IN THE SUPREME COURT OF FLORIDA

JOHN LOVEMAN REESE,

Appellant,

v. CASE NO. 91,411

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 Issues I and III(E-F) in the state's Answer Brief. Appellant relies on his Initial Brief as to the remaining issues.

ARGUMENT

ISSUE I

REESE WAS DEPRIVED OF DUE PROCESS OF LAW WHEN HE WAS RESENTENCED TO DEATH WITHOUT A HEARING.

In his initial brief, appellant contended the imposition of his death sentence without his presence, a hearing, or an opportunity to be heard violated the state and federal constitutions, the Florida Rules of Criminal Procedure, and established caselaw. Appellant contended the procedure mandated in Scull v. State, 569 So. 2d 1251 (Fla. 1990)--allowing both

parties to present new evidence and argument at judge-only capital resentencings--is constitutionally required, and this Court's later cases, to the extent they conflicted with Scull, were wrongly decided.

The state has presented no argument for why the constitutional provisions, rules, and caselaw cited by appellant do not apply here. The state simply asserts "it would be better to leave the scope of the proceeding to the discretion of the courts." State's Answer Brief at 8.

Leaving the scope of a death penalty resentencing proceeding to the trial court's discretion is a blueprint for arbitrary and capricious death sentencing. There is no logical or legal basis for denying any defendant facing the death penalty an opportunity to present evidence or argument at resentencing. Furthermore, as appellant pointed out in his initial brief, a trial court's refusal to consider mitigating evidence at a death sentencing proceeding violates the eighth amendment. Lockett v. Ohio, 438 U.S. 586, 98 S.Ct. 2954, 57 L.Ed.2d 973 (1973). Within the confines of Scull, a trial judge still has ample discretion as to what evidence he or she can allow under the general rules of evidence. Furthermore, as this Court recognized in Scull, "if mitigating evidence already exists in the record, there is no

need to reproduce it through `live' testimony. Both sides may rely upon the transcript to this end." 569 So. 2d at 1253.

Appellant disagrees with the state's characterization of Reese's resentencing as "simple." State's Answer Brief at 7. Deciding whether a person should be put to death is never "simple." If anything, resentencing after an original sentence has been found constitutionally flawed requires more, not less, thought and analysis, not only because errors were made the first time, but because the trial judge must reconsider and reweigh evidence presented years earlier (in the present case, four years earlier). An adversarial proceeding is critical at resentencing for the same reasons. Surely, after a flawed sentence has been reversed, the defendant upon whom the sentence was imposed is an "interested party" and therefore entitled to an opportunity to be heard before a new sentence is imposed. See Scull, 569 So. 2d 1252 ("the essence of due process is that fair notice and a reasonable opportunity to be heard must be given to interested parties before judgment is rendered").

The state also asserts that Reese's original sentence was not vacated. Although this Court's opinion on remand did not expressly state the sentence was vacated, appellant has found no other case in which a remand for failure to properly evaluate

mitigating evidence did not require imposition of a new sentence. This Court recognized long ago that reweighing involves much more than "cleaning up the language of the order." Lucas v. State, 417 So. 2d 250 (Fla. 1982)(Lucas II). Furthermore, what is the purpose of reweighing if not to impose a new and possibly different sentence? If the original sentence is still in effect and the outcome of reweighing a foregone conclusion, then reweighing is a sham no amount of due process could cure.

The state also says Reese's due process claim comes "too late." Answer Brief at 10. This is an interesting point. If a defendant is sentenced without notice or a hearing, when and how is the defendant to preserve his right to a hearing? Here, appellant moved the trial court to withdraw its first resentencing order (entered April 17, 1997), pointing out as a threshhold matter that rehearing was still pending and mandate had not yet issued. SR 30-31. The trial court denied the motion. SR 32-33. After mandate issued, the trial court entered its second resentencing order (July 16, 1997), adopting the April 17 order. On August 22, 1997, as soon as Reese's trial counsel learned about the second order (both orders were sent to appellate counsel but not to trial counsel), trial counsel filed an objection to both sentencing orders, asserting they were

entered without a hearing, notice, or an opportunity for the defense to be heard. SR 37-39. So, even if there were some sort of post-sentence preservation requirement, appellant has satisfied it. There is no such requirement, however, as sentencing a defendant without his presence, a hearing, or an opportunity to be heard is fundamental error. See, e.g., Walker v. State, 284 So. 2d 415 (Fla. 2d DCA 1972).

ISSUE III

THE TRIAL COURT'S EVALUATION OF THE MITIGATING EVIDENCE IS INCOMPLETE AND LEGALLY AND FACTUALLY ERRONEOUS.

