IN THE SUPREME COURT OF FLORIDA

CASE NO. SC07-1309
Lower Tribunal: 16-1992-CF-004174-AXXX-MA Division: CR-E

JOHN LOVEMAN REESE,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

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

INITIAL BRIEF

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PRELIMINARY STATEMENT

This is an appeal to The Florida Supreme Court of the trial court's denial of Reese's Motion to Vacate Judgment of Conviction and Sentence, pursuant to Fla.R.Crim.P.3.850/3.851. Reese's claims were denied after an evidentiary hearing.

REQUEST FOR ORAL ARGUMENT

By way of separate document pursuant to Rule 9.320, oral argument is requested.

RECORD CITATIONS

Citations shall be as follows:

Reference to Reese's Jury Trial will be "TR." Reference to Reese's 3.850/3.851 Hearing will be "R." for Evidentiary Hearing Transcript.

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STATEMENT OF THE CASE AND FACTS

I. PROCEDURAL HISTORY

On May 14th, 1992, John Loveman Reese was indicted by a Duval County Grand Jury for First Degree Murder and Sexual Battery, and Burglary of Charlene Austin (R.14). Mr. Reese was tried before a jury on March 18th, 1993, and was convicted as charged. The Penalty Phase portion of the trial was held on May 14th, 1993, and after the jury instructions and deliberations the jury returned with an advisory verdict recommending the Death Sentence by a vote of eight to four (8-4) (TR.1492). The same jury that heard the evidence in the Guilt Phase also heard the evidence in the Penalty Phase. Subsequent to the jury's recommendation of death, the trial court sentenced Mr. Reese to death for First Degree Murder (TR.1508-1513, R.382-384).

Mr. Reese timely sought direct appeal to this court. This court affirmed Mr. Reese's convictions and death sentence. On appeal to the Supreme Court, this court held that the trial judge failed to expressly evaluate the mitigating evidence, as required by Campbell v. State, 571 So.2nd 415 (Fla.1990). Reese v. State, 694 So.2nd 678,684 (Fla.1997). The opinions noted that mitigation was offered "which was apparently unrebutted." The court remanded for entry of a new sentencing order expressly weighing the evidence offered in mitigation. Judge Haddock

resentenced Mr. Reese on April 17th, 1997, by entering a new written sentencing order, without holding a hearing. The judge received the sentencing memorandum from the State (but not from the Defendant) before entering a new order. On appeal of the resentencing order, This Court again remanded in directing the trial court to "conduct a new hearing, giving both parties an opportunity to present argument and submit sentencing memoranda before determining appropriate sentence." Reese v. State, 728 So.2nd 727 (Fla.1999). On April 28th, 1999, Judge Haddock held a new hearing at which both parties presented argument. Prior to the hearing, the State and Defense submitted sentencing memoranda. On June 16th, 1999, the judge reconvened the parties and filed a new sentencing order resentencing Mr. Reese to death (TR.118-155). The Court found three (3) aggravating factors:

1.) The homicide was committed during a burglary and sexual battery;

2.) The homicide was especially heinous, atrocious, or cruel;

3.) The homicide was committed in a cold, calculated, and premeditated manner.

The Court found no statutory mitigators. Trial counsel waived lack of significant prior criminal history as a statutory mitigator. The Court weighed the non-statutory mitigators and made the following findings:

1.) The Court rejected the mitigator that the Defendant was adaptable to prison life;

2.) The Court found the Defendant had a good jail record, but gave this minimal weight;

3.) The Court rejected the evidence of childhood trauma, other than the death of the Defendant's mother, and gave that little weight;

4.) The Court found the Defendant had positive character traits, but gave that minimal weight;

5.) The Court found the Defendant supported Jackie Grier and her children, but gave that finding little weight;

6.) The Court found the Defendant's possessive relationship with Jackie Grier, but assigned very minimal weight;

7.) The Court rejected the mitigator that the Defendant was emotionally or mentally impaired at the time of the murder;

8.) The Court found that the Defendant was emotionally immature, but gave that little weight;

9.) The Court rejected the mitigator that the Defendant was using crack cocaine at the time of the murder;

10.) The Court found the Defendant may have been using drugs and alcohol around the time of the murder, but gave that little weight;

11.) The Court found the Defendant had no significant record of prior criminal convictions, but gave that slight weight;

The United States Supreme Court denied certiorari on March 5, 2001. Reese v. Florida, 532 U.S. 910 (2001).

Mr. Reese filed his Amended Post Conviction Motion on April 1, 2002. A Huff hearing was held in Circuit Court and the lower court entered an order granting an evidentiary hearing on some of the factual claims asserted in Mr. Reese's post-conviction motion and denying the balance. (R. 407). An evidentiary hearing was held in this case on September 28, 2006. The evidentiary hearing was continued and completed on October 19, 2006. After the hearing, both Mr. Reese and the State submitted written closing arguments, (R. 447-490). The lower court denied Reese's Motion for Post Conviction Relief on 6/27/07 (R. 491-499). This appeal follows.

II. TRIAL TESTIMONY – GUILT PHASE AND PENALTY PHASE

The testimony at trial established that John Reese had been together with his girlfriend, Jackie Grier, for approximately seven (7) years before the murder occurred. The murder victim, Charlene Austin, was a close friend of Jackie Grier, (John Reese's girlfriend), (TR.642). There was testimony developed at the trial level that John Rees became very possessive and jealous of the relationship

(TR.645). Several times Jackie Grier thought about leaving Mr. Reese. Mr. Reese felt threatened when that occurred and became emotional (TR.648). The couple met in Anniston, Alabama, where they both worked, and Mr. Reese helped support Jackie and her children. Jackie Grier lost her job and John's paycheck was not enough for the family so Jackie Grier decided to move to Jacksonville, Florida, where she had family (TR.649). John Reese stayed in Anniston, but soon joined Jackie Grier later in Jacksonville, to try to start the relationship again. Jackie Grier suspected John was using drugs (TR.651). Jackie met Charlene Austin (victim) and they became close friends. Charlene Austin was popular among men and she and Jackie began spending lots of time together and would frequently go to clubs together (TR.652). Jackie Grier testified there was tension when Charlene Austin would come by the house and John was there. He felt threatened by the relationship between Jackie Grier and Charlene Austin (TR.653).

Trial testimony also indicated there was domestic violence that occurred between Jackie Grier and John Reese (TR.1002). Charlene Austin and Jackie Grier eventually each met soldiers at the Officer's Club at Fort Stewart, Georgia, where they traveled to on weekends to party (TR.657). Jackie Grier and Charlene Austin went to Georgia the weekend before Charlene was killed. They left on Saturday, January 25th, 1992, and returned on Monday, January 27th, 1992 (TR.619).

On Wednesday, January 29th, 1992, Jackie Grier became worried because she was not able to reach Charlene Austin by phone. She went to Charlene's house and found her body in the bedroom, face down, covered only with a bedspread (TR.629). When Jackie returned home John Reese was in the bedroom. He would not come out and meet Charlene Austin's parents (TR.635).

Crime scene forensic evidence was also introduced at the trial. Press-on nails were found on the coffee table and under the body (TR.719). An electric extension cord was around her neck. The cord was folded in half and looped twice around her neck (TR.740). A palm print was lifted from the footboard of the bed (TR.742). An autopsy performed by the medical examiner Dr. Arruza showed that Charlene Austin had been dead 24-36 hours before the body was discovered (TR.788). She died of strangulation. Dr. Arruza found internal hemorrhaging in the neck areas and a fracture in the neck area (TR.762). Intact sperm was also found in the victim's vagina (TR.772).

The palm print was identified by a finger print expert as similar to John Reese's palm print and Detective Thorwart brought in Mr. Reese for questioning (TR.807). After his rights were read, John Reese stated he had never been in Charlene Austin's house, or had sex with her, and signed a statement to that effect (TR.869-870). After that statement, Detective Thorwart told Mr. Reese his prints had been found inside the house. Jackie Grier was then brought into the interview

room and Jackie Grier told Mr. Reese to tell the truth, and then she left the room (TR.918). John Reese confessed the details of the crime to the detectives. He stated he went to Charlene Austin's house to talk to her about traveling with Jackie all the time leaving him to watch her kids and that it was causing a problem in their relationship. He stated that when he got there no one was at home so he used a knife to open the back door and waited in a closet in the back bedroom (TR.879-920). Charlene Austin then arrived home around four o'clock p.m., and he waited in the closet for her to go to sleep which occurred around ten o'clock (TR.920). He stated he waited for an hour, then came up behind her and grabbed her around the neck and had sex with her (TR.883). He then pushed her to the floor and choked her with an extension cord that was on the floor (TR.886).

