

IN THE SUPREME COURT OF FLORIDA

JOHN LOVEMAN REESE,

Appellant,

v.

CASE NO. SC07-1309

STATE OF FLORIDA,

Appellee

_____ /

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

ANSWER BRIEF OF THE APPELLEE

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CASE SNAPSHOT

This is an appeal from an order denying Reese's amended motion for post-conviction relief. Reese raises seven issues on appeal. However, it is clear from his initial brief that Reese raises all but one, Issue I, for future preservation only. The principal issue in this appeal is whether trial counsel was ineffective during the penalty phase of Reese's capital trial. Reese alleges trial counsel was ineffective for failing to put on evidence that Reese has frontal lobe brain damage. Reese also claims counsel should have put on evidence that, at the time of the murder, Reese was suffering from an extreme mental or emotional disturbance.

There is no issue of Reese's guilt. Reese testified at trial that he killed Charlene Austin.

At the penalty phase, Reese called several family members, two former teachers, and forensic psychologist, Dr. Harry Krop. The jury recommended the death penalty by a vote of eight to four (8-4).

After the case was remanded, twice, by order of this Court, the trial judge entered an amended sentencing order which specifically addressed each of the aggravating and mitigating circumstances. The court found three aggravators: (1) the homicide was committed during a burglary and sexual battery; (2) the homicide was heinous, atrocious, or cruel (HAC); and (3) the

homicide was committed in a cold, calculated, and premeditated manner (CCP). The trial court found no statutory mitigators.

The trial court found seven nonstatutory mitigators: (1) good jail record (minimal weight); (2) positive character traits (minimal weight); (3) defendant's support of Jackie Grier and her children (very little weight); (4) his possessive relationship with Jackie Grier (minimal weight); (5) emotional immaturity (little weight); (6) possible use of drugs and alcohol around the time of the murder (little weight); and (7) lack of a significant criminal record (very slight weight). The trial court rejected, however, the following nonstatutory mitigators proffered by the defendant: (1) defendant's adaptability to prison life; (2) childhood trauma other than the death of his mother; (3) emotional or mental impairment at the time of the murder; and (4) use of crack cocaine at the time of the murder.

In August 2000, this Court affirmed Reese's conviction and sentence of death. After his petition for certiorari was denied by the United States Supreme Court in March 2001, Reese filed a motion for post-conviction relief. He amended it twice. Reese requested, and was granted, an evidentiary hearing on two of his fifteen claims. After the evidentiary hearing, Reese's motion was denied. This appeal follows. Reese did not file a petition for habeas corpus.

PRELIMINARY STATEMENT

Appellant, JOHN LOVEMAN REESE raises seven issues in his appeal from the denial of his motion for post-conviction relief. References to the appellant will be to "Reese" or "Appellant". References to the appellee will be to the "State" or "Appellee".

The four volume record on appeal in the instant case will be referenced as "PCR" followed by the appropriate volume number and page number. References to the exhibits introduced during the evidentiary hearing will be referred to by the party offering the exhibit along with the exhibit number.

References from Reese's direct appeal will be referred to as "TR" followed by the appropriate volume and page number. The supplemental volumes on appeal shall be referred to as "TR Supp" followed by the appropriate volume and page number. Reese's initial brief will be to "IB" followed by the appropriate page number.

STATEMENT OF THE CASE AND FACTS

On January 28 or 29, 1992, John Loveman Reese raped and murdered Charlene Austin. The details of the murder were set forth in the Florida Supreme Court's decision on direct appeal:

...The evidence presented at trial reveals that Reese dated Jackie Grier on and off for seven years; the victim had been Grier's best friend for approximately two and a half years. Reese was extremely possessive and disliked Austin because of the amount of time Grier spent with her. Grier and Austin had begun making trips to Georgia where, unknown to Reese, both had met new boyfriends. They returned from the last of these trips on Monday, January 27, 1992. On Wednesday of the same week, Grier was concerned because she could not reach Austin by phone, and she and a neighbor went to Austin's house and entered through the unlocked back door. They found Austin lying face down in the bedroom, covered with a sheet. She had been strangled with an electrical extension cord that was doubled and wrapped around her neck twice with the ends pulled through the loop.

Reese was questioned by police after his palm print was found on Austin's waterbed. He confessed to breaking into her home around noon on Tuesday, January 28. He said he waited for her to return home because he wanted to talk to her about Grier, but when he saw Austin coming home from work around four o'clock he got scared and hid in a closet. Reese said that after Austin went to sleep on the sofa, he came out of the closet but panicked when she started to move. He grabbed her around the neck from behind and dragged her into the bedroom. He raped her, then strangled her with the extension cord. He was arrested after his confession.

Reese v. State, 694 So.2d 678 (Fla. 1997).

Reese was indicted on May 14, 1992, and tried March 22-25, 1993. He testified on his own behalf at the guilt phase,

detailing an intensely troubled childhood and his emotional relationship with Grier. Reese admitted he killed Ms. Austin. He claimed to have killed Austin out of panicked emotion. Reese v. State, 694 So.2d 678, 680 (Fla. 1997).

Jackie Grier also testified. She claimed that Reese never liked Austin. Ms. Grier told the jury that she (Grier) had broken up with Reese before Austin was killed. Two detectives testified that Reese responded "yes" when he was asked if he had decided to hurt the victim while waiting for her to come home. Reese was convicted of first-degree murder, sexual battery with great force, and burglary with assault. Id. at 680.

At the penalty phase, the state presented no additional evidence. Reese called several family members, two former teachers, a psychologist, and a deputy at the jail to testify that Reese had adapted well to incarceration.

Deputy Freeland testified that during the time Reese was awaiting trial in the Duval County Jail, he was well behaved. Reese had no incidents of misconduct or disciplinary reports. (TR Vol. XV 1186-1187).

Trial counsel next called Dr. Harry Krop to testify before Reese's penalty phase jury. Dr. Krop testified Reese did not have any type of major mental illness or anti-social personality disorder. (TR Vol. XI 1205-1206). Dr. Krop testified at length about Reese's upbringing, including his abandonment at birth and

the death of his adoptive parents. He also testified as to the emotional triggers which, in his view, led up to the murder of Charlene Austin. (TR Vol. XV 1209-1218). Dr. Krop told the jury that, at the time of the murder, Reese was suffering from a serious emotional disturbance. ¹

Trial counsel next called Christine Cunningham. Ms. Cunningham testified about Reese's tragic upbringing as well as his early years. She told the jury that Reese's adopted parents, Calvester and John Reese Sr., were very loving and caring. She testified that John Sr. killed Calvester and that, afterward, John Loveman Reese went to live with her brother. She described John Reese Sr.'s commitment to a mental institution and his subsequent death.

Through Ms. Cunningham, trial counsel introduced some family photos of Reese. (TR Vol. XV 1276). Ms. Cunningham testified how her sister died and what Reese saw when he found his mother dead. (TR Vol. XV 1282). She also testified about the effect of Calvester's death on young John Loveman Reese. (TR Vol. XV 1272-1273).

Trial counsel also called Dorothy Robinson. She is Reese's aunt. Ms. Robinson told the jury about the circumstances of

¹ Dr. Krop's trial testimony is outlined in detail in the State's argument on Reese's claim that trial counsel was ineffective for failing to put on evidence that Reese had frontal lobe damage.

Reese's mother's death. She described the effect his mother's death had on Reese. She testified that her brother took Reese in after his mother's death. Her brother was real strict. She described him as "super strict". (TR Vol. XV 1300).

Ernestine Reese also testified on Reese's behalf at the penalty phase of Reese's capital trial. Ms. Reese is Reese's aunt. She told the jury about Calvester's death.

She and her husband took Reese in when he asked her if he could live with them. (TR Vol. XV 1317). While he was living with them, he went to school and played sports. (TR Vol. XV 1317). She told the jury that Reese and her husband formed a father-son relationship. Ms. Reese testified Reese was not a violent person. (TR Vol. XV 1319).

Ms. Reese told the jury that her husband had a massive heart attack. Reese tried to do CPR to save him but couldn't. (TR Vol. XV 1320). Reese had lost another father. (TR Vol. XV 1320). He was a good son. (TR Vol. XV 1329).

Ms. Ida Romine testified next. She testified that Reese was a good athlete in school and worked very hard to excel. (TR Vol. XV 1348). He was respectful and never a disciplinary problem. (TR Vol. XV 1353).

