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

INITIAL BRIEF OF APPELLANT 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. This is the defendant's second appeal from a sentence of death. The parties will be referred to as they appeared below. By this Court's order of May 18, 1990, it has permitted reference to the record of the defendant's first appeal in Case No. 68,044. The symbol "R" will be used to designate documentary evidence and pleadings contained within the record on appeal. "TR" represents the transcripts of trial proceedings. "SR" will describe the trial court's most recent sentencing order, the subject of the accompanying "Motion to Supplement Record on Appeal." 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]

A trial by jury commenced on August 6, 1985. 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 the 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 note 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; SR.] 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 prosecuted a direct appeal to this Court in Case No. 68,044. On April 6, 1989, this Court, divided four to three, affirmed the defendant's convictions. It unanimously found that the trial court's imposition of the death penalty was not supported by either the heinous, atrocious or cruel

aggravating circumstance or the finding that the victim was killed to avoid arrest. ("The facts of the case indicate that Cook shot instinctively, not with a calculated plan to eliminate Mrs. Betancourt as a witness.") The trial court remanded the case to the trial court with instructions to resentence Cook. Cook v. State, 542 So.2d 964 (Fla. 1989).

On February 5, 1990, in the presence of the defendant and after hearing the arguments of counsel, the trial court orally reimposed the death penalty. [TR. 22] On March 30, 1990, the trial court reconvened the matter to enter a contemporaneous written order. [TR. 26-28; SR.]

The defendant filed an amended notice of appeal the same day. [TR. 42-43] 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, 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 led 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, 1066-67]

The record demonstrates the defendant to have been twenty years old at the time of the crime. [R. 22; TR. 1035] He had no

prior criminal conviction record. [TR. 1071] Born the youngest of ten children, the defendant had suffered the death of his mother in March of 1985. [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 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]

SUMMARY OF THE ARGUMENT

I.

The death penalty imposed against David Cook, by the trial court for a second time after remand, is disproportionate. The crime for which twenty-year old, first-offender, David Cook has received the ultimate penalty, is a felony robbery-murder. While inexcusable, it is not "the most aggravated, the most indefensible of crimes."

On direct appeal, this Court struck two aggravating circumstances expressly finding that Cook's homicide was neither heinous, atrocious and cruel nor committed for the purpose of avoiding or preventing a lawful arrest or effecting an escape from custody. The trial court, however, persisted in its consideration of such inappropriate aggravating circumstances to justify its decision to reimpose the death penalty. This error renders the trial court's death order unsustainable on its face.

In addition, the remaining aggravating circumstances, (homicide committed during the commission of a robbery or a burglary; prior conviction for felony of violence), when balanced against the statutory mitigating circumstance "no significant history of prior criminal activity", numerous non-statutory mitigating circumstances, and the overall circumstances of this case, compel the conclusion that when compared with similar offenses committed by similar defendants, the death penalty is inappropriate. Accordingly, this Court should vacate the defendant's sentence of death and order that he serve a sentence

of life imprisonment with no possibility of parole for twenty-five years.

II.

The trial court's sentencing order violates Florida Statute §921.141(3) (1985) and the mandate of this Court for its failure to make specific written findings of fact relative to the defendant's claimed non-statutory mitigating circumstances. By failing to determine which such mitigating circumstances were supported by the evidence, which circumstances were truly mitigating, and what weight each circumstance was entitled to receive, the instant order fails to demonstrate the independent weighing and reasoned judgment required by the statute and impairs the opportunity for meaningful review. As such, this Court must reduce the defendant's sentence to life imprisonment with no possibility of parole for twenty-five years.

ARGUMENT

I.

