

IN THE SUPREME COURT OF FLORIDA

JOHN LOVEMAN REESE,

Appellant,

CASE NO. 91,411

v.

STATE OF FLORIDA,

Appellee.

_____ /

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

SUPPLEMENTAL
ANSWER BRIEF OF APPELLEE

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FLORIDA STATUTES

§921.141(5)(i), Florida Statutes (1991) 29

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STATEMENT OF THE CASE AND FACTS

On January 23, 1992, Reese killed his former girlfriend's best friend. The state charged Reese with first-degree murder, sexual battery, and burglary, and the jury convicted him as charged. At the penalty phase the jury recommended that he be sentenced to death, which the trial court did.

On appeal this Court stated the facts as follows:

Reese was charged with first-degree murder, sexual battery with great force, burglary with assault, and armed kidnapping for the rape and strangulation of Sharlene Austin on January 28 or 29, 1992. The kidnapping charge was dropped before trial, and Reese was found guilty of all remaining counts. He was sentenced to death following a jury recommendation of eight to four.

The evidence presented at trial reveals that 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 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 was indicted on May 14, 1992, and tried March 22-25, 1993. He 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.

At the penalty phase, the state presented no additional evidence; Reese called several family members, former teachers, and a psychologist. The jury recommended the death penalty by a vote of eight to four. The judge found three aggravators: cold, calculated, and premeditated ("CCP"); heinous, atrocious, or cruel ("HAC"); and committed in the course of a sexual battery and a burglary. He found one nonstatutory mitigator -- no significant criminal history -- but found that the mitigator, along with other proposed nonstatutory mitigation, was of minimal or no value. He accepted the jury's recommendation and imposed the death penalty.

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

Reese raised nine issues on direct appeal, three as to guilt and six as to the death sentence. This Court found no reversible error on the three guilt-phase issues. Id. at 684. Turning to the

sentencing issues, this Court found any instructional error on the cold, calculated, and premeditated (CCP) aggravator harmless because the facts supported the jury's instruction on and the trial court's finding of the CCP aggravator. Id. This Court also found no merit to Reese's claim that death was a disproportionate sentence because this was a domestic killing. Id. at 685. Likewise, no merit was found in the claims about the prosecutor's penalty-phase argument and that the heinous, atrocious, or cruel (HAC) instruction was unconstitutional. Id.

As to the remaining issue raised on direct appeal, this Court stated: "The sentencing order in this case contains inadequate discussion of the mitigation offered. We therefore remand to the trial court for the entry of a new sentencing order expressly discussing and weighing the evidence offered in mitigation." Id. at 684. In closing its opinion this Court reiterated the scope of the remand and set a time limit for that remand: "Accordingly, we affirm the judgment of conviction. We remand to the trial court, however, for the entry of a new sentencing order expressly weighing all mitigating evidence presented. The sentencing order shall be entered within thirty days of the issuance of this opinion." Id. at 685. The opinion issued on March 20, 1997. Id. at 678.

After the jury made its recommendation, Reese filed a sentencing memorandum on June 24, 1993, listing twenty-six proposed

nonstatutory mitigators. (II 368).¹ The state did not file a sentencing memorandum at that time. After this Court's remand, however, the state filed a sentencing memorandum on March 31, 1997. (SI 12).²

On April 17, 1997, the trial judge issued an "Addendum to Sentencing Order." (SI 24). The judge reaffirmed the finding of three aggravators and no statutory mitigators in the original order. (SI 24). He then discussed the proposed nonstatutory mitigation. (SI 24-29). Finally, the judge concluded: "For those mitigators above which have been found to be established by the greater weight of the evidence, the Court finds that they are of insufficient weight to counterbalance the aggravating facts proven in this case." (SI 29).

Reese's trial counsel moved to strike the addendum and asked for its withdrawal on April 25, 1997. (SI 30-31). Counsel argued in that motion that the trial court had no jurisdiction to rewrite the sentencing order until this Court's opinion was final and its mandate had issued. (SI 31). The trial court denied the motion, stating:

The directive and instruction of the Florida Supreme Court was clear, that the new sentencing order would be entered within

¹ "II 368" refers to page 368 of volume II of the record in Reese's first appeal, case no. 82,119.

² "SI 12" refers to page 12 of the single volume of record produced on the first remand, which the clerk of the circuit court designated as "Appeal No. 82,119 (supplemental Volume I)."

thirty days of the date the Supreme Court opinion was issued. It is clear from the language chosen by the Supreme Court that the thirty days began on March 20, 1997, not thirty days from the issuance of a mandate. Had the Supreme Court intended that, they would have required, using more common language, that the trial court enter its order within thirty days of the opinion becoming final. It is clear from the wording chosen by the Supreme Court that it was their intent that they relinquished jurisdiction to this Court for the entry of a new sentencing order prior to their entry of a final order in this case.

(SI 32-33, emphasis in original).

