IN THE SUPREME COURT OF FLORIDA

CASE NUMBER 75,725

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

* *

BRIEF OF APPELLEE

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INTRODUCTION

The following symbols are used herein:

R: The original record and trial transcripts from the initial direct appeal.

2R: The record on appeal from the instant resentencing proceedings.

T: The transcript of the resentencing proceedings.

SR: The supplemental record from the resentencing proceedings, containing the resentencing order.

STATEMENT OF THE CASE AND FACTS

On September 12, 1984, 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). On August 9, 1985, at the conclusion of a jury trial, the jury returned verdicts of guilty as charged on all six counts. (R. 187-192, 1010-1012). Judgments of guilty were entered on the same date. (R. 193-195).

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 the murder of Rolando Betancourt, and the jury recommended, by a vote of 8-4, to impose the death penalty as to the murder of Onelia Betancourt. (R. 1156-58). 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 death penalty for the murder of Onelia Betancourt; a life sentence for the murder of Rolando Betancourt; and various terms of imprisonment for the remaining counts. (R. 218-234). The trial court entered a written order discussing the aggravating and mitigating circumstances. (R. 224-234). 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).

In a prior appeal to this Court, the death penalty imposed for the murder of Onelia Betancourt was reversed and the cause was remanded to the trial court for resentencing by the Judge, without the need to empanel a new sentencing jury. Cook v. State, 542 So.2d 964 (Fla. 1989). On remand, the trial court reimposed the death penalty for the murder of Onelia Betancourt and entered a new written sentencing order. (SR. 1). The defendant has appealed that reimposition of the death penalty and that is the subject matter of the instant appeal.

The basic facts of the underlying offense are summarized in this Court's decision from the prior appeal:

> On August 15, 1984, Rolando and Onelia Betacourt, who worked as the midnight cleaning crew at a Burger King in South Miami, were found dead, both of single gunshot wounds to the chest. Following an anonymous tip, police brought Cook in for questioning and obtained a statement. According to this statement, Cook and two companions, Derek Harrison and Melvin Nairn, went to the Burger King to commit a robbery. They waited behind a dumpster in the back until Mr. Betancourt came out the back door and emptied the garage. Cook then picked up Harrison's .38 caliber revolver, which was lying on the ground, followed Mr. Betancourt to the door, and pushed him inside. The door slammed shut behind them, preventing entry by Harrison and Nairn. Cook told the police that when he demanded money from the safe, Mr. Betancourt responded that he did not speak English and could not open the safe. When Cook continued to demand money, Mr. Betancourt hit him in the arm with a long metal rod and Cook shot him. Cook said he was on his way out when Mrs. Betancourt started screaming and grabbed him around his knees. He then shot her, ran out the back door, and fled with Harrison and Nairn. Cook told the police that he thought he had shot both of the victims in the arm. The physical evidence, as well as the trial testimony of Harrison and Nairn, were consistent with Cook's version of the shootings.
>
> 542 So.2d at 966.

A substantially more detailed summary of the guilt phase trial testimony is contained in the State's Brief of Appellee from the

original direct appeal and the State adopts that prior brief as if fully set forth herein.

During the sentencing phase of the trial, defense counsel presented several family friends and relatives of the defendant. 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 nonviolent and a follower, and said that Cook was a substance abuser, but was unsure as to what. (R. 1037-38). 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. 1044-46). Jose Santa Cruz, Cook's former employer at a fast food restaurant called Church's Fried Chicken, found that Cook got along well with employees and was a good employee, and could not believe Cook was involved in murder. (R. 1049). Julie Major said that Cook was like a big brother to her son. (R. 1053).

Rackell Yaro participates in jail ministries and delivers religious literature to inmates. (R. 1056). She had met Cook a few months earlier and he was part of the Dade County choir. (R. 1057). Cook explained to her how he had "found God." (R. 1057). Joann Bryant, an Evangelist, said that during revival, Cook was saved, but then strayed; he deserved another

chance; he could be productive. (R. 1061-63). She also said that Cook and his wife were "very sweet on each other" and that Cook was a father to the children. (R. 1062). Diane Simmons, Cook's sister, said that Cook had no problems growing up and was not violent. (R. 1065-66). He had something to offer the world. (R. 1067). He now accepted Christ, could help others and was a great artist. Id. She said that God will be the judge. (R. 1068).

Dr. M. Haber, a clinical psychologist, interviewed Cook that morning. (R. 1068-69). 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. 1070-71). This combination of drugs influenced Cook's judgment, in Haber's opinion. (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 was not 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).[1] Haber said that Cook's judgment could have been impaired to the point where he was doing a robbery, but not to the point where he said he would not go into Church's because they would recognize him. (R. 1080).[2]

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. 1086-87). He had since become a Christian, helping others, and wanted to rehabilitate himself and others. (R. 1088-89). 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 did not remember if Mrs. Betancourt was kneeling. (R. 1100). He claimed that he lied about some

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[1] During the testimony at the guilt phase of the trial, Cook's accomplice, Derek Harrison, stated that earlier in the evening on which the murders were committed, Harrison, Cook and Melvin Nairn were looking for a place to rob and Cook suggested Church's Chicken, since he had worked there before. (676-77). Cook also suggested the Burger King which they ultimately went to. (R. 677). They did not rob Church's Chicken because Harrison checked it out and did not like it. (R. 676-77).

