IN THE SUPREME COURT OF FLORIDA

JOHN LOVEMAN REESE,

Appellant,

v. Case No. 82,119

STATE OF FLORIDA,

Appellee.

_____/

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

ANSWER BRIEF OF APPELLEE

ROBERT A. BUTTERWORTH
ATTORNEY GENERAL

BARBARA J. YATES
Assistant Attorney General
Florida Bar #293237

OFFICE OF THE ATTORNEY GENERAL
The Capitol
Tallahassee, FL 32399-1050
(904) 488-0600

COUNSEL FOR APPELLEE

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STATEMENT OF THE CASE AND FACTS

This summary of the facts is offered to supplement and/or clarify Reese's factual statement.

When she was unable to contact her friend, Charlene Austin, on January 29, 1992 (T 620-21),[1] Jackie Grier went to Austin's house (T 621) and found her friend dead on the floor in one of the bedrooms. (T 631). The living room of the victim's home was in disarray, and it looked like there had been a fight in the room. (T 630-31). Margarita Aruza, the medical examiner, performed an autopsy on the victim's body on January 30. (T 748). The autopsy disclosed four blunt trauma wounds to the victim's face (T 748) that were consistent with the victim having been beaten. (T 760). The victim had been strangled with an electrical extension cord that was doubled and wrapped around the victim's neck twice, with the ends pulled through the loop. (T 760). According to Dr. Aruza, strangulation causes a slow death; 'once you apply pressure in the neck area, which is the area of the strangulation, you need about 30 to 60 seconds to lose consciousness, after that, you still need to apply the pressure for an additional three to five minutes

[1] "T" refers to the transcript (volumes IV through XVIII, pages 1 through 1517); "R" refers to the record (volumes I through III, pages 1 through 512).

before the person actually dies." (T 787). The instant strangulation was "no typical ligature strangulation, there was certainly extensive manual strangulation" that included "a great deal of manual manipulation and trauma to the neck area to cause all that hemorrhage." (T 794).

A palm print found on the frame of the victim's waterbed was identified as belonging to John Reese, Grier's boyfriend. (T 807). Sheriff's Office detectives interviewed Reese on April 15, 1992. (T 855). During this interview, Reese confessed to breaking into the victim's home around noon on January 28, 1992. (T 879). He waited in the back bedroom for the victim to return home. (T 880). The victim came home about 4:00 p.m. (T 880). She went to bed around 10:00 p.m., and Reese attacked her about an hour later. (T 881). Reese grabbed the victim around the neck from behind, and they struggled through the living room and into a bedroom. (T 882). Reese raped the victim (T 884) and then strangled her with an extension cord. (T 885). The detectives arrested Reese after he confessed. (R 1).

The grand jury indicted Reese on May 14, 1992 for first-degree murder, sexual battery, and burglary. (R 16). The trial took place on March 22-25, 1993. Reese testified in his own behalf at the guilt phase. (T 935). He testified about his childhood and

his relationship with Grier. (T 935-58). According to Reese, he broke into the victim's home because he wanted to talk with her because he thought she was interfering with his relationship with Grier. (T 959-60). After the victim came home about 4:00 p.m., he waited until she fell sleep and then decided to leave. (T 961-62). The victim was sleeping in the living room and moved when he came into that room. (T 962). He grabbed the victim from behind so that she could not see him, and they struggled into the bedroom where they had intercourse and he killed her. (T 962). Reese claimed to have killed the victim because he became very emotional and 'lost it." (T 963). Reese said that it was still light outside when he grabbed the victim and that he returned to Grier's apartment by 7:30 p.m. (T 963).

Grier testified that the victim never interfered with her relationship with Reese and that Reese did not like the victim. (T 618). She also testified that she and Reese had broken up and were not living together between October 1991 and the date the murder occurred. (T 618). According to Grier, Reese did not stay at her apartment the weekend before the murder (T 620) and that, when Reese was at her apartment on January 29, it was the first time she had seen him in a week. (T 635). On cross-examination she confirmed that she received a telephone call from the victim at

7:40 p.m. on January 28. (T 663). In rebuttal, Grier testified that she did not cook dinner for Reese on January 28 and that he did not spend that night at her apartment. (T 1002). She also testified that Reese hit her and forced her to have sexual intercourse with him. (T 1002).

Detective Carl Thowart testified about the statement Reese made on April 15, 1992. He testified that Reese responded "yes" when Detective Robert Hinson asked if Reese decided to hurt the victim while waiting for her to come home. (T 920). Reese also responded affirmatively when Thowart asked if that was when he decided to kill the victim. (T 881).

The jury found Reese guilty of first-degree murder (R 320), sexual battery with great force (R 321), and burglary with an assault. (R 322). At the penalty phase, held on May 14, 1993, the state rested on the evidence presented during the guilt phase. (T 1185). Several witnesses, including family members, two of Reese's former teachers, and a psychologist, testified for Reese. The jury recommended that Reese be sentenced to death by a vote of eight to four. (R 366).

On June 24, 1993, the court heard the parties, and Reese filed a sentencing memorandum. (R 368). The following day the trial court sentenced Reese to death. In aggravation the court found

that the murder was committed 1) during a sexual battery and burglary; 2) in a heinous, atrocious, or cruel (HAC) manner; and 3) in a cold, calculated, and premeditated manner with no pretense of moral or legal justification (CCP) . (R 382-84). Because Reese only had petit theft and trespassing convictions, the court found no significant criminal history as a nonstatutory mitigator. (R 384). The court found that mitigator, as well as the other proposed nonstatutory mitigation, to be 'of minimal or no mitigation." (R 384).

SUMMARY OF THE ARGUMENT

Issue I: The trial court properly refused to exclude testimony about Reese's telling the detectives who took his oral statement of the time he killed the victim.

Issue II: After the state asked Grier about a conversation she had with Reese, the defense asked her about another conversation that took place two weeks earlier. The trial court correctly refused to allow Grier to testify about the earlier conversation during the state's case.

Issue III: The state did not err in refusing to let Reese testify about his unilateral offer to plead guilty.

Issues Iv and V: Although the court gave a now-insufficient instruction on the CCP aggravator, the error was harmless because this murder was CCP under any definitions.

Issue VI: The trial court properly considered and weighed the proposed mitigating evidence, and the sentencing order is sufficiently complete and clear for this Court to review it.

Issue VII: Reese's death sentence is both proportionate and appropriate.

Issue VIII: The prosecutor's argument during sentencing did not mislead or inflame the jury.

Issue IX: The trial court ♑♋❖♏ the standard HAC jury instruction, and this murder was HAC under any definitions of those terms.

ARGUMENT

Issue I

WHETHER THE TRIAL COURT CORRECTLY REFUSED TO EXCLUDE REESE'S STATEMENT REGARDING THE TIME THAT THE HOMICIDE OCCURRED.

Reese argues that the trial court erred by refusing to prevent the detectives to whom Reese confessed from testifying that Reese told them he killed the victim late in the evening of January 28, **1992.** The trial court properly refused to exclude such testimony, and there is no merit to this issue.

During his opening statement, the prosecutor told the jury that Reese told police detectives that the victim went to sleep about 10:00 p.m. and that he attacked her about an hour later. (T 607). Reese made no objection to that statement, and, after the defense made its opening statement, the state began presenting its case. After four state witnesses testified, the prosecutor called Detective Carl Thowart of the Jacksonville Sheriff's Office (T 811) and proffered Thowart's testimony about how he advised Reese of his rights under Miranda v. Arizona, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966).

