IN THE SUPREME COURT OF FLORIDA

CASE NO. 68,044

DAVID COOK

Appellant,

vs.

THE STATE OF FLORIDA,

Appellee.

* *

AN APPEAL FROM THE CIRCUIT COURT OF THE ELEVENTH JUDICIAL CIRCUIT IN AND FOR DADE COUNTY, FLORIDA CRIMINAL DIVISION

* *

BRIEF OF APPELLEE

ROBERT A. BUTTERWORTH
Attorney General
Tallahassee, Florida

RICHARD L. POLIN
Assistant Attorney General
Department of Legal Affairs
401 N. W. 2nd Avenue (Suite 820)
Miami, Florida 33128
(305) 377-5441

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STATEMENT OF THE CASE

On September 12, 1984, the Defendant/Appellant, **David Cook**, was indicted for two counts of first degree murder, for the August 15, 1984, murders of Rolando Betancourt and Onelia Betancourt, one count of burglary, two counts of attempted robbery and one count of unlawful possession of a firearm while engaged in a criminal offense. (R. 1-4a). The first degree murder counts were charged alternatively as premeditated murder or felony murder. Prior to trial, the Defendant filed a Motion to Suppress Confessions, Admissions and Statements, alleging that the Defendant's statements were not freely and voluntarily given. (R. 51-52). At a pretrial hearing on August 5, 1985, the motion to suppress was denied. (R. 51, 319).

A jury trial commenced on August 6, 1985, in the Circuit Court of the Eleventh Judicial Circuit, In and For Dade County, Florida. (R. 323, et seq.). On August 9, 1985, the jury returned verdicts of guilty as charged on all six counts, reflecting that the burglary and robberies were committed with a firearm. (R. 187-192, 1010-1012). Judgments of guilty were entered on the same date. (R. 193-195).

On August 12, 1985, prior to the commencement of the sentencing phase of the trial, defense counsel requested the appointment of doctors to examine the Defendant's mental

condition with respecting to mitigating factors he intended to argue in the sentencing phase. (SR. 3-11, 13). The trial judge appointed two doctors. (SR. 13, R. 196).

The sentencing phase of the trial commenced on August 13, 1986. (R. 1019, et seq.). At the completion of the sentencing phase, the jury recommended, by a vote of 7-5, to impose the death penalty as to Count I, for the murder of Rolando Betancourt, and the jury recommended, by a vote of 8-4, to impose the death penalty as to count II, for the murder of Onelia Betancourt. (R. 1156-1158). On that date, the trial judge ordered that a presentence investigation be prepared prior to sentencing. (R. 217, 1159).

On October 25, 1985, the trial court imposed the following sentences: as to Count 2, for the murder of Onelia Betancourt, the death penalty; as to Count I, for the murder of Rolando Betancourt, life imprisonment; as to Count 3, for burglary, life imprisonment; as to Counts 4 and 5, for attempted robbery, two 15 - year sentences; and as to Count 6, for unlawful possession of a firearm, a suspended sentence. (R. 218-234). The trial court entered a written order discussing the aggravating and mitigating circumstances set forth in section 921.141(3), Florida Statutes. (R. 224-234). These factors will be discussed at length in the Statement of the Facts and Argument portions of this Brief, infra. On October 29, 1985, an amended sentencing order was

entered for the purpose of correcting two typographical errors in the original sentencing order. (R. 238).

The Defendant thereafter filed a Notice of Appeal, commencing this appeal.

STATEMENT OF THE FACTS

Officer Anita Ellison arrived at the scene of the homicide, a Burger King located at 268th Street and U.S. 1, at 6:00 a.m. on August 15, 1984. (R. 521). All of the doors were locked and the front door was eventually forced in because no one had a key. (R. 522-523). Upon entering, she saw a white male and female lying on the floor. (R. 524). Fire rescue was unable to revive them. (R. 524). The remainder of the store was checked out, and the site was roped off for preservation and investigative purposes. (R. 524). Photographs reflecting the interior and exterior of the Burger King were admitted into evidence as Exhibits 1, 2, and 3. (R. 525-527, 53-55).

Technician Michael McAlhany arrived at the Burger King, had the victim's hands swabbed, prepared a sketch of the Burger King interior, and identified numerous photos of the scene and the surrounding areas. (R. 529-541). The photos included one of the rear of the Burger King (R. 535, 60); one

of the rear exit door and hallway (R. 536; 61); one of the exterior trash dumpster (R. 536, 62); two of the outer area and parking lot (R. 537, 64-65); and one of a hook-type tool found lying in the hallway. (R. 542, 72). The hook-type tool was also admitted into evidence. (R. 543). The dark blue pants worn by the victim, Mrs. Betancourt, were admitted into evidence. (R. 544-545). The technician searched for fingerprint evidence and explained the circumstances under which latent prints might not be found. (R. 545-547). The walls near the kitchen in the hallway were not conducive to processing because of grease residue. (R. 548).

Terrence Quintyn, as assistant manager of the Burger King, stated that Rolando and Onelia Betancourt were the midnight crew. (R. 553). He identified photos of the Betancourts. (R. 553-554). On the night of the murders, he closed up the store at 1:30 a.m., and the Betancourts had not yet arrived. (R. 554-555). The trash had been piled up by the back door. (R. 555). He drove by at 3:30 a.m. and saw the porters cleaning inside. (R. 556-557). The rear door to the store had no handle outside; the door could be opened only by pushing from the inside. (R. 559). He did not give Cook permission to enter. (R. 561).

Rolando Betancourt, Jr., the son of the Betancourts, said that his parents had worked at the Burger King for 3-4 years, from about 2:00 a.m. - 5:00 a.m. (R. 564). They

drove a 1978 Chevrolet Caprice, a full-size car. (R. 564). The son had a paper route, and dropped by the store to exchange his small sports car for his parents larger car, to deliver the papers. (R. 565). He stopped by at 3:30 a.m. (R. 565). His parents opened the backdoor from the inside pushbar. (R. 566). He left his car in the parking lot and took his parents' car. (R. 567). His wife was with him. (R. 568). His parents were alive at about 4:00 a.m., when he left. (R. 568-569). After finishing his paper route at 6:00 a.m., he went to his parents' home, to trade cars again, and when he didn't find them there, he went to the Burger King, where he saw the police and fire rescue units. (R. 569-570).

John Keeler, the manager of the Burger King, arrived between 5:30 and 6:00 a.m., found the two bodies inside and called the police. (R. 571-572). No one other than the victims had permission to enter after closing. (R. 573-574).

David Ervin was a friend of Derek Harrison and heard about the Burger King murders. (R. 579). The day before, while playing basketball with Harrison, he noticed that Harrison had a .38 revolver. (R. 579-581). The day after the murders, Harrison, Cook and Melvin Nairn were at Ervin's home. (T. 581). Cook started to describe what happened at the Burger King. (R. 583). Cook said he was at the Burger King, waiting outside, when he saw the man take out the garbage. (R. 584). The man was pushed back inside and Cook

demanded money. (R. 584). Cook did not say where Harrison and Nairn were. (R. 585). The victims did not give him money and spoke Spanish. (R. 585). The man swung something at Cook and Cook shot him. (R. 585). The woman then started screaming and he shot her too. (R. 586). Cook thought he barely hit her. (R. 586). While at Ervin's home, Nairn asked for the gun so he could do away with it. (R. 587). Harrison went and got it and gave it to Nairn. (R. 587-588). Cook and Nairn then left. (R. 589). In a prior statement, Ervin said Harrison gave the gun to Cook. (R. 590). At trial, Ervin became uncertain as to this. (R. 590). Ervin told one of his friends what he heard about the incident. (R. 592).

