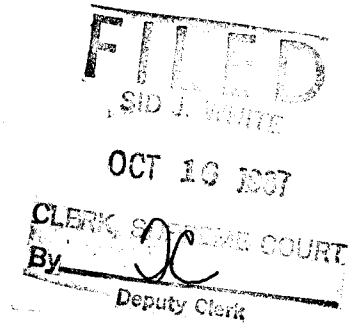
IN THE SUPREME COURT OF FLORIDA

CASE NUMBER: 68,044



DAVID COOK,

Appellant,

vs.

THE STATE OF FLORIDA,

Appellee.

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

INITIAL BRIEF OF DAVID COOK

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STATEMENT OF THE CASE

The Appellant, David Cook, was the defendant in the trial court and the Appellee, the State of Florida, was the prosecution. The parties will be referred to as they appeared below. The symbol "R" will be used to designate documentary evidence and pleadings contained within the Record on Appeal. "TR" represents the transcript of trial proceedings from voir dire to verdict. A hearing held on the defendant's Motion to Suppress will be described as "Supp.". The sentencing phase of the defendant's trial will be represented by the symbol "Sent". The actual sentencing hearing, not yet located at the time of the preparation of this brief, shall be added, when prepared, as a supplemental record described as "S.R.". All emphasis is supplied unless otherwise indicated.

On September 13, 1984, the defendant was charged in a six count indictment with two counts of first-degree murder, burglary, two counts of attempted robbery, and unlawful possession of a firearm while engaged in a criminal offense. [R 1-4a]

Prior to trial, the defendant filed a Motion to Suppress his post-arrest confession. [R 51-52] After conducting an evidentiary hearing on August 5, 1985, the trial court denied the defendant's motion. [TR 247-319]

A trial by jury commenced on August 6, 1985. During jury selection the defendant challenged two jurors for cause who affirmatively expressed their inability to fully comprehend the English language and to understand the trial proceedings. [TR

476-478] The trial court denied the defendant's request and, although granting one addition peremptory challenge, denied the defendant's challenges for cause as well as his request for another peremptory challenge. [TR 486] At the conclusion of the state's case and at the conclusion of all the evidence, the defendant moved for judgments of acquittal which the trial court denied. [TR 849-850, 894-895]

The jury ultimately returned verdicts finding the defendant guilty as charged. [R 187-192; TR 1010]

A sentencing hearing was conducted on August 13, 1985. The state presented no evidence. At its conclusion, the jury recommended, by a vote of seven-to-five the imposition of the death penalty for the homicide of Rolando Betancourt and eight-to-four the death penalty for the homicide of Onelia Betancourt. [TR 1155] The trial court, after making written findings, sentenced the defendant to life imprisonment for the shooting death of Rolando Betancourt but to death by electrocution for the homicide of Onelia Betancourt. [R 218-234; S.R.] On the remaining counts of the indictment, the trial court sentenced the defendant to consecutive terms of life imprisonment including a twenty-five year minimum mandatory term of imprisonment for armed burglary, consecutive terms of fifteen years imprisonment for each count of attempted robbery, and a suspended sentence for unlawful possession of a firearm while engaged in a criminal offense. [R 234] On October 29, 1985, the trial court entered an "Order Amending Sentencing Order of October 25, 1985, to Correct Typographical Errors" in which it expressly found

applicable the mitigating circumstance that the defendant did not have a significant history of prior criminal activity and that there were "insufficient mitigating circumstances, rather than no mitigating circumstances" to justify other than the imposition of the death penalty. [R 238]

The defendant filed a timely Notice of Appeal on December 17, 1985. [R 239] This appeal follows.

STATEMENT OF THE FACTS

In the early morning of August 15, 1984, Melvin Nairn, Derek Harrison, and the defendant David Cook, decided to "make some money" by committing a robbery. Without any particular plan, the trio decided to rob a Church's Chicken the defendant had worked at previously. Because there was too much light and it "did not feel right", the plan was abandoned in favor of a Burger King at 26801 South Dixie Highway, Naranja, Florida. [TR 563, 675-677] Harrison brought with him a gun he had stolen in a previous burglary committed with one David Ervin two months earlier. [TR 675]

Cook, Nairn, and Harrison parked their car two or three blocks away, exited, walked to the Burger King and hid behind the garbage "dumpster." [TR 678-680] They planned to wait until someone within the premises opened the back door so they could "rush inside the place and rob it." [TR 681] The gun, meanwhile, a .38 caliber revolver, remained on the ground in front of them. [TR 680]

While they waited, Rolando Betancourt, Jr., the son of Rolando and Onelia Betancourt, arrived in his small sports car to exchange his car for his parent's larger stationwagon in order to work his newspaper delivery route. [TR 565-566, 682-683]

Sometime after 4:00 a.m. and after the son had left, Rolando Betancourt, Sr., opened the door pushing a container of garbage to the dumpster. [TR 566, 684-685] According to Harrison, Cook grabbed the gun, ran up to Betancourt, and pushed him inside. Nairn and Harrison remained outside. [TR 686] Harrison moved

closer to the door, heard voices arguing in Spanish, and heard Cook repeat, "Where the money at? Where the money at?" [TR 687-688] Thereafter, according to Harrison, he heard a shot. The arguing ceased but he heard a woman screaming. [TR 688] He did not hear Cook say anything before he heard a second shot which ended the screaming. [TR 689] Harrison ran away, joined by Cook and Nairn. Cook retrieved the car which they all entered and went home. Harrison admitted that at some point after leaving the Burger King he regained possession of the firearm. [TR 691] According to Harrison, Cook later explained that Betancourt had tried to "buck" and had attempted to hit him with something and that he had then shot him. Cook said nothing about having shot Mrs. Betancourt. [TR 692-693] Harrison hid the gun under his mattress. [TR 697]