During the Guilt Phase, and prior to the Penalty Phase, Mr. Reese was called to the stand. He admitted to breaking into her house and having sex with her and killing her. He testified he found the extension cord, looped it around her neck, and pulled twice, then let go (TR.962). He also testified about his childhood, and in particular, he testified that when he was seven (7) years old he entered his parent's room and a butcher knife lay on the floor broken into two (2) pieces, and he found his mother on the floor stabbed to death. He could not find his father. His father was found the next day (TR.941). His father was sent to a mental institution and John Reese never saw him again (TR.948). Following his mother's death he went

to live with his mother's brother, Marvin Smith, in Anniston, Alabama (TR.948). He was not allowed to play sports or have friends and was whipped frequently (TR.949). When he was in high school, Mr. Reese went to live with his father's brother, Grover Reese, and his wife, Ernestine. Once there he was allowed to play sports, have friends, and allowed to travel to different places. After high school he went to the Job Corps in Kentucky and learned a painting trade, and then returned to Anniston (TR.950). Later he met Jackie Grier at a night club and they struck up a relationship. He often told her she reminded him of his mother because she was always there for him and they were close. (TR.952). He testified he took care of Jackie's kids and loved her and would give her his paycheck (TR.952).

Mr. Reese was often left with the responsibility of caring for the children. Jackie Grier had asked him to go out partying a few times, but she knew that he did not want to do that. He did not care for clubs anymore and wanted to stay home and take care of the house and children (TR.954). John Reese tried out for the Jacksonville Blazers Football Team during the period of time Jackie had been traveling to Georgia with Charlene. Mr. Reese and Jackie Grier starting having communication problems and John would speak very harshly to her and leave the house. During one time that Jackie was traveling to Georgia, Mr. Reese left and stayed with a friend for approximately a month. He returned to Jackie after a month and they discussed trying to stay together (TR.956).

A month or so before the homicide, John Reese was very upset and people kept asking him why he didn't try to find out why Jackie was traveling so much. He decided to talk to Charlene so he went to her house and opened the back door with his pocket knife (TR.959). His intent when he entered the house was to wait until she arrived and talk to her to get information about Jackie. He believed that Charlene was interfering in their relationship because Jackie and Charlene were always together and he felt like Charlene was taking the person he loved away from him (TR.960).

After Mr. Reese broke into Charlene's house he waited for her and watched television. Around 4 o'clock he looked out the window and saw Charlene approaching the apartment and hid in the bedroom. Charlene watched television for awhile and then went to bed (TR.961). Mr. Reese was still debating on how to leave the apartment. He could not leave the bedroom because of the burglar bars, so he waited for her to go to sleep. When he thought she was asleep, he opened the door, saw what he thought was movement and got scared. He ran to her and grabbed her around the neck to keep her from screaming, but was so upset he did not let go. At this point Mr. Reese forced sexual intercourse and then killed Charlene.

After he left the apartment Mr. Reese went to Winn-Dixie and called Jackie Grier to see if she knew anything. Jackie wanted him to get some groceries and

Mr. Reese got home around 7:30 p.m., and ate dinner with Jackie. Mr. Reese was asked what was going through his mind when he was killing Charlene Austin and he replied, "Everything. I was very emotional mentally. I done lost it. To me, it seemed like I had blacked-out, just lost control. Just lost control of the situation." (TR.963). On cross-examination the prosecution asked him why he raped Charlene Austin and he replied, "I don't know, sir. Sir, I don't know how my reaction was sir. I was lost, okay, I was lost, I can't say what…" (TR.976).

After the conviction, the Penalty Phase part of the trial occurred. Dr. Harry Krop, a forensic psychologist, testified during the penalty phase of the trial. He testified that John Reese was of below average intelligence and that he did not have an anti-social personality disorder or other major mental illness (TR.1206). The homicide was out of character for Mr. Reese, but could be explained by a number of factors related to John's traumatic childhood (TR.1208). His father was mentally ill and a paranoid schizophrenic. He became so severely mentally ill that he stabbed Mr. Reese's mother to death. After Mr. Reese met Jackie and had a relationship with her, he became desperate to find an explanation as to why the relationship was not working (TR.1211). His coping skills were not effective. He tended to be dependent on alcohol and drugs and started using crack cocaine regularly four to five nights before the homicide. He was using crack cocaine on the day of the offense (TR.1212). Dr. Krop concluded that John Reese's mental

state was essentially seriously impaired when he killed Charlene Austin, based upon his emotional distress plus the effects of the alcohol and cocaine (TR.1217). Dr. Krop testified that the crack cocaine was immediate and had a dramatic effect on a person's thinking, which intensified whatever emotions were already present (TR.1218). This created poor impulse control. Dr. Krop testified that the murder of his mother by his father was traumatic and contributed to the rape and murder of Charlene Austin. These types of trauma can shape an individual's personality over time (TR.1248).

Certain members of John Reese's family testified during the Penalty Phase of the trial. Christian Cunningham and Dorothy Robinson, John's maternal aunts, described his early years. In January of 1973, John was approximately seven years old when his father killed his mother and his father was sent to a mental institution and later froze to death in an abandoned house (TR.1271). When John Reese, (at age seven), would say his Daddy killed his Momma, the family told him that his mother was not his real mother because he was adopted and they thought this would make him feel better. Afterwards, the oldest brother-in-law was entrusted to take custody of John Reese and was very strict and John was whipped frequently. Around the age of fifteen, John then went to live with Grover and Ernestine Reese (TR.1317). Ernestine testified that she had not seen John Reese while he was living with his mother and father, except at his father's funeral. John Reese and Grover

developed a father-son relationship. John participated in sports and helped around the house. In 1983, John Reese was present when Grover died of a massive heart attack. John performed CPR on him and then watched him die. It was like John Reese had lost another father (TR.1320). John's second grade teacher, Arlene Taylor, also testified that he was a great student in school and she remembered him because he was an outstanding child. She also remembered the trauma he suffered when his mother was murdered. He came to school several days after the murder of his mother to get his records and books. He was very sad and told her that he was going to Alabama on a train and his mother was going on a different train (TR.1380).

III. STATEMENT OF THE EVIDENTIARY HEARING FACTS

Dr. Miller was admitted as an expert in forensic psychiatry. Dr. Miller evaluated John Loveman Reese on May 11, 2004, (R.659). After investigating the case, the file, and interviewing Mr. Reese and reviewing medical opinions and reports by other experts, including the State's expert witnesses, Dr. Miller testified that there was sufficient mitigation from a psychiatric standpoint that further consideration might be given to whatever penalties might come forth as a result of the action in which he was engaged (R.660-661). More significantly, Dr. Miller testified that Mr. Reese was suffering under the influence of an extreme mental or

emotional disturbance at the time of the crime (R.684). This statutory mitigator was not presented to the jury. Moreover, the basis and predicate for this statutory mitigator would be clear to any reasonable jury. Mr. Reese's mother was murdered in front of him by his father, he was the product of a natural mother who was a drug addict, and he was under the influence of cocaine during the night of the crime. The emotional disturbance came from the cumulative effects of long standing stresses in his life resulting in chronic anxiety and depression for which he treated himself with street drugs. That represented the underlying stress and the immediate stressor was that Mr. Reese was threatened with either real or imagined loss of love by object upon which he was dependant (R.684).

It is the holding of psychiatrists and psychologists that any individual at any given point in time is the sum total product of everything they have experienced, especially stressful experiences. Dr. Miller saw stresses in this particular case involving Mr. Reese (R.661). In the Reese case, Dr. Miller found approximately ten (10) stressors that he outlined for the court.

First, Mr. Reese was the product of a natural mother who was a drug addict. The fact that his mother used street cocaine is a stressor of itself in that it produces vascular effects in the brain of the unborn child which have significant effects later on in life.

Secondly, at age seven (7) he was the witness of the traumatic death of his mother at the hands of his father and remembers running for help to find assistance for her and holding her hand.

Third, he went to live with his adoptive mother's brother who was an extremely abusive man and Mr. Reese suffered abuse from his hands, but whom Mr. Reese also witnessed in death and for whom Mr. Reese has guilty feelings, rightly or wrongly.

The fourth stressor was the overwhelming guilt he experienced after witnessing the death of his uncle, who had raised him.

Fifth stressor was that there was no history of him being abusive to animals or of him setting fires or having arsenal tendencies. These features are extremely important in a person who develops anti-social personality.

The sixth issue was that he has been able to establish ongoing and continuous relationships with females for more than 2 years. Normally in the psychiatric field a psychopathic has great difficulty and does not normally hold continuous relationships with females.

Seventh, was that he has held various jobs of pro-social nature for an extended period of time.

The eighth issue was that his criminal history was insignificant in that he only had a history of misdemeanors.

The ninth issue was that he has been given to a conspicuous use of alcohol and intensive use of cocaine.

Finally, during the interview with Mr. Reese, Dr. Miller did not have any indication of Mr. Reese trying to manipulate him or embellishing psychological issues to impress Dr. Miller.