Finally, trial counsel called Allene Taylor. Ms. Taylor taught Reese in second grade. (TR Vol. XVI 1378). She and Reese had a great relationship. Reese was always respectful and

nice. (TR Vol. XVI 1379). He had no disciplinary problems. She described Reese as an "outstanding little boy". (TR Vol. XVI 1379). She thought this was remarkable given the fact he found his mother murdered. (TR Vol. XVI 1380).

At the conclusion of the penalty phase, the jury recommended Reese be sentenced to death by a vote of eight to four. The trial judge found three aggravators. The court found the murder was: cold, calculated, and premeditated ("CCP"); heinous, atrocious, or cruel ("HAC"); and committed in the course of a sexual battery and a burglary. The trial court found one nonstatutory mitigator--no significant criminal history--but found the mitigator, along with other proposed nonstatutory mitigation, was of minimal or no value. The trial court followed the jury recommendation and sentenced Reese to death. Reese v. State, 694 So.2d 678, 680 (Fla. 1997)

Reese raised a total of nine issues on appeal, three as to the guilt phase and six as to the penalty phase. As to the guilt phase, Reese alleged the trial court erred in (1) finding that no Richardson violation occurred when a witness testified that Reese made a statement as to the time of the homicide, and the statement had not been furnished to defense; (2) restricting cross examination of Grier as to Reese's confession where the state had already opened the door by mentioning another part of Reese's confession to her on direct; and (3) refusing Reese the

opportunity to testify on redirect examination about his offer to plead where the state had already opened the door on cross. As to the penalty phase, Reese alleged (1) error both in instructing on and finding CCP; (2) error in giving an unconstitutional CCP instruction; (3) error in failing to expressly evaluate, find, and weigh unrebutted mitigation; (4) disproportionality of sentence; (5) unreliability of sentence due to improper, misleading and inflammatory closing arguments by the state; and (6) unconstitutionality of the HAC instruction given.

This Court rejected each of Reese's claims of error with the exception of his claim that the trial judge failed to adequately evaluate and weigh evidence offered in mitigation. This Court concluded the sentencing order contained inadequate discussion of the mitigation offered. Accordingly, this Court affirmed Reese's convictions but remanded the case to the trial court for the entry of a new sentencing order. The Court required the trial court to expressly discuss and weigh the evidence offered in mitigation. Reese v. State, 694 So.2d 678 (Fla. 1997).

On remand, the trial court did not hold a new hearing but simply entered the revised sentencing order. Prior to entering this order, the State filed a sentencing memorandum without request of the trial court. It is disputed whether Reese's

trial counsel ever received a copy of the state's sentencing memorandum. Reese did not submit his own sentencing memorandum. Reese v. State, 728 So.2d 727 (Fla. 1999). Reese appealed.

Once again, this Court remanded with directions to conduct a new hearing. This Court directed the trial court to permit both parties an opportunity to present argument and submit sentencing memoranda before determining an appropriate sentence. Reese v. State, 728 So.2d 727 (Fla. 1999).

The trial court held a new hearing on April 28, 1999. Both parties submitted sentencing memoranda prior to the hearing and presented argument during the hearing. On June 16, 1999, the trial court reconvened the parties and sentenced Reese to death. Reese v. State, 768 So.2d 1057 (Fla. 2000).

Pursuant to the instructions on remand from this Court, the trial court entered an amended sentencing order which specifically addressed each of the aggravating and mitigating circumstances. The court found three aggravators: (1) the homicide was committed during a burglary and sexual battery; (2) the homicide was heinous, atrocious, or cruel (HAC); and (3) the homicide was committed in a cold, calculated, and premeditated manner (CCP). The trial court found no statutory mitigators.

The trial court found seven nonstatutory mitigators: (1) good jail record (minimal weight); (2) positive character traits (minimal weight); (3) defendant's support of Jackie Grier and

her children (very little weight); (4) his possessive relationship with Jackie Grier (minimal weight); (5) emotional immaturity (little weight); (6) possible use of drugs and alcohol around the time of the murder (little weight); and (7) lack of a significant criminal record (very slight weight). The trial court rejected, however, the following nonstatutory mitigators proffered by the defendant: (1) defendant's adaptability to prison life; (2) childhood trauma other than the death of his mother; (3) emotional or mental impairment at the time of the murder; and (4) use of crack cocaine at the time of the murder. (TR Supp. II 50-67).

Once again, Reese appealed. Reese alleged (1) the trial court erred in rejecting several of Reese's proposed mitigating circumstances; (2) the trial court erred in finding CCP and in giving the jury an unconstitutional instruction on this aggravator; and (3) the imposition of the death sentence is disproportionate. On August 17, 2000, this Court rejected each of Reese's arguments and affirmed Reese's sentence of death. Reese v. State, 768 So.2d 1057 (Fla. 2000).

On January 8, 2001, Reese filed a petition for writ of certiorari to the United States Supreme Court. His petition was denied on March 5, 2001. Reese v. Florida, 532 U.S. 910 (2002).

On September 27, 2001, Reese filed an initial motion for post-conviction relief. (PCR Vol. I 1-21). On April 1, 2002,

Reese filed an amended motion for post-conviction relief. (PCR Vol. I 152-200, Vol. II 201-247). Reese raised 14 claims. On March 3, 2004, Reese filed a second amended motion adding a Ring claim to his previous claims. (PCR Vol. 371-376).

The collateral court held a Huff hearing on April 16, 2004. After a subsequent case management conference, at which collateral counsel listed those claims for which he requested an evidentiary hearing, the collateral court entered a case management order, *nunc pro tunc* to April 16, 2004. (PCR Vol. III 412-413). The order reflected that Mr. Reese's collateral counsel requested an evidentiary hearing on Claim II of his amended motion, except for paragraphs 18 and 19, and Claim IV insofar as it alleged ineffective assistance of counsel. The Court granted Reese's request for an evidentiary hearing on these two claims. (PCR Vol. III 412-413).

In preparation for the evidentiary hearing and at the request of collateral counsel, the collateral court appointed Dr. Ernest Miller to evaluate Mr. Reese. (PCR Vol. III 415). The collateral court also appointed Dr. Harry Krop to conduct neuropsychological testing on Mr. Reese. (PCR Vol. III 421). Collateral counsel obtained the services of Dr. David McCraney and had Reese's brain tested to determine whether Reese had organic brain damage. (PCR Vol. III 423).

In response to the appointment of the defense's experts, the State requested appointment of its own expert, Dr. Tannahill Glen. The collateral court granted the State's motion. (PCR Vol. III 432).

An evidentiary hearing was held on September 28, 2006 and October 19, 2006. At the conclusion of the evidentiary hearing, the collateral court permitted both parties to submit written closing arguments. Subsequently, on June 26, 2007, the collateral court entered an order denying Reese's post-conviction claims for which an evidentiary hearing was granted. (PCR Vol. III 491-498). On July 18, 2007, the court entered an additional order, denying those claims for which no evidentiary hearing was requested. (PCR Vol. III 559-564).

Reese appealed and filed his initial brief on March 27, 2008. He did not file a petition for habeas corpus. This is the State's answer brief.

SUMMARY OF THE ARGUMENT

ISSUE I: Within this claim, Reese alleges trial counsel was ineffective during the penalty phase in two ways. First, Reese alleges trial counsel was ineffective for failing to present evidence that Reese suffers from frontal lobe impairment and brain damage. The record refutes Reese's claim that trial counsel was ineffective for failing to put on evidence of brain damage.

Counsel had no basis, at the time of trial, to believe that Reese suffered from any frontal lobe damage. Prior to trial, counsel retained a competent and experienced mental health expert. The expert, Dr. Harry Krop, evaluated Reese before trial. He did not detect any evidence of brain damage or recommend neuropsychological testing. Counsel is not ineffective for relying on a competent and qualified mental health expert.

Reese can also show no prejudice. At the evidentiary hearing, the evidence of brain damage was hotly disputed. The State put on two witnesses who could have served, at trial, to rebut any defense evidence of brain damage, including a normal MRI. Even one of the defense experts, Dr. Miller, found no gross evidence of brain damage. Additionally, the facts of the murder belie any notion that Reese's ability to plan and control his impulses was impaired by any brain damage. Reese failed to

show that failure to put on contested evidence of brain damage probably affected the outcome of this capital trial.

Reese also avers that trial counsel was ineffective for failing to present statutory mitigation evidence. Specifically, Reese alleges that trial counsel was ineffective for failing to present evidence that Reese was suffering from an extreme emotional or mental disturbance at the time of the murder.