On cross-examination, Ervin stated that Derek Harrison was his best friend, and that the gun in question had been stolen by Ervin and Harrison in a burglary. (R. 595-596). Harrison had called him after he was arrested and said he thought that Cook and Nairn would try to pin it on him. (R. 607). On redirect, it was brought out that Harrison said that he and Nairn stayed out by the trash dumpster while Cook went inside. (R. 614).

Dr. Eugene Hunt Scheuerman performed the autopsies on the Betancourts. Mrs. Betancourt had a single gunshot would to the left anterior chest and a bruise over the center, top of the head. (R. 626-627). The bruise did not have an

overlying skin abrasion or color changes and was due to blunt force trauma. (R. 626-627). While the bruise could be from falling down after the shooting, its location was such as to make that unlikely. (R. 627-628). The bruise was consistent with being struck with the handle of a gun or another hard, smooth object. (R. 629). There were also bruises below Mrs. Betancourt's right knee, also due to blunt force trauma, and in an unusual place to come from an unprotected fall. (R. 630-631). These bruises were consistent with being kicked with a shoe. (R. 631). The cause of death was the bullet wound. (R. 632). The bullet was removed from the body. (R. 633). The bullet had a downward trajectory which would be consistent with the victim kneeling while the shooter was standing with the weapon pointed downward. (R. 634).

On cross-examination, the doctor stated that Mrs. Betancourt would not have lost consciousness instantaneously; it would be a matter of seconds to minutes. (R. 649). The time of infliction of the bruises could not be pinpointed, but they were fairly recent, as determined by coloration - the body had not begun to break the blood down, which would take at least a few hours. (R. 650).

On redirect examination he said that Mrs. Betancourt's death would have taken longer, based on the different blood vessels that were affected by the bullet. (R. 653). On recross examination, the doctor stated that a downward shot

was possible, without kneeling by the victims, due to their short heights. (R. 654).

Ray Freeman, a firearms examiner testified that the two projectiles were fired through the same barrel of a revolver, either a .38 caliber or a .357 caliber. (R. 658). Technician Rao gave testimony relating to the handswabs of the victims and gunpowder residue, concluding that Mr. Betancourt's hand was close to the gun when the gun was fired. (R. 666-669).

Derek Harrison testified for the state. He pled guilty to two counts of second degree murder, two attempted armed robberies and burglary and received a 23 year sentence. (R. 672-673). He was at the Burger King with Cook and Nairn. (R. 674). He had a gun from a burglary he previously committed with David Ervin. (R. 674-675). During the evening, Nairn had suggested commmitting a robbery. (R. 675). Cook met them about an hour later. (R. 676). There was no particular plan. (R. 675). First they went to one place, which did not work out. (R. 676). The first place, Church's Chicken, was where Cook used to work. (R. 677). Cook then suggested the Burger King. (R. 677). Harrison had the gun. (R. 677). They parked 2-3 blocks away and walked over and hid behind the garbage dumpster. (R. 678). Harrison put the gun on the grass in front of them. (R. 680). The gun was a .38 revolver. (R. 680). When the back door to the store opened, someone was supposed to rush in and rob it.

(R. 681). Eventually, Harrison saw a sports car with a young couple pull in. (R. 681). The man went to the back door and was let in by an older man. (R. 681). Five minutes later, the younger man came out, and the couple left the sports car in the lot and departed in the Chevrolet. (R. 683). When the older man pushed the garbage out to the dumpster, Cook and Nairn told Harrison to pick up the pistol and rush the man. (R. 685). Harrison was scared and Cook grabbed the gun, ran up behind the man, pushed him inside and the door slammed shut. (R. 686). Neither Harrison nor Nairn went in. (R. 686). Harrison went to the door, which was closed, and he couldn't open it. (R. 687). He heard arguing in Spanish, and Cook asked where the money was. (R. 687). Harrison heard one shot, heard a lady screaming and then heard another shot. (R. 688-689). He ran back to the dumpster and jumped over the fence. (R. 689). Nairn ran, too, and Cook came running out, saying to get the car. (R. 690). Harrison got the gun from Cook. (R. 692). Nairn asked why Cook fired and Cook said the man was "bucking" - i.e., the man tried to hit him with something. (R. 692). Cook said he grabbed the lady around the wrist, but did not say he shot her. (R. 693). Cook said there was a safe, but the porters did not know anything about it. (R. 694). Cook did not get any money. (R. 694). Cook drove Harrison home. (R. 694). Harrison kept the gun and Cook and Nairn left. (R. 696-697). The next day, Harrison heard about the murders on the television, and later saw Cook and Nairn

talking to David Ervin. (R. 698-700). Nairn asked for the gun, and Harrison got it and gave it to him. (R. 701-702, 704). The police came by a few days later. Initially he said nothing, but eventually gave a statement claiming that Cook did the shooting. (R. 707-708).

On cross-examination, Harrison admitted he previously lied when he said he gave the gun to Cook (the day after). (R. 716-717). He also lied when he told Detective Loveland that he brought the gun from a friend. (R. 718). In a prior deposition he said he did not hear Cook say anything inside the Burger King. (R. 725). He said that David Ervin was not at the house when he gave the gun to Nairn; Ervin was on the street and asked whether he gave the gun to Nairn; Ervin didn't hear Nairn ask for the gun. (R. 736-737).

Peggy Hubbard, a court reporter, transcribed Cook's statement on August 25, 1984. (R. 749-750). She identified the statement and said nothing was stated off the record. (R. 750). While she was present, Cook was not threatened or coerced in any way by anyone. (R. 751).

Detective Loveland directed the investigation at the scene of the crime. He identified Mrs. Betancourt's pants and noted the blood residue on the front of the knee areas. (R. 758-759). He received a call from Ricky Davis and then spoke to Harrison, Cook, Davis and Nairn. (R. 760). He did not speak to Ervin until seven months later. (R. 760).

After Loveland spoke to Harrison, (R. 761-763), he spoke to Nairn. (R. 763-764). He then sent Detectives Parr and Borrego to bring Cook in for questioning. (R. 766). When Cook came in, he started asking background questions, and Cook said he could read and write. (R. 765-766). Loveland explained he had information placing Cook at the Burger King, which involved Cook in the shooting. (R. 766). Cook then said he shot the people, but did not plan it. (R. 766). After that statement, Cook was not free to leave and was given his warnings. (R. 766-767).

Cook told Loveland that the three of them were looking for a place to rob and ended up at the Burger King. They hid behind the dumpster and when the man came out with the trash, Cook picked up the gun, got behind the man as the door was opening, shoved the man in, and shut the door. He told the couple to open the safe, and they spoke Spanish and did not understand. The man tried to hit him with a long rod with a hook. Cook shot the man and the woman started screaming. She got down on her knees and he shot her. (R. 771-772).