On May 27, 1997, this Court denied Reese's motion for rehearing. (SI 33A). Six weeks later, the Department of Corrections wrote to the clerk of the circuit court, inquiring if the trial court had rewritten the sentencing order. (SI 34). The trial court then entered an "Order Pursuant to Mandate" adopting, reaffirming, and reentering the addendum dated April 17. (SI 35-36). Reese's trial counsel objected to that order, complaining for the first time that the trial "Court did not schedule the Defendant's case for a review in open court nor did the Court provide an opportunity for the defense to be heard with regard to the new sentencing order." (SI 38).

On appeal this Court acknowledged the confusion engendered by its 1997 opinion and, finding that it could not adequately review the case, remanded yet again. Reese v. State, 728 So.2d 727 (Fla. 1999). In doing so, it included the following specific directions on the resentencing:

On remand, the court is to conduct a new hearing, giving both parties an opportunity to present argument and submit sentencing memoranda before determining an appropriate sentence. No new evidence shall be introduced at the hearing. See *Crump v. State*, 654 So.2d 545, 548 (Fla. 1995) ("[A] reweighing does not entitle the defendant to present new evidence."). After the hearing is concluded, the trial judge is instructed to submit a revised sentencing order explicitly weighing the mitigating circumstances consistent with *Campbell*. The order shall be submitted within 120 days of the issuance of this opinion.

Id. at 728.

Pursuant to this directive, the trial court issued an order on March 2, 1999 setting a resentencing hearing for April 28, 1999 and directing both sides to file sentencing memoranda by April 1, 1999. (SII 6).³ The court also issued an order to transport Reese to the April 28 hearing. (SII 8). At defense counsel's request the court extended the time for filing the sentencing memoranda to April 23, 1999. (SII 10). Thereafter, the state filed its memorandum on April 19, and the defense filed its on April 23. (SII 12, 24).

The trial court listened to the parties' argument on their respective positions at the April 28 hearing. (SII 75-112). The court directed that the proceedings be transcribed and announced that, when the court was ready to release its order, the parties, including Reese, would reconvene. (SII 115). In open court on

³ "SII 6" refers to page 6 of volume II of the supplemental record produced on the second remand.

June 16, 1999 the trial court read its order and resented Reese to death. (SII 122-52).

SUMMARY OF ARGUMENT

ISSUE I.

The trial court fully considered Reese's proposed mitigating evidence. Reese has demonstrated no reversible error, and the sentencing order should be affirmed.

ISSUE II.

As this Court held in its 1997 opinion, the trial court properly found this murder to have been committed in a cold, calculated, and premeditated manner with no pretense of moral or legal justification.

ISSUE III.

As this Court held in its 1997 opinion, this is not a "domestic relationship" case and Reese's death sentence is proportionate.

ARGUMENT

ISSUE I

WHETHER THE TRIAL COURT PROPERLY
CONSIDERED THE PROPOSED MITIGATING
EVIDENCE.

At this Court's direction, the trial court rewrote its sentencing order and, in doing so, greatly expanded its analysis of Reese's proposed mitigating evidence. Reese acknowledges this, but complains that the court should have found that all of his proposed mitigators had been established and should have given those mitigators more weight against the aggravators. There is no merit to this claim.

A. Standard of Review

In Rogers v. State, 511 So.2d 526 (Fla. 1987), cert. denied, 484 U.S. 1020 (1988), this Court set out the manner in which trial courts should address proposed mitigating evidence. Pursuant to Rogers a trial court must "consider whether the facts alleged in mitigation are supported by the evidence[,]. . . must determine whether the established facts are of a kind capable of mitigating the defendant's punishment[, and] . . . must determine whether they are of sufficient weight to counterbalance the aggravating factors." Id. at 534. Whether the greater weight of the evidence establishes a proposed mitigator "is a question of fact." Campbell v. State, 571 So.2d 415, 419 n.5 (Fla. 1990); Lucas v. State, 613 So.2d 408 (Fla. 1992), cert. denied, 510 U.S. 845 (1993). A trial court has broad discretion in determining whether mitigators apply,

and the decision on whether the facts establish a particular mitigator will not be reversed because this Court or an appellant reaches a contrary conclusion absent a palpable abuse of discretion. Banks v. State, 700 So.2d 363 (Fla. 1997), cert. denied, 118 S.Ct. 1314 (1998); James v. State, 695 So.2d 1229 (Fla.), cert. denied, 118 S.Ct. 569 (1997); Foster v. State, 679 So.2d 747 (Fla. 1996), cert. denied, 117 S.Ct. 1259 (1997); Pietri v. State, 644 So.2d 1347 (Fla. 1994), cert. denied, 515 U.S. 147 (1995); Wyatt v. State, 641 So.2d 355 (Fla. 1994), cert. denied, 514 U.S. 1023 (1995); Arbelaez v. State, 626 So.2d 169 (Fla. 1993), cert. denied, 511 U.S. 1115 (1994); Preston v. State, 607 So.2d 604 (Fla. 1992), cert. denied, 507 U.S. 999 (1993); Sireci v. State, 587 So.2d 450 (Fla. 1991), cert. denied, 503 U.S. 946 (1992). A trial court's finding that the facts do not establish a mitigator "will be presumed correct and upheld on review if supported by 'sufficient competent evidence in the record.'" Campbell, 571 So.2d at 419 n.5 (quoting Brown v. Wainwright, 392 So.2d 1327, 1331 (Fla. 1991)); Banks; Spencer v. State, 691 So.2d 1062 (Fla. 1996), cert. denied, 118 S.Ct. 213 (1997); Consalvo v. State, 697 So.2d 805 (Fla. 1996), cert. denied, 118 S.Ct. 1681 (1998); Duncan v. State, 619 So.2d 279 (Fla.), cert. denied, 510 U.S. 969 (1993); Johnson v. State, 608 So.2d 4 (Fla. 1992), cert. denied, 508 U.S. 919 (1993); Ponticelli v. State, 593 So.2d 483 (Fla. 1991), aff'd on remand, 618 So.2d 154 (Fla.), cert. denied, 510 U.S. 935 (1993). Resolving conflicts in the evidence is the trial court's duty, and

