ORIGINAL

IN THE SUPREME COURT OF FLORIDA

CHARLES KENNETH FOSTER,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

Case No. 76,639

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

BRIEF FOR APPELLANT

*RICHARD H. BURR
Florida Bar No. 407402
STEVEN W. HAWKINS
NAACP Legal Defense and
Educational Fund, Inc.
99 Hudson Street, 16th Floor
New York, New York 10013
(212) 219-1900

STEVEN L. SELIGER
Florida Bar No. 244597
16 North Adams
Quincy, Florida 32351
(904) 875-4668

*Counsel of Record

Attorneys for Appellant

TABLE OF CONTENTS

TABLE OF AUTHORITIES

STATUTES

MISCELLANEOUS

STATEMENT OF THE CASE

A. Course of Proceedings

Mr. Foster was convicted on two theories of first degree murder -- premeditated and felony -- and on a count of robbery on October 3, 1975, R (75) - 33, 34.[1] By a unanimous vote, T (75) - 652-54, the jury recommended the death penalty for the murder conviction. R (75) - 43. The Circuit Court for the Fourteenth Judicial Circuit sentenced Mr. Foster to death for the murder conviction and to life imprisonment for the robbery count. R (75) - 44, 45. This Court affirmed the convictions and sentence, Foster v. State, 369 So.2d 928 (Fla. 1979), and the United States Supreme Court denied certiorari. Foster v. Florida, 444 U.S. 885 (1979).

Following various state and federal collateral proceedings not directly relevant here, Mr. Foster filed an original habeas corpus petition seeking a new sentencing trial due to a violation of the Eighth Amendment rule of Hitchcock v. Dugger, 481 U.S. 393 (1987). The Court granted relief, Foster v. Dugger, 518 So.2d 901 (Fla. 1987), and certiorari was thereafter denied. Dugger v. Foster, 487 U.S. 1240 (1988).

On June 1, 1990, on the basis of evidence revealed during preparation for his sentencing trial, Mr. Foster filed a Rule 3,850 motion to vacate the judgment of conviction. R. 1972-88. Over Mr. Foster's objection, the trial court determined that it would defer any ruling on the motion until after the new sentencing trial. R. 60. Mr. Foster's motion to continue the sentencing trial until the 3.850 motion was first resolved was denied. R. 62.

Mr. Foster's new sentencing trial began, thereafter, on June 4, 1990. R. 1686. On June 8, 1990, by a vote of 8-4, the jury recommended a death sentence. R. 1731. The court followed the jury's recommendation and imposed a sentence of death on June 18, 1990. R. 1902-10. Mr. Foster timely filed a motion for a new trial, R. 1735-51, which was denied August 16, 1990. R. 2003.

On July 19,1990, the court summarily denied Mr. Foster's Rule 3.850 motion. R. 1751-52a.[2] Mr. Foster timely filed a motion for reconsideration of this order, R. 1845-50, which was

---

[1] The record in this case will be referenced as follows: "R(75)" will refer to the record on appeal to this Court from the 1975 conviction and sentence; "T(75)" will refer to the transcript of the 1975 trial; and "R" will refer to the record in the present appeal, which consists of fourteen volumes of transcript, two volumes of record on appeal, two volumes of supplemental record on appeal -- numbered consecutively, from pages 1-1910 -- and two envelopes of trial exhibits.

[2] "1752a" is a designation used by Mr. Foster for the third page of this order, which was inadvertently unnumbered in the pagination of the record.

denied August 16, 1990. **R. 2002.**

On September **12,** 1990, Mr. Foster timely filed a notice of appeal from the sentence of death and the order summarily denying his Rule 3.850 motion. R. 2004-05.

B. Material Facts

1. The Crime

Sometime after 11:00 p.m. on July 14, 1975, Mr. Foster, Julian Lanier, Anita Rogers, and Gail Evans began socializing in a bar in Panama City. R. 954-57.[3] Mr. Lanier suggested that they "go party somewhere," R. 957, and Gail Evans proposed that they go "[t]o Callaway to party out in the woods." R. 987-88. With Mr. Foster acting as the go-between, R. 957, 986, Ms. Evans agreed to have sex with Mr. Lanier for money. R. **986** ("I was supposed to be going out to make some money off the old man").

Mr. Lanier began driving everyone toward Callaway in his Winnebago camper. R. 958. However, it soon became apparent that he was too drunk to drive, **R.** 958,988, so **Ms.** Evans took over. Id.[4] Kenny Foster was also drunk, R. 1009; according to **Ms.** Evans, he also was "too drunk to drive." Id.

Upon arrival at the predetermined destination, Mr. Lanier undressed and asked **Ms.** Evans to go to bed with him. R. 990. By then, however, Ms. Evans had changed her mind and told Mr. Lanier "no". Id. Mr. Lanier refused to accept **Ms.** Evans' answer, however, and tried to get her to change her mind. R. 1009. In the course of this, Mr. Lanier began trying to undress **Ms.** Evans. Id.

At about this time according to Ms. Evans, "up jumped Kenny and told Mr. [Lanier]

---

[3] The facts of the crime were presented by the State primarily through the reading of the 1975 testimony of Anita Rogers and Gail Evans into the record. See R. 952-81; 982-1003. Mr. Foster moved to preclude this procedure unless the state could show that Ms. Rogers and **Ms.** Evans were unavailable, because the procedure denied Mr. Foster his Sixth, Eighth, and Fourteenth Amendment right to confront adverse witnesses, as well as the "fair opportunity to rebut any hearsay statements" guaranteed by Fla. Stat. §921.141(1). See R. 1753-57 (Motion to Preclude Introduction of Previous Testimony of Anita Rogers and Gail Evans). The Court denied the motion. R. 885. The state then was permitted to read the testimony of both witnesses to the jury, despite a plainly inadequate showing that **Ms.** Rogers was unavailable. See R. 793-818. Ms. Evans was present in the courthouse in response to the State's subpoena and described by the prosecutor as "available." R. 905. After Ms. Evans' former testimony was read to the jury, Mr. Foster did call Ms. Evans as a live witness and was permitted to examine her before the jury. R. 1007-15.

[4] On autopsy, Mr. Lanier's blood alcohol level was ".18." R. 1092. According to Dr. Sybers, the medical examiner, at this level of intoxication, Mr. Lanier would have experienced "slurring of speech, unsteady gait, that type of thing." Id.

you stupid mother fucker, are you going to try and fuck my sister." **R. 990.** Accord, **R. 961** (Rogers, quoting Mr. Foster) ("you trying to screw my sister...[and] take advantage of her"). Mr. Foster's behavior was so bizarre and unexpected that Ms. Evans believed he had "[gone] nuts," "lost control," "flip[ped] out," R. 1014-15 -- "I'm not a doctor, [but] [t]hat's how he acted." R. 1015. Anita Rogers told her former husband later that day that "all of a sudden ... Kenny went berserk and thought that Mr. Lanier was about to seduce his sister." R. 1118, Ms. Rogers "wasn't expecting [this], it ... happened real fast and ... caught her off guard." R. 1119. So strong was this impression on Ms. Rogers that years later she still recounted how Mr. Foster had "flipped out" and begun "having flashbacks" about someone raping his sister. R. 1131.[5]

Thereafter, Ms. Rogers testified, Mr. Foster assaulted Mr. Lanier. He began hitting him in the face, without any resistance from Mr. Lanier. R. 961. Then he choked him. R. 962. From the moment the assault began, Mr. Lanier said nothing, although early on he appeared to be seeing what was going on. Id. After choking Mr. Lanier, Mr. Foster pulled out a knife, put it against Lanier's throat, shouted that he was going to kill him, and then cut Lanier's neck. R. 962-63. Ms. Rogers had a vivid memory of how Mr. Lanier bled from this wound: "[W]hen he cut his neck I was standing about three foot away from him and it [blood] went all over me.... [I]t hit the floor and you could hear it." R. 963.[6]

Mr. Foster then knocked Mr. Lanier to the floor and grabbed him by the genitals to throw him out the camper. R. 963. When he did that, Mr. Lanier "jumped up," surprising Mr. Foster, who noted that he was "not dead" and started hitting him again. Id. Mr. Foster then got Mr. Lanier's body out of the camper and with the assistance of Ms. Rogers and Ms. Evans dragged the body some distance away. R. **964.** At this point, Mr. Foster noted that Mr. Lanier was still breathing, muttered "he won't die," and stabbed him a second time, severing his spinal cord.[7]

---

[5] Ms. Rogers told this same person, Connie Thames, that during the course of the events in the Winnebago that evening Kenny "had a light seizure." R. 1132.

[6] Ms. Evans agreed: "[Blood] was all going all over the place out of his neck. It was just pouring out." R. 991.

[7] This wound would have caused Mr. Lanier to lose consciousness -- if he were still conscious then -- within 30-60 seconds, R. **1093-94,** and brought about his death within **3-5** minutes. R. 1086,

Gail Evans' recollection of the assault was similar in most respects to Ms. Rogers', but there were some differences. Ms. Evans believed that Mr. Foster said that he was going to kill Mr. Lanier from the very beginning of the assault, not just after he pulled out his knife. R. 990. Ms. Evans also remembered that Mr. Lanier never offered any resistance -- "he couldn't," R. 991 -- but she believed that he spoke once in the midst of the assault. Either after the beating and before the first knife wound, or after the first knife wound and before the second -- the time frame on which the question is focused is vague, see R. 991-92 -- Ms. Evans thought she heard Mr. Lanier "ask[] [Mr. Foster] not to do it." R. 992. Finally, Ms. Evans remembered more stab wounds than Ms. Rogers. She believed Mr. Foster "cut [Lanier] again in the throat" while they were still in the camper, prompting the prosecutor to confirm, "[t]hat's two times." R. 992. After Mr. Lanier's body was outside, she remembered that Mr. Foster inflicted additional wounds when he realized that Lanier "still isn't dead," R. 993. At that point she thought Foster "kept stabbing [Lanier] all over again in the back." R. 992.

After Mr. Lanier quit breathing, the women and Mr. Foster returned to the Winnebago. R. 965-66. Some time after that Mr. Foster said, "Let's take his money." R. 995. After finding Mr. Lanier's wallet, the three split the money: Mr. Foster gave the woman twenty dollars each and kept forty dollars for himself. R. 967, 995.

The three then decided to take Mr. Lanier's Winnebago to the beach and leave it there. R. 967-994. On the way to the beach, Ms. Rogers and Mr. Foster threw out the knife, Mr. Lanier's wallet and clothes, and some bed linens, R. 967, 995. After abandoning the camper, the three went to a nearby hot dog stand, where a cab eventually picked them up. R. 970. The operator of the hot dog stand, Lynn Garner, observed that Mr. Foster "seemed to be loaded on something because he did a lot of sitting down and staggering." Defendant's Exhibit 5, at 3.

Ms. Rogers eventually returned to her home at "[a]bout 3:25" in the morning on July 15, 1975. R. 971. Later in the morning, at 7:00 or 7:30, she and Ms. Evans went to the sheriffs office and reported what had occurred. Id. They each gave a statement to Detective Joe Coram, R. 941-42, and later that day, Mr. Foster was arrested. R. 946.

Five days later, on July 20, 1975, Mr. Foster gave a confession to Detective Coram. Coram testified that Mr. Foster told him "he had stabbed Mr. Lanier. He had beaten him with his fist, had cut his throat and stabbed him in the back, or the neck." R. 947. Mr. Foster "[g]ave no explanation" for why he stabbed Mr. Lanier and did not "try to lay it off on

the girls as being the ones who had beat and killed Mr. Lanier." R. 948-49.[8]

The only other direct testimony about the crime which the State presented came from Mr. Foster himself. During the 1975 trial, Mr. Foster took the stand in his *own* behalf and recounted events as he remembered them. The prosecution read this testimony to the jury in the new sentencing trial. R. 1096-1102. Mr. Foster's account of events up to the beginning of the assault is consistent with the testimony of Ms. Rogers and Ms. Evans, recounted above. See R. 1096-1101. At the point at which the women testified that Mr. Foster suddenly and unexpectedly accused Mr. Lanier of sexually assaulting his sister, however, Mr. Foster's witness stand testimony differed dramatically from the testimony of the women. Mr. Foster testified that at this point,

> [W]e was sitting there drinking, And I felt, you know, felt sort of like electricity going through my brain. I have seizures, epilepsy and I knew I was going to have one
>
> So I handed her my beer, you know, and told her, you know, I am going to be sick. And I got up and pulled my pants on. My intention was to go outside. I didn't want to have a seizure in front of a girl because I never had, you know.
>
> When I woke up, you know, when I come to I figured I either fell off over on the man or I fell in the floor and he saw what was happening, you know, and was trying to help me.
>
> And I believe that Anita -- the reason I say Anita is because she's, my knife, you know, she had stuck it in her brassiere before we left the Bay Shore Bar. I believe that she is the one that killed the man because.... Fuck it, I reckon I'll just cop out. I have done it, killed him deader than hell. I ain't going to sit up here, I am under oath and I ain't going to tell no fucking lie.
>
> I will ask the court to excuse my language, I am the one that done it. They didn't have a damn thing to do with it. It was premeditated and I intended to kill him. I would have killed him if he hadn't had no money....

R. 1101-02.

While this portion of Mr. Foster's witness-stand testimony was portrayed by the State as revealing Mr. Foster's intolerance for his own lies, see, e.g., R. 1470 (prosecutor arguing, in relation to this testimony, "he had just had enough of his own lying"), in fact the evidence demonstrates something else.

In his confession to Joe Coram, when Mr. Foster assumed full responsibility for the assault and recounted it in a manner consistent in most respects with Anita Rogers' account,

---

[8] Mr. Foster's oral confession was recorded and transcribed and was read to the jury in his first trial. T (75) - 470-84. The state did not introduce or read the transcribed confession in the new sentencing trial, but chose instead to have Detective Coram summarize it. Nevertheless, a copy of the transcript of the confession is in the present appellate record, having been attached by the circuit court to the order denying Rule 3.850 relief. See R. 1780-87.

Ms. Thames, consistent with her **1975** testimony,

> that they were in the Winnebago and Kenny had flipped out, he was having flashbacks is how she actually put it. And that. he said that the man was hurting his sister, that he was raping Debra. And he got violent,

R. 1131.

On another occasion, Ms. Rogers described an Occurrence consistent with the seemingly contradictory parts of Mr. Foster's trial testimony -- the "seizure" aspect of his testimony and the "I did it" aspect of his testimony. As recounted by Ms. Thomas,

> [Ms. Rogers] had told me that they were sitting in the Winnebago in the living room and Kenny had a light seizure and he told her that he thought he was going to have another one and he asked could he lay down somewhere. And he went into a little room and laid down and pulled ... some kind of door or something. And then she had went back in there a little while later and told him, Kenny the man that you killed is not dead, he's not dead and Kenny had got up and went outside and removed the dirt and the palmetto leaves and cut his jugular vein.

R. **1132.**

With this evidence, what seemed contradictory became much less so. Mr. Foster did have a seizure that night and probably was involved in the killing as well. His testimony about the seizure was truthful. However, the seizure would have disrupted his memory of events?

---

[9] See R. **1273-76** (testimony of Donald Mace, describing a seizure experienced by Mr. Foster, at the end of which Mr. Foster had very poor memory for the events surrounding the seizure).

Thus his witness-stand testimony was probably not what the prosecutor portrayed it to be, but rather was an effort to make sense of what, to him, were fragmented memories which, because they could not be pieced together, led to his frustrated -- "[f]uck it, I reckon I'll just cop out," R. 1102 -- reconfirmation of his involvement in the killing of Mr. Lanier.

2. The motive for the crime: Mr. Foster's preconceived felony-murder plan, or Ms. Rogers' and Ms. Evans' plan to steal gone awry?

At the 1975 trial, the only explanation for why this crime occurred was provided by Anita Rogers. In reading her 1975 testimony to the jury in Mr. Foster's new sentencing trial, the State presented this explanation anew.

On the way out to Callaway in Mr. Lanier's Winnebago, Mr. Foster supposedly told Ms. Rogers that he planned "to rip the old man off." R. 959. When she asked how, Mr. Foster told her that he **was** going to take Mr. Lanier's money when he went to bed with Ms. Evans. Id. Ms. Rogers also noted that before the group left the bar for Callaway, Mr. Foster asked her to exchange rings with him -- he had a ring with a "K" on it, and she had a male's class ring -- but he did not explain why he wanted to do this. R. 958-59. After the assault of Mr. Lanier was over, Ms. Rogers asked him if that was why he wanted to exchange rings, and he said "yes." R. 969. The prosecutor asked Ms. Rogers twice why he did not want to keep his own ring, and Ms. Rogers gave two different answers: first, "I don't know[;] [h]is ring is harder than mine," R. 970; second, "it would have left 'K's' all over him and they would have known it was [Kenny]." R. 970.

The evidence raised grave questions about the reliability of Ms. Rogers' assertions.

First, Ms. Rogers' recorded and transcribed statement to Detective Coram on July 15, 1975 contained none of this information. See Defendant's Exhibit 7. This is particularly significant, because the recorded statement was the third statement taken from Ms. Rogers on the morning of July 15. See R. **941-42, 945-46.** Thus, one could reasonably infer that if Mr. Foster had told Ms. Rogers of his robbery plan, and if the exchange of rings had occurred as she described it, this information would have been divulged by the time the recorded statement was given.

Second, Gail Evans testified that she heard no discussion of any plan to rob or hurt Mr. Lanier. R. 998. As a result, she had no expectation that either would occur. Id.

Third, in his confession to Detective Coram, Mr. Foster told Coram that he did not rob Mr. Lanier, R. 950. See also R. 1786 ("I got this robbery charge, you know, we didn't rob that man"). Further, when asked about exchanging rings with Ms. Rogers, Mr. Foster admitted

that he did, but explained that he did because his "K" ring was cutting his finger when he was hitting Mr. Lanier. R. **1781,** 1784.

Fourth, in her spontaneous statements to Connie Thames several years later, Ms. Rogers explained that she and Ms. Evans, not Mr. Foster, had planned to steal Mr. Lanier's money.

> [T]he plan had been that Gail was going to be in there with the gentleman and then Anita was supposed to have come into the room, removed her shirt and her bra and act like she was going to get in the bed and then Gail was supposed to [have] told her, wait your turn, and ... Anita was supposed to have picked up the wallet or the man's pants and leave the room,

R. **1131.** According to this account, therefore, there was a plan to commit a theft, not a robbery, and Mr. Foster had no part even in that. Mr. Foster's role was simply "to go with them to keep anything from happening to them" while Ms. Evans had sex with Mr. Lanier. R. 1130-31.

Fifth, Ms. Rogers confirmed in her statements to Ms. Thames what Mr. Foster had told the police about the exchange of rings:

> [Mr. Foster] got violent. And was hitting the man and she told me that during the fight, it stopped, Kenny took off his ring and traded rings with her, then he started back.

R. 1131.

Finally, the physical evidence raised substantial doubts about the women's -- and even Mr. Foster's -- accounts that they (the women) had nothing to do with the assault upon Mr. Lanier. Dr. Sybers, the medical examiner, testified that Mr. Lanier had two knife wounds on the right side of his forehead, R. **1073,** in addition to the two large, lethal knife wounds to the left neck and the deep, fatal stab wound behind his right ear, R. **1073-74.** He explained that there was "no question" that the lacerations on the right forehead "were knife wounds and not just blunt trauma." R. 1078-80.