[2] According to Melvin Nairn, who testified as a defense witness in the guilt phase, when the three men tried to rob Church's Chicken, Cook remained in the car because he used to work there. (R. 874).

things when he gave his statement to Detective Loveland, including the screaming of Mrs. Betancourt. (R. 1107). In his statement to Detective Loveland he had said that all three men decided to commit a robbery on the night in question, but he now contested that statement. (R. 1110-11).[3]

On October 25, 1984, the trial court entered the original sentencing order, imposing the death penalty for the murder of Onelia Betancourt. (R. 218-234). In that order, the trial court found the existence of five aggravating factors, which were treated as four, due to the merger of two of the factors:

> 1. The defendant was previously convicted of another capital felony involving the use or threat of violence to the person - referring to the murder

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[3] In his initial oral statement to Detective Loveland, Cook said that the three men 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). In the ensuing formal, transcribed statement, Cook provided more details. He said that he observed a young couple pull up to the Burger King and switch cars. When the janitor came out with the garbage, Cook went in with the janitor, pushing him in and asking that the safe be opened. The man did not speak English. The man then hit Cook with a metal rod with a hook. Cook then shot him. Cook said that he shot him in the left arm. Cook said that the lady started screaming, fell to her feet and tried to hold Cook. She kept on screaming, and he shot her; she was on her knees, kneeling and facing him. Cook then ran from the store and all three went over the fence, back to the car. Cook then gave the gun back to Harrison. (R. 775-800).

of Onelia Betancourt's husband, Rolando. (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. 226-27).

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).

The court, in the original sentencing order, found that one statutory mitigating factor was applicable: that the defendant had no significant history of prior criminal activity. (R. 229-230, 238). Although the original order of October 25, 1985 found that this factor was "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 and the October 29th order stated that there were insufficient mitigating circumstances. (R. 238).

In the original appeal to this Court, the Court found that two of the aggravating factors were erroneously found to

exist by the trial court: heinous, atrocious or cruel; and for the purpose of avoiding arrest. 542 So.2d at 970. The other aggravating factors were found to be supported by the evidence. Id. This Court also addressed Cook's argument "that the court should have found that he was under the influence of extreme mental or emotional disturbance and that his capacity to appreciate the criminality of his conduct to conform his conduct to the requirements of the law." Id. at 971. In support of this argument, Cook had cited "evidence that his ingestion of cocaine, marijuana, and alcohol caused him to have a diminished capacity." Id. This Court rejected Cook's argument as to this alleged mitigating factor, holding as follows:

> . . . We have said that "[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." Stano v. State, 460 So.2d 890, 894 (Fla. 1984), cert. denied, 471 U.S. 1111, 105 S.Ct. 2347, 85 L.Ed.2d 863 (1985). We see no reason to disturb the trial court's rejection of this factor, in that the record contains positive evidence that his mental capacity was not severely diminished on the night of the killings.
>
> Id.

After this Court's remand for resentencing proceedings, defense counsel submitted a written "Sentencing Memorandum", which argued that the death penalty would be disproportional in the instant case, and which further set forth the matters which defense counsel believed to constitute the

statutory and nonstatutory mitigating circumstances applicable in the instant case. (R. 32-39)

The trial court thereafter entered a written sentencing order, reflecting that the court heard the arguments of the parties in court and "considered the written submission by the defendant." (SR. 1). With respect to the aggravating factors, the new sentencing order readopted the findings from the original sentencing order of October 25, 1985, with the qualification that it was not finding the existence of factors E and H [heinous, atrocious cruel; commission of murder to avoid arrest], as those factors were stricken by this Court, and those factors were being "given no weight whatsoever." (SR. 1). Thus, the remaining aggravating factors were: (1) the prior conviction for a violent felony - the murder of Rolando Betancourt; (2) the murder was committed during a robbery and burglary; and (3) that the murder was committed for pecuniary gain. (SR. 1). The order again reflects that the two latter factors were merged and treated as one factor. (SR. 1).

With respect to the mitigating circumstances, the order "readopts all findings so made in the previous order. Those portions of the 1985 Order are also incorporated by reference herein." (SR. 1). The original sentencing order had found that the sole statutory mitigating factor was the absence of a significant history of prior criminal activity. In addition to readopting the findings from the original order as

to aggravating and mitigating circumstances, the new sentencing order provided:

> The Court previously found one statutory mitigating factor and no nonstatutory mitigating factors. Defense counsel argued numerous purported nonstatutory mitigating factors in a written submission, however, the Court does not believe that they exist, or those that do exist have so little weight when compared to the two aggravating factors, so as to have no weight at all.
>
> (SR. 2).

The order then explained that it was attaching "great weight" to the two aggravating factors. (SR. 2). Thus, the order concluded:

> . . . that there are sufficient aggravating circumstances existing to justify the sentence of death for the murder of Onelia Betancourt. The Court, after weighing and considering the aggravating circumstances, not as a cold, numerical process, but as a matter of sound and reasoned judgment, being of the opinion that insufficient mitigating circumstances, either statutory or nonstatutory exist, as demonstrated by any testimony or facts, and circumstances presented during the trial in the advisory sentencing proceeding, exist, to outweigh the aggravating circumstances, this Court thereby agrees with and concurs with the advisory sentence and recommendation arrived at by the jury regarding the murder of Onelia Betancourt.
>
> (SR. 3).

POINTS INVOLVED ON APPEAL

I.

WHETHER DEATH IS A DISPROPORTIONATE PENALTY IN LIGHT OF THE CIRCUMSTANCES OF THIS CASE.

II.

WHETHER THE TRIAL COURT'S SENTENCING ORDER REFLECTS SUFFICIENT CONSIDERATION AND WEIGHING OF THE ALLEGED MITIGATING CIRCUMSTANCES.

