IN THE SUPREME COURT OF FLORIDA

CHARLES KENNETH FOSTER,

Appellant,

v. CASE NO. 76,639

STATE OF FLORIDA,

Appellee.

APPEAL FROM SENTENCE OF DEATH AND
DENIAL OF RULE 3.850 MOTION
CIRCUIT COURT FOR THE 14TH JUDICIAL CIRCUIT,
BAY COUNTY, FLORIDA

ANSWER BRIEF OF APPELLEE

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STATEMENT OF THE CASE AND FACTS

The state does not accept Mr. Foster's statement given its incomplete and argumentative nature. The actual facts are as follows:

(A) Procedural History

Charles Kenneth Foster was convicted of murder in the first degree (under both premeditated and felony murder theories) on October 4, 1975. Foster was sentenced to death following an unanimous jury recommendation.

Foster appealed the convictions and sentence to the Florida Supreme Court, which affirmed the lower court. Foster v. State, 369 So.2d 928 (Fla.1979), cert. denied, 444 U.S. 885 (1979). As noted in the opinion, Foster confessed while on the witness stand. On appeal, Foster raised issues relating to the exclusion of anti-death penalty jurors, the constitutionality of prosecutorial discretion and the propriety of the death penalty as applied.

Foster obtained new counsel (his present counsel) and filed a motion for post-conviction relief which was denied without an evidentiary hearing. Foster appealed this decision, again without success. Foster v. State, 400 So.2d 1 (Fla.1981). The petition raised a host of procedurally barred claims, dismissed on that basis by the courts, id at 4, and claims of ineffective assistance of trial counsel and Foster's alleged "incompetence" to stand trial, The issues were clearly refuted by the record, id at 3, and thus failed.

Foster petitioned the federal district court for relief pursuant to 28 USC § 2254. Relief was denied and Foster took an unsuccessful appeal to the Eleventh Circuit. Foster v. Strickland, 707 F.2d 1339 (11th Cir.1983). The Eleventh Circuit was given the following issues:

(1) Competence of defense counsel during both phases of trial.

(2) The constitutionality of the jury instructions on "how" aggravating and mitigating factors should be weighed.

(3) Whether the Florida Supreme Court relied upon non-record materials in reviewing capital cases.

(4) Whether the advisory jury is precluded from considering nonstatutory mitigating evidence due to faulty penalty phase jury instructions.

Foster received an extensive evidentiary hearing in federal district court. See id at 1341.

Foster's allegations of ineffective assistance of counsel centered upon counsels' (Mr. Mayo and Mr. Wager's) "failure" to pursue an insanity defense based upon Foster's drug use, behavior and mental health history. This issue was rejected because counsel did, in fact, have Foster examined by experts and did review his records, id at 1342-43 and because Foster, who was competent, precluded counsel from raising any mental health defense. Id at 1343. Thus, counsel was deemed effective during both phases of trial. Id at 1343-44.

Foster filed a second successive § 2254 petition alleging the discovery of additional or "new" evidence regarding counsel's effectiveness and Foster's mental illness. After an evidentiary hearing relief was denied and Foster appealed anew to the Eleventh Circuit. Foster v. Duqqer, 823 F.2d 402 (11th

Cir.1987). The court, on appeal, described Foster's petition as "a thinly disguised rehash''of his first petition, id at 498, and denied relief.

Foster returned to state court and filed a second successive motion for post-conviction relief pursuant to Fla.R.Crim.P. 3.850, which was summarily denied, and a habeas corpus petition in the Florida Supreme Court. Foster v. Dugger, 518 So.2d 901 (Fla.1987).

The combined habeas corpus Rule 3.850 appeal addressed issues involving Caldwell v. Mississippi, 472 U.S. 320 (1985) and Hitchcock v. Dugger, 481 U.S. 393 (1987). A new sentencing was ordered on the basis of Hitchcock error.

On remand, Foster sought to expand the scope of the remand by filing a third successive "Rule 3.850" petition challenging his conviction. Relief was denied, on the merits, regarding the successive claim of "ineffective counsel''and the alleged "Brady" claim. (R 1751-52).

Foster received a full resentencing with input from a new advisory jury which, again, voted (8-4) for death. (R 1537).

Foster was sentenced to death in a subsequent written order which addressed all of Foster's proffered mitigating factors. (R 1902-1909).

(B) Statement of the Facts

Mr. Foster's brief raises sixteen separate issues. The facts relevant to each will be set forth in order.

Since Mr. Foster's guilt is not at issue, we will rely upon this Court's opinion in Foster v. State, 369 So.2d 928 (Fla.1979) for the general facts regarding the murder itself.

FACTS: ISSUE I
(Denial of successive Rule 3.850 petition)

Mr. Foster took advantage of this Court's limited remand to file a third successive motion for post-conviction relief pursuant to Fla.R.Crim.P. 3.850. (S.R. 1972-88). The petition raised two general claims which were known to Foster or reasonably discoverable by him since, at least, 1981. (R 30). Defense counsel offered as an excuse nothing more than the fact that they had, after 15 years, only gotten around to speaking with Gail Evans "yesterday." (R 30-31).

The motion alleged (again) that defense attorney Virgil Mayo was incompetent for failing to sufficiently investigate the case. (S.R. 1972 et. seq.). In the alternative, the petition accused the state of not disclosing several items of evidence to the defense in violation of Brady v. Maryland, 373 U.S. 83 (1963). According to Mr. Foster:

(1) The state failed to disclose "deals" with Anita Childers and Gail Evans - assuming arguendo they existed.

(2) The state failed to disclose "inconsistencies" in the womens' pretrial statements on the fact that Gail Evans attempted suicide prior to trial.

(3) The state failed to tell the defense that Foster cut off Mr. Lanier's penis during the course of the murder.

The record, of course, refuted claim three in its entirety. Mr. Lanier's body was not mutilated, (R 35, 1094), so the issue was factually baseless.

The trial transcript showed that trial counsel (Mr. Mayo) was fully aware of Ms. Childers' and Ms. Evans' presence during the murder, the fact that they were not arrested and the fact

that Ms. Childers was being housed at a motel. (R **974-981, 998 et. seq.**)

Andre Childers, the ex-husband of Anita Childers, was called to testify regarding her credibility during **a** pretrial motion in limine. **(R 840).** Andre was **a** lifelong friend of the Fosters. **(R 841).** Childers gave a hearsay account of what Anita allegedly told him about the murder. (R **844).** Childers never came forward at trial or for fifteen years thereafter and no one, including collateral counsel, ever spoke to him. **(R 847-849).** Childers allegedly did not even know how he came to be subpoenaed. (R 849).

Connie Thaymes allegedly heard a different version of the **murder** from Anita Childers 12 years after Foster's trial, but Anita at that time had "burned out" herself on cocaine and other drugs. (R 856-57).

While testifying during the penalty phase itself, Ms. Thaymes was unwilling to state that Anita Childers was a drug abuser. (R **1134).**

Ms. Thaymes was the twin sister of Don Goodman, who testified by telephone during the motion hearing. (R **824).** Goodman was married to Anita in **1987.** (R 825). Goodman claimed that Anita **made** "a deal" for her testimony against Foster because she made "a deal" and testified against Goodman during his trial (for robbery). (R 826). Anita told Don the state put her up in a motel to protect her from Foster's family. (R 828). Don described Anita, in 1987, as burned out on drugs. **(R 830).**

Gail Evans testified in person at the resentencing. (R 1007). She did not remember her statements, did not recall anyone cutting off Mr. Lanier's penis (R 1011) and was adamant that no one, in 1975, told her to withhold any information. (R 1014).

Thus, the entire Rule 3.850 petition was based upon a false presumption (mutilation of Mr. Lanier) and hearsay comments from a burned out dope user made twelve years after the crime, reported by people who obviously had a motive to attack Anita's credibility given their friendship with Foster and her (Anita's) subsequent testimony against Don Goodman.

The State countered this "evidence" with the sworn testimony of Dr. Sybers regarding the condition of the victim's body (R 1094); the sworn testimony of Officer Coram (who took Foster's confession) (R 947) confessions by collateral counsel that they had been aware of the "mutilation" issue for ten years (R 878), and a report from Dr. Sapoznikoff, delivered to trial counsel in 1975, referring to the mutilation issue. (R 861).

A separate Rule 3.850 hearing was not conducted but, from this record, the trial court was able to deny relief. (R 1751).