Significantly, no witness accounted for the infliction of these wounds. Ms. Rogers recounted only two knife wounds inflicted by Mr. Foster -- one of the two to the neck, R. **963,** and the one behind the right ear that severed Mr. Lanier's spine, R. 965. Ms. Evans distinctly remembered Mr. Foster inflicting both wounds to the neck, R. 990-91,992, and then "stabbing him all over again in the back" after Mr. Lanier's body was taken away from the Winnebago.

R. 992 (emphasis supplied)."[10] In no way did these accounts explain the wounds to Mr. Lanier's right forehead. Nor, in light of the consensus that Mr. Lanier never struggled or resisted once Mr. Foster's assault began, see R. 961 (Rogers), 991 (Evans), is it likely these wounds could have been inflicted in the course of a fight and simply not noticed by the women."

In yet another respect, the physical evidence established the strong probability that, in addition to Mr. Foster, Anita Rogers was involved in stabbing Mr. Lanier. As we have already noted, after Mr. Foster inflicted the neck wounds, Ms. Rogers described the bleeding in vivid terms: "I was standing about three feet away from him and it went all over me[;] . . . it hit the floor and you could hear it." R. 963. Ms. Evans' testimony was consistent with this. R. 991. However, when the prosecutor asked Dr. Sybers in the 1990 trial to describe how Mr. Lanier would have bled from the neck wounds, Sybers made it clear that Mr. Lanier could not have bled in the fashion described by the women. After explaining that the neck wounds cut the jugular veins, not the carotid artery, Dr. Sybers was asked to explain how one would bleed from such a wound. R. 1083-85. Dr. Sybers' answer made it absolutely clear that Mr. Lanier could not have bled in the manner reported by the women:

> [W]hen one suffers a cut to a vein the bleeding is relatively slow, depending on the vein and it is not under high pressure. In other words, blood does not squirt of spurt from the body. If one were to cut an artery the pressure then is released suddenly and this artery bleeding is then high pressure and, indeed, the blood sprays or squirts from that artery no matter what size the artery.

R. 1084-85.

3. Mitigation

The story of Renny Foster's life is a story of disability and struggle against disability. Kenny Foster was born two months premature into a terribly dysfunctional family

---

[10] While Mr. Foster's out-of-court confession was not introduced verbatim, in it Mr. Foster was certain about the number of knife wounds he inflicted: "Just two times is all I stabbed him," R. 1784 -- "in the throat," R. 1781, and "in the back of the neck," R. 1785.

[11] For these same reasons, there is significant doubt about whether Mr. Foster inflicted the other wound described by Dr. Sybers in his 1990 testimony, a laceration on the base of Mr. Lanier's right thumb, R. 1074, characterized by Sybers as a "defense wound" because of the likelihood that it was inflicted while Lanier was defending himself. R. 1082-83.

It should be noted as well that Dr. Sybers described two additional knife wounds in his 1975 testimony -- to Mr. Lanier's left ear and left shoulder, T(75) - 411 -- which fell into this same category. (These wounds were not described in the 1990 testimony.) They were not recalled by Ms. Rogers or Ms. Evans. Nor, because there was no struggle with Mr. Foster, were they likely inflicted by Foster and simply unnoticed by the women.

crippled by alcoholism and poverty. Two months before his due date, R. 1240, Kenny's mother fell down some steps, precipitating labor. R. 1252. Kenny was in an incubator for a number of days following his birth and nearly died before he came home. Id. As an infant he was always "sickly" and "puny." R. 1253. He had "much more sickness" than the other children, but his family could not afford to pay for health care. R. 1253-54. Throughout his early childhood years, he was slow developing. R. 1254.

The family into which Kenny Foster was born was vulnerable to and disabled by alcoholism. Kenny's father and paternal grandfather were both alcoholics. R. 1240-41, 1242. His father lost his job due to alcoholism and stayed drunk most of the time. R. 1291. On his mother's side of the family, alcoholism was also a pervasive disability. His maternal grandfather "drank himself to death," and a maternal aunt and uncle were alcoholics. R. 1254-55. Kenny's siblings also drank excessively; one of his brothers conceded on the witness stand, for example, that he was an alcoholic. R. 1305.

Compromised by alcoholism, Kenny's family was dysfunctional in a multitude of ways. His parents never earned enough money to provide for their children's basic needs. Often there was not enough to eat. R. 1290. When there was food, meals usually consisted of nothing more than beans and cornbread, R. 1251. New clothes were provided to Kenny and his siblings by the schools rather than by their parents. R. 1290. Disciplinary measures were harsh for the children but especially for Kenny.

Whenever Kenny was whipped by his father, for example, the whipping became excessive and turned into an assault, Kenny's father would whip him with a belt. R. 1260. No matter how long or how hard his father whipped him, however, Kenny would not cry. R. 1260-61. This so enraged Kenny's father that he would keep whipping him until he (the father) ran out of breath. R. 1293. Typically his father would then sit down, catch his breath, and beat Kenny some more. Id. On occasion during these episodes, Kenny's father would also throw him against a wall in an effort to make him cry. R. 1261. Because Kenny would never cry in response to these beatings, R. 1241-42, 2160-61, 1293, they frequently escalated into aggravated assaults before Kenny's father would stop, Kenny's mother provided no refuge from his father. Although she did not physically abuse Kenny, she was always "very nervous" and seldom able to offer a kind word or a gentle hand to her children. Instead, she "hollered" at the children or "cussed" at them, especially Kenny, much of the time. R. 1258-59.

As a result of these factors, Kenny felt unwanted and unloved. R. 1260. The severe

degree to which his feelings ran was revealed one day by a comment to one of his uncles, Ed Burch. Kenny had just returned from several months' confinement in the juvenile institution at Marianna. He told his uncle that he wanted to go back to Marianna, R. 1266, because "he was treated better and he was learning more there and he got along better up there than he did at home," Id.

Kenny's family history of alcoholism and the abusive neglect of his parents led to his own use of alcohol at an early age. The first time he got drunk, he was eight years old, and by the time he was a teenager, he was an alcoholic. R. 1294. By this time in his life, Kenny was getting drunk three or four times per week. R. 1295. As time went by, he also began ingesting other drugs. He swallowed prescribed medications "handfuls at a time," R. 1296, he sniffed glue and gasoline, id., and he ate the contents of nose inhalers. R. 1261.[12] Every time his Uncle Ed saw him, Kenny was drinking or "using that stuff," and it "affected his mind." R. 1262. Through his adult years, his alcohol and drug abuse was so severe that he was admitted several times to the mental health unit of the local hospital for overdoses and suicidal behavior. R. 1279.

In his early adult years Mr. Foster's disabilities were multiplied by the onset of mental illness and neurological disease. His family and friends were acutely aware of the symptoms. He saw things that were not there. R. 1264 (Kenny talked about "little devil ... men coming after him"). He carried on numerous conversation with dead relative and with people who were not present. R. 1272, 1299, 1336-37. He heard voices telling him to do things. R. 1243-44, 1351. He held strange beliefs that were not rooted in reality. R. 1335 ("he felt like the devil was taking bites out of his brain" and that "his brains were boiling"), R. 1337 ("[h]e thought that when he had a seizure that a family member would die"). He mutilated himself, frequently cutting his arms, his wrists, his heels, and his ankles, without knowing or being able to articulate why. R. 1297-98, 1337-38.

Mr. Foster was also subject to unpredictable, sudden outbursts of bizarre or violent behavior. His Uncle Roscoe described him as having "two or three kinds of personalities." R. 1243. His brother Larry explained that "[h]e could be real nice and ... just change, you know, just wasn't the same Kenny." R. 1300. These changes were unpredictable and could

---

[12] Nose inhalers can contain methamphetamine. See Siegel "Methamphetamine," 4 Cal. Defender 7 (1991). The chief symptom described by Mr. Foster when he ate inhalers -- feeling "his heart . . . running away," R. 1261 -- is consistent with methamphetamine ingestion. See Siegel, supra.

result in Kenny not having control over himself. R. 1300-01. To illustrate these qualities, Larry recounted an occasion when

> [Kenny] listened to [a] Hank Williams tape -- all night long. I got up, went to work the next day [and] he was balled up in a little knot right in front of the stereo.... I said Kenny, how about changing that tape. He said, I'll change it. He jumped, up, pulled it out, throwed it on the floor, and stomped it through the floor of the trailer.

R. 1301.

Mr. Foster's former wife, Frances, recounted similar incidents. When she and Kenny were living in Texas, for example, she came home from work one day to find that Kenny had "destroyed" their house. R. 1331.

> [H]e cut up all the clothes and he had bent all the silverware. And he had threw everything against the wall.... [T]hat's what I saw first was the catsup and mustard, everything just against the wall, just looked like an abstract painting or something....
>
> [Thereafter, she saw that Kenny] was bent down with a spoon under his foot bending the spoon, you know, he was bending all the silverware and broke all the dishes.

R. 1332. Another such incident occurred after Kenny and Frances moved back to Panama City. R. 1333. Frances was at her mother's house when a neighbor called and "said that I shouldn't go home, that Kenny was crazy and swinging off the wiring [of a ceiling light fixture].,.." Id, In talking with Frances after these incidents, Kenny could not explain what happened, but he felt "[v]ery sorry that he did it." R. 1334.

Andre Childers, the former husband of Anita Rogers, also testified about Mr. Foster's "just do[ing] things all of a sudden that were irrational." R. 1121. He recalled an occasion when he had been visiting at Kenny's house, left for a few minutes, and then returned. Id. "[A]s I knocked on the door, the door opened and for some unknown reason Kenny just punched me in the face." R. 1121-22. Kenny's brother Larry came out and talked to Mr. Childers, saying, "[L]ook, he doesn't even know why he's done this." R. 1122.

The final kind of mental or neurological disorder observed by others was a seizure disorder. Larry Mace described a seizure that Kenny had when they were out on a commercial fishing boat. Kenny "started blinking his eyes like this ..., [then] fell over and started, you know, knotting up and blood started coming out of his mouth and I guess he was biting his tongue." R. 1274. "[I]t was about 35 to 40 minutes after he come to, you know, come to himself." Id. After this, Kenny was confused:

> I asked him, Kenny, do you know where you're at. He looked at me ... and shook his head, no. I said, you're out here on a fishing boat, and he said. how long have I been out here, I said, you been out here since last night. And he didn't remember it.

R. 1275. Kenny's brother Larry also testified about having seen Kenny experience seizures.

R. 1297, 1305-06. And Kenny's former wife Frances recalled how "he was embarrassed about having seizures and never wanted me to witness one.... I just know it was real hard for him to have seizures." R. 1330.

Beginning in 1968, when Mr, Foster was twenty-two years old, he was admitted seven times to in-patient mental health facilities for psychiatric treatment. R. 1358-59. See also Defendant's Exhibits 1 (discharge summaries from the mental health unit of Bay County Memorial Hospital), 2 (record of involuntary, nine-month hospitalization in Florida State Hospital at Chattahoochee), and 3 (records from two involuntary commitment proceedings). Greg Lindsey, who worked at the local hospital's mental health unit, described his contact with Mr. Foster during these admissions:

> Kenny was just extremely mentally ill. And he, when he would come in to the unit he would just really be out of it, you know, psychotic.,.. [H]e would have to be, to protect himself, he would be restrained.

R. 1315-16. In connection with these admissions, Mr. Foster was diagnosed as having severe mental illness. As Dr. James Merikangas, one of the experts who testified about Mr. Foster's mental and neurological condition at the resentencing trial, explained,

> [A]ll of [the doctors who treated Mr. Foster during his psychiatric hospitalizations] diagnosed that this man was psychotic at various times. He was emotionally unstable that he had alcoholism. That he was, they call him schizophrenic reaction. They called him paranoid schizophrenic, refer to psychotic organic brain syndrome which ... is not simple schizophrenia but based on ... damage to his brain, that he has severe headaches and seizures, that he had had anemia and he was diagnosed as having a toxic organic brain syndrome secondary to alcohol and Artane. They're all describing various aspects of the same thing....

R. 1367.

At the resentencing trial, two experts -- Dr. Merikangas and a clinical psychologist, Dr. James Vallely -- helped to illuminate and explain the significance of Mr. Foster's longstanding history of mental illness and neurological disease, Taking into account the many observations of the lay people who were close to Mr. Foster, his history of psychiatric hospitalization, Dr. Vallely's psychological and neuro-psychological testing of Mr. Foster, and their clinical interviews with and observations of Mr. Foster, Dr. Merikangas and Dr. Vallely agreed that Mr. Foster suffered from three serious, inter-related mental disorders: brain damage with epileptic seizures, a severe borderline personality disorder, and psychosis. R. **1169-71** (Vallely), **1359-60** (Merikangas).

Mr. Foster's brain damage was plainly a significant factor underlying his sudden outbursts of violent, out of control, bizarre behavior. As Dr. Merikangas explained,

Some people with brain damage ... develop what we call hyperactivity and they have

> this attention deficit in childhood[,] they can't concentrate, ... they're restless, ... they're agitated and they're prone to violent outbursts. That is the kind of brain damage that Mr. Foster had. It's similar, if you had a car and your accelerator pedal were sticking and you step on the gas and all of a sudden the car starts to run away with you and then you find out your brakes don't work. That would be similar to the effect of the brain damage on Mr. Foster. He would fly off and be unable to stop and afterwards not understand why that was because he would notice that other people didn't do that. And that he would have just rapid changes in his behavior, outbursts that were hard to understand, cutting himself. Normal people don't take knives and just cut themselves. But people with borderline personality do or people with impulse disorders do.

R. 1370-71.

The association which Dr. Merikangas noted between Mr. Foster's brain damage and his borderline personality disorder was also noted by Dr. Vallely in explaining the consequences of the personality disorder.

> [Mr. Foster] is suffering from a rather severe borderline personality disorder which is often seen in individuals who do have longstanding brain damage. And a borderline personality disorder means that the basic abilities of a person's personality to function at a level that would be acceptable socially and lead to them getting payoffs and being able to grow and being able to develop as a normal member of society[,] that their development is borderline. Sometime its working fair and other times it's not functioning at all. So it sits at the borderline of obvious d[y]sfunction and function.
>
> These individuals sort of under stress revert to d[y]sfunctional and at best are just marginally functional.

R. 1170.

The third disorder suffered by Mr. Foster -- episodic psychosis[13] -- was, for both Dr. Merikangas and Dr. Vallely, confirmed by Mr. Foster's life history. It, too, was intertwined with Mr. Foster's brain damage and borderline personality disorder. Thus Dr. Vallely found that "[Mr. Foster's] life history ... indicated that within this borderline [personality] problem he also periodically fell apart or decompensated into psychotic reactions marked by paranoia of a significant nature." R. 1170-71. This aspect of Mr. Foster's disabilities was, in fact, the common feature noted by nearly all of the mental health professionals who previously treated Mr. Foster:

---

[13] As Dr. Merikangas explained to the jury,

> [P]sychosis refers to the major mental illness where one loses contact with reality[,] where the thinking is not consistent with what is really going on in the world but is based upon hallucinations [--] and that is seeing and hearing things that aren't there [--] and delusions[,] which is a fixed, false belief or you thin[k] something is true that isn't and that seeing and being told that it isn't doesn't change your mind because you firmly believe that.

R. 1365.

> [T]he commonality is everyone is seeing this guy as a paranoid. Everybody is seeing this guy as incapable of functioning in a normal life and roughly four out of six are saying that he's got a severe psychotic profile periodically throughout his life.

R. **1218,** Concurring with this commonality of diagnosis, Dr. Merikangas re-emphasized the inter-relationship between Mr. Foster's psychotic paranoia and brain damage by noting that some of Mr. Foster's previous doctors "refer to psychotic organic brain syndrome[,] which I think is [a] more accurate diagnosis[,] that his psychosis is not simply schizophrenia but based on the damage to his brain...." R. 1367.

Mr. Foster's multiple, interrelated disabilities were the explanation for those incidents in Mr. Foster's life when his behavior suddenly and unexpectedly changed and led to outbursts of violence, destruction of property, or self-mutilation. This, too, was what Dr. Merikangas and Dr. Vallely found to be the most compelling explanation of the crime against Julian Lanier. As Dr. Merikangas explained,

> I don't think [the crime] would have happened at all if he hadn't been drinking. That his behavior when I have seen him and when other people have seen him in between these violent and crazy episodes has been relatively okay. That sitting here right now he's relatively okay. I doubt that he himself remembers much of the behaviors that he has had these various times that he's been hospitalized.
>
> On the day of the episode he had a lot to drink. I mean he may have taken Phenobarbital or other sedative drugs and ... he was not just the brain damaged, normal self but the impaired,. intoxicated self.... [S]o he was, if you take three things, not normal to start with, with this damaged personality, this damaged brain, add to that the alcohol, add to that the possible effect of sedative drugs, he wasn't in full control of his faculties.
>
> The descriptions by the witnesses and the condition of the whole crime scene indicates, in the words of one of the witnesses,. he just lost it. I think that is the only way to understand what happened. He lost it. He went berserk. The things that happened were not deliberate actions of someone who says, well, I think that we should roll and kill this person.... This is somebody who just went wild and following that, realizing to some degree what had happened, continued to act in ways that weren't reasonable, deliberate or sensible.... The girls there did not understand what had happened. They could not understand this behavior. The reason they couldn't understand it, it was the product of a psychotic brain damaged individual at that time. So, the way that then he tries to understand it himself. He's quoted many times throughout his life when these things have happened as saying I don't know what happened, I don't understand it, I'm sorry it happened and got into this mode of being sort of apologetic for things he really didn't have any control over, that he couldn't understand.

R. **1373-76.** Accord, **R. 1193-94** (Dr. Vallely).

For these reasons, both Dr. Merikangas and Dr. Vallely concluded "that the crime was committed while [Mr. Foster was] under extreme emotional disturbance or extreme mental disturbance," R. 1376, and that Mr. Foster "was impaired by drugs and alcohol and that his capacity to understand what he was doing and to control it was very much impaired." Id. See also R. 1200-01 (Dr. Vallely).

This conclusion was reached notwithstanding Mr. Foster's witness-stand statement that

the killing of Mr. Lanier "was premeditated." See R. 1102. Dr. Vallely explained that he discounted Mr. Foster's witness-stand statement because it was so much at odds with the course of events described by Ms. Rogers and Ms. Evans. R. **1198-99** (Mr. Foster "remember[ed] it that way when, in fact, it didn't happen that way"). In addition, Dr. Merikangas explained that Mr. Foster's disabilities made it likely that he could not remember what happened, so that a statement like his witness-stand confession was inherently unreliable.

> I think what he said on the stand does not alter what happened. I've talked to lots of alcoholics who have told me lots of things some of which they remembered correctly, some of which they didn't and some of which they were told by others[,] and ... many of them are remorseful for things and mistakes they have made[,] or people who have drunkenly run over children [are] remorseful and confess but that doesn't mean that they wanted to do that.

R. 1412. See also R. 1413-14 (adding that "any given statement he makes under stress or under guilt or remorse[,] or any explosive outburst that this borderline person ... with brain damage [would] make" is likely to be unreliable).

Notwithstanding the mess that Kenny Foster's disabilities and life-long hardships have made of his life, he still has character traits that called for a life sentence. He has a long history of being the primary care-giver for his younger siblings. R. **1270.** He was very protective of the younger kids, id., and very good at the role he assumed -- it was "[j]ust [a] natural thing for him...." R. **1271.** This, in fact, was one of the traits that originally attracted Frances to him. R. 1324.