DEATH IS A DISPROPORTIONATE PENALTY TO IMPOSE ON DAVID COOK IN LIGHT OF THE CIRCUMSTANCES OF THIS CASE

We are told by the United States Supreme Court in Furman v. Georgia, 408 U.S. 238, 92 S.Ct. 2726, 33 L.Ed.2d 346 (1972) and subsequent decisions that the Florida death penalty scheme is valid only because it is subject to the doctrine of proportionality. It is thereby that the system insures that capital punishment is reserved only in "the most aggravated, the most indefensible of crimes." State v. Dixon, 283 So.2d 1 (Fla. 1973). Recognizing that "death is a unique punishment in its finality and in its total rejection of the possibility of rehabilitation", Dixon, supra, the ultimate penalty has historically been reserved for homicides which are premeditated and/or plotted, execution-style, sadistic, physically torturous, or committed under circumstances involving kidnapping and/or the prolonged anticipation of death.

Death must "serve both goals of measured, consistent application and fairness to the accused," Eddings v. Oklahoma, 455 U.S. 104, 111, 102 S.Ct. 869, 875, 71 L.Ed.2d 1 (1982), and must "be imposed fairly, and with reasonable consistency, or not at all." Id. Accord Hitchcock v. Dugger, ___ U.S. ___, 107 S.Ct. 1821, 95 L.Ed.2d 347 (1987); Skipper v. South Carolina, 476 U.S. 1, 106 S.Ct. 1669, 90 L.Ed.2d 1 (1986); Caldwell v.

Mississippi, 472 U.S. 320, 105 S.Ct. 2633, 86 L.Ed.2d 231 (1985). This is not a death case.

Here, the trial court perpetuated the same error which led it impose the death penalty prior to remand. The trial court expressly relied upon illegitimate aggravating circumstances to justify its imposition of the death penalty:

> All I can remember about this case that really impelled me to give the sentence that I did was that it was a double killing. He killed her to quite her down, and that's "from his confession".
>
> Now, we have an execution to either eliminate someone as a witness or to kill her because he was so cold blooded not to care anything about other human life. As far as I'm concerned, you can take your pick; one is as bad as the other.
>
> The sentence will remain the same. [TR. 22]

"Cold blooded" is not a statutory aggravating circumstance. If the trial court meant heinous, atrocious, and cruel, such a finding conflicts with the law of this case. Such a finding was expressly rejected by this Court on direct appeal. [502 So.2d at 970]

The trial court's application of the "witness elimination" aggravating circumstances is equally inappropriate and is also inapplicable under the law of this case. This Court reached precisely the same issue on direct appeal and found, "The facts of the case indicate that Cook shot instinctively, not with a calculated plan to eliminate Mrs. Betancourt as a witness." [542 So. 2d at 970] Accordingly, this Court addressed precisely

the same issue of fact relied upon by the trial court as the sole reason for its imposition of the death penalty and reasoned:

> Next Cook attacks the finding Mrs. Betancourt was killed to avoid arrest, arguing that his statement that he shot her "to keep her quite because she was yelling and screaming" was insufficient to support the trial court's findings. We agree. [542 So.2d at 970]

As such, Cook's crime remains an unpremeditated felony-murder by a single, reflexive, gunshot unremarkable except for the fact of two victims.

Armed robbery felony murders such as David Cook committed are generally not death cases. Caruthers v. State, 465 So.2d 496 (Fla. 1985), involving a convenience store robbery gone sour, is representative. On appeal, the Caruthers Court struck two aggravating circumstances - cold, calculated and premeditated and the prevention of a lawful arrest. Similarly here, this Court struck two aggravating circumstances - heinous, atrocious and cruel, and the prevention of a lawful arrest.

As in this case, Caruthers had no significant history of prior criminal activity although he had suffered a prior misdemeanor bicycle theft conviction. Here, David Cook had no prior conviction record at all. (He apparently had two prior arrests). Caruthers made a voluntary confession, exhibited remorse, and presented evidence of the mutual love and affection of his family and friends. All these circumstances apply to David Cook as well. Nine witnesses testified to Cook's previous exemplary, non-aggressive, non-violent character. [TR. 1024-1067]

He was described consistently as "good hearted, a good employee, and one who got along well with others." He is intelligent and artistic [TR. 1067], twenty years old at the time of his offense [R. 22; TR. 1085], and had been happily married for two years. [TR. 1062] He has two infant children, David, Jr. and Lajeana. [TR. 1086]

In Caruthers, the victim "jumped and [Caruthers] just started firing, shooting her three times." Here, Mrs. Betancourt screamed uncontrollably and grabbed Cook's legs causing the panicked response that resulted in her death. [R. 125, 129]

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.

