IN THE SUPREME COURT OF FLORIDA

CHARLES KENNETH FOSTER,	:	
	:	
Petitioner,	:	
	:	
vs.	:	CASE NO. 70,597
	:	
RICHARD L. DUGGER, Secretary, Department of Corrections, State of Florida,	:	
	:	
Respondent.	:	
	:	

REPLY TO THE RESPONSE TO
PETITION FOR WRIT OF HABEAS CORPUS

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The Response of the State to Mr. Foster's Petition for Habeas Corpus uses the straw-man technique of argumentation. It creates arguments which it claims that the Petitioner is making and then attacks the fictitious arguments. This Reply will briefly sketch what the State claims Mr. Foster is arguing, what he is actually saying in his Petition, and why his actual arguments compel the relief he seeks.

First, the State claims Mr. Foster is asking this Court to change its standard for accepting successive petitions, or alternatively, that he is ignoring that standard. "Petitioners like Foster must show error so serious as to undermine confidence in the outcome. This is something Foster's petition does not even attempt." Response at 4. "Therefore, the question is not whether Foster simply has no other means of revue [sic] but rather, whether habeas corpus is to be expanded to facilitate endless relitigation of non-fundamental claims of error." Response at 4.

Mr. Foster is not requesting this Court to change its standards for considering successive petitions. The Court clearly stated the standard in Kennedy v. Wainwright, 483 So.2d 424, 426 (Fla. 1986):

> It is only in the case of error that prejudicially denies fundamental constitutional rights that this Court will revisit a matter previously settled by the affirmance of a conviction or sentence.

See also McCrae v. Wainwright, 439 So.2d 868 (Fla. 1983)(standard applied in habeas corpus when issues were not objected to at trial or raised on appeal is that error renders trial fundamentally unfair).

The Petition is framed around the Kennedy standard, see Petition at 3-4, and Mr. Foster's case is clearly shown to fall within the defined exception to the rule against reconsideration of issues. As the Petition explains, this Court erred in affirming the denial of Mr. Foster's first 3.850 motion on the ground that the Lockett issue could not be raised in collateral relief. The Court has since recognized that Lockett claims can properly be raised in 3.850 motions if the trial was held before the Court clarified Florida law on the scope of consideration of

mitigating circumstances in capital sentencing decisions, which occurred in Songer v. State, 365 So.2d 696 (Fla. 1978). See Copeland v. Wainwright, 505 So.2d 425 (Fla. 1987). Mr. Foster's trial took place before Songer; thus, he should have been heard on his Lockett claim in his first 3.850 motion.

Mr. Foster's Petition also demonstrates that the right denied by this Court is a fundamental right. Petition at 4. The Eighth Amendment to the Constitution prohibits cruel or unusual punishment. The Supreme Court of the United States has long interpreted the Eighth Amendment to require reliable sentencing proceedings in capital cases, and in its view a sentencing proceeding cannot be reliable unless consideration of mitigating evidence concerning the defendant's character and record and the circumstances of the offense is unrestricted.

> [A] statute that prevents the sentencer ... from giving independent mitigating weight to aspects of the defendant's character and record and to circumstances of the offense proffered in mitigation creates the risk that the death penalty will be imposed in spite of factors which may call for a less severe penalty. When the choice is between life and death, that risk is unacceptable and incompatible with the commands of the Eighth and Fourteenth Amendments.

Lockett v. Ohio, 438 U.S. 586, 605 (1978)(plurality opinion). A majority of the Supreme Court, in Eddings v. Oklahoma, 455 U.S. 104 (1982), reaffirmed Lockett's plurality opinion and explained it as follows:

> As the history of capital punishment has shown, such an approach [mandatory death sentences] to the problem of discretion could not succeed while the Eighth Amendment required that the individual be given his due: 'the fundamental respect for humanity underlying the Eighth Amendment . . . requires consideration of the character and record of the individual offender and the circumstances of the particular offense as a constitutionally indispensable part of the process of inflicting the penalty of death.'

Id. at 112, quoting Woodson v. North Carolina, 428 U.S. 280, 304 (1976).

These cases and the Supreme Court cases which expound on them make it completely certain that an error which restricts the consideration of relevant mitigating evidence is error which is fundamental because it throws into question the reliability of the death sentence. Mr. Foster's sentencing jury and judge were

restricted in their consideration of mitigating circumstances, so the error of this court in refusing to hear that claim denied Mr. Foster his fundamental right to a reliable capital sentencing hearing.