After Kenny and Frances were married, Kenny was deeply concerned about Frances and their babies, both at birth and after. R. **1328.** He was a patient, loving, involved parent, who shared willingly in changing diapers, comforting crying babies, feeding hungry babies, and providing gentle affection. R. **1328-29.** On the occasions when he could not work, or lost jobs due to his disabilities, he worried profoundly about his failure to provide for his young family's material needs. R. **1325-26.**

Kenny's affection for other people was by no means limited to his family. He was an uncommonly generous man. R. **1330.** Moreover, though his material possessions were always meager, he shared those with others whenever the need arose. As Frances described him, "[H]e [was] not materialistic. He would literally give you the shirt off his back." Id.

That Kenny Foster had these noble traits, despite the daily struggle that confronted him because of all his physical and mental disabilities, was heroic. Perhaps the most heroic, certainly the most poignant, of his strengths, however, was the insight he had into his own life. Just a week before the killing of Julian Lanier, Mr. Foster spent several hours with a family

friend, Barbara Mace, seeking her spiritual guidance and her prayers. R. **1350-51.** In great anguish, he told Ms. Mace "that he didn't like doing the things he did, that the devil just made him do it." R. **1351.** Not many months before that he had shared a similar anguish with Grey Lindsey, during an admission to the mental health unit of the local hospital. Mr. Lindsey was with Mr. Foster during a suicide watch,

> [T]his was at a time when Kenny was on the mental health unit and he had been there for several days, had been receiving treatment. His thinking had cleared up because of the treatment that he was receiving. But he sat with me and I'll just never forget how he ... just seemed like he was just so desperate that he get some kind of help because he was afraid of himself. He told me that, he said, Greg, you know, he said, they really need to put me away somewhere, I need to be put away in the state hospital because if they don't I'm going to wind up hurting somebody some day. So, he was really afraid that he was going to do something.

R. 1318-19.

Obviously, the help Mr, Foster so desperately wanted did not come to him. Frances and his mother tried to get him committed, but couldn't. R. **1340-42.** The tragedy is that Kenny Foster had a sense of foreboding, expressed it, and could not find a strong hand to hold on to.

SUMMARY OF ARGUMENT

Three days before his capital sentencing retrial was scheduled to begin, Mr. Foster filed a motion to vacate his judgment of conviction, pursuant to Fla. R. Crim. P. 3.850. In the course of preparing for the sentencing retrial, Mr. Foster uncovered facts which supported a new challenge to his conviction on two grounds: **(1)** in exchange for their testimony, the prosecution secretly promised not to prosecute Anita Rogers and Gail Evans for their involvement in the killing of Julian Lanier, and failed to disclose this matter to the defense, in violation of Brady v. Maryland, **373** US. 83 **(1963);** and (2) defense counsel at the original trial failed to investigate whether Rogers and Evans thought Mr. Foster was suffering from acute mental illness at the time of the crime, cutting off the only possible avenue that would have allowed counsel to develop and present a mental health defense at trial. The trial court deferred ruling on the Rule 3.850 motion until after the sentencing retrial, and then summarily denied relief, even though the record required that relief be granted, or at the least, that an evidentiary hearing be held.

At the sentencing retrial, Mr. Foster's Sixth Amendment right to confront the evidence against him was denied in three ways : (1) the 1975 trial testimony of Anita Rogers was admitted as hearsay, without an adequate showing that she was unavailable, and despite the fact that the prosecutor's failure to reveal the promise made in return for her testimony had

deprived Mr. Foster of an adequate opportunity to cross-examine **Ms.** Rogers at the **1975** trial, see Ohio v. Roberts **448** U.S. 56 (1980); **(2)** the trial judge refused to admit evidence of **Ms.** Rogers' 1989 convictions for false reporting of a crime and grand larceny, which was proffered to impeach her credibility; and **(3)** the trial judge refused to allow Mr. Foster to obtain copies of Ms. Rogers' and Ms. Evans' psychiatric records despite a preliminary showing that their psychiatric difficulties were relevant to their credibility and to their personal involvement in the crime.

The trial judge's sentencing findings and jury instructions concerning mitigating Circumstances did not provide any assurance that mitigating circumstances were properly considered and created the risk that the evidence of Mr. Foster's mental and neurological disorders was not given appropriate consideration. The judge's findings with respect to mitigating circumstances were deficient in every respect under Rogers v. State, 511 So.2d 526, **534** (Fla. 1987), and its progency. The instructions created the risk that the jury would refuse to consider the evidence of Mr, Foster's mental disorders in mitigation if the evidence fell short of establishing the "extreme" disturbance or "substantial" impairment required under §§ 921.141 (6)(b) *& (f),* Fla. Stat., creating the same constitutional defect in the jury instructions that the Court condemned in the judge's sentencing findings in Cheshire v. State, 568 So.2d 908, **912** (Fla. 1990). Finally, the instructions could have been understood as mandating a death recommendation if the jury found that the mitigating circumstances failed to outweigh the aggravating circumstances.

The trial judge's sentencing findings and jury instructions concerning aggravating circumstances were constitutionally deficient. The finding that the murder was especially heinous, atrocious, or cruel was not supported by the evidence, since the degree of cruelty inflicted was not so extreme as to warrant the finding of this factor, and since the victim was not conscious during the time that most of the injuries were inflicted. The instructions with respect to this factor were deficient for failing to provide any meaningful principles defining and limiting its application, and for failing to explain its relationship to the mental illness which drove Mr. Foster's behavior at the time of the crime. Similarly, the finding that the murder was cold, calculated, and premeditated was not supported by the evidence, since there **was** no evidence that the crime was the product of a prearranged plan or calculated design. The instructions with respect to this factor were also deficient for failing to provide any meaningful guidance in its application.

Death is a disproportionate sentence for Mr. Foster, because the evidence of his serious mental and neurological disorders is not in dispute, and those disorders provided the entire impetus for the crime. See, e.g., Nibert v. State, 574 So.2d 1059, 1061-63 (Fla. 1990); Fitzpatrick v. State, 527 So.2d 809, 811-12 (Fla. 1988).

The prosecutor discriminates on the basis of race in seeking the death penalty in Bay County. Mr. Foster's allegations satisfied the requirements of McCleskey v. Kemp, 481 U.S. 279 (1987), and entitled him to a hearing on this claim, which if proved, would preclude the State from seeking the death penalty against him.

Finally, the trial judge erred in two ways in the jury selection process: (1) he refused to strike for cause three jurors who were predisposed to impose the death penalty, and (2) he struck for cause a juror who was opposed to the death penalty but who nevertheless made clear her ability to follow the law and the instructions of the count.

ARGUMENT

I. MR. FOSTER'S MOTION TO VACATE HIS JUDGMENT OF CONVICTION SHOULD HAVE BEEN GRANTED, OR AT LEAST GIVEN PLENARY CONSIDERATION, BECAUSE THERE IS A REASONABLE PROBABILITY THAT HE WOULD NOT HAVE BEEN CONVICTED IN 1975 IF THE STATE HAD REVEALED EXCULPATORY EVIDENCE KNOWN TO IT AND IF DEFENSE COUNSEL HAD CONDUCTED A REASONABLY EFFECTIVE INVESTIGATION

As noted in the Statement of the Case, Mr. Foster was originally convicted on October 3, and sentenced to death on October 4, 1975. Although there was only one murder victim in his case, the jury returned special verdicts convicting him of premeditated murder and felony murder. Eventually, his death sentence was set aside and his case was remanded to the trial court for a full new sentencing proceeding.

The new sentencing trial was scheduled to begin June 4, 1990. Shortly before then, on the basis of evidence discovered during preparation for the sentencing trial, counsel for Mr. Foster determined that substantial grounds had emerged to support a new challenge to the original conviction. Accordingly, on June 1, 1990, the defense filed a Motion to Vacate Judgment of Conviction pursuant to Fla. R. Crim. P. 3.850. R. 1972-88. The motion alleged that the original conviction was constitutionally defective because the State had failed to disclose material, exculpatory evidence concerning the credibility of Anita Rogers and Gail Evans and their account of the crime, in violation of the due process rule of Brady v. Maryland, 373 U.S. 83 (1963), and because defense counsel had failed to conduct a reasonable

investigation of **Ms.** Rogers' and **Ms.** Evans' observations of Mr. Foster's mental condition during the course of the crime, in violation **of** his Sixth and Fourteenth Amendment right to counsel.

Mr. Foster immediately asked that the new sentencing trial be continued in order to permit the fair and orderly consideration of his Rule 3.850 motion. Beyond the obvious reasons of judicial economy, Mr. Foster explained that he would be irremediably prejudiced in the conduct of the new sentencing trial, because **his** conviction of felony murder conclusively established the aggravating circumstance set forth in **Fla.** Stat. § 921.141(5)(d). Unless the felony murder basis for his conviction were vacated, the evidence that he had available to contest whether the murder was committed during the course of a robbery **could** not be given any effect **in** the new sentencing proceeding. The trial court denied **his** request to continue the sentencing and decided that it would defer ruling on the Rule 3.850 motion until **after** the new sentencing proceeding was over. R. 60, 62.

Over Mr. Foster's persistent objection, the new sentencing trial took place with the court instructing prospective jurors at the outset that "[t]he defendant has been found guilty of first degree . . . felony murder, to wit: robbery," R. 116; instructing the jury to the same effect at the beginning of the State's case, R. 910; allowing the prosecutor to argue in his opening statement that in **1975** "the **jury** ... found [Mr. Foster] guilty of **...** murder by what we call felony murder, **...** that is, the murder was committed during the perpetration or attempt to rob Mr. Lanier," R. 915, and, "[y]ou are not here to determine whether he's guilty of robbery of Mr. Lanier because that was determined on October **3,** 1975," R. **916;** and, finally, allowing the prosecutor to argue in closing:

> The second aggravating circumstance, robbery. Was there a robbery? **You** got the jury verdict in here.... [T]he jury fifteen years ago found him guilty of not only robbery but robbery, felony murder.... So, is **he** guilty of robbery? Yes.

R. 1467.

In light of the trial court's decision to defer ruling on the Rule 3.850 motion until after the sentencing trial, the sentencing trial itself preordained the result that would be reached on the motion. **A** grant of even limited relief on the Rule 3.850 motion -- vacating the conviction of felony murder **and** leaving in place the conviction of premeditated murder, for example -- would have required that the just-completed, five-day jury sentencing trial **be** nullified, for the conviction played the very role in the sentencing trial that everyone knew it would play: the felony murder conviction, by itself, made Mr. Foster eligible for the imposition **of** a death

sentence.

Accordingly, long before the trial judge entered the post-trial order denying the Rule 3.850 motion, the result was preordained. Indeed, it was preordained on June 1, 1990, the date the motion was filed and the defense motion to defer resentencing was denied. Mr. Foster never had anything approximating a full and fair consideration of his Rule 3.850 motion.

The proof of this proposition lies in the facts established by Mr. Foster in support of the Rule 3.850 motion. These facts, together with the trial court's order denying the Rule 3.850 motion, are examined under headings A and B, infra.

A. Mr. Foster Made At Least A Prima Facie Showing That The Prosecution Violated His Brady Rights, And Defense Counsel Deprived Him Of Effective Assistance, In His Original Trial

During the course of the new sentencing trial, once the prosecutor made clear that he intended not to call Anita Rogers and Gail Evans as witnesses, but intended only to introduce their 1975 trial testimony, Mr. Foster filed a Motion to Preclude Introduction of Previous Trial Testimony of Anita Rogers and Gail Evans. R. **1753-57.** One of the theories underlying this motion overlapped the theory underlying the Rule 3.850 motion: Mr. Foster had been denied an adequate opportunity to confront Ms. Rogers and Ms. Evans when they testified in **1975** due to the prosecutor's failure to disclose exculpatory evidence concerning these witnesses' credibility and account of the crime, and due to defense counsel's ineffective failure to investigate these witnesses' observations of Mr. Foster's mental condition during the course of the crime. An evidentiary hearing was conducted on the motion to preclude. R. 790-885. During this hearing, Mr. Foster made at least a prima facie showing that the prosecutor violated his Brady rights, and that defense counsel deprived him of effective assistance in his original trial.

1. The Brady claim

The Brady claim centers on Anita Rogers, and involves the prosecution's failure to disclose both exculpatory evidence and evidence that Mr. Foster could have used to impeach Ms. Rogers and Ms. Evans, The due process requirement of prosecutorial disclosure encompasses both kinds of evidence. Brady v. Maryland, 373 U.S. at 87; Giglio v. United States, 405 U.S. **150, 154 (1972).** See also United States v. Bagley, 473 U.S. ***667, 676*** **(1985).**

At trial, Ms. Rogers and Ms. Evans gave the impression that their testimony was wholly the product of what they experienced on the night of the crime. In response to

defense counsel's questions, each denied that she had been arrested for prostitution in connection with the events of the evening. R. 981, 1002. Moreover, each denied that she had been arrested on "any charge" "arising out of the death of the old man." Id. Defense counsel's questions were obviously the predicates for asking whether Ms. Rogers and Ms. Evans had struck a deal with the prosecution in exchange for their testimony. Since the predicates were denied, counsel did not ask whether Ms. Rogers and Ms. Evans were testifying pursuant to a deal. Nevertheless, the questions and answers gave the definite impression that there was no deal.

This impression was consistent with the substance of Ms. Rogers' and Ms. Evans' testimony, for each also gave the impression that they were innocent bystanders to the crime. Indeed, Ms. Rogers went one step further. She gave the impression that the course of events that evening were wholly the responsibility of Kenny Foster, She testified that at the bar, Mr. Foster developed a plan to "rip the old man off." R. 959. She also testified about Mr. Foster's exchange of rings with her and his admission that, as part of his plan to rob Mr. Lanier, he also planned to assault -- and by implication, to kill -- Mr. Lanier. R. 958-59, 969, 970.

The evidence presented in the hearing on the motion to preclude Rogers' and Evans' 1975 testimony directly contradicted the impressions created by Rogers and Evans.

Donnie Goodman, who was married to Anita Rogers far a time during the 1980's, testified during the hearing that Ms. Rogers admitted to him that the sheriff's department agreed to "commute her sentence for testimony [against Mr. Foster]." R. 826. When asked what he meant by this, Mr. Goodman explained that the State agreed not to charge her in connection with the killing of Mr. Lanier. R. 828-29. This deal, he was told, was also extended to Ms. Evans. R. 831. Out of this experience in Mr. Foster's case, Ms. Rogers learned that "if she was ever in trouble, all she had to do was give up State's evidence on somebody and be out of it," R. 826.

Confirmation of Ms. Rogers' and Ms. Evans' need to strike a deal with the State was provided by the testimony during the hearing of Connie Thames. Ms. Thames testified that Ms. Rogers admitted to her that the plan to steal Mr. Lanier's money was Ms. Rogers' and Ms. Evans' plan, not Kenny Foster's plan. R. 853. Mr. Foster was not a part of this plan: "Anita said [nothing] about Kenny Foster knowing about ... or being involved in th[e] plan." Id.

Ms. Rogers' spontaneous statements to Ms. Thames about the crime further established that Ms. Rogers had set up Mr. Foster to take all the responsibility for the crime. Not only did she falsely accuse Mr. Foster of having planned to rob Mr. Lanier, she also lied about the context in which she and Mr. Foster exchanged rings. Ms. Rogers' statement to Ms. Thames made clear that the exchange of rings occurred after Mr. Foster had begun to hit Mr. Lanier, R. 853 -- consistent with Mr. Foster's account in his confession of exchanging rings at that time because the "K" ring was cutting his finger -- not in advance of the beating, as part of a planned assault.

Thus, the picture that emerged during the hearing on Mr. Foster's motion to preclude was that Ms. Rogers and Ms. Evans had struck a deal with the State. In exchange for not being charged for their role in the crime, Ms. Rogers and Ms. Evans agreed to testify against Mr. Foster.

The substantial likelihood that there was a deal between the prosecution and the women is confirmed independently, in two ways, by the record in Mr. Foster's case. The first has to do with the emergence of Ms. Rogers' story about Mr. Foster's plan to assault and rob Mr. Lanier. The second has to do with the number of knife wounds inflicted upon Mr. Lanier and the manner in which he bled from them.

Anita Rogers' story about Mr. Foster's plan to assault and rob Mr. Lanier did not emerge until trial. The context out of which her story did finally emerge provides strong corroboration of Donnie Goodman's testimony that Ms. Rogers struck a deal with the State -- a deal which generated the story attributing an assault and robbery plan to Mr. Foster.

In the daylight hours of July 15, 1975, after Ms. Rogers and Ms. Evans went to the police, Detective Joe Coram interviewed Rogers and Evans three times about the crime. R. 941-42, **945-46.** On the third occasion, the interviews were recorded and transcribed. Id. Ms. Rogers' transcribed statement was introduced in the hearing on the motion to preclude, R. 858-60, and as Defendant's Exhibit 7 in the resentencing trial. If her statement is examined from a prosecutor's perspective, it contains a fundamental void. It does not establish with any certainty that the killing was first degree murder, for it says nothing about an attempt to commit, or the commission of, an underlying felony, and it refers only in a murky fashion to

facts that could be consistent with premeditation.[14] Nevertheless, this was Ms. Rogers' third statement about the crime. Accordingly, if Mr. Foster was involved in an underlying felony connected to the crime, or if he in any way premeditated the crime, it is reasonable to think that such information would have been elicited by the time this statement was taken.

Gail Evans' transcribed statement, also her third statement about the crime, is identical in this respect, for it also contains nothing to support the view that this crime was a first degree murder. See R. 1796-1807.[15] If anything, Ms. Evans' interview portrays Mr. Foster's "I'll kill you" statement as more likely a product of passion, emotional disturbance, or both, than as a statement of premeditation."

Two days later, on July 17, 1975, Detective Coram took another statement from Gail Evans. In this statement, Coram tried to elicit facts that would establish that Mr. Foster committed a felony murder. What he elicited, however, sounded more like Ms. Rogers' and Ms. Evans' plan to steal Mr. Lanier's money[17] -- but with Mr. Foster substituted as the planner -- than a plan to commit a robbery:

> Q. [O]n the night of July 14, 1975, at the Bayshore Bar, which is located in Panama City, Bay County, Florida did Kenny Foster engage you in conversation in an effort to help him to "roll" Mr. Lanier?
>
> **A.** No.
>
> ***Q.*** What did Kenny ask you?

---

[14] Ms. Rogers' statement notes that Mr. Foster said to Mr. Lanier, "I'll kill you."' Defendant's Exhibit 7, at 2. However, Mr. Foster's declaration was made well after the start of a wholly unexpected, crazy attack on Mr. Lanier for attempting to "screw [Mr. Foster's] sister," and in the heat of the fight that ensued. Id, It could readily have been interpreted as a statement generated by heat of passion or emotional disturbance. Later on, after Mr. Lanier's throat had been cut, when Mr. Foster realized that Mr. Lanier was not dead, he expressed surprise that Lanier was still alive and inflicted additional knife wounds. Id. While this expression by Mr. Foster could have been seen as premeditation if taken out of context, in context it was no different from the earlier expression and was readily seen as a continuation of the emotionally driven behavior that characterized the entire assault against Mr. Lanier.

[15] Ms. Evans' statement was not introduced at the evidentiary hearing on the motion to preclude or at trial, as was Ms. Rogers' statement. However, it was attached to the circuit court's order denying the Rule 3.850 motion and thus is a part of the record.

[16] Ms. Evans said that, in the midst of his assault upon Mr. Lanier, Mr. Foster said, "I'll kill you you Goddam old man you mother-fucker and then he says because I am a Federal Agent, I will kill you for trying to fuck my sister...." R. 1799. See also n. 14, supra.

