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

REPLY BRIEF OF APPELLANT

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PRELIMINARY STATEMENT

Appellant files this reply brief in response to the arguments presented by the state as to Points VI and VII. Appellant will rely on the arguments presented in the initial brief as to Points I-V, VIII, and IX.

ARGUMENT

Point VI

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

In his initial brief, Reese contended the trial court's conclusory sentencing order is deficient under Campbell v. State, 571 So. 2d 415 (Fla. 1990), because it rejects without explanation several uncontroverted mitigating circumstances

(Reese's traumatic and emotionally deprived childhood, the breakup of his relationship with his girlfriend, and his good conduct record as an inmate) and does not even address other uncontroverted mitigating circumstances (that Reese was a good son and grandson, that his capacity to control his conduct was seriously impaired, that he accepted responsibility for the crime, that he can be rehabilitated).[1]

The state has responded by attacking the testimony of Reese's psychological expert, as follows:

> [Dr.] Krop admitted he relied heavily on Reese's self-reporting in forming his opinion (1230-31) and, in fact, stated: "It's not up to me to determine the facts," (T 1230) even though facts would help formulate the opinion. (T 1231).
>
> . . . . .
>
> . . . Krop admitted that his opinion was just that, an opinion, and one that was based on Reese's self-serving self-reporting because Krop did not feel he needed to develop the facts.

State's Answer Brief at 34, 35.

The state's answer fails for several reasons. First, the state's characterization of Dr. Krop's opinion misrepresents the

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[1]The sole mitigating circumstance found by the trial court was Reese's minimal prior record, which consisted of two misdemeanors (petit theft and trespassing).

record. Indeed, the state's assertion that Dr. Krop's opinion was based solely, or primarily, on Reese's self-report could not be further from the truth. As Reese pointed out in his initial brief, see Initial Brief of Appellant at 21 n.3, Dr. Krop's opinion was based on police reports; the depositions of the police officers, the medical examiner, and Jackie Grier; the trial testimony of Reese and Grier; a personal interview with Grier; a battery of psychological tests on Reese; an extensive review of Reese's life history, including school records, his father's psychiatric records, and adoption records; and personal interviews with Reese's relatives. (T 1202-1204, 1236, 1259).

The state's assertion that Dr. Krop "did not feel he needed to develop the facts" also distorts the record, as is apparent when Dr. Krop's actual statement, "It's not up to me to determine the facts," is read in context:

> BY MR. BATEH [prosecutor]:
>
> Q Dr. Krop, you stated earlier in your testimony that the defendant gave you an explanation that allowed you to determine the facts surrounding this murder, is that correct?
>
> A If you put it that way, I said that I received a history from Mr. Reese with regard to his perception or his reports of what happened and his report, perception of his own history and background. It's not up

to me to determine the facts, it's up to me to make a determination, and in terms of any kind of clinical entity or clinical diagnoses based on any information that I have.

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

A About the defendant? Yes, certainly.

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

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

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

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

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

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

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

BY MR. BATEH:

A I understand what your --

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

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

A Sure.

(T 1230-1232).

The state also has cited Walls v. State, 641 So. 2d 381 (Fla. 1994), cert. denied, 115 S.Ct. 943, 130 L.Ed.2d 887 (1995), to support its argument that Dr. Krop's opinion is not necessarily binding, even though uncontroverted. See State's Answer Brief at 35. As this Court recently stated, however, Walls does not mean a trial court is free to summarily reject qualified expert testimony:

> Actually, Walls stands for the proposition that opinion testimony, unsupported by factual evidence can be rejected, but that uncontroverted and believable factual evidence supported by opinion testimony

cannot be ignored.

Johnson v. State, 660 So. 2d 637, 647 (Fla. 1995)(second emphasis added), pet. for cert. filed, No. 95-7969 (Dec. 20, 1995).

Here, although Reese relied on Dr. Krop to explain the psychological dynamics underlying the murder, including Reese's mental state when the crime was committed, Dr. Krop's opinion was supported by uncontroverted factual evidence, much of which came from the state's own witnesses. The possessive and dysfunctional nature of Reese's relationship with Jackie Grier, and his jealousy of Austin, were established through Jackie Grier's testimony. The details of Reese's traumatic childhood experiences were established through the testimony of Reese's relatives and former schoolteachers, as well as through documentary evidence. See Defense Exhibits 1-15. Reese's exemplary record as an inmate was established through the testimony of Sharon Freeland. (T 1186). The only part of Dr. Krop's testimony that was based primarily on Reese's self-report was that Reese had begun using cocaine several months before the homicide and was using crack cocaine the day of the offense. Even this evidence was uncontroverted and believable: Grier

herself testified she had suspected Reese of drug use.[2] (T 651-652).