The formal statement which was then obtained from Cook was read into the record. (R. 775-800). Cook stated that he observed the young couple pull up and switch cars. (R. 784-785). When the janitor came out with the garbage, Cook went in with the janitor. (R. 787-789). Cook pushed him in and asked that the safe be opened. (R. 789). The man did not

speak English. (R. 789). The man then hit Cook with a metal rod with a hook. (R. 790). Cook then shot him. (R. 791). Cook said he shot him in the left arm. (R. 791). Cook said the lady started screaming, fell to her feet and tried to hold Cook. (R. 792). She kept on screaming, and he shot her. (R. 792). She was on her knees, kneeling and facing him. (R. 793). Cook then ran from the store and all three went over the fence, back to the car. (R. 794). Cook gave the gun back to Harrison. (R. 795).

Detective Parr was present when the statement was taken. (R. 836-837). Parr pointed out that the long metal bar with a hook, referred to by Cook, was found at the scene, and was not mentioned in any press releases. (R. 836-838). Thus, only a person inside the store could know about it. Parr further found Cook's statement consistent with physical evidence: Mrs. Betancourt's bloodstained pants and the downward trajectory of the bullet. (R. 838-840). Cook also said how he gained entrance, and facts relating to entry were not issued in any press releases. (R. 843).

The State then rested (R. 848), and motions for directed verdict were denied. (R. 849-850).

Melvin Nairn testified for the defense. Nairn pled guilty to two counts each of second degree murder and attempted robbery and received a 24 year sentence. (R. 853-

855). He did not see any gun while they were hiding behind the dumpster. (R. 857). When the janitor came out with the trash, Cook and Harrison both ran to the door. (R. 858). He did not see Cook enter. (R. 858-859). He did see Cook come out of the Burger King and heard one of them yell, "Let's bail." (R. 859). He did not hear any shots. (R. 859). They then drove Harrison home. (R. 859-860). The next day he went back to get the gun from Harrison, but Harrison did not give it to him. (R. 860). He later said the first time he saw the gun, it was on the ground; the second time, Harrison had it. (R. 861). He did not hear any screams. (R. 863). He said Derek gave the gun to Cook, but he didn't say when. (R. 865).

On cross-examination he said Harrison gave the gun to Cook the morning after the shooting. (R. 873). Earlier in the evening of the incident, while they tried to rob Church's Chicken, Cook remained in the car because he used to work there. (R. 874). At the Burger King, from the dumpster, he could not see the door; the view was blocked. (R. 877). When Nairn stepped to the side of the dumpster, he could see Harrison, but he could not see Cook. (R. 880). He saw Cook emerge from the back door; Harrison was off to the side. (R. 880-881). He never saw Harrison in the store. (R. 880-881). In the car, Cook said the man tried to hit him with something. (R. 883). Cook said he wanted to get the gun back. (R. 884). The defense then rested and a motion for directed verdict was denied. (R. 894-895).

The jury returned verdicts of guilty as charged on all counts. (R. 1011-1012).

Sentencing phase of trial

Prior to the commencement of the sentencing phase, defense counsel requested appointment of two doctors for psychological evaluation regarding mitigating factors. The court granted the request. (SR. 3-13, R. 196).

Defense counsel, during the sentencing phase, presented several family friends and relatives of Cook. Ethel Strong said Cook was not violent and could not have been the leader. (R. 1025, 1028). John Cook expressed the same opinion regarding his brother. (R. 1032). His brother drank beer, but John Cook was unaware of any hard drug problem. (R. 1031). Don Major found Cook to be non-violent and a follower, and said Cook was a substance abuser, but was unsure as to what. (R. 1037-1038). He believed lengthy incarceration to be sufficient. (R. 1041). Mary Baxter could not say anything bad about Cook, did not believe in the death penalty and felt jail was sufficient. (R. 1044-1046). Jose Santa Cruz, Cook's former employer, found that Cook got along well with employees and could not believe Cook was involved in murder. (R. 1049). Julie Major said Cook was like a big brother to her son. (R. 1053).

Rackell Yaro prayed with Cook, who became part of the County Choir for services for inmates and their families. (R. 1057). Cook gave testimony that he found God after his mother's death. (R. 1057-1058). She felt Cook could work with juveniles, who could learn from his experience. (R. 1059). She did not believe in the death penalty. (R. 1060). Joann Bryant, an Evangelist, said that during revival, Cook was saved, but then strayed; he deserved another chance; he could be productive. (R. 1061-1063). Diane Simmons, Cook's sister, said Cook had no problems growing up and was not violent. (R. 1065-1066). He had something to offer the world. (R. 1067). He now accepted Christ, could help others and was a great artist. Id. She said God will be the judge. (R. 1068).

Dr. M. Haber, a clinical psychologist, interviewed Cook that morning. (R. 1068-1069). Cook discussed his life and the offense with her. (R. 1070). Cook told her that on the night of the offense he used cocaine, marijuana and alcohol, as he had done steadily every day for three years. (R. 1070). On that night, he and his two companions had gone to different bars and had two six packs of beer and bought cocaine and he ingested over 20 spoons of cocaine. (R. 1070-1071). This combination of drugs influenced his judgment. (R. 1071). She described this as a serious drug problem. (R. 1072). This combination impairs judgment, makes one act impulsively, makes you do things you would not ordinarily do,

and makes you nervous. (R. 1072). Cocaine makes people paranoid. (R. 1072).

On cross-examination, she did not recall if Cook said the gun went off accidentally. (R. 1073). She did not know why Cook did what he did. (R. 1074). Cook recalled the event, so he knew what he was doing. (R. 1075). He knew that guns kill, but she wasn't sure if he would have picked up the gun but for his drugged state. (R. 1075). The fact that Cook recalled details of the incident meant that he could have a good memory with judgment impaired. (R. 1078). The fact that Cook would not go into Church's, where he once worked, meant to her, that Cook's judgment could have been impaired in deciding to participate in the robbery to begin with. (R. 1079). His judgment could have been impaired to the point where he was doing a robbery, but not to the point where he said he wouldn't go into Church's because they would recognize him. (R. 1080).

The defense then called Cook, who said he used cocaine for 3-4 years, including 17-20 spoons on the night of the offense, together with rum and beer. (R. 1086-1087). He had since become a Christian, helping others, and wanted to rehabilitate himself and others. (R. 1088-1089).

On cross-examination, he said that his friends and relatives did not know he was using cocaine all of those

years. (R. 1095). The devil made him kill the Betancourts. (R. 1099). He didn't remember if Mrs. Betancourt was kneeling. (R. 1100). He claimed he lied about some things to Detective Loveland, including the screaming of Mrs. Betancourt. (R. 1107). In his statement he said that all three decided to commit a robbery but he now contested that. (R. 1110-1111).

Counsel for the State and Defendant then presented closing arguments (R. 1114-1148), the Court instructed the jury (R. 1149-1156), and the jury returned verdicts of 7-5 and 8-4, recommending the death penalty as to Mr. and Mrs. Betancourt, respectively. (R. 1156-1158). A PSI report was requested by the State and ordered by the court. (R. 1159, 217).

