. Defense counsel's statement in his sentencing memorandum that the defendant "fully accepts responsibility for his criminal acts" is contradicted by the defendant's initial lies to Ms. Grier and to the police, and by his testimony in Court, which was found unworthy of belief by the jury, (since they rejected lesser included offenses and a lesser sentence), and this Court. This mitigator clearly was not established by the evidence. SR 28.

The trial court's findings are legally and factually erroneous. The evidence as to Reese's good jail record and potential for rehabilitation was uncontroverted. Sharon Freeland testified at the May 14, 1993, penalty phase proceeding that Reese had no incidents, no disciplinary reports, and no management problems since his incarceration on April 12, 1992. T 1188. Dr. Krop testified Reese would have "no problem whatsoever" functioning in a prison environment. Dr. Krop further stated that in most cases he could not say this with such conviction, but he was convinced in this case because of Reese's good conduct record in jail, acceptance of responsibility for his

crime, cooperation with Dr. Krop, and lack of any significant criminal history. T 1216-1217.

No evidence was presented regarding security in jail during Reese's incarceration. Also, if high security were sufficient to negate a good jail record as mitigating, good conduct in jail would never be mitigating. Furthermore, this Court should read "very minimal weight, at best" to mean "no weight" or "not mitigating." It is clear the trial judge did not view this evidence as of a mitigating nature.⁹

As for Reese's potential for being a good prisoner, the trial judge erred in concluding this mitigator was "pure speculation." The trial judge apparently did not consider Dr. Krop's testimony regarding Reese's adaptability to prison. Dr. Krop's testimony was uncontradicted, unrebutted, unequivocal, and supported by the evidence. The trial court's rejection of this evidence therefore was error. Farr v. State, 621 So. 2d 1368 (Fla. 1993) ("mitigating evidence must be considered and weighed when contained anywhere in the record, to the extent that it is unbelievable and uncontroverted). The judge's conclusion that the jury rejected Reese's trial testimony also is erroneous. The jury may well have believed Reese, yet still found the facts sufficient to support premeditated murder. Or, the jury could

⁹ Trial judges should not be allowed to bypass the Campbell requirements, and the principles underlying those requirements, by finding mitigating factors in one breath and dismissing them in the next with the words "little weight." .

have found Reese guilty of felony murder. That Reese initially lied to police does not contradict his later acceptance of responsibility. People change. Furthermore, the trial judge failed to consider Dr. Krop's testimony that Reese's initial denial was related to his fear of losing Jackie, not a lack of guilt. The trial judge's failure to consider this testimony was error.

B. Childhood Trauma

The trial judge abused his discretion in giving "very little weight" to what this Court characterized as an "intensely troubled" childhood. Indeed, the trial court only begrudgingly conceded that Reese's childhood was "imperfect." The word "imperfect" characterizes the childhood of a great many people. It does not come close to describing Reese's childhood, particularly finding his mother stabbed to death by his mentally ill father when he was seven; never seeing his father again; and living for the next seven years with an uncle who beat him, isolated him from family and friends, and provided no emotional nurturing.

This evidence was entitled to significant weight. You do not have to be a psychologist to realize such experiences can have a profound effect on a developing child. In this case, however, there was a psychologist. Dr. Krop said Reese's childhood trauma absolutely contributed to the murder. Dr. Krop testified further there is no dispute that such experiences shape

an individual's personality. The state did not rebut this testimony.

The trial court dismissed this evidence, however, because

[t]he defendant suffered no worse deprivation than have many other children who manage to grow up and become law abiding citizens as adults, or at least refrain from rape and murder. The defendant was not retarded or sexually abused as a youth. None of these problems occurred recently, they all occurred at a very early age, and the murder was committed when the defendant was twenty-seven years old, many years after these experiences had been mellowed by the passage of time.

SR 25.

This Court repeatedly has recognized that "passage of time" does not negate the mitigating factor of an abusive or traumatic childhood. Walker, 22 Fla. L. Weekly at S544; Nibert v. State, 574 So. 2d 1059, 1062 (Fla. 1990). Furthermore, this murder obviously never would have been committed if time had "mellowed" the childhood trauma and dysfunctional parenting Reese experienced. Nor does abuse have to be sexual in nature to be mitigating. Finally, the background of other hypothetical individuals who have not committed murder is totally irrelevant to this proceeding. The trial court abused its discretion in failing to give Reese's traumatic childhood significant weight.