Harrison was initially charged with two counts of first-degree murder, armed burglary, and two counts of armed robbery. [TR 671] In exchange for his plea of guilty to the lesser offenses and two counts of second-degree murder and in consideration of his agreement to cooperate with the police in their prosecution of David Cook, Harrison was sentenced to twenty-three years imprisonment. [TR 672, 746]

The investigation of the Betancourt homicide reached a turning point upon the receipt of an anonymous telephone call by Detective Kenneth Loveland of the Metro-Dade Police Department. [TR 754-759] Thereafter, the investigation quickly lead the police to co-defendants Harrison and Nairn who, upon questioning, admitted their complicity in the robbery/homicides and implicated

the defendant. [TR 761-764] On August 25, 1984, the defendant was invited to the police station where he was engaged in conversation. He was not placed under arrest, according to Loveland, until after being accused of having planned and committed the two murders and he admitted, "I shot those people but I didn't plan it." [TR 766] Thereafter, having been advised of his Miranda rights, the defendant executed a recorded confession. [TR 768, 770; 775-800; state's exhibit 36] The defendant was thereafter prosecuted giving rise to his conviction and sentence of death.

SENTENCING PHASE

On August 13, 1985, four days after returning its verdict, the jury was reconvened to determine its advisory sentence.

The state presented no evidence. [TR 1022]

The defendant presented the testimony of nine witnesses who attested to the defendant's previous exemplary, non-aggressive, non-violent character. [TR 1024-1067] The defendant was described as a follower rather than a leader who was good-hearted, a good employee, who got along well with others, and was both intelligent and artistic. [TR 1032, 1037, 1044, 1049, 1053-1055, 1063, 1066-1067]

The testimony demonstrated the defendant to have been twenty years old at the time of the crime. [R 323] He had no prior criminal record. [TR 1071] Born the youngest of ten children, the defendant had suffered the death of his mother in March of that year. [TR 1034, 1065] He was married to his wife of two years and had two infant children, a boy, David, Jr., and a girl, Lajeana. [TR 1086] His marriage was described as happy. [TR 1062] One witness, the administrator of "jail ministries", described the defendant's participation while in jail in the Dade County Choir. She described the defendant's gift for teaching and described how he had moved grown men to tears by his presentations in church. [TR 1057]

Clinical psychologist Merry Sue Haber testified on behalf of the defendant. [TR 1068 et. seq.] She described the defendant as an habitual daily abuser of cocaine, marijuana, and alcohol

for the prior three years. [TR 1070] On the night of the robbery the defendant had been drinking at various bars, had shared two six-packs of beer with his companions and had ingested an extraordinary amount of cocaine. [TR 1070-1071] The defendant, himself, described having shared a fifth of Bacardi Rum, beer, and seventeen to twenty spoons of cocaine. [TR 1087]

Haber explained that the combination of cocaine and alcohol ingested by the defendant was a "deadly combination" which "impairs judgment, ... makes you act impulsively [and] makes you do things you wouldn't ordinarily do, ..." [TR 1072] In Haber's expert opinion, "[Cook's] judgment had to be influenced by the ingestion of cocaine and alcohol." [TR 1072] She further explained:

> Cocaine makes people paranoid, they get suspicious, they hide, they think they are being followed, they get very nervous. And the alcohol reduces that nervousness and it also reduces their judgment. And I think his judgment was influenced. I believe his judgment was influenced that night by the drugs he used. [TR 1072-1073]
>
> ***
>
> I think his judgment was influenced significantly that night. [TR 1075]
>
> ***
>
> He recalled the event so he knew what he was doing. He was aware of it but I don't that he realized the extent of it, the danger of it; his judgment was off.
>
> ***
>
> I think David Cook behaved significantly different when he is on drugs and alcohol than he would if he were not on drugs and alcohol. [TR 1076]

Thus, the defendant explained his utterly uncharacteristic behavior on the night in question after having never been in trouble before and having consistently exhibited exemplary behavior characterized by the quality of non-violence. [TR 1028, 1037, 1044, 1049, 1053, 1063, 1066]

SUMMARY OF THE ARGUMENT

I.

The trial court refused to excuse for cause two jurors who both expressed and demonstrated their inability to fully comprehend the English language. The defendant was thereby forced to exhaust his peremptory challenges in order to effectuate his constitutional right to a jury of fully competent jurors. The trial court thereby committed reversible error. Such an impairment of the defendant's right under the Fifth and Sixth Amendments to due process of law and a trial by jury is unacceptable in any event but especially so in a capital case where a precise understanding of the trial court's instructions and the evidence presented may literally determine the difference between life and death. The trial court erred in failing to grant the defendant's motion to excuse these jurors for cause. That error not only infected the trial itself, but even more clearly tainted the sentencing phase of the proceedings below. Accordingly, neither the defendant's convictions nor his sentence of death can be sustained.

II.

