IN THE SUPREME COURT OF FLORIDA

JOHN LOVEMAN REESE,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

CASE NO. 91,411

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

ANSWER BRIEF OF APPELLEE

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STATEMENT OF THE CASE AND FACTS

On January 28, 1992, Reese killed his former girlfriend's best friend.[1] The state charged Reese with first-degree murder, sexual battery, and burglary, and the jury convicted him as charged. At the penalty phase the jury recommended that he be sentenced to death, which the trial court did.

Reese raised nine issues on direct appeal, three as to guilt and six as to the death sentence. This Court found no reversible error on the three guilt-phase issues. Reese v. State, 694 So.2d 678, 684 (Fla. 1997). Turning to the sentencing issues, this Court found any instructional error on the cold, calculated, and premeditated (CCP) aggravator harmless because the facts supported the jury's instruction on and the trial court's finding of the CCP aggravator. Id. This Court also found no merit to Reese's claim that death was a disproportionate sentence because this was a domestic killing. Id. at 685. Likewise, no merit was found in the claims about the prosecutor's penalty-phase argument and that the heinous, atrocious, or cruel (HAC) instruction was unconstitutional. Id.

As to the remaining issue raised on direct appeal, this Court stated: "The sentencing order in this case contains inadequate

[1] These facts are taken from Reese v. State, 694 So.2d 678 (Fla. 1997).

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

After the jury made its recommendation, Reese filed a sentencing memorandum on June 24, 1993, listing twenty-six proposed nonstatutory mitigators. (II 368).[2] The state did not file a sentencing memorandum at that time. After this Court's remand, however, the state filed a sentencing memorandum on March 31, 1997. (SI 12).[3]

On April 17, 1997, the trial judge issued an "Addendum to Sentencing Order." (SI 24). The judge reaffirmed the finding of

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

[3] "SI 12" refers to page 12 of the single volume of record in the instant case (no. 91,411), which the clerk of the circuit court designated as "Appeal No. 82,119 (Supplemental Volume I)."

three aggravators and no statutory mitigators in the original order. (SI 24). He then discussed the proposed nonstatutory mitigation. (SI 24-29). Finally, the judge concluded: "For those mitigators above which have been found to be established by the greater weight of the evidence, the Court finds that they are of insufficient weight to counterbalance the aggravating facts proven in this case." (SI 29).[4]

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

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

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[4] The trial court sent copies of this addendum to Reese's appellate counsel and the assistant state attorney and assistant attorney general assigned to this case. (SI 29).

(SI 32-33, emphasis in original).[5]

On May 27, 1997, this Court denied Reese's motion for rehearing. (SI 33A). Six weeks later, the Department of Corrections wrote to the clerk of the circuit court, inquiring if the trial court had rewritten the sentencing order. (SI 34). The trial court then entered an "Order Pursuant to Mandate," adopting, reaffirming, and reentering the addendum dated April 17. (SI 35-36).[6] Reese's trial counsel objected to the court's latest order, complaining for the first time that the trial "Court did not schedule the Defendant's case for a review in open court nor did the Court provide an opportunity for the defense to be heard with regard to the new sentencing order." (SI 38).

[5] The court sent copies of this order to Reese's trial counsel and the assistant state attorney. (SI 33).

[6] The court sent copies of this order to Reese's appellate counsel, the assistant state attorney, assistant attorney general, and the clerk of this Court. (SI 36).

SUMMARY OF ARGUMENT

ISSUE I

The trial court did not err when it rewrote the sentencing order without hearing the parties.

ISSUE II

The trial court independently evaluated and weighed the proposed mitigating evidence.

ISSUE III

The trial court properly weighed the proposed nonstatutory mitigation.

ISSUE IV

The trial court's evaluation of the evidence was impartial and unbiased.

ARGUMENT

ISSUE I

WHETHER THE TRIAL COURT ERRED BY REWRITING ITS ORDER WITHOUT HEARING THE PARTIES.

As his first issue, Reese argues that the trial court should not have rewritten its order without holding a hearing in open court. Reese also complains that the trial court did not follow on remand the dictates of Spencer v. State, 615 So.2d 688 (Fla. 1993). According to Reese, Spencer means that his trial court should have held a hearing at which all parties were allowed to present evidence and he, himself, was allowed to speak, followed by both a recess for the court to consider the sentence and another hearing at which sentence was imposed. (Initial brief at 16-17). There is no merit to this argument.