C. Positive Character Traits

The trial court recognized but, in essence, gave no weight to the evidence presented at trial of Reese's positive character traits: he was able to bond with the uncle he lived with during

his high school years; he played football and track and helped other athletes during high school; he helped care for his elderly grandmother; he helped his aunt when his uncle died; he obtained his GED while in the Job Corps. Positive character traits, such as these, are mitigating in any case, see Harmon v. State, 527 So. 2d 182 (Fla. 1988); Rogers v. State, 511 So. 2d 526 (Fla. 1987); Thompson v. State, 456 So. 2d 444 (Fla. 1984), but are particularly significant where, as here, the defendant has no prior violent criminal history. This type of mitigation demonstrates rehabilitation potential and an ability to adapt to prison life. It was error not to give this evidence any weight.

D. Support of Jackie Grier

The court dismissed this as a mitigating factor because “[s]uch support as the defendant did provide for Ms. Grier and her children must be balanced against the fact that for most of the time he did not provide any support despite his continuing sexual relationship with her.” SR 26.

The court's rejection of this mitigator is not supported by competent evidence. The evidence showed Reese helped support Jackie and four children from another relationship during most of their relationship. Reese said he turned over his paycheck to Jackie in the beginning. He slacked up when things “started getting out of proportion,” but still gave her money. At the end, when he got upset about what was going on, he moved out and quit giving her money. T 965-966. Jackie herself confirmed that

Reese helped support her, though "not every week." T 701-702.

The trial judge also rejected this mitigator on the premise that a man is obligated to support anyone with whom he is having a sexual relationship. This may be the trial judge's opinion; it is not the law, however, and was an improper basis for rejecting this mitigator.

E. Possessive Relationship with Jackie Grier

The trial court found "devoid of credibility" and "worthy of no weight, or at best minimal weight" that Austin's murder was the result of Reese's possessiveness, jealousy, and fear of losing Jackie Grier. SR 26. Dr. Krop's testimony on this point, however, was unrebutted, uncontradicted, unequivocal, and supported by Reese's life history and psychological profile. Moreover, Reese's obsession with losing Jackie and his childlike reaction when she tried to leave him were supported by the state's own evidence. Jackie herself testified that on occasions when she left Reese, he became extremely emotional and cried a lot. She said he became 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 jealous attachment to Jackie Grier and his profound fear of losing her. There was no evidence to the contrary.

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). The trial court erred in rejecting this as a mitigating factor.

F. Mental Impairment

Dr. Krop testified Reese's childhood experiences resulted in emotional inadequacies, including extreme sensitivity to rejection, hostility and violence under stress, and alcohol and drug dependency. In Dr. Krop's opinion, the murder was a crime of rage, and Reese was seriously mentally impaired when he killed Austin due to his distress over losing Jackie and his use of crack cocaine the day of the crime and in the weeks prior to it.

The trial court rejecting this testimony, stating:

[T]he defendant broke into the victim's home, and then proceeded to calmly wait for a period of from eight to ten hours, like a predator waiting for prey beside a waterhole in the jungle, anticipating the defendant's return home. Even after the victim was in her home, believing herself to be safe and secure, the defendant waited, hidden, for her to fall asleep, so he could take full advantage of her most vulnerable position, 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. Harry 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's testimony confirmed that the defendant's raping and killing the victim was consistent with the defendant having made a conscious decision in advance to commit these crimes. This circumstance was clearly not established by the evidence, and the Court therefore gives it no weight whatsoever.

Dr. Krop's testimony that the defendant's fear, anxiety, and frustration produced a seriously impaired mental state at the time of the murder was emasculated by his further testimony that the defendant had no major mental illness or personality disorder (T 1205), and that his impulse control was generally good (T 1219). 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, and in fact said "it's not up to me to determine the facts" (T 1230), even though he admitted that those facts could help formulate an opinion (T 1231). Dr. Krop confirmed that the rape and murder were consistent with the defendant having made a conscious decision to commit the crimes. (T 1247-1248). Dr. Krop's testimony was typical of the watery and inconclusive expert witness testimony based solely on the defendant's self-serving statements that is frequently offered in such cases. This type of opinion testimony intentionally ignores all the other facts and circumstances of the case, and has led to the rule of law that such testimony, even if uncontroverted, may be rejected by the judge and jury. Walls v. State, 641 So. 2d 381 (Fla. 1994), cert. denied, 115 S.Ct. 943 (1995); Wuornos v. State, 644 So. 2d 1000 (Fla. 1994), cert. denied, 115 S. Ct. 1705 (1995). The Court therefore finds, as did

the jury, that the portion of his testimony seeking to establish a mitigating circumstance, was unworthy of belief and fails to establish such a mitigator.

