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

INITIAL BRIEF OF APPELLANT

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IN THE SUPREME COURT OF FLORIDA

JOHN LOVEMAN REESE, :

Appellant, :

v. : CASE NO. 82,119

STATE OF FLORIDA, :

Appellee. :

:

INITIAL BRIEF OF APPELLANT

STATEMENT OF THE CASE

On May 14, 1992, the Duval County Grand Jury indicted appellant, JOHN LOVEMAN REESE, for the first-degree murder of Sharlene Austin on or between January 28 and 29, 1992, sexual battery with great force, burglary with assault, and armed kidnapping. (R 14).[1] The kidnapping charge was dropped before trial. (T 162)

Reese was tried by jury before Circuit Judge L. P. Haddock on March 18 and 22-25, 1993. During pretrial proceedings, appellant gave notice of his intent to participate in discovery and demanded all matters encompassed by Rule 3.220(b). (R 10). As to any statements by accused, the state's response was "All statements brought out at depositions. Any statements by accused on arrest and booking report. Defendant confessed to Hinson, Thowart, and Grier. (T 17). During the state's case-

[1]References to the three-volume record on appeal are designated by "R" and the page number. References to the fifteen-volume trial transcript are designated by "T" and the page number.

in-chief, appellant alleged a discovery violation in that the state had failed to disclose appellant's alleged statement as to the time-frame of the murder. The trial court ruled there was no violation and denied appellant's motions to exclude the testimony and for mistrial. (T 820-849). Appellant testified in his defense. Following deliberations, the jury found appellant guilty as charged on all counts. (T 1146).

At the penalty phase of the trial, on May 14, 1993, the defense presented seven witnesses, and the state presented one rebuttal witness. (T 1186-1402). During the penalty phase charge conference, the trial court overruled appellant's objections to the standard jury instructions on the heinous, atrocious, or cruel, and cold, calculated, and premeditated aggravating circumstances and rejected his requests for expanded instructions. (T 1413-1414, 1420-1421, R 343-345). Following deliberations, the jury returned with an advisory verdict recommending the death sentence by a vote of 8 to 4. (T 1492).

On June 24, 1993, the trial court denied appellant's motion for new trial (T 1499) and the defense submitted its memorandum in support of a life sentence. (T 1501, R 368-373). On June 25, 1993, the court sentenced Reese to death for the first-degree murder, finding three aggravating factors and one mitigating factor. (T 1508-1513, R 382-384). The court sentenced Reese to concurrent sentences of 22 years in prison on the remaining counts. (T 1515).

Notice of appeal was timely filed July 16, 1993. (R 392).

This Court has jurisdiction. Art. V, s. 3(b)(1), Fla. Const.

STATEMENT OF THE FACTS

This case involves an emotional triangle between Reese, his girlfriend, Jackie Grier, and the victim, Sharlene Austin. Austin was Grier's best friend. The state's theory at trial was that Reese blamed Austin for his failing relationship with Grier and plotted to rape and kill Austin as an act of revenge. The defense theory was that Reese had developed an abnormal attachment to Grier as a result of childhood trauma, in particular the brutal slaying of his mother by his father, and, perceiving Austin as a threat to his relationship with Grier, tried to talk to her in an effort to salvage his relationship with Grier, and killed her in a state of rage.

Guilt Phase

State's Case-in-Chief

A. The Triangle: Jackie Grier's Testimony

On direct examination, Grier testified that Reese had been her boyfriend for seven years, off and on, and had lived with her for three-and-a-half years. He was very jealous and possessive. Austin had been her best friend for two-and-a-half years; they saw each other every day. (T 616-617). Reese disliked Austin for "no reason" at all. (T 618). Between October 1991 and the end of January 1992, Austin and Grier had boyfriends in Fort Stewart, Georgia, whom they visited on weekends. (T 619). Grier said Reese was not living with her

during this time period and characterized their relationship as "nonexistent." (T 618).

The last trip to Georgia occurred the weekend before Austin was killed. They left Saturday, January 25, 1992, and returned Monday, January 27. (T 619). According to Grier, Reese was not at her house that weekend. (T 620). On Wednesday, January 29, Grier became worried when she was unable to reach Austin by phone. She and a neighbor went to Austin's house and found the back door unlocked. The living room was in disarray, and Austin's body was in the bedroom, lying face down on the floor, covered only with a bedspread. (T 629-633).

After the police arrived, Austin's parents drove Grier home. She found Reese in the bedroom. She had not seen him since the week before and was surprised to see him. There were fresh fingernail scratches on his neck and arm. He did not react when she told him about Austin's death and would not come out and meet her parents. (T 635-637).

In late April or early May, two weeks after Reese was arrested for the murder, Grier paid a visit to Reese in jail to find out the truth about whether he had raped Austin. At first he admitted only the murder. Eventually, he admitted he also had sexually assaulted Austin. (T 637-638).

Grier provided additional insight into the relationship on cross-examination. She was living in Anniston, Alabama, when she met Reese. She was older than Reese and was married and had four children. (T 642). They dated for a short time, but

Reese broke off the relationship when he found out Grier was married. They resumed dating after Grier left her husband and began living together a few years later. (T 642).

As the relationship developed, Reese became increasingly possessive. The couple often had long talks about Reese's possessiveness and jealousy. (T 645). Grier cared for Reese a lot but at times talked about leaving him and on occasion did leave him. When this occurred, Reese got very emotional and cried a lot. Sometimes he became so distraught, Grier had to hug him and try to calm him down. (T 648).

They both held jobs in Anniston, and Reese helped support Grier and her children. When Grier lost her job because of cutbacks, Reese's support was not enough, so Grier decided to move to Jacksonville where she had family and hoped to find a new job. (T 649). Grier felt Reese should be on his own for a while, so he stayed in Anniston. (T 650). In Jacksonville, Grier met Austin, and they became very close friends. After Grier got settled in Jacksonville, Reese joined her there, and they tried to get a fresh start. The relationship flourished for a while, then the old problems resurfaced. One problem was Grier's suspicion that Reese was using drugs. (T 651-652).

Grier and Austin spent a lot of time together, frequently going to clubs together. (T 652). When Austin visited, Reese usually just said hello, then went to another room or left the house. Reese and Austin never argued, but Grier could tell there was tension on Reese's part and knew he felt threatened

by her relationship with Austin. (T 653, 655-656). Reese wanted Grier to stay home with him and often voiced concerns about her going out with Austin. (T 654). Grier asked Reese to go with them sometimes, but he always said no. (T 655). When Grier eventually confronted Reese about his attitude towards Austin, he said he was afraid the men hanging around Austin at the clubs would become interested in Grier and he might lose her. (T 655).

In October of 1991, Grier and Austin quit the club scene in Jacksonville and start going to the Officer's Club in Fort Stewart. Grier had decided to start looking for someone else, someone who would treat her right. (T 657). When Reese asked her where she was going, she led him to believe she was going to visit Austin's family. (T 658-660). Meanwhile, Grier met a soldier named Rick, Austin met a soldier named Nick, and Grier and Austin began spending their weekends with Rick and Nick. (T 660-661). Grier did everything she could to keep her involvement with Rick a secret because she was afraid Reese would explode with jealousy and become violent if he found out. She admitted she continued to see Reese during the week while the trips to Fort Stewart were going on but she saw less and less of him as the relationship with Rick developed. (T 661).

Defense counsel brought out on cross-examination that Grier had talked to both Austin and Reese the day before Austin's body was discovered. Grier received a phone call from Reese around 3 o'clock that afternoon. He asked if she had a

good time over the weekend and sounded sarcastic. (T 662). About an hour later, she got a call from Austin. After chatting a while, Austin said she was going to take a nap. She called again about 7:40 and said she was about to get up. (T 663). When Grier asked if anyone was with her, Austin said no and abruptly hung up, which was unusual for her. (T 667).

Turning to the night Austin's body was discovered, Grier admitted she called home before she left Austin's house and was told by her children that Reese was coming over that night. She was still surprised to see him because "he lies so much." (T 668). He kept trying to talk to her that night but she put him off because she was so upset. (T 669). He did tell her he loved her very much. He also told her something was going on and she needed to stick by him. (T 669). Even so, a calm seemed to have come over him. (T 669).

Reese eventually moved back in with Grier and the relationship flourished once again. (T 670).

Turning to the arrest, Grier said she accompanied Reese to the police station the day of his arrest. (T 671). After the detectives talked to Reese for a while, they came and told her they expected to arrest him and he wanted to see her. They took her to the door of the interview room, she asked him what happened, and then left. (T 672).

The same day, after Reese was arrested, Grier received a phone call from him. He was upset and crying. (T 673). The state objected to this line of questioning as beyond the scope

of direct examination. The trial court sustained the objection but allowed the defense to make a proffer. (T 675-676). In the proffer, Grier said the conversation at the jail she had testified to on direct examination was one of a series of conversations she had with Reese after his arrest in which she tried to get him to admit the sexual battery. (T 678). During the first conversation, she told him she was mad at him and would not talk to him unless he told her what happened. He called back a half hour later and told her what happened. He went to Austin's house to ask her to lay off seeing Grier so he could have more time with Grier. (T 679). He was planning to talk to her when she got home but when he saw her come down the walk, he got scared and hid in the closet. He hid for a long time while she fell asleep. As he got ready to leave and came out of the closet, she was waking up. He was upset and scared and grabbed her from behind and choked her. He got an extension cord and wrapped it around her neck. He went over there just to talk to her and ask her to give him some more time with Grier. He was jealous and felt like Austin was taking Grier away from him. (T 680-681).

Grier admitted she had been convicted of a crime of dishonesty but did not recall how many times. A conviction for petit theft related to using her identification to lease a television. (T 690).

On redirect, when asked to elaborate on Reese's behavior when she threatened to leave him, Grier said his anger some-

times pushed him to the point where if she did not listen to him, he would shake her, push her down on the bed, lock the door, and not let her out. He would rage and call her names. (T 694-700). When asked if Reese helped support the children, she said he did, but not every week. Sometimes, she would be waiting for the money and he would not show up. (T 701-702).

B. The Physical Evidence

There were signs of a struggle in the living room and bedroom of Austin's house. (T 717). Press-on nails were found on the coffee table, the living room floor, and under her leg. (T 719). An extension cord was around her neck. The cord was folded in half, looped twice around the neck, then fed through the loop and pulled. (T 740). Reese's palm print was found on the foot board of the bed near where the body was found. (T 742-743, 807).

Dr. Arruza, the medical examiner, said Austin had been dead 24 to 36 hours before the body was discovered. (T 788). She died of strangulation. (T 779). In addition to the extension cord around her neck, there were abrasions, or superficial scrapes, on both sides of the neck, above and below the cord. The scrapes were manual-type injuries and could have been made either by the attacker or by Austin herself in an effort to release the pressure. (T 761, 769-770). The mark from the cord extended around the neck and was wider than the cord itself, indicating the cord had moved up and down. (T 762, 766). There was extensive internal hemorrhaging in the

neck area and a thyroid fracture (T 762), indicating it was not a typical ligature strangulation but involved extensive manual manipulation. (T 794).

According to Dr. Arruza, constant pressure to the neck area results in loss of consciousness in thirty to sixty seconds. Three to five minutes of additional constant pressure is required to effect death. If the pressure is relieved, the person will come back to consciousness. (T 787).

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

C. Reese's Statements and the Discovery Violation

On April 15, 1992, Detectives Thowart and Hinson interviewed Reese at the police station and obtained two oral statements from Reese. Each statement was reduced to writing by the detectives after it was made and signed by Reese. (T 811-818).

Prior to Thowart's testimony, defense counsel advised the court that although the prosecutor said in opening statement that Reese told police the actual killing took place around 10

p.m., the state had not provided that statement to the defense during discovery. The only statement the defense got about the time-frame was that Reese had said Austin got home around 4 p.m., he waited in a back bedroom until she went to sleep on the couch in the living room, and then came out. (T 820-821).