its decision is final if supported by competent substantial evidence. Parker v. State, 641 So.2d 369 (Fla. 1994), cert. denied, 513 U.S. 1131 (1995); Johnson; Sireci; Gunsby v. State, 574 So.2d 1085 (Fla.), cert. denied, 502 U.S. 843 (1991). As this Court has long held, "the weight to be given a mitigator is left to the trial judge's discretion." Mann v. State, 603 So.2d 1141, 1144 (Fla. 1992); Robinson v. State, 24 Fla. Law Weekly S393 (Fla. August 19, 1999); Hill v. State, 727 So.2d 198 (Fla. 1998); Alston v. State, 723 So.2d 148 (Fla. 1998); Spencer; Kilgore v. State, 688 So.2d 895 (Fla. 1996), cert. denied, 118 S.Ct. 103 (1997); Bonifay v. State, 680 So.2d 413 (Fla. 1996); Windom v. State, 656 So.2d 432 (Fla.), cert. denied, 516 U.S. 1012 (1995); Campbell; Swafford v. State, 533 So.2d 270 (Fla. 1988), cert. denied, 489 U.S. 1100 (1989).

Reese lists several of the nonstatutory mitigators he proposed in his sentencing memorandum and complains that the trial court erred in not finding they had been established and/or in not assigning more weight to them. The trial court, however, followed the dictates of Rogers and Campbell in considering the proposed nonstatutory mitigation. Cf. Barwick v. State, 660 So.2d 685 (Fla. 1995), cert. denied, 516 U.S. 1097 (1996); Armstrong v. State, 642 So.2d 730 (Fla. 1994), cert. denied, 514 U.S. 1085 (1995); Peterka v. State, 640 So.2d 59 (Fla. 1994), cert. denied, 513 U.S. 1129 (1995); Atwater v. State, 626 So.2d 1325 (Fla. 1993), cert. denied, 511 U.S. 1046 (1994); Tompkins v. State, 502 So.2d 415 (Fla. 1986),

cert. denied, 483 U.S. 1033 (1987). As is readily apparent, no reversible error occurred.

B. Mental Impairment

The trial court made the following findings as to statutory and nonstatutory mental mitigation:

VI. The defendant was under the influence of an extreme emotional disturbance at the time of the murder.

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 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]ts 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 offenses. Accordingly, the Court finds that the evidence fails to support this factor and the Court assigns it no weight.

(SII 63-64). Reese argues that the court's rejection of the proposed mental mitigation is not supported by competent substantial evidence and that Krop's testimony "was uncontradicted, unrebutted, and supported by other evidence." (Initial brief at 38-45). Contrary to this argument, however, the record supports the trial court's findings and its assessment of Krop's testimony.

Reese complains about the trial court's comments that he calmly planned to kill the victim while waiting for her to return home and then fall asleep and that the court mentioned his lack of a mental illness or personality disorder in finding that he made a conscious decision to kill the victim. (Initial brief at 38-39). As the trial court found and this Court affirmed, however, the CCP aggravator was established on the facts of this case. Reese, 694 So.2d at 684. The record supports the court's statements, and there is no merit to Reese's complaints.

The same is true of the trial court's comments about Dr. Krop's testimony. On direct examination Krop stated that he interviewed Reese on December 16, 1992, and May 5, 1993 (XV 1202),

well after Reese committed this murder. He stated that Reese had no major mental illness or personality disorder. (XV 1205). After talking about Reese's background, Krop concluded that Reese's "mental state was seriously impaired at the time of the offense." (XV 1217). However, Krop also testified that Reese's impulse control was generally good. (XV 1219).

On cross-examination Krop stated that Reese was not insane and knew right from wrong. (XV 1225). Krop relied on Reese's "perception or his reports of what happened and his report, perception of his own history and background." (XV 1230). He then stated: "It's not up to me to determine the facts." (XV 1230). Krop agreed that Reese was of average intelligence and had no brain damage. (XV 1247). He also agreed that the facts were consistent with Reese having made a conscious decision to break into the victim's home, rape, and then kill her. (XV 1247-48).