[17] Rogers divulged this plan to Connie Thames years later. See R. 1131.

A. Asked me if I could screw the old man to make some money off of him.

Q. Did Kenny tell you that the old man, or Mr. Lanier, had a lot of money?

A. Yes,

Q. Did he say that he was going to get the money?

A. He said he would try to but I didn't think he was gonna go out there to kill him when he said that.

Q. Did Kenny Foster ask Juanita to help?

A. I am not sure.

Q. Did Kenny and Juanita talk about money?

A. Yes.

Q. What was said?

A. I don't know.

Q. Then how do you know they talked about the money?

A. Because he kept on talking to her and I heard Kenny say let's get all of his money if we can.

. . . .

Q. When you got to the dirt road in Callaway where you parked the camper, what did Kenny tell you to do?

A. Told me to talk to the old man, so I started talking and he asked me would I screw him and I said no at first and then, that stupid Kenny Foster said just fuck him Gail, just fuck, fuck him. I said Kenny, I don't want to. He said do it. I got up and started taking m pants down and then he said get him a Schlitz, I got him a beer and then he started eating the old man.

R. 1809-10.

At trial, Gail Evans retracted what she said in this statement. She agreed that she "didn't know and hadn't heard any conversation ... that anybody was going to ... rob [Mr. Lanier]." R. 998. Moreover, she said nothing about Mr. Foster urging her to have sex with Mr. Lanier prior to the assault. R. 990.

We do not know when Ms. Evans retracted her July 17 version of events, but we do know that three days later on July 20, 1975, when Mr. Foster provided a statement to Detective Coram, Mr. Foster said nothing that would have established the crime as a first degree murder, Mr. Foster could not account for why he assaulted Mr. Lanier -- "I don't know what the hell started us to fighting[;] I just, you know, was beating him ...," R. 1781 -- and he did not remember saying anything to Lanier at that time, R. 1784 -- "[a]ll I know is I was hitting him." Id. Moreover, he insisted that "we didn't rob that man." R. 1786.

Thus, at this point in the State's investigation, the State had no hard, unequivocal evidence that the crime was first degree murder, Nevertheless, when Anita Rogers testified against Mr. Foster at trial two months later, the State produced such evidence through Ms. Rogers' testimony that Mr. Foster planned at the bar "to rip the old man off," R. 959, and, by exchanging rings with Ms. Rogers, planned to do so through a violent assault, R. 958-59, 969-70. Since these plans preceded Mr. Foster's emotionally-driven assault, they provided the period of thoughtful, cool deliberation, as well as the underlying felonious intent, necessary to establish the crime as a first degree murder.

We do not know directly how Ms. Rogers came around to giving this testimony. The foregoing sequence of events is certainly consistent, however, with a deal having been struck with her. The State needed to fill an evidentiary void which plainly had not been filled by July 20, 1975. Ms. Rogers, by her own admission several years later, was involved in the underlying felony if this was a felony murder. The prosecution may have known this at the time, or at least suspected it, and used it to pressure Ms. Rogers into testifying to the version of events that was necessary to ensure a first degree murder conviction. Donnie Goodman testified in the hearing on the motion to preclude use of the 1975 trial testimony that Ms. Rogers' testimony was given as part of a deal to avoid being charged. The record establishes that all of the elements were in place for such a deal to be struck,

In one additional respect, the record supports Mr. Goodman's testimony during the hearing that Ms. Rogers' testimony at trial was the product of a deal. As noted in the Statement of Case, Mr. Lanier suffered two knife wounds to the forehead that no one attributed to Mr. Foster's attack. These wounds, therefore, were likely inflicted by someone else. Ms. Rogers and Ms. Evans were, by everyone's account, the only other people present besides Mr. Foster and Mr. Lanier. In addition, both Ms. Rogers and Ms. Evans, but especially Ms. Rogers, testified that Mr. Lanier bled from his neck wounds so profusely and with such force that the blood "went all over me" even though "I was standing about three feet away." R. 963. The State's own witness, Dr. Sybers, established that Mr. Lanier's neck wounds could not have bled in this fashion. R. 1084-85.

A reasonable inference from these aspects of the physical evidence is that Anita Rogers or Gail Evans was also involved in a knife-wielding assault against Mr. Lanier. One of them was likely responsible for the lacerations on Mr. Lanier's forehead. Ms. Rogers testified, "[w]e all had [blood] on us," by the time the crime was over. R. 968. The question

is, then, how did the blood get on the women? Ms, Rogers' explanation of how it got on her -- from Mr. Lanier's spurting neck wound -- was false. A reasonable inference, therefore, is that the blood got on her because she was involved in inflicting the wounds to Mr. Lanier's forehead.

In these circumstances, which were as apparent to the prosecution in July or August of 1975 as they are to the rest of us now, the prosecution could exert enormous leverage against Ms. Rogers.

For all of these reasons, the evidence demonstrated that Ms. Rogers and Ms. Evans testified against Mr. Foster pursuant to an undisclosed agreement: they would establish a case of first degree murder against Mr. Foster in exchange for not being charged for their participation in the crime.[18] These facts establish a Brady violation.

As the Supreme Court explained in United States v. Bagley, to establish a Brady violation a defendant must show (1) that the prosecutor failed "to disclose evidence favorable to the accused," 473 U.S. at 675, and (2) that "there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different," 473 U.S. at 682.

There can be no doubt that the prosecution's promise not to charge a witness in exchange for his or her testimony is "evidence favorable to the accused" under Brady. See Giglio v. United States, 405 U.S. at 154-55. See also United States v. Bagley, 473 U.S. at 676 ("[i]mpeachment evidence," such as a prosecutor's promise to forego prosecution in exchange for testimony, "is 'evidence favorable to an accused'"). We have established that there was such a promise extended to Anita Rogers and Gail Evans.

While "[t]here [can be] no Brady violation where allegedly exculpatory evidence is equally accessible to the defense and the prosecution," Roberts v. State, 568 So.2d 1255, 1260 (Fla. 1990) (citing James v. State, 453 So.2d 786, 790 (Fla. 1984)), the deal with Ms. Rogers and Ms. Evans was obviously not equally accessible to the defense. The prosecution knew about the deal, because it was a party to the deal. On the other hand, the deal was concealed

---

[18] It should be noted that the state has not denied that there was a deal struck with Ms. Rogers and Ms. Evans to secure their testimony. In response to the motion to preclude, the State put on no witnesses and argued only that Mr. Foster had not established that there was a deal. R. 868-74. At no point did the prosecutor assert that there was no deal. Similarly, in his answer to the Rule 3.850 motion, the prosecutor did not deny that there was a deal. See R. 1989-92.

from the defense. Even though the deal was required to be disclosed under Brady and Giglio, and under Fla. R. Crim. P. 3.220(a)(2), it was not. When no such information was provided to trial counsel, particularly in light of the purpose of Rule 3.220(a)(2) -- to serve as a "standing" specific request for such information in each case, see James v. State, 453 So.2d 786, 789 (Fla. 1984) -- it was "reasonable ... for the defense to assume from the nondisclosure that the evidence [did] not exist." United States v. Bagley, 473 U.S. at 682-83. When defense counsel's cross-examination questions on whether Ms. Rogers and Ms. Evans had been charged with any offense connected to the Lanier homicide were answered in the negative, counsel plainly had no reason to believe that there had been a deal with the two women.

Further, Mr. Foster has demonstrated "a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceedings would have been different." United States v. Bagley, 473 U.S. at 682. As we have demonstrated, Anita Rogers was the sole state witness who could establish beyond a reasonable doubt elements necessary to convict Mr. Foster of first degree murder. No other witness provided ***any*** evidence that the murder was committed during the course of committing, or attempting to commit, a robbery or any other felony. Indeed, both Ms. Evans and Mr. Foster denied that the murder was accompanied by a robbery. No other state witness provided unequivocal evidence that the murder was premeditated. Gail Evans did testify that Mr. Foster threatened to kill Mr. Lanier at the outset of the assault and, "over and over" again during the course of the assault. R. 990-991. However, those threats occurred as part of an emotionally-charged, impassioned, mental-illness-driven piece of behavior. As Dr. Merikangas testified, "the description by [Ms. Rogers and Ms. Evans] and the condition of the whole crime scene indicates, in the words of one of the [women], he just lost it. I think that is the only way to understand what happened. He lost it. He went berserk." R. 1374-75. While such a crime can be found to be intentional, it will not invariably be found to be premeditated. Hence, Anita Rogers' testimony that Mr. Foster planned all along, beginning with their encounter in the bar, to assault Mr. Lanier, and to kill him if it became necessary, was crucial. There was no other unequivocal evidence of premeditation.[19]

---

[19] By "unequivocal" evidence of premeditation, we mean evidence that could not reasonably be questioned. Certainly the evidence that Mr. Foster stated his intention to kill Mr. Lanier at the commencement of and during the assault could have been found to establish premeditation. However, it could also reasonably have been construed as an expression of irrational rage, in which case it would not have been found to establish premeditation. See,

Had the deal between the State and Ms. Rogers been revealed, Ms. Rogers would likely have been disbelieved. Against the relevant background evidence -- her long-delayed revelation of felony murder and premeditation facts, the futile early efforts by the police to elicit those facts, and the knife wounds clearly inflicted upon Mr. Lanier that no one's account attributed to Mr. Foster -- revelation of the deal would have created reasonable doubt about the truthfulness of Ms. **Rogers** and about her and **Ms.** Evans' proclaimed status as innocent bystanders to the crime. There is, accordingly, a "reasonable probability" that revelation of the deal with Ms. Rogers would have led to a different outcome in Mr. Foster's trial.

2. The ineffective assistance of counsel claim

The ineffective assistance of counsel claim centers on Anita Rogers' and Gail Evans' impressions about Mr. Foster at the time of the homicide. **As** we have shown in the Statement of the Case, they believed that Mr. Foster was really "crazy" during the course **of** events in the camper, They did not perceive his accusation that **Mr.** Lanier was trying to have **sex** with his sister as a ruse. Both women perceived it as the onset of an episode **of** acute mental illness. It was sudden, wholly unexpected, and a sign that Mr. Foster had "[gone] nuts," "lost control," "flip[ped] out". R. **1014-15.** See also **R. 1131. His** accusation that Mr. Lanier was trying to have sex with his sister was the product of mental illness: it was a "flashback." Id,

The extreme degree of Mr. Foster's irrational behavior was reflected in another way to **Ms.** Rogers and Ms. Evans: they each remembered, and Ms. Rogers even reported to her former husband, that during the course of the attack Mr. Foster cut off Mr. Lanier's penis.

---

e.g., Mitchell v. State, **527** So.2d **179, 182** (Fla. **1988)** ("[a] rage is inconsistent with the premeditated intent to **kill** someone").

Similarly, Mr. Foster's witness-stand statement that the murder was premeditated could reasonably have been questioned. While it could have been found to establish premeditation, it could just as reasonably have been found to be unreliable. **As** Dr. Vallely and Dr. Merikangas explained, there were two substantial reasons for discounting Mr. Foster's testimony: it was too much at odds with the course of events at the crime scene, which did not reflect premeditated homicidal behavior, R. 1198-99; and statements by Mr. Foster about his episodes of out-of-control behavior are -- because they are the product of disability -- inherently unreliable. R. **1412-14.**

By contrast, Ms. Rogers' testimony about Mr. Foster's preconceived plan to assault and rob Mr. Lanier could not reasonably be questioned. Those statements were made by Mr. Foster at a time when he was not actively disabled or driven by mental **illness. Thus,** the only reasonable basis upon which to question Ms. Rogers' testimony was her credibility.

R. **1011-13** (Ms. Evans' acknowledging that at some point she thought Mr. Foster had cut off Mr. Lanier's penis); R. 1119-1123 (Ms. Rogers' former husband's account of Ms. Rogers telling him about Mr. Foster cutting off the victim's penis). Whether this in fact occurred was sharply disputed during the new sentencing trial. Dr. Sybers testified that he had reported finding normal male genitalia in his autopsy report. **R.** 1094. However, there were no photographs that revealed, unexposed, Mr, Lanier's genitals. All the photographs had something covering this part of Mr. Lanier's body, "for the sake of modesty." **R. 1033.** The fact is that Ms. Rogers and Ms, Evans both remembered, and Ms. Rogers even reported to someone else (whose credibility was unquestionable), that Mr. Foster cut off Mr. Lanier's penis.

In the Rule **3.850** motion, we alleged that Virgil Mayo, Mr. Foster's counsel during the **1975** trial, did not know or present any of these facts. We attributed his ignorance concerning these facts to alternative grounds: the State's failure to disclose them, in violation of Brady, or his own unreasonable failure to find them, in violation of Mr. Foster's right to effective assistance of counsel. See R. **1972-88** (Motion to Vacate Judgment of Conviction); R. 1845-50 (Motion for Reconsideration of Order Summarily Denying Rule 3.850 Motion). A legitimate question was raised as to whether defense counsel's lack of knowledge about Ms. Rogers' and Ms. Evans' impressions of Mr. Foster could be attributable to a Brady violation, since the facts may have been equally accessible to defense counsel and the prosecutor. See Roberts v. State, **568** So.2d at 1260.[20]

No legitimate question was raised about the ineffective assistance of counsel claim. The deficient performance of counsel -- failure to investigate facts relevant to the defense -- goes to the heart of the right to effective assistance. See Strickland v. Washington, 466 **U.S. 668, 691 (1984)** ("counsel has a duty ... to make [a] reasonable decision that makes particular investigations unnecessary"). See also Stevens v. State, 552 So.2d 1082, **1087** (Fla. 1989) (same). Although an evidentiary hearing might reveal otherwise, it is difficult to

---

[20] This question assumes that even though Ms. Rogers and Ms. Evans were the state's witnesses, they would have been as willing to disclose their impressions about Mr. Foster to defense counsel as they would have been to the prosecutor. While this assumption obviously would not have been valid with respect to the state's deal with Rogers and Evans -- that information was actively concealed by the women and the prosecution -- it is more likely that Rogers and Evans would have readily disclosed their thoughts about Mr. Foster's behavior. Ultimately, however, this is a question of fact which can be fairly explored only in an evidentiary hearing.

conceive of a reasonable basis for not asking the two eyewitnesses to the crime what their impressions were of the assailant's behavior and mental state during the course of the crime.[21]

In its response to the Rule 3.850 motion, the State suggested a reason peculiar to Mr. Foster's case: because of Mr. Foster's insistence at trial that counsel not present any defense based on his mental disabilities, counsel could reasonably have decided not to ask Rogers and Evans about Mr. Foster's mental state. See R. 1990. The State's argument might have been legitimate but for the allegation in the Rule 3.850 motion that, had the observations and impressions of Rogers and Evans been known to defense counsel, he would have disregarded Mr. Foster's restrictions and "would have insisted that the psychiatrist re-evaluate Mr. Foster in light of these new facts." R. 1983. If the observations of Rogers and Evans would have had this effect on counsel, counsel cannot have had a reasonable basis for failing to ask Rogers and Evans the appropriate questions.

Further, defense counsel's asserted willingness to pursue mental health guilt-phase defenses in light of the Rogers-Evans impressions reveals how extraordinarily prejudicial this error was to Mr. Foster. If Mr. Mayo had pursued mental health defenses, it is reasonable to believe that he would have developed evidence similar to that presented in the new sentencing trial. As the Statement of the Case reveals, Mr. Foster could have demonstrated that at the time of the crime he was severely impaired by three serious mental disorders or disabilities: brain damage, episodes of psychosis, and borderline personality disorder. Because of the effects of these disabilities in combination with the effect of alcohol at the time of the crime, Mr. Foster could have put on a substantial case demonstrating that he did not engage in a premeditated homicide. As Dr. Merikangas explained,

> The descriptions by the witnesses and the condition of the whole crime Scene indicates, in the words of one of the witnesses, he just lost it. I think that is the only way to understand what happened. The things that happened were not deliberate actions of someone who says, well I think we should roll and kill this person.... This is somebod who just went wild and following that, realizing to some degree what had happened: continue to act in ways that weren't reasonable or sensible.

R. 1374-75. Since Dr. Merikangas' opinion was rendered in a sentencing trial, he had no occasion to explain whether he found that Mr. Foster was insane. However, his opinion is consistent with the view that Mr. Foster was insane. Moreover, if Dr. Merikangas' opinion

---

[21] Of course, a hearing might also reveal that defense counsel did make this inquiry, and Rogers and Evans refused to answer, gave misleading answers, or refused to talk at all with defense counsel. If these were the facts, the claim would shift back to the Bradv claim. See n. 20, supra.

had been accepted -- and there was no factual dispute about it at the sentencing trial -- it would have established reasonable doubt about whether the homicide was premeditated.

Mr. Foster might still have been convicted of felony murder even if the mental health evidence had been presented. However, we have already established that, but for the Bradv violation concerning the deal between the prosecutor and Ms. Rogers, there is a reasonable probability that **Mr.** Foster would not have been convicted of felony murder. Accordingly, had defense counsel effectively investigated **Ms.** Rogers' and **Ms.** Evans' impressions about Mr. Foster and undertaken the investigation that we have alleged he would have undertaken in light of their impressions, and had the prosecutor not concealed the deal with **Ms.** Rogers, there is a reasonable probability that Mr. Foster would not have been convicted of first degree murder.

There is one significant difference between the ineffective assistance of counsel claim and the Bradv claim focused on the deal with Ms. Rogers. While the evidentiary hearing on the motion to preclude the **1975** testimony of **Ms.** Rogers and Ms. Evans provided an opportunity for Mr. Foster to prove the Brady claim, the hearing was not an adequate vehicle for proof of counsel's ineffective assistance.[22] Accordingly, with respect to the ineffective assistance claim, the Court need determine only whether the statement of the claim is legally sufficient and thus warrants an evidentiary hearing.

B. Because The Record Does Not Conclusively Show That Mr. Foster **Is** Entitled To No Relief, The Trial Court's Order Must Be Reversed

As we have noted, on June 1, 1990, the day Mr. Foster filed his Rule 3.850 motion, the trial court deferred any further consideration of the motion until after the new sentencing trial was over. Thereafter, the court denied the Rule 3.850 motion without holding an evidentiary hearing. R. 1751-52a.[23] Pursuant to Fla. R. App. P. 9.140(g), whenever a Rule 3.850 motion

---

[22] Certain aspects of the ineffective assistance claim -- the factual and medical components of the mental health defenses that effective counsel would have pursued -- were established by the testimony at the sentencing trial itself. However, other aspects -- exactly which mental health defenses were available and the deficient performance component **of** the showing necessary to establish an ineffectiveness claim -- were not provided any forum for evidentiary development.

[23] Even though the evidentiary hearing on the motion to preclude the 1975 testimony of Ms. Rogers and Ms. Evans, **as** well as the sentencing trial itself, afforded Mr. Foster some opportunity to prove his Rule 3.850 claims, that opportunity **was** serendipitous. The circuit court did not treat these opportunities as tantamount to a hearing on the Rule 3.850 motion.

is denied without an evidentiary hearing, "[u]nless the record shows conclusively that the appellant is entitled to no relief, the order shall be reversed and the case remanded for an evidentiary hearing." Rule 9.140(g) requires at the very least, therefore, that the trial court order be reversed and the Rule **3.850** motion remanded for an evidentiary hearing.