Dr. Miller concluded that his diagnosis was that Mr. Reese does suffer personality disorder but not of an anti-social type. He also believed Mr. Reese showed signs of depression and anxiety which was chronic and long standing (R.663).

Dr. Miller had several opinions regarding Post-Traumatic Stress Disorder. Dr. Miller did not diagnose Mr. Reese per se with Post-Traumatic Stress Disorder, but in his diagnosis of chronic anxiety and depression he, at times, was purely making a distinction without making a real difference in terms of the long term impact that it represented on the developing personality of Mr. Reese (R.664). Dr. Miller's psychiatric opinion also was that Mr. Reese used street drugs because he found a refuge for his psychological pain and suffering and guilt that he experienced as a result of the frequent and persistent trauma in his life. This pattern led him to the point of becoming a dependant addict of cocaine (R.664). At the time of the crime Mr. Reese had six "hits" of crack cocaine which altered his personality for the worse, making him maladaptive showing poor judgment,

impulsivity, and it also produced small hemorrhages in the brain (R.664). Dr. Miller also testified the small hemorrhages in the brain can be reflected in studies that can be done (R.665). He found in the State's expert witness's (Dr. Glenn) report several contradictions. For instance, Dr. Miller was surprised that Dr. Glenn diagnosed Mr. Reese as suffering from a "personality disorder with anti-social features." The anti-social features could not be identified historically and domestically, nor could they be identified in a cross section – he did not have a criminal record, he stuck to jobs, he stayed with the women in his life, he did not have the pre adult configuration of conduct disorder, he did not set fires to things with his rage, did not break into places, did not get into juvenile criminal activity, did not hurt or exhibit cruelty to animals, and he did not try to manipulate the examiner. Therefore, Dr. Miller believed that the anti-social disorder did not have much of a basis because it was not matched up with the historical features (R.665-666). Moreover, Dr. Miller felt that Dr. Glenn's findings were that the indications simply showed people of below average intelligence and not brain damage. Additionally, Mr. Reese had Cluster B features. Cluster B features represents a group of personality disorders that includes borderline personality disorders that were discussed by Dr. Glenn. It included anti-social personality, psychopath, and also included the historical individual, dramatic self-presenter, the actress who comes in and always has to be noticed. Mr. Reese did not show the features of an

anti-social personality. Therefore, Dr. Glenn's opinions did not use basic psychology as a basis for her opinions (R.666).

Dr. Miller testified that Mr. Reese should be easily understood by psychologists and psychiatrists since both look at the product of successive traumatic experiences, loss and abandonment of a natural mother, and that this is something children suffer from all their lives and go through life trying to recreate their lost mother. Once they do recapture someone that represents their mother they do not want to release her. Therefore, Dr. Miller testified that the act had two issues; one of the loss of inhibition by the use of cocaine which reduced frontal lobe function in stopping him from acting, and the driving force being to rid himself of the object that was interfering with his important love relationship or mother-substitute surrogate, and the victim apparently in Mr. Reese's opinion was breaking up that relationship (R.667).

Dr. Miller also testified the MRI imaging of Mr. Reese showed features of the brain called centrum semiovale, which is an area having great presence and is reflected prominently in the frontal and parietal lobes. There were puncture areas of increased density in the right and left centrum semiovale, both of these sectioned. Dr. Miller believed it had meaning because it does occur in a number of cases of individuals who have multiple sclerosis and encephalitis, and it occurs

with toxic exposure like cocaine (R.668). That makes sense because cocaine more likely than not causes damage to the brain.

Judge Charlie Cofer was called as a witness in this case. He testified he was the trial lawyer in the Guilt and Penalty Phases. He testified that the death penalty was not an appropriate sentence in this case (R.657). Judge Cofer also testified that Ron Higbee was co-counsel in the case (R.633). Ron Higbee is also now a judge in the county court for Duval County, Florida. He recalled that the jury voted 8-4 for death and the State argued three (3) aggravating factors and the defense argued one (1) mitigating statutory circumstance, (however, the record shows he waived that as a statutory mitigator). Judge Cofer testified the only one (1) statutory mitigating circumstance was the lack of record. There were no statutory mitigating circumstances presented to the jury regarding Mr. Reese's mental health. Judge Cofer also testified that he called his client Mr. Reese in the guilt phase so he could admit to the jury, in the guilt phase, that he committed the murder and the rape. He testified the strategy was to admit Mr. Reese committed the rape and the murder early in the Guilt Phase, rather than later in the Penalty Phase, to get a head start on presenting mitigation in the case (R.634).

Judge Cofer also testified that he requested a Richardson hearing because Detective Thorwart did not provide his detective notes, which would have helped him establish the fact that Mr. Reese would not have had time for a lengthy

premeditated planning phase (R.635). He also testified that Mr. Reese's adoptive father killed his adoptive mother with a butcher knife in their home and Mr. Reese discovered his mother. The father was then found not guilty by reason of insanity (R.638). He also testified that the State's main witness, Jackie Grier, was charged with a felony, public assistance fraud, but he was not aware of it during Mr. Reese's trial (R.641). Judge Cofer said he would pursue evidence of frontal lobe dysfunction and brain damage if he knew about it (R.642). Judge Cofer admitted that he had no idea that Mr. Reese had an I.Q. of 77 (R.636)

Dr. Harry Krop was then called and testified that he evaluated Mr. Reese and in fact testified in the original trial of Mr. Reese in the Penalty Phase (R.688). After the trial he reexamined Mr. Reese and found through neuropsychological testing that Mr. Reese had impairment of his brain frontal lobe functioning (R.690). Dr. Krop testified that because of the frontal lobe impairment that would be considered organic brain damage (R.691). His diagnosis was referred to as Cognitive Disorder NOS, which basically describes the overt manifestations of brain damage which are measured in Mr. Reese's case by psychological testing (R.695). He further testified that Mr. Reese did not have any major mental illness and that the diagnosis was not inconsistent with a person who had neuropsychological deficits.

Jackie Grier was called to testify but she testified that she was charged with public assistance fraud not during the time of Mr. Reese's trial (R.727-728).

The State called Dr. Glenn who testified that in her neuropsychological findings of Mr. Reese she did not find any evidence of frontal lobe deficit or frontal lobe dysfunction (R.745).

The State also called Dr. Holder, a neuro-radiologist, who testified that he could not make any diagnosis that Mr. Reese had any brain abnormality from the MRI (R.764). Dr. Holder was only testifying from the MRI, and therefore the State's witnesses did not rebut or contradict the testimony of Dr. Miller that Mr. Reese was under the influence of an extreme mental or emotional disturbance at the time of the crime.

Mr. Reese also petitioned for a DNA examination which was denied (R.737). Mr. Reese also moved to declare the death sentence as unconstitutional pursuant to Ring, which was also denied (R.371,491). The court's Huff order limited much of the evidentiary hearing (R.407). Mr. Reese also raised the argument that the prosecutor's closing statements that should have been objected to, were also denied. Mr. Reese's other claims regarding the unconstitutionality of Florida's sentencing law, improper jury instructions, the denial of Mr. Reese's attorneys from the grand jury to determine if constitutional error was present, whether or not electrocution is cruel and unusual punishment, whether or not the

capital sentencing statute is unconstitutional on it's face, whether or not a majority vote rather than a unanimous jury verdict should be the standard, all of which were denied.

SUMMARY OF THE ARGUMENTS

Trial counsel failed to present the statutory mitigating circumstance that Mr. Reese was under the influence of an extreme mental or emotional disturbance at the time of the crime. Trial counsel also failed to present evidence showing that Mr. Reese suffered from frontal lobe impairment and organic brain damage. Judge Cofer, (who represented Mr. Reese at the trial level), admitted in the evidentiary hearing that such evidence would be very important to the jury. Mr. Reese was prejudiced by not having this very important evidence presented to the jury in the penalty phase. While it is possible that a jury could have heard this evidence and still decided on the death penalty, that is not the test. This evidence is sufficient to undermine the confidence in the outcome that was actually reached at the Penalty and Sentencing phase. Judge Cofer testified the death penalty was not appropriate in Mr. Reese's case. His testimony was not controverted.

The rules prohibiting Mr. Reese from interviewing jurors to determine if constitutional error was present violates the Equal Protection Clause. Reese also argues that execution by lethal injection is cruel and unusual punishment. Mr. Reese's jury received inadequate jury instructions and, therefore, the recommended death sentence is unconstitutional. The defendant's capital sentencing scheme is

unconstitutional as applied. The cumulative effect of the procedural and substance errors in Mr. Reese's trial deprived him of a fundamentally fair trial.