FACTS: ISSUE II
(Admission of Anita Rogers' 1975 testimony)

The trial court allowed the state to introduce Ms. Childers' sworn testimony from the 1975 trial. Her cross-examination by defense counsel was also admitted, (R 951-981), and Foster was allowed to "impeach" Childers, in absentia, with the testimony of other witnesses as noted above.

Neither party was able to locate Ms. Childers prior to resentencing. (R 810-814). The state had two investigators comb Childers' neighborhood (R 810) and was given an address for Childers by defense counsel, who found her in Tampa but made no effort to secure her attendance. (R 810). The state was not able to contact Ms. Childers. (R 811-12). A subpoena was sent to Hillsborough County but was not served by the local sheriff. (R 812). Apparently Childers had left town. (R 812).

FACTS: ISSUE III
(Exclusion of evidence)

The trial court excluded alleged impeachment evidence showing Ms. Childers' criminal convictions, in 1989, for "false reporting" and grand larceny. (i.e. a misdemeanor and a third degree felony). (R 1162).

FACTS: ISSUE IV
(Denial of access to non-party witness' confidential medical records)

Defense (collateral) counsel demanded a court order granting them access to the private medical records of former (trial) witnesses Childers and Evans. The state had no special access to these reports. (R 901).

FACTS: ISSUE V
(Sufficiency of the trial court's written-sentencing order)

The trial court's written order lists all thirteen proposed "mitigating factors" suggested by Mr. Foster's counsel but found that they lacked sufficient weight to overcome the three aggravating factors established by the state. (R 1902-1909).

FACTS: ISSUE VI
(Hitchcock)

The jury was not restricted in any way from considering nonstatutory mitigating evidence. In fact, the jury was specifically told that the factors were unlimited (R 1526) and that Foster's thirteen suggested factors (delineated) were not the only available factors. (R 1526-28).

FACTS: ISSUE VII
(Failure to tell jury it could ignore evidence and vote for life arbitrarily)

The trial court correctly refused to misinform the advisory jury that it was free to impose any sentence it desired no matter the evidence.

FACTS: ISSUE VIII
(Heinous - Atrocious - Cruel)

The facts establishing this aggravating factor were:

(1) The victim died slowly. (R 1905).

(2) The victim was severely beaten prior to being stabbed. (R 1905).

(3) The victim's nose was broken, he was bruised and his eyes were blackened. (R 1905).

(4) The victim was stabbed in the throat. (R 1905).

(5) The victim bore a defensive would to his hand. (R 1905).

(6) The victim was grabbed by his genitals while being tossed outside, causing him to cry out. (R 1906).

(7) The victim was stabbed again after pleading to Foster not to do it. (R 1906).

(8) The victim was covered with branches, but made a sound which caused Foster to return and cut his spine, (R 1906).

(9) Even then, death took 3 to 5 more minutes. (R 1906).

FACTS: ISSUE IX
(Jury instruction)

The trial court gave the standard jury instruction on the **H-A-C** aggravating factor. **(R** 1954).

FACTS: ISSUE X
(Defense instruction)

Defense counsel wanted the trial court to misinform the jury that the jury had to disregard the "**H-A-C**" aggravating factors if the defense established some mental illness. (R 1427). The request was properly denied. (R 1429).

FACTS: ISSUE XI
(Cold - Calculated-- Premeditated Factor)

The evidence supporting this factor included Foster's statement of his intent to rob Mr. Lanier (R 1907), his exchange of rings with one of the girls (R 1907), and his confession from the witness stand. (R 1907).

FACTS: ISSUE XII
(Ex-post facto)

No development is required.

FACTS: ISSUE XIII
(Proportionality)

No development is necessary.

FACTS: ISSUE XIV
(McClesky)

In yet another effort to expand the limited remand, Foster's lawyers filed a motion challenging the imposition of the death penalty in Florida on the grounds that it is imposed disproportionately in cases involving white victims. (R 1882-1907). The motion sought to put the people, courts and prosecutors of Bay County, Florida, on trial **as** racists (R 1882-

1907). Without regard to the facts of any cases, Foster simply noted the fact that the victims in all seventeen (17) capital cases in the area were white. (R 1884). Without supporting facts, the "statistic" reported by Foster was attributed to prosecutorial racism. (R **1884).**

The document goes on to raise various ad hominem arguments and Foster's version of various undocumented (political) events. (R **1884-1898).** Foster said that, however, "The State Attarney is no worse or better in this respect than the community in which he and his staff practice." (R 1899). Foster then offered argument regarding the school system, jobs, welfare, etc. (R 1899-1900).

The Appellant wanted to set the employees of the state attorney's office for deposition (R 3) and have an evidentiary hearing on racism in the south.

The State denied the allegations (R 5, 7) with the prosecutor noting that he personally tried **two black** victim cases. (R **15).**

The trial court reviewed the McClesky case (R 22) and ultimately denied both relief and a hearing.

FACTS: ISSUE XV

(Failure to strike venire members for cause)

Foster failed to preserve this issue for review. All three challenged venire members were excused peremptorily. (R 759, 761, 762). The defense never exhausted all of its challenges (R **784)** and never identified any jurors as unacceptable but "forced" on the defense. In fact, counsel tendered the jury even though it had challenges remaining. (R 780-784).

The first member, Ms. Pope, was unequivocal regarding her ability to impose a life sentence. (R 170). While she disliked the abuse of the legal system by endless appeals, she appreciated the fact that some inmates deserve a life sentence. (R 173-74). She denied having a pro-death bias. (R 175). She had worked as a medical secretary (R 172) and agreed that mental illness could mitigate a sentence. (R 176). In response to questioning by the bench she declared that she could set aside any personal feelings and follow the court's instructions. (R 181).

Mrs. Pelland was the next venire member challenged for cause. Mrs. Pelland stated she could vote "for life." (R 268). Since her niece was under psychiatric care she trusted mental health experts. (R 275-276). She felt that there should be guidelines for imposing the death penalty. (R 278). Although she leaned toward the death penalty, she would follow any guidelines. (R 279-282).

The third venire member was Thomas Minor. Minor was a schoolmate of Foster's (R 489) and, although they did not get along (R 489) as children he felt this would cause him to be "more fair" now. (R 494). Minor, unlike Foster, went on to college and took psychology classes at F.S.U. (R 501). In fact, since he knew Foster he was not sure he could vote for death. (R 505).

FACTS: ~~ISSUE~~ XVI
(Exclusion of venire member)

Venire member Beth Deluzain had a fixed opinion that death should only be imposed in certain specific murder cases; to wit: inmate on inmate crimes involving a second murder. (R 465).

SUMMARY OF ARGUMENT

The Appellant has presented sixteen assorted issues for review. To avoid redundancy, we note that the factual underpinnings of each of Foster's argument are incomplete and/or incorrect. Foster's citations to the caselaw uniformly fail to include or address controlling decisional law. One claim (Issue XV) was not even preserved for appellate review.

Foster is not entitled to relief.

ARGUMENT: ISSUE I

THE TRIAL COURT DID NOT ERR IN DENYING FOSTER'S THIRD SUCCESSIVE MOTION FOR POST-CONVICTION RELIEF.

The first issue on appeal concerns the trial court's denial of the Appellant's third successive motion for post-conviction relief.

The trial court denied relief "on the merits" even though Foster's petition was untimely and successive. As a result, the trial court achieved the correct result for the wrong reason. Savage v. State, 156 So.2d 566 (Fla. 1st DCA 1963). The successive and untimely petition was procedurally barred. Booker v. State, 503 So.2d 888 (Fla.1987); Demps v. State, 515 So.2d 196 (Fla.1987); Clark v. State, 533 So.2d 1144 (Fla.1988); Bundy v. State, 538 So.2d 445 (Fla.1989). We submit that the trial court was obliged to follow this Court's precedents and should have denied relief on procedural grounds. We suggest that, on appeal, any affirmance should be clearly based upon Florida's procedural rules. See Harris v. Reed, 489 U.S. 255 (1989).

Turning to the merits, Foster alleged "Brady"[1] error and, once again, "ineffective assistance of counsel." We will dispose of both claims in order.

(A) BRADY

The Appellant alleges three distinct "Brady" violations; to wit:

(1) Failure to disclose deals with witnesses Evans and Rogers.

(2) Failure to disclose that the witnesses gave inconsistent statements.

(3) Failure to disclose the amputation of the victim's penis.

