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

REPLY BRIEF OF APPELLANT DAVID COOK

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STATEMENT OF THE CASE AND FACTS

The appellant, David Cook, respectfully relies upon the Statement of the Case and Statement of the Facts as described in his initial brief of appellant.

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.

It is not so much the trial court's abuse of discretion in dealing with a problem which the defendant challenges, as it is its failure to recognize the existence of a problem at all. Contrary to the state's reliance on the broad discretion of a trial court to adjudicate the competency of a prospective juror, the trial court here did not reconcile the obvious linguistic shortcomings of the challenged prospective jurors with the legal standard it acknowledged - that "... they have a substantial and complete understanding of English." [TR 478] Instead, the trial court remained remarkably insensitive to the failings of jurors Boan and Sergio as jurors.

The state's candid verbatim recitation of the dialogues of the parties and the court with the two jurors in question is the best argument in favor of the defendant's position. While the state asserts that the jurors "... responded intelligently to numerous questions, and on several occasions they indicated that they understood what was being said", the state's very argument impliedly acknowledges that the jurors responded <u>un</u>intelligently to several other questions and on various occasions indicated

that they did not understand what was being said. [Appellee Brief at p.30] Thus, this record, both implicity and explicity, demonstrates that two jurors sat in judgment of the defendant's guilt and on the propriety of his execution who had, rather than "a substantial and complete understanding of English", an insubstantial and incomplete comprehension of the language in which the trial was conducted.

The single case relied upon by the state, United States v. Rouco, 765 F.2d 983 (11th Cir. 1985) is notable because of its unique facts. Rouco, of course, is not a capital case. Further, defense counsel at first opposed the state's challenge for cause of a single prospective, Spanish speaking juror and only later, during the government's case, did the defendant protest the juror's competency because of language problems. The trial court conducted an exhaustive inquiry of the prospective juror which, as the Eleventh Circuit found, established:

> Flores had no apparent problem understanding the Court's questions; she did, however, have some difficulty in framing her answers in English to her satisfaction.
>
> ***
>
> We are convinced that the Court had an adequate basis for concluding that Mrs. Flores could render the quality of jury service the law contemplates. The record indicated that she understood English; her only difficulty was in speaking it. [765 F.2d at 991]
>
> ***
>
> As the District Court observed, Mrs. Flores' shortcoming, speaking English, was offset by her command of Spanish, as much of the evidence in the case was presented in Spanish. In sum, we find no

> abuse of discretion in the District Court's decision to allow Mrs. Flores to remain on the jury. [765 F.2d at 991-992]

Moreover, the "discretion" upon which both the state and the Rouco Court found their positions, is not unlimited. As the Court held in Leon v. State, 396 So.2d 203 (Fla. 3d DCA 1981), citing United States v. Nell, 526 F.2d 1223, 1229 (5th Cir. 1976):

> At stake is the party's right guaranteed by the Sixth Amendment to an impartial jury; the principal way this right is implemented is through the system of challenges exercised during the voir dire of prospective jurors. ... Although a trial court has broad discretion in its conduct of voir dire, ... its exercise of that discretion is "subject to the essential demands of fairness." [citations omitted] [Id. at 205]

Where there is any reasonable doubt as to a juror's possessing the requisite state of mind so as to render an impartial verdict, the juror shall be excused, Singer v. State, 109 So.2d 7 (Fla. 1959) and the defendant given the benefit of the doubt. Blackwell v. State, 101 Fla. 997, 132 So. 468 (1931); Walsingham v. State, 61 Fla. 67, 56 So. 195 (1911).

The defendant here did not enjoy the benefit of the doubt to which he was entitled. Instead, the defendant was forced to trial with two jurors who not only presented compelling evidence of their inability to understand the proceedings, but who both expressly admitted their incompetence to sit in judgment of the defendant, as well. The error of the trial court cannot be

excused as a legitimate exercise of its discretion. The error of the Court in failing to grant the defendant's challenges for cause was severely prejudicial. The error infected not only the guilt/innocence portion of the defendant's trial, but the sentencing phase as well. It effectively denied the defendant his right to a twelve person capital jury, a unanimous verdict, a fair trial, and due process of law. The defendant is entitled to a new trial at which the state will be held to establish the simple requirement that all the jurors who sit in judgment of the defendant shall "have a substantial and complete understanding of English." Because this record cannot establish such a finding, the defendant's conviction and sentence cannot be sustained.

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.