ARGUMENT I

MR. REESE'S NEWLY DISCOVERED MENTAL HEALTH EVIDENCE THAT HE WAS UNDER THE INFLUENCE OF AN EXTREME MENTAL OR EMOTIONAL DISTURBANCE AT THE TIME OF THE CRIME AND THAT HE HAD ORGANIC BRAIN DAMAGE SHOULD HAVE BEEN PRESENTED TO THE JURY AND THE LOWER COURT ERRED IN DENYING THIS CLAIM AFTER EVIDENTIARY HEARING. MR. REESE WAS DEPRIVED OF HIS CONSTITUTIONAL GUARANTEED RIGHT TO EFFECTIVE ASSISTANCE OF COUNSEL AT HIS CAPITAL TRIAL WHEN HIS ASSIGNED ATTORNEY FAILED TO ADEQUATELY INVESTIGATE AND/OR PRESENT MENTAL HEALTH EVIDENCE.

A. FAILURE TO PRESENT A VIABLE MENTAL HEALTH DEFENSE

No statutory mental health mitigation was offered at the penalty phase on behalf of Mr. Reese. At the evidentiary hearing, the newly discovered evidence claim that, in fact, Mr. Reese was suffering under an extreme mental or emotional disturbance at the time of the crime should have been granted and the trial court erred below in denying that this claim be allowed. At the post conviction hearing, Dr. Miller testified to the following:

"I don't think I can conceive of him, realistically, as a sadistic rapist who might well deserve the death penalty, and that this is someone who acted on the basis of dynamics, which I have tried to explain here, and was driven by that rather than compulsively to have sexual gratification and a sense of mastery at the expense of vulnerable individuals, be they children, women, or whomever . . . . A child's whose neurological development is incomplete is certainly not held to the levels of responsibility of that of an adult. And an adult who has brain damage, particularly in the frontal lobe is, I think, not held to the same degree of responsibilities. The case gave way that such damage exists in the frontal lobe because the frontal lobe, or the brain, is an integral collection of 10,000 million neurons, the frontal lobe is a repository for the engrames, learned experiences, the neuron pathways and patterns that tend to stop us from acting out on impulses originating at other sources of the brain. Apparently the limbic system, the snake brain that wants to make us reach out and hit someone when they offend us, the frontal lobe says no, put on screeching brakes, you're not going to do that. When the neurons are damaged and we see this in individuals that have atrophy perhaps related to any number of causes, the Alzheimer's being the favored one, these individuals act out and a man might expose himself in public or say dirty words to children or assault children…"

(R.679)

Question: "Is it your opinion Mr. Reese has difficulty or problems associated with impulse control?"

Dr. Miller: "When he uses cocaine I think he does."

Question: "Is it your opinion, you're familiar with statutory mitigation in Florida with regard to the death penalty, correct?"

Dr. Miller: "Yes, sir."

Question: "Is it your opinion that Mr. Reese was suffering under an extreme emotional disturbance at the time of the crime?"

Dr. Miller: "Yes."

Question: "What would that emotional disturbance be?"

Dr. Miller: "Cumulative effects of long standing stresses in his life resulting in chronic anxiety and depression for which he treated himself with street drugs. And the immediate- that was the underlying stress. The immediate stressor being he threatened a real or imagined loss of love object on which he was dependent."

Question: "Would that be Ms. Grier?"

Dr. Miller: "Yes."

(R.684)

Dr. Miller was also asked several questions about his diagnosis and he testified to the following:

Question: "Axis to clinical impression relates NOS with dependent and narcissistic features."

Dr. Miller: "Yes."

Question: "What is NOS?"

Dr. Miller: "Not otherwise specified. That is a hedging sort of position that we are allowed by the grace of the diagnostic and statistical manual for the classification of individuals who have enough a-typical adjustment features that they deserve a personality classification without being specific enough to label them solely as dependent psychopathic borderline schizoid or something of that sort…"

Question: "You mentioned that Mr. Reese does not suffer from any antisocial personality disorder."

Dr. Miller: "In my opinion he does not."

(R.673)

The statutory mental health mitigation that Mr. Reese was suffering under an extreme mental or emotional disturbance at the time of the crime was available to Judge Cofer and he should have presented that evidence to Mr. Reese's jury. Judge Cofer limited the scope of his investigation, failing to present this statutory mitigating evidence.

As Justice O'Connor wrote in Wiggins:

> In this case, as in Strickland, petitioner's claims stems from counsel's decision to limit the scope of their investigation into potential mitigating evidence. Here, as in Strickland, counsel attempts to justify their limited investigation as reflecting a tactical judgment not to present mitigating evidence at the sentencing and pursue alternate strategy instead. In rejecting Strickland's claim, we define the deference owed such strategic judgments in terms of the adequacy of the investigations supporting those judgments;
>
> "Strategic choices made after a full investigation made of law and facts relevant to plausible actions are virtually unchallengeable; and strategic choices made after less than complete investigation are reasonable precisely to the extent that reasonable professional judgments support the limitations on investigation."
>
> Wiggins, at 2535.

Judge Cofer testified he was presently a County Court Judge for Duval County, Florida, but was the trial counsel for Mr. Reese. He recalled that the jury voted eight to four (8-4) for death and recalled the State arguing for three (3) aggravating factors and the defense arguing for one (1) statutory mitigating factor. (waived). Judge Cofer was asked the following questions:

Question: "Just as background, you also had talked to your client, John Loveman Reese, about testifying at trial level?"

Judge Cofer: "Yes, I did."

Question: "And do you recall him testifying during the guilt phase?

Judge Cofer: "Yes, I do."

Question: "Do you recall him testifying and admitting to the murder and the rape during the guilt phase?"

Judge Cofer: "Yes."

Question: "And was there any strategy in doing that at the guilt phase rather than the penalty phase?"

Judge Cofer: "Well, it was primarily to get a head start on presenting mitigation during the case. It was basically a mitigation case."

Question: "Okay, now, you're obviously familiar with the Richardson hearing?"

Judge Cofer: "Yes."

Question: "In fact, you requested a Richardson hearing about the murder occurring at 10:00 p.m.?"

Judge Cofer: "Yes."

Question: "Why was that significant and critical to your defense?"

Judge Cofer: "Then it was significant to my defense because with the longer period of time of John waiting, or reportedly waiting while Ms. Austin was in the house, it tended to establish a higher degree of premeditation or, at least, in planning. So it was very critical because our basic position was that, while John had been in the house for sometime that the act of the sexual battery and the homicide was more of something which was not lengthily premeditated, something that occurred very quickly."

Question: "And you were not shown any detective notes showing it was 10:00 p.m. in his confession?"

Judge Cofer: "No, I remember, if I remember correctly, Detective Thorwart, we had a little interplay during his deposition about the providing of notes. And I don't believe Detective Thorwart provided that." (TR.635)…

Question: "And in your opinion, the evidence of brain damage which is sometimes referred, well, evidence of frontal lobe dysfunction and brain damage, in your opinion would be important evidence for mitigation?"

Judge Cofer: "It certainly is something I would pursue, yes."

(R.642)

Judge Cofer was also asked whether or not, the death penalty was appropriate in Mr. Reese's case, and he answered that it was not appropriate.

Question: "Well, let me ask you this then, is it your opinion then that the death penalty is inappropriate in this case?"

Judge Cofer: "You're asking for an expert opinion or my opinion? My opinion, yes."

(R.657)

Judge Cofer also believed that this was one of the most mitigated death penalty cases that he had seen in a long time. Even so, he did not recall discovering that Mr. Reese had a verbal I.Q. score of 77. (R. 636)

Question: "Okay, and you are probably also familiar with Atkins vs. Virginia that talks about eliminating the death penalty for mentally retarded?"

Judge Cofer: "Yes."

Question: "And usually, generally, they talk about 70 being mentally retarded, do you recall his I.Q. score of verbal being 77?"

Judge Cofer: "No, I don't recall the specific level."

Question: "Did he appear to be functioning to you at a sub-average intellectual level when he talked to you about the case?"

Judge Cofer: "I did not view Mr. Reese as having a great deal of intelligence, but I did not notice any marked deficiencies in that area. He could engage in a conversation, he appeared to understand my discussions and advice about legal issues."

(R. 636)

Judge Cofer did not involve a medical doctor in the preparation of Mr. Reese's case, but did involve Dr. Harry Krop, who is a psychologist. Dr. Krop did not find evidence of brain damage at the trial level because he did not conduct neuropsychological testing.

Question: "And with Dr. Krop, are you aware now that Dr. Krop has found evidence of brain damage from neuropsych testing?"

Judge Cofer: "I've been told that by both yourself and Mr. Siegel."

Question: "Okay. Had you known that at the time, would that be evidence that you would have presented in mitigation at the trial level?"

Judge Cofer: "It probably would have been one of the factors. During that time period, and to tell you the truth, I don't know to the extent that it has gotten present day and what the advances in science have been, but any sort of organic brain problem would be usually something that you would touch upon through experts. "

Question: "And wouldn't that be important for the penalty phase of the trial, evidence of brain damage?"

Judge Cofer: "How important would be something, would have to be weighed by the jury, but it would be something certainly we would present if there was some observable brain damage."

Question: "So, it would be important to present that evidence of brain damage to the jury?"