The trial court held a hearing on the alleged discovery violation. During the hearing, the trial court stated,

> It can't really be cured by [deposing the detectives] at this point. It could be cured by either exclusion of that part of the evidence or by a mistrial, one way or the other. I mean he has --it's been very obvious in [defense counsel's] cross examination that that time-frame is critical.

(T 834). Upon questioning, Thowart said although the 10 o'clock time-frame was not in the notes of the interview and he did not mention at deposition, he remembered Reese saying the victim went to bed around ten o'clock, and he came out about an hour after that.

After further argument, the trial court ruled there was no discovery violation because "the law does not expect anyone to have a verbatim memory" of such lengthy conversations 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." (T 848-849).

Both Thowart and Hinson testified regarding Reese's oral statements. Thowart said Reese was brought down to the station for questioning because a print left in Austin's house had been

positively identified as his.[2] (T 855-856). After reading Reese his rights, they asked him if he had ever been in Austin's house, ever helped her move, or ever had sex with her. Reese answered no to each of these questions and said he did not know who might have hurt her. With Reese's permission, Thowart wrote out a statement to this effect, which Reese signed. (T 869-870).

Thowart then told Reese his prints were found inside the house. Reese asked what would happen if he told the truth and asked to see Grier. (T 876-877, 917). Thowart brought Grier to the door of the room, and Reese stood, held out his hand, and asked her to come here. Grier told him to tell the truth. (T 878, 918). Reese was somewhat emotional after she left the room. (T 918). He then confessed the details of the crime. He went to see Austin around noon. He wanted to talk to her about going off with Jackie all the time and leaving him watching the kids and the problem this was causing in his relationship with Jackie. When he got there, no one was home. He jimmied the back door lock with a pocket knife. (T 879, 920). He waited in the back bedroom, in the closet. Austin got home around 4 o'clock, and he waited for her to go to bed. The longer he waited, the madder he got. Hinson asked Reese if that was when he decided to hurt her, and he said yes. (T 920). Thowart testified they asked him if that was when he

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[2]Thowart admitted he got Reese to the police station by lying. He contacted Jackie Grier and told her they had lost Reese's prints and needed another set. (T 898).

decided to kill her, and he said, yes, the longer he waited, the madder he got. (T 881). She went to sleep around ten o'clock. She was sleeping unclothed on the couch in the living room, covered with a blanket. He waited about an hour, then came up behind her and grabbed her around the neck. They struggled into the bedroom. He admitted he had sex with her but asked them not to tell Jackie. (T 883-884, 922). He pulled her to the floor and choked her with an extension cord that was on the floor. (T 886). He covered her with some bedclothes and left through the back door. He went to a store to get some food, then went home to Jackie. (T 887, 923).

Defense Case

Reese testified in his defense. He was 28 years old and was raised in Alexander, Virginia, by his adopted parents, Calvester and John Reese, Sr, until he was seven years old. (T 935-936, 939). They had a loving family home. When Reese was seven, his father got sick and went to the hospital. He came home on a Monday night and said he was doing fine. The next morning, when Reese went to his parents' bedroom, clothes were all over the floor and drawers were open. A butcher knife lay on the floor, broken into two pieces. He found his mother lying on the floor downstairs. She had been stabbed. He could not find his father. He went to a neighbor's house and told them his mother was dead. The police came. They found his father the next day. (T 941-942). He found out later his father was sent to a mental hospital. When he got out, he

froze to death. (T 947-948).

Reese went to live with his mother's brother, Marvin Smith, in Anniston, Alabama. It was different from what he was used to. They argued all the time. He got whipped a lot. He was not allowed to play sports or have friends. He had to stay home all the time. He was not allowed to see his father's family in Anniston and Birmingham. (T 948-949).

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

He met Jackie Grier at a night club. (T 951). The relationship started off wonderful. It was what he had always been looking for in a relationship. Jackie did things for him nobody had ever done for him. He always told her she reminded him of his mother. She was always there for him. They were close. (T 952).

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

They moved to Jacksonville in late 1989 or early 1990. (T 952). Reese said he did not have any differences with Sharlene. Jackie and Sharlene seemed very close, closer than he and Jackie were. They went off together and did things he and Jackie did not have the opportunity to do. (T 953). They went to clubs excessively. He wanted Jackie home with the kids. Going out every now and then was all right, but every weekend got to be a strain on him. He would ask her to stay home with him and the kids, go to the movies or to a restaurant, but she always had something planned with Sharlene. He was left caring for the kids. He began wondering if Jackie was messing around but did not want to accept that. She always said she was just going out, and he believed her, when he loved her, and he loved her a whole lot. (T 954-955).

He first learned about Jackie and Sharlene going to Georgia about a month before it all started. He was trying out for the Jacksonville Blazers football team. Jackie was telling him she was going to Georgia to see Sharlene's mother. (T 955). But times after that, he would come home from practice, and she was not there. On a Friday evening, he would come home, and the kids would tell him Jackie had gone to Sharlene's mother's house in Georgia. He would wait Friday night, Saturday night, Sunday night. She would get back on Monday morning. At first, he would just wait in the bedroom to see if she would come back there and gave him some kind of response, but she never did. After three months of it, he was very upset and

began to ask her where she had been, what was going on, but she did not have a response. She said she was at Sharlene's mother's house, at church, just going to a friend's house. She never told him she was seeing someone else. (T 956). He did not know she was seeing another man until his lawyer told him. (T 958).

They never had very good communication. He always wanted to sit down and talk when they got into an argument. Towards the end, they got in bad arguments. He would get so upset he would give her a few harsh words, something he never did before. He would apologize but she would still be upset. He would leave the house, move somewhere else. He would call her, see how she was, see if she missed him. She always wanted him to come back, he always came back. (T 956-957). During the time she was going to Georgia, he left and stayed with a friend for about a month. He came back home after that and they talked about doing the right thing. (T 956-957).

In the months before the homicide, he was upset. He did not know what to think. People were asking him why he was letting her go out like that, why he did not get more information about it. He would say maybe she is just doing what she is saying. But every time she came home and he asked her, she told him something different. (T 958).

He decided to talk to Sharlene, to try to get her to tell him what was going on. He wanted to ask her why Jackie was staying out on the weekends, why she was not telling him

anything when they were supposed to be getting things together. (T 959). He got in the house by opening the back door with his pocket knife. (T 959). He did not wait outside because he was scared someone would call the police on him. His intent was to wait until Sharlene got there and talk to her, try to get some information to ease his mind. He could not get his mind eased about Jackie. He felt like Sharlene was interfering in their relationship because Jackie and Sharlene were always together. He felt like Sharlene was taking the person he loved away from him. (T 960).

After he got inside, he turned on the TV. It was about twelve o'clock. He watched TV and thought about what he should say. He kept looking out the window. Around 4 o'clock, he looked out the window and saw her car pull up. He got scared then because he was in her house and had broken in. He hid in the bedroom. She went in the bathroom, and he closed the door and hid. She was on the phone for three or four minutes. He could not tell who she was talking to. She said she was going to lie down, try to sleep, take a little nap, she had a hard day's work. She hung up, then turned on the TV. She watched half a program, turned the TV off, and lay down. (T 961).

At the time, he was still debating about how to leave. He could not leave through the bedroom because of the burglar bars. He waited until she went to sleep, and when he thought she was asleep, he opened the door. It was dark in the living room but daylight outside. As he walked through the room,

between the couch and love seat, she moved, and he got more scared. He ran to her and grabbed her around the neck to keep her from seeing him. But he was so upset, he did not let go. They struggled from the living room to the bedroom, onto the waterbed. They had sex, and after that, he killed her. He put her on the floor with his arms still around her. He found an extension cord, put it around her neck, pulled twice, and let go. (T 962).

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

When asked what was in his mind when he was killing Sharlene, he said, "Everything. I was very emotional mentally, I done lost it. To me, it seemed like I had blacked out, just lost control. Lost control of the situation. And after I had seen what I had did, I felt sorry, because I was wrong." (T 963). Even after he confessed the murder to the police, he did not tell Jackie he had sex with Austin. He did not want her to find out because he knew how much it would hurt her. (T 964).

On cross-examination, Reese said he gave all his paychecks to Jackie during the first part of the relationship. He slacked up when things started getting out of proportion, but

still gave her money. At the end, when he got upset about what was going on, he took the money and left, went somewhere else. (T 965-966).

He denied ever beating Jackie but admitted he had hit her. (T 967). He said she had called the police on him but not for hitting her. She called the police because he would not leave when she asked him to leave. He wanted to stay and try to work things out. (T 968). He denied he had threatened to kill her if she left him, but admitted he had told her if he could not have her, no one else would. During the seven-and-a-half years they were together, he hit her about four times. He never locked her in the bedroom and forced himself on her sexually. (T 969). He was staying at her house between October 1991 and January of 1992. (T 970, 971).

He first grabbed Sharlene about an hour after she got home, sometime after 5 o'clock. When asked why he raped her, he said, "I don't know, sir. Sir, I don't know how my reaction was, sir. I was lost, okay, I was lost, I can't say what--." (T 976). He did not know when the thought entered his mind to rape her. He did not take his clothes off, it did not take long. When asked if he found her desirable, he said he did not have that in mind. (T 977). After that, he was still choking her around her neck. After she was choked out, he put her on the floor, and put the cord around her neck. (T 980). She was not moving. (T 982). He jerked it twice for about three seconds each time. (T 987). He got home by 8 o'clock. Jackie

had made dinner but everyone had eaten by the time he got there. Jackie watched TV while he ate. (T 984-985).

He said he lied to the police when they asked him if he had ever been in Austin's house because he was scared. When asked whether he was scared of being convicted of first-degree murder, he said yes. When asked if he was doing his best to get out of it, he said no. (T 987).

On redirect, he said he cared whether he was convicted of first-degree murder. When asked whether he had authorized a plea, the trial court sustained the state's objection, ruling the testimony irrelevant. (T 988).

State's Rebuttal

Grier said she did not remember seeing Reese the night before she found Austin's body and denied that he spent the night at her house that night. She said he hit her about three times a month during the three-and-a-half years they lived together. She called the police because of the hitting. He also had threatened to kill her if she left him. He also had forced sexual intercourse on her. This happened about three times a month, whenever he got upset that she was going out. He would grab her and refuse to let her leave the room. She would yell for the children but they could not get in because the door was locked. (T 1002-1003).

On cross-examination, Grier admitted she had been violent towards Reese, too, but only when he attacked her. She said she hit him and did whatever it took to get him off her. She

had thrown hot grease on him and cut him but just to keep him from hurting her. (T 1004).

Penalty Phase

Expert Testimony

Dr. Harry Krop testified as an expert in forensic psychology.[3] Dr. Krop said Reese was of somewhat below average intelligence. He found no evidence of a major mental illness or personality disorder. He also excluded the diagnosis of antisocial personality disorder. (T 1206-1208).

Dr. Krop said Reese's childhood experiences helped make sense of the homicide, which was out of character for Reese. (T 1208, 1212, 1251). Reese had begun life in a loving home with parents who apparently cared for him, but whose father was mentally ill, paranoid schizophrenic, and became so severely mentally ill that he stabbed Reese's mother to death. After Reese's father was put in mental hospital, Reese had no contact with him. He went to live with an uncle in a very strict, very rigid environment where he was not allowed to live as a child. At age 14, he went to live with another aunt and uncle, who provided him with a loving, caring environment. He was with this family for two or three years before he joined the Job

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

Corps. He came back because he did not want to leave his uncle without any financial support. The day after he came back, his uncle died of a heart attack. (T 1208-1210).

From that point on, Reese was searching for stability in relationships. He married a woman, found out she was a drug addict, and that relationship broke up. He subsequently met Grier, whom he perceived basically as his fate. He believed he had finally found somebody who loved him, and this was his chance to develop a stable family life. (T 1211). This was not a realistic perception on Reese's part, however, as the relationship was dysfunctional or pathological. Grier had asked Reese to leave, had told him it was over, and had called the police a few times. Reese felt the relationship still had a chance though and was desperate to hold on to it. His continued frustration and desperation to hold on to that stability is what led up to the murder. (T 1211-1213).