The record refutes any claim that counsel was ineffective for failing to put on mental mitigation evidence, including extreme mental disturbance. Trial counsel put on testimony from Dr. Krop that, at the time of the murder, Reese's mental state was seriously impaired. Trial counsel also put on extensive evidence, through Dr. Krop and others, about Reese's early life, tragic upbringing, substance abuse, and even his positive character traits.

The evidence that Reese presented at the evidentiary hearing was largely cumulative to that presented at trial. Trial counsel is not ineffective for failing to put on cumulative evidence. Moreover, even if this Court were to find that Reese put on more favorable evidence at the evidentiary hearing than counsel put on at trial, trial counsel is not ineffective simply because a defendant presents evidence in post-conviction proceedings that is more favorable than that presented at trial.

ISSUE II: This claim is procedurally barred and without merit. Claims attacking the constitutionality of rules prohibiting juror interviews, absent allegations of juror misconduct which, if true, would warrant a new trial, can and should be raised on direct appeal. Failure to do creates a procedural bar in post-conviction proceedings.

This claim is without merit because Reese presented no cognizable grounds, either before the collateral court or before this Court, in his initial brief to warrant juror interviews. Reese seeks only to go on a fishing expedition to investigate the possibility of juror misconduct. This Court has consistently held that such fishing expeditions are not permissible.

ISSUE III: In this claim, Reese alleges that Florida's lethal injection protocols are unconstitutional. This claim is without merit because this Court decided in Lightbourne v. McCollum that Florida's current lethal injection protocols do not violate prohibitions against cruel and unusual punishment.

ISSUE IV: In this fourth claim, Reese alleges that Florida's standard penalty phase instructions unconstitutionally dilute the jury's sense of responsibility for sentencing and improperly shift the burden to him to show death is not an appropriate sentence. Reese also claims that the jury instructions on the three statutory aggravators found to exist in this case were

vague and overbroad. Finally, Reese claims that trial counsel was ineffective for failing to challenge the instructions at trial.

This Court has consistently held that Florida's standard penalty phase instructions do not dilute the jury's sense of responsibility, mislead the jury about its role in capital sentencing or shift the burden to the defendant to show death is not appropriate. Moreover, Reese failed to provide any support for his claim that any of the aggravator instructions were vague and overbroad. As Reese has failed to show that any of the instructions were constitutionally infirm, Reese has also failed to show counsel was ineffective for failing to challenge these standard instructions at trial. Trial counsel is not ineffective for failing to raise a meritless claim.

ISSUE V: In this claim, Reese raises an allegation of cumulative error. Reese has failed to show error in any of the individual claims he brings before this Court in his initial brief. Where there is no individual error, a cumulative error claim must fail.

ISSUE VI: In his sixth claim, Reese alleges that his conviction and sentence to death violate the dictates of Ring v. Arizona. Reese is not entitled to any relief under Ring for two reasons. First, Reese's conviction and sentence of death were final at the time Ring was issued. Both this Court and the United States

Supreme Court have determined that Ring is not applicable to cases on collateral review. Moreover, Ring is satisfied in any event because, in addition to being convicted for first degree murder, Reese was convicted by a unanimous jury, beyond a reasonable doubt, of sexual battery and burglary. One of the aggravators found to exist by the trial court was that the murder was committed in the course of an enumerated felony, specifically sexual battery and burglary. This Court has consistently rejected Ring challenges when the murder was committed in the course of an enumerated felony.

ISSUE VII: In his final claim, Reese avers that his execution is precluded by the United States Supreme Court's decisions in Atkins v. Virginia, 536 U.S. 304 (2002) and Roper v. Simmons, 543 U.S. 551 (2005). Reese is not mentally retarded. Reese was twenty-seven years old at the time of the murder. This Court has rejected attempts to extend Atkins and Roper beyond its specific prohibitions. This claim is properly denied.

ARGUMENT

ISSUE I

WHETHER TRIAL COUNSEL WAS INEFFECTIVE FOR FAILING TO INVESTIGATE AND PRESENT MENTAL MITIGATION EVIDENCE DURING THE PENALTY PHASE OF REESE'S CAPITAL TRIAL

In his first claim, Reese alleges that trial counsel was ineffective for failing to put on certain mental mitigation evidence. Reese claims that trial counsel was ineffective for failing to put on evidence that Reese has brain damage, specifically frontal lobe dysfunction. (IB 42). Reese also claims trial counsel was ineffective for failing to put on evidence that, at the time of the murder, Reese was under the influence of an extreme mental or emotional disturbance.² (IB 23).

To establish a claim of ineffective assistance of counsel, two elements must be proven. First, the defendant must show that trial counsel's performance was deficient. This requires a showing that counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed the defendant by the Sixth Amendment. Kimbrough v. State, 886 So.2d 965, 978 (Fla. 2004).

² This claim was among many factual allegations contained within Reese's amended motion for post-conviction relief. (PCR Vol. I 174). Among his mental mitigation claims were that trial counsel was ineffective for failing to investigate tragic upbringing, history of mental illness and depression. (PCR Vol. I 170).

In order to meet this first element, a convicted defendant must first identify, with specificity, the acts or omissions of counsel that are alleged not to have been the result of reasonable professional judgment. The court must then determine whether, in light of all the circumstances, the identified acts or omissions were outside the wide range of professionally competent assistance. Pietri v. State, 885 So.2d 245 (Fla. 2004).

There is a strong presumption that trial counsel "rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment." Strickland v. Washington, 466 U.S. 668, 690 (1984). A fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time. Darling v. State, 966 So.2d 366 (Fla. 2007). It is the defendant's burden to overcome the presumption that trial counsel rendered effective assistance. Mungin v. State, 932 So.2d 986 (Fla. 2006).

Strategic decisions are virtually immune from findings that counsel was ineffective. Counsel cannot be deemed ineffective if he makes a reasonable tactical decision to pursue, or refrain from pursuing, a particular course of action during trial. A

strategic decision is reasonable unless no other trial counsel, under the same circumstances, would have made the same decision. The defendant has the burden to show counsel's course of action was not the result of a reasoned tactical decision. Chandler v. United States, 218 F.3d 1305, 1315 (11th Cir. 2000) (noting that for a petitioner to show that the conduct was unreasonable, a petitioner must establish that no competent counsel would have taken the action that his counsel did take); Provenzano v. Singletary, 148 F.3d 1327, 1332 (11th Cir. 1998) (noting that counsel's conduct is unreasonable only if petitioner shows "that no competent counsel would have made such a choice").

The presumption that trial counsel rendered effective assistance of counsel includes the presumption "that, under the circumstances, the challenged action 'might be considered sound trial strategy.'" Strickland v. Washington, 466 U.S. at 689, quoting Michel v. Louisiana, 350 U.S. 91, 101 (1955). The defendant bears the burden to overcome this presumption. Strickland v. Washington, 466 U.S. 668, 689 (1984)

If the defendant successfully demonstrates trial counsel's performance was deficient and not the result of a reasonable tactical decision, the defendant must then show this deficient performance prejudiced the defense. In order to demonstrate prejudice, the defendant must show there is a reasonable probability that, but for counsel's unprofessional errors, the

result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome. Rutherford v. State, 727 So.2d 216, 219 (Fla. 1998).

A. Brain damage

This claim may be denied for two reasons: (1) trial counsel had no reason to believe, at the time of trial, that Reese had frontal lobe damage, and (2) the conflict in the evidence presented at the evidentiary hearing, coupled with the facts of the crime, establishes that there is no reasonable probability of a different outcome. During the post-conviction proceedings, Reese failed to show that trial counsel was ineffective for failing to present evidence of Reese's frontal lobe damage.

The evidence presented at the evidentiary hearing established that, at the time of trial, trial counsel had no reason to believe that Reese had brain damage. Trial counsel, Charles Cofer, testified that Reese's case was not his first death case. Mr. Cofer told the collateral court he had been involved in some 700 homicide cases in his time with the Public Defender's Office. In between 100-200 of them, he acted as either lead counsel or co-counsel. (PCR Vol. IV 21). In 1992-1993, trial counsel was responsible for 24 murder cases, 14 of those were first degree murder cases. (PCR Vol. IV 21).

Mr. Cofer perceived the case against his client as very strong. Reese had confessed both in writing and orally and the police had found Reese's palm print at the murder scene. (PCR Vol. IV 644). Trial strategy was geared toward the penalty phase. (PCR Vol. IV 645). Mr. Cofer told the collateral court that the defense strategy was to try to convince the jury that Reese was taking and accepting responsibility for what he had done. Trial counsel also wanted to show that Reese was remorseful.

Trial counsel testified the defense team did a good bit of background work and investigation, including interviewing witnesses. The defense retained Dr. Krop to evaluate Reese in order to develop mitigation evidence.