Following the proffer, defense counsel stated that he had not been given Reese's statement about the 10:00 p.m. time frame during discovery. (T 820). The prosecutor responded that the discovery

rules required that he provide the substance of a statement, 'not each and every single detail." (T 820). The prosecutor then said that he listed in discovery that Reese confessed to Thowart and Detective Hinson that he committed the crimes as charged and that the defense had deposed the detectives. (T 821). Defense counsel responded that no one ever mentioned 10:00 p.m. (T 821). After further discussion (T 822-26), the court decided to hold a hearing pursuant to Richardson v. State, 246 So.2d 771 (Fla. 1971), and called Detective Thowart to testify. (T 826).

Thowart testified that Reese told him that the victim went to bed around 10:00 p.m. (T 827-28). The prosecutor again stated that the defense was put on notice of the substance of Reese's statement and that, if the detail regarding time was important, defense counsel should have asked about the time during depositions. (T 829). Earlier, defense counsel stated that when you 'tell a detective to tell me everything a person told you, you expect him to include everything." (T 823). Harking back to that, the prosecutor stated: 'and to ask a broad-based question: Tell me everything the defendant said regarding the incident in an hour and a half interview, I would submit isn't a fair question." (T 831).

The judge then stated that he thought "there is a duty on the officers to be as specific as humanly possible" and said that he

wanted to know if the time were mentioned in the detectives' notes. (T 832). When the prosecutor questioned if it were required that interviewers write down everything in their notes, the court responded: "It's not, that's my whole point. If it's not in the notes, it's perfectly understandable that after the deposition, since they didn't specifically ask the time, it didn't come out." (T 832). Detective Thowart left the courtroom to get the notes, and, when he returned with them, the court asked him to inspect the notes to see if they included any reference to 10:00 p.m. (T 835). Thowart could find no such reference (T 836) and, in response to the prosecutor's question, said that, if asked the question at the deposition, he would have said that Reese told them the victim went to sleep around 10:00 p.m. and that he attacked her about an hour later. (T 837). Defense counsel then questioned the detective about the deposition. (T 838-41).

The prosecutor argued that the time had not been mentioned because defense counsel did not ask about it and that the defense complaint should have been brought to the court's attention during opening statement instead of halfway through the state's case. (T 842-44). The court summed up what had transpired, noted that the time was not in the notes or the deposition, and stated:

> While I note for the record that it may be important to the defense to plan on the absence of a time-frame as part of the trial, it would seem to me that if the time-frame is that critical an aspect of the defense, that it would behoove the defense to ask every witness if in either their notes or non-recorded memory there was a mention of a time-frame.

(T 846-47).

Defense counsel then stated that he asked Grier on cross-examination about the 4:00 p.m. telephone call from the victim and whether the victim said she intended to go to bed because he understood that to be the critical time. (T 847). After further argument, the court stated that

> when you're deposed for a lengthy period of time about a conversation that took place for an hour to an hour-and-a-half, no one, certainly the law does not expect anyone to have a specific verbatim memory of such conversations, and it appears in my reading of that part of the deposition that the officer was mostly concentrating on his partner's notes at the end of the deposition to make sure everything [was] in the notes - so I find that there is no Richardson violation here.
>
> It does not appear that there was any intent to hide this information from the defense. Certainly, the defendant's statement should be divulged as specifically as humanly possible. It certainly doesn't appear to be any intent by the police officers to hide this one small detail of his testimony. And it appears that the fact that it wasn't mentioned

> in the deposition is a matter of innocence as far as their intent goes.
>
> So I find that there is no Richardson violation. And I will deny the defendant's request to exclude that part of Officer Thowart's testimony.

(T 848-49).

At trial Reese testified that it was still daylight outside when he killed the victim (T 962) and that he returned to Grier's apartment around 7:00 to 7:30 p.m. (T 963). In this issue he argues that the court erred in holding that no Richardson violation occurred and that the error prejudiced him because, had he known of the 10:00 p.m. time frame, "he may have been able to locate witnesses or produce other evidence to corroborate the earlier time-frame he testified to at trial." (Initial brief at 42). The former part of Reese's argument is incorrect; the latter is mere speculation.

Florida Rule of Criminal Procedure 3.220(b)(1)(C) obliges the prosecutor to provide the defense with 'any written or recorded statements and the substance of any oral statements made by the accused." As this Court has acknowledged, 'rule 3.220 **was** no doubt strongly influenced by the United States Supreme Court decision in Brady V. Maryland, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963) . . . which stands for the proposition that the

nondisclosure of evidence favorable to the defense, when the defense has requested such information, results in a violation of due process when the suppressed evidence is material to the defendant's guilt or punishment." State v. Hall, 509 So.2d 1093, 1095 (Fla. 1987). The prosecutor's obligations to disclose, however, "principally concern those matters not accessible to the defense in the course of reasonably diligent preparation." Perry v. State, 395 So.2d 170, 174 (Fla. 1980). The "rules were not designed to eliminate the onerous burdens of trial practice," but, rather, were meant "to avail the defense of evidence known to the state so that convictions would not be obtained by the suppression of evidence favorable to a defendant, or by surprise tactics in the courtroom." Cooper v. State, 336 So.2d 1133, 1138 (Fla. 1976), cert. denied, 431 U.S. 925, 97 S.Ct. 2200, 53 L.Ed.2d 239 (1977).

Reese claims he was surprised and prejudiced by not knowing that he told the detectives that the victim went to sleep around 10:00 p.m. and that he killed her an hour later, but there are numerous problems with his argument. The statement at issue here was an oral one. As required by rule 3.220, the state supplied the defense with the substance of that oral statement. The state's first supplemental discovery response, dated November 14, 1992, includes the following statement: "Defendant confessed to Hinson,

Thowart and Grier that he burglarized, raped, kidnapped[2] and murdered Sharlene Austin. Defendant also told Hinson, Thowart and Grier the details as to how he committed these crimes and his reasons for committing them." (T 24). Reese's confessing to these crimes, not the time, was the substance of his oral statement. The trial court correctly found that no Richardson violation occurred.

The state is not required to make a complete accounting of all the police's work. Johnson v. State, 427 So.2d 1029 (Fla. 1st DCA 1983). As the trial court recognized, it is unrealistic to expect police officers to include every detail of a suspect's oral statement in their notes about that statement. Forcing the police to predict what will be important to the defense would be an unbearable and unwarranted burden. The discovery rules do not relieve the defense of the burden of preparing its case, and the trial court correctly recognized that defense counsel should have asked the detectives about the time when he deposed them. Counsel could also have asked his client about the time because Reese, better than anyone else, knew when he murdered the victim and what he told the detectives.

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[2] The state originally charged Reese with armed kidnapping (R 16), but later dropped that charge. (T 158).