Although existing precedent involving the heinous, atrocious and cruel aggravating circumstance is less than pellucid, what remains abundantly clear from this record is that this case does not involve torture or the defendant's desire to inflict unusual suffering. This record fails to establish either the infliction of an extraordinary degree of pain or the 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. In cases involving homicides perpetrated by a single gunshot this Court has been remarkably consistent in rejecting the application of this aggravating circumstance. Craig v. State, 510 So.2d 857 (Fla. 1987); Kampff v. State, 371 So.2d 1007 (Fla. 1979); Cooper v. State, 336 So.2d 1133, 1141 (Fla. 1976); Fleming v. State, 374 So.2d 954, 959 (Fla. 1979); Antone v. State, 382 So.2d 1205 (Fla. 1980); Maggard v. State, 399 So.2d 973 (Fla. 1981).

In support of its argument, the state recites the trial court's lengthy recitation of facts in support of its determination of the applicability of a heinous, atrocious, and cruel aggravating circumstance. Even a cursory review of the trial court's reasoning, however, exposes its insufficiency. Only the last sentence is relevant to the issue - "To describe the last moments of Mrs. Bettancourt's life one must conclude she endured an inordinate amount of psychic terror." [R 228] The state, picking up on the court's cue, cites several cases for the proposition that the infliction of mental anguish as well as physical pain may be sufficient to invoke the application of the aggravating circumstance, heinous, atrocious and cruel. In Vaught v. State, 410 So.2d 147 (Fla. 1982) upon which the state relies, this Court merely approved the state's argument that the factor heinous, atrocious, or cruel has been applied where a killing was inflicted in a "cold and calculating" or "execution - style" fashion. In King v. State, 436 So.2d 50 (Fla. 1983) this Court simply rejected the defendant's assertion that the killing in the case culminated a series of incidents occurring in the heat of passion, and, that, therefore, the killing was not heinous, atrocious, or cruel. These cases have little or nothing to do with the issue of the sufficiency of mental anguish, as opposed to physical pain, to support this aggravating circumstance.

The other cases relied upon by the state are remarkable for their easily distinguished circumstances from those presented by the case at bar. Mills v. State, 462 So.2d 1975 (Fla. 1985)

involved a prolonged abduction of the victim during a period of time the victim knew he would be killed, begged for his life, and attempted to escape after having been bound and struck on the head with a tire iron. In Stano v. State, 460 So.2d 890 (Fla. 1985) two female victims were beaten by the defendant and then driven a considerable distance from the site of their abduction. As this Court found, "each must have known what was going to happen to her." In Doyle v. State, 460 So.2d 353 (Fla. 1984), the victim died of strangulation which occurred over a period of up to five minutes and prior to losing consciousness the victim was aware of the nature of the attack and had time to anticipate her death. This Court emphasized that, "murder by strangulation has consistently been found to be heinous, atrocious, and cruel because of the nature of the suffering imposed and the victim's awareness of impending death." at 357.

Routly v. State, 440 So.2d 1257 (Fla. 1983) involved an elderly victim who was assaulted with a firearm in his own bedroom, bound hand and foot and gagged, carried out of his house, thrown into the trunk of his car, driven out of town, taken to an isolated area, removed from the trunk and shot three times. In Francois v. State, 407 So.2d 885 (Fla. 1982), this Court sustained the trial court's finding that the murders of six victims were especially heinous, atrocious, or cruel on the basis of the mental anguish inflicted on the victims as they waited for their "executions" to be carried out. In Lucas v. State, 376 So.2d 1148 (Fla. 1979), the evidence showed that the defendant shot the victim, pursued her into a house, struggled with her,

hit her, dragged her from the house, and finally shot her to death while she begged for her life, thereby supporting the trial court's finding that the crime was of a heinous and atrocious nature. Similarly, in Huff v. State, 495 So.2d 145 (Fla. 1986), the victim, the defendant's father, placed his hand up in a futile attempt at self-defense, aware he was about to be murdered by his own son. Thereafter, the defendant's mother, after witnissing her son kill his father and knowing that she was about to be killed, received two bullet wounds to the head which caused excruciating pain but which did not render her unconscious. Thereafter, the defendant delivered eight or nine pulverizing blows to his mother's head with the murder weapon before firing the third and fatal shot.

Accordingly, each of the cases relied upon by the state is either legally imapplicable to the issue here or so factually different as to imply, by its very distinction, the impropriety of the heinous, atrocious, and cruel aggravating circumstance in the case at bar. In every case cited by the state involving the mental anguish of the victim, the circumstances have involved prolonged, torturous anticipation on the part of the victim which is remarkably absent in this case.