This Court has considered similar claims numerous times and has recognized that its "terminology in remanding for resentencing has varied from case to case." Lucas v. State, 490 So.2d 943, 945 (Fla. 1986); Davis v. State, 648 So.2d 107, 109 (Fla. 1994), cert. denied, 116 S.Ct. 94 (1995). Unless the remand specifically requires the empaneling of a new jury or specifically directs the presentation of new evidence, however, the scope of the proceedings on remand are left to the trial court's discretion. Cf. Crump v. State, 697 So.2d 1211, 1213 (Fla. 1997) ("We remanded only for

reweighing and resentencing; therefore it was not error for the judge to refuse to hear arguments from Crump, to refuse to consider Crump's character at the time of sentencing, or to refuse to empanel a new jury or interview jurors"); Lucas v. State, 613 So.2d 408, 409 (Fla. 1992) (no error in trial judge's refusal to permit additional testimony), cert. denied, 510 U.S. 845 (1995); Oats v. State, 472 So.2d 1143, 1144 (Fla. 1985) (no error in refusal on remand to appoint experts to examine defendant). The requirements of Spencer have not been extended to simple reweighings.[7]

Reese argues that the standard on remand should be Scull v. State, 569 So.2d 1251, 1253 (Fla. 1990), where this Court directed that the parties be allowed to introduce new evidence. This Court, however, has not directed that Scull be followed when remanding for a trial court to reconsider the sentencing order. Jackson v. State, 22 Fla.L.Weekly S690 (Fla. November 6, 1997); Walker v. State, 22 Fla.L.Weekly S537 (Fla. September 4, 1997); Larkins v.

[7] The trial court complied with the requirements of Spencer at Reese's original sentencing. The jury rendered its recommendation on May 14, 1993 (XVI 1492), and the court scheduled sentencing for June 24, 1993. (XVI 1494). On that date, the court received the defense's sentencing memorandum and recessed the proceedings to consider that submission with sentencing scheduled for the following day. (XVI 1499 et seq.). On June 25, 1993, the court sentenced Reese to death. (XVI 1513). Reese's original sentencing also complied with Florida Rule of Criminal Procedure 3.780. As with the Spencer requirements, this Court's remands for reweighing or rewriting have not directed compliance with rule 3.780.

State, 655 So.2d 95 (Fla. 1995); Crump v. State, 654 So.2d 545 (Fla. 1995); Ferrell v. State, 653 So.2d 367 (Fla. 1995); Robertson v. State, 611 So.2d 1228 (Fla. 1993); Davis v. State, 604 So.2d 794 (Fla. 1992); Dailey v. State, 594 So.2d 254 (Fla. 1991); see also Crump v. State, 697 So.2d 1211 (Fla. 1997); Ferrell v. State, 680 So.2d 390 (Fla. 1996), cert. denied, 117 S.Ct. 1262 (1997); Dailey v. State, 659 So.2d 246 (Fla. 1995), cert. denied, 116 S.Ct. 819 (1996); Davis v. State, 648 So.2d 107 (Fla. 1994), cert. denied, 116 S.Ct. 94 (1995). Rather than imposing the requirements of Scull on all remands, it would be better to leave the scope of the proceedings to the discretion of the trial courts.

This Court's language directing remands has continued to vary from case to case. Sometimes, especially when ordering resentencing before a new jury, the language is very specific. E.g., Smith v. State, 699 So.2d 629, 633 (Fla. 1997) ("we reverse the sentence of death on the first-degree murder charge and remand for resentencing in front of a jury"); Clark v. State, 690 So.2d 1280, 1283 (Fla. 1997) ("we remand for a full resentencing proceeding before a jury"); Campbell v. State, 679 So.2d 720, 726 (Fla. 1996) ("We reverse Campbell's death sentence . . . and remand for resentencing before a new judge and jury"); see also Robinson v. State, 684 So.2d 175, 180 (Fla. 1996) ("We remand to the trial

court to conduct a new penalty-phase hearing before the judge alone"). In other cases, however, the degree of direction varies. E.g., Jackson, 22 Fla.L.Weekly at S693 ("we vacate Jackson's sentence and remand to the trial court to reweigh the aggravating and mitigating circumstances and resentence Jackson"); Walker, 22 Fla.L.Weekly at S545 ("we must vacate the sentence of death and remand for a proper evaluation and weighing of all nonstatutory mitigating evidence"); Crump, 697 So.2d at 1213 ("We remand to the trial court for a reweighing and resentencing to be conducted within 120 days"); Larkins v. State, 655 So.2d at 101 ("we direct the trial court to reevaluate the aggravating and mitigating circumstances, to resentence the defendant, and to enter a new sentencing order"); Crump, 654 So.2d at 548 ("we vacate Crump's death sentence and remand for the trial judge to reweigh the circumstances and resentence Crump"); Ferrell, 653 So.2d at 371 ("we remand for a new sentencing order"); Robertson, 611 So.2d at 1230 ("we vacate Robertson's two death sentences and remand the case to the trial judge to reweigh the remaining aggravating and mitigating circumstances and to resentence Robertson"); Davis, 604 So.2d at 799 ("We remand the case to the trial judge to reweigh the evidence"); Dailey, 594 So.2d at 259 ("we affirm the conviction,

reverse the sentence, and remand for resentencing before the trial judge").