SR 27-28.

The trial court's finding that Reese coldly plotted this crime in advance is not supported by the evidence.

Dr. Krop's opinion, on the other hand, was uncontradicted, unrebutted, and supported by factual evidence. Contrary to the trial judge's finding, Dr. Krop's opinion was not based solely on Reese's "self-serving statements." Dr. Krop formed his opinion based on Reese's life history (school records, father's psychiatric records, adoption records, personal interviews with Reese's relatives), a battery of psychological tests, and the facts of the murder. Dr. Krop did not rely on Reese for information about the murder; he reviewed police reports; the depositions of the police officers and medical examiner; and the deposition, trial testimony, and a personal interview with Jackie Grier. T 1202-1204, 1236, 1259. The trial judge's evaluation of Dr. Krop's testimony was adopted verbatim from the state's Answer Brief on the initial appeal in this case, which was attached to the state's sentencing memorandum. SR 19-21. As appellant previously pointed out in his Reply Brief on the initial appeal, it is a gross distortion of the record. See T 1230-1232.

Dr. Krop did not "confirm" the facts were consistent with Reese having made a conscious decision in advance to go to Austin's house to rape and kill her. Dr. Krop said that although

the facts could be consistent with a cold-blooded decision, T 1248, he had confidence in his opinion to the contrary. T 1251.

This Court did not hold in Walls v. State, 641 So. 2d 381 (1994), cert. denied, 115 S.Ct. 943 (1995), and has never held a trial judge may summarily reject uncontradicted expert testimony. Such testimony must be weighed in the balance "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); see also Spencer v. State, 645 So. 2d 377 (Fla. 1994). As this Court explained in Johnson v. State, 660 So. 2d 637, 647 (Fla. 1995):

Walls stands for the proposition that opinion testimony, unsupported by factual evidence, can be rejected, but that uncontroverted and believable factual evidence supported by opinion testimony cannot be ignored.

More to the point, this Court held in Spencer that a trial court may not reject mental mitigation established by uncontroverted expert testimony:

We also find merit in Spencer's claim that the trial court rejected the statutory mitigating circumstances. During the penalty phase, the two experts testified that Spencer suffered from chronic alcohol and substance abuse, a paranoid personality disorder, and biochemical intoxication. Based upon their testing, interviews, and evaluations, both experts concluded that Spencer was under the influence of extreme mental or emotional disturbance at the time the murder was committed and that his capacity to conform his conduct to the requirements of law was impaired. . . .

. . . The evidence of these mitigating

circumstances that was submitted by Spencer was uncontroverted. The trial judge rejected the experts' opinions as speculative and conclusory. However, the experts based their opinions on a battery of psychological and personality tests administered to Spencer, clinical interviews with Spencer, examination of the evidence in this case, and a review of Spencer's life history, school records, and military records. Thus, the trial court erred in not finding and weighing these statutory mental mitigating circumstances.

645 So. 2d at 384-85.

Dr. Krop's testimony that Reese was seriously mentally impaired at the time of the murder was similarly unrebutted and uncontradicted. The trial court erred in not finding and weighing this nonstatutory mitigating factor.

G. Emotional Immaturity

The trial court erred in finding this mitigator was not established. The evidence of Reese's emotional inadequacies was uncontroverted. The state even conceded this mitigator was established. The trial court erred in giving this mitigating factor no weight.

H. Drug and Alcohol Dependency

The trial court's order does not mention the evidence of Reese's drug and alcohol dependency, or the evidence that he was using crack cocaine during the months preceding the murder and on the day of the murder itself. The trial court's failure to consider this evidence is error. Farr; Campbell.