SUMMARY OF ARGUMENT

I. The imposition of the death penalty in the instant case is not disproportionate when compared to sentences approved or disapproved by this Court in other cases. The salient factor in this case is that it was a double murder, with the death penalty imposed for one of the victims, and the result of the aggravating factor that Cook had a prior conviction for another violent felony - i.e., the murder of Mrs. Betancourt's husband. The Appellant's argument and comparison of cases routinely ignores this distinctive feature, which sets it apart from other cases. A review of prior decisions shows that the death penalty herein is consistent with death sentences which have been upheld in other cases. All cases upon which the Appellant relies are clearly distinguishable.

II. The sentencing order in the instant case reflects sufficient consideration and weighing of the alleged mitigating factors. Contrary to the Appellant's argument, itemization of the proposed nonstatutory mitigating factors is not required.

ARGUMENT

I.

THIS DEATH SENTENCE IS NOT A DISPROPORTIONATE PENALTY IN LIGHT OF THE CIRCUMSTANCES OF THIS CASE.

Subsumed within Appellant's disproportionality claim are several distinct claims, as follows: (1) that the death penalty is disproportionate when compared to other cases where it has been rejected or upheld; (2) that the trial court relied upon improper aggravating factors; (3) that the trial court should have found certain mitigating factors to exist; and (4) that the death sentence is disproportionate in comparison to the lesser sentences of Cook's accomplices. Before engaging in proportionality review, the Appellant's claims regarding specific mitigating and aggravating factors must be addressed, so that the proper predicate for proportionality review is clear.

Mitigating Circumstances

The sole statutory mitigating circumstance found to exist was that Cook did not have a significant history of prior criminal activity. All other statutory factors were explicitly rejected. With respect to nonstatutory mitigating factors, the lower court, without itemizing them, found that they either did not exist or had such little weight as to not outweigh the aggravating factors. The trial court's order reflects an

explicit awareness of the nonstatutory mitigating factors upon which defense counsel relied, as those factors were set forth in the defense's written sentencing memorandum (2R. 32), which the sentencing order explicitly referred to and considered. Those same alleged mitigating factors are set forth in the Brief of Appellant (at pages 23-27), and are commented upon herein in sequence:

1. The absence of a significant history of prior criminal activity was found to exist.

2. The absence of <u>any</u> prior conviction record, alleged by the defense, is inaccurate, since there was the prior conviction for the killing of Rolando Betancourt. To the extent that this alleged mitigating factor might refer to the absence of <u>any</u> history of prior criminal activity, it would obviously be subsumed within the above statutory factor which the court found to exist.

3. The defendant's prior nonviolent, non-aggressive behavior. Whatever weight may attach to this factor pales in comparison to the enormity of the instant crime and the aggravating factors.

4. The description of Cook as a "follower" by defense witnesses is repudiated by ample evidence. Cook was the one who

took the initiative to barge into the Burger King while the accomplices waited outside. Cook was the one who, earlier in the evening, suggested that they rob Church's Chicken. (R. 676-77). Cook was also the one who suggested robbing the Burger King. (R. 677). The foregoing actions all reflect the leading role that Cook took; hardly the actions of a "follower." Thus, this factor is not supported by the evidence.

5. Cook's good employment record. David Cook was such a wonderful, devoted employee of Church's Chicken that he suggested that he and his friends rob his place of employment and potentially endanger the lives of fellow employees who would have been working that evening. Although Cook's employer stated that Cook was a good employee, Cook's willingness to rob his employer and endanger employees seriously undermines that testimony and either negates it or minimizes it to the point of being inconsequential.

6. Cook's intelligence and artistic abilities. Intelligence, far from mitigating the crime, tends, if anything, to make the criminal conduct more appalling. Thus, this Court, in Rogers v. State, 511 So.2d 526, 534-35 (Fla. 1987), rejected intelligence as a mitigating factor:

> . . .we find no merit to Rogers' assertion that the court erred in failing to find in mitigation that he was intelligent and articulate. Although the record compels such a

> factual finding that Rogers possesses these qualities, this finding standing alone does not extenuate or reduce moral culpability. To the contrary, intelligence and articulateness in the context of this case establish only that Rogers was capable of understanding the criminality of his conduct. Thus, this factor cannot be placed on the countervailing scale.

Whatever artistic ability Cook may have should be similarly treated. The mere statement, by Cook's sister, that Cook was a good artist, in no way extenuates or reduces the degree of moral culpability for the crime committed. Rogers, 511 So.2d at 534. Mitigating factors "must, in some way, ameliorate the enormity of the defendant's guilt." Eutzy v. State, 458 So.2d 755, 759 (Fla. 1984), cert. denied, 471 U.S. 1045 (1985). See also, Lucas v. State, No. 70,653, slip op. at 10. A mere statement that Cook was a good artist hardly satisfies these requirements. The situation might be different if, for example, testimony showed that a defendant had used his artistic abilities to teach others, or to enhance the lives of those less fortunate. For all we know on the instant record, Cook's unspecified artworks may have been used to spread themes or messages of hate; the artwork might glorify violence. Art can be put to good and bad uses, ethical or immoral. Thus, artistic talent, per se, should not be deemed of mitigating value.