In this case the remand directed "the entry of a new sentencing order expressly weighing all mitigating evidence presented." Reese, 694 So.2d at 685. The opinion neither vacated nor reversed Reese's death sentence[8] and did not direct that Reese be resentenced. The opinion also did not direct that the parties were to be allowed to introduce more evidence or even that they should be allowed to argue to the trial court.

The trial court followed this Court's directions precisely -- it entered a new order expressly weighing the mitigating evidence Reese presented and did so within thirty days of being directed to do so.[9] The trial court cannot be faulted for following this Court's directions. Dailey, 659 So.2d at 247. Without specific direction from this Court that such be done, Reese was not entitled to the hearings prescribed in Spencer or for Scull.

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[8] Most remands are accompanied by the reversal or vacating of the appellant's death sentence. The instant case is noteworthy because Reese's death sentence was not vacated or reversed.

[9] In Smith v. State, 699 So.2d 629, 633 (Fla. 1997), this Court directed the resentencing to be done "within 120 days of this opinion becoming final." Directing that times begin to run from the date an opinion becomes final would eliminate confusion over when jurisdiction is returned to a trial court.

Reese only complained about the lack of a hearing after the fact. (SI 38). He could have done so earlier and could have proffered any additional evidence that he wanted to introduce. He has presented nothing but an amorphous claim that he was prejudiced. Reese has not demonstrated that the procedure employed by the trial court constituted an abuse of discretion. Compare Crump, 697 So.2d at 1213 (on remand for reweighing and resentencing trial court did not err in refusing to hear argument from the parties). This issue has no merit. Therefore, it should be denied, and the trial court's findings should be affirmed.

ISSUE II

WHETHER THE TRIAL COURT INDEPENDENTLY EVALUATED THE PROPOSED MITIGATION.

Reese argues that the trial court adopted "almost verbatim the state's sentencing memorandum." (Initial brief at 27; see also 38, 45). There is no merit to this claim.

The purpose of sentencing memoranda is to assist the trial court in its weighing of aggravators and mitigators. The jury recommended the death sentence, and the trial court imposed that sentence, and the facts, therefore, should be taken in the light most favorable to sustaining those actions. That the court's findings resemble the state's submission more than the defense's should come as no surprise.

This is not a case such as Spencer v. State, 615 So.2d 688 (Fla. 1993), where, among other things, defense counsel found the judge and prosecutor proofreading the sentencing order or Patterson v. State, 513 So.2d 1257, 1261 (Fla. 1987), where "the trial judge improperly delegated to the state attorney the responsibility to prepare the sentencing order." Instead, Reese's trial court independently evaluated the evidence and independently weighed the aggravators and mitigators. Reese disagrees with the court's ultimate decision, but has failed to demonstrate that the trial

court abdicated its responsibility to conduct an independent evaluation.

This claim has no merit and should be denied.

ISSUE III

WHETHER THE TRIAL COURT PROPERLY EVALUATED THE PROPOSED MITIGATORS.

Reese argues that the trial court did not properly consider his proposed nonstatutory mitigating evidence and that the court did not assign sufficient weight to the mitigators it found. The trial court, however, properly evaluated the proposed mitigating evidence, and Reese has demonstrated no abuse of discretion. Moreover, even if any error occurred, it was harmless.

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

Lucas v. State, 613 So.2d 408 (Fla. 1992), cert. denied, 510 U.S. 845 (1993). A trial court has broad discretion in determining whether mitigators apply, and the decision on whether the facts establish a particular mitigator will not be reversed because this Court or an appellant reaches a contrary conclusion absent a palpable abuse of discretion. Banks v. State, 22 Fla.L.Weekly S521 (Fla. August 28, 1997); Foster (Jermaine) v. State, 679 So.2d 747 (Fla. 1996), cert. denied, 117 S.Ct. 1259 (1997); Foster (Charles) v. State, 654 So.2d 112 (Fla.), cert. denied, 116 S.Ct. 314 (1995); Pietri v. State, 644 So.2d 1347 (Fla. 1994), cert. denied, 115 S.Ct. 2588 (1995); Wyatt v. State, 641 So.2d 355 (Fla. 1994), cert. denied, 514 U.S. 1023 (1995); Arbelaez v. State, 626 So.2d 169 (Fla. 1993), cert. denied, 511 U.S. 1115 (1994); Preston v. State, 607 So.2d 604 (Fla. 1992), cert. denied, 507 U.S. 999 (1993); Sireci v. State, 587 So.2d 450 (Fla. 1991), cert. denied, 503 U.S. 946 (1992). A trial court's finding that the facts do not establish a mitigator "will be presumed correct and upheld on review if supported by 'sufficient competent evidence in the record.'" Campbell, 571 So.2d at 419 n.5 (quoting Brown v. Wainwright, 392 So.2d 1327, 1331 (Fla. 1991)); Consalvo v. State, 697 So.2d 805 (Fla. 1996); Duncan v. State, 619 So.2d 279 (Fla.), cert. denied, 510 U.S. 969 (1993); Lucas; Johnson v. State, 608

