

IN THE SUPREME COURT OF FLORIDA

JOHN LOVE MAN 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

SUPPLEMENTAL REPLY OF APPELLANT

NANCY A. DANIELS
PUBLIC DEFENDER

NADA M. CAREY
ASSISTANT PUBLIC DEFENDER
FLORIDA BAR NUMBER 0648825
LEON COUNTY COURTHOUSE
SUITE 401
301 SOUTH MONROE STREET
TALLAHASSEE, FLORIDA 32301
(850) 488-2458

ATTORNEY FOR APPELLANT

TABLE OF CONTENTS

	<u>PAGE</u>
TABLE OF CONTENTS	i
TABLE OF CITATIONS	ii
PRELIMINARY STATEMENT	1
ARGUMENT	
ISSUE I	1
THE TRIAL COURT ERRED IN REJECTING THE MITIGATING CIRCUMSTANCES OF REESE’S TRAUMATIC CHILDHOOD, POSSESSIVE RELATIONSHIP WITH JACKIE GRIER, MENTAL IMPAIRMENT AT THE TIME OF THE CRIME, AND AMENABILITY TO PRISON LIFE, FOR REASONS THAT WERE CONCLUSORY, SPECULATIVE, AND NOT SUPPORTED BY THE RECORD.	
ISSUE II	16
THE TRIAL JUDGE ERRED IN FINDING THE HOMICIDE WAS COMMITTED IN A COLD, CALCULATED, AND PREMEDITATED MANNER AND IN GIVING THE JURY AN UNCONSTITUTIONAL JURY INSTRUCTION ON THIS AGGRAVATING CIRCUMSTANCE.	
ISSUE III	20
THE IMPOSITION OF THE DEATH SENTENCE IS DISPROPORTIONATE FOR THIS MURDER COMMITTED WHILE JOHN REESE WAS DESPERATE AND DISTRAUGHT OVER A FAILING RELATIONSHIP WHERE REESE HAD NO SIGNIFICANT PRIOR CRIMINAL HISTORY, THE AGGRAVATING CIRCUMSTANCES ARE NOT NUMEROUS, AND THE MITIGATING CIRCUMSTANCES ARE SUBSTANTIAL.	
CONCLUSION	25
CERTIFICATE OF SERVICE	25

TABLE OF CITATIONS

<u>CASES</u>	<u>PAGE(S)</u>
<u>Adams v. State</u> , 412 So.2d 1850 (Fla.), <u>cert. denied</u> , 459 U.S. 882, 103 S.Ct. 182, 74 L.Ed.2d 148 (1982) . . .	22
<u>Alamo Rent-A-Car v. Phillips</u> , 613 So.2d 56 (Fla. 1st DCA 1993)	9,10,11,13
<u>Arbalaez v. State</u> , 620 So.2d 169 (Fla. 1993), <u>cert. denied</u> , 114 S.Ct. 2123, 128 L.Ed.2d 678 (1994)	23
<u>Blanco v. State</u> , 706 So.2d 7 (Fla. 1998)	22
<u>Campbell v. State</u> , 571 So.2d 415 (Fla. 1990)	2,14,16
<u>Davis v. State</u> , 648 So.2d 107 (Fla. 1997)	22
<u>Douglas v. State</u> , 575 So.2d 165 (Fla. 1991)	19
<u>Duncan v. State</u> , 619 So.2d 279 (Fla.), <u>cert. denied</u> , 114 S.Ct. 453, 126 L.Ed.2d 279 (1993)	23
<u>Griffin v. State</u> , 639 So.2d 966 (Fla. 1995), <u>cert. denied</u> , 115 S.Ct. 1317, 113 L.Ed.2d 198 (1995)	22
<u>Henry v. State</u> , 649 So.2d 1366 (Fla. 1994), <u>cert. denied</u> , 132 L.Ed.2d 839 (1995)	23
<u>Hudson v. State</u> , 538 So.2d 829 (Fla.), <u>cert. denied</u> , 493 U.S. 875, 110 S.Ct. 212, 107 L.Ed.2d 165 (1989) . . .	21
<u>Johnson v. State</u> , 660 So.2d 637 (Fla. 1995)	22
<u>Lemon v. State</u> , 456 So.2d 885 (Fla. 1984), <u>cert. denied</u> , 466 U.S. 909, 104 S.Ct. 1690, 80 L.Ed.2d 164 (1984) . . .	23