Sentencing Order

On October 25, 1985, the trial court entered the sentencing order. (R. 218-234). The death penalty was imposed only for the murder of Onelia Betancourt. The court found five aggravating factors:

> 1. The defendant was previously convicted of another capital felony involving the use or threat of violence to the person. (R. 225).
>
> 2. The murder was committed during the commission of other felonies: burglary and attempted robbery. (R. 226).

> 3. The murder was committed for the purpose of avoiding or preventing a lawful arrest or effecting an escape from custody. (R. 226-227).
>
> 4. The murder was committed for pecuniary gain. (R. 227). The court, aware of the prohibition against doubling 921.141 (d) and (f), treated the two as a single aggravating circumstance.
>
> 5. The murder was especially wicked, heinous, atrocious or cruel. (R. 228-229).

Thus, five aggravating factors were found, and treated as four.

The court found one mitigating factor applicable: that the Defendant had no significant history of prior criminal activity. (R. 229-230, 238). The October 25, 1985 order stated that "[t]he Defendant does not have a significant history of prior criminal activity. The Court finds this circumstance inapplicable." (R. 230). The word "inapplicable" was a typographical error and was corrected in the October 29, 1985 order which stated that "[the] defendant does not have a significant history of prior activity. The Court finds this circumstance applicable." (R. 238). The court found inapplicable all other mitigating factors. The original order of October 25, 1985 stated that there were no mitigating circumstances. (R. 233). The October 29 order corrected this to read" insufficient mitigating circumstances. (R. 238).

Additional relevant facts will be set forth in the argument portion of this brief.

POINTS INVOLVED ON APPEAL

I

WHETHER THE TRIAL COURT ERRED IN DENYING CHALLENGES FOR CAUSE TO TWO PROSPECTIVE JURORS BASED ON THEIR ABILITY TO ADEQUATELY UNDERSTAND ENGLISH.

II

WHETHER THE TRIAL COURT ERRED IN APPLYING AGGRAVATING AND MITIGATING CIRCUMSTANCES IN IMPOSING THE DEATH PENALTY

A

WHETHER THE TRIAL COURT ERRED IN FINDING APPLICABLE THE AGGRAVATING CIRCUMSTANCE THAT THE MURDER OF ONELIA BETANCOURT WAS ESPECIALLY WICKED, HEINOUS, ATROCIOUS OR CRUEL

B

WHETHER THE TRIAL COURT ERRED IN FINDING APPLICABLE THE AGGRAVATING CIRCUMSTANCE THAT THE MURDER WAS COMMITTED FOR THE PURPOSE OF AVOIDING OR PREVENTING LAWFUL ARREST

C

WHETHER THE TRIAL COURT ERRED IN

FINDING INAPPLICABLE THE MITIGATING FACTOR THAT THE MURDER WAS COMMITTED WHILE APPELLANT WAS UNDER THE INFLUENCE OF EXTREME MENTAL OR EMOTIONAL DISTURBANCE

III

WHETHER THE TRIAL COURT ERRED IN INSTRUCTING THE JURY ON THE MANNER IN WHICH TO REACH A RECOMMENDATION REGARDING SENTENCING

SUMMARY OF ARGUMENT

1. Based upon lengthy inquiries, the trial judge was able to determine, within his discretion, that the two prospective jurors adequately understood the English language.

2. The trial court properly found that the murder of Mrs. Betancourt was especially wicked, heinous, atrocious or cruel. The victim first witnessed the murder of her husband and, while kneeling and clutching at the Defendant, was screaming. She had reason to fear that she, too, would be killed, and the final minutes of her life were thus lived in unusual terror. As Mrs. Betancourt witnessed the murder of her husband, and was facing the Defendant, in close proximity, she would be able to recognize the Defendant, and the Defendant admitted this. There was no other motive to explain the murder of Mrs. Betancourt. The medical evidence

as to the influence of drugs on the Defendant was inconsistent with other evidence and, at times, was self-contradictory or highly qualified. The court was free to disregard this as a mitigating factor.

3. The sentencing instructions given to the jury were proper. They did not preclude the jury from deliberating. They told the jurors to carefully consider and weigh the evidence. Appellant never objected to the instructions as given, and this issue has not been properly preserved.

ARGUMENT

I

THE TRIAL COURT DID NOT ERR IN DENYING CHALLENGES FOR CAUSE TO TWO PROSPECTIVE JURORS, AS THE COURT ACTED WITHIN ITS DISCRETION IN CONCLUDING THAT THEIR ABILITIES TO UNDERSTAND THE ENGLISH LANGUAGE WERE ADEQUATE.

Appellant has argued that the trial court erroneously denied two challenges for cause to prospective jurors based on their ability to understand the English language. The trial court has broad discretion in determining the competency of a prospective juror and, in the absence of manifest error, its decision will not be disturbed. Christopher v. State, 407 So.2d 198 (Fla. 1981), cert. denied 456 U.S. 910, 102 S.Ct. 1761, 72 L.Ed.2d 169 (1982); Hooper

v. State, 476 So.2d 1253 (Fla. 1985). A review of the voir dire examination of prospective jurors Sergio and Boan reflects that the trial court did not abuse its discretion in denying the challenges for cause. The trial court, based upon the answers to numerous questions, could properly conclude that these prospective jurors adequately understood the English language.

The examinations of Sergio and Boan are set forth verbatim:

> **JUROR SERGIO:** Your Honor, I don't think I understand this case one hundred percent because of the language. I understand quite- -
>
> **THE COURT:** Are you from Cuba, sir? Are you from Cuba, sir?
>
> **JUROR SERGIO:** Yes.
>
> **THE COURT:** When did you come to the United States?
>
> **JUROR SERGIO:** I came here many years ago. My English is just the one I picked up from the street.
>
> **THE COURT:** It sounds a lot better than my Spanish.
>
> **JUROR SERGIO:** That is what everybody says, but I still, you know--
>
> **THE COURT:** Are you engaged in business, sir?
>
> **JUROR SERGIO:** If I am what?
>
> **THE COURT:** Are you in business? Do you work?

JUROR SERGIO: Oh, I work.

THE COURT: What do you do?

JUROR SERGIO: I am a cab driver.

THE COURT: Do you read the Miami Herald?

JUROR SERGIO: Sometimes I don't even have the chance to.

THE COURT: When you read the Miami Herald, do you read El Herald or the Miami Herald?

JUROR SERGIO: The Miami Herald.

THE COURT: The regular Herald?

JUROR SERGIO: The Miami Herald.

THE COURT: There are two. One is in Spanish. One is in English.

JUROR SERGIO: Yes, there are two.

THE COURT: Which one do you read?

JUROR SERGIO: Sometimes I read the Spanish one. Usually that is the one that I read.

THE COURT: Fine. In our conversation right now is there anything that you didn't understand?

JUROR SERGIO: I don't understand this case about what really happens. Whatever happened in the Burger King up there.

THE COURT: I don't want to use fancy words, but if you do, you would be what they call clairvoyant.

You have not heard any of the evidence, so I cannot imagine you would understand what really the case is. If you are picked as a juror then the lawyers would be able to make opening arguments to you and the lawyers would be able to put witnesses on the stand and that is how you will understand the case.

JUROR SERGIO: Sound different now.

THE COURT: Fair enough. Anybody else?