ISSUE IV

THE TRIAL JUDGE'S EVALUATION OF DR. KROP'S TESTIMONY WAS BIASED, RENDERING REESE'S SENTENCING FUNDAMENTALLY UNFAIR, IN VIOLATION OF THE EIGHTH AND FOURTEENTH AMENDMENTS.

Due process entitles persons to "an impartial and disinterested tribunal in both civil and criminal cases." Marshall v. Jerrico, 446 U.S. 238, 242, 100 S.Ct. 1610, 1613, 64 L.Ed.2d 182 (1980). Every litigant is entitled to the "cold neutrality of an impartial judge." State v. Rowe, 100 Fla. 1382, 1385, 131 So. 331, 332 (1930), quoted in Livingston v. State, 441 So. 2d 1083, 1086 (Fla. 1983).

A judge must not only be impartial, he or she must leave the impression of his or her impartiality on all who attend court. Anderson v. State, 287 So. 2d 322 (Fla. 1st DCA 1973). Thus, no judge "under any circumstance is warranted in sitting in the trial of a cause whose neutrality is shadowed or even questioned." Livingston, 441 So. 2d at 1086. In a death case, the court must be especially sensitive to a litigant's fear of partiality, as the defendant's life is literally at stake, and the judge's sentencing decision is in fact a life or death matter.¹⁰ Id. at 1087; Duest v. Goldstein, 654 So. 2d 1004 (Fla.

¹⁰In a capital case, judicial bias raises Eighth Amendment concerns as well. Lightbourne v. Dugger, 549 So. 2d 1364, 1368 n.3 (Fla. 1989)(Barkett, J, concurring in part and dissenting in part)(sentencing by partial judge creates substantial risk that sentencing will be imposed in arbitrary and capricious manner, in violation of Gregg v. Georgia, 428 U.S. 153, 96 S.Ct. 2909, 49 L.Ed.2d 859 (1976)), cert. denied, 494 U.S. 1039, 110 S.Ct. 1505,

4th DCA 1995); Chastine v. Broome, 629 So. 2d 293, 294 (Fla. 4th DCA 1993).

Statements or actions by a trial judge reflecting bias towards a certain category of defendants, or class of cases, constitutes a disqualifying prejudice. E.g., Torres v. State, 697 So. 2d 175 (Fla. 4th DCA 1997)(judge disqualified based on announced policy that no probation violator would be sentenced to time served); Hayes v. State, 686 So. 2d 694 (Fla. 4th DCA 1996)(same), review dismissed, 691 So. 2d 1081 (Fla. 1997); Mitchell v. State, 642 So. 2d 1108 (Fla. 4th DCA 1994)(judge disqualified based on comment he had policy requiring alleged violators of community control to be arrested and then sit in a jail for a "first hearing"); see also United States v. Townsend, 478 F.2d 1072 (3d Cir. 1973)(judge disqualified based on comment it was his policy to sentence all selective service violators to thirty months in prison "if they are good people").

When a party believes he cannot obtain a fair and impartial trial before the assigned judge, he or she may present the issue to the court in accordance with section 38.10, Florida Statutes (1995), and Florida Rule of Criminal Procedure 3.230. The party need not establish prejudice will actually occur in the trial, but need show only "a well grounded fear that he will not receive a fair trial at the hands of the judge." Livingston, 441 So. 2d at 1086. The facts must be viewed from the perspective of the

108 L.Ed.2d 640 (1990).

litigant not the judge: "It is not a question of how the judge feels; it is a question of what feeling resides in the affiant's mind and the basis for such feeling." Id. (quoting State ex rel. Brown v. Dewell, 131 Fla. 566, 573, 179 So. 695, 697-98 (1938)).

However, where the record itself reveals comments or actions by the trial judge that reflect a disqualifying bias, such bias renders the proceedings fundamentally unfair. Alamo Rent-A-Car v. Phillips, 613 So. 2d 56 (Fla. 1st DCA 1992). In Alamo, a worker's compensation case, Mr. Phillips claimed he got pneumonia from his job of washing buses during the nighttime. The employer challenged the causal relationship between Mr. Phillips illness and his job through the testimony of an expert witness, Dr. Brumer. During the hearing, the judge made the following comments about Dr. Brumer:

I don't care how many times he's been to court. Anybody that's got the guts to charge \$500.00 witness fees is a professional witness, whether he goes to court many times or not.