On redirect examination Krop stated that "the facts are certainly consistent with the way Mr. Reese presented them." (XV 1255). When asked how Reese's early life and experiences affected his actions, Krop, despite his earlier-stated opinion that Reese's background made him commit these crimes, stated that "from Mr. Reese's own explanation, nothing caused Mr. Reese to kill this woman." (XV 1257). Krop then stated that Reese was not trying to avoid responsibility for his actions. (XV 1258). Shortly thereafter, however, Krop stated: "But that does not mean that he has accepted responsibility for what has happened." (XV 1261).

Krop's testimony was internally inconsistent in many respects. As this Court has acknowledged many times, the finder of fact can reject self-serving statements. See Wuornos v. State, 644 So.2d 1000, 1008 (Fla. 1994), cert. denied, 514 U.S. 1069 (1995); Walls v. State, 641 So.2d 381, 387 (Fla. 1994), cert. denied, 513 U.S. 1130 (1995); Pardo v. State, 563 So.2d 77, 80 (Fla. 1990), cert. denied, 500 U.S. 928 (1991); Bertolotti v. State, 534 So.2d 386, 387 (Fla. 1988); Burch v. State, 478 So.2d 1050, 1051 (Fla. 1985); Cirak v. State, 201 So.2d 706, 709-10 (Fla. 1967). Also, even expert opinion testimony may be rejected when, as here, that testimony is contrary to or inconsistent with the facts. Walls; Whitfield v. State, 706 So.2d 1 (Fla. 1997), cert. denied, 119 S.Ct. 103 (1998); Gudinas v. State, 693 So.2d 953 (Fla.), cert. denied, 118 S.Ct. 345 (1998); Foster v. State, 679 So.2d 747 (Fla. 1996), cert. denied, 117 S.Ct. 1259 (1997); Farr v. State, 656 So.2d 448 (Fla. 1995); Ramirez v. State, 651 So.2d 1164 (Fla. 1995); Wuornos.

The record supports the trial court's rejection of Reese's proposed mental mitigation, and Reese has demonstrated no reversible error. See Whitfield; Pooler v. State, 704 So.2d 1375 (Fla. 1997); Gudinas; Foster. Even if this Court were to decide that the trial court should have found that nonstatutory mental mitigation existed and that it should have been given some weight, any error is harmless. This is not a case such as Nibert v. State, 574 So.2d 1059 (Fla. 1990), where the mental mitigation was

overwhelming. Even if mental mitigation had been established in this case, it would not outweigh the three strong aggravators. Any error, therefore, was harmless. Thomas v. State, 693 So.2d 951 (Fla.), cert. denied, 118 S.Ct. 449 (1997); Lawrence v. State, 698 So.2d 1219 (Fla. 1997), cert. denied, 118 S.Ct. 863 (1998); Barwick; Wuornos; Armstrong.

C. Possessive Relationship with Grier

The trial court made the following findings in regards to this proposed mitigator:

V. Possessive relationship with Jackie Grier

The defendant contends that the Court overlooked the evidence that this murder was caused by the defendant's "possessiveness, jealousy, and fear of losing Jackie Grier," as allegedly established by Dr. Krop's "unrebutted testimony." The defendant cites to a number of the Supreme Court of Florida's "domestic violence/heat of passion" related crimes in support of this claimed factor. Apparently, the defendant has overlooked the fact that the Supreme Court of Florida, in *this case*, has previously expressed its disagreement with the defendant's attempt to equate the actual facts of this case with the facts found in its "domestic relationship/heat of passion" cases. Reese v. State, 694 So.2d 678, 685 (Fla. 1997).

The defendant has also overlooked Justice Wells' citation, in his concurring opinion, to Foster v. State, 679 So.2d 747, 755 (Fla. 1996), in which the Court said, "Even uncontroverted opinion testimony can be rejected, especially when it is hard to reconcile with the other evidence in the case." 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.

(SII 61-63). Reese claims that these findings are erroneous because his expert's testimony was "unrebutted, uncontradicted, unequivocal." (Initial brief at 45). The expert's testimony, however, was inconsistent and unreconcilable with other testimony.

Krop testified that Reese was insecure, that he felt inadequate, and that he was sensitive to rejection. (XV 1214). Krop blamed Reese's violent activities on "[n]ot only because of what he felt was happening in his relationship with Ms. Grier, but basically, what happened to him throughout his life." (XV 1215). Krop also found, however, that Reese's impulse control was

generally good (XV 1219) and acknowledged that Reese's killing the victim could be consistent with a conscious decision. (XV 1247-48). Grier testified that the victim never interfered with her relationship with Reese (XII 618, 656) and that Reese did not like the victim. (XII 618). She also testified that Reese was violent. (XII 703; XIII 1002). As this Court held on direct appeal, the facts of this murder supported finding CCP in aggravation.⁴ Reese, 694 So.2d at 684. This undercuts any argument that the murder was the result of an uncontrollable obsession that caused Reese to act impulsively.