Judge Cofer: "Yes, I agree with you."

(R. 643)

Judge Cofer, before he became a County Judge, had handled many capital cases. He testified this was one of the more mitigating cases he had handled in some time.

Question: "Judge Cofer, on the last page of your May 19, 1993 letter, you indicate that the acts surrounding the homicide which John committed are quite horrible and yet you state, "I certainly feel this – his history and general demeanor make this one of the more mitigating cases I have handled in quite some time." As you sit here today, do you still perceive that to be the case?"

Judge Cofer: **"**Yes, I do."

Question: "The mitigation that you refer to is the mitigation that you outlined in your letter and what you talked about here today?"

Judge Cofer: **"**Primarily, yes."

Question: "Recognizing that the death penalty proceedings has guilt phase and penalty phase and with the strength of the evidence in the guilt

phase, what were your tactics or trial strategy with regard to the penalty phase?"

Judge Cofer: "Well, I think first and foremost I wanted to demonstrate that John – well, let me back up. In homicide cases, even though sometimes there's overwhelming proof, you have a non-remorseful or recalcitrant client. I view that remorse as a very important non-statutory mitigating factor. And I think we wanted to try to demonstrate to the jury that John was taking and accepting responsibility for what he had done and that he was remorseful for that. And so we wished to develop that certainly we had offered to enter a plea to a non-death disposition, John was ready. And so that was part of the strategy is to use – take some of the sting out of the guilt phase as kind of preliminary penalty phase."

Question: "Recognizing that the same individuals who determine guilt will ultimately make an advisory recommendation to the Court?"

Judge Cofer: "Yes."

Question: "You indicated on direct examination, I believe, that Mr. Reese was remorseful."

Judge Cofer: "Yes."

Question: "And had expressed a desire to accept responsibility for the crime.

Judge Cofer: "Yes."

Judge Cofer did not recall Dr. Krop recommending Mr. Reese undergo neuropsychological testing. (R. 653).

Dr. Krop, a psychologist who was called at the penalty phase in the trial, was then also called in the post conviction phase. Dr. Krop testified he did not conduct a neuropsychological test in the trial below, but did do a neuropsychological test

for the post conviction hearing. Dr. Krop testified after his comprehensive battery of neuropsychological testing that Mr. Reese suffered from frontal lobe impairment and organic brain damage.

> **Question:** "And after your testing did you reach an opinion as to whether there were any frontal lobe dysfunction in Mr. Reese?"
>
> **Dr. Krop:** "The results were consistent with impairment on those tests which generally are associated with frontal lobe functioning."
>
> **Question:** "Okay. And what is a deficit in the frontal lobe functioning?"
>
> **Dr. Krop:** "Well, the frontal lobe is the part of the brain that is responsible for again, the general term would be executive function that would be problem solving, complex planning, impulse control, inhibition, there are certain personality traits that are associated with frontal lobe such as frustration tolerance, things also that have to do with impulse and self-control. Often individuals who have problems with frontal lobe have difficulty stopping after they have started something, sometimes it is actually the opposite and that individual sometimes has problems with motivation and getting motivated and starting. So that's primarily what frontal lobe is associated with, those types of behaviors."
>
> **Question:** "And is frontal lobe dysfunction, is that indicative of brain damage, organic brain damage?"
>
> **Dr. Krop:** "Well, if there is impairment in any part of the brain, frontal lobe included, that would be considered organic brain damage."

(R.691)

Dr. Krop was asked if he had any memory of why the neuropsychological testing was not performed back in 1992 during the trial and he did not have any memory as to why. He did say that since he did not do his neuropsychological testing he did not find any brain damage. Dr. Krop testified that he "messed up"

by not conducting a neuropsychological test for Mr. Reese. This fact illustrates the extent of the ineffectiveness of counsel.

> **Question:** "Okay. Do you have any memory of why the neuropsychological testing was not performed back in 1992?"
>
> **Dr. Krop:** "I don't have a direct recall of that. I looked over my testimony, and in my testimony I believe I indicated that my- the testing and my observations did not reflect brain damage and therefore I did not- in fact, as far as I can remember I probably didn't suggest to Mr. Cofer, or Judge Cofer currently, I did not suggest to him that neuropsychological testing be done. I can't tell you why because even at least in the last ten years or so, out of an abundance of caution, I almost always suggested at least neuropsychological screening, particularly if there is anything in the history, either medical history such as head injuries, which I'm not aware of in this case, but if there's a history of substance abuse which can always lead to possible neuropsychological damage- usual almost always- I almost always will recommend that. So I can only say that I messed up, to some degree by not suggesting that."

(R.700)

Dr. Krop also said that his testimony at the present time would be similar to his testimony in the penalty phase in 1993 except that he would have done the neuropsychological testing and he would have testified that Mr. Reese's serious emotional disturbance was more extreme because of the neuropsychological aspects.

> **Question:** "If we go back and look at the time period in 1992 when you testified, my question to you would be that your testimony in 1992 versus your testimony in 2006, what would the difference between your testimony today be and your trial testimony during the penalty phase of Mr. Reese's case in 1993 be?"

Dr. Krop: "Is this assuming that I had done the neuropsychological testing?"

Question: "Well, you have done the neuropsychological testing?"

Dr. Krop: "Yes, sir."

Question: "Yes, sir."

Dr. Krop: "Well, I would testify very similarly to what I testified to in 2000, I'm sorry whenever it was in 1993,"

Question: "1993, yes, sir."

Dr. Krop: "But I would also indicate when I would be questioned about this serious emotional disturbance, I would still have found he had a serious emotional disturbance at the time in question and it would have been a function of interaction between frustration, low frustration tolerance, the highly charged emotional state he was in, the substance abuse, and the pre-existing neuropsych frontal lobe deficit. So my testimony would have similar but I would have added the- that it probably would have been more extreme because of the neuropsychological aspects. I also probably would have opined independently in terms of potential mitigation that the neuropsychological deficits in and of themselves should be viewed as possible mitigating factors by the trier of the fact because of how they may have contributed over two years in this man's development. And I probably would have addressed those further or developed those further."

(R.723)

In deciding ineffective assistance of counsel claims, this Court reviews legal questions *de novo* and gives deference to the lower courts findings of fact. Reichmann v. State, 777 So.2nd 342,350 (Fla.2000). Mr. Reese argues that the Court's findings are not supported by competent and substantial evidence. Blenca v. State, 702 So.2nd 1250 (Fla.1997). With four (4) jurors voting for a life

recommendation, the Appellant disagrees with the court below and argues that Dr. Miller's testimony was competent, substantial evidence that Mr. Reese was suffering under an extreme emotional disturbance at the time of the crime. In fact, the State presented no evidence to the contrary nor did any of their expert witnesses testify that Mr. Reese was not under the influence of an extreme mental or emotional disturbance at the time of the crime.

Early childhood experiences play a very influential role in criminal behavior and a number of studies indicate that genes, organic processes, and traumatic early childhood experiences from a person's psyche. There is extensive research indicating that "most character formation occurs in the developmental years leading up to the age of 14, when the person can hardly be held responsible for how he or she turns out." Christopher Slobogin, Stephen C. O'Connell, Professor of Law, University of Florida, Levin College of Law, "The Civilization of the Criminal Law," PP.33-35, current working papers, HTTP://www.law.ufl.edu./faculty/publications/workingpaprs.html, (July 14th, 2005).

Complete social histories are important when presenting mitigation to capital juries. Expert witnesses and medical doctors can formulate opinions relevant to a particular case. Professor Haney wrote in 1995 that:

> The social history of the defendant has become the primary vehicle with which to correct the misinformed and badly skewed vision of a capital version… mitigation evidence is not intended to excuse, justify or diminish the significance of what they (i.e., capital defendants) have done, but to help explain it, and explain it in a way that has some relevance to the decision capital jurors must make about sentencing… no jury can render justice in the absence of an explanation. In each case, the goal is to place the defendant's life in a larger social context, and in the final analysis, to reach conclusion that have someone who has had certain life experiences, then treated in particular ways, and experienced certain kinds of psychologically-important events has been shaped and influenced by them.
>
> -Craig Haney, "The Social Context of Capital Murder; Social Histories and the Logic of Mitigation." 35 Santa Clara L. Rev. 547,559-61(1985).

Justice Sauter summarized the holding in Rompilla v. Beard, 125 S.Ct. 2456 (2005), as follows:

> This evidence adds up to a mitigation case that there is no relation to the few naked pleas for mercy actually put before the jury, and although we suppose it is possible that a jury could have heard it all and still have decided on the death penalty, that is not the test. It goes without saying that the undiscovered "mitigating evidence, taken as a whole, might well have influenced the jury's appraisal of (Rompilla) culpability," Wiggins, (citation omitted). (Again quoting Wiggins v. Smith, citation omitted) and the likelihood of a different result if the evidence had gone in is "sufficient to undermine the confidence in the outcome" actually reached at sentencing, Strickland (citation omitted).
>
> Rompilla, at 2469.