Dr. Krop said Reese had difficulty accepting and understanding some of the things that were going on in his life. That is why he went to Austin's house that day. He was desperate to find an explanation for why the relationship was not working. He was frustrated because he felt like he could not get answers from Grier, and so he tried talking to Austin about it. Instead, he lost control. (T 1213). He was scared and frustrated, and all the anger, frustration, and rejection he had experienced in his life came out at once. (T 1214). The manner of killing reflected that Reese was enraged and his rage

and violence came out. (T 1236).

Dr. Krop said Reese is insecure, feels inadequate, and is very sensitive to rejection. He also is a very non-assertive person, meaning he has difficulty expressing the way he really feels at a given time.[4] (T 1214-1215). Thus, the frustration, anger, and resentment that had built up was not just because of what was happening in his relationship but because of what had happened to him throughout his life. (T 1215). As a result of the trauma Reese experienced as a child, he grew up feeling helpless, and, hence, a need to control. When he got into a relationship with someone he loved very much, he felt a desperate need to hold on, no matter what. (T 1216).

Reese's coping skills were not effective and he tended to be dependent on alcohol and drugs. He had started using crack cocaine regularly four or five months before the homicide and was using quite a lot of crack cocaine the day of the offense. (T 1212). Dr. Krop said Reese accepted responsibility for what he had done from the first time Dr. Krop saw him. Reese was not trying to blame alcohol and drugs but was trying to understand how he could have done what he did. It was hard for him to believe he had done it. (T 1212).

In Dr. Krop's opinion, Reese's mental state was seriously impaired when he killed Sharlene Austin. (T 1217). Dr. Krop

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[4]Dr. Krop drew an analogy to walking around with a knapsack full of boulders. Each time the person holds on to a strong feeling, it is like putting a boulder on his back and carrying it around. There may come a time, when provoked or not, the boulders come flying out and violence occurs out of proportion to the situation.

said crack cocaine has a very acute, very immediate, and very dramatic effect on a person's thinking, intensifying whatever emotions are already present. (T 1218). Both crack cocaine and the accumulation of emotional stress result in poor impulse control. Although Reese's impulse control generally is good, when under considerable stress, such as the stress caused by fear of losing a high-priority relationship, his impulse control could be impaired. (T 1219-1220).

Dr. Krop said Reese would have no problem whatsoever functioning in a prison environment. Although he usually did not say this in such an absolute way, in this case, he was convinced by Reese's lack of a significant criminal history, his good conduct in jail, his cooperation with him, and his acceptance of responsibility for what he done. (T 1216-1217).

When asked if Grier had told him Reese habitually beat her and forced himself on her sexually after arguments, Dr. Krop said she had not, but if she had, this would not have affected his findings regarding Reese, and, in fact, would have supported his opinion since a non-assertive person can, in stressful situations, act out in a hostile or violent manner. (T 1244-1245). Dr. Krop said he specifically asked Grier about some of the discrepancies between her report of the relationship and what Reese had told him. Grier said she had several times asked Reese to leave and told him she was through, but he would not leave. He became verbally abusive, sometimes shoved her around, and she called the police. When he asked her if there

was any type of "beating [sic] sexual activity" on Reese's part, she said no. Sometimes when they argued, though, he felt the only way he could show his love was to have sex, and he would pressure her and was insensitive to the fact that she was not interested. But he did not force her to have sex. (T 1246).

Dr. Krop said the murder of Reese's adoptive mother by his adoptive father was traumatic and "absolutely" contributed to the rape and murder of Sharlene Austin. There was no dispute in psychological theory that such traumas shape an individual's personality. (T 1248-1249).

When asked if Reese's behavior after the crime was consistent with someone who was ruthless and had committed a cold-blooded murder, Dr. Krop said Reese's behavior after the crime was more consistent with his personality trait of dealing with things as if they were not really there. He coped by going on with his life as if nothing had happened. When asked if he could rule out the possibility that the rape and murder was a cold-blooded decision thought-out beforehand, Dr. Krop said that was not his opinion, and he had sufficient information to have confidence in his opinion. (T 1251).

On redirect, Dr. Krop said it was very unusual for a person charged with first-degree murder to admit what he has done, including the gruesome details, even in a confidential evaluation. (T 1255). Reese was still very much in love with Grier and was very ashamed of what he had done, particularly

the sexual assault. He recognized the wrongfulness of what he did and was not trying to avoid responsibility or punishment in any way. (T 1256). His initial denial when first questioned by police was related to his fear of losing the relationship with Grier. Obviously, after he killed the victim, there was a very real possibility he would be arrested and lose the relationship. He wanted that relationship to continue. He had mixed feelings: He felt guilty about what he had done, but was scared of being arrested. (T 1260-1261).

Lay Testimony

Christan Cunningham was Reese's adopted mother's sister. Christan testified that Reese's adoptive parents, Calvester and John, met in Virginia, though both were from Alabama. (T 1265). Johnnie was the third baby they had tried to adopt. They were very proud of him. (T 1267). The night before Calvester was killed, John called Christan four times, talking about blackouts and seeing people he had killed in Vietnam. (T 1268-1269). He had taken a bottle of sleeping pills but could not sleep. He wanted Calvester and Johnnie to leave because he felt like something was going to happen. (T 1269). Christan's brothers decided to go get him, but before they left, they heard he had killed Calvester. (T 1270). This was in January of 1973. Johnnie was seven. Reese's father was sent to a mental institution and later froze to death in an abandoned house. (T 1271-1272). Later, when Johnnie kept saying his daddy killed his mama, the family told him Calvester was not

his mother, that she was his adopted mother. They thought this would make him feel better. (T 1273).

Dorothy Robinson was Calvester's younger sister. John Reese, Sr. treated her like a sister, and she was crazy about him. (T 1294). Dorothy spoke to Calvester several hours before she died. She said John was having a breakdown. The police said they could not do anything. The next day, she was dead. (T 1296-1297). Dorothy and her brothers brought Johnnie back to Alabama. (T 1297). The oldest brother, Marvin Smith, and his wife took custody of Johnnie. (T 1299). They met his physical needs but were very strict. They did not allow other children in the home and did not allow Johnnie to play. (T 1300). They had no parenting skills. Johnnie was whipped. (T 1303).

Ernestine Reese, Johnnie's aunt, was married to John Reese, Sr.'s brother, Grover. (T 1307). Johnnie came to live with them when he was going into the tenth grade. (T 1317). Johnnie and Grover developed a father-son relationship and Ernestine was like a mother to him. He was an affectionate boy, played a lot, and loved kids. He participated in football, track, and weight-lifting at his high school. He helped around the house by cutting the grass, mopping, and doing dishes. In 1983, he saw Grover die of a massive heart attack, after a long illness, and it was like he had lost another father. (T 1320). She never knew Johnnie to be violent or to get into a fight. He was very well-mannered and respectful

towards older people. He helped care for his grandmother, who was 100 years old. (T 1325-1326).

Ernestine did not want Reese involved with Grier because he was so young and she had kids. But he loved kids. She told him not to live with her and not to go to Florida. (T 1322). On cross-examination, Ernestine denied discouraging Jackie from a relationship with Reese. She did not remember telling Jackie he did not mean her any good or that she was too nice a girl to get mixed up with him. (T 1339). She did not remember Jackie complaining about him beating her or telling Jackie she should find someone else if he was beating her. (T 1340).

Ida Romaine coached Johnnie in track and field for two years at Anniston High School. (T 1347). He also played football for three years. (T 1352). John was a hard worker and excellent leader. He helped other students with their training. (T 1348). Outside of school, he was very respectful towards her and she never had any disciplinary problems with him. (T 1352-1353).

Allene Taylor was Reese's second-grade teacher. He was a great student, one of the brightest, and very happy. He was respectful towards teachers and other adults and popular with his classmates. (T 1379). She remembered him because he was such an outstanding child and because his parents were so supportive. She also remembered him because of the trauma he suffered when his mother was murdered. He came by school a few days after it happened to get his records and books. He was

very, very sad. He said he was going to Alabama on a train, and his mama was going, too, on a different train. (T 1380).

State's Rebuttal

Jackie Grier said Ernestine had discouraged her relationship with Reese and told her he did not mean her any good. (T 1399). Ernestine told her she was too good to be messed up with him. During the two years she and Reese lived together before coming to Florida, he was violent two or three times. He would slap her or push her around. (T 1400). She told Ernestine about these incidents. (T 1401).

SUMMARY OF ARGUMENT

Point I. The trial court erred in failing to exclude Detective Thowart and Hinson's testimony regarding Reese's alleged oral statement that he killed the victim after 10 p.m., where the statement was not disclosed in discovery. The trial court applied the wrong standard in finding there was no discovery violation because the failure to disclose was unintentional. The violation was substantial because the time-frame was critical to the defense theory of the case, and the detectives' testimony contradicted Reese's trial testimony. The violation was prejudicial because Reese had no opportunity to rebut or diminish the impact of the officers' testimony. The record does not show beyond a reasonable doubt that the discovery violation did not procedurally or substantively prejudice the defense. Reese is entitled to a new trial.

Point II. The trial court erred in refusing to permit Reese to cross-examine Jackie Grier about Reese's confession the day he was arrested where Grier testified on direct that Reese admitted the sexual assault in a jailhouse conversation two weeks after his arrest. The earlier conversation, in which Reese confessed the details of the murder, led up to and was necessary to explain, place in context, and make not misleading the later conversation. Allowing the jury to hear only the last conversation was misleading and prejudicial and warrants a new trial.

Point III. The trial court erred in refusing to allow

Reese to testify on redirect about his offer to plead where the state opened the door on cross-examination by asking Reese if he was doing his best to escape conviction. The exclusion of this testimony denied Reese an opportunity to rebut the state's inference that he is a ruthless killer doing whatever he can to avoid punishment. This error requires a new trial.

Point IV. The trial court erred in finding the murder was cold, calculated, and premeditated, where the killing was the product of intense emotions in the context of a tormented domestic relationship and where there was no evidence Reese planned the murder before he entered the victim's house. The trial court also erred in instructing the jury on this aggravating factor. These errors denied Reese a fair penalty proceeding and rendered his death sentence unreliable. This Court must reverse for a new penalty phase proceeding.

Point V. The trial court erred in giving the jury an unconstitutionally vague jury instruction on the cold, calculated, and premeditated aggravating circumstance. This error was prejudicial where the evidence was insufficient to establish this aggravator, there remained only two other valid aggravators, the jury heard extensive mitigating evidence, and the advisory verdict for death was by a vote of 8 to 4. Appellant is entitled to a new penalty phase proceeding.

Point VI. The trial court erred in failing to expressly evaluate, find, and give significant weight to the unrebutted mitigating evidence. Without explanation, the trial court

dismissed as having "little or no weight" the unrebutted mitigating evidence of Reese's childhood trauma, the deterioration of his seven-year relationship with his girlfriend, and his good conduct in prison. The trial court's order did not even mention other proposed mitigating circumstances, including Reese's emotional incapacities, his drug and alcohol use, and that he was a good son and grandson. The conclusory nature of the sentencing order falls far short of the "reasoned judgment" required by this Court and requires reversal for resentencing.

Point VII. Reese's death sentence is disproportionate based on similar cases in which this Court has reduced the death sentence to life. This Court consistently has vacated the death sentence where, as here, the murder resulted from violent emotions in the context of a troubled domestic or family relationship and the defendant had no prior convictions for violent offenses. Florida juries, too, have consistently found this type of crime undeserving of the ultimate punishment. Reese's culpability should be no greater than the defendants in these cases.

Point VIII. The cumulative effect of the prosecutor's improper, misleading, and inflammatory arguments during the penalty phase rendered Reese's death sentence unreliable.

Point VIX. The trial court erred in giving an invalid and unconstitutional jury instruction on the heinous, atrocious, or cruel aggravating circumstance.