* * *

JUROR BOAN: I have the same thing. I don't understand but fifty percent. I hear what you say, but it like you explain me because I don't know. What is doubt?

THE COURT: We will get into that a little later on. How long have you lived in the United States?

JUROR BOAN: Eighteen years.

THE COURT: Are you engaged in some business?

JUROR BOAN: No. I am an inspector of an aircraft.

THE COURT: Do you work for a company or Dade County or Federal agency?

JUROR BOAN: No, I work for a company.

THE COURT: What company?

JUROR BOAN: Rolls Royce.

THE COURT: And you inspect aviation engines made by Rolls Royce?

JUROR BOAN: Yes, sir.

THE COURT: They make them in Miami?

JUROR BOAN: Yes, sir. Five years.

THE COURT: You learn something every day. What are the details of your job? What does your inspection consist of?

JUROR BOAN: My inspection is maniflux inspection.

THE COURT: What is that?

JUROR BOAN: It is a very long explain. Magnifluxion inspects parts for cracks or the oil and the metal.

THE COURT: Do you do this with an instrument?

JUROR BOAN: I use an instrument. I use liquid. I use magniflux machines.

THE COURT: You were trained for that job, I take it?

JUROR BOAN: Oh, yes.

THE COURT: Did you receive your training here in the United States?

JUROR BOAN: Certainly.

THE COURT: Was that a long period of training?

JUROR BOAN: Well, it is very hard for me, but I did it.

THE COURT: And the training was in English?

JUROR BOAN: Yes.

(T. 367-371).

Subsequently, the prosecutor questioned Mr. Sergio as follows:

MR. WAKSMAN: . . . Mr. Sergio, have you been understanding what I have been saying?

JUROR SERGIO: I would say almost everything.

MR. WAKSMAN: Okay. you raise your hand if I say something that you miss. You have been in this country

a long time. We would like to have you on the jury.

JUROR SERGIO: Whatever.

(T. 412-413).

Defense counsel then questioned Mr. Sergio at length:

MR. CARTER: Mr. Sergio, I'm not picking on you, sir, because I have an accent myself. I don't know what kind, but I have an accent anyway.

You indicated you have a slight problem with the English language; am I correct?

JUROR SERGIO: Yes.

MR. CARTER: So far you seem to have understood everything that has been said here for the most part; is that correct?

JUROR SERGIO: So far, yes.

MR. CARTER: You know at this point that this is a case that involves first degree murder; is that correct?

JUROR SERGIO: Yes.

MR. CARTER: You have some idea in your head, from the questions that have been asked, what the ultimate consequence of first degree is; have you not?

JUROR SERGIO: Well, as far as I am concerned, first degree murder could be a premeditation or when you, like they explained, robbed somebody and as a result of that you know, somebody dies.

MR. CARTER: Have you understood everything that I have said to you so far?

JUROR SERGIO: So far, yes.

MR. CARTER: Have you understood everything that the Judge has said so far?

JUROR SERGIO: Yes.

MR. CARTER: Now let me ask you this: Since you indicate you have some problem with the language, would you feel comfortable sitting here being tried for first degree murder with a juror sitting there with the understanding of the language that you possess? Would you feel comfortable under those conditions knowing that he may miss -- he may pick up 99.9 percent of everything said and may miss that point one percent that makes a difference. Would you feel comfortable under those conditions?

JUROR SERGIO: Not really. Not really.

MR. CARTER: May I take that to mean that you do not feel that you understand enough of the language to be able to sit here and give him, not a partial, but a completely fair trial?

JUROR SERGIO: I am afraid. One hundred percent-- you know -- I wouldn't understand one hundred percent. So far I understood, but I'm afraid that further I will fail to understand some questions or words and things.

MR. CARTER: Do you feel that you are qualified, based upon your ability to understand, to sit on a jury and make a decision as to what you will hear? Do you feel that you are qualified enough language-wise?

JUROR SERGIO: Not all the way.

MR. CARTER: That is fair enough.

(T. 444-446).

Examination of Mr. Boan then continued:

Mr. Boan?

You did not indicate you had any problem with the language, did you?

JUROR BOAN: A little bit, sir. A little bit.

MR. CARTER: The same question I posed to Mr. Sergio I will pose to you. What would your answer be?

JUROR BOAN: If you talk like that, right now, and another lawyer talk like that, I understand everything what you said.

MR. CARTER: Let me ask you this: Let us suppose, for argument's sake, that two witnesses come into the Courtroom and they spoke with what I, for lack of a better term, call "ghetto lingo."
JUROR BOAN: What?

MR. CARTER: You are lost already? English that sounds like English that should be English, but I don't know what it is. I can understand it, I can understand some of it, but I don't understand what it is. It is a very very thick dialect. Do you think you can pick it up if it were not clear English?

JUROR BOAN: Can I understand?

MR. CARTER: Could you understand?

JUROR BOAN: I don't know.

MR. CARTER: You are able to understand the English language. Would you feel comfortable sitting on a jury knowing you may or may not miss the most important thing that happened in this trial because you did not understand what was said?

JUROR BOAN: Of course not. I don't feel good if I don't understand one hundred percent.

MR. CARTER: Do you think you would be able to say you would understand one hundred percent of everything that occurs here?

JUROR BOAN: Oh, yes. Of course.

MR. CARTER: You would have no problem whatsoever?

JUROR BOAN: No.

MR. CARTER: You are absolutely certain? You are certain about that?

JUROR BOAN: Repeat again. I don't understand.

MR. CARTER: Are you certain about that?

JUROR BOAN: I don't understand.

MR. CARTER: You don't understand that, do you?

JUROR BOAN: No.

MR. CARTER: That words may be used a number of times during this trial. Are you certain, are you sure, are you positive if I were to use the term "Are you certain," you wouldn't know what I was talking about, would you? You would miss the significance of that, would you not?

JUROR BOAN: Yes.

MR. CARTER: If you were on trial instead of this man being on trial, you would not want the juror to miss the significance of anything that your lawyer said, would you?

JUROR BOAN: Yes.

MR. CARTER: You have to speak up. She can't take down a nod of the head. You have to speak up.

THE COURT: I think he said yes. Please make a verbal answer.

MR. CARTER: You wouldn't want the juror to miss anything that happened that was going to help you, am I correct?

JUROR BOAN: Yes, I would like to know what happened.

MR. CARTER: So with that in mind, you wouldn't want to miss anything either, would you?

JUROR BOAN: No.

MR. CARTER: If you miss something then you have not given a completely fair trial, right?

JUROR BOAN: Of course. Right.

MR. CARTER: Do you think you will miss a few things?

JUROR BOAN: Yes.

(T. 446-449).

Based on these examinations, the trial court could properly conclude that the two prospective jurors were capable of understanding the language. They responded intelligently to numerous questions, and on several occasions they indicated that they understood what was being said.

After the challenges for cause were denied (T. 476-476), the court stated that "legal standard is whether in my judgment upon the conversations and colloquy that took place, if they have a substantial and complete understanding of English." (T. 478). Subsequently, pursuant to defense counsel's request for two additional peremptory challenges, the court granted one. (T. 485).