Moreover, the trial court's finding no Richardson violation did not prejudice Reese. Contrary to the complaint that the defense only knew about a 4:00 p.m. time frame, during cross-examination, defense counsel asked Grier about a telephone call she received from the victim at 7:40 p.m. on January 28. (T 663). This, more than any mention of 10:00 p.m. or later, undercut Reese's testimony that it was daylight when he attacked the victim because, as the jurors must have known and as this Court can take judicial notice, the sun would have set by that time. The defense questioning about the 7:40 telephone call also cast doubt on Reese's claim that he was at Grier's apartment before 8:00 p.m. Additionally, Grier testified that, on the date of the murder, she and Reese had been separated for several months (T 618) and that he was not at her apartment the evening or night of January 28 and that she did not cook dinner for him that night. (T 1002).

Reese has shown no error or abuse of discretion in the trial court's ruling. There is no merit to this issue, and the trial court's ruling should be affirmed.

Issue IL

WHETHER THE TRIAL COURT ERRED IN RESTRICTING REESE'S CROSS-EXAMINATION OF JACKIE GRIER.

Reese argues that the trial court erred in restricting his cross-examination of Grier about conversations he had with her after his arrest. There is no merit to this claim.

The state called Grier as its first witness. During direct examination, the prosecutor asked Grier about a conversation she had with Reese two weeks after his arrest. (T 637-39). On cross-examination defense counsel asked Grier about a telephone conversation she had with Reese the day he was arrested. (T 673). The prosecutor objected that the question was outside the scope of direct examination, (T 673). Defense counsel argued that the prosecutor opened the door to other conversations, but the prosecutor stated that he clearly limited the question to the conversation that took place two weeks after Reese's arrest. (T 674). The court affirmed that the prosecutor did not inquire about all statements Reese made to Grier and stated that the prosecutor "specifically inquired about one specific time on specific dialogue. I don't think that really opens the door to any dialogue she's had with him. Especially not that far distant." (T 675).

Defense counsel argued that it was a continuing conversation (T 675), but the court held that the earlier conversation was beyond the scope of direct examination and stated: 'That's why you have an opportunity to call witnesses to explain what [the state] presented. This would be part of the defense." (T 676).

Now, Reese argues that the court erred because he should have been allowed to question Grier about the first conversation under the rule of completeness. Reese states that "[h]is entire defense was predicated upon his showing the jury that the homicide resulted from his jealous attachment to Jackie Grier and his profound fear of losing her" and that the excluded conversation was relevant to his defense. (Initial brief at 46). This argument, however, has no merit.

The rule of completeness is codified in section 90.108, Florida Statutes (1995):

> When a writing or recorded statement or part thereof is introduced by a party, an adverse party may require him at that time to introduce any other part or any other writing or recorded statement that in fairness ought to be considered contemporaneously.

By its language section 90.108 does not cover oral conversations. As stated by one commentator: "Although the language of section 90.108 does not cover testimony regarding part of a conversation,

a similar consideration of the potential for unfairness may require the admission of the remainder of a conversation to the extent necessary to remove any potential for prejudice that may result from the original evidence being taken out of context." Charles W. Ehrhardt, Florida Evidence § 108.1 at 32 (1992) (emphasis supplied).

This Court addressed the rule of completeness and conversations in Christopher v. State, 583 So.2d 642 (Fla. 1991). Christopher tried to force the state to introduce the substance of a second, exculpatory conversation he had with a state witness. This Court affirmed the trial court's exclusion of testimony about the second conversation. "While the two conversations referred generally to the same events, the later conversation did nothing to explain the earlier conversation. The jury could not have been misled as to the content of the earlier conversation by the exclusion of the later conversation." Id. at 646.

Relying on Christopher and Eberhardt v. State, 550 So.2d 102 (Fla. 1st DCA 1989), Reese states that "the defendant is entitled to cross-examine the witness about other confessions or admissions that place in context, explain, or make not misleading that part of the admission that was introduced." (Initial brief at 45). As set out above, this Court held that Christopher's first conversation

stood alone and did not need to be explained by the second. In Eberhardt, on the other hand, the district court held that Eberhardt's related conversations should have been allowed into evidence because they 'in fairness are necessary for the jury to accurately perceive the whole context of what transpired between the two." 550 So.2d at 105.

The instant case is like Christopher rather than Eberhardt. The two conversations at issue here were discrete events, separated from each other by a two-week time span and by other conversations. There was no need to cross-examine Grier about the earlier conversation to explain the later.

In deciding Christopher, this Court specifically set out the Law Revision Council Note to section 90.108 that states, in part, that "remaining portions of conversations are best left to be developed on cross-examination or as part of a party's own case." 6B Fla.Stat.Ann. 209 (1979). This is precisely what the trial court held. If Reese wanted to introduce the substance of the earlier conversation, he could have called Grier as his witness and questioned her about it.

The trial court correctly excluded questions about the earlier conversation because they were beyond the scope of the prosecutor's

direct examination. Reese has demonstrated no error, and the trial court's ruling should be affirmed.

Issue III

WHETHER THE TRIAL COURT PROPERLY REFUSED TO ALLOW REESE TO TESTIFY THAT HE OFFERED TO PLEAD GUILTY.

Reese testified during the guilt phase of the trial. He now argues that the court erred in not allowing him to testify that he offered to plead guilty. There is no merit to this claim.

The following exchange occurred during cross-examination:

> Q [Assistant State Attorney Batehl When the police first interviewed you on April 15th, 1992, they asked you if you had been in Charlene Austin's house, didn't they?
>
> A [Reese] Yes.
>
> Q And you told them you had not been, isn't that right?
>
> A Yes, sir.
>
> Q That was not the truth, isn't that correct?
>
> A Was that?
>
> Q That was a lie?
>
> A What is that?
>
> Q That you had told the police you had not been in Charlene Austin's house?

A First time they asked me, I told a lie, yes, sir.

Q Why did you lie?

A At the time, sir, I was scared.

Q Was it the same sort of fear that forced you to break into Charlene Austin's home?

A I was scared.

Q Was it the same sort of fear that caused you to rape Charlene Austin?

A I was still scared.

Q You're scared of being convicted of first-degree murder on this case, aren't you?

A Yes, sir.

Q And you are doing your best to get out of it, aren't you?

A No, sir.

(T 986-87). On redirect examination defense counsel brought up his plea discussion with Reese:

Q Mr.Reese, Mr. Bateh asked you if you were doing your best to -- excuse me. Doing your best to be avoiding being convicted of first-degree murder, you don't really care whether or not you're convicted of first-degree murder?

A Yes, sir, I care.

Q Have your previously had discussions with me about entering a plea --

MR. BATEH: Your Honor, object, objection. Totally irrelevant.

THE COURT: Sustain the objection.

(T 988). At the bench conference immediately following this exchange counsel and the court discussed the matter further.

MR. COFER: Judge, I think Mr. Bateh's questions about whether he's concerned about being convicted of first-degree murder opened the door, but due to that which would have otherwise been irrelevant and inadmissible. We have clearly tendered pleas to the state.

I don't know why Mr. Bateh asked the question.

THE COURT: I think that it's really just the opposite, I think it is relevant and admissible if he had answered your question the same way he answered his. But when he answered yes, he's concerned about getting convicted of first-degree murder, and therefore, plea negotiations are irrelevant, because you're right, it is: I don't want to be committed.

MR. COFER: Well, maybe if I rephrase the question.

MR. BATEH: Your Honor, plea negotiations are not admissible. I mean at this proceeding. They're not even admissible in the penal[ty] phase.

