IN THE SUPREME COURT OF FLORIDA

CASE NO. 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 CRIMINAL DIVISION

REPLY BRIEF OF APPELLANT DAVID COOK

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STATEMENT OF THE CASE AND FACTS

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

ARGUMENT

POINT I.

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

Under Florida's death penalty statute, the ultimate punishment of death is reserved for the most aggravated and indefensible of crimes committed by the most culpable of offenders. See State v. Dixon, 283 So.2d 1, 8 (Fla. 1973), cert. denied, sub nom. Hunter v. Florida, 416 U.S. 943, 94 S.Ct. 1950, 40 L.Ed.2d 295 (1974). Death is qualitatively different from every other punishment and requires extraordinary statutory and procedural safeguards. Hitchcock v. Dugger, 481 U.S. 393, 107 S.Ct. 1821, 95 L.Ed.2d 347 (1987); Gardner v. Florida, 430 U.S. 349, 97 S.Ct. 1197, 51 L.Ed.2d 393 (1977). Notwithstanding the vehemence of the State's bloodlust, the fact remains that David Cook panicked during an otherwise unremarkable armed robbery. Mrs. Betancourt's murder was neither intended nor contemplated by this young first offender. "The facts of [this] case indicate that Cook shot instinctively, not with a calculated plan..." Cook v. State, 542 So.2d 964, 970 (Fla. 1989).

The State spends a great deal of effort and space in its brief of appellee attempting to demonstrate that Cook's death penalty can be rationalized by a pure and absolute weighing of aggravating circumstances against mitigating circumstances. It acknowledges that the only difference between this and other

convenience store robbery murders is the fact of two victims but fails to concede that that sole circumstance does not compel the imposition of a sentence of death. Foster v. State, 436 So.2d 56 (Fla. 1983); Hawkins v. State, 436 So.2d 44 (Fla. 1983); Stokes v. State, 403 So.2d 377 (Fla. 1981).

The State relies upon LeCroy v. State, 533 So.2d 750 (Fla. 1988) and Carter v. State, 14 FLW 525 (Fla. Oct. 19, 1989) to suggest the propriety of the death penalty in double murders. Both cases are distinguishable. LeCroy murdered two people and stole their personal property from their corpses. The second victim, the wife of the first, was found approximately four hundred feet away from the body of the first victim. The wife's trousers were unzipped and her brassiere was partially dislocated. She had been shot three times - in the chest, head and neck. LeCroy sought to obfuscate his involvement by pretending to help the police search for the missing victims. In his initial statement to the police, he lied. He later admitted killing the wife to eliminate her as a witness. Contrary to the circumstances here, this Court reversed the trial court's determination that the defendant had committed a capital felony for the purpose of avoiding or preventing a lawful arrest.

The circumstances surrounding the double murder committed in Carter v. State, supra, are not revealed by this Court's decision. However, it appears that there existed no mitigating circumstances whatsoever, except for a deprived childhood, and in addition to aggravating circumstances surrounding the crime, Carter was under sentence of imprisonment at the time of the

capital felony (parole). Unlike Carter, David Cook had no significant history of prior criminal activity and, in fact, had no convictions prior to this incident at all.

The fact remains that the trial court imposed the ultimate penalty upon David Cook because, "all [he could] remember about this case that really impelled [him] to give the sentence that [he] did was that it was a double killing." [TR 22] We know, however, that that is not enough.

Accordingly, there is nothing within this record to suggest that consecutive life sentences precluding the possibility of parole for at least fifty years is not the appropriate, proportional sentence in this case. David Cook's death sentence should be reversed.

POINT 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

This Court has expressly set out definitive guidelines for dealing with statutory and non-statutory mitigating circumstances. Campbell v. State, 15 FLW S342 (Fla. Jun. 14, 1990). In order for this Court to engage in meaningful appellate review, those guidelines should be followed in all capital-sentencing orders. Lucas v. State, 15 FLW S473, 475 (Fla. Sept. 20, 1990) (Shaw, C.J., Barkett and Kogan concurring). There is no question that a trial court's findings must be of "unmistakable clarity." Mann v. State, 420 So.2d 578, 581 (Fla. 1982); Lucas v. State, supra, at S475. The trial court here entered an order imposing upon Cook the sentence of death which is less than unmistakably clear. Cook's death sentence, therefore, cannot be sustained.