E. Possessive Relationship with Jackie Grier

The state says the record supports the trial court's rejection of this mitigator because Dr. Krop's testimony that the murder arose from Reese's possessiveness and fear of losing Jackie Grier was "inconsistent and unreconcilable with other testimony." Answer Brief at 19. The state fails to identify any evidence or testimony inconsistent with Dr. Krop's testimony, however.

The state also says Krop's testimony that the killing could be consistent with a preplanned decision negates this mitigator. State's Answer Brief at 19. First of all, Krop did not say the killing could be consistent with a conscious preplanned decision.

When asked by the prosecutor whether the facts of the case were consistent with a preplanned murder, Dr. Krop said, "I would say the facts of this case could be consistent with that, but also be consistent with exactly the way Mr. Reese described what happened." T 1248. In other words, the bare facts of the killing--ignoring the psychological evaluation--were consistent with a preplanned murder. Anyone could look at the facts (man breaks into house, hides in closet when occupant returns, hours later comes out and kills occupant) and conclude they could be consistent with a preplanned killing. When asked, Dr. Krop merely stated the obvious.

When asked his expert opinion regarding the not-so-obvious, however, Dr. Krop clearly and firmly stated that, based upon his psychological evaluation, a preplanned killing was not what happened. In Dr. Krop's opinion, Reese did not plan to kill Austin but killed her in a rage built up from years of frustration, anger, fear, and jealousy, and exacerbated by his use of alchohol and crack cocaine the day he went to talk to her.

F. Mental Impairment

The state says the trial court properly rejected mental impairment as a mitigator because Dr. Krop's testimony was "internally inconsistent." Answer Brief at 23. Dr. Krop's

testimony was inconsistent, says the state, in that he said Reese was not insane, retarded, or brain damaged and his impulse control was generally good but Reese was seriously mentally impaired when he committed the crime due to stress over losing Jackie and the effects of crack. These are not inconsistencies. A sane, intelligent, nonbraindamaged person can be mentally impaired due to emotional distress or drugs and alcohol. This Court long has required trial courts to consider and weigh mental or emotional impairment that does not rise to the level of insanity, retardation, or brain damage, or that does not rise to the level of statutory mitigators:

> any emotional disturbance relevant to the crime must be considered and weighed by the sentencer, no matter what the statutes say. Any other rule would render Florida's death penalty statute unconstitutional.

Cheshire v. State, 568 So. 2d 908, 912 (Fla. 1990)(citations omitted). This Court also has recognized that crack cocaine can cause emotional disturbance and is a valid mitigating factor. See Caruso v. State, 645 So. 2d 389, 396-97 (Fla. 1994).

The state also says Krop's testimony was inconsistent in that Krop said "Reese's background made him commit these crimes" but "from Mr. Reese's own explanation, nothing caused him to kill this woman." State's Answer Brief at 23.

The state is grasping at straws, and in so doing, has mischaracterized the testimony and misled the court. Dr. Krop never said Reese's background made him commit the crimes. He said the traumas Reese suffered as a child--especially finding his mother murdered by his father and losing both parents at the age of seven--"contributed" to the crimes. These traumatic events, and other factors (no counseling, sent to a home where he was not loved) "shaped his personality to the point where he was feeling very desperate to remain in the relationship which was obviously not working, and all those factors together contributed to his state of mind at the time." T 1248-1249.

The state also asserts Krop's testimony was inconsistent because he first said Reese was not trying to avoid responsibility for his actions, T 1257, then later said, "But that does not mean he has accepted responsibility for what has happened." T 1261. State's Answer Brief at 23.

This argument is based on an obvious clerical error. The statement quoted above should read ". . . does not mean he has<u>n't</u> accepted responsibility for what happened." The state should have realized this was a typographical or clerical error and is misleading the Court by referencing this statement.[1] Dr. Krop

[1]The transcript in this case has numerous clerical errors.

testified repeatedly that Reese had admitted and accepted responsibility for his actions and that such admissions were unusual:

> Mr. Reese told me about crack cocaine the first time I saw him. He also said: I know this is going to sound like an excuse, and I am not telling you this because I want it to be an excuse, he from the first time I saw him, Mr. Reese has accepted full responsibility for what he has done. He's not trying to blame alcohol, he's not trying to blame drugs. He was trying, himself, from my evaluation, to get a handle, to understand why he would have done something that, in my opinion, is pretty much out of character for him.

T 1212.