The state has not pointed to any "competent, substantial evidence," see Nibert v. State, 574 So. 2d 1059 (Fla. 1990), to support the trial court's rejection of any of the mitigating circumstances in this case, including Dr. Krop's testimony as to Reese's impaired mental state at the time of the crime.[3]

Finally, the state has presented no grounds for upholding the sentencing order. The order plainly does not meet this Court's directive to "expressly evaluate. . . each mitigating circumstance." See Larkins v. State, 655 So. 2d 95, 101 (Fla. 1995). Although the order mentions a few of the proposed mitigating circumstances, it does not explain whether those circumstances were rejected as unsupported by the evidence or

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[2]Dr. Krop testified that Reese's use of crack cocaine and alcohol the day he went to see Austin, combined with his already distressed emotional state, seriously impaired his capacity to conform his conduct to the requirements of the law. In Caruso v. State, 645 So. 2d 389, 396 (Fla. 1994), a forensic psychologist testified that people who use crack cocaine experience a "quality of bizarreness" that overcomes thinking much more than with alcohol. People on cocaine become emotionally disturbed, do not act as they normally would, and become "almost totally disinhibited." Id. Dr. Krop said much the same thing, i.e., that crack cocaine has a very acute, very immediate, and very dramatic effect on a person's thinking, intensifying whatever emotions are present, and resulting in poor impulse control. (T 1217-1218)..

[3]It is now well-settled that "all evidence of mental disturbance or impairment is relevant if it may have some bearing on the crime or the defendant's character." Walls, 641 So. 2d at 389 (emphasis in original).

rejected as not of a mitigating nature. The order does not even address other proposed mitigating circumstances. The instant order is at least as deficient as the sentencing orders this Court condemned in Larkins, Crump v. State, 654 So. 2d 545 (Fla. 1995), and Ferrell v. State, 653 So. 2d 367 (Fla. 1995). This deficiency requires resentencing.

Point VII

REESE'S DEATH SENTENCE IS DISPROPORTIONATE

In his initial brief, Reese argued the death penalty is disproportionate when compared to other cases where a death sentence arose from a tortured love relationship or domestic dispute.

The state's response is that this is not a domestic case because Reese killed "a virtual stranger" rather than his girlfriend.[4] State's Answer Brief at 39-40. The present case, contends the state, is more like cases involving a spurned lover who killed someone other than his girlfriend or wife, such as Occhicone v. State, 570 So. 2d 902 (Fla. 1990), cert. denied, 500 U.S. 938, 111 S.Ct. 2067, 114 L.Ed.2d 471 (1991), Hudson v.

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[4]The state made the same argument with regard to the aggravating factor of CCP: "If Reese had killed Grier, he might have a better argument [that the CCP aggravator is invalid] . . . The victim, however, was a mere acquaintance who, Grier testified, never interfered with her relationship with Reese." State's Answer Brief at 29.

State, 538 So. 2d 829 (Fla.), cert. denied, 493 U.S. 875, 110 S.Ct. 212, 107 L.Ed.2d 165 (1989), and Turner v. State, 530 So. 2d 45 (Fla. 1987), cert. denied, 489 U.S. 1040, 109 S.Ct. 1175, 103 L.Ed.2d 237 (1989); burglary/murders; or nondomestic double-aggravator cases.

This argument should be rejected for several reasons. First, the victim was not a stranger. The victim was Reese's emotional rival for his girlfriend's affection. Second, a defendant's reduced moral culpability in "domestic" cases is not predicated on the victim's identity but on the intense emotions that arise in the context of a failing or troubled love relationship. Reese was deeply threatened by Grier's relationship with Austin, and in his view, Austin was responsible for alienating Grier's affections. Regardless of the platonic nature of Grier and Austin's relationship, Reese's distress over his severed relationship with Grier, and his jealousy of Austin, are what led to the confrontation that resulted in Austin's death. This case is comparable to domestic or crime of passion cases because Reese killed while in the grip of "violent emotions brought on by . . . hatred and jealousy associated with [a] love triangle," see Santos v. State, 591 So. 2d 160, 163 (Fla. 1991), albeit not a love triangle in the classic sense. Accordingly,

the nondomestic cases cited by the state are inapposite.[5]

Occhicone, Turner, and Hudson are not comparable to the present case because they either did not involve crimes of passion or were much more aggravated than the present crime. Both Occhicone and Turner were double murders, involving three or four valid aggravators, including CCP. Hudson did not involve a domestic confrontation or love triangle: Hudson stabbed to death his former girlfriend's roommate after the roommate discovered Hudson burglarizing their home. Hudson also is distinguishable because Hudson had a prior conviction of violence (for which he was on community control at the time of the murder).[6]

The other "true" domestic murders cited by the state also are either much more aggravated than the present crime or not truly domestic cases. In Henry v. State, 649 So. 2d 1366 (Fla.

