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

REPLY BRIEF OF THE APPELLANT

JEFFERSON W. MORROW, ESQUIRE
Florida Bar No. 369136
1301 Riverplace Blvd.,
Suite 2600
Jacksonville, FL 32207
P: (904)399-5626
F: (904)399-5980

ATTORNEY FOR APPELLANT
JOHN LOVEMAN REESE

PRELIMINARY STATEMENT

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

RECORD CITATIONS

Citations shall be as follows:

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

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SUMMARY OF THE ARGUMENTS

Trial counsel failed to present the statutory mitigating circumstance that John Reese (herein referred to as "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 decide on the death penalty, that is not the applicable test. Such evidence is sufficient to undermine the confidence in the outcome that was eventually 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

JOHN REESE'S NEWLY DISCOVERED MENTAL HEALTH EVIDENCE (SPECIFICALLY, 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 AN EVIDENTIARY HEARING. JOHN 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 PRESENT MENTAL HEALTH EVIDENCE.

A. FAILURE TO PRESENT A VIABLE MENTAL HEALTH DEFENSE

The State solely relies upon this Court's opinion in Darling v. State, 966 So.2d 366 (Fla. 2007) and argues that Darling, supra controls the decision in the case at bar. In that case, the expert defense witness at trial testified that he found no indication of brain damage to warrant a neuropsychological work up and did not recommend neuropsychological testing. Later, at the evidentiary hearing, the defense presented a new doctor who opined that Darling had frontal lobe damage. This Court rejected Darling's claim. This

Court concluded that in the Darling case, the defense counsel was entitled to rely on evaluations conducted by qualified mental health experts citing State v. Sireci, 502 So.2d 1221 (Fla. 1987). In the case at bar, however, the very same expert witness, Dr. Harry Krop, was heard at both the trial level and at the evidentiary hearing. Also distinguishable from the Darling case is that a medical doctor, not a psychologist, testified that, at the time of the offense, Reese was suffering from an extreme emotional disturbance. At first glance, it sounds reasonable to separate these two issues: as it relates to the death penalty, these issues are inseparable. Reese contends these issues have to be argued together because it now proves that a statutory mitigating circumstance was available but not used at the trial level. Moreover, Judge Cofer, who represented Reese at the trial level, testified in his opinion the death penalty was inappropriate in the Reese case. (R.657). Dr. Harry Krop, the psychologist, called both at the trial level and at the evidentiary hearing, later testified that me must have "messed up" by not suggesting neuropsychological testing to trial counsel. (R.700).

Dr. Krop was asked if he had any memory of why the neuropsychological testing was not performed back in 1992 during the trial. He responded that 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. (R.700). This fact illustrates the extent of the ineffectiveness of Reese's defense 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, at the present time, his testimony would be similar to his testimony in the penalty phase in 1993 except that he would have done the neuropsychological testing; thus, 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).

The State also argues that Freeman v. State, 761 So.2d 1055 (Fla. 2000), controls the issue of whether trial counsel was ineffective for failing to present evidence of extreme emotional distress. Reese contends that this was statutory mitigation that could have been presented as a powerful evidentiary tool supporting a life sentence at the trial level. The State incorrectly argues the collateral court denied this portion of the claim because trial counsel did present that Reese's mental state was seriously impaired at the time of the crime. This begs the question that a statutorily mitigating circumstance was not presented at the trial level, and the record supports the same. Dr. Krop, however, did testify that, in his opinion, Reese's mental state was seriously impaired at the time of the offense and trial counsel did not expound upon that evidence. Therefore, it was proven that a statutorily mitigating circumstance could have been easily presented to the penalty phase jury and could have clearly resulted in a life recommendation. Therefore, confidence with the outcome is fatally undermined.

The State also relies on the argument that even if this Court were to find that Reese presented more favorable testimony at the evidentiary hearing, trial counsel is not rendered ineffective because he somehow manages years later to present

more favorable testimony. (See Davis v. State, 875 So.2d 359 (Fla. 2003)). The Davis case is inapplicable because Dr. Krop did testify there was emotional disturbance at the trial level and trial counsel simply did not present it correctly, nor did they expound upon the testimony to present it as a statutory mitigating circumstance which could have clearly resulted in a life recommendation. Thus, Reese has met Strickland's prejudice prong because the testimony was not simply cumulative to that provided by the witnesses at the sentencing. (Rhodes v. State, 33 Fla. L. Weekly, S 190 Fla. March 13, 2008).

The State also argues that Reese presented no significant additional mental mitigation. That argument ignores the testimony of Dr. Miller, a medical doctor, who unequivocally stated that Reese was suffering under an extreme emotional distress at the time of the incident: this proves that a statutory mitigator was not presented to the jury. This undermines the confidence of the outcome.