The circumstances of Caruthers and this case are, therefore, materially indistinguishable. This Court, conducting a proportionality comparison in Caruthers, vacated Caruthers' death sentence as this Court should here.

In Cannady v. State, 427 So.2d 723 (Fla. 1983), the defendant was arrested for the robbery, kidnapping, and first degree murder of a night auditor at a Ramada Inn after having been arrested earlier for an unrelated robbery and kidnapping. The defendant

confessed that he stole money from the Ramada Inn, kidnapped the victim, drove him to a remote wooded area and shot him. This Court affirmed the trial court's findings that the murder was committed during the commission of a felony-kidnapping and committed for pecuniary gain. Cannady, although admitting the kidnapping, denied intending to kill the victim who he claimed "jumped at him". Id. at 730. Here, by comparison, no kidnapping was involved. In Cannady, this Court reversed the trial court's override of the jury's life sentence recommendation. Cannady, for an offense arguably more calculated, more deliberate, and more heinous, is serving his mandatory life sentence.

In the consolidated appeals of McCaskill v. State, and Williams v. State, 344 So.2d 1276 (Fla. 1977), both defendants were charged with attempted robbery, robbery, and first degree murder resulting from the robbery of a liquor store and its patrons. During their get-a-way, one of the patrons was shot twice in the neck with a handgun at close range and another patron, carrying a chair, was killed by a shotgun blast by a third unnamed accomplice. The trial judge overruled the jury's life recommendation and imposed the death penalty noting, among other things, as the State has here, that the killing was wanton and unnecessary, occurring after the commission of the robbery with no need to shoot the man chasing them armed only with a chair. Id. at 1278. This Court exercised its final responsibility to review the case in light of other decisions and determine whether or not the punishment was too great:

> Review by this Court guarantees that the reasons present in one case will reach a

> similar result to that reach under similar circumstances in another case. No longer will one man die and another live on the basis of race, or a woman live and a man die on the basis of sex. If a defendant is sentenced to die, this Court can review that case in light of the other decisions and determine whether or not the punishment is too great. [Id. at 1279]

This Court noted the general reluctance of juries, under the then new death penalty statute, to recommend the imposition of the death penalty in first degree felony murder convictions except in all but the most aggravated cases despite the general knowledge and concern of the citizenry of the substantial increase in crime. [Id. at 1280]

On the other hand, murders committed during the commission of a robbery may justify the death penalty when the circumstances are egregious enough. In Garcia v. State, 492 So.2d 360 (Fla. 1986), the defendant and three accomplices robbed a farm market. The two owners, an elderly husband and wife, were forced into a back room along with an employee. The robbers killed the husband and then the wife by multiple shots into the back of their heads as the victims lie prone on the floor. The employee was shot five times but survived to testify at trial. The plan included the murder of witnesses. This Court found, contrary to the circumstances here, that the murders were committed for the purpose of avoiding or preventing the lawful arrest and that they were heinous, atrocious, and cruel. Here, this Court has found precisely the opposite. [542 So.2d at 970]

Because David Cook killed spontaneously and reflexively

during the commission of an otherwise unremarkable robbery, this case is like Smalley v. State, 546 So.2d 720 (Fla. 1989), even though Smalley involved the murder of a twenty-eight month old child during an episode of child abuse. This Court commuted the defendant's sentence of death to life imprisonment for twenty-five years without possibility of parole, commenting that "except for the theory of felony murder, it is doubtful that he could have been convicted of a crime greater than second degree murder." Id. at 343. The same reasoning applies here.