ARGUMENT

Point I

THE TRIAL COURT ERRED IN FAILING TO EXCLUDE A STATEMENT MADE BY REESE TO THE ARRESTING OFFICERS REGARDING THE TIME-FRAME OF THE HOMICIDE WHERE THE STATE FAILED TO FURNISH THIS STATEMENT TO DEFENSE COUNSEL PURSUANT TO FLORIDA RULE OF CRIMINAL PROCEDURE 3.220(b)(1)(C).

During the state's case-in-chief, Reese moved to preclude Detectives Thowart and Hinson from testifying that he said the killing took place after 10 p.m. Defense counsel advised the court the 10 o'clock time-frame was not disclosed in the depositions, was not in Reese's written statement, and counsel only became aware of it when the prosecutor mentioned it in his opening statement. The only statement provided about the time-frame ws that the victim got home around 4 p.m. and Reese came out sometime after she went to sleep on the living room couch. (T 820-821).

The prosecutor argued counsel would have found out about the statement if "defense counsel had asked that particular question" as "that's the statements from the detective from the outset of the case." (T 823). The prosecutor asserted there was no intent to hide anything from the defense and it was defense counsel's responsibility to "take a deposition of whatever they feel is proper." (T 825).

The trial court conducted a Richardson inquiry.[5] During the hearing, when the prosecutor asked the trial judge what

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[5]Richardson v. State, 246 So. 2d 771 (1971).

obligation the state had to furnish the time-frame, the trial judge responded, "None, but the state has an obligation if there is a statement by a defendant, it's a whole different ball of wax." (T 831). The trial judge stated there was "a duty on the officers to be as specific as humanly possible," and "if it's in the notes, and they left it out, it sounds like a Richardson [violation]." (T 832). While Thowart retrieved his notes of the interview, the following colloquy took place:

> MR. BATEH [prosecutor]: Your Honor, my suggestion is that we - if the court finds that there's some sort of Richardson violation of prejudice, what I would like to do is recess and let the defense depose them on a limited area.
>
> MR. COFER [Defense counsel]: The problem is, it's past deposing because I've done certain things in my cross examination which I would have not done had I been really on notice about this.
>
> THE COURT: It can't really be cured by that at this point. It could be cured by either exclusion of that part of the evidence or by a mistrial, one way or the other. I mean he has --it's been very obvious in his cross examination that that time-frame is critical.

(T 834).

Upon questioning, Thowart testified, "I do not see anything about ten o'clock [in the notes] but that is the time he told us." (T 836). Thowart said the 10 o'clock time-frame had always been in his mind and he would have disclosed if he had been specifically asked about it. He had discussed the 10 o'clock time-frame with the prosecutor on numerous occasions, and he considered it an important factor in the homicide. (T

842). Hinson testified that although he said at deposition that Reese said he was not sure exactly what time he came out of the back bedroom and confronted the victim, this was wrong. Reese had said the victim went to sleep at 10 o'clock and he came out about an hour after that. Hinson remembered this clearly and his failure to mention it at the deposition was an oversight. (T 929).

The court found the written statement contained no time-frame of 10 o'clock, this time-frame was not in the detectives' notes of the interview, the detectives were not specifically asked about it at deposition, and they did not provide it in deposition. (T 845-846). The court then ruled:

> [W]hen 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, . . . 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 statements should be divulged as specifically as is 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 848-849).

The trial court's ruling was error. The defense has no duty to elicit a defendant's oral statements during deposi-

tions. The state has an affirmative duty to provide the substance of such statements. In addition, the innocence or willfullness of the state's failure to disclose a statement is not relevant to whether there was a violation; intent is relevant only to the court's determination of an appropriate sanction for the violation. Because the court applied the wrong standard, it ruled incorrectly that there was no discovery violation. There was a clear discovery violation because the state failed to provide the defense with one of Reese's oral statements. The late disclosure of the statement was prejudicial because Reese had no opportunity to rebut or diminish the impact of the testimony. The court's failure to exclude the testimony requires reversal for a new trial.

The state has an obligation under the discovery rules to provide the defense with "the substance of any oral statements made by the accused." Fla. R. Crim. P. 3.220(b)(1)(C). Here, the state's response to the defense request for any statements by the accused was "All statements brought out at depositions. Any statements by accused on arrest and booking report. Defendant confessed to Hinson, Thowart and Grier." (R 17). In short, the state said Thowart and Hinson would furnish Reese's statements at their depositions. Thowart and Hinson did not furnish Reese's statement that he killed the victim after 10 o'clock. The state failed to comply with rule 3.220(b)(1)(C).

Contrary to the state's contention below, rule 3.220(b)(1)(c) imposes no duty on the defense to elicit the

defendant's oral statements from those who witnessed the statements. Rule 3.220(b)(1)(C) imposes an affirmative duty on the state to disclose such statements of the accused. The state cannot fulfull this obligation merely by disclosing the existence of such statements but is required to disclose the "substance" of the statements, along with the names and addresses of any witnesses to the statements. Clair v. State, 406 So. 2d 109, 111 n.4 (Fla. 5th DCA 1981). The rule places the responsibility squarely on the state: "The fact that the defense had access to a witness for deposition does not satisfy the requirements of Rule 3.220(b)(1)(C) to disclose an accused's statements." Martinez v. State, 528 So. 2d 1334 (Fla. 1st DCA 1988)(emphasis in original). Where the state's response to a demand for oral statements is "those brought out deposition," the defense is entitled to rely on the deposition testimony. The defense cannot be expected to ask the "right questions."

In Martinez, for example, the state responded to the demand for oral statements with, "All statements brought out at depositions. Any statements by accused on the arrest and booking reports." The report mentioned an October 8 statement to Deputy Curry that the defendant could get "more," (meaning more cocaine), and defense counsel deposed Curry about that statement. At trial, Curry testified the defendant offered to get him a kilo on October 9. The trial court allowed this testimony since defense counsel had an opportunity to depose

Curry about both statements. The appellate court reversed, reasoning that defense counsel did not know there was anything to ask because he had been led to believe the October 8 statement was the only one.

Here, too, defense counsel did not know there was anything to ask about a 10 o'clock time-frame because he was led to believe the 4 o'clock time-frame was the only one. At Thowart's deposition, defense counsel asked Thowart to "reconstruct for me the best you can the interview with Mr. Reeese" by "utilizing Detective Hinson's notes as best you can, and your recollection."[6] (T 485). Counsel directed Thowart "to put it in context, the best you can, your line of questioning and his answers." (R 486). As to the time-frame of the murder, Thowart said Reese said he went to the victim's house around noon and waited for her to get home. She got home around 4 p.m. He waited for her to go to sleep on the living room couch. He confronted her about an hour after she went to sleep. (R 499). Defense counsel asked Hinson to "reconstruct for me in as detailed fashion as you could everything that happened in that interview" (R 417) and "tell me everything that either you said or Carl Thowart said or that Reese said" and to tell him even "what wasn't included in your notes." (R 421). As to the time-frame, Hinson said Reese said he went to Austin's house around noon and she got home around 4 p.m. (R

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[6]Thowart said neither he nor Hinson took notes during the interview with Reese, but Hinson wrote down some notes after the interview.

426). Hinson also said, "He stated he waited in the back bedroom by the bathroom. He was unsure exactly what time it was that he came out of the back bedroom and confronted her." (R 429?). Given counsel's painstaking efforts to get everything; Hinson's response that Reese said he was unsure what time he came out; both detectives' clear testimony about the 4 o'clock time-frame; and the omission of any other time-frame in the written statement, counsel was led to believe there was no other time frame. As in Martinez, he did not know there was anything to ask.

Although there is a dearth of caselaw on what is meant by the "substance" of a defendant's oral statements, the cases hold that whenever the state seeks to admit a statement different from the statement furnished in discovery, there is a discovery violation when the two statements are appreciably different, White v. State, 585 So. 2d 1050 (Fla. 4th DCA 1991)(statement "that all he (defendant) would have to do is make one phone call and the `Disciples' would come down and get them" and that he would "call his cousin and have him come down from Chicago and `spray' the officers" held appreciably different from, "That's okay. I can get more guns. I will kill you if you arrest me. All you pigs are going to die," and "If you arrest me, I can get my hands on another gun and come back and shoot you."); do not carry the same evidentiary weight, Price v. State, 627 So. 2d 64 (Fla. 2d DCA 1993)(failure to deny does not carry same evidentiary weight as outright admission); or

where defense counsel was on notice of the statement because of a reasonable inference from the responses at deposition. Banks v. State, 590 So. 2d 465 (Fla. 1st DCA 1991)(reasonable inference from officer's negative response to question, "Did he tell you where he may have been that day?," was defendant did had indicated he did not know his whereabouts), review denied, 599 So. 2d 654 (Fla. 1992).[7]

In any event, here, the officers did not testify at trial to merely a different statement from what was provided in discovery; the officers testified about a statement that was not provided at all. The complete omission of Reese's statement about the 10 o'clock time-frame was a clear violation of the rule. The state's omission of one of the defendant's oral statements is no different from the omission of a witness from the witness list. In both instances, the omission constitutes a failure to comply with the rules.

When the state violates a discovery rule, the trial court must conduct an inquiry to determine whether the violation resulted in harm or prejudice to the defendant. Richardson v. State, 246 So. 2d 771 (Fla. 1971). In making this inquiry, the trial court must determine whether the discovery violation was inadvertent or willful, whether the violation was trivial or

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[7]Although none of these cases is directly on point, they demonstrate the confusion that arises when the trial court merges the question of whether there is discovery violation with the question of whether the defendant has been prejudiced. Whenever the state seeks to introduce a statement different from the statement disclosed in discovery, the court should find there has been a discovery violation. The significance of the difference between the two statements should be addressed in determining whether the violation was prejudicial.

substantial, and, most importantly, what effect it had on the defendant's ability to prepare for trial. State v. Hall, 509 So. 2d 1093 (Fla. 1987); Wilcox v. State, 367 So. 2d 1020 (Fla. 1979); Richardson. The burden is on the state to show the defendant was not prejudiced in the preparation of his defense. Cumbie v. State, 345 So. 2d 1061 (Fla. 1977). The trial court's obligation thus is two-fold: first, to determine whether the discovery violation prevented the defendant from properly preparing for trial, and, if so, what sanction is appopriate. Wilcox, 367 So. 2d at 1023.

Here, although the trial court ultimately--and incorrectly--concluded there was no discovery violation, the record establishes that the violation was both substantial and prejudicial. The time-frame of the actual killing clearly was critical to Reese's defense. The defense had already elicited testimony from Jackie Grier that supported an earlier time-frame for the murder, a time-frame consistent with Reese's anticipated testimony that the victim went to sleep around 4:30 p.m. and he came out and confronted her sometime after 5 p.m. and was home by 8 p.m. Indeed, the trial court itself explicitly found the time-frame was critical to the defense and that the only appropriate remedy would be exclusion of the testimony or mistrial. (T 834).

The state's late disclosure of Reese's alleged statement indicating a much later time-frame for the actual killing was critical in two respects. First, the length of time Reese

waited before he came out and confronted the victim goes directly to the issue of premeditation; the length of time also was relevant to the jury's determination during the penalty phase as to the existence of the cold, calculated, and premeditated aggravating factor.[8] The state's late disclosure of Reese's alleged statement about the 10 o'clock time-frame also undermined the defense theory as to when the murder took place. The prejudice to Reese's ability to prepare his defense is apparent. Reese had no opportunity to rebut or diminish the impact of Thowart's and Hinson's testimony. If Reese had been aware of the 10 o'clock 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.

This error cannot be deemed harmless as both procedural and substantive prejudice are apparent from the record. See State v. Schopp, 653 So. 2d 1016 (Fla. 1995)(failure to conduct adequate Richardson inquiry reversible error unlesss reviewing court can say beyond reasonable doubt that no prejudice resulted from discovery violation). Reese is entitled to a new trial.

Point II

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[8]The prosecutor emphasized the long wait in his closing argument to the jury during the penalty phase: "Waited until ten o'clock at night, by his own words," "From noon till ten or eleven o'clock, he is planning premeditating, deciding when he was going to ambush," "That ten to eleven hours is more than adequate time to coldly and in a premeditated fashion plan this murder." (T 1442).