The imposition of the ultimate penalty under the circumstances of this case constitutes cruel and unusual punishment. The trial court erroneously found two aggravating circumstances applicable. The offense of which the defendant stands convicted was not heinous, atrocious, or cruel under established case law. The homicide for which the defendant received the

death penalty was effected by a single gunshot to the chest inflicted during a panicked and aborted robbery attempt without any desire or intention to inflict physical or emotional pain. This offense was neither shockingly evil, wicked and vile, nor designed to inflict a high degree of pain with utter indifference to or enjoyment of the suffering of others. In short, while senseless and tragic, this crime was not accompanied by such additional acts as to set it apart from the norm of capital felonies.

Neither was this homicide for the purpose of avoiding or preventing a lawful arrest or effecting an escape from custody. There is no evidence, yet alone proof beyond a reasonable doubt, that the homicide of Onelia Betancourt was committed for the purposed of eliminating her as a witness. Any contention that the defendant killed solely to avoid a future identification is nothing more than mere speculation. The trial court's conclusion to the contrary was erroneous.

On the other hand, the trial court improperly rejected the unimpeached and uncontradicted testimony of both the defendant and expert psychiatric witness who testified that the defendant acted under the influence of a "deadly combination" of alcohol and cocaine. The resulting diminution of the defendant's judgment constituted not only explicit evidence of diminished mental capacity but should have compelled a determination by the trial court that the defendant acted under an "extreme mental disturbance" and that his capacity "to appreciate the criminality of his conduct" or to "conform his conduct to the requirements of

the law," was significantly impaired so as to compel the finding of two mitigating circumstances under Florida Statute §921.141(6)(b) and (f).

The trial court's consideration of inapplicable aggravating circumstances and rejection of statutory mitigating circumstances resulted in the imposition of a sentence which is unconstitutionally cruel and unusual. At the very least, the defendant's sentence of death should be vacated.

III.

The imposition of the death penalty in this case is fundamentally defective for the deficiencies of the trial court's jury instructions. The trial court repeatedly directed the jury to adhere to a "single ballot" which effectively forbade the jury to deliberate and thereby compelled a premature recommendation without the benefit of the jurors' interaction. The jurors' advisory sentence, which in Florida is given great weight, is required to be the product of deliberation. The trial court's extemporaneous instructions misled the jury to forego any analysis of the evidence or weighing of competing policy considerations by its directive to take a "single ballot" and "return to the court with the verdict signed." The fact that the jury heeded the trial court's erroneous instructions is demonstrated by the fact that it took only twenty minutes to return two separate recommendations. Because the recommendation procedure ordered by the trial court here was constitutionally defective, the defendant's ultimate sentence of death cannot stand.

ARGUMENT

I.

THE TRIAL COURT ERRED IN FAILING TO EXCUSE FOR CAUSE PROSPECTIVE JURORS WHO EXPRESSED THEIR INABILITY TO FULLY UNDERSTAND THE ENGLISH LANGUAGE THEREBY FORCING THE DEFENDANT TO EXHAUST HIS PEREMPTORY CHALLENGES AND DENYING HIM DUE PROCESS OF LAW AND A FAIR TRIAL GUARANTEED BY THE FIFTH, SIXTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

During jury selection in this case, two Spanish-speaking prospective jurors expressed their lack of facility with the English language. The defendant moved the trial court to excuse these jurors for cause in this capital case where the jurors' ability to fully understand the evidence and, in particular, the court's instructions, would determine whether the defendant would live or die. The trial court refused the defendant's requests, however, and forced the defendant to exhaust his peremptory challenges on these jurors who, because of their language deficiencies, should not have sat in judgment of the defendant at all. Because the defendant exhausted his peremptory challenges, even though the trial court granted one additional challenge to him, the defendant's rights under the Fifth and Sixth Amendments were abridged. The defendant should be granted a new trial.

During the trial court's initial questioning of the prospective jury, jurors Sergio and Boan both indicated their inability to fully comprehend the English language:

> Juror Sergio: Your Honor, I don't think I understand this case one-hundred percent because of the language. ...[TR 367]

Sergio revealed he had come to the United States from Cuba, that he had picked up the English he knew "from the street", and that he usually read the Spanish edition of the Miami Herald. When the court asked Sergio whether, "in our conversation right now is there anything that you didn't understand?", Sergio answered unresponsively:

> I don't understand this case about what really happens. Whatever happen in the Burger King up there. [TR 369]

When the trial court explained that evidence would be presented, juror Sergio responded, strangely, "Sound different now." [TR 369]

Juror Boan complained of a similar, arguably more serious, lack of comprehension:

> 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? [TR 369]

When asked to explain his work as an aviation engine inspector, Boan responded with demonstrably poor grammar, "it is a very long explain." [TR 370] Juror Boan not only admitted that he would "miss a few things" during the course of the trial, but he exhibited a lack of understanding even of the questions asked during voir dire:

> 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. [TR 448]

Subsequently, during further questioning by counsel, Sergio restated his discomfort in a situation where his total comprehension was required:

> 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 happens to this young man based on what you will hear. Do you feel that you are qualified enough language - wise?
>
> Juror Sergio: Not all the way. [TR 445-446]

The defendant challenged both Sergio and Boan for cause. Nevertheless, based on the remarkably limited dialogue the trial court was able to evaluate, it denied the defendant's motions. [TR 476-478] As a result, the defendant was compelled to utilize his peremptory challenges against Sergio and Boan [TR 480-481] with the result that the defendant was forced to exhaust his peremptory challenges even though the trial granted him one additional. [TR 486] The defendant's request for another

peremptory challenge was denied by the trial court. [TR 486]

A juror's ability to be fair and impartial must be unequivocally asserted in the record. Auriemme v. State, 501 So.2d 41 (Fla. 5th DCA 1986). It takes no great strain of logic to extend that rule to a prospective juror's ability to comprehend the English language. Because a juror cannot be fair and impartial without a clear understanding of the proceedings, it necessarily follows that a juror's command of the English language must also be demonstrated by the record unequivocally. In this case, the record fails to establish such a showing with regard to prospective jurors Sergio and Boan.