The trial court gave one reason for denying the ineffective assistance of counsel claim without a hearing: defense counsel could not have been ineffective for failing to investigate Ms. Rogers' and Ms. Evans' impressions of Mr. Foster's mental state during the crime, because Mr. Foster's insistence that **no** mental health defenses be pursued at trial would have foreclosed the use of this evidence even if it had been gathered. R. 1752. We have already explained why this fact does not settle the ineffective assistance claim, supra. In short, the Rule 3.850 motion alleges that Mr. Foster's trial lawyer would have disregarded Mr. Foster's restriction concerning mental health defenses had he **known** how irrational and "crazy" Ms. Rogers and Ms. Evans believed Mr. Foster was at the time of the crime. R. **1983.** For this reason, the record does not conclusively establish that Mr. Foster is entitled to no relief.

The trial court gave two reasons for denying the Brady claim without a hearing. First, "[a]s to the issue of whether the State promised not to prosecute Rogers in return for her testimony there is nothing in the record to support such a claim or that her story changed in any material manner." R. 1752. To reach this conclusion, the trial court had to ignore the following:

(1) Donnie Goodman's testimony that Ms. Rogers told him that the State promised not to prosecute her in return for her testimony;

(2) the profoundly material change in Ms. Rogers' story between her last recorded (and disclosed) statement to the police and her trial testimony -- from providing no basis for concluding that the murder was premeditated or committed in the course of committing an underlying felony, to providing an unequivocal basis for these conclusions;

(3) the conditions that made a deal for Ms. Rogers' testimony attractive to both the State and Ms. Rogers;[24] and

---

See R. 1751 (Order Denying Motion to Dismiss Filed Under Rule **3.850,** Florida Rules of Criminal Procedure) ("finding that the Defendant's motion can be denied without an evidentiary hearing").

[24] The conditions that made the deal attractive to Ms. Rogers were her active participation in the crime -- planning to steal Mr. Lanier's money and inflicting at least two knife wounds upon Mr. Lanier. The condition that made the deal attractive to the state was

(4) the State's conspicuous failure to deny that there was a deal with **Ms. Rogers.**

As we have argued, supra, these facts have established Mr. Foster's Brady claim. Even if this Court rejects that argument, these facts certainly have substantiated the Brady claim sufficiently to require an evidentiary hearing. Under no rational view of the record could a court hold that the record conclusively shows that Mr. Foster is entitled to no relief on the Brady claim.

The second reason given by the trial court for denying the Brady claim without a hearing was its determination that, in light of the witness-stand confession by Mr. Foster that the murder was premeditated, "[a]ny attempt to impeach Ms. Rogers as to the guilt phase would ... have been useless," R. 1752a. This was tantamount to a determination that Mr. Foster could not meet the materiality requirement of Bagley.[25]

As we have argued, supra, despite the clarity with which Mr. Foster admitted the commission of a premeditated homicide, that admission did not necessarily establish beyond a reasonable doubt that the murder was premeditated, Based on thorough assessment of Mr. Foster's mental condition and on a careful review of all the circumstances surrounding the crime, Dr. Vallely and Dr. Merikangas each concluded that Mr. Foster's witness-stand statement was unreliable, that it could not be taken as establishing that the homicide was premeditated. Taking into account Ms. Rogers' and Ms. Evans' description of Mr. Foster's actual behavior during the crime, as well as the substantial questions concerning the accuracy of Ms. Rogers' testimony that Mr. Foster planned in advance to assault and rob Mr. Zanier, Dr. Vallely concluded that Mr. Foster "remember[ed] it that way [as premeditated] when, in fact, it didn't happen that way." R. 1198-99. Dr. Merikangas agreed with this assessment and added that, in light of the multiple, serious, mental disabilities which were driving his behavior during the course of the crime, Mr. Foster would not be able to remember accurately what took place, but because of feelings of guilt and remorse, he could readily damn himself -- wholly inaccurately -- in the way he did on the witness stand. R. 1412, 1413-14.

Accordingly, a reasonable juror could have had reasonable doubt about Mr. Foster's

---

its need for unequivocal proof that the murder was a first degree murder.

[25] The requirement is that "[t]here is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different." 473 U.S. at 682.

guilt of first degree murder even after his witness stand confession. The ability to impeach Ms. Rogers with evidence of her deal with the State was, therefore, just as crucial after Mr. Foster's testimony, for she was the only other witness who could establish that the crime was a first degree murder.

For these reasons, the trial court could not find that the record conclusively foreclosed relief. Accordingly, the summary denial cannot stand. At the very least, this Court should reverse and remand for an evidentiary hearing pursuant to the mandate of Fla. R. App. P. 9.140(g).[26]

Finally, there is one other matter which the Court will undoubtedly consider in connection with a remand decision. The Rule 3.850 motion filed by Mr. Foster was his second such motion, the first having been filed and decided in May 1981. See **R. 1568-1617.** In addition, the **1990** Rule 3.850 motion was filed outside of the limitations period prescribed in Rule **3.850** (requiring anyone whose judgment and sentence became final prior to January 1, 1985 to file any Rule 3.850 motion by January 1, 1987). Accordingly, the present Rule 3.850 motion could be procedurally barred as an abuse of Rule **3.850** procedure, for Mr. Foster's having failed to raise the present grounds in the previous Rule **3.850** motion, or as too late under Rule **3.850's** limitations period. Neither bar should be applied here.

Failure to comply with the statute of limitations may be excused if "the facts upon which the claim is predicated were unknown to the movant and his attorney and could not have been ascertained by the exercise of due diligence" prior to the expiration of the limitations period. Fla. R. Crim. P. **3.850.** These circumstances should also avoid a finding of "abuse of procedure." See Amadeo v. Zant, **486** U.S. **214, 221-22** (1988) ("cause" for failure to raise a claim in prior proceeding when factual basis for claim was "reasonably unknown" to habeas petitioner).

Because the trial court did not base its denial of the Rule 3,850 motion on either of these procedural grounds, there has been no hearing into whether the procedural bars should apply. In any remand, therefore, Mr. Foster should be given the opportunity to show that they do not apply. Although there has been no factual development of these procedural issues at all, it is plain that the Brady issue is the kind of issue whose factual basis is often reasonably unknown to defendants or their counsel. Counsel for Mr. Foster will demonstrate,

---

[26] Of course, if the Court agrees that we have established a Brady violation, a remand for an evidentiary hearing would be unnecessary.

when given the opportunity, that, despite diligent investigation, the factual basis for the Brady claim was not discovered until 1990. A similar showing will be made with respect to the ineffective assistance of counsel claim, because, despite previous reasonably diligent searches for Ms. Rogers and Ms. Evans, post-conviction counsel were unable to locate them or secure relevant information from or about them until 1990.

II. THE ADMISSION OF ANITA ROGERS' 1975 TESTIMONY DENIED MR. FOSTER THE RIGHT OF CONFRONTATION SECURED TO HIM BY THE SIXTH AND FOURTEENTH AMENDMENTS

Over Mr. Foster's objection, the prosecution was allowed to introduce the testimony of Anita Rogers and Gail Evans from his original trial. Anita Rogers was not produced or made available by the State to testify during the new sentencing trial. Gail Evans was. Mr. Foster called her as a witness following the introduction of her former testimony, was allowed to examine her as if she were on cross-examination, and was not restricted by the court in his examination. Mr. Foster's right to confront Ms. Evans was not, therefore, abridged.

With respect to Ms. Rogers, however, his right of confrontation was completely vitiated. As the Supreme Court explained in Ohio v. Roberts, 448 U.S. 56 (1980), when the State offers hearsay testimony against a criminal defendant, "[t]he Confrontation Clause operates in two separate ways to restrict the range of admissible hearsay." Id. at 65.

> First, ... [i]n the usual case (including cases where prior cross examination has occurred), the prosecution must either produce, or demonstrate the unavailability of, the declarant whose statement it wishes to use against the defendant....
>
> The second aspect operates once a witness is shown to be unavailable. Reflecting its underlying purpose to augment accuracy in the factfinding process by ensuring the defendant an effective means to test adverse evidence, the Clause countenances only hearsay marked with such trustworthiness that 'there is no material departure from the reason of the general rule.'

Id. "Generally speaking, ... [the defendant must have been previously provided] an opportunity for effective cross-examination" of the hearsay testimony. Delaware v. Fensterer, 474 U.S. 15, 20 (1985) (emphasis in original). See also Mancusi v. Stubbs, 408 U.S. 204, 216 (1972) ("[s]ince there was an adequate opportunity to cross-examine [the witness], and counsel ... availed himself of that opportunity, the transcript ... bore sufficient 'indicia of reliability' and afforded 'the trier of fact a satisfactory basis for evaluating the truth of the prior statement'") (citation omitted); Pointer v. Texas, 380 U.S. 400, 407 (1965) (Confrontation Clause satisfied if prior testimony was "taken at a full-fledged hearing at which petitioner [was] represented by counsel who [was] given a complete and adequate opportunity to cross-examine").

Both aspects of the protection afforded by the Confrontation Clause were ignored in

Mr. Foster's sentencing trial when the court allowed the prosecutor to introduce Anita Rogers' previous trial testimony.

A. The Prosecution Neither Showed Nor Did The Trial Court Require it To Show, That Ms. Rogers Was Unavailable

The trial judge was under the mistaken impression that the showing of unavailability required under the Confrontation Clause was less demanding than the showing of unavailability required under Fla. Stat. § 90.804(1)(e).[27] The judge explained his understanding of the law as follows:

> I do think it would be wise for the State in light of Counsel's arguments under the Sixth and Fourteenth Amendment to show some reason why the witness is not here to be testifying in person. I don't think it goes as far in terms of determining the unavailability as required by the Statute 90.804 but I think, for example, if the witness is sitting in the courtroom and is available to testify, I think that might be a different approach.

R. 809.

The trial judge was flatly wrong in his understanding of the Confrontation Clause. The prosecution must carry the same burden in establishing unavailability under the Confrontation Clause that it must carry under § 90.804(1)(e). As this Court has explained, "Section 90.804(1)(e) require[s] the state to exercise due diligence in making a good faith effort to locate [the declarant]." Jackson v. State, **575** So.2d 181, 187 (Fla. 1991). Similarly, the Confrontation Clause requires

> 'prosecutorial authorities ... [to make] .. a good faith effort to obtain [the declarant's] presence at trial....'
>
> The law does not require the doing of a futile act ... [b]ut if there is a possibility, albeit remote, that affirmative measures might produce the declarant the obligation of good faith may demand their effectuation. 'The lengths to which the prosecution must go to produce a witness ... is a question of reasonableness.'

Ohio v. Roberts, **448** U.S. at **74** (emphasis in original).

Because the trial judge believed that the prosecution could satisfy its Confrontation Clause obligation to show that Anita Rogers was unavailable merely by showing her absence, R. 809, supra, the judge did not even bother to find that Ms. Rogers was unavailable. Once the prosecutor represented that Ms. Rogers was not present, that was enough under the judge's measure. Since the prosecutor's efforts to obtain Ms. Rogers' presence were detailed in the record, however, there is an ample basis for this Court to determine in the first instance

---

[27] This provision of the Evidence Code allows the introduction of hearsay, including prior testimony, if the declarant is unavailable. She is "unavailable" if she "[i]s absent from the hearing, and the proponent of [her] statement has been unable to procure [her] attendance or testimony by process or other reasonable means." Fla. Stat. § 90.804(1)(e).

whether the prosecution made a good-faith, reasonable effort to obtain Ms. **Rogers.**

The facts relevant to this determination are as follows:

(1) On October 6,1988, shortly after Mr. Foster's case was remanded to the trial court, the prosecutor told defense counsel that he planned to undertake no special effort to secure the presence of Ms. Rogers and Ms. Evans at the new sentencing trial. R. 816. He planned only to send subpoenas to their last known addresses, and if the subpoenas were not served, to use their former testimony. Id. The only effort he made in this regard was to have two investigators try to locate Ms. Rogers' former husband, Andre Childers. R. 810.

(2) In keeping with this, the prosecutor did nothing else to secure the presence of Ms. Rogers until May 29, 1990, a mere *six* days before the trial started. R. 810.

(3) On May 29, 1990, the prosecutor asked defense counsel for a then-current address for Ms. Rogers. R. 810. Defense counsel had located Ms. Rogers previously and had a current address and telephone number for her. Id. By May 30, the prosecutor had obtained Ms. Rogers' address and telephone number from defense counsel. Id.

(4) On May 30, the prosecutor called Ms. Rogers' phone number three times, leaving a call-back message on her answering machine two of the three times. R. 810-11. He received no call back. Id.

(5) On May 31, the prosecutor called again and got Ms. Rogers' ex-husband's brother, who did not know where Ms. Rogers was. R. 812.

(6) Between June 1 and **4,** 1990, the prosecutor tried to get Ms. Rogers served with a subpoena. Id. Service was unsuccessful because Ms. Rogers had gone out of town for the weekend. Id.

(7) The prosecutor admitted that he had also learned from defense counsel that Ms. Rogers was on probation, but that he had not talked with anyone in the probation office that was supervising her. R. 813.

(8) Defense counsel explained that the defense had located Ms. Rogers several months earlier by tracing her through her criminal record. R. 817. He further explained that he had spoken to her and arranged to have her served with a deposition subpoena (for which she failed to appear). Id. His impression was that Ms. Rogers was "not running" from process. Id.

Four phone calls and one attempt to serve a subpoena within the week before trial -- that is the entire effort the prosecutor made to secure Ms. Roger's presence for the June **4,**

1990 trial. In the year and one half between his minimal effort to find Ms. Rogers' former husband and May 29, **1990,** the prosecutor did nothing to find Ms. Rogers. He did not check for a criminal record; he did not assign an investigator, or anyone else, to look for her; he did absolutely nothing. In contrast, the defense located Ms. Rogers easily several months before trial simply by checking for any involvement in the criminal justice system.

It is absolutely clear that the prosecutor did not act in good faith, or reasonably. He did not want Ms. Rogers present. He as much as told the defense that in the fall of **1988.** He did nothing thereafter to secure her presence until the week before trial. And then, his only effort was to make four phone calls and attempt service of a subpoena over the weekend before trial.

This cannot be deemed "a good faith effort to obtain [Ms. Rogers'] presence at trial." Ohio v. Roberts, **448** U.S. at 74. For this reason, the Confrontation Clause required that Ms. Rogers' former testimony be excluded.

B. Mr. Foster Was Not Previouslv Provided An Opportunity For Effective Cross-Examination

Even if the State had demonstrated Ms. Rogers' unavailability, her former testimony would have been inadmissible because of its failure to meet the second requirement of the Confrontation Clause. As we have shown in Point I(A)(1), supra, the prosecution violated the due process requirement of Brady v. Maryland in the 1975 trial by failing to disclose its promise not to prosecute Ms. Rogers in exchange for her testimony. The effect was to deprive Mr. Foster of a critical opportunity to impeach her testimony. In Delaware v. Van Arsdall, **475** U.S. 673 (1986), the Supreme Court held that this kind of deprivation violated the Confrontation Clause.

> We think that a criminal defendant states a violation of the Confrontation Clause by showing that he was prohibited from engaging in otherwise appropriate cross-examination designed to show a prototypical form of bias on the part of the witness, and thereby 'to expose to the jury the facts from which jurors ... could appropriately draw inferences relating to the reliability of the witness.'

Id. at 680.

Since the Brady violation in the 1975 trial thus cut short Mr. Foster's "opportunity for effective cross-examination," Delaware v. Fensterer, **474** U.S. at 20, of Ms. Rogers' former testimony, the admission of her former testimony in his sentencing trial violated anew the rights guaranteed to him by the Confrontation Clause.

III. THE TRIAL COURT'S EXCLUSION OF EVIDENCE THAT MS. ROGERS HAS BEEN CONVICTED OF FALSE REPORTING OF A CRIME AND GRAND LARCENY

VIOLATED MR. FOSTER'S RIGHT OF CONFRONTATION UNDER THE SIXTH AND FOURTEENTH AMENDMENTS

In the wake of the trial judge's decision to admit the former testimony of Anita Rogers, Mr. Foster attempted to introduce evidence to impeach her credibility. He could not effectively challenge her testimony that Mr. Foster planned to rob Mr. Lanier -- despite the considerable new evidence that questioned its reliability -- because the trial judge refused to decide the Rule 3.850 motion before trial. Since Ms. Rogers' testimony was the basis for the felony murder and robbery convictions, unless those convictions were vacated, Mr. Foster's intent to rob Mr. Lanier stood as established beyond a reasonable doubt. Thus, impeachment of Ms. Rogers could not help him raise reasonable doubt about whether the murder was committed during the course of attempting to commit a robbery, Fla. Stat. § 921.141 (5)(d).

However, Ms. Rogers' testimony was also relevant to the two other aggravating factors which the State sought to establish. Her testimony about the exchange of rings was the sole evidence that Mr. Foster thoughtfully planned a lethal assault against Mr. Lanier long before the time that, in the heightened emotion of the assault, he blurted out a threat to kill Mr. Lanier. If the "cold, calculated, and premeditated" aggravating Circumstance, Fla. Stat. § 921.141 (5)(i), was applicable, this aspect of Ms. Rogers' testimony thus provided the crucial facts. That was certainly why the prosecutor urged the jury to find the §(5)(i) circumstance:

> Now, if he had no intent at that time [when the rings were exchanged] to kill Mr. Lanier after he robs him, what difference would it make if he left the 'K' impression on Mr. Lanier's head, forehead or body. It would make none because Mr. Lanier would be alive today to testify that that man is the one.
>
> No, he took that branding iron off his hand so he would not leave a telltale sign or clue on that dead body. He intended right at that point in time to kill this man.

R. 1463.

Similarly, if the "heinous, atrocious, or cruel" aggravating circumstance, Fla. Stat. § 921.141 (5)(h), was applicable, the portrait of the assault painted by Ms. Rogers and Ms. Evans had to be accepted as what actually took place. The sudden and wholly unprovoked attack by Mr. Foster, the passivity and lack of resistance by Mr. Lanier, the verbal threats by Mr. Foster, Mr. Lanier's plaintive pleading for his life, the signs of consciousness and awareness of pain in Mr. Lanier as the assault proceeded -- the vivid portrait painted by Ms. Rogers and Ms. Evans -- was all necessary in the State's effort to establish that the murder was especially heinous, atrocious, or cruel. See R. 1468-69 (prosecutor's argument). If the jury came to distrust Ms. Rogers or Ms. Evans, or if they believed that Ms. Rogers' or Ms. Evans' accounts were inaccurate or self-serving, they might not have found these facts beyond

a reasonable doubt.

It is in this context that the Court must examine the trial court's exclusion of evidence that Ms. Rogers had been convicted of false reporting of a crime.

Ms. Rogers' FDLE record, Defendant's Exhibit 8, revealed that she had been convicted in **1989** of two counts of false reporting of a crime[28] and two counts of grand larceny.[29] Mr. Foster proffered these convictions as impeachment evidence under Fla. Stat. § 90.610(1) (conviction of certain crimes as impeachment) and, as to the false reporting of a crime convictions, also under Fla, Stat. § 90.405(2) (methods of proving character). R. 1158-59. The trial judge excluded any evidence of these convictions, however, because they occurred after Ms. Rogers gave her testimony in the **1975** trial. R. 1162. As the judge explained,

> Whether her credibility in **1989** for testimony given in **1975** for which was the basis of the conviction is what I'm looking to and I don't think that is an appropriate use of that to show her truth and veracity for the testimony given in **1975.**

R. 1161.[30]

The trial court's explanation is a bit opaque, but however it is interpreted, it is wrong as a matter of state law.