Turning our attention to claim (2), we can swiftly dispose of it because the law places no obligation on the state to report such information to the defense. The state must disclose exculpatory information and, under Fla.R.Crim.P. 3.220 it must disclose witnesses and their statements, but the state is never required to "do defense counsel's job" and report "inconsistencies" to the defense. Heqwood v. State, 16 F.L.W. S120 (Fla.1991); Hansbrough v. State, 509 So.2d 1081 (Fla.1987). Thus, the claim does not warrant discussion.

Claims (1) and (3) suffer from similar deficiencies. First, the underlying "Brady" evidence has never been shown to exist and second, Foster cannot show that the defense did not have access to the information involved.

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[1] Brady v. Maryland, 373 U.S. 83 (1963).

Foster never proved the actual existence of any "deal" between the state, Evans and Rogers. Foster offered the dubious opinion testimony of some of his friends based upon alleged conversations with Anita Rogers seven to twelve years after trial, but that testimony was unreliable because (1) Anita Rogers also put Don Goodman in jail (so he did not like her) and (2) the witnesses all agreed Anita was burned out on drugs when she spoke to them.

Conspicuously absent was testimony from the police, prosecutors or the two witnesses themselves regarding any pretrial "deal."

If no "deal" existed, then it follows that Brady was not violated because there was nothing to disclose.

The question of whether Mr. Lanier's penis was cut off was answered by the medical examiner. Mr. Lanier was intact, so there was no evidence to "report." Again, there is no Brady claim.

In addition to Foster's failure to prove the existence of his Brady evidence, he has failed to show that anything was withheld by the state or was not equally available to the defense.

Trial counsel was a veteran criminal lawyer whose cross-examinations of Evans and Rogers deftly pointed out to the jury that these women were not arrested. Counsel clearly did not want to open the door to the fact that Anita Rogers was in protective care due to threats from the Foster family (real or perceived) so, when Anita mentioned that the state had her at a motel,

counsel backed off. Still, the record demonstrates that counsel knew that the witnesses were not charged with any offenses.

The record also shows - and Foster's lawyers confessed below - that trial counsel received a pretrial report from Dr. Sapoznikoff in which the doctor states that Foster himself thought that Lanier's penis had been cut off. Therefore, counsel and the defendant were aware of this issue.[2] Since the rumor was refuted by the autopsy, it was not worthy of further mention.

Since the "evidence" Foster complains about did not exist, Foster cannot possibly support his claim of Brady error. He cannot show the existence of evidence, suppression by the state, exclusive control by the state (of said evidence) or that the outcome of the trial would have been any different. United States v. Bagley, 473 U.S. 667 (1986).

Mr. Foster's Brady claim was subject to disposition without a hearing because it was both facially deficient (being based upon conclusory allegations) and refuted by the record. Glock v. State, 537 So.2d 99 (Fla.1989); Demps v. State, 515 So.2d 196 (Fla.1987); Runyon v. State, 460 So.2d 494 (Fla. 1st DCA 1984). In the absence of anything other than the petitioner's unsupported conclusions, relief was properly denied.

(B) INEFFECTIVE ASSISTANCE OF COUNSEL

The Appellant's second argument is a fairly standard alternative to any "Brady" claim. Foster alleges that if the state did not violate Brady then his lawyer was ineffective for

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[2] Collateral counsel confessed to being aware of the issue ten years ago. (R 878-9).

not "finding" the alleged evidence. (Again, Foster's complaint assumes that any evidence even existed.)

Mr. Foster's brief, at page (1), suggests to this court that his previous collateral proceedings are irrelevant. This issue, however, points up the need to consider those earlier petitions. Foster's claim of ineffective assistance of counsel is a successive claim and, in Florida, constitutes an abuse of process. Sullivan v. State, 441 So.2d 609 (Fla.1983); Dobbert v. State, 456 So.2d 424 (Fla.1984); Christopher v. State, 489 So.2d 22 (Fla.1986); Booker v. State, 503 So.2d 888 (Fla.1987). Mr. Foster is not permitted, by law, to perpetually file successive attacks upon trial counsel, in piecemeal fashion, either to create delay or in response to some alternative theory he just "discovered." See In re Shriner 735 F.2d 1236 (11th Cir. 1984); Booker, supra; Christopher, supra.

Mr. Foster may allege that it has taken 15 years and five prior collateral proceedings to discover the availability of this claim. Such an argument, if made, would clearly be refuted by the record. The fact that Rogers and Evans were not prosecuted is and always has been a matter of public record. Collateral counsel could and should have investigated this issue. The ''amputation" issue is found in Foster's pretrial evaluation by Dr. Sapoznikoff. Collateral counsel, whose earlier efforts centered on trial counsels investigation of mental health issues, knew or reasonably should have known about this facet of the case.[3]

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[3] We would compare the case at bar to cases involving the

Again, without weighing this issue, we note that Foster's claim was devoid of merit.

The performance of Foster's counsel in preparing this case has repeatedly been examined and upheld. Foster v. State, supra; Foster v. Strickland, supra; Foster v. Dugger, supra. This latest attack upon caunsel centers on two alleged "failures."

First, counsel is faulted for not "discovering" the existence of any "deals." Again, Foster merely assumes that deals were made. Ironically, after **10** years collateral counsel have yet to prove any deals existed, yet trial counsel is being faulted for his failure to find anything over a brief period of four weeks. The truth is, there **were** no "deals" for counsel to discover. At trial, counsel knew better than to ask Evans or Rogers the "key" question because they would bolster their credibility by denying the existence of any deal. Instead, counsel adroitly phrased his questions to let the jury know that the women were not prosecuted. This was not "incompetent." Strickland v. Washington, 466 U.S. 688 (1984).

Second, counsel is faulted for "failing" to discover the amputation of the victim's penis. Foster loses here because the amputation never happened. Thus, counsel cannot be faulted.

Thus, Foster's "failure to investigate" claim still rings as hollow **as** before. As such, it was properly denied. Counsel cannot be faulted for any failure to find nonexistent evidence or evidence of dubious worth, See Blanco v. State, 507 So.2d **1377**

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untimely use of Ch. 119, Fla. Stat. See Agan v. State, 560 So.2d **222** (Fla.1990).

(Fla.1987); Squires v. State, 558 So.2d 401 (Fla.1990). In the absence of any showing that evidence existed for counsel to "find," Foster cannot meet his burden of proving error or prejudice under Strickland. See Smith v. State, 445 So.2d 223 (Fla.1983). Foster's claims were facially deficient and therefore correctly denied. Bundy v. State, 497 So.2d 1209 (Fla.1986); Stano v. State, 520 So.2d 278 (Fla.1988).

We emphasize, however, the fact that Faster has already enjoyed a decade of successive "merits" hearings and review in the state and federal courts on the issue of counsel's preparation of this case. At some point, litigation must **end** in the interests of fairness and finality. Johnson v. State, 536 So.2d 1009 (Fla.1988). Indeed, Foster's case has now devolved into litigation over the putative impact of nonexistent evidence. It is time to clearly and unequivocally invoke our procedural bar. Harris v. Reed, supra.

ARGUMENT: ISSUE II

THE TRIAL COURT DID NOT ERR IN ALLOWING THE TRANSCRIPTS OF POSTER'S GUILT PHASE TRIAL TO BE READ INTO THE RECORD AT RFSENTENCING.

Section 921.141(1), Fla. Stat., provides that a trial judge, during the penalty phase of a capital case, has discretion to admit any probative evidence relating to aggravating or mitigating factors "regardless of its admissibility under the exclusionary rules of evidence," Under this provision, hearsay evidence which would ordinarily be inadmissible may come in as long as the defendant has a "fair opportunity to rebut.'' This

liberal rule regarding the admission of evidence was recognized in State v. Dixon, 283 So.2d 1 (Fla.1973) and in Alvord v. State, 322 So.2d 533 (Fla.1975).

In our case the state offered certain guilt phase evidence in support of the aggravating factors it was required to prove. To this end the state was correctly allowed to introduce the guilt phase testimony of Anita Childers (Rogers). (R 951 et. seq.) The defendant, in turn, was allowed to introduce the transcript of the guilt-phase cross-examination of Ms. Rogers. (R 974 et. seq.)[4]

Since Ms. Rogers was not in Court, Foster was permitted to "rebut" her testimony by offering the testimony of Andre Childers (R 1116) and Connie Thaymes (R 1127).