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) . . . 21

TABLE OF CITATIONS

(Continued)

<u>CASES</u>	<u>PAGE(S)</u>
<u>Pooler v. State</u> , 704 So.2d 1375 (Fla. 1997), <u>cert. denied</u> , 119 S.Ct. 119, 142 L.Ed.2d 96 (1998)	15,22
<u>Porter v. State</u> , 564 So.2d 1060 (Fla. 1990), <u>cert. denied</u> , 483 U.S. 1033, 107 S.Ct. 3277, 97 L.Ed.2d 781 (1987) . . .	23
<u>Richardson v. State</u> , 604 So.2d 1107 (Fla. 1992)	19
<u>Santos v. State</u> , 591 So.2d 160 (Fla. 1989)	19
<u>Smith v. State</u> , 641 So.2d 1319 (Fla. 1994), <u>cert. denied</u> , 115 S.Ct. 1129, 130 L.Ed.2d 1091 (1995)	22
<u>Spencer v. State</u> , 645 So.2d 377 (Fla. 1994)	19
<u>Turner v. State</u> , 530 So.2d 45 (Fla. 1987), <u>cert. denied</u> , 489 U.S. 1040, 109 S.Ct. 1175, 103 L.Ed.2d 237 (1989) . .	21
<u>Walls v. State</u> , 641 So.2d 381 (Fla. 1994)	13
<u>Williams v. State</u> , 437 So.2d 133 (Fla. 1983), <u>cert. denied</u> , 466 U.S. 909, 104 S.Ct. 1690, 80 L.Ed.2d 164 (1984) . . .	23

IN THE SUPREME COURT OF FLORIDA

JOHN LOVEMAN REESE, :

Appellant, :

v.
:
. CASE NO. 91,411

STATE OF FLORIDA, :

Appellee. :

SUPPLEMENTAL REPLY BRIEF OF APPELLANT

PRELIMINARY STATEMENT

This brief has been prepared using 12 point Courier New, a font that is not proportionately spaced.

ARGUMENT

ISSUE I

THE TRIAL COURT ERRED IN REJECTING THE MITIGATING CIRCUMSTANCES OF REESE'S TRAUMATIC CHILDHOOD, POSSESSIVE RELATIONSHIP WITH JACKIE GRIER, MENTAL IMPAIRMENT AT THE TIME OF THE CRIME, AND AMENABILITY TO PRISON LIFE, FOR REASONS THAT WERE CONCLUSORY, SPECULATIVE, AND NOT SUPPORTED BY THE RECORD.

On page 10 of its Answer Brief, the state asserts appellant "acknowledges" the trial court "greatly expanded its analysis of Reese's proposed mitigating evidence" but "complains that the

court should have found that all of his proposed mitigators had been established and should have given those mitigators more weight."

To the contrary, appellant disagrees that the trial court has expanded its analysis. Appellant contends the present order is just as deficient under Campbell as the original order. Although the present order is lengthier, the substance of the order is no improvement over the original order because the trial court has provided neither a logical nor factual explanation for its rejection of Dr. Krop's testimony. The discussion is conclusory, speculative, and unsupported by sufficient, competent evidence.

Moreover, the state in its Supplemental Answer Brief has not elucidated or provided record support for the trial court's conclusory findings, nor responded to most of appellant's arguments. The state's brief in the main merely quotes the trial court's findings, followed by the conclusory assertion that the court's findings are supported by the record.

Turning to the proposed mental mitigation and the trial court's conclusion that Reese "calmly" waited for Charlene to return home, the state simply states on page 14 of its Supplemental Answer Brief that "the CCP aggravator was established on the facts of this case." What facts establish

Reese was calm while he sat in the back bedroom closet? Just like the trial court, the state never says. The only evidence as to Reese's mental and emotional state at the time was the testimony of Dr. Krop, who expressed the opinion that Reese was not calm but enraged.