THE COURT: The general rule of law is that plea negotiations of any kind [are] inadmissible.

Ii we were arguing on an insurance hearing, it wouldn't be admissible.

MR. COFER: If I asked a question like that, you all would send him there. I think it kind of opens the door to it.

THE COURT: I really think it's -- again, what you're asking is discussions he had with you about it, and that's another whole set of problems.

MR. COFER: Well, I understand that, but that would be to lay a predicate as to whether he had authorized me to enter a plea, and he has the understanding that I have done so, I mean authorized me to offer a plea and whether I had done so.

MR. BATEH: Your Honor, that is not admissible at this stage. It's in the case law that plea negotiations, offers to plead guilty or even offers by the state to permit the defendant to plead guilty, none of that is permissible in the penalty phase, which makes it more -- it would have more relevancy. Your Honor, it's just not permissibie.

THE COURT: The bare fact that he could have pled, that's what we're doing here.

MR. COFER: Well --

THE COURT: Discussing it with the usual flair. If your plea is not guilty --

MR. COFER: I would like to be allowed the opportunity to continue on.

THE COURT: I'm going to sustain their objection while you all are up here, but I hope this all goes away soon.

(T 987-89).

Reese claims that 'the court correctly ruled the state opened the door to testimony concerning plea negotiations by asking Reese if he was doing his best to get out of being convicted." (Initial brief at 48). This is incorrect. The court stated that, if Reese had answered defense counsel's question the same way he answered the prosecutor's, negotiations would be relevant and admissible. (T 997) . Because Reese responded to defense counsel's question differently, the court correctly held that information about any plea negotiations was irrelevant. (T 997) .

The state's rejection of Reese's plea offer rendered that offer a nullity. See Hitchcock v. State, 578 So.2d 685 (Fla. 1990), reversed on other grounds, 112 S.Ct. 3020, 120 L.Ed.2d 892 (1992) . The trial court correctly held that the state did not open the door to any testimony about Reese's unilateral plea offer. Reese has presented nothing demonstrating that a contrary conclusion should be reached, and there is no merit to this issue.

ISSUES IV AND V

WHETHER THE TRIAL COURT ERRED IN ITS INSTRUCTION ON THE CCP AGGRAVATOR AND IN FINDING CCP.

In these two issues Reese argues that the trial court erred by giving the CCP instruction found deficient in Jackson v. State, 648

So.2d 85 (Fla. 1994), and that the facts do not support finding CCP in aggravation. The former contention is correct, the latter is not.

At the penalty-phase charge conference defense counsel argued that the facts did not support giving the CCP instruction. (T 1418-19). The court overruled the objection. (T 1419-20). Counsel then asked that the definitions set out in the proposed instruction (R 244-45) be given. (T 1420). The court refused to do so, however, (T 1420-21) and instructed the jury as follows: "Number three, that the crime for which the defendant is to be sentenced was committed in a cold, calculated and premeditated manner without a pretense of moral or legal justification." (T 1485). As Reese points out, Jackson held this instruction insufficient. As found in Walls v. State, 641 So.2d 381 (Fla. 1994), cert. denied, 115 S.Ct. 943, 130 L.Ed.2d 887 (1995), however, giving the erroneous instruction is harmless if the facts support finding this aggravator.

The trial court made the following finding as to the CCP aggravator:

> 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, 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."

(R 383-84). As the state will demonstrate, the court properly found this murder to have been committed in a cold, calculated, and premeditated manner because the facts establish this aggravator under any definitions.

This Court adopted an interim instruction in Jackson and a permanent instruction in Standard Jury Instructions In Criminal Cases (95-2), 20 Fla.L.Weekly S589 (Fla. Dec. 7, 1995). The newest instruction defines "cold" as meaning "the murder was the product of calm and cool reflection" and "calculated" as "having a careful plan or prearranged design to commit murder." Id. at S589. In

addition "a heightened level of premeditation, demonstrated by a substantial period of reflection, is required," and "a pretense of moral or **legal** justification" means "any claim of justification or excuse that, though insufficient to reduce the degree of the murder, nevertheless rebuts the otherwise cold, calculated or premeditated nature of the murder." Id.

Reese claims that he broke into the victim's home and waited for her return so that he could talk to her about his relationship with Grier (initial brief at 8) and that this domestic murder arose from a loss of emotional control. (Initial brief at 53) . The facts, however, show differently.

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. (T 979-81). He answered affirmatively when Detective Hinson asked if he decided, while he waited in the house, to hurt the victim (T 920) and when Detective Thowart asked if this was when he decided to kill her. (T 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, 112 S.Ct. 265, 116 L.Ed.2d 218 (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, 109 S.Ct. 183, 102 L.Ed.2d 153 (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 v. State, 644 So.2d 1000 (Fla. 1994), cert. denied, 115 S.Ct. 1705, 131 L.Ed.2d 566 (1995); 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. (T 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. Reese makes no claim of a pretense of moral or legal justification because none 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 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 defendants' 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. (T 618). As explained in issue VI, infra, Reese's purported mitigation was worth little consideration and could not preclude the finding of this aggravator.

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. 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, 111 S.Ct. 2067, 114 L.Ed.2d 471 (1991). Therefore, this Court should affirm the trial court's finding CCP in aggravation.

In his sentencing order the trial judge stated: 'The Court further finds that any one of the aggravating factors listed above would be sufficient to require the imposition of the death penalty, even if standing alone." (R 384). Even if this Court were to hold that the CCP aggravator is not supported by the facts, any error in finding this aggravator would be harmless. The death sentence, therefore, should be affirmed because, as shown in issue VI, infra, the mitigating evidence was of little weight.

ISSUE VI

WHETHER THE TRIAL COURT GAVE PROPER CONSIDERATION TO THE MITIGATING EVIDENCE.

Reese claims that the trial court did not expressly evaluate each of his proposed mitigators and failed to give significant weight to those mitigators. There is no merit to this claim.

In the penalty phase the state rested on the evidence presented at the guilt phase. (T 1185). Reese called three relatives, his former physical education teacher, and an elementary school teacher who testified about his childhood and family life; a records clerk from the Jacksonville Sheriff's Office who testified that Reese had received no disciplinary reports while in

jail; and Harry Krop, a psychologist, who testified about Reese's mental state at the time of the murder. The state presented Jackie Grier as a rebuttal witness. The jury recommended death by a vote of eight to four. (R 366).

Reese filed a sentencing memorandum on June 24, 1993, listing numerous proposed nonstatutory mitigators.[3] (R 368 et seq.). After listening to the parties, the judge filed his sentencing order the following day. The judge made the following findings regarding mitigation:

> The Defendant waived the statutory mitigating circumstance of no significant criminal history in the penalty phase of the trial. However, the Court does find, as a non-statutory mitigating circumstance, that the Defendant's criminal record before this

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[3] The proposed mitigators included Reese's: 1) minimal criminal record; 2) good record in jail; 3) being adopted; 4) having a good home until age seven; 5) adopted father's schizophrenia; 6) being a mannerly and hard-working child; 7) father killed his mother; 8) discovering his mother's body; 9) receiving no counseling; 10) never seeing his father again; 11) moving in with an uncle; 12) lack of emotional nurturing; 13) moving in with another uncle at age 14; 14) helping care for his grandmother; 15) helping his aunt when his uncle died; 16) extracurricular activities in high school; 17) being on the track team; 18) receiving a GED while in the Job Corps; 19) support of Grier and her children; 20) being possessive of Grier; 21) good conduct in court; 22) testifying truthfully; 23) extreme emotional disturbance; 24) potential for rehabilitation; 25) emotional immaturity; and 26) possible sentences for the other convictions.