As noted before, trial judges are vested with considerable discretion in the admission of penalty phase evidence and their decision will not be reversed in the absence of a clear showing of abuse. Alvord, supra; Stano v. State, 473 So.2d 1282 (Fla.1985); Jackson v. State, 575 So.2d 181 (Fla.1991). It is evident from this record that the "hearsay" evidence, if it can be so characterized, of Anita Childers-Rogers was admissible under the terms of the statute and was fairly rebutted by her cross-examination and by the testimony of other witnesses. See Teffeteller v. State, 495 So.2d 744 (Fla.1986).

Foster, who was aware of Ms. Rogers' address (and gave it to the state) made no effort to produce this witness but, rather,

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[4] The same procedure was followed as to Gail Evans even though Ms. Evans was in Court and was called, by Foster, as a witness.

expected the state to call her since, in effect, it would be relying upon her testimony. Referring to alleged, non-record, conversations with the prosecutor, Foster now complains that the state did not try "hard enough" to produce Ms. Rogers.

The record shows that the state was only served with Foster's motion to exclude Rogers' testimony thirty minutes before court. (R 803). The record also shows that neither the defense nor the state were ever able to locate Ms. Childers. The state had two investigators searching for her. (R 810). Telephone calls to her alleged residence yielded no results and the Hillsborough authorities were unable to serve a subpoena on her. (R 812). In fact, Ms. Childers not only ignored the state's calls, she left town. (R 812).

On appeal, Foster alleges that the state did not try "hard enough" to find Ms. Childers and opines, using alleged non-record conversations as "proof," that the state never really wanted to find Childers anyway.

The question of whether the state was duly diligent presupposes that § 90.804(7)(e) is to be strictly applied in capital sentencing proceedings. We submit that it is not. Alvord, supra. Nevertheless, in Jackson v. State, 575 So.2d 181 (Fla.1991) this Court held that when a trial court fully reviews (the state's) efforts, and determines that due diligence was used to locate a witness, that decision will not be disturbed on appeal absent a clear showing of abuse.

Ms. Childers was described by Foster's witnesses as a burned out dope addict who was irresponsible and unreliable. It is easy

to see from the record how Anita Childers, or Rogers, or Gillette, or whatever, would be hard to find. It is also obvious that such a person would and did avoid contact with the state. It is entirely reasonable to assume - since Foster's own people were also unable to find her - that the state made a reasonable effort.

The unreasonable accusation that the state deliberately did not find Childers presupposes that, had she appeared, her original testimony would (a) not be used or (b) would differ from her new testimony. Given the example of Gail Evans, we submit that there is no support for this proposition other than the ponderous speculations of Mr. Foster.

Given the fact that the statutes in question were not violated, we must turn our attention to Foster's "confrontation" issue.

It is beyond dispute that Foster and his lawyer were present at the first trial and cross-examined Ms. Childers-Rogers. Thus, as far as any right of confrontation is concerned, Foster confronted this witness. Delaware v. Fensterer, 474 U.S. 15 (1985); Bundy v. Dugger, 850 F.2d 1402 (11th Cir.1988). The constitution guarantees only the opportunity to cross-examine, not the quality or content of any cross. Delaware v. Van Arsdall, 475 U.S. 673 (1986). That, alone, does not cover Foster's real issue.

Foster sought to expand the scope of the trial to include a whole new trial on the issue of guilt. This was made obvious by his successive, and improper, Rule 3.850 petition and by his

objection to any penalty phase jury instruction that advised the jury that Foster was guilty of first degree murder. **(R 100).**

When Foster did not win a new trial he fought very hard to transform the new penalty phase proceeding into a new guilt-phase trial. Foster wanted Ms. Childers and Ms. Evans in court so he could create residual doubt about Foster's guilt and lay the groundwark for his Rule 3.850 petition. Foster was not interested in resentencing or in compliance with this court's mandate.

Foster's tactics were similar to those employed in King v. State, 514 So.2d 354 (Fla.1987) and Harvard v. State, 414 So.2d 1032 (Fla.1982). In both cases, this Court held that when a case is **remanded** for resentencing the trial court is not required to expand the inquiry into a new "guilt phase" proceeding.

Foster, however, will allege that he had some right to challenge these witnesses to disprove bath felony and premeditated murder and, accordingly, Foster's innocence (or guilt of a lesser offense). Even if these witnesses were present for requestioning, such an inquiry would be improper. As this Court held in King v. State, supra, at 358:

> "This Court, however, has consistently held that residual, or lingering, doubt is not an appropriate nonstatutory mitigating circumstance, Alderidge v. State, 503 So.2d 1257 (Fla.1987); Burr v. State, 466 So.2d 1051 (Fla.)cert. denied, 474 U.S. 879, . . . Buford v. State, 403 So.2d **943** (Fla.1981).

Foster did not have the right to use this resentencing hearing as a springboard for a new trial. Foster was denied a new trial by this Court and was bound by the scope of the remand.

Since, as we know, the Court was not bound by the strict rules of evidence and since, as we know, Foster was allowed liberal rebuttal, the record clearly demonstrates an absence of either error or prejudice.

ARGTJMENT: **ISSUE III**

THE TRIAL COURT DID NOT ERR IN EXCLUDING PENALTY PHASE "IMPEACHMENT" EVIDENCE REGARDING ANITA ROGERS' CONVICTIONS FOR VARIOUS CRIMES IN 1989, FOURTEEN YEARS AFTER TRIAL.

One of Foster's more unusual arguments is his claim, presented here, that he should have been allowed to impeach the testimony of Anita Rogers (in 1975) with evidence of criminal pleas entered by her in 1989. At the outset, we note that Foster's exhibit (the FDLE printout) reflects the criminal charges levelled against Anita, along with the handwritten interlineation "pled guilty." (The source is unknown). The printout does not reflect any conviction nor does it reflect representation by counsel. We will assume arguendo, however, that these omissions are not a factor.[5]

During the penalty phase, Foster put on testimony from witnesses who allegedly spoke to Anita in the late 1980's and heard her claim that she received a (secret) deal in this case. By impeaching Anita with a contemporaneous conviction (from 1989), Foster would effectively impeach all of his "Brady" witnesses too! This inconsistency has apparently escaped Mr. Foster.

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[5] But see Loper v. Beto, 405 U.S. 473 (1972).

Citing no caselaw, Foster theorizes that someone's conviction for a crime in 1989 is admissible to impeach their testimony as given in 1975. Foster observes that "if" Anita testified in 1990 the convictions would be relevant and, accordingly, suggests that they would be of retroactive value too. This is nonsense.

Anita Childers-Rogers-Goodman-Gillette was very young when she testified in 1975 and, according to Foster's own witnesses, gradually became a burned out "junkie" by 1989. Her FDLE printout shows a succession of drug arrests prior to her eventual convictions. Foster, as a proponent of psychological theories regarding the mind altering effects of narcotics, clearly cannot in good faith allege that Anita's personality or credibility was unchanged after fourteen years of drug abuse.

The trial judge's discretion was clearly not abused. Alvord, supra; King, supra.

While Foster offers no legal authority for his theory that § 90.610, Fla. Stat., applied strictly to penalty phase proceedings there is contrary authority. In Muehleman v. State, 503 So.2d 310 (Fla.1987), this Court upheld the trial court's exclusion of witnesses' criminal records in penalty phase proceedings as a matter of judicial discretion under the facts of that case.

Prior to the adoption of our evidence code, the district court in Bradwell v. State, 306 So.2d 609 (Fla. 1st DCA 1975) held that a witness could not be impeached with the conviction of a crime remote in time to the trial. (In that case, 24 years),

Rule 609(b) of the Federal Rules of Evidence is the counterpart to our Rule 90.610. In the federal system, prior convictions more than a decade old cannot be used for impeachment.

There would be nothing wrong with impeaching Anita, in 1990, with proof of her recent convictions or decision to lead a life of crime. It is wrong, however, to suggest a rule of retroactive impeachment exists or is justified.

ARGUMENT: ISSUE IV

AN EVIDENTIARY HEARING IS NOT REQUIRED ON FOSTER'S ELEVENTH HOUR "BRADY" DEMAND FOR MENTAL HEALTH RECORDS.

Charles Kenneth Foster was scheduled for resentencing on June 5, 1990, pursuant to this Court's remand. On June 1, 1990, (after nine years of preparation) Foster suddenly filed a third successive Rule 3.850 motion in an effort to delay the resentencing and possibly win a new trial. (R 61). The trial court, over defense objections, refused to delay resentencing. (R 62).