Eddie Rembert, after drinking for part of the day (like Cook who drank beer and ingested cocaine), entered the victim's bait and tackle shop, hit the elderly victim in the head once or twice with a club, and took forty to sixty dollars from the victim's cash drawer. Rembert v. State, 445 So.2d 337, 338 (Fla. 1984). The defendant was convicted of first degree murder and robbery and was sentenced to death pursuant to the jury's recommendation by a trial court which found two mitigating circumstances. This Court reversed, noting that at oral argument the State conceded that in similar circumstances many people receive a less severe sentence and held:

> Given the facts and circumstances of this case, as compared with other first-degree murder cases, however, we find the death penalty to be unwarranted here. [Id. at 340]

The Rembert court vacated the death sentence and remanded for the imposition of a sentence of life imprisonment with no possibility of parole for twenty-five years. The same result

should apply here.

In Norris v. State, 429 So.2d 688 (Fla. 1983), the defendant broke into a residence occupied by a seventy year old woman and her ninety-seven year old mother. After beating both women, he ransacked the house and stole money and jewelry. The mother died a month after the beating. [Id. at 689] Norris was nineteen years old, suffered from a drug abuse problem, and claimed to have been intoxicated at the time of the crime. [Id. at 690] The same circumstances exist here. This Court reversed the trial court's override of the jury's life sentence recommendation.

Indeed, this Court has consistently vacated death sentences for felony murder even when no jury override is involved where there is no direct evidence of premeditation and the defendant has no significant history of prior criminal activity - both circumstances of which are undeniably applicable here. In Menendez v. State, 419 So.2d 312 (Fla. 1982), this Court reasoned:

> The final issue is whether a sentence of death is appropriate to this case in view of all the properly considered circumstances. The circumstances are that the murder occurred in the course of the crime of robbery committed by the appellant. There was no sufficient proof, however, that this was an "execution-style" or a "witness-elimination" murder. Indeed, there was no direct evidence of a premeditated murder, so we must presume that the conviction rests on the felony murder theory. The appellant, at the time of the murder, had no significant history of prior criminal activity. The trial court found this statutory mitigating circumstance at the original sentencing and it was corroborated and reinforced by further testimony for the defense at the hearing on remand. Moreover, at the hearing on remand several new defense witnesses testified that appellant has

> demonstrated a capacity for rehabilitation. [Id. at 315]

All of the circumstances apply equally to the case at bar.

The State will argue that the fact of two contemporaneous deaths is what distinguishes this case. Indeed, that is the only factor which the State can argue in support of the death penalty for a crime which otherwise remains an unremarkable felony murder committed during the course of a robbery. We know, however, that the mere fact that there exist two or more victims does not mandate death as a punishment.

In Foster v. State, 436 So.2d 56 (Fla. 1983), this Court vacated the defendant's death sentences for two first-degree felony murders and remanded for resentencing. There, both victims died from gunshot wounds in the back. Their pockets were turned inside out, and their wallets were missing. Id. at 57. Despite this Court's finding that Foster's convictions were supported by sufficient evidence showing that he was in fact the trigger-man responsible for the murders of the two victims, this Court remanded for consideration of mitigating circumstances of no significant history of criminal activity and the fact that he was twenty-one years old at the time of the murders. Here, precisely the same mitigating circumstances apply. The defendant had no significant history of criminal activity [SR. 2] and was twenty years old at the time of the murders. [TR. 1085]

In Hawkins v. State, 436 So.2d 44 (Fla. 1983), this Court reversed the trial court's override of the jury's life sentence recommendation, vacated the defendant's death sentence, and

ordered the imposition of life sentences without the possibility of parole for twenty-five years, even though there existed two homicide victims killed by multiple gun shots.

In Stokes v. State, 403 So.2d 377 (Fla. 1981), this Court found evidence beyond a reasonable doubt that the defendant "participated fully. . .in the brutal and senseless beating murders" of two people. Relying, in part, on Stokes' lack of any significant history of prior criminal activity as is the case here, a majority of this Court voted to reverse the trial court's override of the jury's recommendation of life imprisonment.