> case consisted only of a petit theft and a trespassing conviction.
>
> The Court finds that no other circumstances that would mitigate a first degree murder were established by the evidence. The Defendant's behavior in jail, the circumstances of his upbringing, the breakup of his relationship with his girlfriend Jacqueline Grier, and the potential sentences on the other two counts for which he was convicted are of minimal or no mitigation, in light of all the facts and circumstances of the case, including the aggravating circumstances listed above.

(R 384).

In Roaers v. State, 511 So.2d 526 (Fla. 1987), cert. denied, 484 U.S. 1020, 108 S.Ct. 733, 98 L.Ed.2d 681 (1988), this Court set out the manner in which trial courts should address proposed mitigating evidence. Under the Rogers procedure 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 this 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, 114 S.Ct. 136, 126 L.Ed.2d 99 (1993). Moreover, a trial

court has broad discretion in determining whether mitigators apply, and the decision on whether the facts establish a particular mitigator lies with the trial court and will not be reversed because this Court or an appellant reaches a contrary conclusion. Foster v. State, 654 So.2d 112 (Fla. 1995); Pietri v. State, 644 So.2d 1347 (Fla. 1994), cert. denied, 132 L.Ed.2d 836 (1995); Wyatt v. State, 641 So.2d 355 (Fla. 1994), cert. denied, 115 S.Ct. 1372, 131 L.Ed.2d 227 (1995); Arbalaez v. State, 620 So.2d 169 (Fla. 1993), cert. denied, 114 S.Ct. 2123, 128 L.Ed.2d 678 (1994); Preston v. State, 607 So.2d 604 (Fla. 1992), cert. denied, 113 S.Ct. 1619, 123 L.Ed.2d 178 (1993); Sireci v. State, 587 So.2d 450 (Fla. 1991), cert. denied, 112 S.Ct. 1500, 117 L.Ed.2d 639 (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)); Duncan v. State, 619 So.2d 279 (Fla.), cert. denied, 114 S.Ct. 453, 126 L.Ed.2d 385 (1993); Lucas; Johnson v. State, 608 So.2d 4 (Fla. 1992), cert. denied, 113 S.Ct. 2366, 124 L.Ed.2d 273 (1993); Ponticelli v. State, 593 So.2d 483 (Fla. 1991), aff'd on remand, 618 So.2d 154 (Fla.), cert. denied, 114 S.Ct. 352 (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, 115 S.Ct. 944, 130 L.Ed.2d 888 (1995); Lucas; Johnson; Sireci; Gunsby v. State, 574 So.2d 1085 (Fla.), cert. denied, 112 S.Ct. 136, 116 L.Ed.2d 103 (1991).

Applying these precepts to the instant case, it is obvious that the trial court adequately considered the proposed mitigators. Thus, there is no merit to Reese's claim that the court ignored "the uncontroverted evidence" (initial brief at 60) presented through Dr. Krop's testimony and that of other witnesses.

Krop testified that Reese had no major mental illness or personality disorder (T 1205) and that his impulse control was generally good (T 1219), but that Reese's fear, anxiety, and frustration produced a seriously impaired mental state at the time of the murder. (T 1217). Notably, however, Krop did not testify that Reese met the requirements of either of the statutory mental mitigators. Moreover, on cross-examination Krop admitted that he relied heavily on Reese's self-reporting in forming his opinion (T 1230-31) and, in fact, stated: "It's not up to me to determine the facts," (T 1230) even though facts would help formulate that opinion. (T 1231). Krop also confirmed that Reese's raping and

killing the victim were consistent with his having made a conscious decision to commit those crimes. (T 1247-48).

This court recently discussed expert testimony and distinguished factual and opinion testimony. As to the former, this Court stated: 'As a general rule, uncontroverted factual evidence cannot simply be rejected unless it is contrary to law, improbable, untrustworthy, unreasonable, or contradictory." Walls v. State, 641 So.2d 381, 390 (Fla. 1994), cert. denied, 115 S.Ct. 943, 130 L.Ed.2d 887 (1995). The same is not true, however, for opinion testimony:

> Certain kinds of opinion testimony clearly are admissible - and especially qualified expert opinion testimony - but they are not necessarily binding even if uncontroverted. Opinion testimony gains its greatest force to the degree it is supported by the facts at hand, and its weight diminishes to the degree such support is lacking. A debatable link between fact and opinion relevant to a mitigating factor usually means, at most, that a question exists for judge and jury to resolve.

Id. at 390-91; see also Wuornos v. State, 644 So.2d 1000 (Fla.1994), cert. denied, 115 S.Ct. 1705, 131 L.Ed.2d 566 (1995). Here, Krop admitted that his opinion was just that, an opinion, and one that was based on Reese's self-serving self-reporting because Krop did not feel he needed to develop the facts. The mitigating

effect of Krop's testimony truly was for the jury and judge to decide. The trial court, as was within its discretion, properly decided that the proposed mitigators Krop spoke to, Reese's "behavior in jail, the circumstances of his upbringing, the breakup of his relationship with his girlfriend" were 'of minimal or no mitigation, in light of all the facts and circumstances of the case." (R 384).

Reese also complains that the trial court did not give enough weight to the nonstatutory mitigator of his minimal criminal history and other proposed mitigators such as his being a good son and a helpful member of his track team, his support of Grier and her children, and his truthful testimony. (Initial brief at 64-65). As this Court has 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); Jones v. State, 648 So.2d 669 (Fla. 1994), cert. denied, 132 L.Ed.2d 836 (1995); Ellis v. State, 622 So.2d 991 (Fla. 1993); Campbell; Swafford v. State, 533 So.2d 270 (Fla. 1988), cert. denied, 489 U.S. 1100, 109 S.Ct. 1578, 103 L.Ed.2d 944 (1989). Moreover, it is permissible for a trial judge to group nonstatutory mitigators and consider them collectively. Reaves v. State, 639 So.2d 1 (Fla.), cert. denied, 115 S.Ct. 488, 130 L.Ed.2d 400 (1994). Reese has demonstrated no abuse of discretion in the

trial court's not discussing individually each proposed item of mitigation or in the weight given the purportedly mitigating evidence.

The family members and teachers who testified on Reese's behalf had had no contact with him for years - in one case twenty years. The trial court properly found this testimony to be mitigating evidence that was of little or no significance. E.g., Mungin v. State, 20 Fla.L.Weekly S459 (Fla. Sept. 7, 1995). As to Reese's supporting Grier and her children, Grier testified that Reese occasionally supported them, "but more times he wouldn't than he did." (T 701). That a defendant testified truthfully is of doubtful mitigating effect, but the jury and judge rejected, as they were entitled to do, this claim as evidenced by Reese's being convicted of first-degree rather than a lesser degree of murder and by the recommendation of a death sentence and the imposition of that sentence.