On June 4, 1990, the day before the hearing, Foster suddenly dropped into the prosecutor's lap a "discovery motion" that easily could have been filed at any time over the past decade. The motion, citing to Brady, asked that the state divert its resources at the eleventh hour in a nationwide search for any mental health records pertaining to Anita Rogers (whom no one could find) and Gail Evans, who was available and had even been deposed by Foster's lawyers. The timing of the motion was, on the face of the record, strategic.

The use of eleventh hour pleadings to generate delay and obstruction in capital cases is too well documented to warrant extensive discussion,[6] but that issue is important in this instance.

In Fields v. State, 379 So.2d 408 (Fla. 3rd DCA 1980), virtually the exact same tactic was attempted by defense counsel for Mr. Fields. There, the motion was filed on March 5, 1979, about a week before trial. There, as here, the defendant knew of the existence of the records but waited to file his demand. The district court held that the defendant was not entitled to relief because his request came "too late." Accord: Cooper v. State, 356 So.2d 911 (Fla. 3rd DCA 1978); Yavetta v. State, 320 So.2d (Fla. 3rd DCA 1975).

Mr. Foster comes before this court as a victim of his own strategy. Foster had known about these witnesses since at least 1975. He has had the same counsel since 1981. Foster has always had the ability to depose these witnesses, seek releases and present his "case." Foster has been awarded multiple evidentiary hearings, Foster, even prior to this resentencing, took the deposition of Gail Evans yet never sought a release from her. As in Agan and Demps, Foster has no excuse for delaying his request for discovery.

On appeal, Foster ponderously argues the worth of mental health records as evidence without once touching upon the real issues.

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[6] As noted before, thirty minutes before resentencing began Foster ambushed the state again with a motion to exclude testimony, a motion that could have been filed earlier. Again, the motive was to provoke a continuance.

Foster styled his demand, sub judice as a demand for exculpatory evidence under Brady. We do not know or accept the "fact" that the records, particularly post-trial records, of Ms. Evans or Ms. Roberts would have been exculpatory. Both of these women were scared of retaliation from Foster's family. Anita was being hidden at a motel. Gail, even in **1990**, was absolutely terrified. Gail's attempted suicide in 1975 was not necessarily attributable to any emotion or "guilty knowledge" helpful to Foster. The entire claim is purely speculative.

Brady addresses only evidence that is in the exclusive control of the state. When evidence is equally available to both parties, the state is not required to do defense counsel's work or to actively assist the defense. Hansbrough **v.** State, ***509*** So.2d **1081** (Fla.1987); Heqwood v. State, 16 F.L.W. S120 (Fla.1991); Brady. There is no question that the state and Foster had equal access to these records. Indeed, Foster's counsel admitted he could have obtained his own court order (and thus the records) but did not think he should be "forced" to do so simply because these women were state witnesses. **(R 901).**

The two witnesses have not executed releases, nor have their various doctors been subpoenaed.

The state does not control these civilian witnesses and certainly has no more right to their confidential psychotherapist-patient records than anyone else. Foster argued that the state has some omnipotent right of access to all confidential records of anyone who testifies as a witness in a criminal case. There is simply no support for such a proposition.

In Hawkins v. State, 326 So.2d 229 (Fla. 2nd DCA 1976), the court noted that the state cannot invoke the psychiatrist-patient privilege. The reverse, however, is also true. The state cannot "waive it." Wray v. D.P.R., 40 So.2d 961 (Fla. 1st DCA 1982) (The witness-patient or someone on her behalf must waive the privilege.) Since Foster or the state could have subpoenaed these records, the records were not Brady material.

Finally, we note that Foster was remanded for resentencing, not retrial. All of Foster's cited cases address the right of confrontation as it pertains to the guilt phase of a trial. The trial judge at bar permitted defense counsel to offer "rebuttal" testimony regarding, and impeaching, Evans and Rogers. These women, however, were not on trial and Foster's guilt was no longer in dispute. While Foster may have hoped that his resentencing could disintegrate into a trial of the witnesses or a retrial of the guilt phase, that "hope" does not satisfy United States v. Bagley, 473 U.S. 667 (1986) by proving that this alleged evidence would have definitely helped his case, or would even have been admissible.

As this Court held in Sireci v. State, 399 So.2d 964, 972 (Fla.1981):

> "However, the United States Supreme Court also clearly indicated that the trial court may exclude, as irrelevant, any evidence not bearing on the defendant's character or record or circumstances of the offense. . . Defendant, however, says that he was restricted in the presentation of evidence during the sentencing phase. The evidence which he attempted to introduce allegedly would have pointed to his innocence. This argument is without merit."

Foster wanted to cross-examine the two witnesses to destroy their credibility and establish his innocence, nothing more. Foster was not entitled to that relief and certainly was not entitled to the state's labor in putting together his evidence.

ARGUMENT: ISSUE V

THE TRIAL COURTS WRITTEN ORDER WAS NOT DEFICIENT.

Foster never objected to the written order prepared by the sentencer and, despite awareness of Campbell v. State, 571 So.2d 415 (Fla.1990), Foster's motion for new trial (R 1735-47) does not raise a Campbell claim, nor does said order reflect any inability to grasp the findings of the Court, even where Foster disagreed with those findings. Since Foster did not preserve this issue, he is not entitled to an appeal. Jacobs v. Wainwright, 450 So.2d 200 (Fla.1984); Clark v. State, 363 So.2d 331 (Fla.1978); Steinhorst v. State, 412 So.2d 332 (Fla.1982); Henry v. State, 16 F.L.W. S593 (Fla.1991).

Foster's only possible excuse would be that his sentencing order was published on June 18, 1990, and Campbell v. State, 571 So.2d 415 (Fla.1990) did not became final until rehearing was denied on December 13, 1990. If we accept that argument, Foster still loses because Campbell is not retroactive in scope and cannot be applied to Foster's order. Gilliam v. State, 16 F.L.W. S292 (Fla.1991).

It should be noted that § 921.141, Fla. Stat., placed no ponderous writing requirement on the trial court. This "requirement" was initiated, like so many embryonic mandatory rules, as a "guideline" in Campbell. In Santos v. State, 16

F.L.W. S633 (Fla.1991) more detailed rules of draftsmanship were created with a reference being made to Parker v. Dugger, U.S.___, 112 L.Ed.2d 812 (1991).[7] Even so, the requirements of Santos, like those of Campbell, are not retroactive.

ARGUMENT: ISSUE

THE ADVISORY JURY WAS NOT LIMITED IN ITS CONSIDERATION OF MITIGATING EVIDENCE

Foster, in an effort to win yet another delay using the Hitchcock device, contends that the trial court violated Hitchcock v. Dugger, 481 U.S. 393 (1987) by reading the standard jury instructions on such statutory mitigating factors as "extreme" mental disturbance and "substantial" impairment. According to Foster, the advisory jury, out of all the jury instructions and arguments, "homed in" on those two words and totally ignored the evidence, the other instructions and the arguments of defense counsel. There is absolutely no record support for this argument.

First, the jury was told on two different occasions that mitigating factors were unlimited. (R 1526, 1528). Second, the arguments of defense counsel were bolstered by a special instruction advising the jury to consider all thirteen mitigating

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[7] Parker v. Dugger, supra, was remanded because of the perceived failure to the Florida Supreme Court to consider mitigating evidence that was weighed by the trial court. The United States Supreme Court wants either reconsideration or clarification of Parker's appeal. Parker, though it makes reference to Campbell, does not compel the production of detailed sentencing orders from state courts. Indeed, federal courts have no authority to direct state courts to draft opinions. Sims v. Georgia, 385 U.S. 38 (1967); LaVallee v. Della Rose, 410 U.S. 690 (1973). Parker does not bootstrap Campbell.

factors - listed by name - relied upon by the defense. No one can suggest that this jury, which split **(8-4)**, did not think it could consider all the evidence.

In Henry v. State, 16 F.L.W. S593 (Fla.1991), this Court, citing to Sochor v. State, 580 So.2d 595 (Fla.1991); Robinson v. State, **574** So.2d 108 (Fla.1991) and Mendyk v. State, 545 So.2d **846** (Fla.1989) upheld our standard jury instructions even when given alone. Here, they were accompanied by specific defense instructions. There was no error.

ARGUMENT: ISSUE VII

THE TRIAL COURT DID NOT ERR IN REFUSING TO GIVE AN "UNBRIDLED MERCY" INSTRUCTION.