This case is distinguishable from multiple homicide cases in which the death penalty has been affirmed. Such cases virtually always reflect a significant degree of premeditation, and a combination of aggravating circumstances sufficient to establish beyond a reasonable doubt that death is the appropriate penalty. Steinhorst v. State, 412 So.2d 332 (Fla. 1982) (execution murders of four victims stumbling on site of marijuana smuggling operation); Bundy v. State, 455 So.2d 330 (Fla. 1984) (victims bludgeoned, sexually battered, and strangled while sleeping by killer under sentence of imprisonment).

Robert Henderson bound and gagged three hitchhikers and shot each of them in the head with a .22 caliber revolver. He told the police he had no regrets and that if he had his life to live over again, he would not change anything. This Court appropriately affirmed Henderson's three death sentences. Henderson v. State, 463 So.2d 196 (Fla. 1985).

Likewise, this Court in Stano v. State, 460 So.2d 890 (Fla.

1984), affirmed the imposition of death penalties for Stano's strangulation/drowning of one woman in 1975 and the shooting/drowning of another woman in 1977.

The death penalty is reserved for the most heinous of crimes committed by the most depraved of criminals. Hamblen v. State, 527 So.2d 800, 807 (Fla. 1988) (Barkett, J. dissenting). As Justice Stewart noted:

> The penalty of death differs from all other forms of criminal punishment, not in degree but in kind. It is unique in its total irrevocability. It is unique in its rejection of rehabilitation of the convict as a basic purpose of criminal justice. And it is unique, finally, in its absolute renunciation of all that it is embodied in our concept of humanity.

Furman v. Georgia, 408 U.S. 238, 306, 92 S.Ct. 2726, 2760, 33 L.Ed.2d 346 (1972) (Stewart, J., concurring).

We know too, that "death is different" and is reserved for only the most horrible of offenses. Here, the advisory sentencing verdict was eight to four. Fully one-third of the jury (even when considering two invalid aggravating circumstances) disagreed with the recommendation of death. Of the seven Justices of this Court, three believed not only that resentencing was mandated, but that the conviction itself should not stand. Moreover, David Cook's two co-defendants each plead guilty to second degree murder and received sentences of twenty-three and twenty-four years, respectively. See, Messer v. State, 330 So.2d 137 (Fla. 1976); Slater v. State, 316 So.2d 539 (Fla. 1975).

The trial court should have, as a matter of law and fact, found at least the following statutory and non-statutory mitigating circumstances to have applied:

1. No significant history of prior criminal activity. This factor was, appropriately, applied.

2. No prior conviction record of any kind. [TR. 1071] In State v. DeMarco, 495 So.2d 242 (Fla. 2d DCA 1986), the defendant was permitted to plead nolo contendere to second degree murder and burglary with a firearm. The trial court's sentence of concurrent six year terms of imprisonment followed by eleven years probation was upheld on appeal in part due to the defendant's lack of a prior record.

3. A history of non-violent, non-aggressive behavior. [TR. 1024-1067]

4. The description of David Cook as a follower, rather than a leader. [TR. 1032, 1037]

5. Cook's good employment and social adjustment record. [TR. 1044,1049] Evidence that the defendant is a good worker or good employee and that he possess positive personality traits have also been found by this Court to constitute valid mitigating factors. McCampbell v. State, 421 So.2d 1072, 1075-76 (Fla. 1982); Buckrem v. State, 355 So.2d 111 (Fla. 1978).

6. Cook's intelligence and documented artistic abilities. [TR. 1067]

7. Cook's age (twenty years old at the time of the offense). [R. 22; TR. 1085] While there is no per se rule as to when age is mitigating, Peek v. State, 395 So.2d 492 (Fla. 1981),

the factor has often been considered in cases involving defendants of Cook's age. See, Hoy v. State, 353 So.2d 826 (Fla. 1977) (trial court found twenty-two years old to be mitigating factor); King v. State, 390 So.2d 315 (Fla. 1980) (trial court found twenty-three years old to qualify); Hitchcock v. State, 413 So.2d 741 (1982) (twenty years old); Adams v. State, 412 So.2d 850 (Fla. 1982) (twenty years old); Brown v. State, 381 So.2d 689 (Fla. 1979) (twenty-two years old is of some minor significance); Lightbourne v. State, 438 So.2d 380 (Fla. 1983) (twenty-one years old); Foster v. State, 436 So.2d 56 (Fla. 1983) (twenty-one years old); Gafford v. State, 387 So.2d 333 (Fla. 1980) (nineteen years old).