The record supports the trial court's findings. Reese has demonstrated no abuse of discretion in the finding that this proposed mitigator was "of very minimal weight," and the trial court's finding should be affirmed.

D. Childhood Trauma

The trial court made the following findings as to Reese's proposed mitigator regarding his childhood:

II. Childhood trauma.

The defendant claims that the Court should assign significant weight to the fact that the defendant found his adoptive mother stabbed to death by his mentally ill father when he was seven years old, that he never saw his adoptive father again, and that he lived

⁴ The cases cited by Reese (initial brief at 48) are "domestic" cases and are, therefore, distinguishable from the instant case. As noted by the trial court, this Court rejected Reese's claim that this is a "domestic relationship" case. Reese, 694 So.2d at 685.

for the next seven years with an uncle who "beat him," isolated him from family and friends, and provided no emotional nurturing.

The evidence showed that the defendant was born in Virginia and was adopted at birth by Calvester Reese and John Reese, Sr. For the first seven years of the defendant's life, he was raised in a caring and nurturing environment. When the defendant was seven years of age, John Reese, Sr. suffered a mental breakdown and stabbed Calvester to death. The defendant came downstairs one morning and discovered Calvester's body on the kitchen floor. The defendant's relatives told the defendant that he was adopted and that Calvester was not his natural mother. John Reese, Sr. was sent to a mental hospital and eventually died soon after being released from the mental hospital. The defendant did not go to visit John Reese, Sr. while he was in the hospital; however, the defendant testified that they would send each other letters.

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.

(SII 59-61).

Reese complains that the trial court should have given this nonstatutory mitigator more weight and that the court improperly substituted its own view for that of the mental health expert, (initial brief at 54-56), but there is no merit to his complaint. The trial court considered all of the evidence presented about Reese's earlier years and, as it was entitled to do, found it worth little weight. Reese has shown no abuse of discretion in the weight assigned by the trial court. Shellito v. State, 701 So.2d 837 (Fla. 1997), cert. denied, 118 S.Ct. 1537 (1998); Banks; Mungin

v. State, 689 So.2d 1026 (Fla. 1995); Williamson v. State, 681 So.2d 688 (Fla. 1996); Bonifay. The court's findings should be affirmed.⁵

E. Good Record in Jail/Adaptability to Prison Life

The trial court made the following findings as to this proposed mitigator:

I. Good record in jail/Adaptability to prison life.

The defendant presented the testimony of a custodian of records of the Duval County Jail that the defendant had not had any disciplinary reports filed against him while he was in the jail. The defendant also presented the testimony of his mental health expert, Dr. Harry Krop, that although he could not absolutely say that the defendant was amenable to prison life, it was his opinion that the defendant was amenable to prison life because the defendant had no significant criminal 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

⁵ Reese's reliance on Alamo Rent-A-Car v. Phillips, 613 So.2d 56 (Fla. 1st DCA 1992), is misplaced. Alamo is a workers' compensation case in which the judge of compensation claims (JCC) rejected the opinion of the employer's expert based on the JCC's "impermissible reliance of his personal experience." Id. at 58. The district court concluded "that the collective statements of the JCC with respect the e/c's expert witness reflect a personal bias" and "a negative bias" that was unwarranted. Id.

Here, on the other hand, the court's comments were a recognition of the facts of this case. Reese assumes that an expert's testimony is sacrosanct, but such is not true, as acknowledged by this Court in Walls and Wuornos and other cases. Reese has failed to show that his trial court was other than impartial and unbiased. See Correll v. State, 698 So.2d 522 (Fla. 1997).

type of personality, and that the defendant committed the instant murder because, "He was scared, frustrated, and all the anger and all the frustrations 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 establishes that when the defendant is confronted with stressful situations over which he feels he has no control, he will act in a hostile and violent manner. Further, the evidence showed 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. As to the defendant's good jail behavior, the Court assigns that factor minimal weight.

(SII 58-59). Reese complains that these findings "are legally and factually erroneous." (Initial brief at 58). He has not, however, demonstrated any abuse of discretion in the trial court's finding this proposed mitigator, if established at all, to be worth minimal weight. Even if this Court were to decide that the trial court erred in its consideration of this proposed nonstatutory mitigator,

that error would be harmless in light of the three strong aggravators (felony murder, HAC, and CCP) and the negligible nature of this mitigation. Banks; Thomas; Lawrence; Barwick; Wuornos; Armstrong; Peterka.

F. Emotional Immaturity

The trial court made the following findings regarding this proposed nonstatutory mitigator:

VII. Emotional immaturity.

The defendant claims, "The evidence of Reese's emotional inadequacies was uncontroverted." 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.

(SII 64). Reese's argument that these findings are erroneous relies yet again on Krop's testimony. It ignores, however, the fact that Krop testified that Reese had no major mental illness or personality disorder (XV 1205), that his impulse control was generally good (XV 1219), that he was not insane and knew right from wrong (XV 1225), that his murdering the victim was consistent with a conscious decision (XV 1247-48), and that "nothing" in his past life "caused Mr. Reese to kill this woman." (XV 1257). The

record supports the trial court's giving this proposed mitigator⁶ little weight. Reese has shown no abuse of discretion, and the trial court's finding should be affirmed.