The State, throughout its brief of appellee, suggests that the clarity of the trial court's order [S.R.] is enhanced by its incorporation by reference of the trial court's prior 1985 order imposing death. [see pp. 10, 42] The original order, however, which preceded the guidelines formulated by this Court in Rogers v. State, 511 So.2d 526 (Fla. 1987), cert. denied, 484 U.S. 1020 (1988), and Campbell v. State, supra, suffered the same deficiency as does the present order. Neither order addressed,

except in the most general and perfunctory way, any of the nonstatutory mitigating circumstances offered by Cook in support of his life. The trial court's adoption of his prior order does nothing to bolster the sufficiency of the order here under attack.

In fact, the lack of clarity suffered by the trial court's order is demonstrated by a paragraph of that order emphasized by the State in its brief:

> 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]

This Court's most recent pronouncement in Campbell requires the sentencing court to "expressly evaluate in its written order each mitigating circumstance proposed by the defendant...". As this Court explained, "as with statutory mitigating circumstances, proposed nonstatutory circumstances should generally be dealt with as categories of related conduct rather than individual acts." Id. at fn.3. This Court, therefore, did no violence to the State's assertion that "the law does not require the specific itemization of alleged nonstatutory mitigating factors." See Mason v. State, 438 So.2d 376 (Fla. 1983) cert. denied, 465 U.S. 1051 (1984); Lucas v. State, supra, and Downs v. State, 15 FLW S478 (Fla. Sept. 20, 1990), upon which

the State relied. The crucial fact remains here that the trial court did not consider nonstatutory circumstances either individually or in categories of related conduct. The trial court's rejection of nonstatutory mitigating circumstances here was indiscriminate and wholesale.

In addition, the trial court demonstrated the insufficiency and lack of clarity of its order by its finding:

> ...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]

First, this Court cannot determine from the court's expression which nonstatutory mitigating factors the trial court found to exist or not to exist. The order is thereby too vague to support a sentence of death.

Second, the trial court violated the quintessential rule that "...a mitigating factor once found cannot be dismissed as having no weight." [Campbell at S344] The trial court's order is explicitly violative of this Court's mandate in that regard by dismissing, as having "no weight at all", even those nonstatutory mitigating factors "that do exist."

In addition, the trial court's order lacks clarity for the simple reason that it is irreconcilable with the trial court's oral pronouncements. At the conclusion of the hearing held on the defendant's resentencing, immediately prior to imposing the death penalty, the trial court remarked:

> 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 quiet 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]

The State argues that the trial court disclaimed any reliance upon aggravating factors E and H (HAC and "witness elimination") in its written order. [S.R. 1] Such an argument is irreconcilable with the trial court's spontaneous expression of feeling and explanation regarding the basis for its death sentence of Cook. The likelihood, or even possibility, that an accused will be executed because a trial court was influenced even to the slightest degree by improper aggravating circumstances is constitutionally impermissible and morally intolerable.

The trial court's order sentencing Cook to death is deficient. The defendant's death sentence must be vacated and reduced to life imprisonment with no possibility of parole for twenty-five years. Bouie v. State, 15 FLW S188 (Fla. April 5, 1990).

CONCLUSION

WHEREFORE, based upon the foregoing arguments and authorities, the appellant, David Cook, respectfully requests this honorable Court to reverse his sentence of death and to remand this case with directions to the trial court to impose a sentence of life imprisonment without parole for 25 years.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was forwarded to Richard L. Polin, Esquire, Assistant Attorney General, 401 N.W. 2nd Avenue, Suite N921, Miami, Florida 33128, this 26th day of October, 1990.

BY: _____
GEOFFREY C. FLECK, ESQUIRE