There is little appellate law on this issue apparently because the error is not often made by trial courts. Those courts which have addressed the matter, however, have consistently upheld as constitutional requirements that jurors speak and understand the English language. Commonwealth v. Acen, 487 N.E.2d 189 (Mass. 1986). As a general rule, jurors who cannot read and write may be excused sua sponte by the court. Liveoak v. State, 717 S.W.2d 691 (Tex. Crim.App. 1986). As the court reasoned in People v. Guzman, 125 Misc.2d 457, 478 N.Y.S.2d 455 (N.Y. 1984):

> In any case when a prospective juror does not have a sufficient grasp of the English language, or is obviously biased in some way, or is, for any other statutory reason incompetent to sit on a particular case a challenge for cause will be granted. [Id. at 459]

Thus, as the United State Supreme Court has held, a trial court has the responsibility of removing jurors if they cannot

impartially evaluate the evidence and follow the court's instructions. Rosales-Lopez v. United States, 451 U.S. 182, 188, 101 S.Ct. 1629, 1634, 68 L.Ed.2d 22 (1981).

A new trial is required where, after the erroneous denial of a motion to strike for cause, the defense is forced to peremptorily challenge the jurors and exhaust his peremptory challenges. Robinson v. State, ___ So.2d ___ Case No. 85-1829 (Fla. 5th DCA April 9, 1987) [12 FLW 985] This Court, in Hill v. State, 477 So.2d 553 (Fla. 1985), reiterated the rule in Florida and most other jurisdictions that it is reversible error for a court to force a party to use peremptory challenges on persons who should have been excused for cause, provided that the party subsequently exhausts all of his or her peremptory challenges and additional challenges are sought and denied. Id. at 556, citing Singer v. State, 109 So.2d 7 (Fla. 1959). Thus, this Court concluded that such error cannot be harmless because it is error for the court to force a party to exhaust his peremptory challenges on persons who should be excused from the jury for cause since it has the effect of abridging the right to the exercise of peremptory challenges. Swain v. Alabama, 380 U.S. 202 (1965); Leon v. State, 396 So.2d 203 (Fla. 3d DCA 1981). A defendant in a criminal proceeding is not required to sacrifice his peremptory challenges to correct errors resulting from the trial court's refusal to grant appropriate challenges for cause. Jenkins v. State, 380 So.2d 1042 (Fla. 4th DCA 1980).

It was error in this case for the trial court to compel the

defendant to exhaust his peremptory challenges to exclude two jurors about whom the record not only failed to unequivocally demonstrate command of the english language but whose own responses during voir dire affirmatively demonstrated their lack of understanding and their inability to sit in judgment in this capital case. Because of the subtle, if not elegant, judgments and balances required to be made in a capital case to determine not only whether an accused is guilty but whether or not he should suffer the ultimate penalty, the court's error is magnified to the point of constitutional impermissibility. The court's error infected the defendant's trial from beginning to end and, accordingly, the defendant must be granted a new trial where his right to exercise peremptory challenges is not abridged and he is fully afforded the guarantees of the Fifth and Sixth Amendments to the United States Constitution.

II.

THE TRIAL COURT ERRED IN SENTENCING THE DEFENDANT TO DEATH, THEREBY DENYING THE DEFENDANT DUE PROCESS OF LAW AND EQUAL PROTECTION WHILE IMPOSING A CRUEL AND UNUSUAL PUNISHMENT UNDER THE FIFTH, SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

A

The Trial Court's Determination as Justification for the Imposition of the Death Penalty that the Capital Felony Was Especially Heinous, Atrocious or Cruel was Erroneous Where Such an Aggravating Circumstance Was Neither Proved Beyond a Reasonable Doubt, Nor Appropriate Under the Circumstances of This Case.

The term "heinous" as used in Florida Statute §921.141(5)(h) means extremely wicked or shockingly evil. "Atrocious" means outrageously wicked and vile. The word "cruel" decribes conduct designed to inflict a high degree of pain with utter indifference to, or even enjoyment of, the suffering of others. Alford v. State, 307 So.2d 433 (1975), cert. denied, 428 U.S. 912, 96 S.Ct. 3227, 49 L.Ed.2d 1221, rehearing denied 429 U.S. 873, 97 S.Ct. 191, 50 L.Ed.2d 155; Maggard v. State, 399 So.2d 973 (Fla. 1981) cert. denied, 454 U.S. 1059, 102 S.Ct. 610, 454, 70 L.Ed.2d 598; State v. Dixon, 283 So.2d 1 (1973) cert. denied, 416 U.S. 943, 94 S.Ct. 1950, 40 L.Ed.2d 295. The homicide of which the defendant stands convicted, as senseless and inexcusable as it was, was not heinous, atrocious or cruel under established law. The trial court erred in basing its imposition of the death penalty on this aggravating factor.