On page 16, the state asserts the trial court was acting within its discretion in rejecting Dr. Krop's opinion because Krop's testimony was internally inconsistent. The inconsistencies the state points to are contrived, not real, however. First, on page 15-16, the state asserts Krop said Reese's background made him commit these crimes but contradicted this later when he said "nothing caused Mr. Reese to kill this woman." Dr. Krop, however, never said Reese's background made him commit these crimes.¹ Krop did say the trauma Reese suffered as a child, particularly the circumstances of his mother's murder--"contributed" to the crime. These traumas, and other factors, such as receiving no counseling and being raised thereafter in a home where he received no nurturing, "shaped his personality to the point where he was feeling very desperate to

¹The state's brief does not include a reference to that part of Krop's testimony in which he purportedly said Reese's background made him commit the crimes.

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 second alleged inconsistency the state points to, at the top of page 16 of its brief, is that Dr. Krop stated Reese was not trying to avoid responsibility for his actions but later said, "But that does not mean he has accepted responsibility for what has happened." This alleged inconsistency is not an inconsistency at all but a court reporter error. The statement quoted above should read ". . . does not mean he hasn't accepted responsibility for what happened." Dr. Krop 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. 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 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 responsibility?

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.

And, last, in context, the comment relied on by the state to show inconsistency obviously is a transcription or typographical error:

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 responsibility for what has happened.

T 1260-1261.

The sum total of inconsistencies in Krop's testimony is zero.

Finally, on page 16, the state argues that "expert opinion testimony may be rejected when, as here, the testimony is contrary to or inconsistent with the facts." The state's argument is nothing but a bare conclusion: The state never points to facts that are inconsistent with Krop's testimony.

The state did not even respond to the following arguments made by appellant: (1) that the sentencing order fails to mention the key portions of Dr. Krop's testimony offered in support of the mental mitigating circumstance, Initial Brief at page 38; (2) that the trial judge did not consider evidence of impairment not rising to the level of "extreme," Initial Brief, page 39; (3) that the trial court erred in finding Dr. Krop based his opinion primarily on Reese's self-reporting, Initial Brief, page 40.

As to Reese's argument regarding his possessive attachment to Jackie Grier, the state again asserts Dr. Krop's testimony was inconsistent and irreconcilable with other testimony. The state never points to any inconsistencies in Dr. Krop's testimony, however, or to specific facts in the record that are irreconcilable with his testimony. For example, the state mentions that Jackie testified Charlene never interfered with her relationship with Reese and that Reese did not like Charlene. How is this testimony inconsistent with the evidence that he attacked her because he was jealous and believed--inaccurately perhaps--that she was taking Jackie away from him? The state also mentions Krop's testimony that Reese's impulse control generally was good. How is this inconsistent with Krop's testimony and the other evidence, most of it supplied by or confirmed by Jackie Grier, that Reese's impulse control was not good at all when he felt threatened with losing Jackie?

The state's argument that Dr. Krop's testimony with regard to Reese's possessive attachment to Jackie was inconsistent and irreconcilable with other testimony is wholly without merit.

Regarding the mitigator of childhood trauma, the state conclusorily has responded "there is no merit to [Reese's] complaint" and the trial court was "entitled" to find the

evidence worth little weight. State's Supplemental Answer Brief at page 22. The state has not even addressed appellant's arguments: (1) that the trial court's finding that Reese was whipped for things he did wrong and that Marvin Smith's wife must have provided some nurturing is not supported by competent evidence; (2) that the trial court failed to consider Dr. Krop's testimony that this nonnurturing, isolating environment contributed to the development of Reese's personality and pathological attachment to Jackie Grier; (3) that the trial court erred in giving little weight to the stabbing death of Reese's mother and the subsequent institutionalization of his father because it happened long ago, did not "cause" the murder, and was not the product of domestic violence; (4) that the trial court erred in not considering and/or rejecting Dr. Krop's testimony explaining the effects of this trauma on Reese; (5) that the trial court erred in relying on his own personal opinion in concluding the murder of his mother "should have taught Reese that death is a very sad thing." See Initial Brief of Appellant at pages 53-55.

The state asserts only that Reese's reliance on Alamo Rent-a-Car v. Phillips, 613 So. 2d 56 (Fla. 1st DCA 1992), is misplaced because in that case the judge rejected the expert's opinion in

favor of his own personal opinion whereas here, "the court's comments were a recognition of the facts of this case." The state, however, never says which "facts" support the trial court's conclusion about the effects of traumatic loss on a small child.