The state's arguments in support of a finding of heinous, atrocious, and cruel cannot and should not contribute to such a determination. The homicide committed in this case was not, under established case law, accompanied by such additional acts as to set the crime apart from the norm of capital felonies. The sentence of death should be vacated.

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.

Both the state and the trial court misconstrue the established facts to support the untenable position that the capital felony was committed for the purpose of avoiding or preventing a lawful arrest or effecting an escape from custody. This circumstance apparently requires a showing of specific intent since the statute refers to "purpose" to avoid arrest and has been interpreted as requiring a showing that the "motive" for the murder was to avoid arrest. See, State v. Dixon, 283 So.2d 1, 9 (Fla. 1983). Thus, a spontaneous killing, as was committed in the case at bar, does not qualify. Armstrong v. State, 399 So.2d 953 (Fla. 1981).

The state asserts that the defendant "stated that he shot [the victim] 'to keep her quite because she was yelling and screaming'." [TR 797] As the state correctly notes, the trial court relied on the same testimony and "deemed this to be an acknowledgement that the defendant was seeking to eliminate her testimony." [TR 227; Appellee Brief at p.37] A more careful reading of the defendant's confession clearly demonstrates that the victim was hysterical at the time of her shooting and that while the defendant acted to quiet her, he did not act to silence her. Indeed, it is apparent that the defendant's actions were instinctive and without thought of being caught or convicted for

any crime:

> Q. What were you thinking before you shot the female?
>
> A. To keep her quite.
>
> 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]

The evidence in this case was simply insufficient, as a matter of law, to provide the very strong proof of the requisite intent to avoid arrest and detection required to sustain the trial court's finding of this aggravating circumstance. Riley v. State, 366 So.2d 19 (Fla. 1978). Because the offense of which the defendant stands convicted was neither heinous, atrocious, or cruel, nor committed for the purpose of avoiding apprehension or detection, the defendant's death penalty cannot be upheld. At the very least, the case should be remanded for reconsideration of the sentence by the trial judge. Riley v. State, supra; Elledge v. State, 346 So.2d 998 (Fla. 1977).

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.

The unrefuted expert testimony established that the defendant was an habitual daily abuser of cocaine, marijuana, and alcohol, who, on the night of the murders had drunk a large quantity of alcohol and ingested an extraordinary amount of cocaine. This combination of cocaine and alcohol, it was established, gave rise to the defendant's uncharacteristically violent behavior and a severe impairment of his judgment. These defects established by the evidence presented unrefuted proof of an "extreme mental distrubance" and an impairment of the defendant's capacity "to appreciate the criminality of his conduct" or to "conform his conduct to the requirements of the law." Accordingly, the trial court erred in failing to credit the defendant with mitigating circumstances under Florida Statute §921.141(6)(b) and (f).

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.

The trial court's instructions to the jury prior to the sentencing phase, especially when considered in their entirety, as set forth by the state in its brief, prove the defendant's point. By its instructions, the trial court directed the jury to adhere to a single ballot, discouraged interaction between the jurors, and thereby compelled a premature recommendation of death without the benefit of deliberation.

First, the distinction between the sentencing phase and guilt phase of the proceedings was emphasized by the trial court when it quite properly instructed the jury that "it is not necessary that an advisory sentence of the jury be unanimous. Your decision may be made a majority of the jury." Thereafter, the court instructed the jury not once, but at least twice, that the recommendation of a majority of the jury would be reached by single ballot [TR 1153] and that as soon as six or more of the jurors agreed as to the sentence to be recommended that they shall return to the court with the verdict signed. [TR 1154]

Contrary to the assertions of the state, nothing in the court's instructions, including its admonition against acting hastily or without due regard for the gravity of the proceedings, suggested interaction among the jurors. Similarly, this Court on appeal cannot assume, as the state suggests, that the jury was

aware of its obligation to deliberate and discuss the relevant issues simply because it may have done so during the guilt/innocence phase of the proceedings. In fact, since the difference between the guilt phase and the sentencing phase was stressed by the trial court, the jury was more likely misled to believe that the procedure was different and, consistent with the court's expressed instructions, uncharacterized by deliberate interaction. Accordingly, the erroneous and misleading instructions of the trial court which took from the jury its deliberate function and bound the jury to its first and only ballot, rendered the defendant's advisory sentencing procedure constitutionally deficient.

Furthermore, the state's claim of waiver is misplaced. A defect in the recommendation procedure necessarily infects the legality of a sentence of death imposed by the trial court in consideration of a jury's recommendation. Thus, the defect of which the defendant complains constitutes fundamental error.