The "heinous, atrocious and cruel" aggravating factor applies

only to a capital crime the actual commission of which is accompanied by such additional acts as set the crime apart from the norm of capital felonies. Its application is restricted to conscienceless or pitiless crimes which are unnecessarily torturous to the victim. Blanco v. State, 452 So.2d 512 (Fla. 1984), cert. denied, _____ U.S. _____, 105 S.Ct. 940, 83 L.Ed.2d 953.

The application of this aggravating circumstance has been deemed to be appropriate to offenses "shockingly evil." Dobbert v. State, 409 So.2d 1053, 1058 (Fla. 1976) (Murder of nine year old daughter). It has been applied to murders committed in connection with abductions, confinement, sexual abuse and execution-style killings. Smith v. State, 424 So.2d 7206 (Fla. 1982), cert. denied, ____ U.S. ____, 103 S.Ct. 3129, 77 L.Ed.2d 1379. The aggravating circumstance has been upheld in torture murders. Thompson v. State, 389 So.2d 197 (Fla. 1980).

This case does not involve torture or the defendant's desire to inflict suffering. The record fails to establish either the infliction of an extraordinary degree of pain or prolonged anticipation on the part of the victim sufficient to establish the degree of suffering required to invoke the wicked, heinous, and cruel aggravating circumstance. The victim, Onelia Betancourt, was shot once in the chest and succumbed to her unremarkable gunshot wound. [TR 626, 632] The medical examiner could testify only that the fatal bullet travelled in a downward trajectory. He was unable to determine whether Betancourt was standing, sitting, or lying down. [TR 633] With regard to the

mechanism of death, all that was established by the state was that Rolando Betancourt died quickly from a catastrophic rupture of the aorta and that Onelia Betancourt, having suffered somewhat less damaging internal injuries, would not have died as quickly. [TR 641-653]

The best, and only, description of the shooting itself came from the defendant's own mouth. From Cook's confession, it is obvious that the defendant's shooting of Onelia Betancourt was a panicked, frenzied response to a chaotic situation gotten totally out of hand. Cook, intending to rob the Burger King, confronted Rolando Betancourt, pushed him inside the premises and directed him to open the safe. [R 123] When Betancourt swung at the defendant with a short metal rod used to push garbage carts, the defendant shot at him striking him, he believed, in the arm. [R 123-124] It is apparent that the defendant thereupon sought to abort the already failed robbery and "was on [his] way out" when "the lady started screaming." [TR 125] He shot an hysterical Onelia Betancourt in a frenzied panic within seconds of the shooting of Rolando Betancourt:

> When he swung, I ducked and he hit me on my shoulder slightly, and that's when I start running out and at the same time I shot him. [R 129]
>
> ***
>
> She was like -- she fell to my feet and tried to hold me. Then, when I got away, she kept on screaming. That's when I shot and ran at the same time. [R 125]

Nothing in this record refutes the defendant's consistent assertion that he never intended the deaths of Rolando or Onelia

Betancourt at all. As Cook stated in his post-arrest statement:

> I didn't know they was gonna die. When I shot them I didn't even wanna shoot. I shot them in the arm. [R 132]

Later, in his testimony to the jury, the defendant similarly explained:

> I didn't know they were going to die. I really didn't know if I shot them or not. [TR 1104-5]

What is abundantly clear from this record, therefore, is that the shooting of Onelia Betancourt, upon which the defendant's sentence of death is based, as inexcusable as it is, was not accompanied by such additional acts as set the crime apart from other non-capital shooting homicides.

This Court has repeatedly reiterated its established rule and concluded "that in order for a capital felony to be considered heinous, atrocious, or cruel it must be "accompanied by such additional acts as to set the crime apart from the norm of capital felonies'." Simmons v. State, 419 So.2d 316 (Fla. 1982); State v. Dixon, supra. The same consideration applies here and the same result should follow.

This case is much like Gorham v. State, 454 So.2d 556 (Fla. 1984) cert. denied 105 S.Ct. 941, 83 L.Ed.2d 953, where one shot penetrated the victim's heart causing death within ten seconds, the evidence disproved any possibility of prolonged and torturous captivity, and there was no evidence that the victim apprehended his death more than moments before he died. This Court found the

heinous, atrocious, and cruel aggravating circumstance inapplicable even though the victim was shot twice. Thus, this case is unlike Scott v. State, 494 So.2d 1134 (Fla. 1986) (victim brutally beaten, driven to deserted area, became conscious, undoubtedly suffered stark terror from awareness of likelihood of death at hand of abductors and was mercilessly beaten second time); Cooper v. State, 492 So.2d 1059 (Fla. 1986) (murder victims were acutely aware of their impending deaths, were bound and rendered helpless, a gun pointed at the head of one of them misfired three times, and another pleaded for his life); Deaton v. State, 480 So.2d 1279 (Fla. 1985) (killing of victim took fifteen minutes, victim begged and pleaded for his life, defendant laughed and joked about how long it took victim to die, defendant enjoyed unmercifully the pain and suffering victim was forced to endure, and defendant discussed how he would kill victim by strangulation); and Francis v. State, 473 So.2d 672 (Fla. 1985) cert. denied, 106 S.Ct. 870, 88 L.Ed.2d 908 (defendant forced victim to crawl on his hands and knees and beg for his life, victim was taped with his hands behind his back, placed on a toilet stool for a period in excess of two hours, victim was placed in fear of death by way of injection of Drano and other foreign substances into his body, and finally defendant shot his victim in the heart causing death).