Alamo-Rent-A-Car is directly on point. In Alamo Rent-A-Car, a worker's compensation case, the worker claimed he got pneumonia from his job of washing buses during the nighttime. The employer challenged the causal relationship between the worker's illness and his job through the testimony of an expert witness, Dr. Brumer. During the hearing, the judge commented:

I will respect [Dr. Brumer's] opinion regarding pneumonia, but I will not respect his opinion regarding the fact it can't be aggravated by cold or wet. I know better from personal experience.

613 So. 2d at 58. In his final order awarding benefits, the judge said:

As this court noted at trial, one does need a medical expert or in this case a "hired gun" to know that the water and cold found in Mr. Phillips' working place precipitated the advancement and causation of [his] pneumonia.

Id.

The appellate court reversed, concluding the claims judge impermissibly relied on personal opinion to reject the medical

doctor's opinion:

Moreover, there is another reason why the JCC's findings must be rejected. The JCC appears to have impermissibly relied on his personal experience to conclude that claimant's pneumonia was aggravated by his working conditions. The question whether claimant's pneumonia was caused by or aggravated by his working conditions is essentially a medical one which is most persuasively answered on the basis of the medical evidence provided, rather than a matter falling within the sensory experience of a lay person. With respect to the causation of streptococcal pneumonia, even claimant's expert witness, Dr. Alexander, testified that the disease is caused by inhalation of the particular bacteria. Although Dr. Alexander testified that claimant's pneumonia could "get worse" if he returned to work while still suffering from the disease, it is not clear whether the JCC's findings reflect a preference for Dr. Alexander's opinion over that of Dr. Brumer (even assuming the JCC was giving fair consideration to Dr. Brumer's opinion), or whether the JCC was simply giving undue weight to his own unqualified lay opinion on the aggravation question. In such a case, we are reluctant to conclude that the JCC's findings are supported by competent, substantial evidence.

613 So. 2d at 58. Here, too, the trial judge has violated Reese's due process rights by relying on his own personal views to reject those of the expert.² The error is even greater here

² The court in Alamo-Rent-A-Car reversed despite some evidence in the record supporting the trial court's ultimate conclusion. Here, the state did not put on any expert testimony

because Alamo-Rent-A-Car involved only money damages whereas the present case involves whether the ultimate punishment--death--should be imposed. The Eighth Amendment's standard of reliability has not been met when the sentencing process has been tainted by the trial judge's reliance on his own uninformed personal opinion to determine the existence and weight of mitigating factors.

As for adaptability to prison life, again, the state has merely asserted in conclusory fashion that Reese has shown no abuse of discretion in the trial court's finding that this proposed mitigator is worth minimal weight. The state has not responded to appellant's arguments: (1) that there was no record evidence that Reese beat his first wife; (2) that the record does not support the court's finding that Reese physically beat or forcibly raped those he is supposed to consider most dear to him; (3) that Krop's testimony does not establish Reese will become violent in situations over which he has no control (such as prison life) but established rather that Reese may become violent only when faced with losing a high-priority relationship; (4) that the record refutes the trial judge's conclusion that Marvin

to contradict Dr. Krop's testimony, so it is clear the trial court's findings reflect a preference for his own unqualified lay opinion.

Smith's home was a nurturing and caring environment; (5) that the trial judge erred in rejecting Dr. Krop's testimony that violence is not inconsistent with a non-assertive personality in favor of his own personal opinion to the contrary.³

Furthermore, contrary to the state's characterization of the trial court's findings as to this mitigator, the court did not find Reese's adaptability to prison life worth minimal weight; the court found this claim refuted by the evidence. SII 59. The error, then, is a failure to consider this mitigator at all, not an error in the trial court's assignment of weight.

As for the mitigator of emotional immaturity, the state has

³In his sentencing order, the trial judge wrote: "When confronted with the fact that the defendant would settle arguments with Jackie Grier concerning their relationship by beating and raping her, and with the fact that the defendant had beaten his wife to the point of sending her to the hospital, Dr. Krop indicated this information was inconsistent with the defendant's non-aggressive personality type!" Assuming the exclamation point at the end of this statement indicates the trial judge's incredulity, appellant reiterates there was no evidence Reese beat and raped Jackie or beat his wife and that Krop testified that when he specifically asked Jackie if these things had occurred, she said no. Krop further testified that even if such things had occurred, that would not change his opinion about Reese's personality, that persons who are generally nonassertive can act out in a hostile or sometimes violent manner. T 1245. Appellant notes that Dr. Krop testified violence and acting out is consistent with a nonassertive personality, not a nonaggressive personality. The trial judge apparently misread and misunderstood the testimony in this regard.