THE TRIAL COURT ERRED IN RESTRICTING REESE'S CROSS-EXAMINATION OF JACKIE GRIER REGARDING PART OF REESE'S CONFESSION THE DAY OF HIS ARREST WHERE THE STATE OPENED THE DOOR BY OFFERING INTO EVIDENCE GRIER'S TESTIMONY REGARDING ANOTHER PART OF HIS CONFESSION TWO WEEKS LATER.

During the state's examination of Jackie Grier, Grier testified about a conversation she had with Reese in the Duval County Jail two weeks after his arrest. (T 637). She told him "it wasn't a friendly visit, I came for him to tell me the truth about what happened to Sharlene, if he raped her or not." (T 638). At first, "he told me he killed her, but he didn't do that." She continued to press him for the truth, and he finally admitted the sexual assault. (T 638). On cross-examination, however, the trial court sustained the state's objection when Reese asked Grier about earlier conversations in which she tried to get Reese to tell the truth about what happened. (T 675-676). In a proffer, Grier said the conversation at the jail was one of a series of conversations she had with Reese that began shortly after his arrest, in which she pressed him to tell the truth and confronted him with the evidence of sexual battery. She had several telephone conversations with him the day of his arrest, during which he was upset and crying. During the first conversation, she told him then she was mad at him and would not talk to him unless he told her what happened. He called back a half hour later and

told her about the murder.[9] After many conversations, he finally admitted the sexual battery. (T 673-676). Agreeing the earlier conversations "might explain" the eventual admission, the trial court nonetheless disallowed the testimony because the conversations were two weeks apart. The trial court's ruling violated the rule of completeness and denied Reese a fair trial.

Under the rule of completeness, once the state offers testimony regarding part of a confession or admission against interest, the defendant is entitled to bring out on cross-examination the entire confession or admission. Christopher v. State, 583 So. 2d 642 (Fla. 1991); Louette v. State, 152 Fla. 495, 12 So. 2d 168 (1943); Eberhardt v. State, 550 So. 2d 102, 105 (Fla. 1st DCA 1989), review denied, 560 So. 2d 234 (Fla. 1990); Somerville v. State, 584 So. 2d 200 (Fla. 1st DCA 1991).

The rule of completeness applies with full force when the parts of the confession or admissions were made at different times or in different conversations. Christopher; Eberhardt. In Eberhardt, the state elicited testimony from Officer Glisson in its case-in-chief regarding a statement Eberhardt made to him, but the trial court refused to allow Eberhardt to cross-

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[9]In the proffer, Grier said Reese told her he went to Sharlene's house to ask her to lay off seeing Grier so he could have more time with her. When he saw her come down the walk, though, he got frightened and hid in the closet. He hid there a long time while she fell asleep. As he was getting ready to leave, he was coming out of the closet and she was waking up. He was upset and scared and he grabbed her from behind and choked her. Then he got an extension cord and wrapped it around her neck. When Grier asked him why he did it, he said he just went over there to talk to her, he was jealous and felt that Sharlene was taking Grier away from him. (T 679-681).

examine Glisson about other exculpatory statements Eberhardt made to Glisson on the basis that the statements were self-serving. Even though there may have been different conversations at issue, the court held it was error to restrict Eberhardt's cross-examination about the exculpatory statements, which apparently supported his voluntary intoxication defense. The court said:

> Because portions of the defendant's conversation with the officer were admitted on direct examination, the rule of completeness generally allows admission of the balance of the conversation as well as other related conversations that in fairness are necessary for the jury to accurately perceive the context of what has transpired between the two. Ehrhardt, Florida Evidence, s. 108.1 (2nd Ed. 1984).

Id. at 105 (emphasis added), quoted with approval in Christopher, 583 So. 2d at 646.

The touchstone of the rule of completeness, then, is fairness. Once direct testimony regarding a defendant's confession has been admitted into evidence, 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. Christopher; Eberhardt. Whether the admissions came out in the same conversation or even on the same day is not relevant.

In the present case, it was error to restrict Reese from cross-examining Grier about her conversations with Reese the day he was arrested. Grier's testimony about Reese's confession at the jail two weeks later opened the door to the earlier

confession. The conversations clearly related to the same subject: They all dealt with Grier's efforts to get Reese to tell her the truth about what happened. As Grier herself testified, the jailhouse conversation was the last in a series of conversations that led to Reese's eventual admission that he raped Sharlene. Restricting the testimony to only the last conversation gave the jury a false impression of what transpired between Reese and Grier after Reese's arrest, i.e., that Reese talked to her about the murder only once, and when he did, he coldly admitted the murder, and after some prodding, admitted the sexual assault. The excluded testimony, in sharp contrast, showed that Reese and Grier had several extremely emotional conversations immediately after Reese's arrest in which Reese confessed the details of the murder to an incredulous Grier.

This whole case was about Reese's relationship with Grier. His 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. The excluded testimony was relevant to Reese's defense, would have provided context for the testimony Grier already had given, and was necessary to insure that the jury accurately and fairly perceive what transpired between the two after Reese's arrest. Allowing the jury to hear only part of Reese's confession to Grier was misleading and prejudicial. Reese was entitled to have the jury consider all of it.

This error denied Reese the right to due process and confrontation under the fifth, sixth, and fourteenth amendments to the United States Constitution and Article I, Sections 2, 9, 15, and 16 of the Florida Constitution. A new trial is warranted.

Point III

THE TRIAL COURT ERRED IN REFUSING TO ALLOW REESE TO TESTIFY ON REDIRECT ABOUT HIS OFFER TO PLEAD WHERE THE STATE OPENED THE DOOR ON CROSS BY ASKING HIM IF HE WAS DOING HIS BEST TO ESCAPE CONVICTION.

On cross-examination, Reese responded "Yes, sir," when asked if he was scared of being convicted of first-degree murder, but responded "No, sir," when asked if he was doing his best to get out of it. (T 987). On redirect, defense counsel followed up on this testimony by asked Reese, "Mr. Bateh asked you if you were 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?," to which Reese responded, "I care." (T 988). But when defense counsel sought to elicit that Reese had authorized him to offer a plea in the case, the trial court sustained the state's relevancy objection, stating:

> 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.

(T 997). The court's ruling was error.

"Testimony is admissible on redirect which tends to qualify, explain, or limit cross-examination testimony." Tompkins v. State, 502 So. 2d 415, 419 (Fla. 1986), cert. denied, 483 U.S. 1033, 107 S.Ct. 3277, 97 L.Ed.2d 781 (1987). Furthermore, the state may "open the door" on cross-examination to certain testimony that might otherwise be inadmissible. Metropolitan Dade County v. Zepata, 601 So. 2d 239, 243 (Fla. 3d DCA 1992).

Here, 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. The state's question, "Aren't you doing your best to get out of it?," could very well have suggested to the jury that Reese had refused to plead in the case. Reese was entitled to rebut this inference by testifying that he had authorized a plea. The trial court erred, however, in ruling that Reese's testimony on redirect that he "cared" whether he was convicted closed that door. Trying "to get out of" being convicted is not the same thing as "caring" about being convicted. Reese's response that he cared did not negate the prejudicial inference raised by the state's question on cross-examination that Reese was doing everything he could to avoid a conviction.

The court's erroneous restriction of Reese's testimony on this issue cannot be considered harmless error. The exclusion of the testimony supported the state's theory that Reese was a

ruthless killer who accepted no responsibility for the murder and who was doing whatever he could to avoid punishment. Reese is entitled to a new trial.

Point IV

THE TRIAL COURT ERRED IN INSTRUCTING THE JURY ON AND FINDING THAT THE MURDER WAS COMMITTED IN A COLD, CALCULATED, AND PREMEDITATED MANNER.

In finding this aggravating circumstance, the trial court wrote:

> This murder was committed in a cold, calculated, and premeditated manner. 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 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 justification: "She took my girlfriend."

(T 383-384).

Each element of an aggravating factor must be proved beyond a reasonable doubt. State v. Dixon, 283 So. 2d 1, 9

(Fla. 1973), cert. denied, 416 U.S. 943, 94 S.Ct. 1950, 40 L.Ed.2d 295 (1974). Moreover, such proof cannot be supplied by inference from the circumstances unless the evidence is inconsistent with any reasonable hypothesis that might negate the aggravating factor. Geralds v. State, 601 So. 2d 1157, 1163-64 (Fla. 1992).

Two of the four elements the state must prove to establish the cold, calculated, and premeditated aggravating circumstance (CCP) are that the murder was the product of "cool and calm reflection" and that the defendant had a "prearranged design to kill before the crime began." Jackson v. State, 648 So. 2d 85, 89 (Fla. 1994).[10] The state failed to prove either of these elements.

Because the killing arose from a tormented domestic relationship, and was the product of intense emotions, it cannot be characterized as "cold" within the meaning of this aggravating factor. Santos v. State, 591 So. 2d 160, 162-63 (Fla. 1991); Spencer v. State, 645 So. 2d 377 (Fla. 1994); Maulden v. State, 617 So. 2d 298, 303 (Fla. 1993); Richardson v. State, 604 So. 2d 1107, 1109 (Fla. 1992); Douglas v. State, 575 So. 2d 165, 166-167 (Fla. 1991). As the Court explained in Maulden:

> In a domestic setting . . . , where the circumstances evidence[] heated passion and violent emotions arising from hatred and jealousy associated with the relationships

[10]The other two elements are heightened premeditation and no pretense of legal or moral justification. Jackson, 648 So. 2d at 89.

> between the parties, we c[an]not characterize the murder as cold even though it may have appeared to be calculated.

617 So. 2d at 303.

Here, the overwhelming weight of the evidence established the crime was the product of intense emotions--jealousy, frustration, anger, fear--precipitated by the disintegration of Reese's relationship with his girlfriend. Furthermore, because there is no evidence Reese planned to rape or kill Sharlene before he entered her house, the murder cannot be characterized as "calculated." See Crump v. State, 622 So. 2d 963, 972 (Fla. 1993)(state did not prove beyond a reasonable doubt that Crump had a careful prearranged plan to kill victim before inviting her into his truck); Hamblen v. State, 527 So. 2d 805 (Fla. 1988)(evidence must prove beyond a reasonable doubt that the defendant planned or arranged to commit the murder before the crime began).

Reese's statements to police and his trial testimony provide the only evidence of what actually happened that night. At worse, Reese's statements demonstrate he went to Austin's house to ask her to give him more time with Jackie, and while there, he got "madder and madder" and attacked the victim in a desperate rage. A defendant's version of what occurred must be accepted as true unless contradicted by other proof showing that version to be false. See, e.g., Jaramillo v. State, 417 So. 2d 257 (Fla. 1982). Here, the state's evidence was entirely consistent with an intensely emotional killing. The state's

own witness, Jackie Grier, established that Reese was extremely emotional about their relationship and that he was jealous, possessive, and very threatened by Jackie's friendship with Austin.

The expert testimony also supports a rage killing. Dr. Krop testified that when Reese attempted to talk to Sharlene, all the anger, frustration, and rejection he had experienced in his life came out. Dr. Krop's testimony was unequivocal, unrebutted, and uncontradicted by other evidence or testimony.

The trial court erred in focusing on Reese's motivation for the crime. The trial court wrote Reese "had an extremely long time to ponder and reflect upon his decision" and concluded "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." The coldness aggravating circumstance focuses not on motive but "on the manner in which the crime was executed." Stein v. State, 632 So. 2d 1361 (Fla. 1994), cert. denied, 115 S.Ct. 111, 130 L.Ed.2d 58 (1994). Here, as Dr. Krop testified, the manner of killing reflected that "Reese was enraged and his rage and violence came out." (T 1236).

In fact, the court's written findings do not even address the "coldness" element of this aggravating circumstance. The court's oral findings suggest, however, the trial court did not find the crime was committed in a calm manner:

> Your intent to commit this attack was so strong that it lasted through all of this

> period of time in which you had to get nervous or get scared or cool down or get cold feet or any way you want to describe it. So I therefore attribute to your act to a heightened level of premeditation above that necessary -- necessary only for premeditated murder.