This Court has consistently refused to find a homicide especially heinous, atrocious, or cruel when effected by a single gun shot. Kampff v. State, 371 So.2d 1007 (Fla. 1979). Most recently, in Craig v. State, ____ So.2d ____, Case No.: 62,184

(Fla. May 28, 1987) [12 FLW 269], this Court reviewed the defendant's conviction of two counts of first-degree murder and two sentences of death. The facts in Craig established that both victims had suffered execution style killings. When the first gunshot wounds failed to inflict mortal injury, the defendant directed a co-defendant "to shoot [the victim] as he was not yet dead." [Id. at 269] This Court, reversing the finding of the trial court, agreed with appellant's argument that the murders were not especially heinous, atrocious, or cruel. While finding the murders to be fully premeditated, this court noted, as it must in the case at bar, that "the murders were carried out quickly by shooting." Accordingly, based on its interpretation of the statute and well-established precedent, this Court found insufficient support in the evidence for the trial court's finding. Tafero v. State, 403 So.2d 355 (Fla. 1981) cert. denied, 455 U.S. 983 (1982); Lewis v. State, 377 So.2d 640 (Fla. 1979); Kampff v. State, supra.

Similarily, in Teffeteller v. State, 439 So.2d 840 (Fla. 1983), cert. denied, ___ U.S ___, 104 S.Ct. 1430, 79 L.Ed.2d 754, this Court rejected especially heinous, atrocious and cruel as an aggravating circumstance under circumstances substantially more torturous and painful, both psychologically and physically, than in the instant case. In Teffeteller, the victim sustained massive abdominal damage due to a shotgun blast inflicted by the defendant but remained conscious and coherent for approximately three hours. He underwent emergency aid both at the scene and at the hospital and ultimately died on the operating table. This

Court nevertheless concluded:

> The fact that the victim lived for a couple of hours in undoubted pain and knew that he was facing imminent death, horrible as this prospect may have been, does not set this senseless murder apart from the norm of capital felonies. [Id. at 846]

Teffeteller, therefore, controls the legal conclusion that the aggravating circumstance of heinous, atrocious and cruel does not apply here. The homicide of which the defendant stands convicted was not, under established case law, especially heinous, atrocious and cruel. The trial court erred in its contrary conclusion and in basing its sentence of death upon such a finding.

B.

The Trial Court Erred in Determining that the Capital Felony was Committed for the Purpose of Avoiding or Preventing a Lawful Arrest or Effecting an Escape from Custody.

The evidence presented in this case, considered in a light most favorable to the state, failed to prove beyond a reaonable doubt that the killing of Onelia Betancourt was committed for the purpose of avoiding arrest or effecting an escape from custody. In fact, there is no such evidence of this aggravating factor and the trial court clearly erred in relying upon it to justify its death sentence.

The trial court, contrary to the evidence presented, made the following finding:

> By eliminating the only eye-witness to the murder of Rolando Betancourt, the defendant sought to avoid or prevent his lawful arrest. The defendant was seen full in the face by Mrs. Betancourt and she was kneeling in front of him, embracing his legs when he shot her. [R 226]

The trial court's conclusion is sustainable only by conjecture. It is not supported by the record and remains irrefutably unproven beyond a reasonable doubt.

The defendant's confession, upon which the state relied to secure the defendant's convictions, establishes that the defendant was not even thinking about being caught when he shot Onelia Betancourt:

> Q. What were you thinking before you shot the female?
>
> A. To keep her quiet.
>
> Q. Were you afraid that she might have recognized you.?
>
> A. Not really. She probably would have, though; but I was just trying to keep her quiet because she was yelling and screaming. [R 129-130]

In fact, it is apparent that the defendant "didn't know they was gonna die", "didn't even wanna shoot", and believed he had "shot them in the arm[s]". [R 132] Thus, but for the fact that Onelia Betancourt was a witness to her husband's shooting and could have later identified the defendant, there exists no evidence whatsoever that silencing her testimony was the defendant's actual purpose.

In order to support a finding that a murder has been

committed for the purpose of avoiding a lawful arrest under Section 921.141(5)(e) Florida Statutes (1981), the evidence must establish beyond a reasonable doubt the defendant's intent to avoid arrest or detection through the killing. Dufour v. State, 495 So.2d 154 (Fla. 1986). There must be a showing that the dominant or sole motive for the murder was the elimination of witnesses. Bates v. State, 465 So.2d 490 (Fla. 1985); Riley v. State, 366 So.2d 19 (Fla. 1978), cert. denied, 459 U.S. 981, 103 S.Ct. 317, 74 L.Ed. 294 (1982). It is by now well established that the mere fact of a death is not enough to invoke this factor when the victim is not a law enforcement official. As this Court held in Doyle v. State, 460 So.2d 353 (Fla. 1984):

> We have consistently held that where the victim is not a law enforcement officer, the state must prove beyond a reasonable doubt that the dominant motive for the murder was the elimination of witnesses. [Citations omitted] [Id. at 358].