Although cleverly reworded through a non-contextual quotation from Alvord v. State, 322 So.2d 533 (Fla.1975),[8] Foster is really renewing the discredited claim that Florida juries must be granted discretion to bestow unbridled, arbitrary and capricious grants of mercy. The long **term** strategy behind this argument is to "set up" the law so as to make it vulnerable to a new challenge under Furman v. Georgia, 408 U.S. 238 (1972).

Florida does not permit juries to arbitrarily bestow unbridled mercy and our instruction does not offend the constitution. Bertolotti v. Dugger, **883** F.2d 1503 (11th Cir.1989), see California v. Brown, 479 U.S. 538 **(1987)**; Boyde v.

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[8] Alvord's holding was misstated by Foster's brief. The decision refers to the **fact** that Florida does not mandate an automatic death penalty for crimes falling into similar categories, i.e., bank robberies or wife shootings. Alvord does not mention "mercy."

California, U.S. ___, 108 L.Ed.2d 316 (1990); Blystone v. Pennsylvania, ___ U.S. ___, 108 L.Ed.2d 316 (1990); Henry, supra.

Foster is not entitled to relief.

ARGUMENT: ISSUE VIII

THE MURDER AT BAR WAS PLAINLY HEINOUS, ATROCIOUS AND CRUEL.

On appeal, all facts and inferences from the facts are taken in favor of the judgment and sentence. Spinkellink v. State, 313 So.2d 666 (Fla.1975); Shapiro v. State, 390 So.2d 344 (Fla.1980); Gilvin v. State, 418 So.2d 996 (Fla.1982). We reject Foster's characterization of the murder because it does not correctly state the facts and it merely offers the defense version of the crime.

It is beyond dispute that this was an exceptionally heinous, atrocious and cruel murder.

Foster's prolonged and vicious attack on Mr. Lanier began with a painful beating which produced a broken nose and blackened eyes. (R 1072-73). There were cuts on his forehead. (R 1073). The left neck had two large knife wounds. (R 1073). The large quantity of blood about the face and front of the body (R 1073) proved that Lanier was alive during the time the wounds were inflicted. (R 1087).

There was a stab wound behind the right ear. (R 1073). Contrary to the misstatement that Lanier was unconscious and never resisted (in Foster's brief), Lanier's right hand was cut in what was identified as a defensive wound. (R 1074, 1082). Lanier's body was covered with bloody drag marks which indicated he was still alive at the time he was pulled into the brush. (R

1076). Lanier's spine was severed with a plunging knife wound. (R 1082).

The initial assault would have caused Lanier to suffer for twenty minutes before he died. (R 1085). Even the final plunging wound to the neck would only produce death in three to five minutes. (R 1086).

Foster alleges that his victim did not suffer enough or anticipate death long enough to justify a finding of H-A-C. Clearly, this argument is self-serving speculation. The truth is that Mr. Lanier was savagely beaten and stabbed. Lanier had time to contemplate his death. Lanier felt pain (crying out when Foster grabbed his testicles while moving him outside the trailer). Lanier died slowly. This outrageous attack compares with Douglas v. State, 328 So.2d 18 (Fla.1976); Thompson v. State, 389 So.2d 197 (Fla.1980) (victim tortured); Cherry v. State, 544 So.2d 184 (Fla.1989) (victim beaten and killed); Chandler v. State, 534 So.2d 701 (Fla.1988) (victims beaten); Lamb v. State, 532 So.2d 1051 (Fla.1988) (beaten with hammer, defensive wound on hands); Turner v. State, 530 So.2d 45 (Fla.1988) (victim cut and stabbed); Hardwick v. State, 521 So.2d 1071 (Fla.1988) (stabbing and shooting); Roberts v. State, 510 So.2d 885 (Fla.1987) (beating, defensive wounds); Hansbrough v. State, 509 So.2d 1081 (Fla.1987) (stabbing, defensive wounds) and Randolph v. State, 562 So.2d 331 (Fla.1990) (beaten and stabbed).

This murder was so shocking, vile and torturous that even defense counsel, arguing vigorously for his client's life, could

do no better in closing than say that the facts supporting H-A-C were "murky." (R 1490).

Foster is clearly not entitled to relief.

ARGUMENT: ISSUE IX

THE TRIAL COURT DID NOT ERR IN GIVING THE STANDARD INSTRUCTION ON "HEINOUS, ATROCIOUS AND CRUEL."

Despite the massive size of Foster's brief, the Appellant, once again, has failed to advise the court that his legal challenge to the standard jury instruction has already been rejected. Clark v. Dugger, 559 So.2d 192 (Fla.1989); Porter v. Dugger, 559 So.2d 201 (Fla.1990); Bertolotti v. Dugger, 883 F.2d 1503 (11th Cir.1989).

Maynard v. Cartwright, 486 U.S. 356 (1988) does not apply to Florida because Florida does not have jury sentencing. Clark, supra; Porter, supra.

ARGUMENT: ISSUE X

THE TRIAL COURT DID NOT ERR IN REFUSING *TO* GIVE A MISLEADING AND INACCURATE JURY INSTRUCTION.

When aggravating or mitigating factors are presented to the advisory jury it is the jury's task to find, weigh and compare those factors. The trial court cannot direct the jury's decision from the bench. See Bowden v. State, 16 F.L.W. S614 (Fla.1991).

Foster's proposed jury instructions were a transparent effort to obtain a direction, from the bench, "not to find" the H-A-C factor. Again, Foster was not entitled to a special instruction that misstated the law. Henry v. State, 16 F.L.W. S593 (Fla.1991).

The jury was told to consider Foster's mental health mitigation and to weigh it against any aggravating factors. If, as Foster contends, this is all his attorneys' special instruction would have accomplished, the issue is moot.

ARGUMENT: ISSUE XI

THE "COLD, CALCULATED, PREMEDITATED" AGGRAVATING FACTOR WAS CORRECTLY APPLIED.

The cold-calculated and premeditated nature of this murder is established by the careful planning involved. Julian Lanier was "rolled" (to use the vernacular). While Lanier per se may not have been previously known to Foster, the basic plan was for a victim to be picked up, taken to a remote spot, killed and robbed. Further embellishing this plan is Foster's crucial decision to use a ring (for extra hitting power) other than his own "K" ring - which Foster feared might leave a recognizable mark on his victim.

The murder thus fell within the Rogers v. State, 511 So.2d 526 (Fla.1987) definition of a "careful or prearranged plan." Again, in Rutherford v. State, 545 So.2d 855 (Fla.1989) the application of this factor to preplanned killings (rather than simply executions or contract killings) was upheld, while the procurement of a weapon (or exchange of rings, in this case) also supports this factor. Lamb v. State, 532 So.2d 1051 (Fla.1988); Huff v. State, 495 So.2d 145 (Fla.1986); Eutzy v. State, 458 So.2d 755 (Fla.1984).

The luring and killing of Mr. Lanier compare to the tactics used in Koon v. State, 513 So.2d 1253 (Fla.1987). It also

compares with Lamb, a case in which the defendant, a burglar, waited for and killed his victim. Foster's selection of Lanier as a victim, his befriending of him **and** his luring **of** the victim to a secret location could even be compared to the abduction in Duest v. State, 462 So.2d 446 (Fla.1985) or the "stalking" of the victim in Mills v. State, 462 So.2d **1075** (Fla.1985).

Foster suggests that this was a frenzied, seizure-based attack brought on by a delusion. This is clearly not the case,

First, the fact that Foster screamed some pretextual excuse as he began his assault does not "prove" anything. We would submit that even a schoolyard bully will fabricate an excuse to "justify" an attack on a weaker child.[9] Foster never confused Rogers or Evans with anyone. This entire scheme, right down to swapping rings, was preplanned.

Second, Foster's conduct was not in keeping with any "seizure" ever previously seen. Francis Foster said Kenneth mutilated **only** himself. (R **1338).** Larry Foster described **a** seizure as involving "tongue chewing,'' "eyes rolled back" and a "tightening of the muscles." (R 1297). Don Mace noted the same symptoms (R 1274) and testified that during a seizure Foster would not have been able to kill anyone. **(R 1276).**

Third, **Dr.** Sapaznikoff flatly stated that Foster's "seizure" excuse was unbelievable. (R 1821). During a "grand mal" seizure Foster would not have had the ability to kill anyone, much less hide their body and rob them, Also, Foster would not be able to

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[9] **At (R 1820)** Foster **depicted** himself, to his doctor, as a student who picked fights and carried a knife.

remember the incident. (R 1821). Dr. Sapoznikoff had the advantage of having been Foster's doctor for a number of years. (R 1819).