The error which denied Mr. Foster his constitutional, fundamental right was also prejudicial. Mr. Foster was not heard on his Lockett claim: prejudice from the appellate error depends on the strength of that claim. Showing prejudice in a Lockett claim requires that the petitioner show two things. First, substantial, non-statutory mitigating factors existed. Second, the sentencers were restricted in their consideration of these factors. The Petition does show both aspects of prejudice, and this Reply will discuss them only in argument against the State's Response.

The second straw-man argument which the State creates concerns the non-statutory mitigating factors and the evidence from which the jury was to deduce these factors. The State portrays the Petition as claiming that non-record evidence of non-statutory mitigating factors shows that Mr. Foster was prejudiced. "There is an inherent inconsistency in alleging that the sentencer and the advisory jury 'failed' (or 'were restricted') to (or in) consider(ing) non-statutory mitigating evidence which in another forum, Foster is claiming was never gathered or presented." Response at 2. "Foster has yet to identify the non-statutory evidence he would have proferred." Response at 3.

This portion of the Response blatantly misstates the claim presented in the Petition. Mr. Foster argues that substantial evidence actually before the jury, which was introduced during the course of his trial, could have been used by the jury in weighing aspects of his character and the offense which were not within the scope of the statutory mitigating factors. These non-statutory factors, shown by the evidence admitted at trial, are detailed at page 12 of the Petition. Mr. Foster neither needs nor attempts to allege additional, non-record evidence to show

that the consideration given his sentence falls beneath the requirements of the Eighth Amendment. The judge and jury did not consider mitigating factors shown by the evidence because they were non-statutory factors, which they reasonably believed they could not consider. This error led to the imposition of a death sentence that cannot now be deemed reliable.

Lastly, the State claims that the Petition does not show that Mr. Foster's sentencing judge and jury believed they were restricted to considering only statutory mitigating circumstances. Here, the State does attempt to grapple, in an offhand fashion, with the arguments actually made in the Petition. However, the State rests its position upon the palpably frivolous assertion that

> no significance at all attaches to the wording of either the court's instructions . . . or its orders even though only statutory factors are listed.

Response at 4.

One wonders where one should look to find what the judge and jury believed the law to be if not in the instructions on the law given to the jury and the orders written by the judge. Fortunately, neither Mr. Foster nor this Court must make such an inquiry because the United States Supreme Court has held unequivocally that instructions and orders do have significance in making this determination. The Supreme Court unanimously found that a judge and jury did restrict their consideration of mitigating circumstances based on record evidence of instructions and orders on all fours with the instructions and orders in Mr. Foster's case. Hitchcock v. Dugger, 95 L.Ed.2d 347 (1987). The Petition sets out a comparison of Mr. Hitchcock's and Mr. Foster's sentencing proceedings, yet the Response does not even attempt to dispute this comparison. No honest dispute could be attempted, inasmuch as this Court has recently recognized that record evidence similar to that in Hitchcock is grounds for post-conviction relief. See McCrae v. State, No. 67, 629 (Fla. June 18, 1987).

Mr. Foster has shown prejudice because his sentencers, due

to their mistaken belief as to the requirements of the law, did not consider non-statutory factors in mitigation which were supported by the evidence adduced during his trial. This error denied Mr. Foster his fundamental right to a reliable sentencing proceeding. After Mr. Foster raised the error in his first 3.850 motion, this Court erroneously refused to consider this error, ruling instead that Mr. Foster should have raised the error at trial and on direct appeal. The Court has since recognized that defendants who were in Mr. Foster's position should be heard because they could not reasonably have been required to raise the error prior to the Songer decision. The error of this Court's ruling thus meets the Kennedy test for reconsidering an issue previously decided on appeal: it prejudicially denied a fundamental, constitutional right of the Petitioner. This Court should correct its error by granting the writ and ordering a new sentencing proceeding; Mr. Foster's life may be unjustly taken if the Court does not.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I herby certify that a copy hereof has been furnished by mail to Mark C. Menser, Assistant Attorney General, Department of Legal Affairs, The Capitol, Tallahassee, Florida, 32301, this 1st day of July, 1987.

Richard H. Burnett

ATTORNEY FOR PETITIONER