quoted the trial court's order, noted Krop's testimony that Reese has no major mental illness and was not insane, and contends appellant's reliance on Alamo is misplaced. State's Supplemental Answer Brief at page 25. The state has failed to respond to appellant's arguments, has not pointed to any specific facts in the record that support the trial court's conclusion that immaturity is created or chosen by the individual, and does not explain what the absence of major mental illness or insanity has to do with emotional immaturity.

As for Reese's use of drugs and alcohol at the time of the murder, the state has responded that "an expert's opinion based on self-serving statements can be rejected when contrary to or inconsistent with the facts," (emphasis added), citing Walls and other decisions of this Court. However, like the trial court, the state has not pointed to any "facts" in the record that are contrary or inconsistent with Reese's use of drugs and alcohol at the time of the crime. The state says "the record supports the trial court's findings" but has not cited to any such support in the record. The state also relies on this Court's previous finding of CCP as somehow negating this mitigator, but again without any discussion or citation to the record to support its assertion. Furthermore, appellant takes issue with the state's

characterization of Reese's statements about his drug and alcohol as self-serving. Dr. Krop testified Reese mentioned his use of cocaine the day he killed Charlene not as an excuse but in trying to understand himself how he could have done what he did.

There is no basis in the record for the trial court's finding the evidence of Reese's drug and alcohol use "unworthy of belief." The trial court's finding that this mitigator is "contrary to the evidence" violates this Court's requirement in Campbell and its progeny that the court's evaluation of proposed mitigating evidence be thoughtful and comprehensive and supported by specific facts rather than be a mere listing of conclusions.

Appellant cannot agree with the state that the trial court fully or conscientiously considered Reese's proposed mitigating evidence. With regard to almost every single proposed mitigator, the trial court abused his discretion by failing to fully consider the evidence (as shown in some instances by a failure to even mention the relevant testimony); rejecting expert testimony based on personal opinion or a misreading of the testimony; rejecting mitigating evidence based on speculation; rejecting mitigating evidence without pointing to any specific facts in the record that support rejection of the evidence; rejecting mitigation by applying the wrong rule of law.

The trial court's nearly wholesale rejection of the case for mitigation deprived appellant of due process and a fair sentencing proceeding. The trial judge is an essential part of the death sentencing procedure in Florida. The sentencing judge is the ultimate factfinder and the ultimate sentencing authority. Pooler v. State, 725 So. 2d 191 (Fla. 1998). Absent a fair and impartial evaluation of the defendant's case for mitigation by the trial judge, the procedure is fundamentally flawed. This Court cannot simply find the result is sustainable; if the trial judge has abused his discretion in reaching that result, the defendant is entitled to a new proceeding.

The state asserts appellant has not claimed the trial judge is biased. Appellant is claiming the trial judge is biased, however. Making findings and reaching conclusions based on personal opinions rather than the evidence presented is the quintessence of bias. The bias is particularly disturbing here, where the trial judge has had three opportunities to fairly and objectively consider the mitigating evidence. The present order indicates the trial judge has a result he is trying to protect. In attempting to inoculate his order from error, however, the trial judge has removed the real reasons behind his conclusions, reasons that demonstrate bias. For example, in the April 17

order, the trial court dismissed Dr. Krop's testimony as "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." SRI 27-28. In the present order, the court deleted this partial and inaccurate characterization of Krop's testimony. Instead, there is virtually no logical explanation for his rejection of Krop's testimony, certainly no legally sustainable explanation.

The present order is just as deficient under Campbell⁴ as the original sentencing order. The remedy for such error is resentencing. The history of this case suggests the trial judge is either unwilling or unable to view the mitigating evidence in a fair and impartial manner. Accordingly, appellant is entitled to a new sentencing proceeding before a different judge.

ISSUE II

THE TRIAL JUDGE ERRED IN FINDING THE HOMICIDE WAS COMMITTED IN A COLD, CALCULATED, AND PREMEDITATED MANNER AND IN GIVING THE JURY AN UNCONSTITUTIONAL JURY INSTRUCTION ON THIS AGGRAVATING CIRCUMSTANCE.