G. Drug and Alcohol Dependency

In his most recent sentencing memorandum Reese stated: "This Court's previous sentencing 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 failure to consider this evidence would be error." (SII 40). The trial court made the following findings as to this proposed nonstatutory mitigator:

VIII. Drug and alcohol dependency.

The Court finds the defendant's trial testimony that he used crack while waiting inside of the victim's home to be contrary to the evidence of his actions, and therefore, self-serving and unworthy of belief. Further, the only potential corroboration of the defendant's assertion regarding drug use, not dependency, was Jackie Grier's testimony on cross-examination, which *may* suggest that the defendant had begun to use drugs toward the end of their relationship.

The Court finds that the totality of the facts of this case show that the use of drugs or alcohol did not result in the defendant's commission of the rape and murder, nor do the facts establish an ongoing drug or alcohol *dependency*. Accordingly, the Court finds that the fact that the defendant may have been using alcohol or drugs around the time frame

⁶ As set out in n.5, supra, Reese's reliance on Alamo Rent-A-Car v. Phillips is misplaced.

of this rape and murder is entitled to only minimal weight.

(SII 64). Again relying on Krop's testimony, Reese argues that the trial court improperly substituted its personal opinion for that of the expert. (Initial brief at 63). The record, however, supports the court's findings.

As stated earlier, self-serving statements can be rejected by the finder of fact, Wuornos; Walls; Pardo; Bertolotti; Burch; Cirak, and an expert's opinion based on self-serving statements can be rejected when contrary to or inconsistent with the facts. Walls; Whitfield; Gudinas; Farr; Ramirez; Wuornos; see also Tompkins v. Moore, no. 98-3367, slip op. At 23 (11th cir. October 29, 1999) ("The opinion of a medical expert that a defendant was intoxicated with alcohol or drugs at the time of a capital offense is unreliable and of little use as mitigating circumstances evidence when it is predicated solely upon the defendant's own self-serving statements, especially when other evidence is inconsistent with those statements") (footnote omitted). The only evidence of any drug use by Reese came from what he, himself, told Krop; he introduced no corroborating evidence. The facts of this case, as acknowledged by this Court, Reese, 694 So.2d at 684, support the CCP aggravator and the court's giving this mitigator only minimal weight. Brown v. State, 721 So.2d 274 (Fla. 1998);

Banks.⁷ Reese has demonstrated no abuse of discretion in the trial court's consideration of this nonstatutory mitigator.

H. The trial court properly evaluated the proposed mitigators

The trial court fully, independently, and conscientiously considered Reese's proposed mitigating evidence. The record supports the trial court's findings, and Reese has demonstrated no abuse of discretion. If any error occurred, it was harmless. This Court, therefore, should affirm the trial court's findings.

⁷ As stated earlier, n.5, Reese's reliance on Alamo Rent-A-Car v. Phillips is misplaced.

ISSUE II

WHETHER ANY ERROR OCCURRED IN THE
TRIAL COURT'S FINDING AND
INSTRUCTING THE JURY ON THE CCP
AGGRAVATOR.

As Reese admits, this Court affirmed the trial court's finding the CCP aggravator, and held that any instructional error on that aggravator was harmless, in the original appeal of this cause. Reese, 694 So.2d at 684. In his June 1999 sentencing order, the trial judge rewrote the findings on both the aggravators and mitigators. Now, Reese claims that this Court's prior holding is of no effect and that the propriety of the CCP aggravator must be considered again.⁸ There is no merit to this claim, and it should be denied.

The original sentencing order contained the following findings as to CCP:

3. This murder was committed in a cold, calculated, and premeditated manner, without any pretense of moral or legal justification. Even by his own statements, the Defendant's attack upon the victim was motivated by his belief that she had come between him and his girlfriend. Ironically, the girlfriend testified that she had broken up with him because he was abusive; he beat her, he settled disagreements by committing sexual battery upon her, and he did not contribute to their mutual support when he stayed in her home. Blaming the victim rather than himself, the Defendant broke into the victim's home,

⁸ Reese makes no complaint, again, about the other aggravators found by the trial court even though the findings regarding them were rewritten, and the court's finding those aggravators should be affirmed.

hid himself, and lay in wait for a substantial period of time for the victim to come home from work, undress, lie down, and eventually fall asleep before commencing his attack. He had an extremely long time to ponder and reflect upon his decision. His motivation to kill her, in order to have persisted through so long a period of hours in which to contemplate his crime, had to have achieved a heightened level of premeditation, above that necessary merely to commit murder in the first-degree. His only moral justification : "She took my girlfriend."

(II 383-84). The court stated its findings in the current order as follows:

III. The capital felony was a homicide and was committed in a cold, calculated, and premeditated manner without any pretense of moral or legal justification. Section 921.141(5)(I), Florida Statutes (1991).

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 in to 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 Jacker 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.

(SII 56-57).