8. Cook's successful and happy marriage. [TR. 1062] In the past, this Court has found that a defendant's qualities as a good father, husband and provider constitute valid mitigating factors. Thompson v. State, 456 So.2d 444, 448 (Fla. 1984); Fead v. State, 512 So.2d 176 (Fla. 1987).

9. Cook's two loving children, David, Jr. and Lajeana. [TR. 1086] Close family ties may constitute a mitigating circumstance. Cf., Hill v. State, 549 So.2d 179, 183 (Fla. 1989)

10. Cook's pre-conviction conduct in jail (the administrator of jail ministries described Cook's participation in the Dade County Choir and a gift for teaching which he described as having "moved grown men to tears."). [TR. 1057] McCambell v. State, 421 So.2d 1072 (Fla. 1982) (defendant's potential for rehabilitation is proper nonstatutory mitigating factor).

11. Cook's use of cocaine, marijuana, and alcohol in the

years preceeding the event and at the time of the commission of the crime caused him to act wholly uncharacteristically due to the paranoia and impairment of judgment he suffered. [TR. 1070-1087] The fact that the defendant, at the time of the crime charged, was under the influence of alcohol is a legitimate non-statutory mitigating factor. Waterhouse v. State, 522 So.2d 341 (Fla. 1988).

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 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]

Alcohol or drug abuse can constitute a mitigating circumstance. Huddleston v. State, 475 So.2d 204, 206 (Fla. 1985); Cannady v. State, 427 So.2d 723, 731 (Fla. 1983). In Amazon v. State, 487 So.2d 8 (Fla. 1986), this Court held improper an override where, among other mitigating factors, there was "some inconclusive evidence that [appellant] had taken drugs the night of the murders" along with "stronger" evidence of a drug abuse problem. Id. at 13. Similarly, the defendant's drug problem and claim of intoxication at the time of the murder in Norris v. State, 429 So.2d 688 (Fla. 1983), resulted in the vacation of his death penalty sentence.

12. David Cook's conduct in prison since his conviction is

that of a model prisoner. He has consistently availed himself of rehabilitative facilities, is active in as many social and educational activities as are available to him, and has otherwise served his sentence utterly without incident.

In Fead v. State, 512 So.2d 176, the trial court's override of the life sentence recommendation of the jury was held to be improper where the evidence demonstrated mitigating circumstances similar to those here - the defendant was under the influence of alcohol at the time of the offense, the defendant was a hard worker and provided for the members of his family and children, and the defendant was a model prisoner during a previous commitment.

David Cook's crime, is inexcusable as it may be, was a garden variety robbery which tragically but unintentionally resulted in death. His is not "the most aggravated, the most indefensible of crimes." The circumstances are of this case, are not "so clear and convincing that virtually no reasonable person could differ" concerning the appropriate penalty. Indeed, there is nothing within this record to suggest that consecutive life sentences precluding the possibility of parole for at least 50 years is not the appropriate, proportional sentence in this case.

Accordingly, David Cook prays this Court to resentence him to life imprisonment rather than death.

II.

THE TRIAL COURT'S SENTENCING ORDER, BEING VIOLATIVE OF FLORIDA STATUTE SECTION 921.141 (3) (1985) IS INSUFFICIENT UPON WHICH TO PREDICATE THE DEFENDANT'S SENTENCE OF DEATH, WHICH MUST BE REDUCED TO LIFE IMPRISONMENT WITHOUT THE POSSIBILITY OF PAROLE FOR TWENTY-FIVE (25) YEARS

The trial court's wholesale and generalized rejection of the mitigating circumstances offered by the defendant fails to comport with the requirements of Section 921.141(3), Florida Statutes (1985), which requires "specific written findings of fact based upon [aggravating and mitigating] circumstances." As such, the order from which the defendant appeals fails to provide "the opportunity for meaningful review" required and fails to demonstrate the independent weighing and reasoned judgment required by the statute. The defendant's sentence should be reduced to life imprisonment with no possibility of parole for twenty-five (25) years.