All the information gathered during the course of counsel's investigation was provided to Dr. Krop. (PCR Vol. IV 651). In addition to relevant documentation, Mr. Cofer provided Dr. Krop with an outline of the case. (PCR Vol. IV 651).³

Dr. Krop informed trial counsel that Reese did not have any major mental illness, did not have an antisocial personality disorder and was of low average intelligence. (PCR Vol. IV 652-653). Dr. Krop did not recommend neuropsychological testing.

³ In his motion for post-conviction relief, Reese alleged trial counsel did not adequately prepare his expert for trial. The collateral court rejected that claim finding that trial counsel effectively prepared Dr. Krop for his testimony. (PCR Vol. III 495). Reese did not challenge that finding on appeal.

Had he done so, trial counsel would have scheduled it. (PCR Vol. IV 654). At the time of Reese's trial, Dr. Krop was recognized as a death penalty mitigation specialist. When trial counsel retained Dr. Krop, trial counsel was aware that Dr. Krop had done a large number of evaluations in death penalty cases. (PCR Vol. IV 656).

Dr. Krop testified at the evidentiary hearing. Dr. Krop told the collateral court that he performed neuropsychological tests on Reese in preparation for the evidentiary hearing.

Dr. Krop also testified for Reese at trial. Dr. Krop testified he did not do neuropsychological testing with Reese in 1992. He believed, at the time of trial, his testing and observations did not reflect brain damage. Accordingly, he did not suggest to trial counsel it be done. (PCR Vol. IV 699-700). If, as a result of his evaluation he felt neuropsychological testing needed to be done, he would have shared that information with Mr. Cofer. (PCR Vol. IV 710).

During cross-examination, Dr. Krop testified that trial counsel had asked him to evaluate Reese for potential mitigation. He testified he gave Reese a battery of psychological tests in 1992, including psychosexual tests, but they were not neuropsychological tests. Dr. Krop testified that Reese was coherent and spoke with him in a relevant manner.

(PCR Vol. IV 705). Reese is clearly not retarded. (PCR Vol. IV 707).

He did not believe that in 1992 neuropsychological testing was done as a matter of course, as it is today. (PCR Vol. IV 706). Dr. Krop, himself, did not administer neuropsychological tests routinely at the time of trial, as he does now. (PCR Vol. IV 706). Dr. Krop testified there is a lot more research available now suggesting that family background and trauma can result in organic problems. (PCR Vol. IV 706). There is also a lot more research, now, in terms of frontal lobe deficits and their contribution to behavioral problems. (PCR Vol. IV 706).

Dr. Krop would have done neuropsychological testing in 1992 if he felt it had been needed. (PCR Vol. IV 710). Given Reese's history of substance abuse, if he were doing the evaluation now, Dr. Krop would recommend neuropsychological testing. (PCR Vol. IV 710).

In this case, trial counsel cannot be deemed ineffective for failing to obtain neuropsychological testing and then to present evidence of brain damage because Mr. Cofer had the right to reasonably rely on his expert who was, and remains, a well-respected mental mitigation expert in death penalty litigation. Dr. Krop did not recommend neuropsychological testing because he did not observe anything that led him to believe Reese was brain damaged. While, in hindsight, Dr. Krop would do it differently,

Dr. Krop's hindsight does not give rise to a claim that counsel was ineffective.

Last year, this Court addressed a similar claim. In Darling v. State, 966 So.2d 366 (Fla. 2007), trial counsel retained Dr. Hercov, prior to trial, to investigate potential mental mitigation. Id. Dr. Hercov found no indication of brain damage to warrant a neuropsychological workup and did not recommend neuropsychological testing. Counsel testified at the evidentiary hearing that he would not order such testing unless Dr. Hercov recommended it.

At the evidentiary hearing, Darling presented the testimony of Dr. Henry Dee, who opined that Darling had frontal lobe damage. Darling v. State, 966 So.2d at 377. Darling argued that trial counsel was ineffective in failing to order a neuropsychological assessment when there was a clear indication from his history that Darling may suffer from brain damage.

This Court rejected Darling's claim. Citing to State v. Sireci, 502 So.2d 1221, 1223 (Fla. 1987), this Court concluded that defense counsel is entitled to rely on the evaluations conducted by qualified mental health experts. This is true even if, in retrospect, those evaluations may not have been as complete as others may desire. Darling v. State, 966 So.3d 366, 377 (2007). Indeed, this Court ruled that even if "the evaluation by Dr. Hercov, which found no indication of brain

damage to warrant a neuropsychological workup, was somehow incomplete or deficient in the opinion of others, trial counsel would not be rendered ineffective for relying on Dr. Hercov's qualified expert evaluation." Id.

This Court's decision in Darling controls the outcome of this case. The evidence at the evidentiary hearing established that trial counsel retained a competent and experienced mental mitigation expert. Trial counsel provided Dr. Krop with all available information about Reese and the case, as well as counsel's own outline of the case.

Based on his evaluation prior to trial, Dr. Krop found no indication of brain damage. Accordingly, he did not recommend that trial counsel seek neuropsychological testing, which may have shown signs of brain damage. In accord with this Court's decision in Darling v. State, 966 So.2d 366 (Fla. 2007), Reese's claim should be denied.

This Court may also affirm the collateral court's finding that Reese failed to show any prejudice from counsel's failure to introduce evidence of brain damage. (PCR Vol. III 498). At the evidentiary hearing, Reese presented two witnesses to support his claim that trial counsel was ineffective in failing to order neuropsychological testing which would have revealed frontal lobe damage. The first was Dr. Ernest Miller.

Dr. Miller testified that Dr. Krop's neuropsychological testing and Reese's behavior suggested brain damage.⁴ There was no gross evidence, however, of any brain damage. (PCR Vol. IV 669).

Reese also called Dr. Krop to testify. Dr. Krop testified that the results from two of the three tests he administered that were sensitive to frontal lobe dysfunction were consistent with impairment of the frontal lobe.⁵ The results of the third test were normal. (PCR Vol. IV 713). Dr. Krop then performed a second battery of tests, put together over the last four or five years, from tests formerly used independently. Reese's test results were consistent with frontal lobe impairment. (PCR Vol. IV 690). Dr. Krop testified the frontal lobe is responsible for executive functioning such as problem solving, complex planning, impulse control and inhibition. (PCR Vol. IV 691).

Dr. Krop told the collateral court that he could not positively diagnose Reese with brain damage as there was no medical evidence of any lesion or stroke. He does not view his

⁴ Reese presented no evidence that Dr. Miller's conclusion that Reese had signs of brain damage was based on anything but Dr. Krop's testing. Accordingly, it cannot be said that Dr. Miller corroborated Dr. Krop's opinions. Dr. Miller did not review any portion of the trial testimony or any records obtained by trial counsel prior to trial. Dr. Miller testified that the only information upon which he relied in forming his opinions came from Reese. (PCR Vol. IV 673-674, 681).

⁵ These three tests were the Trailmaking test, the Categories test, and the Wisconsin Card Sort. (PCR Vol. IV 689).

initial diagnosis in 1992 as contradictory or inconsistent with a person who has neuropsychological deficits. (PCR Vol. IV 695).

When asked how his testimony would have changed if he had conducted neuropsychological testing and discovered brain damage, Dr. Krop testified he would have testified very similarly to what he testified to in 1993. (PCR Vol. IV 722-723). He would still opine that, at the time of the murder, Reese had a serious emotional disturbance. Dr. Krop told the collateral court that he would have added that the disturbance probably would have been more extreme given the brain damage. (PCR Vol. IV 723). He also would have opined that brain damage and its effects are a possible mitigating factor to be considered by the trier of fact. (PCR Vol. IV 723).

At the evidentiary hearing, the State presented evidence in rebuttal of Dr. Krop's opinion that Reese has brain damage. The first was Dr. Tannahill Glen.

Dr. Glen is a neuropsychologist. She administered some sixteen (16) neuropsychological tests to Reese. (PCR Vol. IV 740). She opined that Reese has a personality disorder, not otherwise specified. (PCR Vol. IV 743). Reese has anti-social traits but does not have an anti-social personality disorder. (PCR Vol. IV 743). Reese also exhibits traits of a borderline personality disorder. (PCR Vol. IV 744).