The trial court's conclusion that Reese's acts were not the result of an extreme mental or emotional disturbance indicates it did not consider the evidence of impairment, thus not rising to the level of "extreme." The trial court erred in rejecting the mental mitigation stating 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 was based upon faulty reasoning and a misapprehension of the law. The trial court erred in disallowing Reese's claim that he was under the influence of a mental or emotional disturbance.

Therefore, the trial court misunderstood the record related to Dr. Krop's testimony. During two clinical interviews and six and one-half hours (6.5 hours) of psychological testing with Reese, Dr. Krop reviewed the State's evidence in the case-in-chief. These included the depositions of seven differing police officers, the deposition of the medical examiner, and Jackie Grier's deposition and trial testimony.

ARGUMENT II

THE RULES PROHIBITING JOHN REESE FROM INTERVIEWING JURORS TO DETERMINE IF CONSTITUTIONAL ERROR WERE PRESENT VIOLATES EQUAL PROTECTION PRINCIPLES OF THE FIRST, SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION. MOREOVER, IT DENIES JOHN REESE ADEQUATE ASSISTANCE OF COUNSEL IN PURSUING HIS POST-CONVICTION REMEDIES.

The current restrictions that Florida places on post-trial juror interviews are an equal production violation. (Bush v.

Gore, 531 US 98 (2000)). Defense counsel cannot 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). Counsel for the defense is placed at unfair advantage disadvantage when compared to journalists, academics, and those lawyers not connected with a particular case. Academics are allowed to interview capital jurors, post-trial, on a wide range of matters and are not limited to those factors which may be grounds for legal challenge. 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, lawyers who are not connected with the case are given more information or opportunity to receive better information because the rule does not restrict them.

Mr. Reese was placed at an fundamental disadvantage by not being able to determine if his jury would have voted differently had they had evidence 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 UNUSUAL PUNISHMENT AND VIOLATES MR. REESE'S RIGHTS UNDER THE EIGHTH AND FOURTEENTH AMENDMENTS OF THE FLORIDA CONSTITUTION AND THE UNITED STATES CONSTITUTION.

The United States Supreme Court recently ruled in Baze v. Rees, 76 U.S.L.W. 4199 (2008), that Kentucky's three (3) drug protocol, a protocol that mirrors Florida's protocol, did not violate the Eighth Amendment's prohibition against cruel and unusual punishment. Reese argued prior to this opinion that Florida's three (3) drug protocol did violate the Eighth Amendment's prohibition against cruel and unusual punishment.

ARGUMENT IV

JOHN REESE WAS DENIED HIS RIGHT 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 State argues that This Court has consistently rejected claims that the standard penalty phase jury instructions violate the dictates of Caldwell v. Mississippi. Reese contends that This Court revisit that issue because of the specific language of the jury instructions. The State heavily relies on Barnhill

v. State, 971 So.2d 106 (Fla. 2007), holding the standard jury instructions fully advise the jury of the importance of its role.

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.

ARGUMENT V

THE CUMULATIVE EFFECT OF THE PROCEDURAL AND SUBSTANTICE ERRORS IN JOHN 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 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 Reese's capital proceedings. These errors are harmful. The cumulative effect of these errors denied Reese his fundamental rights under the Constitution. State v. Diguilio, 491 So.2d 1129 (Fla. 1986); Landry v. State, 620 So.2d 1099 (Fla. 4th DCA 1993); Jackson v. State, 575 So.2d 181 (Fla. 1981).

ARGUMENT VI

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

The State argues Johnson v. State, 904 So.2d 400 (Fla. 2005), that holds that Ring is not retroactive in Florida. The State also argues that the United States Supreme Court, in Schriro v. Summerlin, 542 U.S. 348 (2004), held that the decision in Ring is not retroactive. Reese acknowledges that his conviction and sentence were final when Ring was issued, however, Reese argues that this issue should be reviewed and revisited and that Ring should be retroactive to cases on collateral review.

ARGUMENT VII

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

The State argues that Roper v. Simmons, 543 U.S. 551 (2005), has no applicability to Reese's sentence of death. Reese was not under the age of 18 at the time of the murder, however, by analogy, argues that Roper, supra stands for the proposition that a young defendant falls within a class of persons that are much less morally culpable and deterable than an average murderer and should be excluded from being eligible for the death penalty. Therefore, by analogy, Reese, who was not under the age of 18 at the time of the murder, did have an emotional disturbance at the time of the crime and therefore, was much less morally culpable and deterable than an average murderer and should be excluded for the death penalty.

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 June, 2008.

_____
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 with 12 point Courier New type, a font that is not spaced proportionately.

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JEFFERSON W. MORROW, ESQUIRE
FLA.BAR NO.: 369136
1301 Riverplace Blvd., #2600
Jacksonville, FL 32207
P: (904)399-5626
F: (904)399-5980

Attorney for Appellant
John Loveman Reese