The state first argues that because there is no substantive difference between the present findings on the CCP aggravator and the findings in the previous order, this Court's affirmance of

⁴Campbell v. State, 571 So. 2d 415 (Fla. 1990).

CCP on the first appeal is the law of the case, and this issue should not be revisited.

There are differences between the court's findings then and now, however. In the original sentencing order, the trial judge did not address the "coldness" element of the CCP aggravator but only whether there was sufficient time for a heightened level of premeditation. The trial judge's oral findings, however, suggest he believed the crime was not committed coldly and calmly:

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). In the present order, in contrast, the trial judge actually made a finding as to "coldness"--albeit a conclusory finding--that is, that Reese decided sometime in the three months before he went to Austin's house "to decide in a cold, calculated and premeditated manner to murder Charlene Austin" and that he "coldly and calmly consider[ed] his murderous plan" in the four or more hours while he was inside the house before the attack took place. So, the orders are different, certainly sufficiently different to render the law of the case inapplicable here and allow this Court to review the new findings

and conclusions.

The state has not addressed appellant's second argument for why this Court should review the trial court's findings on CCP, that is, that this Court's prior affirmance was premature and constitutionally infirm because the Court did not have before it findings by the trial court with regard to the existence of mental mitigation, which bore directly on the question of whether the state proved the CCP aggravating factor.

On the merits, the state argues only that Reese had hours to reflect on what he planned do. State's Supplemental Answer Brief at 31. As appellant explained in his Initial Brief, that he had hours to plan does not mean he was occupied during those hours with planning. It is just as likely--more likely--Reese was stewing in anger, fear, frustration, confusion during this time period, not knowing what to do. Pure speculation is all the trial court relied on in reaching the conclusion that this crime was thought out in advance and that Reese went to Charlene's house with the purpose of killing her. Nor do Reese's statements to police establish this was a cold, calculated killing. To the contrary, Reese told police, consistent with his testimony at trial, that he went to Charlene's house to talk to her but ended up killing her. Reese's statements to police establish the

killing was not planned in advance, negating the "calculation" element of the CCP aggravator.

On page 31, the state argues that Reese's claim that he did not intend to hurt the victim is belied by the facts. Reese never said he did not intend to hurt the victim. He said his purpose in going to see her was to talk to her and that after he got there, he got scared and more scared and lost control. As Dr. Krop testified, Reese does not understand how he could have done what he did and is ashamed of what he did.

On page 32, the state contends the cases cited on page 74-76 of appellant's initial brief are distinguishable because the victims in those cases were wives or girlfriends and that appellant would have a better argument if he had killed Jackie instead of Charlene. First, in Douglas, at least, the defendant killed his girlfriend's new husband, the rival for his affections, as here. Furthermore, as appellant argued in his initial brief, this Court's disapproval of CCP in these cases was not predicated on the identity of the victims but on the evidence showing the murder was the product of intense emotions rather than cold calculation. The identity of the victim has no bearing on the manner of the killing. The state's repeated reliance on this not being a "domestic killing" because the victim was not a

wife or girlfriend is a red herring, calculated to draw the Court's attention away from the real issues: Whether the state proved beyond any reasonable doubt that Reese planned this murder before the crime began and whether the killing was cold-blooded rather than the product of intense emotions.

The state also contends the mental mitigating evidence in the cases relied on by appellant and/or the evidence of drug and alcohol abuse negated CCP in those cases. In Spencer, at least, the evidence of mental mitigation was no greater than the evidence presented here. The evidence of preplanning in all the cases appellant has relied on, however, was far greater than the evidence of preplanning in the present case. Here, there was no positive evidence of preplanning at all. In Santos, Richardson, Douglas, and Spencer, there was positive evidence of preplanning in that the defendant purchased the murder weapon in advance or carried the murder weapon to the scene and/or made prior death threats against the victims.

Furthermore, the evidence in the present case is entirely consistent with a lack of cold calculation, and under Geralds, Reese is entitled to the benefit of any reasonable inference from the evidence which negates CCP. See Appellant's Initial Brief at pages 71-73. The state has not addressed this argument.