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[5]See Johnson v. State, 660 So. 2d 637 (Fla. 1995)(defendant stabbed to death 73-year-old woman; 3 aggravators, including prior murder); Griffin v. State, 639 So. 2d 966 (Fla. 1994)(defendant killed police officer during burglary of Holiday Inn, 4 aggravators), cert. denied, 115 S.Ct. 1317, 131 L.Ed.2d 198 (1995); Adams v. State, 412 So. 2d 850 (Fla.)(defendant abducted, raped, and murdered 8-year-old girl, 3 aggravators), cert. denied, 459 U.S. 882, 103 S.Ct. 182, 74 L.Ed.2d 148 (1982); Davis v. State, 648 So. 2d 107 (1994)(defendant stabbed to death 73-year-old woman in her home, 2 aggravators); Smith v. State, 641 So. 2d 1319 (Fla. 1994)(defendant killed cabdriver during robbery, 2 aggravators), cert. denied, 115 S.Ct. 1129, 130 L.Ed.2d 1091 (1995).

[6]"[A]rguably a close call," Hudson's death sentence was affirmed by a 4-3 vote. 538 So. 2d at 832. Hudson's sentence has since been vacated in post-conviction proceedings. See Hudson v. State, 614 So. 2d 482 (Fla. 1993).

1994), cert. denied, 132 L.Ed.2d 839 (1995), the defendant killed his ex-wife and her 9-year-old son; Henry also had murdered his first wife. In Arbalaez v. State, 620 So. 2d 169 (Fla. 1993), cert. denied, 114 S.Ct. 2123, 128 L.Ed.2d 678 (1994), where the defendant killed his girlfriend's 5-year-old son to assure "that bitch is going to remember me for the rest of her life," the Court upheld three aggravators, including CCP. In Duncan v. State, 619 So. 2d 279 (Fla.), cert. denied, 114 S.Ct. 453, 126 L.Ed.2d 385 (1993), the defendant had previously murdered a fellow inmate. Porter v. State, 564 So. 2d 1060 (Fla. 1990), cert. denied, 498 U.S. 1110, 111 S.Ct. 1024, 112 L.Ed.2d 1106 (1991), involved a double murder with three aggravating factors, including CCP.[7] Tompkins v. State, 502 So. 2d 415 (Fla. 1986), cert. denied, 483 U.S. 1033, 107 S.Ct. 3277, 97 L.Ed.2d 781 (1987), was not a domestic case (Tompkins killed his girlfriend's stepdaughter after she refused his sexual advances), and Tompkins had several prior convictions for both kidnapping and rape. The defendants in both Lemon v. State, 456 So. 2d 885 (Fla. 1984), cert. denied, 469 U.S. 1230, 105 S.Ct. 1233, 84 L.Ed.2d 370 (1985), and Williams v. State, 437 So. 2d 133 (Fla. 1983), cert.

[7]Porter's death sentence was affirmed by a 4-3 vote.

denied, 466 U.S. 909, 104 S.Ct. 1690, 80 L.Ed.2d 164 (1984), had prior convictions for similar violent crimes: Williams had shot two other people, Lemon had stabbed another woman.

This Court repeatedly has emphasized that proportionality review requires consideration of "the totality of the circumstances in a case." Porter, 564 So. 2d at 1064; Tillman v. State, 591 So. 2d 167, 169 (Fla. 1991). Proportionality review "is not a comparison between the number of aggravating and mitigating circumstances." Porter, 564 So. 2d at 1064 (emphasis added). Proportionality review requires, rather, a thoughtful examination of the "nature and quality of those factors as compared with similar death appeals." Kramer v. State, 619 So. 2d 274 (Fla. 1993). In some first-degree murder cases, the deed itself is so beyond the pale (torture/slayings or multiple murders, for example) as to warrant the ultimate punishment, despite mitigation related to the defendant's background or character. For other less egregious murders, the defendant's violent history (the paroled murderer who kills again, for example) tips the scales towards death. And sometimes, the ultimate penalty fits both the crime and the criminal.

Here, the ultimate penalty fits neither the crime nor the criminal. Although Reese's acts were despicable, he committed

this murder while distraught and desperate over the loss of his girlfriend. He was 27 years old at the time and had no violent criminal history. Reese is not a hardened, vicious, depraved, or irredeemable criminal. He does not fit the profile of a death row inmate. This case is the moral equivalent of those domestic/heat of passion cases involving defendants with no prior violent criminal history in which this Court has found the death penalty inappropriate. Life in prison is the appropriate punishment for John Reese.

CONCLUSION

Appellant respectfully requests this Honorable Court to grant the relief requested in his initial brief.

Respectfully submitted,

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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, # 123069, Union Correctonal Institution, Post Office Box 221, Raiford, Florida 32083, on this 2nd day of ~~March~~ April, 1996.

Nada M. Carey

NADA M. CAREY