7. Cook's age (20 years old at the time of the offense). The trial court, in the original sentencing order of

1985, specifically rejected Cook's age as a factor, finding that "nothing appears in this record that would make age a factor...." (R. 232). The resentencing order readopted that previous finding. (SR. 1). This Court has held that if age, as a mitigating factor, "is to be accorded any significant weight, it must be linked with some other characteristic of the defendant or the crime such as immaturity or senility." Echols v. State, 484 So.2d 568, 575 (Fla. 1985). See also, Scull v. State, 533 So.2d 1137 (Fla. 1988), Kokal v. State, 492 So.2d 1317 (Fla. 1980)(age of 20 properly rejected as a mitigating factor); Deaton v. State, 480 So.2d 1279 (Fla. 1986)(trial judge acted within his discretion in rejecting age of 18 years and 10 months as a mitigating factor); Quince v. State, 414 So.2d 185 (Fla. 1982); Garcia v. State, 492 So.2d 360 (Fla. 1986)(age of 20 insignificant without more). In the instant case, the defense has never linked the defendant's age to any other relevant characteristic. Indeed, the claims of intelligence and a good employment record reflect a maturity which would negate age as a factor. Thus, the lower court acted within its discretion in rejecting this as a mitigating factor.

8. Cook's "successful and happy marriage." One defense witness, in passing, referred to Cook and his wife, stating that "they seen to be very sweet on each other" and "they seem to be in love." (R. 1062). Such testimony is not exactly a testament to a "successful and happy marriage." The testimony doesn't

even reflect whether Cook and his wife lived together, whether he supported her, etc. Whatever value such a factor has can properly be deemed minimal. Indeed, the actions of a person who commits a murder, reflect a rather low level of concern for a spouse, as he is willing to jeopardize the marriage with a long prison term or worse.

9. Cook's "two loving children." The sole testimony about Cook's parental relation is a passing reference that Cook "seemed to be doing a pretty good job" as a father. (R. 1062). The reasoning of the preceding paragraph is equally applicable here. Moreover, Cook's willingness to participate in a brutal crime hardly sets a role model for young children and evinces little concern that they should have a proper role model. Indeed, as the children's ages were three and one at the time of the trial, in August, 1985 (R. 1086), Cook's incarceration for the preceding year (R. 218), reflects that he spent little time as an active father prior to his incarceration. To make the situation worse, the dates reflect that the younger child was born around August, 1984, right around the time of the robbery and homicides. Thus, Cook was committing these crimes either shortly before, or immediately after, the birth of the child, further minimizing his professed concerns for his expectant wife/new mother and newborn infant.

10. Cook's pre-conviction conduct in jail. The sole testimony about this was from a secretary who spent time bringing religious literature to the jail (R. 1055-56), who said that Cook participated in the jail choir and services and gave beautiful "testimony" when he found God. (R. 1057). While model prisoner testimony does have mitigating value, Valle v. State, 502 So.2d 1225 (Fla. 1987), this testimony does not really cover Cook's prison record and behavior. Indeed, no corrections officials testified as to how Cook behaved while incarcerated. The instant testimony amounts to little more than saying that Cook "found religion." The State is somewhat leery of the notion that finding religion can have mitigating value. To permit such mitigation implies that the non-religious, atheistic or agnostic are somehow to be held on a lower plane, since they do not "find religion" and they do not have such a mitigating factor available. In any event, if such testimony can be deemed to have mitigating value, it can properly be deemed of minimal significance.

11. Cook's alleged use of drugs and alcohol. The lower court, in its 1985 sentencing order, addressed the testimony of Cook's alleged drug use and Dr. Haber's related testimony:

> There is no evidence that these murders were committed while the Defendant was under the influence of extreme mental or emotional disturbance and therefore the Court does not consider this mitigating circumstance. In so concluding, the Court has taken

> 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.
>
> The Court concludes, as did Dr. M.S. Haber, that the veracity of Defendant's statements is questionable. The Court further finds them not worthy of belief. His actions in these murders all indicate a logical (albeit criminal) progression of thought, unaffected by psychological or emotional disturbance.

(R. 230). The resentencing order readopts the foregoing finding. (SR. 1).

In the prior appeal, Cook argued that the trial court had erred in rejecting the testimony about drug use as a mitigating factor. 542 So.2d at 971. This Court rejected that argument, finding "that the record contains positive evidence that his mental capacity was not severely diminished on the night of the killings." Id. Thus, "'[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.'" Id., quoting Stano v. State, 460 So.2d 890, 894, (Fla. 1984), cert. denied, 471 U.S. 1111, 105 S.Ct. 2347, 85 L.Ed. 2d 863 (1985). As this issue has been fully litigated and adjudicated by this Court, the prior adjudication is binding as the "law of the case." Preston v. State, 444 So.2d 939 (Fla. 1984); Greene v. Massey, 384 So.2d 24

(Fla. 1980). There are no exceptional circumstances to warrant reconsideration, especially where the evidence remains exactly the same.

The State would, however, note and reiterate the same matters that were pointed out in the prior appeal. Dr. Haber's testimony that Cook's judgment was impaired by alcohol, marijuana and cocaine and that he was a massive substance abuser is contradicted by other testimony. Some of Cook's other sentencing-phase witnesses said that, if anything, Cook just drank some beer. (R. 1031-32). None could testify as to any serious problem with hard drugs. While Cook 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 it. Cook, in his confession, stated that all three cohorts decided to commit the robbery. (R. 90). His 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 Cook 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 Cook did not want to enter Church's, because he worked there and might be recognized, qualified Haber's opinion as to the impairment of Cook's judgment. (R. 1079-80). She said that the impairment of judgment "changes over time," thus reducing her own conclusions

to speculation as to any given time during the course of the night. (R. 1080)

In addition to the foregoing arguments, the state would note that in Kokal v. State, 492 So.2d 1317, 1319 (Fla. 1986), this Court found that the trial court did not err in failing to find the mitigating factor of the defendant's lack of capacity to appreciate the criminality of his conduct, or the lack of ability to conform his conduct to the law, even though there was testimony that the defendant abused alcohol and drugs on the night of the murder. "The specificity with which Kokal recounted the details of the robbery and murder to his friends contradicts the notion that he did not know what he was doing, as does the testimony of his companion. There was no abuse of discretion in not giving significant weight to this evidence in mitigation." Id. See also, Koon v. State, 513 So.2d 1253 (Fla. 1987).