(T 1511-1512)(emphasis added).

This Court has refused to uphold this aggravating circumstance in similar cases, i.e., in domestic murders where the loss of emotional control is apparent from the facts or supported by expert testimony. In Santos, for example, the defendant gunned down his ex-girlfriend and their daughter in the street. Despite evidence showing Santos had acquired the gun in advance and had made death threats, the Court held "the fact that the killing arose from an intensely emotional domestic dispute" negated that Santos's acts were accomplished through "cold" deliberation. 591 So. 2d at 163. The defendant in Richardson also shot to death his girlfriend two days after he threatened to kill her. The Court concluded that, "While there is sufficient evidence to show calculation on Richardson's part, the record clearly establishes that the present murder was not `cold':

> Richardson's actions were spawned by an ongoing dispute with his girlfriend, one that involved an obvious intensity of emotion. The eyewitnesses even testified that Richardson appeared angry, crazy, or mean when he shot Newton. Accordingly, the element of coldness, i.e., calm and cool reflection, is not present here.

604 So. 2d at 1109.

In Douglas, the defendant got a rifle, tracked down his

former girlfriend and her new husband, forced them to have sex, then murdered him while she watched. Discussing Douglas in Santos, this Court said:

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

Santos, 591 So. 2d at 163.

The Court disapproved the CCP aggravating circumstance in another domestic torture murder in Spencer. Spencer brutally beat his wife, sexually humiliated her, then stabbed her to death. The evidence showed he parked his car away from her house the day of the killing, wore plastic gloves during the attack, and carried a steak knife in his pocket. 645 So. 2d at 381. He also had previously threatened to kill his wife and assaulted her twice in the weeks before the murder. A clinical psychologist testified Spencer thought his wife was trying to steal his painting business, a "recapitulation of a similar situation with his first wife." The psychologist said Spencer's ability to handle his emotions when under such stress

was severely impaired, he had limited coping ability, and he was impaired to an abnormal, intense degree. Id. at 384. Given this testimony, the Court concluded the murder could not be characterized as "cold."

No more evidence of a cold, calculated plan to kill exists in the present case. This murder was the product of the same intense emotions that fuel the classic lover's triangle: jealousy, possessiveness, fear, anger. There was no evidence this crime was thought out in advance or that it was the result of calm reflection. All the circumstances point to a loss of emotional control, an explosion of fury. Certainly, the circumstances are equally consistent with a crime of rage. Cf. Santos, 591 So. 2d at 163 ("[I]t is equally reasonable to conclude that Santos' acts constituted a crime of heated passion as it is to conclude that they exhibited cold, calculated premeditation").

It was error for the trial court to instruct the jury on this aggravator. It also was error for the trial court to consider this aggravator as a reason for imposing the death sentence. This Court must reverse Reese's death sentence and remand for a new penalty phase proceeding.

Point V

THE TRIAL COURT REVERSIBLY ERRED IN GIVING AN UNCONSTITUTIONAL JURY INSTRUCTION ON THE COLD, CALCULATED, AND PREMEDITATED AGGRAVATING FACTOR.

In Jackson v. State, 648 So. 2d 85, 90 (Fla. 1994), this

Court held unconstitutional the then-standard jury instruction on the cold, calculated, and premeditated aggravating circumstance:

> Florida's standard CCP jury instruction suffers the same constitutional infirmity as the HAC-type instructions which the United States Supreme Court found lacking in Espinosa, Maynard, and Godfrey--the description of the CCP aggravator is "so vague as to leave the sentencer without sufficient guidance for determining the presence or absence of the factor." Espinosa, -- U.S. at --, 112 S.Ct. at 2928.

Here, the trial court gave the jury the same standard instruction found deficient in Jackson. (T 1485). This error was preserved both by specific objection and request for an alternative instruction. (T 1420-1421, R 344-345).

The trial court's failure to adequately define the cold, calculated, and premeditated aggravator cannot be deemed harmless error. As explained in Issue IV, supra, the CCP aggravating circumstance was not supported by the evidence in this case. Therefore, not only did the jury have inadequate facts before it to justify this factor, it also had an inadequate instruction on the law to be applied to those facts. Although a reviewing court may presume a properly-instructed jury did not reach a decision for which there was insufficient evidence, such presumption is not available where the jury was not given a legal instruction. Socher v. Florida, 504 U.S. 967, 112 S.Ct. 2114, 2122, 119 L.Ed.2d 326 (1992). As the Court noted in Jackson, without sufficient guidance as to the meaning of the terms "cold," "calculated," and "premeditated,"

a jury might consider every premeditated first-degree murder as "cold-blooded murder" and therefore involving the CCP aggravator. 648 So. 2d at 89. Consequently, the very real likelihood exists that Reese's jury improperly found and used the CCP aggravating factor in reaching its decision to impose death.

Even if this Court rejects Reese's argument that the facts do not support the CCP aggravating factor, the invalid instruction still may have affected the jury's determination as to the existence of this aggravator. Some jurors may have concluded that Reese killed Sharlene Austin in a jealous rage, yet, given the inadequate instruction, improperly found the CCP aggravating circumstance applicable.

Finally, it cannot be said beyond a reasonable doubt that the invalid instruction did not affect the weighing process. In Jackson, this Court rejected the challenge to the aggravating factor itself but concluded the invalid jury instruction may have affected the jury's consideration. 648 So. 2d at 85. In Jackson, the trial judge found two aggravating circumstances and several nonstatutory mitigating circumstances. Here, the jury was instructed on only two other aggravating factors (felony/murder and HAC) and **was** presented with substantial and compelling mitigating evidence. See Issue VI, infra. The jury's recommendation for the death sentence was by a vote of 8 to 4. Under these circumstances, it cannot be said the vote for death **was** "surely unattributable to the jury instruction

error." Sullivan v. Louisiana, 113 S.Ct. 2078, 124 L.Ed.2d 182 (1993). This Court must vacate Reese's death sentence and remand for a new penalty proceeding.

Point VI

THE TRIAL COURT ERRED IN FAILING TO EXPRESSLY EVALUATE, FIND, AND GIVE SIGNIFICANT WEIGHT TO THE UNREBUTTED MITIGATING EVIDENCE.

In Campbell v. State, 571 So. 2d 415, 419 (Fla. 1990), this Court held the trial judge must, in his or her written sentencing order, expressly evaluate every statutory and nonstatutory mitigating factor proposed by the defendant. Moreover, the trial court must find that a mitigating circumstance has been proved if it is supported by a reasonable quantum of competent, uncontroverted evidence. Nibert v. State, 574 so. 2d 1059, 1062 (Fla. 1990). Once established, a mitigating factor cannot be dismissed as having no weight. Campbell, 571 So. 2d at 420. The trial court may reject a proposed mitigating circumstance only if the record contains "competent substantial evidence to support the rejection of these mitigating circumstances." Nibert, 574 So. 2d at 1062. Every mitigating factor apparent in the record, statutory and nonstatutory, must be considered and weighed in determining the sentence. Crump v. State, 654 So. 2d 545 (Fla. 1995); Ferrell v. State, 653 So. 2d 367 (Fla. 1995); Maxwell v. State, 603 So. 2d 490, 491 (Fla. 1992); Cheshire v. State, 568 So. 2d 908 (Fla. 1990; Santos v. State, 591 So. 2d 160 (Fla. 1991).

In the present case, the trial judge found one nonstatutory mitigating factor, that Reese's record before this case consisted only of a petit theft and a trespassing conviction. (R 383). The trial judge summarily dismissed the remaining plethora of proposed mitigating factors in two short sentences:

> 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). The sentencing order in this case does not pass muster under Campbell. Without any explanation, the trial court gave "little or no weight" to unrebutted mitigating circumstances (good conduct in jail, prior domestic relationship, and childhood trauma), Other proposed mitigating circumstances were not even addressed. The trial judge's failure to find and properly weigh all of the mitigating factors requires reversal for resentencing.

An abusive, deprived, or traumatic childhood is a valid mitigating circumstance. Campbell; Holsworth v. State, 522 So. 2d 348 (Fla. 1988); Rogers v. State, 511 So. 2d 526 (Fla. 1987), cert. denied, 484 U.S. 1020, 108 S.Ct. 733, 98 L.Ed.2d 681 (1988). A parent's mental illness is itself a valid mitigating circumstance. Thompson v. State, 456 So. 2d 444 (Fla. 1984). A prior domestic relationship is a valid

mitigating circumstance. Douglas v. State, 575 so. 2d 165 (Fla. 1991); Cheshire v. State, 568 So. 2d 908 (Fla. 1990); Herzos v. State, 439 so. 2d 1372 (Fla. 1983). Indeed, the passionate emotions and distress that accompany a failing relationship have been regarded as sufficiently compelling to justify reversal of the death sentence in most such cases. See Issue VII, infra. Good conduct in jail or prison is a valid mitigating circumstance. Skipper v. South Carolina, 476 U.S. 1, 4-7, 106 S.Ct. 1669, 90 L.Ed.2d 1 (1986); Maulden v. State, 617 So. 2d 298 (Fla. 1993); Craig v. State, 510 So. 2d 857 (Fla. 1987), cert. denied, 484 U.S. 1020, 108 S.Ct. 732, 98 L.Ed.2d 680 (1988). Such evidence "necessarily implies a potential for rehabilitation and productivity in a prison setting," Kramer v. State, 619 So. 2d 274, 276 n.1 (1993), which "unquestionably" is a "significant factor in mitigation." Cooper v. Dugger, 526 so. 2d 900, 902 (Fla. 1988).

In the present case, the uncontroverted evidence showed the murder was the product of Reese's frustration over the deterioration of his relationship with his girlfriend, Jackie Grier. The overwhelming weight of the evidence also established that Reese's possessiveness, jealousy, and fear of losing Jackie Grier were due to traumas he experienced as a young child. The present case is unusual in that the expert testimony established a direct link between the events of Reese's childhood, the possessive nature of his relationship with Grier, and the acts that let to the homicide. As this

Court stated in Rosers, "the effects produced by childhood traumas. . . indeed have mitigating weight if relevant to the defendant's character, record, or the circumstances of the offense." 511 so. 2d at 535.

Here, Dr. Krop, the only mental health expert who testified at Reese's trial, said the murder was essentially out of character for Reese and resulted from his profound frustration over his failing relationship with Grier. Dr. Krop said Reese's desperate need to hang on to the relationship was directly related to the trauma he experienced as a child when his mentally deranged father murdered his mother. In Dr. Krop's opinion, this early childhood trauma "absolutely" contributed to the rape and murder of Sharlene Austin. (T 1249).

Dr. Krop also testified about Reese's emotional incapacities: He said Reese's coping skills are deficient; he is non-assertive; he is insecure, feels inadequate, and is very sensitive to rejection; he tends to act out in a hostile or violent manner when in stressful situations; he tends to be dependent on alcohol and drugs, had been using crack cocaine for several months before the homicide, and **was** using crack the day of the offense. In Dr. Krop's opinion, this was a crime of rage and Reese was "seriously impaired" at the time of the homicide. (T 1212, 1217, 1236).

Dr. Krop's opinions were neither rebutted nor contradicted by another witness. When asked whether it was possible Reese

coldly plotted and carried out this murder, Dr. Krop firmly stated he had sufficient information and **was** confident in his opinion. (T 1251).

The uncontroverted evidence also established that Reese would function well in the general prison population and has excellent rehabilitation potential. It was undisputed that Reese's conduct in jail while awaiting trial was excellent. He had no incidents, no disciplinary reports, no management problems. (T 1188). Based on Reese's good conduct in jail, his lack of any significant criminal history, and his acceptance of responsibility for his crime, Dr. Krop said Reese would have no problem "whatsoever" functioning in prison. (T 1216).