The identical issue was raised in United States v. Rouco, 765 F.2d 983 (11th Cir. 1985). There, a prospective juror said she did not speak English, and demonstrated some difficulty with English during the colloquy with the court. Defense counsel eventually challenged her for cause, and the court denied the challenge. The appellate court upheld the trial court's decision, finding it to be within the exercise of his discretion.

So, too, in the instant case, the record does not reflect any abuse of the lower court's discretion, as the answers of the prospective jurors demonstrated an ability to speak English adequately. As one additional peremptory was given, this Court would have to find error as to both veniremen, before Appellant could claim prejudice; an error as to the challenge of one would not suffice.

II-A

THE TRIAL COURT CORRECTLY FOUND APPLICABLE THE AGGRAVATING FACTOR THAT THE MURDER WAS ESPECIALLY WICKED, HEINOUS, ATROCIOUS OR CRUEL.

The trial court found that the murder of Mrs. Betancourt was "especially cruel, pitiless and without conscience." (R. 229). The court relied on the following facts:

> The store was closed and the three young men lay in wait for one of the victims to open the door and throw garbage away. This Defendant was holding a pistol stolen in a previous burglary by one of the other Defendants. As Mr. Betancourt returned from emptying the trash, this Defendant alone forced his way inside. A struggle ensued. The Defendant demanded the Betancourts give him the combination to the floor safe. The victims replied in Spanish unresponsively, saying they didn't know or couldn't speak English. Mr. Betancourt tried to strike Defendant with a long metal rod. Defendant shot and killed him. Mrs. Betancourt then began to scream. She was 4'11" tall, and abaout forty-four years old. The Defendant, 5'8" tall and heavily muscled, was about twenty years old. She kept screaming, fell to her knees, and put her arms around Defendant's legs. In the Defendant's own words, "she was yelling and screaming, so to quiet her, I shot her." To describe the last moments of Mrs. Betancourt's life one must conclude she endured an inordinate amount of psychic terror. (R. 228).

In determining whether this aggravating factor applies, this court has focused on the infliction of physical pain or mental anguish of the victim. Vaught v. State, 410 So.2d 147, 151 (Fla. 1982). Thus, numerous cases have noted and relied on the victim's anticipation of and fear of impending death. Mills v. State, 462 So.2d 1075, 1080-81 (Fla. 1985); Stano v. State, 460 So.2d 890, 893 (Fla. 1985); Doyle v. State, 460 So.2d 353 (Fla. 1984); Routly v. State, 440 So.2d 1257, 1264-65 (Fla. 1983); Francois v. State, 407 So.2d 885 (Fla. 1982); King v. State, 436 So.2d 50 (Fla. 1983); Lucas

v. State, 376 So.2d 1148 (Fla. 1979); Huff v. State, 495 So.2d. 145 (Fla. 1986). These cases have also noted that the existence of instantaneous death and the absence of prolonged torture do not negate this factor. Vaught supra; Mills, supra.

The relevant facts in the instant case, as to Mrs. Betancourt's mental anguish, include the following: she witnessed the murder of her husband and thus had reason to fear for her own life; according to the Defendant's statement, she was kneeling, at his feet, trying to hold onto his legs, and screaming (R. 792-793); she was facing him at the time (R. 793); the Defendant "was just trying to keep her quiet because she was yelling and screaming." (R. 797). The screaming was corroborated by Derek Harrison. The kneeling was corroborated by the downward trajectory of the bullet and the stains on the knees of her pants. Thus, Mrs. Betancourt's last moments of life were clearly filed with terror and mental anguish. Routly, supra.

In Lucas v. State, 376 So.2d 1148 (Fla. 1979), a murder was deemed cruel, atrocious or heinous where the defendant shot the victim, pursued her into her house, struggled and hit her, dragged her from the house and fatally shot her while she begged for life. In King v. State, 436 So.2d 50 (Fla. 1983), a killing was deemed cruel, atrocious or heinous where the defendant hit the victim on the head with a blunt

instrument and then shot the victim in the head twice. It should be noted in the instant case that Mrs. Betancourt was found to have a recent wound to the top of the head, due to blunt force trauma, which was not likely to have come from falling to the ground. (R. 626-628). The wound was no more than a few hours old (R. 650), and was consistent with being struck by the butt of a gun. (R. 629).

Some cases which have rejected this aggravating factor are instructive due to the factual distinctions. In Riley v. State, 366 So.2d 19 (Fla. 1979), while it was atrocious for a son to see his father's murder, the emphasis is on what the victim felt or suffered. Thus, Mrs. Betancourt, a victim herself (as opposed to a surviving son), witnessed her husband's murder and thus feared for her own life. In Clark v. State, 443 So.2d 973, 977 (Fla. 1983), there was no proof that the victim knew for more than an instant before she was shot, what was going to happen to her. Mrs. Betancourt had reason to fear and know during the struggle the Defendant had with her husband and while she was kneeling and screaming. Maggard v. State, 399 So.2d 973, 977 (Fla. 1981), rejected this factor because there was "no evidence indicating that the victim was aware that she was going to be shot." Evidence of such knowledge obviously exists in this case, and the murder became an execution-style killing.

Pleas for help have likewise been deemed relevant factors. Lightbourne v. State, 438 So.2d 380, 391 (Fla. 1983); Delap v. State, 440 So.2d 1242 (Fla. 1983); Washington v. State, 362 So.2d 658 (Fla. 1978).

In Scott v. State, 494 So.2d 1134 (Fla. 1986), this Court found that the victim's consciousness between two beatings indicated an awareness of the likelihood of death, further demonstrating the stark terror felt by the victim. So too, in the instant case, the screaming of the victim, while clinging to the defendant's knees, after witnessing the murder of her husband, satisfies the criteria of anxiety and fear while anticipating one's own death. Those cases cited by Appellant, in which the "heinous, atrocious and cruel" factor was upheld, involve the same element of fear in anticipation of one's own murder. Cooper v. State, 492 So.2d 1059 (Fla. 1986); Deaton v. State, 480 So.2d 1279 (Fla. 1986); Francis v. State, 473 So.2d 672 (Fla. 1985). Conversely, all cases relied on by Appellant in which this factor was deemed improper involve situations in which the victim did not face the fear of an impending murder. Gorham v. State, 454 So.2d 556 (Fla. 1984)(victim shot in back of head; no facts indicating awareness of impending murder); Kampff v. State, 371 So.2d 1007 (Fla. 1979)(nothing showing fear, knowledge, begging or awareness); Craig v. State, 510 So.2d 857 (Fla. 1987); Teffeteller v. State, 439 So.2d 840 (Fla. 1983). The most recent opinions from this Court have

again found this factor appropriate based upon foreknowledge of the impending killing. Roberts v. State, 510 So.2d 885 (Fla. 1987)(defensive wounds to hands supported finding of heinous, atrocious and cruel); Tompkins v. State, 502 So.2d 415 (Fla. 1987).

Finally, an execution-style killing will also satisfy the requirements of this factor. Smith v. State, 424 So.2d 726, 733 (Fla. 1982); Craig v. State, supra. In Butt v. State, 466 So.2d 1051 (Fla. 1985), this Court found no error in a trial court's conclusion that the position of a victim's body, indicating a shot to the back of the head while kneeling, was indicative of an execution-style killing. Id. at 1054. So, too, in the instant case, the defendant's own statement acknowledged a shooting while the victim was on her knees, clinging to him, and screaming. This, too, must be deemed an execution-style killing.