In sum, therefore, Foster was involved in a carefully preplanned murder-robbery scheme for which his only proffered excuse is a medically impossible "seizure." The Court and the jury saw through Foster's defense and their decision must be affirmed on appeal. Shapiro, supra; Spinkellink, supra.

Foster offers no legal authority for his challenge to the standard jury instruction. Since the instruction correctly sets forth the law, it provides no basis for relief. See, e.g., Henry, supra.

ARGUMENT: ISSUE XII

FOSTER'S "EX-POST FACTO" ARGUMENT IS WITHOUT MERIT.

Amazingly, Foster's brief fails to advise the Court, as required, that this issue has been repeatedly rejected. Dobbert v. Florida, 432 U.S. 282 (1977); Justus v. State, 438 So.2d 538 (Fla.1983). This issue is nat worthy of discussion, therefore, except to the extent that Foster's continued failure to fully set forth facts and law reflects on the reliability of any other arguments in his brief.

ARGUMENT: ISSUE XIII

THE DEATH PENALTY IS PROPORTIONATE IN THIS CASE.

Although Foster contends that his death sentence is disproportionate, he is in the unenviable position of having now been condemned by two different courts and two different juries,

fifteen years apart, despite having been given the opportunity to put on new and unlimited mitigating evidence. Foster may dispute the relative weight of the aggravating and mitigating evidence, but his opinion does not control. Sireci v. State, 16 F.L.W. S623 (Fla.1991).

Foster proposed a "shopping list" of statutory and nonstatutory mitigating factors. These suggested factors consist largely of redundant and insignificant "factors" which do not compel mercy. Indeed, they may have even seemed offensive to the jury. The lesser factors can be readily rebuffed.

Foster said he was poor. This "factor" does not explain or justify this crime. Millions of poor people never commit murder. Foster's father allegedly was abusive, yet none of Foster's siblings are murderers. Foster "loved his family." Most people love their families. This is not a "unique trait," setting Foster apart. Foster had a "trouble personal life." Assuming this is not redundant, it is of no relevance. Everyone has problems. Foster grieved over the death of some relatives years ago. Again, so what? Foster had some "potentials for sustained human relations." Whatever that implies, it certainly does not ameliorate murder.

Foster also proposed redundant claims of physical illness. Again, this factor (however divided) does not excuse, explain or lessen murder.

Foster's primary weapon was his claim of mental illness. Even here, however, the experts could not agree.

The doctors who knew Foster best and longest, Drs. Mason and Sapoznikoff, found Foster to have been sane and competent. Their conclusions are well supported.

Foster has relied heavily on the myth that he killed Lanier in the course of a seizure. Unfortunately for Foster, he hade the strategic error of attempting to "gild the lily" with too may witnesses. The result was devastating.

Dr. Vallely, whom we will revisit later, offered a helpful theory but then qualified it by saying that if Foster's confession was true, the entire diagnosis was wrong. (R 1196). Defense counsel made a valiant attempt at damage control which, to the jury, clearly was an effort to lead this "hired gun" back to the diagnosis he was procured for. (R 1196-1198).

Don Mace, Foster's friend, described a (grand mal) seizure he allegedly witnessed. Mace said Foster's eyes rolled back, his (Foster's) muscles tensed and Foster began chewing his tongue until it bled. (R 1274). Then, however, Mace said that during this seizure Foster could not have killed anyone. (R 1276). Larry Foster, Kenneth's broth, described Foster's seizures in the same way. (R 1297).

Dr. Sapoznikoff (R 1821) described this kind of seizure as a grand mal seizure. During such a seizure, Foster would have no control over his bodily functions, he would be unable to perform deliberate tasks (i.e. fighting, stabbing, dragging the body, covering it up, returning and cutting a spine, etc.) and, afterwards, would not remember anything. (R 1821).

Assuming Mace and Foster told the truth, Sapoznikoff's report destroys Kenny Foster's defense. Foster could not have killed Lanier and then remembered enough to confess if his crime was attributable to his illness. Furthermore, the doctors who knew Foster best and who saw him at the time,[10] all concurred that Foster was not psychotic, not insane and not delusional. (R 1821, 1822). Dr. Mason agreed with Dr. Sapoznikoff that Foster's seizure disorder had nothing to do with this murder. (R 1822). It was just an excuse.

Foster tried to overcome the facts with the testimony of two expert witnesses.

The first, (psychologist) Dr. Vallely, did not see Foster until 1988, thirteen years after the trial. (R 154). Dr. Vallely reviewed material given to him by the defense. (R 1168, 1173). Vallely subscribed to the theory that Foster's problems stemmed from a bump on the head be received as a child, opining that anyone who has ever been hit in the head can become a murderer. (R 1187).

Vallely could not say whether Foster was sane or insane at the time of the murder. (R 1192). Vallely felt Foster simply lacked good judgment and self control even though he knew what he was doing. (R 1195). This expert attached no significance to the ring-switching incident. (R 1194). As proof of Foster's "problem" Vallely said that the absence of any "need" to commit

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[10] In Drope v. Missouri, 420 U.S. 162 (1975) the Court held that recent evaluations of "past" competence are of no probative value and, even under Pate v. Robinson, 386 U.S. 375 (1966) need not be considered. The Court found no error in the state court's refusal to even admit such evidence.

the crime (R 1195) and Foster's (unhelpful) confession to the police (R 1227) reflect bad judgment. (R 1227).

Vallely had no opinion as to whether Foster suffered from mental problems when he confessed at trial. (R 1203). Vallely confessed that Foster's strategy of blaming Evans and Rogers was "goal oriented behavior," thus contrary to his "borderline personality disorder" diagnosis. (R 1204). The same was true of Foster's phony "seizure" story. (R 1205).

Vallely never received all of the reports on Foster. Although he was more than willing to rely upon favorable reports, when he was confronted with Dr. Mason's report he refused to agree with it because he "wasn't there." (R 1209). When cornered about his theories, Vallely even complained that the questions "weren't fair" because he was "just giving an opinion." (R 1213). At most, Foster had poor judgment and a borderline personality disorder. (R 1213).

Even worse, if possible, than Dr. Vallely was Dr. Merikangas, whom this Court will recognize not only as a regular anti-death "expert," but as the doctor whose unfounded defense opinions were rejected out of hand in Francis v. State, 529 So.2d 670 (Fla.1988) and Eutzy v. State, 541 So.2d 1143 (Fla.1989). Merikangas also enjoys the dubious honor of drawing an unusually strong judicial rebuke of his "opinion" as "preposterous" in state court, and then having the rebuke cited with approval in federal court. Bertolotti v. Dugger, 883 F.2d 1503 (11th Cir.1989).

Merikangas said that Foster had a "personality disorder" and "impulse control" problems compounded by hypoglycemia, a bump on the head as a child, epilepsy and substance abuse.

Merikangas alleged that Foster has never really had a neurological exam (R 1361) and he relied upon descriptions of Foster as "psychotic" made at various times by Drs. Mason, Sapoznikoff, etc. (R 1367).

On cross, Merikangas made the classic error of being too strident in the presence of the jury. Digging in his heels, Merikangas suddenly refused to agree that Drs. Mason and Sapoznikoff were doctors because he never met them personally (only after protracted questioning did he grudgingly relent.) (R 1386). Although Merikangas was all too willing to accept reports that Foster was psychotic, he was allegedly unaware that Foster was deemed sane in 1975. (R 1388). When questioned on the issue of whether "normal" people commit heinous-atrocious or cruel murder, Merikangas refused to answer, choosing instead to play semantic word games ("what is normal?") with the attorney for the state. (R 1415).

Like Vallely, Merikangas also predicated his findings of impaired judgment on the fact that crime, in general, is not a proper course of social behavior. (See R 1408).. This posture led the doctor to almost comical statements. For example, the doctor found no evidence of preplanning in Foster's trading of rings. (R 1407). His reason had nothing to do with Foster, Foster's ability to plan or Foster's goal orientation. Merikangas based his opinion on the belief that the "K" on

Foster's ring would probably not have left a "K" on Lanier's body! (R 1407). This absurd response was followed by a claim that Foster "had no intent to kill" even though he stabbed Lanier and said he was going to kill him.