Dr. Glen told the collateral court that she did not see any evidence of frontal lobe deficit or dysfunction in Mr. Reese. (PCR Vol. IV 745). She saw no evidence that Reese ever suffered from a traumatic brain injury, had any sort of stroke or frontal lobe disorder or any history of bizarre behavior, inability to control himself, being out of control on a regular basis, or mood dysfunction. (PCR Vol. IV 746). She believed that Reese's performance on the tests, upon which Dr. Krop relied, can be more easily explained by factors, other than brain damage. (PCR Vol. IV 746).

Dr. Glen ruled out frontal lobe dysfunction in Reese because the results of her testing did not suggest frontal lobe dysfunction. She noted that Reese performed fine on some of the tests that were sensitive to frontal lobe dysfunction. (PCR Vol. IV 751-752).

Dr. Glen told the collateral court that cocaine abuse can cause people to do poorly on neuropsychological tests. (PCR Vol. IV 748). She said that medical doctors would be able to detect if there is any evidence of brain damage stemming from cocaine use. (PCR Vol. IV 749).

The State also presented a radiologist to testify on the issue of brain damage. Dr. Lawrence Holder is a medical doctor. He is a clinical professor of radiology at Shands hospital.

(PCR Vol. IV 760). He reviewed an MRI done on Reese and opined it was of diagnostic quality. (PCR Vol. IV 763-764).

Dr. Holder testified that Reese's MRI was "normal". (PCR Vol. IV 764). He could not diagnose any brain abnormality. (PCR Vol. IV 764).

The collateral court denied this claim. (PCR Vol. IV 496-498). The court concluded that the evidence presented at the evidentiary hearing failed to show counsel was ineffective for failing to present evidence of brain damage. (PCR Vol. IV 496).

The collateral court noted that Dr. Krop, at the time of his pre-trial observations, did not observe any signs of brain damage and he did not suggest to counsel that there was any issue of brain damage that should be raised in mitigation. (PCR Vol. IV 496). The court pointed to Dr. Krop's testimony that he could not positively diagnose brain damage as there was no medical evidence of lesion or stroke. (PCR Vol. IV 497).

The collateral court also noted that the State called two witnesses to rebut Dr. Krop's opinion formed during post-conviction proceedings that Reese has brain damage. The collateral court concluded that the testimony of the experts, the normal MRI, and the defendant's own admissions contradict any impairment in the defendant's ability to plan and solve problems. The collateral court found that there is no

reasonable probability that the outcome of the penalty phase would have been different. (PCR Vol. IV 498).

The ruling by the collateral court is supported by competent substantial evidence. Reese cannot show prejudice from trial counsel's failure to present evidence of brain damage for two reasons.

First, the evidence of brain damage was in conflict. Even Dr. Krop could not positively conclude that Reese had brain damage. While Dr. Krop was convinced Reese showed signs of brain damage based on Reese's performance on some of the neuropsychological testing that Dr. Krop administered, he could not positively diagnose brain damage because there was no medical evidence to support the diagnosis. Moreover, Dr. Miller testified he saw no gross indication of brain damage.

Dr. Glen testified that, in her opinion, Reese does not suffer from any frontal lobe dysfunction. Dr. Holder testified that Reese's MRI results were "normal" with no sign of brain abnormality.

Given the conflicting testimony of the medical experts and the absence of any medical evidence that supports Reese's claim of brain damage, Reese cannot show there is a reasonable likelihood that, had trial counsel presented this evidence, he would have received a life sentence.

Reese can also show no prejudice because Dr. Krop's testimony, coupled with the facts of the crime, supports the notion that there was little, to no, link between any brain damage and Charlene Austin's murder. To the contrary, while Dr. Krop testified that frontal lobe damage affects that part of the brain that affects problem solving, complex planning, impulse control and inhibition, Dr. Krop told the collateral court that Reese is still capable of planning and doing things in an organized way. (PCR Vol. IV 719). Dr. Krop testified that people with frontal lobe damage do not always show impairment in their actual functioning in terms of impulse control, planning, and other executive functions. It does become more difficult with the addition of drugs and alcohol or in an emotionally charged situation. (PCR Vol. IV 719).

Dr. Krop told the court that Reese's breaking into Charlene Austin's apartment and laying in wait for her was clearly something he planned and thought out. (PCR Vol. IV 719). Dr. Krop also saw no signs that Reese disassociated at the time of the crime. (PCR Vol. IV 720-722).

Reese's problem was, at least in his mind, Charlene Austin. Reese thought about a way to solve his problem and then executed his plan. Reese broke into Ms. Austin's apartment and lay in wait for hours until she not only returned home but fell asleep. Once she was vulnerable and helpless, Reese attacked her, raped

her, and strangled her with an electrical cord. Given Dr. Krop's testimony that Reese had the ability to overcome his deficits in problem solving, impulsivity, and planning, coupled with the facts of the crime, which demonstrate that Reese's ability to control his actions, plan, and solve problems was not substantially impaired, there is no reasonable probability the outcome of the penalty phase would have been different. This collateral court properly denied this claim and this Court should affirm.

A. Extreme Emotional Distress

Reese failed to show that counsel was ineffective for failing to present evidence that Reese was under an extreme emotional disturbance at the time of the murder.⁶ First, Dr. Harry Krop, a forensic psychologist, testified that Reese's mental state was seriously impaired at the time of the murder. (TR XV 1217). Trial counsel also argued, in his sentencing memorandum before Reese's second resentencing, that the court should find in mitigation, based on Dr. Krop's testimony, that

⁶ In scrutinizing this claim, this Court must view counsel's performance as of the time of trial. Darling v. State, 966 So.2d 366 (Fla. 2007). Accordingly, should this court find, in accord with its decision in Darling, that trial counsel had the right to reasonably rely on his expert who neither suggested neuropsychological testing nor detected any sign of brain damage, it would be inappropriate to consider, in evaluating this claim, Dr. Krop's opinion, formed during post-conviction proceedings, that Reese has brain damage.

Reese was seriously mentally impaired at the time of the murder. (TR Supp. Vol. II 37).

Although the trial court rejected Reese's mental mitigation evidence in his sentencing order, a decision which this Court affirmed on appeal, trial counsel cannot be ineffective for failing to convince the trial court that it should find mental mitigation when trial counsel investigated and presented expert testimony that Reese was under a serious emotional disturbance at the time of the murder. Freeman v. State, 761 So.2d 1055, 1072 (Fla. 2000)(presenting an argument yet failing to convince the court is not ineffective assistance of counsel). While the character of the evidence presented at trial was slightly different from that presented at the evidentiary hearing, trial counsel is not ineffective for failing to put on evidence similar to evidence he actually presented at trial.

At the evidentiary hearing, Reese put on two witnesses to testify as to this aspect of his claim. Dr. Miller testified that, in his view, there was sufficient mitigation from a psychiatric standpoint that further consideration might be given to whatever penalties that might come forth as a result of the acts in which he engaged. (PCR Vol. IV 38).⁷ Dr. Miller told

⁷ Dr. Miller admitted at the evidentiary hearing that he did not read any of the trial testimony including the testimony of Dr. Krop. While the State does not contest there were mitigating circumstances to be considered, trial counsel put on

the collateral court a person is the sum total of everything that has befallen them, especially stressful experiences. (PCR Vol. IV 661).

Dr. Miller listed nine stresses he believes shaped John Reese. They were: (1) he was the product of a mother who was a drug addict, (2) he was a witness at age 7 to the traumatic death of his adoptive mother at the hands of his adoptive father, (3) he lived thereafter with his adopted mother's brother who was an abusive and punitive man, (4) he witnessed the death of that same uncle, (5) he has no history of setting fires or being abusive to animals, (6) he has been able to establish on-going relationships with women, (7) he has held various jobs over extended period of time, (8) he has a history of only misdemeanors which does not establish a history of criminality, and (9) he has used alcohol and cocaine extensively. (PCR Vol. IV 661-663).⁸

Dr. Miller diagnosed Reese on Axis I with cocaine dependence, chronic depression, and chronic anxiety. (PCR Vol.

a wealth of mitigation. Dr. Miller simply was not aware that mitigation had been offered at trial. Moreover, because Dr. Miller did not read any of the testimony that trial counsel actually offered, Dr. Miller was in no position to opine, or even imply, that more mitigation should have been offered.

⁸ "Stresses" 5-8 are not really stresses at all. Instead they were factors that Dr. Miller used to rule out a diagnosis of anti-social personality disorder. At trial, trial counsel put on evidence of all but one of the actual stresses about which Dr. Miller testified.

IV 671-672). Dr. Miller told the collateral court, however, that the only basis for his diagnosis of cocaine dependency was Reese's self-report. (PCR Vol. IV 673).