The court may have been saying that, because Ms. Rogers' testimony came in as hearsay and was **1975** testimony, not 1990 testimony, it was insulated from impeachment by any events which occurred after it was given in **1975.** Under this construction, if Ms. Rogers had appeared as a live witness and given live testimony in **1990,** even though the subject matter was the same as the **1975** testimony, she would have been subject to impeachment by intervening events. However, since her testimony had come in as **1975** hearsay testimony, it could be impeached only by events which the jury in **1975** could have considered, i.e., events which pre-dated her testimony.

The central problem with such a rule is that it is explicitly forbidden by statute. Pursuant to Fla. Stat. § **90.806(1),** "[w]hen a hearsay statement has been admitted in evidence,

---

[28] Fla. Stat. § 837.05 (false reports to law enforcement authorities) (misdemeanor of the first degree).

[29] Fla. Stat. § 812.021(2) (felony of the third degree).

[30] Despite being repeatedly directed by this Court to include all the exhibits in the record on appeal, the circuit court clerk excluded Defendant's Exhibit 8 (Ms. Rogers' **FDLE** record) from the record. See Index to (second) Supplemental Record. Accordingly, a copy of it has been attached as an appendix to Mr. Foster's brief.

credibility of the declarant may be attacked and, if attacked, may be supported by any evidence that would be admissible for those purposes if the declarant had testified as a witness."

The alternative view of the trial court's rule is much narrower: it relates only to impeachment by the use of convictions. Its reasoning is based upon the notion that the impeachment value of a conviction lies in the fact that it occurred prior to the time the witness first testified. To the extent that the prior convictions are for crimes involving "dishonesty or a false statement," Fla. Stat § 90.610(1), the convictions establish that this person now testifying has already lied at least once. It gives a solid point of reference for the factfinder: if this person behaved deceitfully in the past, why should I believe her in the present? On the other hand, the rule is skeptical of convictions whose impeaching value runs backward in time. For example, even though Anita Rogers was convicted of crimes involving dishonesty or a false statement in 1989 -- and that would cause concern about her present testimony -- how do I know that she was of the same character fourteen years ago when she first testified?

The problem with this rationale is that it defies logic. As explained in 3A Wigmore, Evidence § 929 (Chadbourne rev. 1970), a conviction for a crime involving dishonesty is probative because it illuminates an underlying character trait which is thought to be constant over time. Thus, "it is immaterial whether the inference is from prior or subsequent character.... If character in 1875 indicates probativeiy the future character in 1877, then by the same token character in 1877 indicates the past character in 1875," Id.

Accordingly, the trial court erred when it excluded the evidence of Ms. Rogers' 1989 convictions. These convictions were plainly admissible under Fla. Stat. § 90.610(1). Further, the convictions for false reporting of a crime were admissible under Fla. Stat. § 90.405(2). One of Mr. Foster's theories of defense was that Ms. Rogers falsely reported certain highly material facts of the crime. See, e.g., R. 1131 (testimony of Connie Thames, recounting Ms. Rogers' statements that the plan to take Mr. Lanier's money was her and Gail Evans' plan, that the exchange of rings took place in the midst of the assault, and that Mr. Foster had a seizure in the camper that night). A conviction for "false reporting of a crime" focuses on a specific trait of character that is extraordinarily relevant to this defense.

Under Fla. Stat. § 90.610(1) and § 90.405(2), therefore, evidence of Ms. Rogers' convictions were admissible to attack the credibility of her hearsay testimony. The fact that

her convictions occurred after her original 1975 testimony is of no moment.

Finally, the exclusion of this evidence further deprived Mr. Foster of the right to confront the testimony of Ms. Rogers. See Belton v. State, 475 So.2d 275, 275 (Fla. 3d DCA 1985) (under the Confrontation Clause, "the factfinder should have had the benefit of this [very kind of] probative impeachment evidence") (citing Davis v. Alaska, 415 U.S. 308, 316 (1974)). A criminal defendant's rights under the Confrontation Clause are plainly violated when he is "prohibited from engaging in otherwise appropriate cross-examination designed to show a prototypical form of bias on the part of the witness..." Delaware v. Van Arsdall, 475 U.S. at 680.

IV. AN EVIDENTIARY HEARING SHOULD BE ORDERED TO DETERMINE WHETHER THE TRIAL COURT'S REFUSAL TO GIVE MR. FOSTER ACCESS TO MS. ROGERS' AND MS. EVANS' PSYCHIATRIC RECORDS VIOLATED HIS SIXTH AND FOURTEENTH AMENDMENT RIGHT TO CONFRONTATION

At the beginning of the new sentencing trial, Mr. Foster filed a Motion for Disclosure of Mental Health Records of State's Witnesses, seeking access to the psychiatric records of Ms. Rogers and Ms. Evans.[31] In support of his motion, Mr. Foster pointed out that each witness had a psychiatric history that could have been relevant to her "capacity, ability, or opportunity ... to observe, remember, or recount the matters about which [s]he [would testify]," Fla. Stat. § 90.608(4).[32]

Before the court with respect to Ms. Rogers' psychiatric history was information provided by Donnie Goodman, the former husband of Ms. Rogers who testified in the hearing on the motion to preclude use of the 1975 testimony, discussed supra. In his testimony, Mr. Goodman referred to Ms. Rogers' psychiatric problems:

(1) "[Kenny was taking] her [Ms. Rogers'] psychotic drugs. Drugs she takes for her epilepsy and stuff.... Phenobarbital, and she even mentioned having barbiturates of some sort." R. 829.

---

[31] As with Defendant's Exhibit 8, the circuit court clerk has not been able to get this motion into the record on appeal despite repeated requests. Accordingly, it too is included in the appendix to this brief.

[32] This section of the Evidence Code provides as follows: "Any party, including the party calling the witness, may attack the credibility of a witness by: . . . (4) showing a defect of capacity, ability, or opportunity in the witness to observe, remember, or recount the matters about which he testified,"

(2) "[Ms. Rogers] was on no drugs that were not ... across the counter other than her prescription drugs she was taking and she did them quite heavily.... [Mr. Goodman then agreed with the prosecutor that] she abused those even though they were prescriptions[.]" R. 831.

(3) "[I]f you have ever been to Chattahoochee you'd probably know what she was like because she was off and on. Sometimes she was there, most of the time she wasn't. It was like, you know, off and on. She would be herself one minute; three minutes later she was a different person.... [When she was a different person she was] [k]ind of psychotic and crazy, wild acting[;] ... in several instances she got into some big time fights in barrooms over a little bit of nothing.... She'd just get crazy as hell, that's all I know[,] ... [with] violent tendencies. She pulled a knife on me a couple of times and pulled a pistol on me." R. 834-35.

(4) Mr. Goodman had known Ms. Rogers "since she was 12," and had observed her having mental problems "all her life." R. 835.

Before the Court with respect to Ms. Evans was the following summary of Ms. Evans' pretrial deposition testimony:

> Gail Evans indicated ... that a couple of days after -- she wasn't specific as to one, two, three days -- a couple of days after the reporting of this incident to the police she attempted suicide by taking Phenobarbital tablets from Anita [Rogers] along with Valium. Anita [Rogers] who is the other girl, the other witness, then involuntarily placed her in the Bay County Hospital. She stayed there on involuntary status according to Gail for, approximately, a week and received psychiatric attention and catering.

R. 29.

The trial court denied Mr. Foster's motion. R. 902. No effort was made by the prosecutor or the court to obtain the psychiatric records, subject them to in camera inspection, and determine whether they contained any material that was relevant to Mr. Foster's confrontation of these witnesses or, in any way, helpful to the defense. The motion was simply denied.[33]

---

[33] Mr. Foster's motion was framed as a request to the court to order the prosecution to make available Ms. Rogers' and Ms. Evans' mental health records. The prosecutor objected to the motion on the grounds that the state did not have these witnesses' mental health records, R. 902, and had no better access to them than the defense: "I cannot get mental health records of any particular witness that I have any more so than they can get them.... I [would] have to ... file a motion and if I am not mistaken I think it takes a court order to get the mental health records." R. 901.

The prosecutor's evasive response could not, however, have obscured the thrust of Mr.

At least one court in Florida, and a number of federal courts, have recognized that a witness's mental disorders may have a direct bearing on the reliability of his or her testimony. See Hawkins v. State, 326 So.2d 229, **231** (Fla. 2d **DCA** 1976) ("psychiatric testimony to the effect that [the witness's] propensity to tell the truth was affected by her mental and emotional condition would have been relevant and admissible for the purpose of impeaching her credibility"). As the United States Court of Appeals for the Eleventh Circuit has explained,

> 'In simple language, the defendant has the right to explore every facet **of** relevant evidence pertaining to the credibility of those who testify against him,' and evidence on mental capacity may be especially probative of their ability to 'comprehend, know and correctly relate the truth.'

United States v. Lindstrom, 698 F.2d **1154,** 1165-66 (11th Cir. **1983)** (quoting United States v. Partin, **493** F.2d 750, **763-64** (5th Cir.), cert. denied, **434** U.S. **903 (1974)).** For these reasons, a number of cases, including Hawkins and Lindstrom, have required new trials where defendants were denied access to prosecution witnesses' mental health records, and subsequent inspection of the records revealed that the witnesses' mental disorders compromised their ability to, as the Florida Evidence Code puts it, "observe, remember, or recount the matters about which [they] testified," Fla. Stat. § 90.608(4). See, e.g., in addition to Hawkins, supra; Lindstrom, supra; and Partin, supra; United States v. Society of Independent Gasoline Marketers, **624** F.2d **461, 466-69** (4th Cir. **1979)** cert. denied, **449** U.S. **1078 (1980);** United States v. Honneus, 508 F.2d **566, 573** (1st Cir. **1974),** cert. denied, **421** U.S. 948 **(1975);** Sinclair v. Turner **447** F.2d **1158, 1163** (10th **Cir. 1971),** cert. denied, 405 U.S. **1048** (1972).

Unlike the defendants in those cases, Mr. Foster was unable even to persuade the trial court to obtain the psychiatric records, inspect them in camera, and make them a part of the appellate record -- even if it ultimately precluded the use of these records at trial. Accordingly, we cannot know at this point whether Mr. Foster's confrontation rights or Brady rights were violated. What we do know, on the basis of the record that has been made, is that Anita Rogers has a longstanding history of psychotic-like disorders, which have caused her on occasion to become suddenly and inappropriately violent, to lose touch with reality, and to become "wild" and "crazy-acting." These disorders, together with abuse of the drugs

---

Foster's request. He sought a court order requiring the production of Ms. Rogers' and Ms. Evans' mental health records, because they each had suffered psychiatric problems, and there was reason to believe that these problems -- or the records of treatment for them -- were relevant to the issues in his case.

prescribed for her disorders, probably affected her before, during, and after the crime. We also know that Gail Evans tried to commit suicide in the wake of the crime and was involuntarily committed by Anita Rogers. The proximity between this Occurrence and the crime, as well as Ms. Rogers' role in her commitment, suggest a possible connection to the crime, dealings with the police thereafter, and possible feelings of guilt about the crime.

The appropriate course of action in a situation like this has been demonstrated by the Eleventh Circuit in a case involving the same possible violation of constitutional rights, but in a different factual context. In McKinzy v. Wainwright, 719 F.2d **1525** (11th Cir. 1983), the petitioner had been denied access to a prosecution witness's sealed juvenile record. To try to get access to these records for cross-examination, McKinzy argued to the State court

> that the juvenile proceedings may have formed a motive for the witness to tailor her testimony to please the state. The witness may have had an expectation of favorable disposition of her own proceedings if she cooperated.

719 F.2d at 1527. As in Mr. Foster's case, the judge denied access to the records without "know[ing] the particulars of the juvenile witness' brush with the law[,] as he never inquired about the juvenile's record." Id. Neither the juvenile witness's record, nor the facts surrounding her adjudication were in habeas record. Id.

After determining that McKinzy's "Sixth Amendment right of confrontation encompasse[d] the right to impeach a juvenile witness on cross examination with questions about the juvenile's record," id. at 1526; see id. at 1528-29, the court decided that it "[could] not determine from the record if cross examination about the juvenile proceeding would have been relevant to showing bias." Id. at 1530. Accordingly, it "remand[ed] to the district court for a full evidentiary hearing to evaluate the relationship between the juvenile witness and the state authorities." Id.

The same course should obtain here. Mr. Foster had a right to confront and cross examine Ms. Rogers and Ms. Evans with respect to their mental disorders, (a) to the extent those disorders bore upon their ability to observe, remember, or recount the events before, during, and after the crime; (b) to the extent that their disorders involved them in the crime more significantly than their transcribed statements to the police revealed; and (c) to the extent that their disorders, particularly Ms. Evans' acute suicidal behavior, reflected the impact of the crime or post-crime Occurrences on them. Without Ms. Rogers' and Ms. Evans' records, however, no one can know whether they actually contain information relevant to any of these concerns. Accordingly, in regard to this question, Mr. Foster's case should be

remanded for full evidentiary exploration of these concerns.

V. THE TRIAL COURT FAILED IN ITS WRITTEN ORDER TO EVALUATE THE PROPOSED MITIGATING FACTORS, FAILED TO EXPRESS THE WEIGHT GIVEN MITIGATING FACTORS, AND ERRONEOUSLY CONCLUDED THAT A CONFLICT EXISTED IN EXPERT OPINION ON TWO MITIGATING CIRCUMSTANCES

The trial court's findings in support of Mr. Foster's death sentence failed to provide the necessary assurance that mitigating circumstances were given constitutionally proper consideration. The court failed to evaluate each proposed mitigating factor and to articulate the weight given the two mitigating factors it found to exist. Moreover, the court erred in concluding that there was a conflict in expert opinion presented on those factors it found to exist, thereby resulting in the court unconstitutionally reducing the weight of those factors.

A. The Court Failed To Evaluate Each Proposed Mitigating Factor And To Express The Weight Given Mitigating Factors

Under Florida law, the sentencing court is required to make "specific written findings of fact based upon [aggravating and mitigating] circumstances . . . and upon the records of the trial and the sentencing proceedings." § 921.141(3), Fla. Stat. (1985). Given this statutory directive, the Court, in Rogers v. State, 511 So.2d 526 (Fla. 1987), ruled that

> the trial court's first task in reaching its conclusions is to consider whether the facts alleged in mitigation are supported by the evidence. After the factual finding has been made, the court then must determine whether the established facts are of a kind capable of mitigating the defendant's punishment, i.e., factors that, in fairness or in the totality of the defendant's life or character may be considered as extenuating or reducing the degree of moral culpability for the crime committed.

Id, at 534.

Recently, the Court, in Campbell v. State, 571 So.2d 415 (Fla. 1990), reiterated that the trial court must make express findings with respect to each proposed mitigating circumstance.

> When addressing mitigating circumstances, the sentencing court must expressly evaluate in its written order each mitigating circumstance proposed by the defendant to determine whether it is supported by the evidence and whether, it is truly of a mitigating nature. See Rogers v. State, 511 So.2d 526 ... (1988). The court must find as a mitigating circumstance each proposed factor that is mitigating in nature and has been reasonably established by the greater weight of the evidence[.]

Id, at 419 (footnotes omitted).

The trial court in Mr. Foster's case failed to make the findings with respect to mitigating circumstances required by § 921.141(3), Rogers, and Campbell. After listing all of the mitigating factors "proposed" by Mr. Foster for consideration, R. 1907-08, the court merely noted that it considered there to be a "conflict" in expert opinion with respect to the factors concerning "extreme mental or emotional disturbance" and "substantially impaired behavior.

R. 1908-09. The court then noted that it "considered this conflict in the weight to be given these two factors in relation to the aggravating circumstances." R. 1909. Finally, the court noted that it had "considered the evidence presented in support of these factors" and, after "weighing these factors", found "that the aggravating circumstances outweigh the mitigating circumstances in this case." Id.

The court was required by § 921.141(3), Rogers, and Campbell to make express findings with respect to each proposed mitigating circumstance. Without such express findings, the cryptic ruling of the trial court makes appellate review impossible. The trial court's written order in Mr. Foster's case could be interpreted to mean that it found only two of the proposed mitigating circumstances: "extreme mental or emotional disturbance" and "substantially impaired behavior."[34] Alternatively, and just as reasonably, the order could be interpreted to mean that the court found all the proposed mitigating factors to exist, and that the cumulative weight of "these factors" did not outweigh the aggravating circumstances. Because the trial court failed to follow the procedure required by Rogers and Campbell, appellate review is presently impossible. At a minimum, therefore, the trial court should be ordered to reconsider and reformulate its sentencing order to comply with Rogers and Campbell.

B. The Trial Court Failed To Express In Its Written Order The Weight It Gave Those Mitigating Factors It Found to Exist

The Court in Rogers held that if mitigating "factors exist in the record at the time of sentencing, the sentencer must determine whether they are of sufficient weight to counterbalance the aggravating factors." 511 So.2d at 534. The Court in Campbell further set out the procedure the sentencing court is to follow.

> The court next must wei h the aggravating circumstances against the mitigating and, in order to facilitate appe late review, must expressly consider in its written order each established mitigating circumstance.

571 So.2d at 420.

In Mr. Foster's case, the court failed to express in its order the degree of weight it

---

[34] If the trial court did indeed find only two mitigating circumstances to exist, the court's silence with respect to the other proposed factors leaves much ambiguity. As the Court in Rogers noted, the Court's failure to find the other proposed mitigating factors could mean any one of the following: "(1)that the evidence urged in mitigation was not factually supported by the record; (2) that the facts, even if established in the record, had no mitigating value; or (3) that the facts, although supported by the record and also having mitigating value, were deemed insufficient to outweigh the aggravating factors involved." Ropers, 511 So.2d at 534.

gave to the two mitigating factors on mental health -- the only mitigating circumstances that the court made clear that it did consider. Accordingly, Rogers and Campbell require a remand for this reason as well. There is no way for this Court to conduct meaningful appellate review of the trial court's sentencing findings without a clearer record of how the sentencing court conducted the weighing process.

C. The Trial Court Erroneously Concluded That A Conflict Existed In The Expert Opinion Presented On Two Mitigating Circumstances Found To Exist, Resulting In the Court Not Giving These Mitigating Circumstances The Consideration That Is Constitutionally Required

The court considered there to be a conflict in the evidence on two mitigating factors: "whether the capital felony was committed while the defendant was under the influence of extreme mental or emotional disturbance" and whether the "capacity of the defendant" to conform "his conduct to the requirements of the law was substantially impaired." R. 1908 (emphasis supplied). The conflict stemmed from what the Court perceived to be a conflict in the testimony of the mental health experts with respect to the impact of Mr. Foster's in court testimony on their opinion of his mental disorders having dictated his actions on the night of the killing.

The court erroneously found this conflict on the basis of reading only part of the testimony of Dr. James Vallely, a defense expert.

> [DEFENSE COUNSEL]: Are you aware that during the course of the trial, the first trial in this case, Mr. Foster took the witness stand and ended up confessing on the witness stand saying that he intended to kill the man, it was a premeditated killing?
>
> A. I'm aware of that, yes.
>
> Q. How does that fact bear on what you're telling us about the way his mental illness affected him at the time the crime was committed?
>
> A. I'm not sure, to be perfectly honest with you. Kenny's statement at that time says that he disavows any of the other statements that were made or any of the circumstances as I've been told. If, in fact what he is saying is true then those circumstances don't exist and therefore, what I'm basing my opinion on cannot be accurate. But in my opinion in looking at this, it is more consistent that the facts occurred as I've related them from the record than Kenny is saying they didn't occur.

