IN THE SUPREME COURT OF FLORIDA

CHARLES KENNETH FOSTER,

Petitioner,

-v- Case No. 65,967

LOUIE L. WAINWRIGHT, Secretary, Department of Corrections, State of Florida,

Respondent.

_____/

RESPONSE

Comes now Louie L. Wainwright, by and through undersigned counsel, and hereby shows why petitioner's prayer for habeas corpus relief should not be granted.

I.

Petitioner's death sentence was affirmed by this court in Foster v. State, 369 So.2d 928 (Fla. 1979). The United States Supreme Court denied certiorari review on October 1, 1979. Foster v. Florida, 444 U.S. 885 (1979). Petitioner was a member of a class of deathrow inmates who challenged Florida's death penalty statute by habeas corpus petition. Brown, et al. v. Wainwright, 392 So.2d 1327 (Fla. 1981), decided the claim adversely to petitioner's prayer for relief. Subsequent to the signing of a warrant setting petitioner's execution, Foster filed a Motion for Post-conviction Relief on the basis of an alleged ineffective assistance of trial counsel. The allegation, in part, concerned the failure to produce at sentencing certain medical records which are reproduced in the current petition before this court. The relief was summarily denied without a hearing, and this court affirmed the trial court's ruling in Foster v. State, 400 So.2d 1 (Fla. 1981).

A hearing on the claim of ineffective assistance of trial counsel was held before the Honorable Lynn Higby, Federal District Judge, after petitioner filed a prayer for habeas corpus relief at the federal level. Again, the medical records found in this

current action were produced as evidence of trial counsel's "omission." After denial of relief, Foster v. Strickland, 517 F.Supp. 597 (N.D.Fla. 1981), the Eleventh Circuit affirmed the District Court's denial of relief. Foster v. Strickland, 707 F.2d 1339 (11th Cir. 1983). Thereafter petitioner applied for certiorari relief to the United States Supreme Court. This was denied in Foster v. Strickland, ____U.S.____, 104 S.Ct. 2375, reh.denied, ____U.S.____, 104 S.Ct. 3564 (1984).

II.

By his claim for relief, Foster alleges ineffective assistance of appellate counsel, and disproportionality of his death sentence. These allegations stem from the medical records produced at the motion for post-conviction relief, and the petition for habeas corpus relief in the district court. This court has affirmed the denial of post-conviction relief, and after a hearing in the district court, the district court also found that trial counsel was not ineffective in failing to produce such evidence.

The petition for relief further alleges that this court's consideration of extra-record materials caused the ineffectiveness of Foster's counsel on appeal.

A.

Petitioner's Claim of Ineffective Assistance of Appellate Counsel

In a recent habeas corpus petition before this court alleging ineffective representation of appellate counsel, this court stated:

> The standards to be applied in determining whether a defendant was denied his sixth amendment right to effective assistance of counsel were set forth by the United States Supreme Court in Strickland. The standards enunciated in that case do not "differ significantly" with those espoused by this Court in Knight v. State, 394 So.2d 997 (Fla. 1981); Jackson v. State, Nos. 65,429, 65,430, 65,431 slip op. at 3 (Fla.June 12, 1984)[9 F.L.W. 223]. See also Downs v. State, No. 64,184 (Fla.

June 21, 1984)[9 F.L.W. 253]. Strickland held that a defendant's claim for ineffective assistance of counsel has two components:

> First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable.

104 S.Ct. at 2064.

* * *

> To prove prejudice, the court further stated that "the defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome. Id. at 2068.

Adams v. Wainwright, ___So.2d___(Fla. 1984)(9 F.L.W. 357).

However, the application of those criteria begs the question: How can appellate counsel's performance be deficient when "the deprivation of assistance was not the fault of counsel. . .." (Petition, p. 23) Such an allegation is akin to a claim of the failure to anticipate future changes in the law. This has been repeatedly rejected as a claim of ineffective assistance of appellate counsel.

To further demonstrate that petitioner has failed to make a valid claim, respondent will consider the second prong of the analysis: prejudice. Would the result of the proceeding have been different? Respondent's answer is no. This is evident because this court has clearly stated that no extra-record material was considered in evaluating petitioner's sentence. Brown v. Wainwright, 392 So.2d 1327, 1332 (Fla. 1981).

Petitioner's premise must be based on the assumption that this court considered the extra-record psychological screening report. Without such a conclusion, petitioner could not claim

that additional medical records should have been adduced by appellate counsel in rebuttal. The incorrect assumption that this court considered extra-record material causes all the legal conclusions thereafter drawn by petitioner to fall like a house of cards.

Petitioner interprets Brown, supra, to include a narrow exception applicable to himself. Foster states that in the circumstance wherein the judge finds no mitigating circumstances to outweigh aggravating circumstances, this court is charged with the duty of weighing the evidence of mitigation to conclude whether the trial court's finding was a palpable abuse of discretion. Petitioner states that in this alleged weighing process, the psychological screening report took an added importance causing petitioner's appeal to be bypassed for remand to allow the trial judge to enter specific findings of mitigating circumstances. Again, petitioner assumes that the psychological screening report was considered, when it clearly was not. However, petitioner also misapprehends the function of this court upon review of a death sentence.