On Axis II, Dr. Miller diagnosed Reese with a personality disorder with dependent and narcissistic features. (PCR Vol. IV 673). Reese is not anti-social in Dr. Miller's opinion. (PCR Vol. IV 673).

Dr. Miller admitted he had not read any of the trial testimony, including the penalty phase testimony of Dr. Krop. All of Dr. Miller's information about the actual crime and Reese's activities on the day of the murder came only from Reese. (PCR Vol. IV 674). In his recitation of the events leading up to the murder, Reese did not tell Dr. Miller that he wrapped an extension cord around Ms. Austin's neck and held it taut for an extended period of time in order to kill her. Nor did Reese tell Dr. Miller that he raped Ms. Austin before he murdered her. (PCR Vol. IV 675-676).

Dr. Miller testified that Reese has impulse control problems when he uses cocaine. (PCR Vol. IV 679). He did not observe anything in Reese that would align itself with difficulties in planning and flexibility. (PCR Vol. IV 679). Laying in wait would be consistent with an ability to show persistence and control at least for the period of time that he lay in wait. (PCR Vol. IV 680). He did not see Reese as a

sadistic rapist but one driven by the dynamics of his life. (PCR Vol. IV 677).

Dr. Miller admitted he had no information to support the stressor that Reese was born to an addicted mother who used cocaine *in utero*. His only knowledge about that "fact" came from Reese. (PCR Vol. IV 680-681). Additionally, while Dr. Miller believed Reese had suffered from two cerebral concussions in later years, his only source of information was Reese. He had no medical records to corroborate Reese's self-report. (PCR Vol. IV 681). Though Dr. Miller knew few details of the murder except those provided by Reese and had read none of the testimony elicited at trial, including Dr. Krop's testimony, Dr. Miller opined that Reese was suffering under an extreme emotional disturbance at the time of the crime. (PCR Vol. IV 684).

Dr. Krop also testified. Dr. Krop testified that Reese suffers from no major mental illness. He noted it was clear to him that Reese abused drugs and alcohol. Dr. Krop told the collateral court his conclusions regarding major mental illness and drug use remains unchanged. (PCR Vol. IV 694). Dr. Krop testified he saw no evidence that changed his initial opinion that Reese does not suffer from any major mental illness. Dr. Krop told the collateral court that he testified at trial that

at the time of the murder Reese was suffering from a serious emotional disturbance. (PCR Vol. IV 711).

The collateral court denied this portion of Reese's claim. The collateral court found no deficient performance because trial counsel presented testimony, at the penalty phase, that Reese's mental state was seriously impaired at the time of the murder. The collateral court concluded that trial counsel cannot be ineffective for failing to put on evidence he actually presented. (PCR Vol. III 493).

The collateral court's rejection of this claim is supported by competent, substantial evidence. During the penalty phase of Reese's capital trial, Mr. Cofer called Dr. Krop to testify. In addition to eliciting significant testimony about Reese's childhood and abandonment issues, his strong attachment to Jackie Grier, and Reese's frustration over Ms. Grier's efforts to end the relationship, trial counsel asked Dr. Krop specifically whether at the time of the murder, Reese was under the influence of an emotional disturbance at the time of the murder. Dr. Krop testified:

I would say that when you look at all the factors combined, that was accumulated, hurt, frustration feelings, he felt desperate to stay in the relationship, coupled with some fear and anxiety that were occurring at the time of the incident, plus the effects of cocaine and alcohol, I'd say in my opinion, his mental state was seriously impaired at the time of the offense. (TR Vol. XV 1217).

Because Reese's entire claim seems to be based on the notion that Dr. Krop did not use the magic words, "extreme emotional disturbance" it is significant to note that Dr. Krop offered no specific opinion, at the evidentiary hearing, that either of the two statutory mitigators applied in this case.

While Dr. Miller did opine that, at the time of the murder, Reese was under an "extreme emotional disturbance," the collateral court discounted his testimony. The Court noted, in reviewing Dr. Miller's testimony that "all of Dr. Miller's information came from the defendant himself. Unlike Dr. Krop, Dr. Miller did not review a single piece of independent or corroborative material." (PCR Vol. III 496).

The record shows that counsel investigated and presented a qualified, competent mental health expert who testified that, at the time of the murder, Reese was suffering from a serious mental disturbance. Counsel cannot be ineffective for presenting mental mitigation evidence when the record shows that he presented significant evidence from which the jury, and the trial court, could have found either statutory or non-statutory mental mitigation. Even if this Court were to find that Reese presented more favorable testimony at the evidentiary hearing at trial, trial counsel is not rendered ineffective because he manages years later to present more favorable testimony. Davis v. State, 875 So. 2d 359, 371 (Fla. 2003) ("[T]rial counsel was

not deficient where the defendant had been examined prior to trial by mental health experts and the defendant was simply able to secure a more favorable diagnosis in post-conviction.");

This Court may also affirm because Reese failed to present any evidence at the evidentiary hearing that was not largely cumulative to the testimony that trial counsel presented at trial. Accordingly, Reese cannot meet Strickland's prejudice prong. Rhodes v. State, 33 Fla. L. Weekly S 190 (Fla. Mar. 13, 2008) (Rhodes cannot demonstrate prejudice because any testimony the additional witnesses would have provided would have been cumulative to that provided by the witnesses at resentencing).

At the evidentiary hearing, Reese presented no significant additional mental mitigation. Dr. Miller's testimony, albeit essentially discounted by the collateral court, added almost nothing new to the testimony presented by trial counsel at Reese's penalty phase proceeding.

For instance, Dr. Miller testified at the evidentiary hearing that there were at least five major stresses that contributed to Reese's behavior on the night of the murder. These included: (1) he was the product of a mother who was a drug addict, (2) he was a witness at age 7 to the traumatic death of his adoptive mother at the hands of his adoptive father, (3) he lived thereafter with his adopted mother's brother who was an abusive and punitive man, (4) he witnessed

the death of that same uncle, and (5) he has used alcohol and cocaine extensively. (PCR Vol. IV 661-663). Dr. Miller also testified that Reese has impulse control problems when he uses cocaine. (PCR Vol. IV 679).

At trial, Dr. Krop testified about all but one of these stresses at great length. Dr. Krop also testified that Reese's relationship with Jackie Grier provided the flashpoint for this murder.

At trial, Dr. Krop testified that Reese never knew his biological parents. His mother was 13 years old. When he was seven he lost both of his adoptive parents. His adopted father stabbed his adopted mother. (TR Vol. XV 1208). Reese saw his mother's body. His father was placed in a mental hospital. Reese never had contact with his father after that. Reese's adopted father died, homeless, from exposure. (TR Vol. XV 1209).

Dr. Krop testified that after his father was committed, he went to live with an uncle who was very strict. He did not allow Reese to live as a child. (TR Vol. XV 1209). At the age of 14, Reese went to live with another uncle. This uncle was loving and supportive. Reese lived with him for about two or three years. Reese quit school to work because his uncle got sick. (TR Vol. XV 1210). He joined the Peace Corps but came back home to provide financial support to his aunt and uncle. His

uncle died the day he returned of a heart attack. Dr. Krop characterized this as Reese having yet another individual, for whom he cared, taken away from him. (TR Vol. XV 1210).

Dr. Krop told the court that Reese got married, then discovered his wife was a drug addict. Reese's search for a loving stable relationship culminated in Reese meeting Ms. Grier. In effect, she became everything to him. (TR Vol. XV 1211).

Reese perceived the relationship much differently than did Ms. Grier. According to Dr. Krop, Reese was desperate to stay in the relationship. (TR Vol. XV 1211). The fact that Ms. Grier tried to end the relationship several times led to Reese's continued frustration and desperation. This frustration, in Dr. Krop's view, led up to murder. (TR XV 1212). Reese sought answers from the victim that he was not getting from Ms. Grier. (TR Vol. XV 1213).

Dr. Krop described Reese as insecure and non-assertive. These traits make it difficult for Reese to express the way he feels. (TR Vol. XV 1214-1215). Reese's frustrations and anger build up because he is not an assertive person. An inability to vent or express his strong feelings to others causes eventual eruption. (TR Vol. XV 1215).

Reese tends to become dependent on drugs and alcohol. He started using crack cocaine regularly and on the day of the

murder, used cocaine. Cocaine would intensify Reese's anger, rage, paranoia, and frustration. (TR Vol. XV 1218). According to Dr. Krop, Reese's cocaine use dramatically impaired Reese's ability to think clearly. (TR Vol. XV 1218).

Dr. Krop told the jury that John Reese was a product of his environment. (TR Vol. XV 1216). Dr. Krop testified Reese had a good potential to function well in prison.