12. Cook's conduct in prison since his conviction. While the defense alleged in its "Sentencing Memorandum", that Cook had been a "model prisoner" since his conviction, no testimony has ever been adduced in support of this contention; nor was the allegation ever corroborated by any affidavits or copies of prison records. As such, this alleged nonstatutory mitigating factor was not supported by any evidence.

In general, with respect to mitigating circumstances, this Court has recently noted that, "[w]e, as a reviewing court, not a fact-finding court, cannot make hard-and-fast rules about what must be found in mitigation in any particular case. [citations omitted]. Because each case is unique, determining what evidence might mitigate each individual defendant's sentence must remain within the trial court's discretion." Lucas v. State, No. 70, 653, slip. op. at 10-11.

Aggravating Circumstances

The Appellant maintains that the trial court, on resentencing, improperly relied upon the aggravating factors that (1) the murder was heinous, atrocious and cruel, and (2) the murder was for the purpose of avoiding arrest by eliminating Mrs. Betancourt as a witness. The Appellant maintains that these factors were relied upon even though this Court, in the prior appeal, had stricken those factors. In support of this argument, the Appellant quotes five sentences which the judge verbally uttered during the resentencing hearing. (Brief of Appellant, p. 12; T. 22). Those sentences do not appear in the written sentencing order. Nor does the written sentencing order in any way reflect that the court relied upon the stricken aggravating factors. Indeed, the resentencing order explicitly states that "[a]ggravating factors E and H were stricken by the Supreme Court and, therefore, are not found by this Court and

are given no weight whatsoever." (SR. 1). Thus, the record reflects that the trial court did not consider or give weight to the stricken aggravating factors.

In Floyd v. State, No. 72,207, slip. op. at 14-15, this Court noted that a sentencing judge, after finding two aggravating circumstances and no mitigating circumstances, stated, "I cannot ignore that score." Although that verbal statement appeared to violate the prohibition against simply tabulating the aggravating and mitigating circumstances, the Court proceeded to review the sentencing order in its totality. Id. at 15. The written sentencing order, in its totality, convinced this Court "that the trial court correctly understood its role and effectively weighed the aggravating and mitigating circumstances. . . .We are persuaded by the totality of the sentencing order that the trial court considered all the evidence submitted and appropriately weighed it." Id. So, too, in the instant case, the written order clearly reflects that the death penalty was in no way based on the two aggravating circumstances which had previously been stricken by this Court.

Proportionality Review

"Proportionality review compares the sentence of death with other cases in which a sentence of death was approved or disapproved." Palmes v. Wainwright, 460 So.2d 362, 362 (Fla.

1984). It is not a requirement of the federal constitution, but a feature of state law. State v. Henry, 456 So.2d 466, 469 (Fla. 1984). "Absent demonstrable legal error, this Court accepts those aggravating factors and mitigating circumstances found by the trial court as the basis for proportionality review." Id. Thus, the applicable aggravating factors are: (1) the murder was during the course of a robbery; (2) the murder was committed for pecuniary gain (merged with the prior factor); and (3) the defendant had a prior conviction for another violent felony - i.e., the murder of Rolando Betancourt. The sole statutory mitigating factor was the absence of a significant history of prior criminal activity. Additionally, the lower court gave minimal weight to any nonstatutory mitigating evidence, as outlined above.

The death sentence imposed in the instant case is fully consistent with death sentences upheld by this Court in other cases. LeCroy v. State, 533 So.2d 750 (Fla. 1988), involved a double murder where, as in the instant case, the death penalty was imposed only for one of the two murders. The defendant murdered a husband and wife and received the death penalty for the murder of the wife. Three aggravating factors existed: (1) the defendant committed another prior violent felony - i.e., the murder of the husband; (2) the murder was committed during a robbery; and (3) the murder was committed to avoid arrest. Mitigating factors included: (1) the lack of a significant

history of prior criminal activity; (2) the defendant's age (17); and (3) other non-specified nonstatutory mitigating factors. Id. at 755-56. Although that case involved the additional aggravating factor of avoiding arrest, it also involved more substantial mitigation than the instant case, as the trial judge gave great weight to the defendant's youthfulness. Id. at 755. Thus, the penalties in the two cases are comparable.

Carter v. State, 14 F.L.W. 525 (Fla. Oct. 19, 1989), also involves a double murder, occurring during a grocery store robbery, in which the death penalty was imposed for just one of the two victims. The aggravating factors were that: (1) the defendant was on parole at the time; (2) there was a conviction for a prior violent felony; and (3) the murder was committed during a robbery. Mitigating evidence was found to reveal that the defendant had a deprived childhood. This Court upheld the death sentence, rejecting the disproportionality argument and rejecting the defense's effort to minimize the killing as a "robbery gone bad."

Both of the foregoing cases, like the instant one, involve double killings, where the death penalty is imposed for just one, and the defendant is found to have a conviction for a prior violent felony. The second killing, for which the death penalty was not imposed, and which serves as the basis for the

aggravating factor, is an extremely salient factor. Not only does it represent a prior violent felony conviction, but it reflects a prior conviction for the most serious violent felony conceivable. Thus, the trial judge recognized that in the instant case, and the sentencing order reflects that this aggravating factor was being given "great weight." (SR 2). By contrast, the Appellant's proportionality argument improperly minimizes or ignores the fact that this was a double killing, where one homicide serves as an aggravating factor for the imposition of death on the second of the murders. Due to the "double killing" aspect of this case, the defense's effort to relegate this case to the status of a run-of-the-mill convenience store killing is unwarranted.