Even a cursory comparison of these two paragraphs reveals that there is no substantive difference between them. Nothing of substance has been added or subtracted; no different facts were relied on. Instead, the differences between the two consist of minor, superficial wording changes. This Court's upholding the CCP aggravator on the first appeal is the law of the case, and this issue should not be revisited. Robinson; Spencer; Farr v. State, 621 So.2d 1368 (Fla. 1993); Waterhouse v. State, 596 So.2d 1008 (Fla.), cert. denied, 506 U.S. 957 (1992); Magill v. State, 428 So.2d 649 (Fla.), cert. denied, 464 U.S. 865 (1983); Menendez v. State, 419 So.2d 312 (Fla. 1982).

Even if this Court decides to revisit this issue, the facts still support the trial court's finding that the CCP aggravator has been established. Reese waited in the victim's house for hours. When she arrived home from work, however, he did not attempt to talk with her as he claimed he wanted to do. Instead, he stayed

hidden for several more hours until she fell asleep. Then, he attacked her from behind, beat her, choked her into submission, raped her, and strangled her with an extension cord. (XIII 979-81). He answered affirmatively both when Detective Hinson asked if he decided, while he waited in the house, to hurt the victim (XIII 920) and when Detective Thowart asked if this was when he decided to kill her. (XIII 881).

It is obvious that this was not a spur-of-the-moment killing. By his own statements Reese showed that he planned to kill the victim. This Court has upheld the CCP aggravator where the perpetrator had only twenty minutes for reflection. Asay v. State, 580 So.2d 610 (Fla.), cert. denied, 502 U.S. 895 (1991). Here, Reese had hours to reflect on what he planned to do. He had plenty of time to reconsider and leave the victim's home, but, instead, stayed and carried out a violent, unprovoked attack on her. See Jackson v. State, 522 So.2d 802 (Fla.), cert. denied, 488 U.S. 871 (1988).

Reese claimed that he did not really intend to hurt the victim, but the jury and judge were entitled to reject that self-serving claim as contrary to the facts. E.g., Wuornos; Walls. Reese subdued the victim by choking her and committed a brutal rape on her. Then he took an extension cord, doubled it, wrapped it around her neck twice, put the ends through the loop, and strangled her. (XII 760). The time Reese had to plan and reflect on this killing, coupled with the ruthless manner in which he committed it,

demonstrate that Reese murdered the victim in a cold, calculated, and premeditated manner. No pretense of moral or legal justification exists.

The cases that Reese relies on to support his claim that this was a domestic killing that arose from an intensely emotional domestic dispute (initial brief at 74-76) are distinguishable. In Santos v. State, 591 So.2d 160 (Fla. 1991), Richardson v. State, 604 So.2d 1107 (Fla. 1992), Douglas v. State, 575 So.2d 165 (Fla. 1991), and Spencer v. State, 645 So.2d 377 (Fla. 1994), for example, the defendants killed wives or girlfriends with whom they had tormented domestic relationships. In these cases the facts surrounding the fatal disputes and/or the presence of the statutory mental mitigators or extensive drug and alcohol abuse negated the defendant's formation of the requisite intent for CCP. If Reese had killed Grier, he might have a better argument in this regard. The victim, however, was a mere acquaintance who, Grier testified, never interfered with her relationship with Reese. (XII 618). Reese's mitigating evidence does not preclude the finding of this aggravator.

The just-cited cases are further distinguished by this Court's recognition that this was not a domestic killing: "This case does not encompass a domestic relationship as we have used the term in the past: Reese and Grier were, arguably, in a domestic relationship, yet Austin was the victim." Reese, 694 So.2d at 685 (emphasis in original). This Court stated further: "Even if [this

case] were to fall within that class of cases, however, we have made it clear that the death penalty can still be appropriate." Id.

Rather than a crime of passion or one caused by a loss of emotional control, the facts demonstrate the coldness, calculation, and heightened premeditation needed to support the CCP aggravator and the total lack of any moral or legal justification. Where there is a legal basis for finding an aggravator this Court will not substitute its judgment for that of the trial court. Occhicone v. State, 570 So.2d 902 (Fla. 1990), cert. denied, 500 U.S. 938 (1991). Therefore, this Court should affirm the trial court's finding CCP in aggravation.

ISSUE III

WHETHER REESE'S DEATH SENTENCE IS PROPORTIONATE.

Reese argues that the instant murder is similar to murders that "resulted from violent emotion in the context of a tormented domestic relationship." (Initial brief at 78). Contrary to Reese's claims, however, this is not a domestic case, Reese, 694 So.2d at 685, and there is no merit to this issue.

In a proportionality review this Court must "consider the totality of circumstances in a case" and "compare it with other capital cases." Porter v. State, 564 So.2d 1060, 1064 (Fla. 1990), cert. denied, 498 U.S. 1110 (1991). The cases that Reese relies

on, however, are factually distinguishable from the instant case and, therefore, not suitable for a proportionality review.