> Neither of our sentencing review functions, it will be noted, involves weighing or reevaluating the evidence adduced to establish aggravating and mitigating circumstances. Our sole concern on evidentiary matters is to determine whether there was sufficient competent evidence in the record from which the judge and jury could properly find the presence of appropriate aggravating or mitigating circumstances. [Emphasis ours.]

Brown v. Wainwright, supra, at 1331.

Petitioner's allegation fails to draw the distinction between examining evidentiary sufficiency, and reweighing the evidence. Since this court did not reweigh the evidence of the mitigating factors, the need to present rebuttal to a report that was never considered, is obviously nonexistent.

Petitioner cites Magill v. State, 386 So.2d 1188 (Fla. 1980), for the theory that he was not afforded a remand for specific findings of mitigating circumstances because of the differences in the psychological screening reports of Magill and himself. Again, it is necessary to state that the psychological screening report affected neither case. Brown, supra. However, there is no clue given by this court's opinion in Magill that the psychological factors played a part in the remand. In stark contrast to Magill, petitioner's case does not contain the possible mitigating factor of age. Beyond the obvious distinction that Magill's cause was returned for specific findings, there is no comparison which can logically be made between petitioner's cause and Magill's. It is difficult to imagine that the two cases, side by side, lead to an appearance of caprice.

Lastly, petitioner brings to this court a variation on an earlier theme. The Brown v. Wainwright claim was considered as a petition for writ of habeas corpus by this court upon review of the trial court's denial of 3.850 relief. See Foster v. State, 400 So.2d 1, 4 (Fla. 1981). The earlier finding that no extra-record material was considered is dispositive of petitioner's claim herein that appellate counsel was ineffective for failing to rebut, with additional extra-record material, the psychological screening report.

It is worth noting that the medical records on which petitioner relies herein were seen by Judge Higby to include prejudicial material.

> If Mayo had introduced Foster's medical history in testimony of his relatives as Foster says he should have, a great deal of highly prejudicial evidence would have come along.

Foster v. Strickland, supra, at 605.

The Eleventh Circuit found little difference between the medical records Foster thought should have been admitted during the sentencing phase, and those which were actually admitted.

> The evidence Mayo in fact presented covered essentially the same subjects as that which petitioner would now have him present.

Foster v. Strickland, 707 F.2d 1339, at 1334.

Clearly, the evidence Foster now finds so persuasive, was not found to be so by the federal courts. There is nothing in petitioner's allegation of ineffective assistance of appellate counsel which would convince this court that Foster is entitled to relief. This court must deny petitioner's claim on this ground.

B.

Proportionality

Petitioner admits that this court conducted a proportionality review on direct appeal of his conviction and sentence. (See Petition, p. 30.) Of course, this court has said that proportionality review is undertaken for all death sentences, and this is accomplished even though not expressly stated in the opinion. Messer v. State, 439 So.2d 875 (Fla. 1983).

However, petitioner takes the argument a step further. The claim is made that if the medical evidence offered by this petition were presented to the trial court, that court would of necessity have found a mitigating factor. Given that, petitioner claims, his case was not properly considered in relation to other death sentences simply because this court lacked the essential evidence necessary to make the distinction.

The claim of nonproportionality is misplaced. First, there is nothing to mandate the trial court find the mitigating circumstance even if the evidence had been introduced. The cases cited by petitioner in support of this theory have only

one thing in common: the finding by this court under the factual circumstances presented, that the trial court erred in failing to find the mitigating circumstance. There is nothing to suggest that, had the evidence been introduced below, and had the trial judge's finding been no different, this court would have remanded for specific findings as to mitigating circumstances. Further, as earlier stated, petitioner here overemphasizes the "quality" of the medical evidence. See Foster v. Strickland, 517 F.Supp. 597 (N.D.Fla. 1981); Foster v. Strickland, 707 F.2d 1339 (11th Cir. 1983).

Secondly, there was no infirmity in counsel's failure to produce the material at trial, see Foster v. State, 400 So.2d 1 (Fla. 1981), and this court found on direct appeal that the trial court did not abuse its discretion in imposing the sentence of death. Foster v. State, 369 So.2d 928 (Fla. 1979).

Thirdly, there is nothing to suggest that this court would have accepted extra-record material, as suggested by the supplemental petition for habeas corpus relief, for the limited purpose of proportionality review. Brown v. Wainwright, supra, clearly states that proportionality review is conducted on the basis of materials found in the record. To allow the submission of extra-record material for the purpose of proportionality review would be to require a mini-trial on appeal to determine whether all evidence defendant believes relevant to proportionality, should be adduced.

Clearly, this court examined petitioner's death sentence in light of other cases, and petitioner is not entitled to the relief he requests on the basis of his theory that this court must recede from Brown v. Wainwright.

Respectfully submitted:

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I have furnished a copy of the foregoing Response to Mr. Richard H. Burr, III, Assistant Public Defender, 224 Datura Street/13th Floor, West Palm Beach, Florida 33401, by U.S. Mail, this 8th day of October, 1984.

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