So.2d 4 (Fla. 1992), cert. denied, 508 U.S. 919 (1993); Ponticelli v. State, 593 So.2d 483 (Fla. 1991), aff'd on remand, 618 So.2d 154 (Fla.), cert. denied, 510 U.S. 935 (1993). Resolving conflicts in the evidence is the trial court's duty, and its decision is final if supported by competent substantial evidence. Parker v. State, 641 So.2d 369 (Fla. 1994), cert. denied, 513 U.S. 1131 (1995); Lucas; Johnson; Sireci; Gunsby v. State, 574 So.2d 1085 (Fla.), cert. denied, 502 U.S. 843 (1991). As this Court has long held, "the weight to be given a mitigator is left to the trial judge's discretion." Mann v. State, 603 So.2d 1141, 1144 (Fla. 1992); Spencer v. State, 691 So.2d 1062 (Fla. 1996); Kilgore v. State, 688 So.2d 895 (Fla. 1996); Foster (Jermaine); Bonifay v. State, 680 So.2d 413 (Fla. 1996); Windom v. State, 656 So.2d 432 (Fla.), cert. denied, 116 S.Ct. 571 (1995); Jones v. State, 648 So.2d 669 (Fla. 1994), cert. denied, 115 S.Ct. 2588 (1995); Ellis v. State, 622 So.2d 991 (Fla. 1993); Campbell; Swafford v. State, 533 So.2d 270 (Fla. 1988), cert. denied, 489 U.S. 1100 (1989). Moreover, it is permissible to group nonstatutory mitigators and to consider them collectively. Reaves v. State, 639 So.2d 1 (Fla.), cert. denied, 513 U.S. 990 (1994).

Reese lists several of the nonstatutory mitigators he proposed in his sentencing memorandum[10] and complains that the trial court erred in not finding they had been established and/or in not assigning sufficient weight to them. The trial court, however, followed the dictates of Rogers and Campbell in considering the proposed nonstatutory mitigation. Cf. Barwick v. State, 660 So.2d 685 (Fla. 1995); Armstrong v. State, 642 So.2d 730 (Fla. 1994), cert. denied, 514 U.S. 1085 (1995); Peterka v. State, 640 So.2d 59 (Fla. 1994), cert. denied, 513 U.S. 1129 (1995); Atwater v. State, 626 So.2d 1325 (Fla. 1993), cert. denied, 511 U.S. 1046 (1994); Tompkins v. State, 502 So.2d 415 (Fla. 1986), cert. denied, 483 U.S. 1033 (1987). As is readily apparent, no reversible error occurred.

A. Good Record in Jail/Adaptability to Prison Life

The trial court made the following findings as to these proposed mitigators:

> **2. Good Record In Jail.** The fact that the defendant had no violation reports written on him while he was incarcerated was established. However, given the fact that the defendant was being held in a constant high state of security at the Duval County Jail, facing a first degree murder charge, the Court finds that this nonstatutory mitigating circumstance in entitled to very minimal weight, at best.

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[10] He also lists one nonstatutory mitigator not included in his memorandum (drug use) that will be discussed infra.

(SI 25).

> **9. Potential for Being a Good Prisoner.** This circumstance warrants very little weight in the Court's consideration, and is at most pure speculation on the part of defense counsel. Defense counsel's statement in his sentencing memorandum that the defendant "fully accepts responsibility for his criminal acts" is contradicted by the defendant's initial lies to Ms. Grier and to the police, and by his testimony in Court, which was found unworthy of belief by the jury, (since they rejected lesser included offenses and a lesser sentence), and this Court. This mitigator clearly was not established by the evidence.

(SI 28). Reese complains that these findings "are legally and factually erroneous" (initial brief at 29) and also complains about the weight assigned by the trial court. (Initial brief at 30). He has not, however, demonstrated any abuse of discretion in the trial court's finding these proposed mitigators to be worth "minimal" and "little" weight. Even if this Court were to decide that the trial court erred in its consideration of these proposed nonstatutory mitigators, that error would be harmless in light of the three strong aggravators (felony murder, HAC, and CCP) and the negligible nature of this mitigation. Banks; Thomas v. State, 693 So.2d 951 (Fla. 1997); Lawrence v. State, 691 So.2d 1068 (Fla. 1997); Barwick; Wuornos v. State, 644 So.2d 1000 (Fla. 1994), cert. denied, 514 U.S. 1069 (1995); Armstrong; Peterka.