In Bertolotti, Merikangas gave a similar opinion in a case involving the stabbing death and battery of a woman by an apparent burglar. The doctor was not believed because his opinion did not comply with the facts, and was medically unsound. In Francis, supra, Merikangas based his opinion on the defendant's facial expressions, but no tests. In Eutzy, supra, his theory was based on hypoglycemia and alcohol, but not hard scientific data.

To be reliable, psychiatric opinion must have some basis in fact. Bundy v. Dugger, 850 F.2d 1402 (11th Cir.1988). The mere presence of even an organic brain disorder will not mitigate murder unless there is some nexus between the crime and the disorder. Bundy, id; James v. State, 489 So.2d 737 (Fla.1986). "Personality disorders" are not recognized as being the equivalent of insanity or incompetence or, in fact, mental disease itself. Boag v. Raines, 769 F.2d 1341 (9th Cir.1984).

The only documented, verifiably "mental" disorder attributable to Foster was his history of grand mal seizures. This problem, however, had no nexus to this crime. Bundy.

Thus, Foster's so-called mitigation boils down to a possible personality disorder, irrelevant seizures and some sophomoric "poor, abused person" rhetoric. None of this outweighed even one of the three aggravating factors at bar.

This case compares favorably with the similar murders in Bertolotti, supra; Bryan v. State, 533 So.2d 744 (Fla.1988); Eutzy v. State, 458 So.2d 755 (Fla.1984); Hamblem v. State, 527 So.2d 800 (Fla.1988) and Sireci v. State, 399 So.2d 964 (Fla.1981), as well as those cited in our arguments on the aggravating factors.

Foster's reliance upon Fitzpatrick v. State, 527 So.2d 809 (Fla.1988) is misplaced. In that case, the defendant (in a hostage situation) was rushed by several deputies. In the ensuing confusion, the defendant was wounded and an officer was killed. Fitzpatrick's mental problems were not offset by any aggravating factors such as the H-A-C factor present in our case. (The only factors aggravating Fitzpatrick's case were technical factors such as his record, the existence of a felony, etc.)

In Penn v. State, 574 So.2d 1079 (Fla.1991), the heinous murder (Penn killed his mother with a hammer) was offset by a crack cocaine problem and an apparent marital problem in which his mother was interfering. Even so, there was a strong and cogent dissent which we agree. Penn hit his mother in the head 31 times with a hammer. Crack cocaine use, the "mitigator," is a crime. One crime cannot logically ameliorate another.

Two separate juries, fifteen years apart, have concurred in their assessment of Foster's crime despite his repeated chances at reargument. As Justices Grimes and (now Chief Justice) Shaw have noted, those decisions are entitled to great weight. Penn, id., quoting Middleton v. State, 426 So.2d 548 (Fla.1982).

ARGUMENT: ISSUE XIV

THE TRIAL COURT DID NOT ERR IN DENYING FOSTER'S REQUEST FOR A "McCLESKY" HEARING.

The Appellant moved for leave of court to conduct a statistical study which, he alleged, would establish that the death penalty in Bay County is applied in a racially discriminatory manner. Foster's petition tried to particularize his accusations with unfounded ad hominem attacks on Mr. Appleman, Mr. Paulk - none of which are worthy of response - and a litany of dubious case summarizes and complains about the school and welfare systems. Foster alleged that his request was supported by McClesky v. Zant, 481 U.S. 279 (1987).

On appeal, Foster does not report the holding in McClesky, nor does he cite to those Florida cases which hold that McClesky does not support requests of this kind. King v. State, 514 So.2d 354 (Fla.1987); Cochran v. State, 547 So.2d 928 (Fla.1989).

Mr. McClesky touted an allegedly comprehensive statistical study put together by two professors, Baldus and Woodworth. A full evidentiary hearing on the merits of this study was conducted. In a massive written opinion, Judge Forrester found that every single facet of this study was unreliable and inaccurate. In fact, the methodology employed was of a kind which could produce any desired conclusion. McClesky v. Zant, 580 F.Supp. 338 (N.D. GA. 1984).

When this case reached the Supreme Court, see McClesky v. Zant, 481 U.S. 279 (1987), the Court noted the impossible situation facing statisicious who hoped to quantify variables

which simply do not lend themselves to analysis. See McClesky, id, n. 6, 7.

The Court then rejected these general surveys and required defendants to prove discrimination in their case. Id, 292. This Court correctly interpreted McClesky in King, supra, and Cochran, supra, and the trial court, in the absence of any relevant information, correctly followed this Court's decision and denied relief.

ARGUMENT: ISSUE XV

THE VENIRE ISSUE WAS NOT PRESERVED FOR REVIEW.

Foster did not preserve this issue for review.

To preserve this issue, Foster had to do more than object when his challenge for cause was denied. Foster had to create a record reflecting both error and prejudice to his case. Gunoby v. State, 16 F.L.W. S114 (Fla.1991); Trotter v. State, 16 F.L.W. S17 (Fla.1991); Penn v. State, 16 F.L.W. S117 (Fla.1991); Floyd v. State, 569 So.2d 1225 (Fla.1990).

The necessary record is made when counsel makes his challenge for cause, loses, expends all of his peremptory challenges and identifies, on the record, unsatisfactory jurors he has been forced to accept. Gunoby, supra; Trotter, supra; Penn, supra; Floyd, supra. Once again, Foster does not cite to these cases or attempt to address the facts.

The record shows that venire members Pope (R 185), Pelland (R 283) and Minor (R 507) were unsuccessfully challenged for cause. All three were stricken peremptorily by the defense. (R 759, 761, 762).

Foster, however, never exhausted all of his peremptorily challenges and, in fact, tendered the jury even after being told by the court he had challenges remaining. (R 780, 784).

Foster has failed to show any prejudice, thus rendering any error completely harmless.

In point of fact, however, none of these venire members demonstrated bias worthy of a challenge for cause. See Lusk v. State, 446 So.2d 1038, 1041 (Fla.1984). Bundy v. State, 471 So.2d 9 (Fla.1985).

Thomas Minor was a childhood acquaintance of Foster's who felt, if anything, he would be "more fair." (R 494). Minor took psychology classes at F.S.U. (R 501) and stated he could readily vote for life as well as death. (R 488). In fact, Minor was not sure he could ever vote for death since he knew Foster. (R 505). It is hard to fathom why anyone would strike this juror.

Mrs. Pelland also stated she could vote for life. (R 268). She trusted psychiatrists and psychologists because her niece was a mental health patient. (R 275-276). She leaned toward death due to the capital murder conviction but stated she was ready to consider all the evidence and follow the "guidelines." (R 278-279).

Ms. Pope was unequivocal in stating she could vote for "life" and was a former medical secretary. (R 170-173). She agreed that mental illness was a valid mitigating factor and denied any bias in favor of death. (R 175-176). She adamantly declared she was not "closed minded." (R 184-85).

Even if this error had been preserved, it is obvious that Lusk, supra, and Bundy, supra, would deny relief.

ARGUMENT: ISSUE XVI

THE TRIAL COURT DID NOT ERR IN STRIKING JUROR DELUZAIN FOR CAUSE.

Ms. Deluzain, unlike the other venire members mentioned on appeal, came to court with her own social theory regarding when "death" was appropriate. She said she only felt death was appropriate in cases where a ("life") prison inmate killed another person while in prison. (R 465). She said, in all honesty, while she would hope to be fair, she simply could not set aside her feelings against the death penalty. (R 470).

The trial judge who heard and saw this venire member was well within his discretion in granting a challenge for cause. Lusk, supra, Bundy, supra. Clearly her abilities, as she confessed, were substantially impaired. Wainwright v. Witt, 469 U.S. 412 (1985).

The problem with Mr. Foster's proposed "rule" (brief, pg. 99) is that it compels the parties to accept jurors who have essentially concocted their own personal capital punishment law or who have reserved the right to pick and choose "when" they will vote for life or death, no matter the law.[11] This would not be fair to either the state or the defense.

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[11] Foster's proposal says that a juror "cannot be subject to exclusion for cause" if the juror says, "in any way," a vote for death was possible "under certain circumstances." (Brief, at 99).

CONCLUSION

The Appellant is not entitled to relief.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Mail to Richard H. Burr, NAACP Legal Defense and Educational Fund, Inc., 99 Hudson Street, 16th Floor, New York, New York 10013 and Steven L. Seliger, 16 North Adams Street, Quincy, Florida 32351 on this 14th day of October, 1991.

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