Accordingly, the trial court properly concluded that the murder was especially heinous, atrocious or cruel.

B

THE TRIAL COURT PROPERLY FOUND APPLICABLE THE AGGRAVATING FACTOR THAT THE MURDER WAS COMMITTED FOR THE PURPOSE OF AVOIDING OR PREVENTING A LAWFUL ARREST.

The trial court found that the murder of Mrs. Betancourt was for the purpose of avoiding or preventing a lawful arrest. (R. 226-227). The court found that the murder was committed to eliminate the only eyewitness to the prior murder of Mr. Betancourt. The Defendant, in his confession, stated that he shot her "to keep her quiet because she was yelling and screaming." (R. 797). This was noted in the sentencing order, and the court deemed this to be an acknowledgment that the Defendant was seeking to eliminate her testimony. (R. 227). Indeed, the Defendant, when questioned as to whether he was afraid she would recognize him, initially said "not really," but then said "[s]he probably would have . . . ." (R. 797). The court found that the victim's "cries for mercy were ignored for the choice of a clean escape from the first murder." (R. 227). The victim, when kneeling, was in close proximity to the Defendant, as she was holding on to him and facing him. Thus, she had a clear opportunity to identify him. (R. 793).

The requirement that "[p]roof of the requisite intent to avoid arrest and detection must be very strong," Riley v. State, 366 So.2d 19, 22 (Fla. 1979), has been met in this case. In Riley, the owners and managers of a business were threatened, bound, gagged and shot, after a robbery. Avoidance of arrest by eliminating witnesses was deemed a proper factor in Riley. The facts of the instant case are even stronger, where the victim witnessed a prior murder and the

Defendant acknowledged she could probably identify him. There was no other plausible reason for the murder.

In Clark v. State, 443 So.2d 973, 977 (Fla. 1983), this factor was established where the defendant made a statement to a cellmate, the victim knew her husband had just been the victim of a felony, the wife was helpless to thwart the robbery and no other motive was readily apparent Recognition of the murderer has long been deemed an adequate factual basis. Lightbourne, supra; Vaught, supra.

In Routly, supra, this factor was upheld where the defendant knew the victim could identify him and no logical reason existed for the subsequent kidnapping and killing of the victim (after a burglary and theft).

Cases rejecting this factor are instructive for the purpose of noting distinctions. In Herzog v. State, 439 So.2d 1372, 1379 (Fla. 1983), this Court noted:

> The State argues that the defendant killed the victim with the intent of avoiding arrest for the crime of aggravated battery, which occurred sometime previous to the homicide. This argument may have merit if the facts supported a finding that a previous aggravated battery occurred, and that the motive for the homicide was to avoid arrest. However, the trial court did not so find, nor do we find evidence in the record to support such a conclusion. (Emphasis added).

In the instant case, the prior murder, (and other felonies), were clearly found to exist, contrary to the battery in Herzog which may not have occurred.

In Menendez v. State, 368 So.2d 1278 (Fla. 1979), in which a killing followed a robbery, there is no indication that the victim had an opportunity to recognize or view the murderer's face, and the possibility existed that the murder could have occurred due to resistance by the victim. Such possibilities are excluded in the instant case.

In Rivers v. State, 458 So.2d 762 (Fla. 1984), a waitress, shot when fleeing a restaurant robbery, may not have been in a position to recognize or clearly view the felon. Likewise, in Armstrong v. State, 399 So.2d 953 (Fla. 1981), the medical examiner could not say whether the victim was below, above or behind the murderer, thus rendering indeterminate the likelihood that the victim could identify the accused.

The instant case presents more than the fact that the victim might identify the assailant, as was the case in Bates v. State, 465 So.2d 490 (Fla. 1985), as the Defendant himelf acknowledged that the victim could probably identify him, and terminating the victim's screaming, the purpose admitted by the Defendant, served to lessen the likelihood of attracting attention from motorists or residents in the vicinity.

Thus, this factor was properly relied on by the court. See also, Oats v. State, 446 So.2d 90 (Fla. 1984); Fokal v. State, 11 F.LW. 348 (Fla. July 17, 1986); Cooper v. State, 11 F.L.W. 352 (Fla. July 17, 1986).

In the event that either of the challenged factors were deemed inappropriate, the strength of the remaining reasons would still suffice to uphold the death penalty. Randolph v. State, 463 So.2d 186 (Fla. 1984); Vaught v. State, 410 So.2d 147 (Fla. 1982); Jackson v. Wainwright, 421 So.2d 1385 (Fla. 1982); Jacobs v. State, 396 So.2d 1113 (Fla. 1981).

Appellant has not attacked the remaining aggravating factors and their propriety should be briefly noted; they are therefore deemed valid. Moreover, the trial court's finding of one mitigating factor, that Appellant had no significant history of prior criminal activity, was in reality inapplicable, as other offenses were committed just prior to the murder of Mrs. Betancourt. Those offenses negate this mitigating factor. "Prior" mean prior to sentencing. Ruffin v. State, 397 So.2d 277, 283 (Fla. 1981). In Echols v. State, 484 So.2d 568, 576, 577 (Fla. 1985), convictions for offenses committed concurrently with the capital crime were used to negate this mitigating factor. Thus, this Court noted that in mitigation the trial court erroneously found the absence of a significant history of prior criminal activity, and then proceeded to hold that the aggravating

factors clearly outweigh the mitigating factors such that no reasonable person could differ. That would obviously hold true here, as well, where the only mitigating factor was found in error.

C

THE TRIAL COURT CORRECTLY FOUND INAPPLICABLE THE MITIGATING FACTOR THAT THE MURDER WAS COMMITTED WHILE APPELLANT WAS UNDER THE INFLUENCE OF EXTREME MENTAL OR EMOTIONAL DISTURBANCE.

Appellant relies on the testimony of Dr. Haber to establish this mitigating factor. Dr. Haber's testimony that Appellant judgment was impaired by alcohol, marijuana and cocaine and that he was a massive substance abuser, is contradicted by other testimony. Some of Appellant's other witnesses during the sentencing phase said that, if anything, Appellant just drank some beer. (R. 1031-1032). None could testify as to any serious problem with hard drugs. While Appellant told Dr. Haber that he used a large quantity of cocaine on the night of the offense, his statement to the police made no reference to any cocaine use. The Appellant in his confession , stated that all three cohorts decided to commit the robbery; it was an idea of the entire group. (R. 90). The Appellant's confession reflects a vividly detailed recollection of the incident, following a logical thought

process, as was noted by the trial judge. (R. 230). Dr. Haber stated that Appellant knew that guns kill (at the time of the incident)(R. 1075), and she further said that it is difficult to tell from a person's confession what his mental condition was at the time. (R. 1078). The fact that Appellant did not want to enter Church's (the first intended robbery site), because he used to work there and might have been recognized, qualified Dr. Haber's opinion as to the impairment of Appellant's judgment. (R. 1079-1080). She said the impairment of judgment "chances over time," thus reducing her own conclusions to speculation as to any given time during the course of the night. (R. 1080).