B. Childhood Trauma

In his sentencing memorandum Reese identified sixteen proposed nonstatutory mitigators dealing with his childhood and young adulthood, ranging from his being adopted to his having earned a GED. (SI 16). The trial court grouped these proposed mitigators and made the following findings:

> **3. Childhood Difficulties.** The following factors were established: The defendant was abandoned at an early age, was adopted, was raised in a good loving home until the age of seven, when his adoptive father murdered his adoptive mother. The defendant found the mother's body. The defendant, age seven at the time, received no counseling regarding this event. The defendant never saw his adoptive father again. The defendant was thereafter raised by a maternal uncle until age fourteen. The uncle provided well for the defendant in terms of material needs. At age fourteen the defendant moved in with a different uncle, with whom he bonded and at whose home he lived until his uncle's death. The defendant helped care for his elderly grandmother in some fashion. The defendant assisted and comforted his aunt when his uncle died. The defendant played football and ran track in high school. The defendant left high school before graduation, and obtained his GED while in the Job Corps. The Court finds that the above circumstances were proven, and that they indicate that the defendant did have an imperfect childhood. The Court gives them little weight in consideration of the sentence. The defendant suffered no worse deprivation than have many other children who manage to grow up and become law abiding citizens as adults, or at least refrain from rape and murder. The defendant was not retarded or sexually abused as a youth. None of these problems occurred recently; they all occurred at a very early age, and the murder was committed when the defendant was twenty-seven years old, many years after these experiences had been mellowed by the passage of time. When compared to the egregious nature of rape and murder involved in these crimes, and the weight of the three aggravating circumstances, the

> circumstances are entitled to very little weight as mitigators.

(SI 25-26).

Contrary to Reese's current contention, this mitigation is not "entitled to significant weight." (Initial brief at 31). The trial court considered all of the evidence presented about Reese's earlier years and, as it was entitled to do, found it worth little weight. Reese has shown no abuse of discretion in the weight assigned by the trial court. Shellito v. State, 22 Fla.L.Weekly S737 (Fla. November 26, 1997); Banks; Mungin v. State, 689 So.2d 1026 (Fla. 1995); Williamson v. State, 681 So.2d 688 (Fla. 1996); Bonifay.

C. Positive Character Traits

Reese lists several "positive character traits" such as bonding with an uncle, playing football in high school, caring for his grandmother, and obtaining a GED. (Initial brief at 33). After acknowledging that the trial court recognized these "traits," however, he complains that the court gave them no weight. This contention is incorrect. The court considered these "traits" in its discussion of Reese's "Childhood Difficulties" and found them worth little weight. (SI 25-26). Reese has shown no abuse of discretion in the weight given this nonstatutory mitigation. Shellito; Banks; Mungin; Williamson; Barwick.

D. Support of Jackie Grier

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

> **4. Supporting Jacqueline Grier.** The defendant claims to have supported Ms. Grier and her children. This contention is refuted by the testimony of Ms. Grier in the guilt phase. Ms. Grier testified that the defendant occasionally supported her and her children, "but more times he wouldn't than he did." (T701). Such support as the defendant did provide for Ms. Grier and her children must be balanced against the fact that for most of the time he did not provide any support, despite his continuing sexual relationship with her, and this mitigation is therefore of little or no significance, especially in light of the facts that the defendant raped and murdered Ms. Grier's best friend, and that this murder was in fact the defendant's response to Ms. Grier's efforts to terminate their relationship. The Court further finds that Ms. Grier's testimony regarding the abusive and controlling nature of their relationship is more worthy of belief than Mr. Reese's version. She testified that he beat her, even early in the relationship, before they moved to Florida. (T1400). This circumstance must be given little or no weight.

(SI 26). The record supports these findings.

Although Reese testified that he supported Grier and her children, Grier testified that such support was sporadic and "more times he wouldn't than he did." (XII 701). She said the support was not regular and that, when Reese got some money, he would leave and be gone for days. (XII 702). Reese had been gone from Grier's home for several months at the time of the murder. (XII 618).

Reese was violent, and Grier wanted to get away from him. (XII 703; XIII 1002; XVI 1400).

It is the trial court's duty to resolve conflicts in the evidence, and the record supports the court's finding Grier to be more credible than Reese. Reese has shown no error in the court's findings on this proposed mitigator and has demonstrated no abuse of discretion in assigning it "little or no weight."