Like the trial court, the state asserts "the facts demonstrate [] coldness, calculation, and heightened premeditation," State's Supplemental Answer Brief at 33, but does not cite any facts that demonstrate cold calculation, does not explain how the facts demonstrate cold calculation beyond any reasonable doubt, and does not point to any facts inconsistent with appellant's claim that the killing resulted from a loss of emotional control and rage. The state failed to prove CCP and this Court must reverse and remand for a new penalty phase.

ISSUE III

THE IMPOSITION OF THE DEATH SENTENCE IS DISPROPORTIONATE FOR THIS MURDER COMMITTED WHILE JOHN REESE WAS DESPERATE AND DISTRAUGHT OVER A FAILING RELATIONSHIP WHERE REESE HAD NO SIGNIFICANT PRIOR CRIMINAL HISTORY, THE AGGRAVATING CIRCUMSTANCES ARE NOT NUMEROUS, AND THE MITIGATING CIRCUMSTANCES ARE SUBSTANTIAL.

The state has responded to this argument primarily by setting up a straw man. That is, the state has reframed appellant's argument as a claim that this is a domestic case, then argued that it is not. Appellant is not arguing this is a domestic case, nor does appellant read this Court's prior cases as applying proportionality review any differently when the victim is a spouse or lover. There are numerous cases in which this Court has vacated the death sentence, however, where the killing

was a crime of passion, that is, the result of a tortured love or family relationship, and where the defendant has no significant prior criminal history. This case does fall within this category.

On page 35, the state asserts this case is much closer to Occhicone v. State, 570 So. 2d 902 (Fla. 1990), cert. denied, 500 U.S. 938, 111 S.Ct. 2067, 114 L.Ed. 471 (1991); 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); and Hudson v. State, 538 So. 2d 829 (Fla.), cert. denied, 493 U.S. 875, 110 S.Ct. 212, 107 L.Ed.2d 165 (1989). Those cases are not comparable, however, because they either did not involve crimes of passion at all 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 at all: Hudson stabbed his former girlfriend's roommate during a burglary. 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.

For the same reason, the cases cited on page 36 of the state's brief also are not comparable. See Blanco v. State, 706 So. 2d 7 (Fla. 1997)(defendant broke into victim's home and shot victim 6

time; 2 aggravators including prior violent felony); 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).

The other cases cited by the state and referred to as "true domestic cases," State's Supplemental Answer Brief at 36-37, are either more aggravated than the present crime or not domestic cases at all. In Pooler v. State, 704 So. 2d 1375 (Fla. 1998), where the defendant killed his ex-girlfriend by shooting her five times and shot her brother in the back, the defendant had an extensive criminal record, including having served five prison sentences between 1975 and 1988. In Henry v. State, 649 So. 2d 1366 (Fla. 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 ex-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.⁵ 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 circumstances, including CCP. In 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), the defendant killed his girlfriend's stepdaughter after she refused his sexual advances, and Tompkins had several prior convictions for kidnapping and rape. The defendants in 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. denied, 466 U.S. 909, 104 S.Ct. 1690, 80 L.Ed.2d 164 (1984), had prior

⁵In Arbalaez, unlike in the present case, there was positive evidence showing the murder was a revenge killing.

convictions for similar violent crimes: Williams had shot two other people and Lemon had stabbed another woman.

This murder was the result of an emotional hijacking, a loss of control triggered by accumulated rage and resentment that Reese was unaware even existed when he went to visit Charlene. It was a horrible tragedy but Reese's culpability for the crime is strongly mitigated by his mental impairment at the time of the murder; by the childhood traumas that explain to some degree what went so dreadfully wrong when he confronted Charlene that day; by his lack of any significant prior violent history; and by his rehabilitation potential and capacity for functioning well in prison. This is not the most aggravated and least mitigated of crimes. Reese's death sentence must be vacated.

CONCLUSION

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

.
. Respectfully submitted,
.
. NANCY DANIELS
. PUBLIC DEFENDER
. SECOND JUDICIAL CIRCUIT

.
.
.
. **NADA M. CAREY**
. Fla. Bar No. 0648825
. Assistant Public Defender
. Leon County Courthouse
. Fourth Floor, North
. 301 South Monroe Street
. Tallahassee, Florida 32301
. (850) 488-2458
.
. ATTORNEY FOR APPELLANT

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 November, 1999.

Nada M. Carey