As noted in Stano v. State, 460 So.2d 890, 894 (Fla. 1984), "[f]inding or not finding a specific mitigating circumstance applicable is within the trial court's domain, and reversal is not warranted simply because an appellant draws a different conclusion." The trial court resolves evidentiary conflicts and that resolution is upheld if based on substantial competent evidence. Id. In Stano, two doctors found Stano was under the influence of extreme mental or emotional disturbance, a third doctor could not answer the question, and the trial court was upheld in refusing to find that to be a mitigating factor. See also, Martin v. State, 420 So.2d 583 (Fla. 1982); Johnson v. State, 442 So.2d 185, 189 (Fla. 1985).

Additionally, the judge and jury were free to grant the doctor's testimony little or no weight. As set forth in Lucas v. State, 376 So.2d 1149, 1153-1154 (Fla. 1979):

> Appellant next argues that the evidence supports the existence of at least two mitigating circumstances which the trial court failed to take into consideration. During the sentencing hearing, defense counsel produced a psychiatarist who testified that appellant knew right from wrong, but suffered from a sociopathic personality resulting in defective judgment. Other witnesses testified to appellant's abnormal appearance and behavior on the evening of the shooting. Appellant further contends that he was under extreme mental or emotional disturbance at the time of the commission of the offense. . . . In response, the State argues that it lies within the province of the trier of fact to weigh the evidence presented. We agree. The jury and the judge heard the testimony, and apparently concluded that the testimony should be given little or no weight in their decisions. We find nothing in the record which compels a different result.

This Court has recently reaffirmed that it is within the trial court's discretion to determine whether sufficient evidence of a particular mitigating circumstance exists and, if so, what weight should be given to it. Nibert v. State, 12 F.L.W. 225 (Fla. May 7, 1987). See also, White v. State, 446 So.2d 1031 (Fla. 1984).

The trial court specifically noted that he took "into account the conflicting testimony of the Defendant who maintains he was a massive substance abuser of catholic tastes at the time of these murders, and that of his relatives and friends that he was a teetotaler and abstainer from all controlled substances." (R. 230).

Thus, the court acted properly in rejecting this factor.

III

THE TRIAL COURT DID NOT ERR IN INSTRUCTING THE JURY ON THE MANNER IN WHICH TO REACH A RECOMMENDATION REGARDING THE SENTENCE.

Appellant has argued that the trial court's sentencing instructions to the jury were improper because the jury was instructed to adhere to its first and only "single ballot" and because "nothing in the court's instructions directed, or even suggested that the members of the jury should interact or communicate with each other at all in reaching the jury's sentencing recommendation." (Brief of Appellant, p. 34). A thorough review of all of the relevant instructions, as given, reflects that Appellant's characterization of the instructions, as quoted above, is in error.

The instructions advised the jury:

In these proceedings it is not necessary that an advisory sentence of the jury be unanimous. Your decision may be made by a majority of the jury.

The fact that the determination of whether a majority of you recommend a sentence of death or a sentence of life imprisonment in this case would be reached by a single ballot on each case.

Now please remember that that should not influence you to act hastily or to be without due regard for the gravity of these proceedings.

Before you ballot you should carefully weigh, sift and consider the evidence, all of it, realizing that a human life is at stake and bring to bear your best judgment in reaching your advisory sentence.

If a majority of the jury determines that David Cook should be sentenced to death, your advisory sentence on Count One should be or will be a majority of the jury by a vote of-- put in the number-- advise and recommend to the Court that it impose the death penalty on David Cook.

On the other hand insofar as Count One is concerned, by six or more votes the jury determines and recommends to the Court that it impose a sentence of life imprisonment upon David Cook without possibility of parole for 25 years.

Now please remember there are four verdict forms here. Two a piece to Count One. Two a piece to Count Two.

You will now retire to consider your recommendation.

When seven or more of you are in agreement as to what the sentence

> should be recommended to the Court, that form of recommendation should be signed by the foreman and returned to the Court.
>
> (T. 1153-1154)(emphasis added).

After a sidebar conference, the judge continued:

> Okay. Let me amend my last sentence, please. You will now retire to consider your recommendation. When six or more are in agreement as to what sentence should be recommended to the Court then you shall return to the Court with the verdict signed.
>
> (T. 1154-1145).

As to Appellant's contention that the court's instructionsd do not even suggest interaction among the jurors, the above-emphasized portions dealing with carefully weighing, sifting and considering the evidence, without acting hastily, totally belie Appellant's argument. These instructions were totally consistent with delibertions and discussions among the jurors. This is all the more true after the sentencing jury has just previously gone through deliberations in the guilt phase and is aware of its ability to deliberate and discuss the relevant issues. With respect to Appellant's emphasis on the "collective judgment" language form McClesky v. Kemp, 481 U.S. ___, 95 L.Ed.2d 262, 290 (1987), the given instructions herein told the jury to "bring to bear your best judgment in reaching your advisory sentence." As "your advisory sentence" obviously can refer only to one collective recommendation, the immediately prior reference to "your best

judgment" is likewise referring to the "collective judgment" of the jury.

Appellant also attacks the language in the instruction that the jury "shall return" as soon as six or more jurors are in agreement. Appellant argues that this removes the deliberative process:

> Obviously, out of twelve jurors selecting between only two choices, six or more of them necessarily would have to agree after the first ballot was taken. Accordingly, the trial court's instructions both singularly and together took from the jury its deliberative function and bound the jury to its first and only ballot. (Appellant's Brief, pp. 34-35).

There are several problems with this analysis. First, the ballot could have undecided votes, thereby compelling further deliberations absent six in agreement. Second, the argument ignores the above-quoted instructions calling for careful consideration and an absence of haste. Third, it ignores that the jury, based on deliberations on guilt, was aware of its deliberative role.

Next, it should be noted that the instructions as given are essentially the same as the standard instructions. Indeed, the standard instructions refer to a single ballot, which, if it results in a recommendation by six in agreement, should be returned to the court. See, Florida Standard Jury Instructions in Criminal Cases, pp. 81-82.

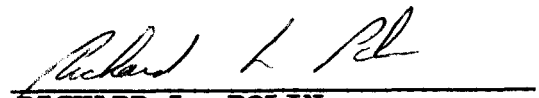
Finally, defense counsel never objected to any of the instructions now being attacked. As such, this issue has not been properly preserved for appeal. Ray v. State, 403 So.2d 956 (Fla. 1981).

CONCLUSION

Based on the foregoing, the judgments and sentences should be affirmed.

Respectfully submitted,

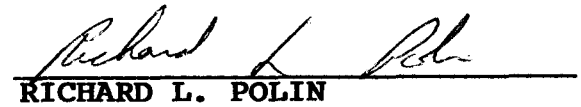
ROBERT A. BUTTERWORTH
Attorney General



RICHARD L. POLIN
Assistant Attorney General
Department of Legal Affairs
Ruth Bryan Owen Rohde Building
401 N. W. 2nd Avenue (Suite 820)
Miami, Florida 33128
(305) 377-5441

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing **BRIEF OF APPELLEE** was furnished by mail to GEOFFREY C. FLECK, FRIEND & FLECK, Suite 106, 5975 Sunset Drive, Miami, Florida 33143, on this 18th day of November, 1987.



RICHARD L. POLIN
Assistant Attorney General

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