E. Possessive Relationship with Grier

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

> **5. The Defendant's Possessive Relationship Toward Jacqueline Grier.** This fact was certainly established by the evidence; however, it is not mitigation. Whether the murder was in revenge for Ms. Austin's perceived role in the breakup of his relationship with Ms. Grier, or whether the defendant perceived Ms. Austin as a threat to his relationship with Ms. Grier, the Court finds totally unworthy of belief the contention that his raping and murdering Ms. Austin were "the result of the defendant's misguided effort . . . to salvage his relationship with Ms. Grier." This allegation is devoid of credibility and is worthy of no weight, or at best minimal weight.

(SI 26). Reese claims that these findings are erroneous because his expert's testimony was "unrebutted, uncontradicted, unequivocal." (Initial brief at 34). The expert's testimony was also inconsistent and unreconcilable with other testimony.

Krop testified that Reese was insecure, that he felt inadequate, and that he was sensitive to rejection. (XV 1214).

Krop blamed Reese's violent activities on "[n]ot only because of what he felt was happening in his relationship with Ms. Grier, but basically, what happened to him throughout his life." (XV 1215). Krop also found, however, that Reese's impulse control was generally good (XV 1219) and acknowledged that Reese's killing the victim could be consistent with a conscious decision. (XV 1247-48). Grier testified that the victim never interfered with her relationship with Reese (XII 618, 656) and that Reese did not like the victim. (XII 618). She also testified that Reese was violent. (XII 703; XIII 1002). As this Court held on direct appeal, the facts of this murder supported finding CCP in aggravation.[11] Reese, 694 So.2d at 684. This undercuts any argument that the murder was the result of an uncontrollable obsession that caused Reese to act impulsively.

The record supports the trial court's findings. Reese has demonstrated no abuse of discretion in the finding that this proposed mitigator was entitled to "at best minimal weight."

F. Mental Impairment

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

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[11] The cases cited by Reese (initial brief at 35) are all "domestic" cases and are, therefore, distinguishable from the instant case. This Court rejected Reese's claim that this is a "domestic relationship" case. Reese, 694 So.2d at 685.

8. Defendant Was Under Influence of an Extreme Emotional Disturbance at the Time of the Murder. This circumstance was not established by the evidence. Although defense counsel argued that his actions were the product of rage and passion, the defendant broke into the victim's home, and then proceeded to calmly wait for a period of from eight to ten hours, like a predator waiting for prey beside a waterhole in the jungle, anticipating the [victim's] return home. Even after the victim was in her home, believing herself to be safe and secure, the defendant waited, hidden, for her to fall asleep, so he could take full advantage of her most vulnerable position, so that he could rape and murder her more easily. This was the act of a calm and calculating person with a plan, not a person filled with uncontrollable rage. Dr. Harry Krop testified that the defendant was not insane, that the defendant knew the difference between right and wrong, and that he understood the nature and quality of his acts. Dr. Krop's testimony confirmed that the defendant's raping and killing the victim was consistent with the defendant having made a conscious decision in advance to commit these crimes. This circumstance was clearly not established by the evidence, and the Court therefore gives it no weight whatsoever.

Dr. Krop's testimony that the defendant's fear, anxiety and frustration produced a seriously impaired mental state at the time of the murder was emasculated by his further testimony that the defendant had no major mental illness or personality disorder (T1205), and that his impulse control was generally good (T1219). Dr. Krop did not testify that the defendant met the requirements of either of the statutory mental mitigators. On cross-examination, Dr. Krop admitted that he relied heavily on the defendant's self-reporting in forming his opinion, and in fact said "it's not up to me to determine the facts" (T1230), even though he admitted that those facts could help formulate an opinion (T1231). Dr. Krop confirmed that the rape and murder were consistent with the defendant having made a conscious decision to commit the crimes. (T1247-48). Dr. Krop's testimony was typical of the watery and inconclusive expert witness opinion testimony based solely on the defendant's self-

> serving statements that is frequently offered in such cases. This type of opinion testimony intentionally ignores all the other facts and circumstances of the case, and has led to the rule of law that such testimony, even if uncontroverted, may be rejected by the judge and jury. Walls v. State, 641 So.2d 381 (Fla. 1994), cert. denied, 115 S.Ct. 943 (1995); Wuornos v. State, 644 So.2d 1000 (Fla. 1994), cert. denied, 115 S.Ct. 1705 (1995). The Court therefore finds, as did the jury, that the portion of his testimony seeking to establish a mitigating circumstance, was unworthy of belief and fails to establish such a mitigating factor.

(SI 27-28). Reese argues that Krop's testimony "was uncontradicted, unrebutted, and supported by factual evidence." (Initial brief at 38). Contrary to this argument, however, the record supports the trial court's assessment of Krop's testimony.