In Dr. Krop's opinion, Reese's mental state was seriously impaired at the time of the offense. (TR Vol. XV 1216-1217). Reese was "scared, frustrated, all the anger and all the frustrations and rejection that he has experienced in life, basically, just came out at one time." (TR Vol. XV 1213-1214). In Dr. Krop's view, Reese lost control on the day he murdered Charlene Austin. (TR Vol. XV 1213).

When comparing Dr. Miller's "new" testimony to Dr. Krop's trial testimony, the only thing that Dr. Krop did not testify to was that Reese's mother was a drug addict who used cocaine *in utero*. However, Dr. Miller did not have any objective evidence that this was the case. His only source of this information was Reese himself. (PCR Vol. IV 680-681).

Counsel is not ineffective for failing to present evidence that is largely cumulative to that actually presented at trial. Marquard v. State, 850 So.2d 417, 429-30 (Fla. 2002) ("[C]ounsel

is not required to present cumulative evidence."). The collateral court's order should be affirmed.

ISSUE II

WHETHER FLORIDA'S RULES OF PROCEDURE THAT PROHIBITED REESE FROM INTERVIEWING JURORS VIOLATES REESE'S FIRST, SIXTH, EIGHTH, AND FOURTEENTH AMENDMENT RIGHTS UNDER THE UNITED STATES CONSTITUTION

In this claim, Reese alleges that Florida's rules of procedure, which prohibit him from interviewing jurors, are unconstitutional. Reese takes issue with two rules; Rule 3.575, Florida Rules of Criminal Procedure, and Rule 4-3.5(d)(4), Rules Regulating the Florida Bar. Reese contends that while "journalists, academics, and lawyers not connected to the case" may interview jurors at will, he may not do so. Reese claims this "different and unequal" treatment violates his right to equal protection. (IB 45-46).

This claim may be denied for at least two reasons. First, the claim is procedurally barred. Claims challenging juror interview rules can, and should be, raised on direct appeal. Because Reese failed to do so, the collateral court properly denied Reese's claim as procedurally barred. Israel v. State, 33 Fla. L. Weekly S 211 (Fla. 2008); Rose v. State, 774 So.2d 629, 637 n.7 (Fla. 2000)(holding that Rose's attack on the constitutionality of the Florida Bar Rule of Professional

Conduct governing interviews of jurors is procedurally barred because Rose could have raised this issue on direct appeal).

This claim may also be denied because this Court has specifically rejected the same claim Reese has made here. In Barnhill v. State, 971 So.2d 106, 116-117 (Fla. 2007), the defendant argued that rule 4-3.5(d)(4) of the Rules Regulating the Florida Bar and Florida Rule of Criminal Procedure 3.575 violate his constitutional right of equal protection and deny him adequate assistance of counsel in pursuing his post-conviction remedies. This Court rejected Barnhill's argument, citing to numerous decisions in which the Court has concluded that rule 4-3.5(d)(4) and rule 3.575, which collectively restrict an attorney's ability to interview jurors after trial, do not violate the defendant's constitutional rights. Id. See also Power v. State, 886 So.2d 952, 957 (Fla. 2004); Sweet v. Moore, 822 So.2d 1269, 1274 (Fla. 2002); Johnson v. State, 804 So.2d 1218, 1225 (Fla. 2001).

As was the case in Barnhill, Reese does not point to any specific juror misconduct that, if true, would warrant a new trial. Johnson v. State, 804 So.2d 1218, 1225 (Fla. 2001) (juror interviews are not permissible unless the moving party has made sworn allegations that, if true, would require the court to order a new trial because the alleged error was so fundamental and prejudicial as to vitiate the entire

proceedings). Instead, Reese's claim is nothing more than a request to investigate possible grounds for finding juror misconduct claims. In light of this court's well-established precedent prohibiting such fishing expeditions, Reese's claim should be denied. Arbelaez v. State, 775 So.2d 909, 920 (Fla. 2000) (finding that a defendant does not have a right to conduct "fishing expedition" interviews with the jurors after a guilty verdict is returned).

ISSUE III

WHETHER EXECUTION BY LETHAL INJECTION CONSTITUTES CRUEL AND UNUSUAL PUNISHMENT

In this claim, Reese alleges that lethal injection is unconstitutional. He acknowledges that this Court's decision in Lightbourne v. McCollum, 969 So.2d 326 (Fla. 2007) precludes relief on his claim which raises nothing more than an attack on the most recent Department of Corrections lethal injection protocols which this Court in Lightbourne ruled were constitutional.⁹

⁹ Reese alleges he raised this claim only because the United States Supreme Court has not yet decided Hill v. Crosby, 547 U.S. 573 (2006). (IB 48). While the State agrees that this Court's decision in Lightbourne precludes relief, Reese is mistaken that the United States Supreme Court has not decided Hill. Indeed, the United States decided Hill in June 2006, almost two years before Reese filed his initial brief.

Even if this were not the case, Hill has no relevance to Reese's appeal from the denial of a motion for post-conviction

As Reese acknowledges, his claim is without merit because this Court in Lightbourne v. McCollum, 969 So.2d 326 (Fla. 2007) and Schwab v. State, 973 So.2d 427 (Fla. 2007) ruled that Florida's lethal injection procedures do not violate the Eighth Amendment. Moreover, on April 16, 2008, the United States Supreme Court, in Baze v. Rees, 76 U.S.L.W. 4199 (2008) concluded that Kentucky's three drug protocol, a protocol that essentially mirrors Florida's protocols, did not violate the Eighth Amendment's prohibition against cruel and unusual punishment. Reese's claim should be denied.

relief because the issue in Hill was not whether lethal injection was constitutional. Instead the issue in Hill was whether a challenge to lethal injection could be raised in a civil action filed pursuant to 42 U.S.C.S. § 1983.

In Hill, the United States Supreme Court ruled that a challenge to Florida's lethal injection protocols could be raised in a claim filed pursuant to 42 U.S.C.S. § 1983 if the petitioner challenged only the particular lethal injection protocol being used by the state and not the validity of lethal injection sentences generally. The Court remanded the case back to the Eleventh Circuit for further consideration.

In turn, the Eleventh Circuit remanded Hill's petition to the district court for consideration of Hill's petition on the merits. Hill v. McDonough, 464 F.3d 1256 (11th Cir. 2006). When the case returned to the district court, Hill filed an amended complaint and request for a preliminary injunction. The State filed a response and motion to dismiss. The district court issued an order denying the injunction and dismissing the complaint. Id. Hill appealed and the Eleventh Circuit affirmed concluding that Hill had unreasonably delayed bringing his claim. Hill v. McDonough, 464 F.3d 1256 (11th Cir. 2006). The United States Supreme Court denied certiorari review. Hill v. McDonough, 127 S. Ct. 465 (2006). Hill was executed on September 20, 2006.

ISSUE IV

WHETHER FLORIDA'S PENALTY PHASE JURY INSTRUCTIONS VIOLATE THE DICTATES OF THE UNITED STATES SUPREME COURT'S DECISION IN CALDWELL V. MISSISSIPPI

In this claim, Reese alleges the jury instructions given to his jury diminished the jury's responsibility toward sentencing, shifted the burden of proof to Reese to demonstrate that life is an appropriate sentence and was premised on unconstitutionally vague and overbroad aggravators.¹⁰ (IB 50). Reese purports to raise this as a claim of ineffective assistance of counsel for failing to object to these "unconstitutional instructions." Reese can show deficient performance for failing to object only if he demonstrates the instructions, about which he complains, are indeed unconstitutional.¹¹

Reese points to two instructions about which he takes issue. The first is the jury instructions that inform the jury that "... it is your duty to advise the court as to what punishment should be imposed upon the Defendant for the crime of first degree murder. (IB 50). Reese claims this instruction unconstitutionally diminishes the jury's sense of responsibility

¹⁰ Reese does not identify the aggravator instructions he claims were vague and overbroad.

¹¹ To the extent Reese attempts to raise this as a substantive issue, the claim is procedurally barred as it could have and should have been raised on direct appeal. Stephens v. State, 32 Fla. L. Weekly S 735 (Fla. November 15, 2007)

toward sentencing in violation of the dictates of Caldwell v. Mississippi, 472 U.S. 220 (1985).

The second is the instruction which advises the jury that before recommending death, it must find that there are sufficient aggravating circumstances to warrant imposition of the death penalty. (IB 51). Reese claims this instruction unconstitutionally shifts the burden to Reese to prove that life is an appropriate sentence. (IB 51).