I will respect [Dr. Brumer's] opinion regarding pneumonia, but I will not respect his opinion regarding the fact it can't be aggravated by cold or wet. I know better from personal experience.

I don't really give a shit what Dr. Brumer said.

In his final order awarding benefits, the judge stated:

As this court noted at trial, one does not need a medical expert or in this case a "hired gun" to know that the water and cold found in Mr. Phillips' working place precipitated the advancement and causation of

[his] pneumonia.

Id. at 58.

In reversing, the Fourth District held the judge's comments reflected a bias against Dr. Brumer "unbecoming a partial trier of fact." The court concluded the judge's partiality, as revealed in the record, constituted a deprivation of the employer's right to due process of law. Id.

Similarly, the trial judge's sentencing order in the present case reflects a bias against Dr. Krop "unbecoming an impartial trier of fact." The sentencing order states:

Dr. Krop's testimony was typical of the watery and inconclusive expert witness testimony based solely on the defendant's self-serving statements that is frequently offered in such cases. This type of opinion testimony intentionally ignores all the other facts and circumstances of the case

SR 27-28.

This comment reflects disdain, hostility, and a predisposition against Dr. Krop, not the "cold neutrality of an impartial judge." Indeed, the sentencing order as a whole resembles advocacy rather than disinterested fact-finding.¹¹ Apart from the trial judge's inaccurate characterization of Dr. Krop's testimony, see Issue III, supra at 37-38, the trial judge's above-quoted comment suggests a predisposition against

¹¹ As discussed in Issue II, supra, the factual and legal basis for the trial judge's conclusions regarding Dr. Krop's opinion were adopted wholesale from the state's sentencing memorandum and the state's Answer Brief on the first appeal in this case, a portion of which was attached to the state's sentencing memorandum.

defense experts generally in death penalty proceedings. The credibility of experts in other cases was completely irrelevant to Dr. Krop's credibility in the present case. The trial judge's characterization of Dr. Krop's testimony as merely "more of the same" suggests he evaluated Dr. Krop's testimony, at least in part, based upon his personal opinion and philosophy with regard to such testimony. Cf. Hayes, 686 So. 2d at 696 (judge's announced intention to make specific ruling before hearing evidence or argument is paradigm of judicial bias and prejudice).

The significance of mental health expert testimony in the sentencing phase of a capital trial cannot be overstated. This Court repeatedly has recognized that mental health mitigation carries significant weight. In numerous cases, the existence of mental mitigation has been a critical factor in reducing a defendant's sentence to life imprisonment. Mental mitigation can tip the scales towards life even where it does not rise to the level of a statutory mitigating circumstance.

Mental health testimony is critical not only to whether mitigating circumstances apply but to whether certain aggravating circumstances apply. The cold, calculated, and premeditated aggravating factor, for example, requires "cold" calculation, an element that can be negated by expert testimony regarding the defendant's mental state when the crime was committed. E.g. Spencer. The trial court's sentencing order reflects bias. Sentencing by a partial judge is a deprivation of due process.

Reese is entitled to resentencing before a different judge.

CONCLUSION

Appellant respectfully requests this Honorable Court to reverse and remand this case for resentencing before a different judge.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY a copy of the foregoing has been furnished to Assistant Attorney General Barbara Yates, by delivery to The Capitol, Plaza Level, Tallahassee, Florida, and a copy has been mailed to appellant, **JOHN LOVEMAN REESE**, #123069, Union Correctional Institution, Post Office Box 221, Raiford, Florida 32083, on this ____ day of November, 1997.

Nada M. Carey

IN THE SUPREME COURT OF FLORIDA

JOHN LOVEMAN REESE,
Appellant,

v.

CASE NO. 91,411

STATE OF FLORIDA,
Appellee.

_____ /

INITIAL BRIEF OF APPELLANT

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IN THE SUPREME COURT OF FLORIDA

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CASE NO. 91,411

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_____ /

**APPENDIX FOR
INITIAL BRIEF OF APPELLANT**

APPENDIX

DOCUMENT

- A Reese v. State, Case No. 82,119 (March 20, 1997)
- B Defendant's Memorandum in Support of Life Sentence
- C State's Memorandum in Support of Death Sentence
- D Addendum to Sentencing Order
- E Order Pursuant to Mandate