There is no prescribed form for a sentencing order. Kins v. State, 623 So.2d 486 (Fla. 1993); Lucas v. State, 568 So.2d 18 (Fla. 1990); Holmes v. State, 374 So.2d 944 (Fla. 1979), cert. denied, 446 U.S. 913, 100 S.Ct. 1845, 64 L.Ed.2d 267 (1980). What is required, however, is that the trial court's findings be of sufficient clarity that this Court can review them. King v. State;

Holmes. Although sparse, the instant order meets these requirements. The trial judge set out various areas of nonstatutory mitigation that he considered and obviously weighed. Cf. Barwick v. State, 660 So.2d 685 (Fla. 1995); Armstrong v. State, 642 So.2d 730 (Fla. 1994), cert. denied, 115 S.Ct. 1799, 131 L.Ed.2d 726 (1995); Peterka v. State, 640 So.2d 59 (Fla. 1994), cert. denied, 115 S.Ct. 940, 130 L.Ed.2d 884 (1995); Atwater v. State, 626 So.2d 1325 (Fla. 1993), cert. denied, 114 S.Ct. 1578, 128 L.Ed.2d 221 (1994); Tompkins v. State, 502 So.2d 415 (Fla. 1986), cert. denied, 483 U.S. 1033, 107 S.Ct. 3277, 97 L.Ed.2d 781 (1987). Even if the court erred in its consideration of the nonstatutory mitigators, any such error was harmless. Given the circumstances of the terrible crimes committed on the victim and the presence of three strong aggravators, the proposed nonstatutory mitigation is negligible, and there is no likelihood of a different sentence. Cf. Barwick; Pietri; Wuornos; Armstrong; Peterka. Therefore, this Court should refuse to grant relief on this issue.

ISSUE VII

WHETHER REESE'S DEATH SENTENCE IS PROPORTIONATE.

Reese argues that the instant murder "resulted from violent emotions in the context of a tormented domestic relationship."

(Initial brief at 66). Contrary to Reese's claims, however, this is not a domestic case, 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, 111 S.Ct. 1024, 112 L.Ed.2d 1106 (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 are living or have 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. 1976); Halliwell v. State, 323 So.2d 557 (Fla. 1975); Tedder v. State, 322 So.2d 908 (Fla. 1975). 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, 111 S.Ct. 2067, 114 L.Ed.2d 471 (1991); Hudson v. State, 538 So.2d 829 (Fla.) (killed former girlfriend's roommate), cert. denied, 493 U.S. 875, 110 S.Ct. 212, 107 L.Ed.2d 165 (1989), and Turner v. State, 530 So.2d 45 (Fla. 1987) (killed estranged wife's roommate), cert. denied, 489 U.S. 1040, 109 S.Ct. 1175, 103 L.Ed.2d 237 (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

issues IV and V, supra, the CCP aggravator is also supported on this record. Also, as the state showed in issue VI, supra, the trial court properly considered the proposed nonstatutory mitigating evidence and correctly found it worth little or nothing in mitigation. 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, 104 S.Ct. 1690, 80 L.Ed.2d 164 (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., Johnson v. State, 660 So.2d 637 (Fla. 1995); Griffin v. State, 639 So.2d 966 (Fla. 1994), cert. denied, 115 S.Ct. 1317, 131 L.Ed.2d 198 (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, 103 S.Ct. 182, 74 L.Ed.2d 148 (1982). Even if this Court were to strike one of the aggravators death would

still be appropriate when compared with double aggravators cases that had more in mitigation than the instant case. E.g., Davis v. State, 648 So.2d 107 (Fla. 1994); Smith v. State, 641 So.2d 1319 (Fla. 1994), cert. denied, 115 S.Ct. 1129, 130 L.Ed.2d 1091 (1995). Although Reese ignores them, there are also true domestic cases where this Court found the death sentence appropriate. E.g., Henry v. State, 649 So.2d 1366 (Fla. 1994), cert. denied, 132 L.Ed.2d 839 (1995); Arbalaez v. State, 626 So.2d 169 (Fla. 1993), cert. denied, 114 S.Ct. 2133, 128 L.Ed.2d 678 (1994); Duncan v. State, 619 So.2d 279 (Fla.), cert. denied, 114 S.Ct. 453, 126 L.Ed.2d 385 (1993); Porter v. State, 564 So.2d 1060 (Fla. 1990), cert. denied, 498 U.S. 1110, 111 S.Ct. 1024, 112 L.Ed.2d 1106 (1991); Tompkins v. State, 502 So.2d 415 (Fla. 1986), cert. denied, 483 U.S. 1033, 107 S.Ct. 3277, 97 L.Ed.2d 781 (1987); Lemon v. State, 456 So.2d 885 (Fla. 1984), cert. denied, 469 U.S. 1230, 105 S.Ct. 1233, 84 L.Ed.2d 370 (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.

ISSUE VIII

WHETHER THE PROSECUTOR'S PENALTY-PHASE ARGUMENTS RENDERED THE SENTENCING UNRELIABLE.

Reese argues that four of the prosecutor's comments during the penalty-phase argument were so improper and prejudicial that he should be resentenced. There is no merit to this claim.

Reese first claims that the prosecutor made a Golden Rule argument, quoting three sentences out of context. As the transcript shows, however, the prosecutor did not make a Golden Rule argument. In explaining the aggravators to the jury, the prosecutor stated:

> The second aggravating circumstance that has been proven and established in this case is that, and bear with me, if anyone cannot read this second line, if you would just hold your hand up. I'll hold this up. The crime for which the defendant is to be sentenced was especially heinous, atrocious or cruel. Heinous means extremely wicked or shockingly evil. Atrocious means outrageously wicked and violent. Cruel means designated to inflict a high degree of pain with utter indifference to - or even the enjoyment of suffering of others. It's the kind of crime intended to be included in heinous or atrocious or cruel, is one accompanied by additional acts that show that the crime was consciousless or hideous or was unnecessarily tortuous to the victim.
>
> I would submit to you that the way that that defendant chose to kill Charlene Austin, what he forced Charlene Austin to experience is everyone woman's worse nightmare.

(T 1434). Defense counsel asked to approach the bench, and the following exchange occurred:

> MR. COFER: Your Honor, Mr. Bateh violated the Golden Rule Seven of our jurors with that comment.
>
> MR. BATEH: Your Honor, I submit that that's not the case. Your Honor, I've got to go in that, and I'm going to detail it with specific facts. I'm referring to the evidence produced.
>
> THE COURT: Huh-huh. I don't think it's a Golden Rule unless you say to directly put themselves in his place.
>
> MR. COFER: A woman's nightmare.
>
> THE COURT: Huh-huh.
>
> MR. COFER: And he's talking to a jury with the majority of them being women on it. How can that be anything but a Golden Rule.
>
> THE COURT: Well, it's just not telling them to put themselves in anybody else's position. To be the Golden Rule, that's what you have to ask them to do.
>
> MR. COFER: Well, if that's the **case,** I'll just raise the objection.

(T 1435). The court overruled the objection. (T 1436). The prosecutor then went on with his argument that the HAC aggravator applied.

Closing argument 'must not be used to inflame the minds and passions of jurors." Bertolotti v. State, 476 So.2d 130, 134 (Fla.

1988). The purpose of such argument "is to review the evidence and to explicate those inferences which may reasonably be drawn from the evidence." Id. To that end, wide latitude is allowed; counsel may advance all legitimate arguments and draw logical inferences. Breedlove v. State, 413 So.2d 1 (Fla. 1982), cert. denied, 459 U.S. 882, 103 S.Ct. 184, 74 L.Ed.2d 149 (1983).