Reese's claim must fail because this Court has consistently rejected claims that the standard penalty phase jury instructions violate the dictates of Caldwell v. Mississippi. Likewise, this Court has rejected, on many occasions, claims that the standard jury instructions shift the burden to the defendant to demonstrate that life is an appropriate sentence.

In Barnhill v. State, 971 So.2d 106 (Fla. 2007), the defendant raised the same claims as Reese does here. Barnhill argued the penalty phase jury instructions violated the Fifth, Sixth, Eighth, and Fourteenth Amendments because they diminished the jury's responsibility, shifted the burden of proof to Barnhill, and were premised on unconstitutionally vague and overbroad aggravators. Additionally, Barnhill argued counsel rendered ineffective assistance by not litigating and preserving these issues. This Court denied Barnhill's claim, noting that it has repeatedly held the standard jury

instructions fully advise the jury of the importance its role, correctly state the law, do not denigrate the role of the jury and do not shift the burden to prove death is the appropriate sentence. Id. See also Miller v. State, 926 So.2d 1243, 1257 (Fla. 2006) (rejecting the claim that the jury instructions dilute the jury's sense of responsibility); Rodriguez v. State, 919 So.2d 1252, 1280 (Fla. 2005) (rejecting the claim that the standard jury instructions impermissibly shift the burden to the defendant to prove that death is not the appropriate sentence); Card v. State, 803 So.2d 613, 628 (Fla. 2001) (finding the decision in Caldwell v. Mississippi, 472 U.S. 320, 105 S. Ct. 2633, 86 L. Ed. 2d 231 (1985), not applicable in Florida); Brown v. State, 721 So.2d 274, 283 (Fla. 1998) (finding the standard jury instructions fully advise the jury of the importance of its role, correctly state the law, and do not denigrate the role of the jury); San Martin v. State, 705 So.2d 1337, 1350 n.5 (Fla. 1997) (concluding that the weighing provisions of Florida's death penalty statute and the accompanying jury instructions do not unconstitutionally shift the burden of proof).

As none of the instructions about which Reese complains are unconstitutional, trial counsel cannot be ineffective for failing to raise a meritless claim. Suggs v. State, 923 So.2d 419, 437 (Fla. 2005)(trial counsel not ineffective for failing

to object to valid standard jury instructions). Reese's claim should be denied.

ISSUE V

WHETHER CUMULATIVE ERROR DEPRIVED REESE OF A FAIR TRIAL

Reese's claim of cumulative error must fail because Reese has failed to prove any of his individual claims of error. If, after analyzing the individual issues that Reese raises on appeal, the alleged errors are either meritless, procedurally barred, or do not meet the Strickland standard for ineffective assistance of counsel, there can be no cumulative error. Because Reese's allegations of individual errors are without merit, his contention of cumulative error is similarly without merit. Griffin v. State, 866 So.2d 1, 22 (Fla. 2003) ("Because the alleged individual errors are without merit, the contention of cumulative error is similarly without merit, and [the defendant] is not entitled to relief on this claim.").

ISSUE VI

WHETHER REESE'S SENTENCE TO DEATH WAS IMPOSED IN VIOLATION OF THE UNITED STATES SUPREME COURT'S DECISION IN RING V. ARIZONA

In this claim, Reese alleges his sentence to death was imposed in violation of the United States Supreme Court decision in Ring v. Arizona, 536 U.S. 584 (2002). Reese's claim is without merit for two reasons.

First, Ring is not retroactive to cases on collateral review. Reese's conviction and sentence were final when Ring was issued. Accordingly, Ring cannot act to disturb Reese's conviction and sentence of death. Johnson v. State, 904 So.2d 400, 412 (Fla. 2005) (holding Ring is not retroactive in Florida). See also Evans v. State, 975 So.2d 1035 (Fla. 2007)(noting the United States Supreme Court in Schriro v. Summerlin, 542 U.S. 348 (2004), held that the decision in Ring is not retroactive and a majority of this Court has also concluded that Ring does not apply retroactively in Florida to cases that are final, under the test outlined in Witt v. State, 387 So.2d 922 (Fla. 1980)).

Ring can also provide no relief because, in addition to first degree murder, Reese was convicted of burglary and sexual battery. Reese v. State, 694 So.2d 678 (Fla. 1997). Moreover, one of the aggravators found to exist in this case was that the murder was committed during a burglary and sexual battery.

A defendant is not entitled to relief, pursuant to Ring, when the trial court finds the murder was committed during the course of an enumerated felony and the jury unanimously found the defendant guilty of that contemporaneous felony. Zack v. State, 911 So.2d 1190, 1202-1203 (Fla. 2005); Kormondy v. State, 845 So.2d 41, 54 n.3 (Fla. 2003) (explaining that defendant was also convicted by jury of violent felonies of robbery and sexual

battery, that murder was committed during course of burglary, and that death sentence could be imposed based on these convictions by the same jury). This Court should reject Reese's sixth claim on appeal.

ISSUE VII

WHETHER THE UNITED STATES SUPREME COURT'S DECISIONS IN ATKINS V. VIRGINIA AND ROPER V. SIMMONS RENDER REESE INELIGIBLE FOR THE DEATH PENALTY BECAUSE HE WAS SUFFERING FROM AN EMOTIONAL DISTURBANCE AT THE TIME OF THE MURDER

In his final claim, Reese avers he is ineligible to be executed pursuant to the United States Supreme Court decisions in Atkins v. Virginia, 536 U.S. 304 (2002) and Roper v. Simmons, 543 U.S. 551 (2005). Reese claims that because Reese was diagnosed with a personality disorder, not otherwise specified, with dependent and narcissistic features, the State may not constitutionally carry out his death sentence. Reese is mistaken.

In Atkins v. Virginia, 536 U.S. 304 (2002), the United States Supreme Court ruled that it is unconstitutional to execute a person who is mentally retarded. Reese is not mentally retarded. Reese alleges that, despite this specific holding, Atkins precludes his execution because his personality disorder and brain damage makes him less culpable. (IB 56-58). Reese is not entitled to relief under Atkins.

In Lawrence v. State, 969 So.2d 204 (Fla. 2007), the defendant made the same claim that Reese makes here. While acknowledging he was not mentally retarded, Lawrence claimed the equal protection clause requires that his mental illness be treated similarly to those with mental retardation because both conditions result in reduced culpability. This Court rejected Lawrence's arguments and declined to extend Atkins' reach to those who are not mentally retarded. Id. at 300. In accord with this Court's decision in Lawrence, Reese is not entitled to relief.

Reese is likewise not entitled to relief under Roper v. Simmons, 543 U.S. 551 (2005). In Roper, the United States Supreme Court determined that it was unconstitutional to execute one who was under the age of 18 at the time of the murder.

Reese was born on March 29, 1965. (TR Vol. I, 1). Reese murdered Charlene Austin on January 28 or 29, 1992. Accordingly, Reese was twenty-seven years old at the time of the murder.

Reese does not explain why, in his view, Roper has any applicability to his sentence to death. Reese does not claim he was under 18 at the time of the murder. Reese does not even claim his mental or emotional age was significantly less than

his chronological age. Indeed, Reese does not provide any support for the application of Roper to his claim at all.

In any event, Reese is not entitled to any relief because this Court has declined to extend Roper to defendants who were over the age of 18 at the time of the murder. In Hill v. State, 921 So.2d 579 (Fla. 2006), Hill alleged that his mental and emotional age places him in the category of persons for whom it is unconstitutional to impose the death penalty under Roper v. Simmons, 543 U.S. 551 (2005).

This Court concluded that Roper did not apply to Hill. This Court observed that "Hill was twenty-three years old when he committed the crimes at issue". This Court found that Roper only prohibits the execution of those defendants whose chronological age is below eighteen. Id. at 584. See also Bevel v. State, 33 Fla. L. Weekly S 202 (Fla. Mar. 20, 2008) (declining to extend Roper to Bevel who claimed his mental age was that of a 14 or 15 year old); Kearse v. State, 969 So.2d 976, 992 (Fla. 2007)(denying Roper relief because Kearse was 18 years and three months old at the time of the murder).

CONCLUSION

Based upon the foregoing, the State requests respectfully this Court affirm the collateral court's order denying Reese's motion for post-conviction relief.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Mail to Jefferson Morrow, Esq., 1301 Riverplace Blvd., Suite 2600, Jacksonville, Florida 32207 this 21st day of May 2008.

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CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that the instant brief has been prepared with 12 point Courier New type, a font that is not spaced proportionately.

MEREDITH CHARBULA
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