A trial court's rejection of uncontroverted mitigating evidence is reversible error. Spencer v. State, 645 So. 2d 377 (Fla. 1994); Santos. Mitigating evidence must be weighed in the balance "if the record discloses it to be both believable and uncontroverted, particularly where it is derived from unrefuted factual evidence." Santos, 591 So. 2d at 164. In Santos, the trial court rejected without explanation the unrebutted testimony of Santos' psychological experts. The Court conducted its own review of the record and determined that substantial uncontroverted mitigating evidence was ignored. The Court remanded for a new sentencing hearing.[11] In

"On appeal after remand, the Court reduced Santos's death sentence to life in prison with no possibility of parole. Santos v. State, 629 So, 2d 838 (Fla. 1994).

Spencer, the trial court rejected the experts' opinions as to Spencer's mental state when he committed the crime. Noting the experts based their opinions on a battery of psychological tests, clinical interviews, examination of evidence, and a review of Spencer's life history, the Court held it was error to reject their opinions. Id. at 385.

In the present case, the trial judge's statement that "no other circumstances that would mitigate a first degree murder were established by the evidence," along with his conclusion that Reese's good conduct in jail, prior domestic relationship, and childhood circumstances were of "minimal or no mitigation" indicates the judge did not consider this evidence to be mitigating at all. Furthermore, the sentencing order does not even address the expert testimony. It is impossible to tell from the order whether the court accepted or rejected any of Dr. Krop's testimony regarding Reese's emotional inadequacies, his drug and alcohol dependence and use the day of the murder, or his impaired mental state when the crime was committed. It is impossible to tell whether the trial rejected Dr. Krop's opinions or accepted his opinions yet found the evidence not of a mitigating nature.

The sentencing order in a capital case must reflect that the trial judge's determination as to which aggravating and mitigating circumstances apply under the facts of a particular case is the result of a "reasoned judgment." State v. Dixon, 283 So. 2d 1, 10 (Fla. 1973), cert. denied, 416 U.S. 943, 94

S.Ct. 1950, 40 L.Ed.2d 295 (1974). The weighing process is not a matter of merely listing conclusions: "Unless the written findings are supported by specific facts, this Court cannot be assured the trial court imposed the death sentence based on a 'well-reasoned application' of the aggravating and mitigating factors." Rhodes v. State, 547 So. 2d 1201, 1207 (Fla. 1989) (quoting State v. Dixon, 283 So. 2d 1, IO (Fla. 1973, cert. denied, 416 U.S. 943, 94 S.Ct. 1950, 40 L.Ed.2d 295 (1974)). Here, the conclusory nature of the trial court's findings make it impossible for this Court to review them. See Crump v. State (trial court violated Campbell by characterizing mitigating evidence in broad generalizations); Mann v. State, 420 So. 2d 578, 581 (Fla. 1982) (sentencing judge's findings must be of "unmistakable clarity" so Court can review them without having to speculate as to what trial judge found).

As to the single mitigating factor the court did find, Reese's minimal criminal history, it is not apparent whether the court even gave this factor much weight. A defendant's lack of prior violent convictions is a mitigating factor of significant weight when the murder is the result of a domestic confrontation. See Blakely v. St-at-e, 561 So. 2d 560, 561 (Fla. 1990) ; see also Issue VII, infra.

The trial judge ignored other nonstatutory mitigating aspects of Reese's character. This Court has recognized as mitigating that a defendant is a good son. Harmon, 527 So. 2d 182, 189 (Fla. 1988); Thompson.. Contributions to

family, community, or society also reflect on character and provide evidence of positive character traits to be weighed in mitigation. Rogers, 511 So. 2d at 535. At the penalty phase proceeding, family members testified that Reese was a good son and grandson. There also was testimony that while in high school, he was a hard-working member of the track team and assisted the coaches in helping other athletes who were training in his sport. Other proposed mitigating circumstances ignored by the trial judge were that Reese supported Jackie and her four children by a previous marriage during the early part of their relationship; that he testified truthfully at trial; and that he accepted responsibility for the murder. Because the trial judge did not address these proposed factors in the sentencing order, this Court cannot determine whether the judge considered, found, or weighed them.

Dismissing the vast amount of proven mitigating evidence offered in this case as of "minimal or no weight" falls far short of what Campbell and its progeny require. This naked conclusion, along with the court's conclusion that "any one of the aggravating circumstances listed above would be sufficient to require the imposition of the death penalty," (R 384) are not supported by any analysis demonstrating the court engaged in a rational weighing process. If it were sufficient for the sentencing judge to say only that the aggravating factors outweigh the mitigating factors, Campbell would be meaningless.

Because the trial court failed to expressly evaluate all

of the mitigation proposed by the defense, and failed to properly find and weigh the unrebutted mitigating circumstances, Reese's death sentence was unconstitutionally imposed in violation of the eighth and fourteenth amendments of the United States Constitution and must be reversed.

Point VII

REESE'S DEATH SENTENCE IS DISPROPORTIONATE.

The murder in this case resulted from violent emotions in the context of a tormented domestic relationship. Based on similar capital cases, this type of offense does not warrant the extinction of life.

This Court has consistently vacated the death sentence on proportionality grounds where the homicide arose from a domestic dispute and the defendant had no prior similar violent offense. White v. State, 616 So. 2d 21 (Fla.), cert. denied, 114 S.Ct. 214, 126 L.Ed.2d 170 (1993); Penn v. State, 574 So. 2d 1079 (Fla. 1991); Farinas v. State, 569 So. 2d 425 (Fla. 1990); Blakely v. State, 561 So. 2d 560 (Fla. 1990); Wilson v. State, 493 So. 2d 1019 (Fla. 1986); Ross v. State, 474 So. 2d 1170 (Fla. 1985); Blair v. State, 406 So. 2d 1103 (Fla. 1981). This Court also has refused to countenance overrides in such cases. Douglas v. State, 575 So. 2d 165 (Fla. 1991); Fead v. State, 512 So. 2d 176 (Fla. 1987), receded from on other srounds in Pentecost v. State, 545 So. 2d 861 (1989); Irizarry v. State, 496 So. 2d 822 (Fla. 1986); Herzog v. State, 439 So.

2d 1372 (Fla. 1983); Phippen v. State, 389 So. 2d 991 (Fla. 1979); Chambers v. State, 339 So. 2d 205 (Fla. 1976); Halliwell v. State, 323 So. 2d 557 (Fla. 1975); Tedder v. State, 322 So. 2d 908 (Fla. 1975). Both this Court and Florida juries, then, consistently have found this type of crime undeserving of the ultimate punishment.[12]

The death penalty has been found inappropriate in cases involving troubled family relationships even where, as here, there were several aggravating circumstances or the manner of death was torturous. Penn (one aggravator, HAC/two mitigators, no criminal history and extreme emotional distress); Farinas (two aggravators, felony murder and HAC/nonstatutory mitigation); Blakely (two aggravators, HAC and CCP/one mitigator, no significant prior criminal history); Wilson (two aggravators, HAC and prior violent felony); Ross (one aggravator, HAC/no mitigators); Blair (one aggravator, HAC/one mitigator, no significant prior criminal history). Reese's culpability

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[12]In her dissenting opinion in Porter v. State, 564 So. 2d 1060, 1065 (Fla. 1990), Justice Barkett, joined by Justice Kogan, summarized the capital cases involving domestic disputes and pointed out that in the vast majority of domestic homicides:

> . . . this Court has found cause to reverse the death sentence, regardless of the number of aggravating circumstances found, the brutality involved, the level of premeditation, or the jury recommendation. . . . The Court has even reversed death sentences where, as in Porter's case, the defendant murdered two people during the same outburst. . . . Generally when we have affirmed death sentences in analogous situations, we have noted that the defendants had prior, unrelated convictions of violent felonies.

(citations omitted).

should be no greater than that of the defendants in these cases.

In the present case, the uncontroverted evidence showed Reese was acting out a state of profound emotional agitation when he murdered Sharlene Austin. As explained in Issue IV, supra, the evidence was wholly insufficient to support the state's theory that this murder was a ruthless act of revenge. The evidence showed rather that the murder was the result of jealousy, anger, frustration, and rage precipitated by Reese's failing relationship with his girlfriend. This "whole thing, to some degree, is related to [Reese's] fear of losing the relationship that he had with Ms. Grier." (T 1260). Reese's umbilical attachment to Grier and fear of losing her were attributable, in turn, to the trauma and loss Reese suffered when his father murdered his mother in a psychotic rage. Aside from this "one explosion of total criminality," see Dixon, at age 28, Reese has no significant criminal history. This murder is not one of "`the most aggravated, the most indefensible of crimes.'" Smalley v. State, 546 So. 2d 720 (Fla. 1989) (quoting State v. Dixon, 283 So. 2d 1, 7 (Fla. 1973), cert. denied, 416 U.S. 943, 94 S.Ct. 1950, 40 L.Ed.2d 295 (1974)).

The death penalty is not appropriate for John Reese, and this Court should reverse his death sentence and remand for imposition of a sentence of life imprisonment with no possibility of parole for twenty-five years.

Point VIII

THE PROSECUTOR'S IMPROPER, MISLEADING, AND INFLAMMATORY ARGUMENTS DURING THE PENALTY PHASE CLOSING ARGUMENT RENDERED REESE'S SENTENCE UNRELIABLE.

The prosecutor made numerous improper and prejudicial arguments to the jury during the penalty phase proceeding. These arguments cumulatively rendered Reese's sentence unreliable in violation of the fifth, sixth, eighth, and fourteenth amendments to the United States Constitution, and Article I, sections 9, 16, and 17, of the Florida Constitution.

1. Golden Rule argument.

During closing argument, the prosecutor asked the jurors to put themselves in the place of the victim:

> I would submit to you that the way that that defendant chose to kill Sharlene Austin, what he forced Sharlene Austin to experience is everyone woman's worse nightmare.

(T 1434). Appellant's objection to this comment was overruled. (T 1435-1436). The prosecutor continued with this argument:

> What was going through her mind? What sort of mental torture was going through her mind as she grabbed for that cord, grasping for breath, gasping for life?

(T 1439). These remarks were overt appeals to juror sympathy and constitute improper "Golden Rule" argument. See Bertolotti v. State, 476 So. 2d 130, 133 (Fla. 1985) (improper Golden Rule argument for state to invite the jury "to imagine the victim's final pain, terror, and defenselessness").

2. Misleading argument that life sentences on non-capital crimes could result in release,

The 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 crimes:

> 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 lives [sic]. 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 1451-1552). Appellant's objection to this argument ws overruled. (T 1454). The prosecutor continued with this argument:

> There are no minimum mandatory sentences that apply to sexual battery and burglary. The maximum sentence, the maximum sentence on either one of these is a life sentence. That is, the judge **can go** from one day in jail up to a life sentence on each of these two offenses with no minimum mandatory.
>
> Now I expect that the defense is going to argue to you with regard to this that the judge can give the defendant three life sentences. And that's a possibility. That's a possibility. But only that judge can make that decision, and that's the judges decision if a recommendation of life is given.
>
> Again I mention to you, there's no minimum mandatory.

(T 1454).

In Jones v. State, 569 So. 2d 1234 (Fla. 1990), this Court ruled the trial court erred in refusing to allow Jones to argue in mitigation that, since he was convicted of two first-degree

murders, consecutive life sentences would prevent him from ever being released from prison:

> Counsel was entitled to argue to the jury that Jones may be removed from society for at least fifty years should he receive life sentences on each of the two murders. The potential sentence is a relevant consideration of "the circumstances of the offense" which the jury may not be prevented from considering.

Id. at 1239-1240; see also Turner v. State, 645 So. 2d 444 (Fla. 1994) (in overriding life recommendation in double homicide, trial court erred in failing to consider mitigating effect of consecutive life sentences for the two murders). But see Nixon v. State, 572 So. 2d 1336 (Fla. 1990) (no error in trial court's refusal to instruct jury on penalties for non-capital offenses), cert. denied, 502 U.S. 854, 112 S.Ct. 164, 116 L.Ed.2d 128 (1991).

