

IN THE
SUPREME COURT OF FLORIDA

FILED
SID J. WHITE
OCT 9 1964

CHARLES KENNETH FOSTER,)
)
 Petitioner,)
)
 v.)
)
 LOUIE L. WAINWRIGHT, Secretary,)
 Florida Department of)
 Corrections,)
)
 Respondent.)
)

CLERK SUPREME COURT
By: *[Signature]*
Chief Deputy Clerk

CASE NO. 65967

SUPPLEMENT TO PETITION FOR WRIT OF HABEAS CORPUS

Issue II -- Part B

THE CONSTITUTIONAL GUARANTEE OF DUE PROCESS OF LAW REQUIRES REVIEW OF STATE MENTAL HOSPITAL RECORDS SHOWING PETITIONER'S MENTAL ILLNESS THAT WERE NOT CONSIDERED IN DETERMINATION OR REVIEW OF PETITIONER'S DEATH SENTENCE.

Full judicial examination and review of the entire medical records of Mr. Foster's mental illness has not been given. Neither the trial court nor this Court had the complete records of Mr. Foster's involuntary mental commitments and treatment in ruling on the sentence. This omission occurred because the hospital records were not introduced into the court record at sentencing.

These records reflect directly and significantly upon the legal propriety of the death sentence imposed on Mr. Foster, on the constitutionality of the sentence and of the appellate review of it. These records were not considered, and could not be considered, on direct appeal because they were not in the court record and had not been reviewed by the trial judge when he imposed the death sentence on Mr. Foster.

In the five years that preceded the murder of Julian Lanier Mr. Foster had been committed to mental hospitals and facilities on numerous occasions for involuntary and emergency mental treatment because of extreme circumstances showing him to be dangerous to himself and others because of mental illness. These instances of involuntary, emergency residential treatment at state provided facilities for the mentally ill, along with the

attendant diagnosis and treatment of Mr. Foster, were not reflected in any full or meaningful way in the records reviewed by this Court when it affirmed the sentence.

This extraordinary request for relief should be granted because of the difference between psychosis as diagnosed in the hospital records, and the antisocial diagnosis this Court reviewed in the record of the sentencing. The difference compels judicial examination of the full records of Mr. Foster's mental illness before ruling upon this Petition and before any sentence of death upon him is executed. The failure of any other procedure to provide for judicial consideration of these state mental health records predating the crime, made while Petitioner was in the custody and care of this state's mental health facilities, must be addressed and corrected. These records were not generated after the crime nor by counsel. They are official records of an agency of the state of Florida. They raise a significant likelihood that he is to be executed for a crime that was a product of an ongoing major mental illness that entitled him to statutory mental mitigation that was denied in determination of his sentence. This type of uncontroverted evidence has repeatedly been recognized as a legally supportive basis for finding statutory mitigation. See Miller v. State, supra, and other cases cited in Point II of the Petition. Such evidence must be considered before the findings are complete in capital sentencing.

These records, not having been placed before the trial judge, were outside the record on appeal. No appellate procedure recognized review of matters outside the trial record and its exhibits. This evidence was not examined for its mitigating value at the time the Rule 3.850 motion was decided because under the step by step analysis required by Knight v. State, 394 So.2d 997 (Fla. 1981), the finding that counsel had not been shown to be ineffective precluded a determination of prejudice. Thus, on appeal from the denial of the Rule 3.850 post-conviction motion this Court also did not review Mr. Foster's prior hospital records to determine if the trial court should make a finding regarding it and to weigh it if found.

That due process protects differently from the right to reasonably effective counsel is shown by Anders v. California, 386 U.S. 738, 87 S.Ct. 1396, 18 L.Ed.2d 493 (1967), holding that due process prevents even effective counsel from denying judicial review by failing to bring up his client's record to the reviewing court.

Under Anders, a decision by competent counsel is not permitted to substitute for judicial review of the relevant record. So also in capital sentencing, due process protections require the sentencing process to include the full relevant records, of the kind in Mr. Foster's background, in determining whether the death sentence is the appropriate sentence. The due process principle of Anders must protect the defendant from a trial counsel's omission to file the record just as it protects persons against an appellate counsel's omission to bring up the full record that is necessary to pass on the issues.

The Court must now correct this deficiency by providing a procedure for examination of these hospital records and for a determination of whether Petitioner is entitled to a new sentencing hearing before the trial court or to further review by this Court based on the full nature of the mental mitigating evidence.

Review by some judicial forum of the full mitigating mental history shown in the hospital records cannot be omitted without denying due process of the law as guaranteed by the Florida Constitution, Art. I, Sec. 9, and the United States Constitution, Amend. XIV.

In Chambers v. Mississippi, 410 U.S. 284, 93 S.Ct. 1058, 35 L.Ed. 2d 297 (1973), a state's enforcement of a procedural rule excluding testimony on the basis of its voucher and hearsay rules to prevent cross-examination of a witness as to prior statements was held to deny due process of law. The same kind of violation of due process of law is involved here when adherence to usual procedural rules excludes this kind of non-record mental history from being included in the calculus of whether Petitioner's crime is at all, or to what extent, mitigated. That the hospital evidence is mitigating and not merely neutral is certain. But without any procedure for the courts to review it, this history

of mental illness has gone unreviewed. Yet the sentencing determination is constitutionally required to be an analysis of the character and background of the offender as well as the nature of the crime. Elledge v. State, 346 So.2d 998 (Fla. 1977); Lockett v. Ohio, 438 U.S. 586 (1978); Eddings v. Oklahoma 455 U.S. 104 (1982).

The Eighth Amendment command for full consideration of mitigation is offended by the particular omission shown here. Both reliability and proportionality to comply with the Eighth Amendment and Art. I, Sec. 17, Fla. Const., are not met unless the Court determines that the rule of Hargrave v. State, 366 So.2d 1 (Fla. 1978), does not mean that relevant background information that is left out of the record at sentencing, but that is determinative of whether there is mitigation, can go unheard simply because in capital cases no pre-sentence or post-sentence investigation is mandated by the rules of procedure.

The Constitution requires this Court to direct a remedy where this kind of evidence has not been considered. There is no barrier to extending review to non-record materials for good cause in an appropriate case. Brown v. Wainwright, supra. The procedural barrier to full consideration of the existing evidence must fall under Chambers, and a remedy must be given.

Respectfully Submitted,

RICHARD L. JORANDBY
Public Defender
15th Judicial Circuit of Florida
224 Datura Street/13th Floor
West Palm Beach, Florida 33401
(305) 837-2150

RICHARD H. BURR III
Assistant Public Defender

LOUIS G. CARRES
Assistant Public Defender

BY Louis G. Carres
Counsel for Petitioner

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy hereof has been furnished by HAND DELIVERY to Gregory C. Smith, Assistant Attorney General, The Capitol, Room 1502, Tallahassee, Florida 32301, this 9th day of October, 1984.

Louis H. Cane
Of Counsel