Moreover, this Court held in Riley v. State, 366 So.2d 19 (Fla. 1978):

> Proof of the requisite intent to avoid arrest and detection must be very strong in these cases. Id. at 22.

The mere fact that a victim might be able to identify an assailant is insufficient. Oats v. State, 446 So.2d 90, 95 (Fla. 1984); Menendez v. State, 368 So.2d 1278 (Fla. 1979); Bates v. State, 465 So.2d 490 (Fla. 1985). In every case in which this aggravating circumstance has been upheld by this Court, the facts are clearly distinguishable. Compare, Herring v. State, 446

So.2d 1049, (Fla.) cert. denied, ___ U.S. ____, 105 S.Ct. 396, 83 L.Ed.2d 330 (1984) (defendant stated that he shot robbery victim a second time to prevent his testifying against him); Clark v. State,443 So.2d 973 (Fla. 1983) (defendant told cellmate that victim could identify him, victim knew defendant, victim knew or soon would know that violent felony had been committed on her husband); Vaught v. State, 410 So.2d 147 (Fla. 1982) (victim announced that he recognized assailant, defendant shot victim five times to make sure he was dead).

In the instant case, the victim was not a police officer and did not know her assailant. Any contention that the defendant killed solely to avoid her identifying him is mere speculation. Because, as in Bates v. State, supra, the proof is insufficient to establish the commission of this murder in order to avoid or prevent lawful arrest, such an aggravating circumstance cannot justify the defendant's sentence of death.

C.

The Trial Court Erred in Rejecting Evidence that the Capital Felony Was Committed While the Defendant Was Under The Influence of Extreme Mental or Emotional Disturbance and that the Capacity of the Defendant to Appreciate The Criminality of His Conduct or to Conform His Conduct to the Requirements of the Law Was Substantially Impaired in Light of Uncontradicted Expert Testimony Presented by the Defense.

Clinical Psychologist Merry Sue Haber testified on behalf of the defendant at the sentencing phase. [TR 1068 et. seq.] She described the defendant as an habitual daily abuser of cocaine,

marijuana, and alcohol for the prior three years. [TR 1070] On the night of the robbery the defendant had been drinking at various bars, had shared two six-packs of beer with his companions and had ingested an extraordinary amount of cocaine. [TR 1070-1071] The defendant, himself, described having shared a fifth of Bacardi Rum, beer, and seventeen to twenty spoons of cocaine. [TR 1087]

Haber explained that the combination of cocaine and alcohol ingested by the defendant was a "deadly combination" which "impairs judgment, ... makes you act impulsively [and] makes you do things you wouldn't ordinarily do, ..." [TR 1072] In Haber's expert opinion, "[Cook's] judgment had to be influenced by the ingestion of cocaine and alcohol." [TR 1072] She further explained:

> Cocaine makes people paranoid, they get suspicious, they hide, they think they are being followed, they get very nervous. And the alcohol reduces that nervousness and it also reduces their judgment. And I think his judgment was influenced. I believe his judgment was influenced that night by the drugs he used. [TR 1072-1073]
>
> ***
>
> I think his judgment was influenced significantly that night. [TR 1075]
>
> ***
>
> He recalled the event so he knew what he was doing. He was aware of it but I don't think that he realized the extent of it, the danger of it; his judgment was off.
>
> ***
>
> I think David Cook behaved significantly different when he is on drugs and alcohol

> than he would if he were not on drugs and alcohol. [TR 1076]

Thus, the defendant explained his utterly uncharacteristic behavior on the night in question after having never been in trouble before and having consistently exhibited exemplary behavior characterized by the quality of non-violence. [TR 1028, 1037, 1044, 1049, 1053, 1063, 1066] The trial court, however, summarily dismissed the uncontroverted evidence presented by the defense.

Diminished mental capacity is clearly a mitigating circumstance. Quince v. State, 414 So.2d 185 (Fla. 1982) cert. denied, 459 U.S. 895, 103 S.Ct. 192, 74 L.Ed.2d 155; Mines v. State, 390 So.2d 332, 337 (Fla. 1980), cert. denied, 451 U.S. 916, 101 S.Ct. 1994, 68 L.Ed.2d 308 (1981). In Jones v. State, 332 So.2d 615 (Fla. 1976), the evidence established, as it does in the case at bar, that the defendant suffered from a severe mental condition which it was reasonable to assume contributed to his behavior the degree of which, however, was unknown. This Court remanded the cause to the trial court with instructions to vacate the sentence of death and to impose a life sentence without eligibility for parole for twenty-five years, reasoning:

> The testimony makes it clear that Appellant suffered a paranoid psychosis to such an extent that the full degree of its mental capacities at the time of the murder is not fully known, but it is reasonable to assume that his mental illness contributed to his strange behavior. Extreme emotional conditions of defendants in murder cases can be a basis for mitigating punishment. [Id. at 619]

The trial court should have reached the same conclusion here. Instead, it ignored the uncontradicted defense testimony. There can be no doubt that drug and alcohol induced dementia as described by Dr. Haber constitutes an "extreme mental disturbance" as recognized in Florida Statute §921.141(6)(b). There is similarly no legitimate question that mental impairment suffered by the defendant constituted an impairment of his capacity "to appreciate the criminality of his conduct" or to "conform his conduct to the requirements of law" described by Florida Statute §921.141(6)(f). The trial court erred in failing to apply these mitigating circumstances in light of the proof adduced in this case.

III.