Several other cases involve comparable aggravating and mitigating factors and have resulted in affirmances of the imposition of the death sentence. See, e.g., Hudson v. State, 538 So.2d 829 (Fla. 1989)(aggravating factors: prior violent felony; murder committed during a burglary; mitigating factors: emotional disturbance and age of defendant); Meeks v. State, 339 So.2d 186 (Fla. 1976) convenience store murder during robbery, aggravating factors: murder during robbery/pecuniary gain; purpose of avoiding arrest/hindering law enforcement; mitigating factors: defendant's age and dull intelligence; lack of prior history of criminal conduct); Freeman v. State, 15 F.L.W. S330 (Fla. May 31, 1990)(aggravating factors: murder during

robbery/pecuniary gain; prior violent felonies; mitigating factors: defendant's low intelligence; abuse by stepfather, some artistic ability; defendant enjoyed playing with children).

In Freeman, while rejecting the disproportionality argument, this Court noted that its function was not to reweigh the factors. It was further noted that the nonstatutory mitigating factors were not compelling. The same is true of any nonstatutory mitigating evidence in the instant case.

Not only is the imposition of the death sentence herein consistent with the foregoing cases in which the death sentence was affirmed by this Court, but a review of cases relied upon by the Appellant reveals that those cases all have clear distinguishing characteristics. The Appellant relies extensively on Caruthers v. State, 465 So.2d 496 (Fla. 1985), which involved the murder of a convenience store clerk. The sole remaining aggravating factor, after several were stricken on appeal, was that the murder was committed during a robbery. One statutory mitigating factor existed - the absence of a significant history of prior criminal activity. Additionally, several non-statutory mitigating factors existed. This Court, exercising its proportionality review powers, overturned the death sentence. As Caruthers did not involve a double killing, the aggravating factor of a prior conviction for a violent felony did not exist. That is the salient distinction between

Caruthers and the instant case and it is one of great weight, lest a prior conviction for a murder be deemed insignificant. Moreover, the trial court in the instant case gave minimal weight to any nonstatutory mitigating factors, a weighing decision which is supported by the record. Virtually all of the other cases on which the Appellant relies did not involve double murders and thus did not have the aggravating factor of a prior conviction for a violent felony. See, e.g., Smalley v. State, 546 So.2d 720 (Fla. 1989); Rembert v. State, 445 So.2d 337 (Fla. 1984); Menendez v. State, 419 So.2d 312 (Fla. 1982).

Thus, in Smalley, the sole aggravating factor -heinous, atrocious and cruel - was outweighed by four statutory mitigating circumstances - lack of prior criminal history; extreme mental and emotional disturbance; extreme duress or domination by another; impairment of ability to appreciate criminality of conduct - plus several nonstatutory mitigating factors. There is hardly any basis for analogizing Smalley to the instant case. Moreover, in Smalley, the defendant was baby-sitting and repeatedly struck the crying infant to quiet the child. Death ensued from this aggravated child abuse. This Court was influenced by the reasoning that but for the felony-murder rule it was doubtful if a conviction could be obtained for anything more than second degree murder. The Appellant herein incredibly asserts that the same reasoning applies to the instant case. Such argument by the Appellant ignores that Cook

intentionally pointed a gun at Mrs. Betancourt; intentionally fired at Mrs. Betancourt; and had an opportunity to consider his actions prior to firing. Such conduct does more than satisfy the elements of felony murder; it also satisfies the elements of first-degree premeditated murder. See generally, Sireci v. State, 399 So.2d 964, 967 (Fla. 1981); Grossman v. State, 525 So.2d 833 (Fla. 1988).

Menendez, supra, also involved the killing of a store owner. The sole aggravating factor was that the murder was committed during a robbery. Mitigating factors included the absence of a significant history of prior criminal activity plus a demonstrated capacity for rehabilitation. There was no double killing and no aggravating factor of a prior conviction for a violent felony. This Court also noted that "there was no direct evidence of a premeditated murder, so we must presume that the conviction rests on the felony murder theory." 419 So.2d at 315. By contrast, in the instant case, Cook's confession provides the direct evidence of his intention to shoot Mrs. Betancourt, thus providing "direct evidence" of premeditation.

Most of the remaining cases on which the Appellant relies are jury overrides, in which the trial court was found to have erroneously overridden the jury's recommendation of life. See, e.g., Cannady v. State, 427 So.2d 723 (Fla. 1983); McCaskill v. State, 344 So.2d 1276 (Fla. 1977); Williams v.

State, 344 So.2d 1276 (Fla. 1977); Norris v. State, 429 So.2d 688 (Fla. 1983); Hawkins v. State, 436 So.2d 44 (Fla. 1983); Stokes v. State, 403 So.2d 377 (Fla. 1981). Jury override cases do not provide a proper basis for proportionality review in cases before this Court following a jury's recommendation of death. For example, in Hudson v. State, 538 So.2d 829, 831-32 (Fla. 1989), this Court engaged in proportionality review in a case in which the death penalty was imposed pursuant to a jury's recommendation of death. The defendant, in making a disproportionality argument, relied on a prior jury override case in which this Court overturned the death penalty. This Court found the reliance on a jury override case to be a clear distinguishing feature ("Holsworth v. State,. . .as Hudson concedes, is also distinguishable as an improper override case." 538 So.2d at 832). Likewise, in Lemon v. State, 456 So.2d 885, 888 (Fla. 1984), this Court, while engaging in proportionality review of a death sentence imposed pursuant to a jury recommendation of death, also found improper the defendant's reliance on jury override cases in which the death sentence was overturned.