This Court has found the death sentence disproportionate in cases where defendants killed their wives, girlfriends, children, or other family members. E.g., White v. State, 616 So.2d 21 (Fla. 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). These cases uniformly involve heated or longstanding disputes between people who were living or had lived as a family unit. In many of such cases this Court struck one or more aggravators found by the trial court (e.g., White; Farinas), only a single aggravator existed (e.g., Penn; Ross; Blair), and/or considerable mitigation, especially mental mitigation, existed (e.g., White). This Court has also reduced the death sentence in "domestic" cases where the trial court overrode the jury's recommendation of life imprisonment. E.g., Douglas v. State, 575 So.2d 165 (Fla. 1991); Fead v. State, 512 So.2d 176 (Fla.1987); 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.1 976); Halliwell v. State, 323 So.2d 557 (Fla. 1975); Tedder v. State, 322 So.2d 908 (Fla. 1975).

As recognized in the original opinion in this case, if Reese had killed Grier, his basic premise, i.e., that this was a domestic murder, might be correct. Here, however, Reese killed a virtual stranger. Thus, this killing is much closer to the killings in Occhicone v. State, 570 So.2d 902 (Fla. 1990) (killed former girlfriend's parents), cert. denied, 500 U.S. 938 (1991); Hudson v. State, 538 So.2d 829 (Fla.) (killed former girlfriend's roommate), cert. denied, 493 U.S. 875 (1989), and Turner v. State, 530 So.2d 45 (Fla. 1987) (killed estranged wife's roommate), cert. denied, 489 U.S. 1040 (1989). Moreover, all three aggravators found by the trial court should be affirmed. Reese does not challenge the court's finding committed during a burglary and sexual battery and HAC in aggravation, and the facts support those aggravators. As the state demonstrated in issue II, supra, the CCP aggravator is also supported on this record. Also, as the state showed in issue I, supra, the trial court properly considered the proposed mitigating evidence and correctly found it insufficient when weighed against the aggravators. Finally, the override cases are inapposite because Reese's jury recommended that he be sentenced to death. E.g., Williams v. State, 437 So.2d 133 (Fla. 1983), cert. denied, 466 U.S. 909 (1984).

The CCP and HAC aggravators are two of the strongest aggravators. See Fitzpatrick v. State, 527 So.2d 809 (Fla. 1988). The presence of both in this case further distinguishes it from the cases relied on by Reese. This murder is comparable to other

murders committed during a burglary, many with much more mitigation than is present in this case. E.g., Blanco v. State, 706 So.2d 7 (Fla. 1997), cert. denied, 119 S.Ct. 96 (1998); Johnson v. State, 660 So.2d 637 (Fla. 1995), cert. denied, 517 U.S. 1159 (1996); Griffin v. State, 639 So.2d 966 (Fla. 1994), cert. denied, 514 U.S. 1005 (1995); Hudson. Death has also been held to be the appropriate sentence for strangulation murders, even with considerable mitigation. E.g., Adams v. State, 412 So.2d 850 (Fla.) (age, no significant criminal history, and both mental mitigators did not outweigh three aggravators), cert. denied, 459 U.S. 882 (1982). Even if this Court were to strike one of the aggravators death would still be appropriate when compared with double aggravator cases that had more in mitigation than the instant case. E.g., Davis v. State, 648 So.2d 107 (Fla. 1994), cert. denied, 516 U.S. 827 (1995); Smith v. State, 641 So.2d 1319 (Fla. 1994), cert. denied, 513 U.S. 1161 (1995). Although Reese ignores them, there are also true domestic cases where this Court found the death sentence appropriate. E.g., Robinson; Pooler; Spencer; Henry v. State, 649 So.2d 1366 (Fla. 1994), cert. denied, 516 U.S. 830 (1995); Arbelaez v. State, 626 So.2d 169 (Fla. 1993), cert. denied, 511 U.S. 1115 (1994); Duncan v. State, 619 So.2d 279 (Fla.), cert. denied, 510 U.S. 969 (1993); Porter v. State, 564 So.2d 1060 (Fla. 1990), cert. denied, 498 U.S. 1110 (1991); Tompkins v. State, 502 So.2d 415 (Fla. 1986), cert. denied, 483 U.S. 1033 (1987); Lemon v. State, 456 So.2d 885 (Fla. 1984), cert.

denied, 496 U.S. 1230 (1985); Williams v. State, 437 So.2d 133 (Fla. 1983).

This was a cold-blooded, unprovoked attack committed in the victim's home. Contrary to Reese's claim, it is one of the most aggravated and least mitigated of murders. When compared with other cases, it is obvious that Reese's death sentence is both proportionate and appropriate and should be affirmed.

CONCLUSION

Reese has failed to show reversible error in the trial court's findings regarding his proposed mitigation, and those findings should be affirmed. The trial court properly weighed the aggravators and mitigators, and Reese's death sentence should also be affirmed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Answer Brief has been furnished by U.S. Mail to Nada Carey, Assistant Public Defender, Office of the Public Defender, Leon County Courthouse, 301 South Monroe Street, Suite 401, Tallahassee, Florida 32301, this 9th day of November 1999.

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