The State seems to argue that the jury did hear evidence of childhood trauma and in view of the facts of the case that if also heard that if Mr. Reese was

suffering from an extreme emotional disturbance at the time of the crime and he had frontal lobe dysfunction and organic brain damage the jury still could have decided in the death penalty. That is not the test. This undiscovered statutory mitigating evidence that Mr. Reese was under the influence of an extreme mental or emotional disturbance at the time of the crime and the non-statutory evidence that he had organic brain damage might well have influenced the jury's appraisal of Mr. Reese's culpability and the likelihood of a difference result if they had heard this evidence is sufficient to undermine the confidence in the outcome. Therefore, since the test is whether or not this new evidence is "sufficient to undermine confidence in the outcome" it would clearly mean that this newly discovered evidence of a statutory mitigator and a non-statutory mitigator that he had frontal lobe dysfunction and organic brain damage should have been presented to the jury! This is sufficient evidence to undermine the confidence in the outcome of the death penalty.

In Strickland v. Washington, 466 US 668 (1984), the United States Supreme Court explained that under the Sixth Amendment there must be both 1.) Unreasonable attorney performance, and 2.) Prejudice. Clearly there was prejudice in this case because a statutory mitigator that Mr. Reese was under the influence of an extreme mental or emotional disturbance at the time of the crime and a non-statutory mitigator that he had a frontal lobe dysfunction and organic brain damage

severely prejudiced Mr. Reese in that this evidence is sufficient to undermine the confidence in the outcome since the jury would have taken these new medical findings in considering the death penalty. Four of the jurors voted for life without this important medical evidence.

The lower court's order denying relief as to this claim is grounded in the notion that Mr. Reese's past trial counsel did present a psychologist, Dr. Krop. It ignores the fact that Dr. Krop was not asked to do a neuropsychological test which did demonstrate evidence of frontal lobe dysfunction and organic brain damage. In Wiggins v. Smith, 123 S.CTR. 2527 (2003), the United States Supreme Court expanded on the duties of counsel to conduct a "reasonable investigation". Wiggins, supra, involved a decision by trial counsel to limit the scope of investigation. The trial counsels' role here was to challenge the exculpatory evidence by investigation and preparation particularly in the area of mental health and mitigation. They failed in this regard.

Factual evidence can be rejected, Johnson v. State, 660 So.2d 637, 647 (Fla. 1995), expert opinion testimony cannot be rejected "if the record discloses it to be both believable and uncontradicted, particularly where it is derived from unrefuted factual evidence." Santos v. State, 591 So.2d 160, 164 (Fla. 1991).

Dr. Krop expressed his opinion at the trial that while Reese did not meet the statutory definition of extreme mental or emotional disturbance, his mental state

was “seriously impaired” at the time of the offense, due to his desperation to stay in the relationship with Jackie, fear and anxiety and the effects of cocaine and alcohol. Dr. Krop testified the murder was an impulsive act – an explosion of fear, frustration, and rage – not a cold decision planned in advance (TR.1213, 1217-1220,1251).

The trial court rejected mental impairment as a mitigating circumstance, at the sentencing and held:

> Although the defendant has argued that his actions were the product of rage and passion, this claim is contrary to the actual credible evidence in this case. The defendant broke into the victim’s home, and then proceeded to calmly wait for a period of from eight to ten hours, like a predator waiting for prey beside a water hole in the jungle, anticipating the victim’s return home. Even after the victim was in her home, believing herself to be safe and secure, the defendant hid in a closet and waited for the victim to fall asleep. The Defendant clearly planned to take full advantage of a victim in her most vulnerable situation, so that he could rape and murder her more easily. This was the act of a calm and calculating person with a plan, not a person filled with uncontrollable rage. Dr. Krop testified that the Defendant was not insane, that the Defendant knew the difference between right and wrong, and that he understood the nature and quality of his acts. Dr. Krop also testified that the Defendant had no major mental illness or personality disorder. Dr. Krop did not testify that the Defendant met the requirements of either of the statutory mitigators. On cross-examination, Dr. Krop admitted that he relied heavily on the Defendant’s self-reporting in forming his opinion, that knowing the actual facts in the case would aid him in forming an opinion, and that “[i]t’s not up to me to determine the facts . . .” Dr. Krop acknowledged that under the facts of this case the Defendant’s acts of raping and murdering the

> victim could be consistent with the Defendant having made a conscious decision in advance to commit those crimes. The Court finds that the evidence establishes that the Defendant's acts were, in fact, the result of a conscious decision to commit the acts of rape and murder, and they were not the result of an extreme mental or emotional disturbance that existed at the time of the offense.

The Court concluded the evidence established Reese's acts were the result of a conscious decision and not the result of an extreme mental or emotional disturbance. The Court did not have the benefit of this new medical evidence. A conscious decision to kill is nothing more than simple premeditation, though, Roberts v. State, 510 So.2d 885 (Fla. 1987), cert. denied, 485 U. S. 943, 108 S.Ct. 1123, 99 L.Ed.2d 284 (1988), and a person can commit premeditated murder while that person's capacity to control his behavior is impaired or while he is under the influence of a mental or emotional disturbance.

Moreover, the Trial Court's conclusion that Reese's acts were not the result of an extreme mental or emotional disturbance indicates he did not consider evidence of impairment not rising to the level of "extreme." The trial court erred in rejecting the mental mitigation because it did not rise to the level of an extreme disturbance. Florida law is well settled, however, that "any emotional disturbance relevant to the crime must be considered and weighed by the sentencer." Chesire v. State, 568 So.2d 908, 912 (Fla. 1990). The trial Court's evaluation of this

mitigator thus was based upon faulty reasoning and a misapprehension of the law and the trial Court erred in disallowing Reese's claim that he was under the influence of a mental or emotional disturbance.

The trial court also has misunderstood the record with respect to Dr. Krop's testimony. Dr. Krop did not base his opinion primarily on Reese's self-reporting. In addition to two clinical interviews with Reese and six and one-half hours of psychological testing, Dr. Krop reviewed all the state's evidence in the case, including the depositions of six or seven different police detectives, the deposition of the medical examiner, and Jackie Grier's deposition and trial testimony. Dr. Krop personally interviewed Jackie Grier, interviewed Reese's family members, and reviewed Reese's birth, adoption, public school records, and jail records, and reviewed the psychiatric records of Reese's adoptive father (TR.1202-1204).

What the record shows is that John still felt the relationship had a chance. John's explanation of why he went to Charlene's house that day – to try to find out what was going on with Jackie – was supported by Dr. Krop's testimony and opinion, and by Jackie's description of her relationship with John, and was not refuted by any other evidence.

Passionate obsession or jealous attachment, when relevant to the Defendant's character, record or circumstances of the offense, has been recognized as mitigating in numerous cases. Douglas v. State, 575 So.2d 165 (Fla. 1991);

Farinas v. State, 569 So.3d425 (Fla. 1990); Chesire v. State, 568 So.2d 908 (Fla. 1990) Blakely vs. State, 561 So. 2d 560 (Fla 1990); Fead vs. State, 512 So.2d 176 (Fla. 1987, receded from on other grounds in Pentecost v. State, 545 So.2d 861 (1989); Irizarry v. State, 496 So.2d 822 (Fla. 1986); Ross v. State, 474 So.2d 1170 (Fla. 1985); Herzog v. State, 439 So.2d 1372 (Fla. 1983); Blair vs. State, 406 So.2d 1103 (1981); Phippen vs. State, 389 So. 2d 991 (Fla. 1979); Chambers v. State, 339 So.2d 205 (Fla. 1976); Halliwell v. State, 323 So.2d 557 (Fla. 1975). This clearly shows the predicate for the basis of the diagnosis that Mr. Reese was under the influence of an extreme mental or emotional disturbance at the time of the crime.

This factual evidence which was the basis of a portion the expert opinion testimony should not be rejected since the record discloses it to be both believable and uncontradicted. The trial judge at the evidentiary hearing rejected Mr. Reese's brain damage evidence which could have been used as the mitigating circumstance in the trial below and thus undermined the confidence in the outcome. The expert opinion testimony regarding brain damage should have been allowed in the penalty phase but was undiscovered by the trial counsel. Crook v. State, 813 So.2nd 68 (Fla.2002)(reversing the trial court's rejection of defendant's brain damage as a mitigating circumstance and knowing that this damage was exacerbated by his use

of alcohol and drugs at the time of the murder). DeAngelo v. State, 616 So.2nd 440 (Fla.1993)(describing the defendant's brain damage as a mitigating factor).

Moreover, Mr. Reese's verbal I.Q. of 77 is part of the predicate in establishing the statutory mitigation that was not presented to the jury.