The reasons for such differential treatment of jury override cases are clear. In such cases, when they appear on appeal in this Court, the issue is not whether the facts of the case, aggravating and mitigating factors, etc., could ever justify the imposition of death. Rather, the jury override

appeal presents the issue of whether "it is inappropriate to impose the death penalty unless the facts are so clear and convincing that no reasonable person could differ." 456 So.2d at 888. See also, Tedder v. State, 322 So.2d 908 (Fla. 1975). Thus, in jury override cases, as long as there is a reasonable basis for the jury's life recommendation, the judge must abide by it. Ferry v. State, 507 So.2d 1373, 1376 (Fla. 1987); Amazon v. State, 487 So.2d 8 (Fla. 1986). Due to the different posture of jury override cases on appellate review, such cases do not provide an adequate basis for comparison in proportionality review of death sentences which do not involve a jury override.

Furthermore, the jury override cases upon which Appellant relies present other distinctions as well. Cannady and Norris did not involve double killings and lack the aggravating factor that there was a prior conviction for a violent felony. McCaskill and Williams, although involving multiple violent felonies, were not double murder cases. McCaskill was not even a trigger man. Norris also involved a drug abuse problem and intoxication at the time of the offense - the type of evidence which a jury in Norris could accept, but which a jury, for previously discussed reasons, could reject in the instant case. Hawkins, although involving two murder victims, was a codefendant situation in which the evidence suggested that Hawkins was not the trigger man. Thus, not only are the jury override cases irrelevant to proportionality review herein

because they are override cases, but significant distinguishing features also appear from the facts of those cases.

The Appellant's reliance on Foster v. State, 436 So.2d 56 (Fla. 1983), is also misplaced. After striking two aggravating factors on appeal, the sole remaining aggravating factor was that the two murders were committed during a robbery. Mitigating factors were the absence of a prior criminal history and the defendant's age. This Court remanded the case to the trial court to reweigh the remaining factors and any others which it might find to exist on the record. Most significantly, this Court never said that death would be inappropriate based on the remaining factors; this Court never rejected the death penalty in Foster on the basis of proportionality review.

Accordingly, a review of the applicable case law regarding proportionality review shows that the death sentence in the instant case is consistent with that upheld in other cases, and that the cases relied upon by the Appellant all present clear distinguishing features.

Codefendant's sentences

The Appellant has also argued that his sentence is disproportionate to that of his codefendants, who each pled guilty to second degree murder and received sentences of 23 and

24 years, respectively. (Brief of Appellant, p. 22). The lower court, in its original sentencing order, rejected this as a statutory mitigating factor (R. 231) and readopted that finding in its resentencing order. (SR. 1). As Cook was the trigger man and the two codefendants remained outside the Burger King while Cook entered, that finding is correct. Cook was clearly the dominant, most significant factor in this offense. Although the respective sentences of codefendants may be considered by the trial court in determining the appropriate sentence, it is permissible for different sentences to be imposed on codefendants whose culpability differs in degree. See, Hoffman v. State, 474 So.2d 1178 (Fla. 1985); Williamson v.State, 511 So.2d 289, 292-93 (Fla. 1987); Marek v. State, 492 So.2d 1055 (Fla. 1986). Thus, in Rogers v. State, 511 So.2d 526 (Fla. 1987), Rogers and a codefendant attempted a robbery of a supermarket, and Rogers killed a man in the store shortly after the codefendant exited the store. Rogers received the death sentence; the codefendant a lesser sentence. Id. at 535. This Court stated:

> . . .we find that an accomplice's sentence is irrelevant where, as here, the evidence shows that the accused perpetrated the murder without the aid or counsel from the accomplice. Where the facts are not the same or similar for each defendant, unequal sentences are justified.

See also, Jackson v. State, 366 So.2d 752, 757 (Fla. 1978), cert. denied, 444 U.S. 885, 100 S.Ct. 177, 62 L.Ed.2d 115

(1979). As Cook was the dominant offender, by virtue of being the sole triggerman and the sole person to enter the Burger King, the differential facts justify the disparate treatment of the co-defendants. See also, Woods v. State, 490 So.2d 24, 27 (Fla. 1986). The instant case thus differs from Slater v. State, 316 So.2d 539 (Fla. 1975), in which the triggerman received life and the accomplice death.

The State would also note that issues pertaining to disparate sentences of codefendants, while relevant to a statutory mitigating circumstance, are not relevant to proportionality review. When a defendant made a similar argument in Garcia v. State, 492 So.2d 360, 368 (Fla. 1986), this Court stated:

> . . .Appellant's argument misapprehends the nature of proportionality review. . . .such review compares the sentence of death to those in cases in which we have approved or disapproved a sentence of death. It has not thus far been extended to cases where the death penalty was not imposed at the trial level. . . .Prosecutorial discretion in plea bargaining with accomplices is not unconstitutionally impermissible and does not violate the principle of proportionality.

See also, Diaz v. State, 513 So.2d 1045, 1049 (Fla. 1987).

Accordingly, the trial court's conclusion that the aggravating factors outweigh the mitigating factors was correct

and the imposition of death is neither disproportionate to sentences approved or disapproved in other cases in this Court, nor is it improperly disparate with sentences given to codefendants in this case.

II.

THE TRIAL COURT'S SENTENCING ORDER SETS FORTH SUFFICIENT FINDINGS WITH RESPECT TO THE AGGRAVATING AND MITIGATING FACTORS AND THE WEIGHING OF THOSE FACTORS.