Controlling counsel's argument is within the trial court's discretion, and the court's ruling will not be reversed unless an abuse of discretion is shown. The prosecutor did not make an improper Golden Rule argument. The trial court ruled correctly, and Reese has shown no abuse of discretion.

Reese also argues that "[t]he prosecutor misled the jury by suggesting that if the trial court imposed life sentences for the sexual battery and burglary, appellant could be paroled for these offenses." (Initial brief at 70). The complained-about argument went as follows:

> [Mr. Bateh:] Now I anticipate, I expect the defense is going to -- you're going to be told that on first-degree murder, the defendant can get, if he doesn't get a life -- if there is a recommendation of life, that means a life sentence, no chance of parole for 25 years.
>
> The Judge is going to tell you this, that on the sexual battery and burglary, that the defendant can face up to [life] in prison on

> those two offenses. But you need to know this, there's no minimum mandatory sentence on these [lifes]. No minimum mandatory on the murder, there is a minimum mandatory of 25 years, on these other lifes, there's no minimum mandatory, and no one really knows what that means.

(T 1451-52). Defense counsel objected, claiming: 'Mr. Bateh has affirmatively misled the jury. Mr. Bateh knows that sexual battery is not a parolable offense." (T 1452). The following exchange then occurred during discussion of the objection.

> MR. BATEH: You say they serve every day?
>
> MR. COFER: If it's a life sentence, they certainly do. Can you tell me one person who on October 1, 1983, the enactment of this provision, was paroled on sexual battery, on burglary and have been given controlled release?
>
> THE COURT: I can't tell you anybody that's in prison at the moment, I'm too tired. I don't quarrel that that statute was enacted, but I don't think that makes his comment improper.
>
> MR. COFER: I think it's misleading the jury. If this court were to impose a life sentence, there's no eligibility for early release, and that's what he's suggesting.
>
> MR. BATEH: No, that's not what I'm suggesting.
>
> THE COURT: He's suggesting no minimum mandatory, in fact, he said no one knows what that means.

> MR. COFER: No, his comments were no one knows what that means, telling them how much time he thinks he would do, how much sentence the court would impose.
>
> MR. BATEH: The interpretation of the court is the interpretation I intended, and then, I stated --
>
> THE COURT: I'm going to overrule the objection.

(T 1453-54).

Defense counsel made the following argument in urging the jurors to recommend life imprisonment:

> Will it protect society? A sentence of life in prison with no possibility of parole for 25 years means that for each and every hour, each and every day of each and every week of each and every month, of this year, next year, this decade John Reese will be in prison and for the next decade, and for the next four years, since he's already been in one year. And then he'll become eligible for parole on that charge only.
>
> The court has a responsibility for sentencing Mr. Reese in each of these [other] two counts. And the court will advise you that the maximum sentence that could be imposed by the court on those charges is life, pure life. And you can consider that as a factor.

(T 1480).

Reese argues that "the jury was entitled to know that if sentenced to life on the non-capital offenses, appellant would

never be released into society." (Initial brief at 72). Defense counsel, however, never told the jury that Reese would never be released from prison. Indeed, if for some reason Reese's death sentence were vacated, he possibly could be paroled after twenty-five years because the trial court imposed concurrent twenty-two year sentences for the noncapital convictions. (R 379, 380). Be that as it may, the prosecutor's argument did not mislead the jury. Reese has shown no error in the trial court's ruling.

Reese's third complaint is that the prosecutor characterized him as a rabid dog. (Initial brief at 72). This complaint comes from the following argument:

> And the mitigation that's been presented in this case reminds me of a story I read about not long ago that concerned a man who had a dog. He'd gotten that dog when he was a young puppy. It was a cute puppy. But the man beat that puppy.
>
> And he abused it, and that puppy, over time, grew, he grew into a large dog. He grew into a vicious dog. And it grew so vicious that it would attack people that came near his house.
>
> And one day, there **was** a woman, a young woman, that walked by the house, and the dog attacked her, and the dog bit the woman. The dog mauled the woman's face. The dog **was** caught, was captured, caught by the dog catcher, and the dog was carried off to the pound to be put to death. To be destroyed.

> And the owner of the dog went to the dog pound, and he pleaded with the officials, please don't kill my dog. And the officials there turned to the dog owner and said why? And his answer was: Because when he was a young puppy, he was my baby.
>
> And I submit to you that like the owner of that dog, what the defense has done is run people through who knew that defendant long ago. You can look at those pictures, they are going to parade them in there for you, long ago when he was a baby, he may have been a cute puppy, to use my analogy, but this is people who hadn't seen or associated with that defendant in years. The little puppy that they knew, the young man that they knew years ago no longer exists.

(T 1455-56). Defense counsel then interrupted, stating: "Your Honor, I'm going to object to this. Forgive me. I would object to what I anticipate being comments Mr. Bateh is about to make." (T 1456). Counsel, however, did not explain what supposedly objectionable comments the prosecutor was going to make, and the court overruled the objection. (T 1456). Following the prosecutor's argument, defense counsel stated: "Your Honor, I would renew my objections to the dog references, that was name-calling." (T 1459). The court overruled this objection as well. (T 1459).

There are several problems with this argument. Defense counsel did not make a timely specific, cognizable objection to the

prosecutor's analogy so that the trial court knew the basis for the objection. cf. Finney v. State, 660 So.2d 674 (Fla. 1995); Steinhorst v. State, 412 So.2d 332 (Fla. 1982). Counsel's specific objection, 'name-calling," came too late to preserve this claim for appeal.

Even if this Court finds that Reese preserved this issue, no relief is warranted. The prosecutor never called Reese a rabid dog. Reese attempted to show in mitigation that he was a good person who killed the victim in a fit of passion caused by his adoptive father's killing his adoptive mother when Reese was seven. The prosecutor's analogy was apt and not so outrageous as to taint the jury's recommendation. Reese has shown no abuse of discretion in the trial court's ruling, and this claim should be denied.

As the final part of this claim, Reese argues that the prosecutor improperly appealed to the jurors' sympathy. At the end of his argument the prosecutor stated:

> I'm concerned that some of you may be tempted to take the easy way out in this proceeding, and that is not to weigh the aggravating and mitigating circumstances, and not want to fully carry out you [r] responsibility under the **law,** and just vote for life without weighing things out.
>
> If you weigh out all of the circumstances, all of the evidence and apply the law in the case, you will clearly see that

> the aggravating circumstances outweigh the mitigating circumstances, and death is the proper recommendation.
>
> I ask you not to be swayed by pity or sympathy for the defendant. What pity or sorrow or sympathy did he show to Charlene Austin?
>
> And I ask you this, and this is my final comment to you, if you are to -- to show pity or mercy or sympathy to this defendant, I ask you to do this: I ask you to show that defendant the same sympathy, the same mercy, the same pity that he showed to Charlene Austin, and that was none.