THE TRIAL COURT'S INSTRUCTIONS DURING THE SENTENCING PHASE DIRECTED THE JURY TO ADHERE TO A "SINGLE BALLOT", EFFECTIVELY FORBADE THE JURY TO DELIBERATE AND THEREBY IMPROPERLY COMPELLED A PREMATURE RECOMMENDATION OF DEATH WITHOUT THE BENEFIT OF THE JURORS' INTERACTION.

A defendant facing the ultimate penalty of death is entitled to the considered and reflective deliberation of interacting jurors. Florida Statute §921.141(2) clearly provides that the jury's advisory sentence shall be rendered only after "deliberation" and that the advice rendered to the court derives from the jury as a whole rather than each individual juror:

> (2) Advisory sentence by the jury. - After hearing all the evidence the jury shall deliberate and render an advisory sentence to the court, ...

Indeed, a capital sentencing jury is not called upon to express its individual sentiments, it is the jury's task to "express the conscience of the community on the ultimate question of life or death." McCleskey v. Kemp, 481 U.S. ____, 95 L.Ed.2d 262, 290 (1987), quoting Witherspoon v. Illinois, 391 U.S. 510, 519, 20 L.Ed.2d 776, 88 S.Ct. 1770 (1968). As the McClesky Court made clear:

> The capital sentencing decision requires the individual jurors to focus their collective judgment on the unique characteristics of a particular criminal defendant. It is not surprising that such collective judgments often are difficult to explain. [Id. at 290-291; emphasis added]

Whatever else McClesky may stand for, it clearly reaffirms the requirement that a sentencing jury reach a consensus, after deliberation, reflecting its collective, rather than individual judgment. Cook's jury did not accomplish this task. It simply took a vote and announced it to the court as it was directed to do.

Like his entitlement to a trial by jury regarding guilt or innocence, a capital defendant is entitled to more than the particular recommendations of his individual jurors, he is entitled to a majority recommendation of a jury sitting as a whole to determine his fate.

More than one-hundred years ago, Justice Oliver Wendall Holmes encouraged the use,

> "[i]n place of sterile, deductive reasoning ... sensitive analysis and the weighing of competing policy considerations." New York Law Journal, June 17, 1981, p.2, c.3.

A death penalty recommendation based on less than that which is constitutionally required cannot be sustained. Such is the case here where the trial court's instructions operated to direct the jury to adhere to its first and only, single ballot.

It is likely the trial court intended to instruct the jury, extemporaneously, that because it had convicted the defendant of two counts of first-degree murder, that it was required to render separate recommendations as to each offense. Instead, the trial court misled the jury to believe it was bound by the recommendation reflected with only "a single ballot on each case":

> 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. [TR 1153]

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. Again, instead of adhering to the "Standard Jury Instructions in Criminal Cases", the court used an unfortunate choice of words which effectively forbade the jury to continue considering its recommendation after its initial vote:

> 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.

The court's immediate partial correction of its misstatement did nothing to diminish the harm complained of here and, in fact, re-emphasized the limitation it had placed on the jury's deliberations:

> 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. [TR 1154]

By its choice of words, the trial court again directed that the jury "shall return" as soon as six or more of the jurors agreed as to a recommendation. 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. It is therefore not surprising that the jury, leaving at 5:20 p.m. and returning a 5:40 p.m., returned a recommendation of death by a vote of eight to four for the murder of Mrs. Betancourt within a mere twenty minutes. [TR 1155-1156]

In Florida, the jury's recommendation regarding the sentence in a capital case is afforded great weight. Engle v. State, 438 So.2d 803 (Fla. 1983), cert. denied, 104 S.Ct.1430, 465 U.S. 1074, 79 L.Ed.2d 53; Tedder v. State, 322 So.2d 908 (Fla. 1975). A defect in the recommendation procedure necessarily infects the sentence of death imposed by the trial court in consideration of the jury's recommendation. The defendant's sentence therefore cannot stand. He is entitled to the vacation of his death penalty and to the grant, at least, of a new sentencing hearing.

CONCLUSION

The defendant stands convicted of the most serious of felonies and has been sentenced to the ultimate irrevocable penalty after a trial tainted ab initio by a constitutionally defective jury selection procedure. The trial court's error implicated the defendant's right to the exercise of peremptory jury challenges as well as his rights under the Fifth, Sixth, and Fourteenth Amendments to the United States Constitution. The defendant's sentence, likewise, was imposed after an advisory sentencing hearing contaminated by the trial court's erroneous impromptu instructions and was thereby rendered constitutionally defective. For these reasons, neither the defendant's convictions nor his sentence of death can be sustained. In addition, the trial court's reliance upon aggravating circumstances which were unsupported by the record and its refusal to consider applicable mitigating circumstances render the defendant's sentence unsustainable even on the merits. Where a trial judge improperly determines the existence of aggravating factors and there is present at least one mitigating circumstances, this Court has consistently ordered the remand of such cases for reconsideration of the sentence by the trial judge. Riley v. State, 366 So.2d 19 (Fla. 1978); Elledge v. State, 346 So.2d 998 (Fla. 1977). The defendant's convictions and sentence of death must be reversed by this Court on appeal.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was mailed to Richard L. Polin, Esquire, Assistant Attorney General, 401 N.W. 2nd Avenue, Suite 820, Miami, Florida 33128, this 14th day of October, 1987.

By: _____
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