Here, the trial court, consistent with Jones, instructed the jury that it could consider potential life sentences on the sexual battery and burglary convictions as mitigating evidence. (T 1408, 1486). The jury's consideration of this potential mitigation was undercut, however, by the prosecutor's repeated references to "no minimum mandatories." By telling the jury these offense carried "no minimum mandatories," the prosecutor erroneously suggested Reese would be eligible for release if sentenced to life in prison for these offenses. If sentenced to life on either of these offense, however, Reese would not be eligible for control release, ss. 947.146(3)(c), (e), 947.1405, Florida Statutes (1993), or conditional release. ss.

947.1405(2), 944.278 n.2, 944.277(3), 944.275(3) (a), Fla. Stat. (1993). Reese would not be eligible for any early release program if sentenced to life in prison on the non-capital offenses.

The eighth and fourteenth amendments prohibit the states from precluding the sentencer from considering any relevant mitigating factor. Eddings v. Oklahoma, 455 U.S. 104, 113-115, 102 S.Ct. 869, 876-77, 71 L.Ed.2d 1 (1982). Here, the jury was entitled to know that if sentenced to life on the non-capital offenses, appellant would never be released into society. The prosecutor's argument precluded the jury from considering this proposed mitigating factor, in violation of the eighth amendment.

3. **Characterizing defendant as a "rabid dog."**

The prosecutor analogized Reese to "a cute little puppy" who "grew into a vicious dog." (T 1455). Appellant's objection to this argument was overruled. (T 1456). The prosecutor continued:

> Like that cute little puppy, this defendant, like the cute little puppy that became a rabid dog, it became a vicious dog, this defendant, by his actions with Sharlene Austin, show him to be a vicious person.

(T 1456-1457). Appellant renewed his objection to this argument at the close of the state's argument. (T 1459).

Prosecutorial name-calling has long been condemned. It is patently improper for the prosecutor to refer to the defendant in derogatory, vituperative, or pejorative terms. Rhodes v.

State, 547 So. 2d 1201, 1206 (Fla. 1989) (referring to defendant as "vampire"); Pacifico v. State, 642 So. 2d 1178 (Fla. 1st DCA 1994) ("sadistic selfish bully," "criminal," "slick fraternity boy"); Biondi v. State, 533 So. 2d 910 (Fla. 2d DCA 1988)("slime"); Duque v. State, 498 So. 2d 1334 (Fla. 2d DCA 1986)("scumbag"); Green v. State, 427 So. 2d 1036 (Fla. 3d DCA 1983); Dukes v. State, 356 So. 2d 873, 874 (Fla. 4th DCA 1978).

The prosecutor's characterization of Reese as a "rabid dog" and a "vicious dog" was used to invoke an emotional response to the defendant and to exploit the jurors' fear. When "comments in closing argument are intended to and do inject elements of emotion and fear into the jruy's deliberations, a prosecutor has ventured far outside the scope of proper argument." Garron v. State, 528 So. 2d 353, 359 (Fla. 1988). The trial court erred in overruling Reese's objection to this argument.

4. Asking jury to show defendant same mercy shown victim.

The prosecutor's final comment was to ask the jury to show appellant the same mercy he showed the victim:

> I ask you to show that defendant the same sympathy, the same mercy, the same pity that he showed to Sharlene Austin, and that was none.

(T **1458**).

This type of argument constitutes an improper appeal to the jurors sympathy. Rhodes v. State, 547 So. 2d 1201, 1205 (Fla. 1989) (urging jury to "show Rhodes the same mercy shown to the victim on the day of her death" was unnecessary appeal to

sympathies of the jurors, calculated to influence their sentence recommendation); accord Richardson v. State, 604 So. 2d 1107, 1109 (Fla. 1992).

This Court has not hesitated to reverse a death sentence based upon egregious prosecutorial misconduct during the penalty phase of a capital trial. King v. State, 623 So. 2d 486, 488 (Fla. 1993); Garron v. State, 528 So. 2d 353 (Fla. 1988); Bertolotti v. State, 476 So. 2d 130, 133 (Fla. 1985). Such misconduct occurs when, in his or her determination to obtain a death sentence, the prosecutor makes comments that urge the jury to consider factors outside the proper scope of the jury's deliberations. Jackson v. State, 522 So. 2d 802, 809 (Fla. 1988), cert. denied, 488 U.S. 871, 109 S.Ct. 183, 102 L.Ed.2d 153 (1988). As this Court explained in Bertolotti:

> The proper exercise of closing argument is to review the evidence and to explicate those inferences which may reasonably be drawn from the evidence. Conversely, it must not be used to inflame the minds and passions of the jurors so that their verdict reflects an emotional response to the crime or the defendant rather than the logical analysis of the evidence in light of the applicable law.

476 So. 2d at 134; see also Bush v. State, 461 So. 2d 936, 942 (Fla. 1984) (Ehrlich, J., specially concurring) ("The purpose of the death penalty statute as now drafted is to insulate its application from emotionalism and caprice"), cert. denied, 475 U.S. 1031, 106 S.Ct. 1237, 89 L.Ed.2d 345 (1986).

This Court also has recognized the cumulative effect of improper arguments in death penalty cases:

> While none of these comments standing alone may have been so egregious as to warrant a mistrial, this is not a case of merely a single improper remark. The prosecutor's closing argument was riddled with improper comments, and not once did the trial judge sustain an objection and give a curative instruction to the jury to disregard the statements. We believe the cumulative effect of the improper remarks in the absence of curative instruction was to prejudice Rhodes in the eyes of the jury and could have played a role in the jury's decision to recommend the death penalty.

Rhodes, 547 So. 2d at 1206; see also Garron, 528 So. 2d at 358-359.

Here, too, the cumulative effect of the prosecutor's improper comments could have played a role in the jury's decision to recommend the death penalty. Accordingly, the trial court's failure to sustain Reese's objections to the improper argument rendered his death sentence unreliable. Reese is entitled to a new penalty proceeding.

Point IX

THE TRIAL COURT ERRED IN GIVING AN INVALID AND UNCONSTITUTIONAL JURY INSTRUCTION ON THE HEINOUS, ATROCIOUS, OR CRUEL AGGRAVATING CIRCUMSTANCE.

Reese objected to the standard jury instruction on the heinous, atrocious, or cruel aggravating factor and requested a substitute instruction. (T 1414, R 343). The trial court overruled the objections and gave the standard instruction. (T 1414, 1485). The jury was not sufficiently instructed on this aggravating circumstance. (T 1485). Reese recognizes this

Court approved the current standard instruction on the heinous, atrocious, and cruel aggravating circumstance in Hall v. State, 614 So. 2d 473 (Fla.), cert. denied, 114 S.Ct. 109, 126 L.Ed.2d 74 (1993), but urges the Court to reconsider the issue in this case.

The trial court followed the standard jury instruction and instructed on the aggravating circumstance provided for in section 921.141(5)(h), Florida Statutes, 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 1484-1485). The instructions given were unconstitutionally vague because they failed to inform the jury of the findings necessary to support the aggravating circumstance and a sentence of death. Espinosa v. Florida, 505 U.S. 112, 112 S.Ct. 2926, 120 L.Ed.2d 854 (1992); Maynard v. Cartwright, 486 U.S. 356, 108 S.Ct. 1853, 100 L.Ed.2d 372 1 (1980).

The United States Supreme Court held Florida's previous heinous, atrocious, or cruel standard penalty phase instruction unconstitutional in Espinosa. Prior to Espinosa, this Court consistently held that Maynard v. Cartwright, which held HAC

instructions similar to Florida's were unconstitutionally vague, did not apply to Florida on the basis that the jury is not the sentencing authority in Florida. Smalley v. State, 546 so. 2d 720 (Fla. 1989). The United States Supreme Court rejected this reasoning in Espinosa, however, as Florida's jury recommendation is an integral part of the sentencing process and neither of the two-part sentencing authority is constitutionally permitted to weight invalid aggravating circumstances. Although the instruction given in this case included definitions of the terms "heinous, atrocious, or cruel," where the instruction in Espinosa did not, the instruction as given, nevertheless suffers the same constitutional flaw: The jury was not given adequate guidance on the legal standard to be applied when evaluating whether this aggravating factor exists.

In Shell v. Mississippi, the state court instructed the jury on Mississippi's heinous, atrocious, or cruel aggravating circumstance using the same definitions for the terms that the trial judge used in the present case. The Supreme Court remanded to the trial court, stating, "Although the trial court in this case used a limiting instruction to define the 'especially heinous, atrocious, or cruel' factor, that instruction is not constitutionally sufficient." 112 L.Ed.2d at 4. Since the definitions employed here are precisely the same as the ones used in Shell, the instructions to Reese's jury were likewise constitutionally inadequate. This Court recently held that the mere inclusion of the definition of the words "hei-

nous," "atrocious," and "cruel" does not cure the constitutional infirmity in the HAC instruction. Atwater v. State, 626 So. 2d 1325 (Fla. 1993), cert. denied, 114 S.Ct. 1578, 128 L.Ed.2d 221 (1994).

The remaining portion of the WAC instruction used in the present case reads:

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

(T 1485). This addition also fails to cure the constitutional infirmities in the HAC instruction. First, the language in this protions of the instruction was taken from State v. Dixon, 283 So. 2d 1, 9 (Fla. 1973), cert. denied, 416 U.S. 943, 94 S.Ct. 1950, 40 L.Ed.2d 295 (1974), and was approved as a constitutional limitation on HAC in Proffitt v. Florida, 428 U.S. 242, 96 S.Ct. 2960, 49 L.Ed.2d 913 (1976). However, its inclusion in the instruction does not cure the vagueness and overbreadth of the whole instruction, The instruction still focuses on the meaningless definitions condemned in Shell. Proffitt never approved this limiting language in conjunction with the definitions. Sochor v. Florida, 504 U.S. 967, 112 S.Ct. 2114, 2121, 119 L.Ed.2d 326 (1992). This limiting language also merely follows those definitions as an example of the type of crime the circumstance is intended to cover. Instructing the jury with this language as only an example still gives the jury the discretion to follow only the first

portion of the instruction which has been disapproved. Shell; Atwater. Second, assuming the language could be interpreted as a limit on the jury's discretion, the disjunctive wording would allow the jury to find HAC if the crime was "conscienceless" even though not "unnecessarily tortuous." The word "or" could be interpreted to separate "conscienceless" and "pitiless and was unnecessarily tortuous." Actually, the wording in Dixon was different and less ambiguous since it reads: "conscienceless or pitiless crime which is unnecessarily tortuous." 283 So. 2d at 9. Third, the terms "conscienceless," "pitiless," and "unnecessarily tortuous" are subject to overbroad interpretation. A jury could easily conclude that any homicide which was not instantaneous would qualify for the HAC circumstance. Furthermore, this Court said in Pope v. State, 441 So. 2d 1073, 1077-78 (Fla. 1983), that an instruction that invites thejury to consider if the crime was "conscienceless" or "pitiless" improperly allows the jury to consider lack of remorse.

Proper jury instructions were critical in the penalty phase of Reese's trial. However, the jury instruction as given failed to apprise the jury of the limited applicability of the HAC factor when death or unconsciousness occurs relatively quickly. Reese was entitled to have a jury recommendation based upon proper guidance from the court concerning the applicability of this aggravating circumstance. The jury should have received a specific instruction on HAC that advised the

jury of the factual parameters necessary before HAC could be considered. The deficient instruction deprived Reese of a fair sentencing determination as guaranteed by the eighth and fourteenth amendments to the United States Constitution and Article I, sections 9, 16, and 17, of the Florida Constitution. This Court must reverse Reese's death sentence.

CONCLUSION

Appellant respectfully requests this Honorable Court to reverse and remand this case for the following relief: Issues I, II, and III, reverse appellant's murder conviction for a new trial; Issues IV, V, VIII, and IX, reverse for a new penalty proceeding; Issue VI, remand for resentencing; Issue VI, vacate appellant's death sentence and remand for imposition of a life sentence.

Respectfully submitted,

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ATTORNEY FOR APPELLANT

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished to James W. Rogers, Assistant Attorney General, by delivery to The Capitol, Plaza Level, Tallahassee, Florida, and a copy has been mailed to appellant, John Loveman Reese, on this 1st day of November, 1993.

NADA M. CAREY