B. FAILURE TO CHALLENGE THE STATE'S EVIDENCE AND TO PRESENT REASONABLE DOUBT EVIDENCE

The State relied on various items of evidence to theorize that Mr. Reese strangled the victim to death in this case and that he raped her, particularly through Mr. Reese's own confession that was presented before the jury. Rather than challenge the State's evidence and present reasonable doubt, Mr. Reese's trial counsel simply called him to the stand in the guilt phase and had him admit that he strangled the murder victim to death and raped the murder victim. The trial counsel's reason for presenting the case in this fashion was to help prove mitigation in an attempt to argue for a life sentence. However, just the opposite occurred in that there was no issue for the jury to decide on guilt. Absolutely no reasonable doubt evidence was presented, and therefore the jury did not make a knowledgeable elective verdict on guilt or penalty.

Trial counsel failed to fully investigate the extent of Mr. Reese's past use of drugs as well as the extent of possible post-traumatic stress syndrome. The post-

traumatic stress syndrome issues came within context when Mr. Reese, as a child, witnessed the murder of his mother by his father. While some non-statutory mitigating evidence was presented at the penalty phase, the trial counsel did not present expert testimony that established a statutory mitigation that he was under the influence of an extreme mental or emotional disturbance at the time of the crime.

ARGUMENT II

THE RULES PROHIBITING MR. REESE FROM INTERVIEWING JURORS TO DETERMINE IF CONSTITUTIONAL ERROR WAS PRESENT VIOLATES EQUAL PROTECTION PRINCIPLES, THE FIRST, SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND THE CORRESPONDING PROVISIONS OF THE FLORIDA CONSTITUTION AND DENIES MR. REESE ADEQUATE ASSITANCE OF COUNSEL IN PURSUING HIS POST CONVICTION REMEDIES.

Mr. Reese notes the procedural rule regarding juror interviews that has been established after the filing of this claim in the court below. Effective on January 1st, 2005, Florida Rule of Criminal Procedure 3.575 provides as follows:

> A party has reason to believe that the verdict may be subject to legal challenge may move the court for an order permitting an interview of juror, or jurors, to say determine. The motion shall be filed within ten (10) days after the rendition of a verdict, unless good cause is shown for the failure to make the motion within that time. The motion shall state the name of any juror to be interviewed and the reason that the party has to believe that the verdict may be subject to challenge. After notice and hearing, the trial judge, upon a finding that the verdict may be subject to challenge, shall enter an order permitting the interview, and setting therein a time and a place for the interview of juror or jurors, which shall be conducted within the presence of the court and the parties. If no reason is found to believe that the verdict may be subject to challenge, the court shall enter its order denying permission to interview.
>
> COURT COMMENTARY: This rule does not abrogate rule regulating the Florida Bar, 4-3.5(d)(4), which allows an attorney to interview a juror to determine whether the verdict may be subject to legal challenge after filing a notice of intention to interview.

The restriction that Florida places on post-trial juror interviews is an equal production violation. Bush v. Gore, 531 US 98 (2000). Therefore, the counsel for the defense is completely treated differently and unequally when compared to journalists, academics, and those lawyers not connected with a particular case. Defense counsel can not interview jurors on behalf of their clients outside the constraints created by Florida Rule of Criminal Procedure

3.575, and the rules regulating the Florida Bar 4-3.5(d)(4). However, academics are allowed to interview capital jurors, post-trial, about a wide range of matters and not just those factors which may be grounds for legal challenge. Moreover, journalists are permitted, without restriction, to interview jurors post-trial. More significantly, Florida Rules of Criminal Procedure 3.575 apply to cases "with which the lawyer is connected" therefore, it can be argued that lawyers not connected with the case are treated differently because the rule does not apply to them.

Therefore, Mr. Reese argues that his jury may have voted differently if exposed to the missing components of his social history and his diagnosis from a medical doctor that he was suffering extreme emotional disturbance at the time.

ARGUMENT III

EXECUTION BY LETHAL INJECTION IS CRUEL AND/OR UNUSUAL PUNISHMENT AND VIOLATES MR. REESE'S RIGHTS UNDER THE EIGHTH AND FOURTEENTH AMENDMENTS OF THE UNITED STATES CONSTITUTION AND THE FLORIDA CONSTITUTION.

The Appellant relies on his pleadings in his motion filed when electrocution was the manner of execution. Mr. Reese also acknowledged that the disposition of his claim may be effected by the outcome of Hill v. Crosby, ___ U.S. ___ (U.S. Jan.25th, 2006), S.Ct. Case 05-8794.

The Eighth Amendment to the United States Constitution prohibits governmental imposition of "cruel and unusual punishment" and bars "infliction of unnecessary pain in the execution of the death sentence." The Florida Department of Corrections revised its lethal injection protocols on August 16th, 2006, calling for three (3) drugs to be administered in succession through an IV tube attached to the inmate. The three (3) drugs were: five (5) grams of sodium pentathal, an ultra-short acting barbiturate which is used to render the inmate unconscious; one hundred (100) milligrams of pancuronium boamide, a paralyzing agent; and two hundred forty (240) milligrams of potassium chloride, which stops the heart. As a backup, a second set of syringes containing the same doses of these same drugs is prepared to in the event that the physician cannot pronounce the inmate dead. In Sims v. State, 754 So.2d 654 (Fla.2000), Mr. Sims was the first death sentence inmate to be executed by lethal injection in Florida and he challenged Florida's lethal injection procedure as a violation of the

Eighth Amendment. This Court denied relief, finding the possibility of mishaps during the lethal injection process insufficient to support a finding of cruel and unusual punishment. New scientific research has been published since 2000 and this same issue was before the court in Lightbourne v. McCollum, Fla.S.Ct. Case SC06-2391. This Court decided in a procuring opinion on November 1, 2007, that Florida's current lethal injection procedure did not violate the Eighth Amendment to the United States Constitution. That case primarily discussed Angel Diaz who was executed by lethal injection but his execution "took 34 minutes, which was substantially longer than any previous lethal injection in Florida" (The Governor's Commission on Administration of Lethal Injection: Final Report with Findings and Recommendations, March 1, 2007; Page 8). Mr. Reese acknowledges that the disposition of his claim is controlled by Lightbourne v, McCollum, however he raises this claim because the United States Supreme Court has not yet decided Hill v. Crosby, *supra*. In the Hill case, Clarence Hill challenged the constitutionality of the three (3) drug sequence that the State of Florida would use to execute him by lethal injection. Hill did not challenge the lethal injection sentence as a general matter but argued instead only to adjoin the State of Florida from executing him in the manner they currently intend. His specific objection was the anticipated protocol

allegedly caused a pursuable risk of gratuitous and unnecessary pain. Hill also conceded that other methods of lethal injection the Department of Corrections of the State of Florida could choose to use would be constitutional. The questions presented under the Hill v. Crosby, *supra*, case were:

1. Whether a complaint brought under 42 U.S.C. Section 1983, by a death sentenced state prisoner, who seeks to stay his execution in order to pursue a challenge to the chemicals utilized for carrying out the execution, is properly recharacterized as a habeas corpus petition under 28 U.S.C. Section 2254?

2. Whether, under This Court's decision in Nelson, a challenge to a particular protocol the state plans to use during the execution process constitutes a cognizable claim under 42 U.S.C. Section 1983?

ARGUMENT IV

MR. REESE WAS DENIED HIS RIGHTS TO COUNSEL UNDER THE SIXTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSITUTION AND THE CORRESPONDING PROVISIONS TO THE FLORIDA CONSTITUTION IN THAT THE JURY RECEIVED INADEQUATE JURY INSTRUCTIONS.

The jury instructions presented to Mr. Reese's jury diminished the jury's responsibility, shifted the burden of proof to Mr. Reese, and were premised on unconstitutionally vague and over broad aggravators. Therefore, the jury's death recommendation of 8 to 4 is, therefore, unreliable. The sentencing judge was required to give "great weight" to the jury's recommendation. By doing this the trial court indirectly weighed the unconstitutional aggravating factors the jury is presumed to have found. Espinosa v. Florida, 112 S.Ct. 22926 (1992); Kearse v. State, 662 So.2d 677 (Fla.1995). This is harmful error.

In Caldwell v. Mississippi, 472 U.S. 220 (1985), the Court held that the suggestion that the responsibility for the ultimate determination of death would rest with the judge presented an intolerable danger that the jury would, in fact, choose to minimize the importance of it's role in recommending life or death.

Mr. Reese's jury was instructed by the court:

> Ladies and Gentlemen of the Jury, it is now your duty to advise the court as to what punishment should imposed upon the Defendant for the crime of First Degree Murder.