(T 1458). Reese did not object to this comment. The comment did not constitute fundamental error and, thus, this complaint was not preserved for appeal. E.g., Crump v. State, 622 So.2d 963 (Fla. 1993); Jackson v. State, 522 So.2d 802 (Fla.), cert. denied, 488 U.S. 871, 109 S.Ct. 183, 102 L.Ed.2d 153 (1988). Even if this claim were cognizable, any error would be harmless because "[t]his record established to a moral certainty that [Reese] killed [the victim], and there is no reasonable probability the verdict would have been different in the absence of this error." Richardson v. State, 604 So.2d 1107, 1109 (Fla. 1992).

Some of the comments Reese complains about were not objected to and, thus, were not preserved for appeal. The trial court correctly overruled the objections to the other comments. None of

the comments vitiated the proceedings or tainted the jury's recommendation. Reese has demonstrated no error regarding this claim, and it should be denied.

ISSUE IX

WHETHER THE HAC INSTRUCTION WAS ADEQUATE.

Reese acknowledges that the HAC instruction given to his jury was identical to that approved in Hall v. State, 614 So.2d 473 (Fla.), cert. denied, 114 S.Ct. 109, 126 L.Ed.2d 74 (1993). He argues, however, that the instruction is still constitutionally deficient. There is no merit to this issue.

At the penalty-phase charge conference defense counsel objected both to giving the HAC instruction because the facts did not support it and to the wording of the standard instruction. (T 1413-14). The court decided to give the standard instruction (T 1414) and instructed the jury as follows:

> Number two, the crime for which the defendant is to be sentenced was especially heinous, atrocious or cruel.
>
> Heinous means extremely wicked or shockingly evil. Atrocious means with utter excuse me atrocious means outrageously wicked and vile. Cruel means designed to inflict any degree of pain with utter indifference to or even enjoyment of the suffering of others.

> The kind of crime intended to be included as heinous, atrocious or cruel is one accompanied by additional acts that show that the crime was consciousless or pitiless or was unnecessarily torturous to the victim.

(T 1484-85). The court, however, granted the defense request for additional explanation of HAC (T 1415-18) and **also** gave the following instruction: "You're instructed that the actions of the defendant which you find were taken after the victim **was** rendered unconscious or dead can't be considered in determining whether the murder was especially wicked, evil, atrocious or cruel." (T 1486).

As Reese admits, Hall apprcved the standard instruction. Moreover, this Court has been consistent in following Hall. g . , Finnev v. State, 660 So.2d 674 (Fla. 1995); Johnson v. State, 660 So.2d 637 (Fla. 1995); Fennie v. State, 648 So.2d 95 (Fla. 1994), cert. denied, 115 S.Ct. 1120, 130 L.Ed.2d 1083 (1995); Falls v. State, 641 So.2d 381 (Fla. 1994), cert. denied, 115 S.Ct. 943, 130 L.Ed.2d 887 (1995); Tavlor v. State, 630 So.2d 1038 (Fla. 1993), cert. denied, 115 S.Ct. 518, 130 L.Ed.2d 424 (1994). Reese has shown no reason why this Court should reconsider this issue, and this claim should be denied as being without merit.

Even if this Court were to find error in the HAC instruction, any such error would be harmless because this murder was heinous, atrocious, or cruel under any definition of those terms. Reese

broke into the victim's home and lay in wait for hours after she returned home. He attacked her, hitting her in the face four times, raped her, and finally strangled her. As found by the trial court,

> [b]efore beginning the act of killing her, he raped her from behind while choking her. This was intended to degrade, punish, and terrify her, all of which it undoubtedly did. Further, the manner in which he choked her to death inflicted a high degree of pain and suffering upon the victim. The killing was conscienceless, pitiless, and torturous, as the Defendant intended it to be, because he wanted to inflict suffering; he wanted revenge.

(R 383).

The HAC aggravator pertains to the nature of the killing and the surrounding circumstances. Gorby v. State, 630 So.2d 544 (Fla. 1993), cert. denied, 115 S.Ct. 99, 130 L.Ed.2d 48 (1994); Stano v. State, 460 So.2d 890 (Fla. 1984), cert. denied, 471 U.S. 1111, 105 S.Ct. 2347, 85 L.Ed.2d 863 (1985); Mason v. State, 438 So.2d 374 (Fla. 1983), cert. denied, 465 U.S. 1051, 104 S.Ct. 1330, 79 L.Ed.2d 725 (1984). 'In determining whether the circumstance of heinous, atrocious and cruel applies, the mind set or mental anguish of the victim is an important factor." Harvey v. State, 529 So.2d 1083, 1087 (Fla. 1988), cert. denied, 489 U.S. 1040, 109 S.Ct. 1175, 103 L.Ed.2d 237 (1989); Phillips v. State, 476 So.2d

194 (Fla. 1985). As this Court has held many times, the fear and emotional strain preceding a victim's death contribute to the heinous nature of that death. Sochor v. State, 619 So.2d 285 (Fla.), cert. denied, 114 S.Ct. 638, 126 L.Ed.2d 596 (1993); Preston v. State, 607 So.2d 404 (Fla. 1992), cert. denied, 113 S.Ct. 1619, 123 L.Ed.2d 178 (1993); Adams v. State, 412 So.2d 850 (Fla.), cert. denied, 459 U.S. 882, 103 S.Ct. 182, 74 L.Ed.2d 148 (1982). Furthermore, the HAC aggravator applies to most strangulation murders. E.g., Sochor v. Florida, 504 U.S. 527, 112 S.Ct. 2114, 119 L.Ed.2d 326 (1992) (acknowledging that the Florida Supreme Court has consistently held that HAC applies to strangulations); Carroll v. State, 636 So.2d 1316 (Fla.) (HAC approved where victim raped and strangled), cert. denied, 115 S.Ct. 447, 130 L.Ed.2d 357 (1994); Happ v. State, 618 So.2d 205 (Fla.) (HAC approved where victim beaten, raped, and strangled), cert. denied, 114 S.Ct. 328, 126 L.Ed.2d 274 (1994); Hildwin v. State, 531 So.2d 124 (Fla. 1988) (HAC approved where victim abducted, raped, and strangled), aff'd, 490 U.S. 638, 109 S.Ct. 2055, 104 L.Ed.2d 728 (1989); Perry v. State, 522 So.2d 817 (Fla. 1988) (same); Tompkins v. State, 502 So.2d 415 (Fla. 1986) (HAC approved where victim abducted and strangled), cert. denied, 483 U.S. 1033,

107 S.Ct. 3277, 97 L.Ed.2d 781 (1987); Adams (HAC approved where victim abducted, raped, and strangled).

The record supports the trial court's finding HAC in aggravation, and that finding should be affirmed, regardless of the jury instruction.

CONCLUSION

Therefore, the State of Florida asks this Court to affirm Reese's conviction of first-degree murder and sentence of death.

Respectfully submitted,

ROBERT A. BUTTERWORTH
ATTORNEY GENERAL

Barbara J. Yates

BARBARA J. YATES
Assistant Attorney General
Florida Bar #293237

OFFICE OF THE ATTORNEY GENERAL
The Capitol
Tallahassee, Florida 32399-1050
(904) 488-0600

COUNSEL FOR APPELLEE

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Mail to Nada Carey, Assistant Public Defender, Leon County Courthouse, Fourth Floor North, 301 South Monroe Street, Tallahassee, Florida 32301, this 2nd day of February, 1996.

Barbara J. Yates

BARBARA J. YATES
Assistant Attorney General