> I don't think he would have any problem whatsoever functioning [in a prison environment]. I usually don't say that in such an absolute way, but based on the fact this individual does not have a significant criminal history, able to function very well in jail, he's been there for over a year, I believe, his records suggest he's not a management problem. He has been cooperative with me on both occasions that I saw him. He does not complain, he does not make excuses. He's accepting responsibility for what he has done.
>
> He knows he is going to be punished. He knows he deserves to be punished.

T 1216-1217.

> Q [by defense counsel]
>
> Now, Dr. Krop, I think you indicated that in your opinion Mr. Reese's [sic] accepting responsibility for his actions, what do you mean by accepting responsiblity?

A He's admitted to what he's done, as far as I know, he has admitted to everything that he has done from the breaking into the house to killing her and to sexually assaulting her.

It is very unusual for individuals charged with first-degree murder to acknowledge what the person had done, including all of the pretty gruesome facts. And I am talking about even in the confidential evaluation, it's very unusual for a defendant to admit to me what he has done.

He's never tried to cover that up. He has been somewhat reluctant, I know, in talking to Ms. Grier, his talking to Ms. Grier to acknowledge the sexual assault, initially, and I believe that he's very ashamed of that aspect of it, particularly, and he's still very much in love with Ms. Grier, and to this day, he's indicated he is still in love with her. He's very ashamed of what he has done.

And again, I think that's the reason that he has been reluctant to get all of the information to Ms. Grier, but that he has shared that information with me from the beginning is very important in terms of him recognizing the wrongfulness of what he has done, recognizing that he will be punished, and he's not trying to avoid responsibility or avoid punishment in any way.

T 1255-1256.

[F]rom Mr. Reese's own explanation, nothing caused Mr. Reese to kill this woman. He did it himself, he's accepted his responsibility, he's not trying to justify in any way or excuse his behavior.

T 1257.

Even in context, the comment referenced by the state obviously is a typo:

> Q Dr. Krop, in Mr. Reese's initial avoidance with the police and initial denial with the police of this involved in this particular place [his involvement in this particular offense?], does that change your mind as to whether or not he accepts responsibility for his acts?
>
> A No. It does not change my opinion.
>
> Q Why?
>
> A It's certainly not unusual for an individual to be scared, I am suggesting that this whole thing, to some degree, is related to his fear of losing the relationship that he had with Ms. Grier. Obviously, after he killed the victim in this case, that was still a major possibility and a realistic possibility that he was going to eventually be arrested and lose the relationship.
>
> In my opinion, he tried to avoid getting arrested. He wanted that relationship to continue. He had mixed feelings about it in our discussions, feeling very guilty, his primary concern, he was scared, scared of being arrested and scared of all that has actually happened.
>
> But that does not mean he has [sic] accepted responsiblity for what has happened.

T 1260-1261.

The state has pointed to nothing in the record to support the trial court's rejection of Dr. Krop's testimony.

Furthermore, contrary to the state's assertion at page 29 of its Answer Brief, appellant does not take the position that

expert testimony is "sacrosanct." Appellant does take the position that a trial court's rejection of mitigating evidence must be supported by substantial, competent evidence. See Nibert v. State, 574 So. 2d 1059 (Fla. 1990). The trial court's rejection of the mental mitigation in the present case is not supported by substantial, competent evidence.

The state also asserts this Court's affirmance of the CCP aggravator on the initial appeal in this case "undercuts any argument that the murder was the result of an uncontrollable obsession that caused Reese to act impulsively," Answer Brief at 20, as well as Reese's claim that the trial court's finding that Reese coldly plotted this crime in advance is not supported by the evidence. Answer Brief at 24.

This Court reviewed the CCP aggravator without a valid sentencing order on mitigation, however, and its affirmance of CCP therefore is unreliable. Because the mitigating evidence, in particular Dr. Krop's testimony regarding Reese's mental state at the time of the murder, is critical to whether the murder was CCP, this Court should revisit the CCP issue when a valid sentencing order has been rendered.[2]

[2] Although it is appellant's position that there still is no valid sentencing order, appellant has filed a supplemental brief raising the validity of the trial court's findings on CCP as a separate issue on this appeal.

CONCLUSION

Appellant respectfully requests this Honorable Court for the following relief: Issues I-III, vacate the sentence and remand for resentencing consistent with Scull; Issue IV, vacate the sentence and remand for resentencing before a different judge.

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Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY a copy of the foregoing has been furnished to Assistant Attorney General Barbara J. Yates, by delivery to The Capitol, Plaza Level, Tallahassee, Florida, and a copy has been mailed to appellant, **JOHN LOVEMAN REESE**, #123069, Union Correctional Institution, Post Office Box 221, Raiford, Florida 32083, on this ____ day of January, 1998.

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Nada M. Carey