On direct examination Krop stated that he interviewed Reese on December 16, 1992, and May 5, 1993 (XV 1202), well after Reese committed this murder. He stated that Reese had no major mental illness or personality disorder. (XV 1205). After talking about Reese's background, Krop concluded that Reese's "mental state was seriously impaired at the time of the offense." (XV 1217). However, Krop also testified that Reese's impulse control was generally good. (XV 1219).

On cross-examination Krop stated that Reese was not insane and knew right from wrong. (XV 1225). Krop relied on Reese's "perception or his reports of what happened and his report, perception of his own history and background." (XV 1230). He then

stated, “It’s not up to me to determine the facts.” (XV 1230). Krop agreed that Reese was of average intelligence and had no brain damage. (XV 1247). He also agreed that the facts were consistent with Reese having made a conscious decision to break into the victim’s home, rape, and then kill her. (XV 1247-48).

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

Krop’s testimony was internally inconsistent in many respects. Moreover, as this Court has acknowledged many times, the finder of fact can reject self-serving statements. See Wuornos, 644 So.2d at 1008; Walls v. State, 641 So.2d 381, 387 (Fla. 1994), cert. denied, 513 U.S. 1130 (1995); Pardo v. State, 563 So.2d 77, 80 (Fla. 1990), cert. denied, 500 U.S. 928 (1991); Bertolotti v. State, 534 So.2d 386, 387 (Fla. 1988); Burch v. State, 478 So.2d 1050, 1051 (Fla.

1985); Cirak v. State, 201 So.2d 706, 709-10 (Fla. 1967). Also, as the trial court noted, even expert opinion testimony may be rejected when, as here, that testimony is contrary to or inconsistent with the facts. Walls; Foster v. State, 679 So.2d 747 (Fla. 1996), cert. denied, 117 S.Ct. 1259 (1997); Farr v. State, 656 So.2d 448 (Fla. 1995); Ramirez v. State, 651 So.2d 1164 (Fla. 1995); Wuornos.

The record supports the trial court's rejection of Reese's proposed mental mitigation, and Reese has demonstrated no reversible error. Reese claims that the "court's finding that Reese coldly plotted this crime in advance is not supported by the evidence." (Initial brief at 38). Contrary to this assertion, however, the trial court found, and this Court affirmed, that the state established the existence of the CCP aggravator. Reese, 694 So.2d at 684. Two other aggravators (felony murder and HAC) were also established. Even if this Court were to decide that the trial court should have found that nonstatutory mental mitigation existed and that it should have been given some weight, any error is harmless. This is not a case such as Nibert v. State, 574 So.2d 1059 (Fla. 1990), where the mental mitigation was overwhelming. Even if mental mitigation had been established in this case, it would not outweigh the three strong aggravators. Any error,

therefore, was harmless. Thomas; Lawrence; Barwick; Wuornos; Armstrong.

G. Emotional Immaturity

The trial court made the following statement regarding this proposed nonstatutory mitigator: "The Court finds that this was not established by the evidence, but if established, the Court finds it is entitled to no weight." (SI 28-29). Reese complains that the evidence of his "emotional inadequacies was uncontroverted" and that even the state, in its sentencing memorandum, conceded that this mitigator had been established.[12] (Initial brief at 40). This argument ignores the fact that Krop testified that Reese had no major mental illness or personality disorder (XV 1205), that his impulse control was generally good (XV 1219), that he was not insane and knew right from wrong (XV 1225), that his murdering the victim was consistent with a conscious decision (XV 1247-48), and that "nothing" in his past life "caused Mr. Reese to kill this woman." (XV 1257). The record supports the trial court's rejection of this proposed mitigator.

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[12] The memorandum states: "Emotional Immaturity -- Probably established but entitled to little weight." (SI 13). The trial court's findings undercut and demonstrate the inaccuracy of Reese's claims (initial brief at 27, 38, 45) that the trial court adopted the state's conclusions verbatim instead of independently considering the evidence. See issue II, supra.

Even if this Court were to decide that the trial court should have found that this proposed mitigator had been established, any error would be harmless. Emotional immaturity is, in reality, a subset of the proposed emotional disturbance mitigator. The court fully considered and evaluated that proposed mitigator and, as demonstrated above, properly rejected it as well. Any weight that this Court might decide should have been given to Reese's alleged immaturity would not outweigh the three strong aggravators established in this case. Any error in the court's consideration of this proposed mitigator, therefore, is harmless.