Mr. Reese's trial counsel made no objection to the jury instruction. In Grossman v. State, 525 So.2d 833 (Fla.1988), this court held up the rationale

of Caldwell as inapplicable in Florida because the judge, and not the jury, renders the sentence. However, in Ring v. Arizona, 122 S. Ct. 2428 (2002), the holding of Grossman should be examined. In Bottoson v. Moore, 833 So.2d 692 (Fla.2002), Justice Lewis wrote:

> I write separately to express my view in light of the dictates of Ring v. Arizona, it necessarily follows that Florida's standard penalty phase jury instructions may no longer be valid and are certainly subject to further analysis under the United State Supreme Court's Caldwell v. Mississippi, 472 US 320,105 S. Ct. 2633,86 L.Ed.2d' 231 (1985) Holding. In Caldwell, the Supreme Court concluded "it was constitutionally impermissible to rest a death sentence on a determination made by a sentencer who had been left to believe that the responsibility for determining the appropriateness of the Defendant's death rest elsewhere"… There, the court deemed prosecutorial statements to a jury unconstitutional because the State "sought to minimize the jury's sense of responsibility for determining the appropriateness of death"… Following the decision in Caldwell, this Court evaluated the constitutionality of Florida's standard jury instructions… just as the high court stated in Caldwell, Florida's standard jury instructions "minimize the jury's sense of responsibility for determining the appropriateness of death."

The concurring opinion in Ring of Justice Breyer that "the Eighth Amendment requires individual jurors to make, and to take responsibility for, a decision to sentence a person to death" and this establishes that Mr. Reese's death sentence violates his rights under the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution."

The jury instruction regarding sufficient aggravating circumstances violated the due process clause of the Fourteenth Amendment of the United

States Constitution because it relieved the State of it's burden of proof beyond a reasonable doubt that such sufficient aggravating circumstances exist in the evidence which outweighed the mitigating circumstances. This instruction shifted the burden of proof to Mr. Reese to prove that the mitigating circumstances outweigh sufficient aggravating circumstances.

Since the trial counsel did not litigate and preserve these issues, Mr. Reese did not receive effective assistance of counsel to which he is entitled under the Sixth and Fourteenth Amendments of the United States Constitution.

ARGUMENT V

THE CUMULATIVE EFFECT OF THE PROCEDURAL AND SUBSTANTICE ERRORS IN MR. REESE'S TRIAL DEPRIVED HIM OF A FUNDAMENTALLY FAIR TRIAL GUARANTEED UNDER THE FOURTH, SIXTH, EIGHTH, AND FOURTEENTH, AMENDMENTS OF THE UNITED STATES CONSTITUTION.

The number and types of errors in Mr. Reese's guilt and penalty phases, when considered as a whole, virtually dictated the sentence of death. While there are means for addressing each individual error by raising that as an issue, addressing all of these errors on an individual basis will not afford adequate safeguards required by the Constitution against an improperly imposed death sentence. The instances of ineffective assistance of counsel, flawed juror instructions, unconstitutional process, and very important medical evidence regarding statutory mitigating circumstances tainted Mr. Reese's capital proceedings. These errors are harmful. The cumulative effect of these errors denied Mr. Reese his fundamental rights under the Constitution. State v. Diguilio, 491 So.2nd 1129 (Fla.1986); Landry v. State, 620 So.2nd 1099 (Fla.4th DCA 1993); Jackson v. State, 575 So.2nd 181 (Fla.1981)

ARGUMENT VI

FLORIDA'S CAPITAL SENTENCING SCHEME WAS UNCONSTITUTIONAL AS APPLIED DENYING MR. REESE'S RIGHTS UNDER THE FIFTH, SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND TO THE EXTENT TRIAL COUNSEL FAILED TO LITIGATE THESE ISSUES MR. REESE WAS DENIED HIS SIXTH AND FOURTEENTH AMENDMENT RIGHTS TO COUNSEL.

In Ring v. Arizona, 122 S.Ct. 2428 (2002), the United States Supreme Court held that the Arizona statute required the trial judge to determine the presence or absence of the aggravating factors under Arizona law for the imposition of the death penalty, violated the Sixth Amendment right to jury trial and capital prosecutions; receding from Walton v. Arizona, 497 U.S. 639,110 S. Ct. 3047 (1990). Whenever the state makes an increase in a defendant's authorized punishment contingent on the finding of a fact, that fact, no matter how the State labels it or defines it, must be found by a jury beyond a reasonable doubt. A defendant may not be exposed to a penalty exceeding the maximum he would receive if punished according to the facts reflected in the jury verdict alone. The right to trial by jury would be senselessly diminished if it encompassed the fact finding necessary to increase a non-capital defendant's sentence by a term of years (as in

Apprendi v. New Jersey, 530 U.S. 466 (2000)), but not the fact finding necessary to put him to death. Ring, 122 S. Ct. at 2243.

The State will no doubt argue that Ring has retroactive application to Reese's conviction or death sentence. Reese submits that since the issue encompasses conviction and sentence, it can be heard. Ring holds that any fact that renders a person eligible for a death sentence is an element of the offense. If a Judge increases the punishment to death, on a finding of the "the fact", that fact must be found by the jury beyond a reasonable doubt. Clearly, in Reese's case, there was no finding of a fact beyond reasonable doubt and, therefore, the Reese's conviction and sentence violate Ring's holding.

ARGUMENT VII

DEATH SHOULD NOT BE AN APPROPRIATE PUNISHMENT SINCE MR. REESE WAS SUFFERING FROM AN EMOTIONAL DISTURBANCE.

Mr. Reese was diagnosed with NOS with dependent and narcissistic features. He falls within the class of persons who are so much less morally culpable and deterrable than the average murder as to be categorically excluded from being eligible for the death penalty, no matter how heinous the crime. Cf. Roper v. Simmons, 543 U.S. 551 (2005) (holding that the death penalty is unconstitutional for defendants under 18 at the time of the crime); Atkins v. Virginia, 536 U.S. 304 (2002) (holding that the death penalty is unconstitutional for mentally retarded defendants).

The American Bar Association ("ABA") Resolution 122A, which recommends that each jurisdiction that imposes capital punishment implement policies and procedures to prevent severely mentally ill defendants from being executed, was approved August 8, 2006. Given his temporary mental illness, which was demonstrated at the evidentiary hearing through expert witnesses, Mr. Reese is constitutionally protected from execution because the death penalty is an unconstitutionally excessive punishment for Mr. Reese for the reasons delineated in Atkins and Simmons.

In Gregg v. Georgia, 428 U.S. 152, 183 (1976), the U.S. Supreme Court identified retribution and deterrence of capital crimes by prospective offenders as the social purposes served by the death penalty. The Atkins Court ultimately found that neither justification for the death penalty was served by its imposition on mentally ill offenders such as Mr. Reese, as some judges across the country have begun to recognize. Mr. Reese's severe mental or emotional disturbance causes him to suffer from the very same deficits in reasoning, judgment, and control of impulses that lessen his culpability and render the penological justification of retribution ineffective against him. Likewise, the justification of deterrence is not served by executing mentally ill individuals, as severe mental illness can impair an individual's ability to control impulses or understand long-term consequences.

At his evidentiary hearing, Mr. Reese presented evidence of his severe mental or emotional disturbance through the testimony of several experts. Dr. Miller testified Mr. Reese suffered from chronic depression and chronic anxiety (R.672). Dr. Miller concluded that at the time of the offense, Mr. Reese suffered from an extreme emotional disturbance at the time of the offense.

Additionally, Dr. Krop concluded that Mr. Reese suffered from Organic brain damage and frontal lobe dysfunction.

The State will no doubt argue Patton v. State, 878 So. 2d 368 (Fla. 2004), which held that "personality disorders are not mental illnesses." The decisions cited in Patton, do not broadly cover "personality disorders," but specifically refer to antisocial personality disorder.

Capital punishment's twin goals of retribution and deterrence would not be served by executing Mr. Reese. Mentally ill defendants, mentally retarded defendants, and juvenile defendants are similarly situated with respect to the goals served by capital punishment, and because there is no rational basis for distinguishing mentally ill defendants from mentally retarded and juvenile defendants, executing Mr. Reese would not comport with equal protection under the United States and Florida Constitutions. Mr. Reese's severe temporary mental illness renders him ineligible for the death penalty under the Eighth Amendment and the U. S. Supreme Court's reasoning in Atkins and Roper.

CONCLUSION AND RELIEF SOUGHT

The lower court's order denying the 3.850/3.851 motion should be reversed because the statutory mitigating factor that he was suffering under extreme emotional disturbance at the time of the crime was not presented to the jury, nor was the evidence that he had frontal lobe dysfunction and organic brain damage, as well as the other constitutional arguments presented.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing has been furnished to Meredith Charbula, Esquire, Assistant Attorney General, Capital Appeals, Department of Legal Affairs, The Capital, PL01, Tallahassee, Florida 32399-1050; by U.S. Mail this _____ day of March, 2008.

By:_____
Jefferson W. Morrow, Esquire

CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that this Initial Brief complies with the requirements of Florida Rules of Appellate Procedure, Rule 9.210, and has been generated in Times New Roman 14-point .

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