Because "[t]he right of an accused to a trial by jury is one of the most fundamental rights guaranteed by our system of government," Floyd v. State, 90 So.2d 105, 106 (Fla. 1956), and is the cornerstone of a fair and impartial trial, Florida Power Corporation v. Smith, 202 So.2d 872 (Fla. 2d DCA 1967), an infringement of that right constitutes fundamental error.

Fundamental error has been defined as "error which goes to the foundation of the case or goes to the merits of the cause of action." Sanford v. Rubin, 237 So.2d 134, 137 (Fla. 1970); Ray v. State, 403 So.2d 956 (Fla. 1981). As the Court held in Carter

v. State, 469 So.2d 194 (Fla. 2d DCA 1985), where a trial judge gives an instruction that is an incorrect statement of the law and is necessarily misleading to the jury, it is fundamental error and highly prejudical to the defendant:

> Failure to give a complete and accurate instruction is fundamental error, reviewable in the complete absence of a request or objection. Rodriguez v. State, 396 So.2d 798 (Fla. 3d DCA 1981); Bagley v. State, 119 So.2d 400 (Fla. 1st DCA 1960); Motley v. State, 155 Fla. 545, 20 So.2d 798 (1945).

The same conclusion is compelled in the case at bar.

In State v. Jones, 377 So.2d 1163 (Fla. 1979), this Court held that it was fundamental error for a trial court in a felony-murder case to fail to instruct the jury on the elements of the underlying felony. As to such a misleading jury instruction, this Court held:

> This was fundamental error. It is essential to a fair trial that the jury be able to reach a verdict based upon the law and not be left to its own devices ... Id. at 1165.

Similarly, in Anderson v. State, 276 So.2d 17 (Fla. 1973), this Court held it to be fundamental, reversible error for a trial court to fail to define "premeditation" in a first-degree murder case even where no objection was made by the defendant.

If capital sentencing instructions do not adequately inform the jury of how to consider mitigating circumstances, resentencing is constitutionally required. Lockett v. Ohio, 438 U.S. 586, 98 S.Ct. 2954 (1978); Morgan v. Zant, 743 F.2d 775 (5th

Cir. 1984) (jury instructions constitutionally flawed because they failed to adequately guide jury in understanding meaning and function of mitigating circumstances. Spivey v. Zant, 661 F.2d 464 (5th Cir. Unit B 1981) (instructions constitutionally flawed because they precluded jury from properly considering mitigating circumstances); Washington v. Watkins, 655 F.2d 1346 (5th Cir. Unit A Sept. 1981) (jury instructions precluded jurors from considering non-statutory mitigating factors). Ipso facto, jury instructions which do not adequately inform the jury of its proper function during the penalty phase, or which affirmatively mislead the jury, must similarly be held to be constitutionally deficient.

Further, the state overlooks the clear requirement of Florida Rule of Appellate Procedure 9.140(f), which mandates this Court's duty to grant any relief to which a party is entitled, especially in a capital case:

> (f) Scope of Review. The Court shall review all rulings and orders appearing in the record necessary to pass upon the grounds of an appeal. In the interest of justice, the Court may grant any relief to which any party is entitled. In capital cases, the court shall review the evidence to determine if the interest of justice requires a new trial, whether or not insufficiency of the evidence is an issue presented for review.

Under the standards established by this Court in Tedder v. State, 322 So.2d 908 (Fla. 1975), a jury's recommendation must be given great weight. Since the jury's recommendation here derived from fundamentally defective jury instructions and the jury's misconstruction of its function and duty, the defendant's sentence of death cannot be constitutionally sustained.

CONCLUSION

WHEREFORE, based upon the above and foregoing, the appellant respectfully requests this Honorable Court to reverse his conviction and grant a new trial or at least to vacate his sentence of death and remand this case for resentencing.

Respectfully submitted,

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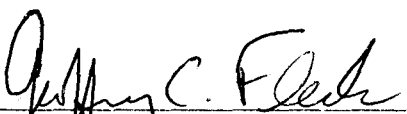
By: 
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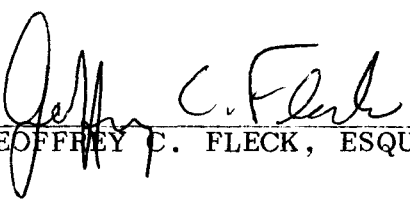
CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was forwarded to Richard L. Polin, Esquire, Assistant Attorney General, 401 N.W. 2nd Avenue, Suite 820, Miami, Florida 33128, this 11th day of December, 1987.

By: 
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