H. Drug and Alcohol Dependency

Reese's final complaint is that the "trial court's order does not mention the evidence of Reese's drug and alcohol dependency, or the evidence that he was using crack cocaine during the months preceding the murder and on the day of the murder itself." (Initial brief at 41). In Lucas v. State, 568 So.2d 18, 24 (Fla. 1990), this Court stated that "the defense must share the burden and identify for the court the specific nonstatutory mitigating circumstances it is attempting to establish." Reese, however, did not mention his alleged drug and alcohol use in his sentencing memorandum or urge in any other way that the trial court should consider it as nonstatutory mitigation. The trial court, therefore, did not err in not considering this currently proposed mitigator. Consalvo; Thompson v. State, 648 So.2d 692 (Fla. 1994), cert. denied, 515 U.S. 1125 (1995).

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

Reese's death sentence should also be affirmed. This Court affirmed the trial court's finding the CCP aggravator, 694 So.2d at

684, and that is now the law of the case. Farr; Waterhouse v. State, 596 So.2d 1008 (Fla.), cert. denied, 506 U.S. 957 (1992); Magill v. State, 428 So.2d 649 (Fla.), cert. denied, 464 U.S. 865 (1983); Menendez v. State, 419 So.2d 312 (Fla. 1982). Reese has never challenged the applicability of the other aggravators found by the trial court. Moreover, no reversible error occurred in the court's consideration of the mitigating evidence. The trial court, at the conclusion of the addendum to the sentencing order, stated that the mitigators that Reese established were "of insufficient weight to counterbalance the aggravating factors proven in this case." (SI 29). The trial court properly weighed the aggravators and mitigators, and this Court should not reweigh these factors. Melton v. State, 638 So.2d 927 (Fla.), cert. denied, 513 U.S. 971 (1994); Gunsby v. State, 574 So.2d 1085 (Fla.), cert. denied, 502 U.S. 843 (1991); Freeman v. State, 563 So.2d 73 (Fla. 1990), cert. denied, 501 U.S. 1259 (1991); Hudson v. State, 538 So.2d 829 (Fla.), cert. denied, 493 U.S. 875 (1989). Therefore, this Court should affirm Reese's death sentence.

ISSUE IV

WHETHER THE TRIAL COURT'S EVALUATION OF THE EVIDENCE WAS UNBIASED.

Reese claims that the trial court's rejection of Dr. Krop's testimony improperly reflected the court's "personal opinion and philosophy with regard to such testimony" (initial brief at 46) and demonstrated the court's bias. There is no merit to this issue.

In discussing the proposed mental mitigation the court tracked Krop's testimony and concluded that it

> was typical of the watery and inconclusive expert witness testimony based solely on the defendant's self-serving statements that is frequently offered in such cases. This type of opinion testimony intentionally ignores all the other facts and circumstances of the case, and has led to the rule of law that such testimony, even if uncontroverted, may be rejected by the judge and jury. Walls v. State, 641 So.2d 381 (Fla. 1994), cert. denied, 115 S.Ct. 943 (1995); Wuornos v. State, 644 So.2d 1000 (Fla. 1994), cert. denied, 115 S.Ct. 1705 (1995).

(SI 28). As set out in issue III, supra, the facts support the court's findings on mental mitigation; the finder of fact can reject testimony based on a defendant's self-serving statements; and expert testimony can be rejected. Contrary to Reese's contention, the quote set out above does not demonstrate an improper judicial bias. Instead, the court's comment is simply that, a comment on the state of the law and why it found Krop's testimony less credible than Reese wanted.

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

Here, on the other hand, the court's comment was a recognition of the facts of this case. Reese assumes that an expert's testimony is sacrosanct, but such is not true, as acknowledged by this Court in Walls and Wuornos and other cases. Reese has failed to show that his trial court was other than impartial and unbiased. See Correll v. State, 22 Fla.L.Weekly S188 (Fla. April 10, 1997).

As Reese states (initial brief at 46), mental mitigation can temper the effect of the CCP aggravator. By affirming the applicability of CCP to this murder, 694 So.2d at 684, however, this Court acknowledged that Krop's testimony did not rise to such a level or produce such an effect. This Court's rejection of Reese's claim that his death sentence was disproportionate because of the "domestic" nature of this murder, 694 So.2d at 685, is

another indication that the trial court's assessment of Krop's testimony was accurate and shows no impermissible bias. See Spencer v. State, 691 So.2d 1062, 1065 (Fla. 1996).

Reese did not move to recuse the trial court in a timely manner after that court filed its addendum to the sentencing order. He has not demonstrated that the trial judge was partial or biased. This claim, therefore, has no merit and should be denied.

CONCLUSION

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

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Answer Brief has been furnished by U.S. Mail to Nada Carey, Assistant Public Defender, Office of the Public Defender, Leon County Courthouse, 301 South Monroe Street, Suite 401, Tallahassee, Florida 32301, this _____ day of December, 1997.

_____
Barbara J. Yates
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