Here, in its sentencing order, the trial court simply stated the following:

> Defense counsel argued numerous purported non-statutory 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. 1]

Thereupon, the trial court confirmed its finding of aggravating D (the homicide was committed during the commission

of a robbery or burglary) and B (prior conviction for felony of violence). [SR. 2]. The trial court's only comment concerning mitigating circumstances pertained to the statutory mitigating circumstance of no significant history of prior criminal activity:

> While the defendant had no significant history of prior criminal activities, when the court considers the defendant's testimony of cocaine usage for three years prior to the crime, it is one thing to say that his history of criminal activity may not be significant; it is another to say that it outweighs the two aggravating factors previously found. [SR. 2]

Although the trial court "readopt[ed]" its findings as to mitigating circumstances made in its original order, that order addressed only statutory mitigating factors and no non-statutory mitigating factors. [R. 229-232, Case No. 68,044]

In conclusion, the trial court merely expressed its ". . .opinion that insufficient mitigating circumstances, either statutory or non-statutory 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. 2]

Thus, it cannot be determined from the trial court's order what consideration, if any, it gave to the defendant's assertions concerning the many non-statutory mitigating circumstances of which he presented evidence and argument. Accordingly, the trial court's order is deficient as a matter of law to sustain the defendant's death penalty.

In Eddings v. Oklahoma, 455 U.S. 104, 114-15 (1982) the Court reasoned:

> [j]ust as the State may not by statute preclude the sentencer from considering any mitigating factor, neither may the sentencer refuse to consider, as a matter of law, any relevant mitigating evidence. . .the sentencer, and the [Appellate Court], may determine the weight to be given relevant mitigating evidence. But they may not give it no weight by excluding evidence from their consideration.

Citing Eddings, this Court in Campbell v. State 15 F.L.W S342 (June 14, 1990), provided guidelines to the trial courts commanding that they expressly evaluate in their written orders each mitigating circumstance proposed by the defendant to determine whether it is supported by the evidence and whether, in the case of non-statutory factors, it is truly of a mitigating nature. Further directing that the trial court must find as a mitigating circumstance each proposed factor that has been reasonably established by the evidence and is mitigating in nature, this Court directed trial courts to next weigh the aggravating circumstances against the mitigating and, in order to facilitate appellate review, to expressly consider in its written order each established mitigating circumstance. Then, and only then, can this Court determine whether the trial court's final decisision in the weighing process is supported by the required "sufficient competent evidence in the record." Brown v. Wainwright, 392 So.2d 1327, 1331 (1981).

Here, the trial court's order is insufficient to satisfy

these guidelines, to insure the defendant's due process rights, or to allow meaningful appellate review.

For this reason alone, the trial court's order directing the death of the defendant must be reversed. As in Bouie v. State, 15 F.L.W. S188 (Fla. April 5, 1990), this Court must find that the trial court's recitations ". . .are merely conclusory statements which fail to show the independent weighing and reasoned judgment required by the statute and caselaw and do not meet [its] requirements." [Id. at S190] In the absence of the requisite findings, this Court must, as it did in Bouie, reduce the defendant's sentence to life imprisonment with no possibility of parole for twenty-five (25) years.

CONCLUSION

WHEREFORE, based upon the foregoing arguments and authorities, the defendant/appellant, David Cook, respectfully urges this Court to vacate his sentence of death.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was forwarded to Michael Neimand, Esq., Assitant Attorney General, 401 N.W. 2nd Avenue, Suite 820, Miami, Florida 33128, this 27TH day of July, 1990.

_____
GEOFFREY C. FLECK, ESQ.