R. 1196, 1909.

The court believed that there was a conflict because it ignored the rest of Dr. Vallely's testimony on this point, which revealed that he had been confused by defense counsel's question. The rest of the colloquy is as follows:

> Q. I'm sorry, I think I've confused you with my quesfion, On the witness stand he started out saying that someone else had committed the killing. Is it that set of facts that you're saying is inconsistent with your opinion?

A. No, I'm trying ... what I was ... you're asking me since he said this, how does that affect my opinion of whether his mental status was as I just outlined it? He is saying these things didn't happen, right?

Q. He is saying that the killing didn't happen.

A. Okay.

Q. Let me start over.

A. Let's do that.

Q. I think I'm I've probably confused all of us. You will recall when he testified he started out describing the events in the way that everybody agreed they happened at the bar. Went out into the Winnebago and out into the ... a rural area and initially he, in his testimony he is starting to say, I had a seizure and when I came to he was dead. Then he abruptly changes and says, no, I'm not going to cop out, I did it, I intended to kill him, it was premeditated.

My question is, given that statement and that admission that it was premeditated murder, if that, could he remember the mruder (sic) in that way and say I intended to kill him? And still have committed the murder in a way that he was, his mental illness affected him at the time?

A. Yeah. I think my confused answer probably is from that whole point. Yeah, he could remember it that way when, in fact, it didn't happen that way. Okay, he could recall it that way and it didn't happen. We don't know what happened, that's why there's always been an evidentiary procedure on it. So, him saying it happened that way to me doesn't change my opinion because I don't know what happened. I only have the evidence in front of me and I still conclude even with his statement that it probably occurred and he couldn't control it because of his mental health problems at the time. Also reinforcing that is you have a guy that is supposedly on the witness stand calculating for his own defense and he falls apart like that. And gives what seems to be self incriminating evidence. That is not a well wrapped person to do that, to fall apart that quickly. That is also evidence of mental health disorder right there.

Q. Well how or could it have been simply a matter of conscience? Is that something that could have caused that?

A. You could argue that, yes. In my opinion it is consistent with all this other stuff that this guy can't plan, he does very transparent kinds of things manipulatively. And ultimately he does not serve his own self protection.

Now, if we go back and look at the crime, ... and taking into context all of the things that were reported by the witnesses and I can't find any beginnin of logical thread that runs all the way through this as a goal directive even& There seems to be all this choppy, moving to do something and no connection between each of the episodes and the pieces in it. That's why I say it is exactly recapitulating this type of personality disorder.

Q. Is that the reason too that you say despite Kenny's recounting of this as a premeditated event it just doesn't fit the facts as the women described how the crime unfolded? Is that a fair characterization?

A. Exactly, yeah, that (sic) doesn't seem that he started at the bar with a plan that led to this stage, this stage and then to this and this. It's like possibly this and then a whole new thing happens. in the next hour and then a whole new thing and so it's not, there's no connection to a plan as I can see.

R. 1196-98.

Upon reading the entire testimony of Dr. Vallely, it is clear that, in his opinion, Mr.

Foster either had a misperception of the events that happened that night on account of his mental illness or gave false testimony at his first trial on account of mental vulnerability. Dr. Vallely did not believe, as the court erred in concluding, that his opinion was rendered baseless by Mr. Foster's testimony. Thus, contrary to the court's ruling, Dr. Valley and Dr. Merikangas were in harmony of opinion with respect to their diagnoses of Mr. Foster's mental disorders, and how those disorders ruled his actions on the night of the killing and led him to give the testimony that he did.

Because the court erroneously reduced the weight that should have been given critical mitigating circumstances in Foster's case, the court did not fairly consider the mitigating circumstances in his case before imposing the death sentence, as is constitutionally required. Hitchcock v. Dugger, 481 U.S. 393 (1987); Lockett v. Ohio, 438 U.S. 586 (1978).

VI. THE COURT'S JURY CHARGE ON MITIGATION, COUPLED WITH THE PROSECUTOR'S CLOSING ARGUMENT ON MITIGATION, IMPERMISSIBLY LIMITED THE JURY'S FULL CONSIDERATION OF MITIGATING EVIDENCE

It is well established that a sentencing body must not be limited in its consideration of mitigating circumstances. Hitchcock v. Dugger, 481 U.S. 393 (1987); Eddings v. Oklahoma, 455 U.S. 104 (1982); Lockett v. Ohio, 438 U.S. 586 (1978); Songer v. Wainwright, 769 F.2d 1488 (11th Cir. 1985)(en banc). The principle applies both to the sentencing jury and the sentencing judge in Florida. Riley v. Wainwright, 517 So.2d 656 (Fla. 1987); see also Magill v. Dugger, 824 F.2d 879 (11th Cir. 1987).

In keeping with this, in Cheshire v. State, 568 So.2d 908 (Fla. 1990), the Court held that, regardless of limitations placed on consideration of the defendant's mental and emotional disorders by the Florida sentencing statute, the sentencer must be unrestricted in considering such conditions in mitigation. Reversing the trial court's refusal to consider Cheshire's emotional disturbance in mitigation because it did not meet the statutory criterion of being "extreme", the Court noted:

> Florida's capital sentencing statute does in fact require that the emotional disturbance be "extreme." However, it clearly would be unconstitutional for the state to restrict the trial court's consideration solely to "extreme" emotional disturbances. Under the case law, any emotional disturbance relevant to the crime must be considered and weighed by the sentencer, no matter what the statutes says. . . . Any other rule would render Florida's death penalty statute unconstitutional.

568 So.2d at 912 (emphasis in original)(citations omitted).

In its jury charge on mitigating evidence, the trial court here created the substantial

risk, in violation of Cheshire, that the jury would restrict itself to considering Mr. Foster's mental health evidence only if the jury found that it reached the level of a statutorily defined mitigating circumstance.

At the jury charge conference defense counsel presented to the court two proposed jury instructions with respect to the jury's findings of mitigating circumstances.

The first proposal (#13A) would have altered the language of two of the statutory provisions contained in the standard jury charge. Instead of instructing the jury that a mitigating circumstance could be found where "the crime for which the defendant is to be sentenced was committed while he was under the influence of extreme mental or emotional disturbance," Mr. Foster proposed eliminating the word "extreme" so that the jury would clearly know that ***any*** mental or emotional disturbance could be considered in mitigation. Moreover, and for the same reasons, Mr. Foster proposed removing the word "substantially" from the court's charge to the jury that mitigation could be found where "the capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was substantially impaired." See Jury Charge #13A, at R. 1964.

The second proposal (#13B) would have allowed "extreme" and "substantially" to stay in the respective charges on mitigation, but would have added the following language:

> Whether or not you are reasonably convinced of either or these two mitigating factors, you must consider the evidence of the defendant's mental illness and may find that evidence to be a mitigating factor.

See Jury Charge #13B, at R. 1966.

The court denied both of these charges, reasoning that a provision at the end of the list of enumerated mitigating factors, instructing the jury to consider "any other aspect of the defendant's character or record or any other circumstance of the offense" was sufficient to guard against placing a restriction on the jury's consideration of mitigating evidence. R. 1437.

Mr. Foster submits that the charge ultimately given to the jury on mitigating circumstances did not ameliorate the concerns raised by the Court in Cheshire. The jury was instructed:

> Among the mitigating circumstances which you may consider are the following. First, the crime for which the defendant is to be sentenced was committed while he was under the influence of extreme mental or emotional disturbance.
>
> Second, that the capacity of the defendant to appreciate the criminality ***of*** his conduct or to conform his conduct to the requirements of law was substantially impaired.
>
> Third, that the defendant had an abusive family background.

Fourth, the defendant's poverty.

Fifth, the physical illness of the defendant.

Sixth, the defendant's love for and love by his family.

Seventh, any alcohol or drug addiction of the defendant.

Eighth, a troubled personal life including depression and frustration.

Ninth, physical injuries suffered by the defendant.

Tenth, the defendant's lack of childhood development.

Eleventh, the effect of death of loved ones on the defendant.

Twelfth, the learning disability suffered by the defendant.

Thirteenth, the defendant's potential for positive sustained human relationships.

Fourteenth, any other aspect of the defendant's character or record and any other circumstance of the crime or offense.

R. 1527-28.

The court's instructions created the substantial risk that a reasonable juror in Mr. Foster's case would be restricted in his or her consideration of nonstatutory mental health evidence, If the juror did not believe that the mental health evidence proffered by Mr. Foster fell within the "extreme" or "substantial" categories of the first and second enumerated mitigating circumstances, there is a reasonable likelihood that he or she would discard that evidence and continue down the list of enumerated mitigating factors.

The instruction to consider the fourteenth mitigating factor did not clearly convey to a juror that he or she could use that factor to alleviate the restrictions initially imposed on his or her consideration of the first two mitigating factors. In the first place, the provision was limited by its own terms to "any other aspect of the defendant's character or record and any other circumstance of the crime or offense" (emphasis supplied). Thus, it would not readily appear to the reasonable juror that the final factor would permit consideration of the type of mitigation that fell within the ambit of the first and second enumerated factors but was excluded from consideration under them because of their express limitations. Simply put, there was a reasonable likelihood that the jury would not have believed that the final factor allowed them to consider mitigating evidence that earlier factors had told them to discard.

Secondly, and just as critical, it is reasonably likely that Mr. Foster's jury would not have interpreted the court's charge to permit consideration of statutorily insufficient quantities of enumerated mitigation as unenumerated mitigation. After initially discarding mental health evidence that did not meet the enumerated standards, and then rolling down a list of eleven

other enumerated factors, there is a reasonable likelihood that a reasonable juror would have thought that the fourteenth "other" aspects mitigating factor meant mitigating matters of a different kind then that provided by the enumerated mitigating circumstances. This is the common sense reading of the jury charge; otherwise, a reasonable juror would be left to wonder: why am I being told to consider only "extreme" mental or emotional disturbance and only "substantially" impaired behavior, if lesser degrees of his mental and emotional state and his behavior can be considered anyway?

Compounding the substantial risk, created by the instructions, that the jury would not understand that mental health evidence falling outside the scope of the first two enumerated mitigating factors could nevertheless be considered under the final factor, was the effect of the prosecutor's argument upon the jury. The prosecutor expressly conveyed to the jury, over objection, that the court's instructions would prohibit the consideration of mental health evidence -- which was the subject of extensive testimony and documentation in Foster's case -- unless that evidence fell within the narrow restrictions of the first two enumerated factors.

> [Mr. Paulk]: ... Now, let's go to the, really the two that we're talking about in this case or really the two out of thirteen. And the judge will tell you that you can take into consideration that the crime for which the defendant is to be sentenced was committed while he was under the influence of extreme emotional, extreme mental or emotional disturbance. Mental and emotional disturbance is modified by that adjective "extreme". Extreme mental and emotional disturbance. Not just a mental and emotional disturbance.
>
> MR. CARR: Objection, Your Honor, that's a misstatement of the law.
>
> THE COURT: Overruled.
>
> MR. PAULK: Secondly or thirteenthly, you can consider the capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was substantially impaired.
>
> His ability to control his conduct impaired? Again, that is modified by the word "substantially", substantially impaired, not moderately impaired.
>
> MR. CARR: Objection, Your Honor, once again. It is a misstatement of the law.
>
> THE COURT: I'll overrule that objection.

R. 1460-61.

The prosecutor's argument, coupled with the jury instruction, clearly created a reasonable likelihood that a reasonable juror would interpret the court's charge as restricting, in violation of Cheshire, the consideration of critical mental health evidence to the mitigating factors listed. While a prosecutor's argument does not carry as much weight with the jury as instructions from the trial court, the Supreme Court has recognized that, in certain Circumstances, they can have "a decisive effect on the jury." Boyde v. California, 108 L.Ed.2d

316,332 (1990). See also Hitchcock v. Dugger, 481 U.S. at 398 (significant that state attorney clearly implied to the jury that statutory list of mitigating factors was exclusive); Messer v. Florida, 834 F.2d 890, 894 (11th Cir. 1987)(same). Mr. Foster submits that his case represents one of those situations, because the prosecutor's argument was expressly sanctioned as a correct statement of law by the court's overruling Mr. Foster's objections. From that point on, the "law" was as the prosecutor, with the blessing of the court, had defined it.

Together the jury charge and the prosecutor's argument left little room for defense counsel to change the jury's understanding of how it had to measure mitigation. Defense counsel argued, as Mr. Foster still maintains, that the mental health evidence proffered by Mr. Foster rose to the level of "extreme" mental or emotional disturbance and that Mr. Foster's ability to conform his behavior was "substantially" impaired. R. 1509-10. Defense counsel further argued that "even if you [the jury] took out 'extreme' and 'substantial'[,] clearly he [Mr. Foster] was under emotional disturbance." R. 1510. This latter defense argument -- that the jury could consider Mr. Foster's mental health evidence, even if it found that the evidence fell below the level required in the jury charge's list of mitigating factors -- was fruitless. A reasonable juror would have considered Mr. Foster's counsel to be making a desperate appeal for relief that could not be given.

Since there is a reasonable likelihood that the jury would have interpreted the court's instruction on mitigation as restricting Mr. Foster's proffered mental health evidence only to the enumerated factors, there is a substantial risk that the jury did not consider Mr. Foster's mental health evidence. The Court held in Cheshire that evidence in mitigation that falls below the level of "extreme" mental or emotional disturbance -- and, by extension, that falling below "substantially" impaired behavior -- "must be considered and weighed by the sentencer, no matter what the statutes say." 568 So.2d at 912. Mr, Foster submits that the court's jury charge in his case, together with the prosecutor's argument to the jury, violated the rule announced in Cheshire. That error was not harmless, given that Mr. Foster's mental and emotional state was the most significant evidence proffered in mitigation in his case.

VII. THE TRIAL COURT FAILED TO MAKE CLEAR TO THE JURY THAT IT COULD EXERCISE ITS REASONED JUDGMENT AND RECOMMEND LIFE IMPRISONMENT EVEN IF THE MITIGATING CIRCUMSTANCES DID NOT OUTWEIGH THE AGGRAVATING CIRCUMSTANCES IN MR. FOSTER'S CASE

Mr. Foster submits that the trial court's charge on the weighing of mitigating and

aggravating circumstances created a reasonable likelihood that the jury would have believed that a death sentence was mandatory if mitigating factors did not outweigh aggravating factors, in violation of longstanding principles of state law.

The Court has long held, since Alvord v. State, 322 So.2d 533 (Fla. 1975), that while the determination that mitigating circumstances do not outweigh aggravating circumstances is a prerequisite to imposing a death sentence, that determination does not mandate the imposition of a death sentence.

> The law does not require that capital punishment be imposed in every conviction in which a particular state of facts occur. The statute properly allows some discretion, but requires that this discretion be reasonable and controlled. No defendant can be sentenced to capital punishment unless the aggravating factors outweigh the mitigating factors. However, this does not mean that in every instance under a set state of facts the defendant must suffer capital punishment.

322 So.2d at **540.**

In keeping with this, the standard jury instructions concerning the jury's deliberative process explain that process in the following terms:

> If one or more aggravating circumstances are established, you should consider all the evidence tending to establish one or more mitigating circumstances and give that evidence such weight as you feel it should receive in reaching your conclusion as to the sentence that should be imposed . . . .
>
> The sentence that you recommend to the court must be based upon the facts as you find them from the evidence and the law. You should weigh the aggravating circumstances against the mitigating circumstances, and you advisory sentence must be based on these considerations.

Fla. Standard Jury Instructions -- Penalty 776. Clearly, under these instructions, a jury could appropriately determine that even though aggravating circumstances outweigh mitigating circumstances, the mitigating circumstances are still weighty enough to recommend a life sentence.

Mr. Faster encapsuled the importance of this distinction in his request for the following instruction:

> I instruct you that your verdict in this case is not to be reached by merely counting the aggravating and mitigating circumstances. You are required to use your reasoned judgment in determining whether the facts of this case, under the aggravating and mitigating circumstances upon which I have instructed you, can be satisfied by life imprisonment, or require the imposition of a death sentence in light of the totality of the circumstances presented, I further instruct you that, even if you were to find that the circumstances of this case warrant imposition of a death sentence, you are free to exercise your reasoned judgment and find that a death sentence is not required, and to recommend imposition of a life sentence.

Proposed Jury Charge # 14, R. 1968.

At the jury charge conference, the court denied Mr. Foster's proposed charge with counsel's understanding that the court would read the standard instruction, quoted supra, to

the jury. R. 1439. The court, however, did not read the standard instruction. Instead, the court instructed:

> [I]t is your duty to follow the law that will now be given to you by the court and render to the court an advisory sentence based upon your determinations as to whether sufficient aggravating circumstances exist to justify the imposition of the death penalty and whether sufficient mitigating circumstances exist to outweigh any aggravating circumstances found to exist.

R. 1521.

> Should you find that sufficient aggravating circumstances do exist it would then be your duty to examine all mitigating circumstances in the case.

R. 1526.

> You should weigh the aggravating circumstances against the mitigating circumstances. And your advisory sentence must be based on those considerations.

R. 1529.

Reading these instructions on the jury's deliberative process as a whole, it is evident that a reasonable juror would have interpreted the instructions to mean that a death sentence was mandatory unless "sufficient mitigating circumstances exist to outweigh aggravating circumstances found to exist." The critical factor in this is that the jury was instructed that it should first determine if there were "sufficient aggravating circumstances" that would "justify the imposition of the death penalty." Upon such a finding, the jury would be death prone since these aggravating Circumstances in and of themselves "justified" the death penalty.
The instruction then told the jury that it should determine if there were "sufficient mitigating circumstances" to "outweigh the "aggravating circumstances found to exist." If the jury found mitigating circumstances but concluded that they did not outweigh the aggravating circumstances, the jury would logically think that it had to impose the death sentence since the charge instructed that "sufficient" aggravating circumstances "justified" its imposition.

Based on the reasonable likelihood that the jury interpreted the trial court's charge in the manner described above, the trial court committed reversible error. Its charge precluded the jury from making a "reasoned judgment" about whether the "factual situations [in Mr. Foster's case] c[ould] be satisfied by life imprisonment in light of the totality of the circumstances present in the evidence." Alvord, 322 So.2d at 540. Accord, McCaskill v. State, 344 So.2d 1276, 1279 (Fla. 1977).

VIII. EVIDENCE PRESENTED BY THE STATE DID NOT SUPPORT A FINDING OF THE "HEINOUS, ATROCIOUS OR CRUEL" AGGRAVATING CIRCUMSTANCE UNDER SECTION 921.141(5)(h)

Section 921.141(5)(h), Fla. Stat. (1987) ["§ (5)(h)"], provides that an aggravating circumstance may be established where the "capital felony was especially heinous, atrocious, or cruel." The trial court found this aggravating factor to be present in Mr. Foster's case, noting in its sentencing order that the victim "did not die an instantaneous death." R. 1905.

While killing another human being is always reprehensible, this act in and of itself does not permit the finding that the murder was "heinous, atrocious, or cruel" pursuant to § (5)(h). That aggravating factor has been reserved for only those homicides where "the actual commission of the capital felony was accompanied by such additional facts as to set the crime apart from the norm of capital felonies -- the conscienceless or pitiless crime which is unnecessarily torturous to the victim." State v. Dixon, 283 So.2d 1, 9 (Fla. 1973). The burden rests with the State to prove beyond a reasonable doubt that the crime rises to the requisite level of aggravation pursuant to § (5)(h). "Not even logical inferences drawn by the court will suffice to support a finding" that the murder qualifies in this regard. Clark v. State, 443 So.2d 973, 976 (Fla. 1983)(quotations omitted).