The Appellant claims that the resentencing order is insufficient because it does not contain detailed findings as to the alleged nonstatutory mitigating factors. The original sentencing order contained detailed findings as to all statutory aggravating and mitigating factors. (R. 118-134). The resentencing order readopted those findings, with the exception of striking the two aggravating factors which this Court declared to have been improperly found to exist. (SR. 1). The resentencing order further stated that:

> The Court heard all the arguments of the parties. . .and considered the written submission by the defendant.
>
> (SR. 1)(emphasis added)

The "written submission" of the defendant was the "sentencing memorandum" which summarized the mitigating factors - statutory and nonstatutory - which the defense alleged existed. (2R. 32-39). The resentencing order further provided:

> The Court previously found one statutory mitigating factor and no nonstatutory mitigating factors. Defense counsel argued numerous purported nonstatutory mitigating factors in a written submission, however, the Court does not believe that they exist, or those that do exist have

> so little weight when compared to the two aggravating factors, so as to have no weight at all.
>
> (SR. 2).

The foregoing quotes from the sentencing order clearly reveal that the trial court did consider the alleged nonstatutory mitigating factors (as set forth in the "Sentencing Memorandum"/"written submission"), and found that they carried minimal weight. Thus, the Court concluded, "after weighing and considering the aggravating circumstances, not as a cold, numerical process, but as a matter of sound and reasoned judgment, being of the opinion that insufficient mitigating circumstances, either statutory or nonstatutory exist, as demonstrated by any testimony or facts, and circumstances presented during the trial in the advisory sentencing proceeding, exist, to outweigh the aggravating circumstances. . . ." (SR. 3).

The law does not require the specific itemization of alleged nonstatutory mitigating factors; the law requires only that the sentencer consider and weigh those factors, and that was done in the instant case. The foregoing principles are clearly established in this court's recent decision in Downs v. State, No. 73,988, slip op. at 13-14 (Fla. September 20, 1990). In Downs, the defendant "[took] issue with the lack of discussion of mitigation in the sentencing order." Id. at 13. This Court nevertheless found that the order was sufficient:

> We acknowledge that Downs did present substantial valid nonstatutory mitigating evidence. Nonetheless, after reviewing the record and the sentencing order in its entirety, we are satisfied that the trial court properly considered that evidence and conducted the appropriate balance, concluding that it could "not find mitigating factors to offset or overcome the aggravating circumstances in this case."
>
> Id. at 14.

Such treatment of mitigating evidence, both statutory and nonstatutory, by the trial court in Downs, was deemed sufficient, notwithstanding the requirement in Campbell v. State, 15 F.L.W. S342, 344 (Fla. June 14, 1990), that the sentencing court "must expressly evaluate in its written order each mitigating circumstance proposed by the defendant to determine whether it is supported by the evidence and whether, in the case of nonstatutory factors, it is truly of a mitigating nature." From Downs, it must be concluded that the "express evaluation" required by Campbell can be satisfied without expressly itemizing the proposed nonstatutory mitigating factors.

This is further corroborated by the recent decision in Lucas v. State, No. 70,653, slip. op. at 10 (Fla. September 20, 1990), which reiterated that:

> We have previously held that a trial court need not expressly address each nonstatutory factor in rejecting them, Mason v. State, 438 So.2d 374 (Fla. 1983), cert. denied, 465 U.S. 1051 (1984), and "[t]hat the court's findings of fact did not specifically address appellant's evidence and arguments does not mean they were not considered." Brown v. State, 473 So.2d 1260, 1268 (Fla.), cert. denied, 474 U.S. 1038 (1985).

Although the sentencing order in Lucas was reversed for reconsideration by the trial court, that result was not due to the failure to itemize each proposed nonstatutory mitigating factor. Rather, the reversal was attributable to the lack of "clarity" in the trial court's findings. Slip. op. at 11-12. This "lack of clarity" was explained earlier in the opinion, where the court's order was described as: (1) making it impossible to discern whether the court found the statutory factor of extreme emotional disturbance/impaired capacity to exist; and (2) making no finding as to the absence of a prior criminal history. Slip op. at 9. Thus, the lack of clarity related to the existence or lack thereof of major statutory mitigating factors, not to the failure to specifically address and itemize each nonstatutory factor.

The Appellant's reliance on Bouie v. State, 559 So.2d 1113 (Fla. 1990), is similarly misplaced. There, the sentencing order did not address any individual aggravating or mitigating factors, statutory or nonstatutory. The order simply had a one

sentence conclusion, finding that there were insufficient mitigating circumstances to outweigh the aggravating circumstances. Id. at 1116. That order is in no way comparable to the instant one, which by virtue of readopting prior findings, specifically addresses all statutory factors with detailed findings of fact. The Bouie order did not even reflect which statutory factors were found to exist. Id.

The major matters set forth in Cook's written "Sentencing Memorandum" were fully addressed in the sentencing order, by virtue of incorporating findings from the original order: Cook's lack of a prior criminal history; Cook's age; Cook's alleged drug and alcohol abuse; Dr. Haber's testimony; the alleged disparate treatment of codefendants. The remaining matters are clearly of minimal, if any, weight, as set forth in the prior section of this argument: Cook's employment record; his intelligence and artistic abilities; his love of his wife and children, and his prison conduct.

In view of the foregoing, the instant sentencing order reflects sufficient consideration and weighing of the aggravating and mitigating circumstances.

CONCLUSION

Based on the foregoing, the imposition of the sentence of death should be affirmed.

Respectfully submitted,

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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, Esq., Friend, Fleck & Gettis, Sunset Station Plaza, 5975 Sunset Drive, Suite 106, South Miami, FL 33143 on this ~~10th~~ 9th day of October, 1990.

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