Examination of this Court's previous decisions demonstrates that a finding under § (5)(h) has to satisfy three requirements, First, the quality and duration of the suffering caused by the additional torturous acts must be markedly different from the suffering normally associated with murders. Second, the victim must be conscious during the torturous acts in question. Finally, the defendant must possess the intent to inflict the heightened suffering.

Application of the current law governing § (5)(h) to the evidence presented by the State at Mr. Foster's sentencing hearing clearly shows that the State failed to meet its burden of proof on the "heinous, atrocious, or cruel" aggravating factor.

A. The Quality And Duration Of The Victim's Suffering Did Not Rise To The Level Required For A Finding Under The "Heinous, Atrocious Or Cruel" Aggravating Circumstance

It is the State's burden under § (5)(h) to establish beyond a reasonable doubt that the quality and duration of the suffering caused the victim by the additional torturous acts is markedly different from the suffering normally associated with murders.

This requirement has been met in those instances where the victim's physical pain or emotional anguish rises to a sufficient level to set his or her death apart from other homicides. See Reed v. State, 560 So.2d 203, 207 (Fla. 1990)(victim tied, severely beaten, choked, raped, then murdered by having throat slashed more than a dozen times with serrated-edge knife, requiring "more time and effort"). The requirement has not been met when "death results

from a single gunshot and there are no additional acts of torture or harm." Cochran v. State, 547 So.2d 928, 931 (Fla. 1989). Nor has it been met when an unprolonged rape or battery occurs and the act of killing is done rapidly. See Robinson v. State, 574 So.2d 108, 111-112 (Fla. 1991)(victim raped, soon after shot twice in head; victim "rendered unconscious immediately after the first bullet struck her head"; "death occurred within several seconds").

The "quality and duration" requirement is also met where the particular method of killing causes the victim an extraordinary amount of pain, beyond that necessary to accomplish the killing. For example, the finding of § (5)(h) has been sustained when the victim has been beaten or bludgeoned to death in a particularly vicious manner. See. e.g., Penn v. State, 574 So.2d 1079, 1080, 1083 n. 7 (Fla. 1991)(victim bludgeoned to death with a hammer); Cherry v. State, **544** So.2d 184, 187-88 (Fla. 1989) (victim beaten so severely skull was dislocated from spinal cord; beating was sole cause of death); Chandler v. State, 534 So.2d 701, 704 (Fla. 1988)(elderly couple beaten to death with baseball bat).

Finally, this requirement may be satisfied upon a showing of the victim's "helpless anticipation of impending death." Clark v. State, 443 So.2d at 977. The "helpless anticipation", however, must be prolonged by the defendant's continuing acts or must be extraordinarily severe in order to qualify. See Douglas v. State, 575 So.2d 165, 166 (Fla. 1991)(victim expressed to wife "that something bad was about to happen and asked that she promise to stay alive"; wife testified defendant "said he felt like blowing our ... brains out"; forced victim and wife to engage in prolonged sexual acts "at gunpoint"; "fired the rifle into the air" when they complied; hit victim in head with rifle so hard "stock shattered"; finally told victim's wife to "get back" and shot victim in head).

Where the "helpless anticipation" is not prolonged and severe, the "quality and duration" requirement has not been met. See Amoros v. State, 531 So.2d 1256, 1260-1261 (Fla. 1988)(victim realized about to be shot, ran to rear of apartment, shot three times); See also Lewis v. State, 377 So.2d 640, 646 (Fla. 1979) (evidence insufficient where defendant "shot the victim in the chest and, as the [victim] attempted to flee, shot him several more times").

The trial court found that the killing of Mr. Lanier indicated "a consciousless [sic] and pitiless regard for the victim's life and was unnecessarily torturous to the victim." R. 1905. In support of this conclusion the trial court noted that the victim was "severely beaten prior to his death." Id. While it is true that, prior to inflicting the fatal wounds, Mr. Foster struck the victim five or *six* times about the head, this attack certainly cannot qualify as a severe and

prolonged torturous act under the "quality and duration" requirement. Mr. Foster struck the victim with his fists, causing injuries no greater than those ordinarily inflicted in a street fight, such as a broken nose. Moreover, this attack was very brief, spanning only a few minutes in time. Even assuming that Mr. Lanier remained conscious throughout this attack -- a fact very much in doubt, see infra -- this act does not compare with that of Reed v. State.

The State further failed to show that Mr. Lanier experienced any anguish over his impending death, beyond that which, assuming his consciousness, he may have felt in the brief moments just before he was stabbed. The trial court found that "after beating the victim, the defendant took out a knife and told the victim 'I'm going to kill you; I'm going to kill you.' ... The defendant then proceeded to stab the victim in the throat."[35] Id (emphasis added). Mr. Lanier had no reason to believe his life was threatened until a moment before he was stabbed, when Mr. Foster removed his knife. Thus, as in Robinson, "there was no evidence that [the victim] labored under the apprehension that [he] was to be murdered." 574 So. 2d at 112.

Moreover, assuming once again that Mr. Lanier was conscious when Mr. Foster inflicted the first two stab wounds, the victim's suffering in this regard would not have been materially different from the suffering of the victim in Lewis, where the victim was initially shot in the chest. 377 So.2d at 646. Thereafter, the victim in Lewis attempted to flee, id., plainly demonstrating that he feared for his life. He was then shot several more times in the back, apparently causing his instantaneous death.

The physical pain associated with the injury suffered by the victim in Lewis would have been at least the equivalent of the pain suffered by Mr. Lanier from his initial stab wounds if he were conscious of them. The fear experienced by the Lewis victim was also no less than that experienced by Mr. Lanier throughout the brief course of Mr. Foster's attack. And just moments later -- like the victim in Lewis -- Mr. Lanier was dead, killed within a matter of seconds by the back wound inflicted by Mr. Foster. Lewis is an appropriate bench mark against which to measure the suffering inflicted upon Mr. Lanier. The pattern of injury was similar, the physical pain and fear of death were similar, and the moment of death came

---

[35] Ms. Evans testified for the State that Mr. Foster announced prior to the beating that he intended to kill Mr. Lanier. However, this testimony was directly countered by State witness Anita Rogers. Given that the State at no time asserted that Ms. Rogers was an adverse witness, it is bound by the testimony she offered. See D.J.G. v. State, 524 So.2d 1024, 1027 (Fla. 1st DCA 1987); Hodge v. State, 315 So.2d 507, 509 (Fla. 1st DCA 1975); Weinstein v. State, 269 So.2d 70, 72 (Fla. 1st DCA 1972).

rather quickly in relation to when the assault began. If the "quality and duration" requirement was not established in Lewis, it cannot be met in Mr. Foster's case.

B. The State Failed To Prove Beyond A Reasonable Doubt That The Victim Was Conscious During The Acts In Ouestion

The second requirement under § (5)(h) is that the State prove beyond a reasonable doubt that the victim was conscious of the additional torturous acts.

In Rhodes v. State, **547 So.2d** 1201 (Fla. 1989) the trial court found a murder by strangulation to qualify as heinous, atrocious, or cruel. Id. at **1208.** The Court reversed this finding, noting that the defendant, in his many conflicting accounts of the murder, repeatedly referred to victim as "knocked out" or drunk, that the victim was known to frequent bars and to be a heavy drinker, and that on the night she disappeared the victim was last seen drinking in a bar. Id. In the face of this evidence, the Court held that the State had failed to make a sufficient showing that the victim was anything more than "semiconscious" at the time of the murder, and, therefore, concluded that the State did not meet its burden of proving the "heinous, atrocious or cruel" aggravating factor beyond a reasonable doubt. Id.

The Court ruled similarly in Jackson v. State, **451** So.2d **458** (Fla. **1984),** where the trial court found the murder to qualify under § (5)(h) based on evidence that the victim was "shot in the back, put in the trunk while still alive, wrapped in plastic bags, and subsequently shot again while still alive." Id. at **463.** (quotations omitted). Reversing the trial court's finding on this point, the Court noted that there was "no evidence that [the victim] remained conscious more than a few moments after he was shot in the back the first time . . . ." See also Herzog v. State, **439** So.2d 1372, **1378-80** (Fla. 1983)(evidence that victim beaten, suffocated with pillow and strangled with a telephone cord held insufficient because victim was unconscious or only semi-conscious during incident due to intake of drugs).

The trial court failed to make any finding of the victim's state of conscious, apparently not considering this factor relevant to its finding of the "heinous, atrocious or cruel" aggravating factor. Given the considerable evidence that Mr. Lanier was not sufficiently conscious to establish the court's finding of this aggravating circumstance, the court's failure to consider this factor creates serious error in the whole of its determination pursuant to § (5)(h).

The evidence is uncontroverted that at the time of the murder the victim was severely intoxicated. He had consumed a significant amount of alcohol during the course of the evening, purchasing a cooler full of beer and a bottle of whiskey before leaving the bar with

Ms. Evans, Ms. Rogers, and Mr. Foster. R. **957,** 987. Both Ms. Evans and Ms. Rogers testified that Mr. Lanier was intoxicated. R. **958** (Anita Rogers); **R. 988** (Gail Evans). Mr. Lanier was so intoxicated, in fact, that the victim was unable to operate his motor vehicle and had to request that Ms. Evans take the wheel. **Id.** The medical examiner was in full agreement with this assessment, testifying that Mr. Lanier's blood alcohol content was ".18". R. 1092. Nevertheless, the trial court failed to make any mention of these facts in its findings.

Although in a highly intoxicated state, there is little doubt that the Mr. Lanier was conscious when Mr. Foster first approached him. Upon reaching him, however, Mr. Foster struck Mr. Lanier with a series of rapid blows to the face, blackening his eyes and breaking his nose. Given that Mr. Lanier was so severely intoxicated, these blows -- even the first of these blows -- were enough to render him unconscious. Indeed, the medical examiner for the State testified upon cross examination that it was possible that these blows left Mr. Lanier unconscious. R. 1093. Thus, by the State medical examiner's own account, there was reasonable doubt about whether the victim was conscious, thereby making it impossible for the State to prove the "consciousness" requirement of the aggravating factor at issue.

Moreover, the confession of Mr. Foster, as well as the testimony of the State's witnesses, establishes that Mr, Lanier offered absolutely no resistance to Mr. Foster during the course of their encounter. R. **1784** (Mr. Foster); **R.** 962 (Anita Rogers); R. 991 (Gail Evans). After striking the victim, Mr. Foster removed his knife, announced he was going to kill the victim, and stabbed the victim in the throat. Yet throughout and after this series of events the victim remained unresponsive, slumping back in his seat. R. **961-63, 991-92.** The trial court ignored this evidence in its findings, noting only that "[t]here is evidence of a defensive wound to the victim's hand which indicates the victim attempted to fend off the knife as the defendant stabbed him in the throat," R. 1905-1906. While the medical examiner did report a wound on the victim's thumb, described as a "defensive wound," both of the state's witnesses directly testified that the victim offered no resistance to the stabbing. Thus, it can hardly be said that the State proved beyond a reasonable doubt that this wound was the result of a defensive effort by the victim in response to Mr. Foster's attack.

Mr. Foster thereafter, in an attempt to remove Mr. Lanier from the Winnebago, grabbed the victim by the testicles. The trial court noted that the victim "groaned or moaned" at this time. R. **1906.** However, the State offered absolutely no evidence that this was anything more than the reflexive reaction of an unconscious, or semi-conscious, man. Given

the absence of additional evidence that the victim was in fact conscious at this time, the simple fact that the victim moaned cannot establish the requisite proof that the victim retained consciousness. See Clark v. State, 443 So.2d at 977 (insufficient proof where "[a]lthough [the witness] testified that he heard [the victim] moan after being shot, there was no evidence of whether she was conscious after being shot").

In response to the victim's groaning, Mr. Foster stabbed him a second time in the throat. The trial court noted in its findings that "there is evidence that the victim asked the defendant not to do it again before he was stabbed a second time." R. 1906. The "evidence" to which the court referred was the testimony of Ms. Evans, who, offering the sole testimony in support of this asserted fact, stated that at some point the victim asked Mr. Foster "not to do it." R. 992. However, the State also offered testimony from Ms. Rogers, who specifically stated that Mr. Lanier did not speak at any time during the attack. R. 962.

Clearly, the mere fact that some evidence was presented in support of this fact does not mean that the State has proven this fact beyond a reasonable doubt. Given the ambivalent language of the trial court, the weight of the evidence supporting a finding that Mr. Lanier was no more than semi-conscious at the time of the first stabbing, and the fact that the State's only supporting testimony was contradicted by one of its own witnesses, the State clearly failed to meet its burden in proving this point. See D.J.G. v. State, 524 So.2d at 1027; Hodge v. State, 315 So.2d at 509; Weinstein v. State, 269 So.2d at 72.

Finally, the trial court considered, as evidence in support of § (5)(h), the fact that Mr. Foster, assisted by the two women, dragged Mr. Lanier out of the Winnebago, covered him with leaves and then, hearing the victim breathing, stabbed him once more, causing almost instantaneous death. R. 1906. It was clearly error for the trial court to consider this turn of events. After the second stab wound Mr. Lanier offered absolutely no signs of consciousness, and the State offered no testimony that he was still conscious thereafter. In fact, the trial court itself noted that the victim "was either alive or dead a very short time before he was being dragged," clearly betraying the lack of proof on this point. R. 1906 (emphasis supplied).

Even assuming, as the trial court did, that Mr. Lanier was alive upon his removal from the Winnebago, the mere fact that the victim was breathing does not establish that the victim was conscious, especially in the face of the evidence that he was not. Indeed, the State itself conceded in its closing argument that there was doubt as to whether the victim was conscious when being removed from the camper. R. 1469.

C. Mr. Foster Did Not Possess The Reauisite Intent

The final requirement under § (5)(h) is that the defendant must have acted with a desire to inflict the enhanced suffering upon the victim, or at least have shown utter indifference to the heightened suffering which his actions caused.

In Porter v. State, 564 So.2d 1060 (Fla. 1990), the Court found significant, in reversing the trial court's findings under § (5)(h), that the crime in question was "a crime of passion" and therefore was not a "crime that was meant to be deliberately and extraordinarily painful." Id. at 1063 (emphasis in original). Likewise, in Shere v. State, 579 So.2d 86 (Fla. 1991), a trial court's finding under § (5)(h) was overturned since the evidence did not rise to the level of establishing that the defendant "desired to inflict a high degree of pain, or enjoyed or [was] utterly indifferent to the suffering [he] caused." Id. at 96.

Under the facts of this case, there is "no evidence that [this crime] was committed to 'cause the victim unnecessary and prolonged suffering,'" Robinson v. State, 574 So.2d at 112, or that this was "a crime that was meant to be deliberately and extraordinarily painful." Porter, 564 So.2d at 1063. In fact, the events support a finding quite to the contrary.

As was the defendant in Porter, Mr. Foster was in a fit of rage, his being brought on by a misperception created as a result of his mental illness. In the midst of his beating the victim with his fists, Mr. Foster impulsively acted to kill. There was no time for Mr. Foster's uncontrollable to dissipate, thus the further stabbings of Mr. Lanier must be seen in their proper context as the impulsive reactions of someone in an out-of-control state of rage, brought on by mental impairments. When Mr. Foster's actions are viewed in this proper context, it is evident that Mr. Foster had no desire to inflict a high degree of pain upon, or enjoy in any way the suffering of his victim.

IX. THE TRIAL COURT WAS IN ERROR IN REFUSING TO GIVE THE JURY INSTRUCTIONS ON THE "HEINOUS, ATROCIOUS AND CRUEL" AGGRAVATING CIRCUMSTANCE REQUESTED BY THE DEFENSE, AND THE INSTRUCTION IT DID GIVE WAS CONSTITUTIONALLY INADEQUATE

With respect to the aggravating circumstance of "especially heinous, atrocious, or cruel," § 921.141 (5)(h), Fla. Stat. (1987), Mr. Foster requested that the trial court give the following jury instruction:

> The crime for which the defendant is to be sentenced was especially heinous, atrocious, and cruel. For purposes of this proceeding, this aggravating factor means that the state must prove beyond a reasonable doubt that Mr. Lanier consciously suffered a high degree of pain over an extended period of time, greater than the

suffering of most murder victims.

R. 1953.

The trial court denied this proposed instruction, and instead charged:

> [T]he crime for which the defendant is to be charges was especially heinous, atrocious or cruel.
>
> "Heinous" means extreme (sic) wicked or shockingly evil. "Atrocious" means outrageously wicked and vile. "Cruel" means designed to inflict a high degree of pain, utter indifference to or enjoyment of the suffering of others and pitiless.

R. 1524.

With respect to Mr. Foster's case, the jury instruction that was given failed properly to channel the jury's consideration of whether the murder of Mr. Lanier was actually "heinous, atrocious or cruel." Indeed, the court gave the verbatim charge on the "heinous, atrocious or cruel" aggravating circumstance that the Supreme Court found to be unconstitutionally vague in Maynard v. Cartwright, 486 U.S. 356 (1988).[36] The Supreme Court held that a "limiting construction of the heinous, atrocious or cruel aggravating circumstance" had to be given in order for its use to "be constitutionally acceptable." Id. at 365. Here, the trial court gave no form of limiting instruction -- unlike Mr. Foster's proposed charge -- to the jury on its finding of the aggravating circumstance against Mr. Foster.

This Court, too, has noted the importance of limiting the application of the "heinous, atrocious or cruel" aggravating circumstance. The aggravating factor is found to exist only upon the State's meeting three requirements: the victim endured physical and emotional anguish beyond that which is experienced by most murder victims; the victim remained conscious throughout those additional torturous acts; and the defendant acted with the intent to cause the heightened pain and suffering of the victim,

While the instruction given by the trial court in Mr. Foster's case may sufficiently define these limiting principles for the jury in some cases, it could not do so here. In those instances where the complexity of the factual setting, as in this case, may cause jurors

---

[36] In Maynard, the Oklahoma trial court instructed the jury that

> the term "heinous" means extremely wicked or shockingly evil; "atrocious" means outrageously wicked and vile; "cruel" means pitiless, or designed to inflict a high degree of pain, utter indifference to, or enjoyment of, the sufferings of others.

Cartwright v. Maynard, 822 F.2d 1477, 1488 (10th Cir. 1987)(en banc).

confusion as to whether the "heinous, atrocious or cruel" aggravating factor exists, arbitrariness can only be avoided by the issuance of more precise instructions from the trial court.

Most striking in this regard is the issue of the victim's consciousness throughout the attack. Mr. Lanier's level of consciousness was in doubt at nearly every stage of the attack. Yet the jury was never informed that this issue was at all relevant to this determination, let alone that the State had the burden to prove consciousness beyond a reasonable doubt. See Rhodes v. State, 547 So.2d 1201, 1208 (Fla. 1989). The jury certainly could not have been expected to know the relevance of this issue without guidance from the trial judge. Indeed, the trial judge harbored some confusion as to the role of victim consciousness, as his findings make no specific reference at any stage in this regard.

More precise instructions were equally necessary to help the jury determine whether this crime possessed sufficient additional torturous acts. The facts of Mr. Foster's case do not present a situation that obviously stands above the masses of homicides in its heinousness. Any determination that this case qualified for the "heinous, atrocious or cruel" aggravating factor must be based on fine distinctions. By failing to offer instructions that specifically noted the relative nature of this determination, the court failed to give the jury any tools to make these subtle distinctions. Once again, the trial court's findings highlight the difficulty of making a thorough and fair analysis of Mr. Foster's case. The court described in detail the events of the evening in question. Yet, the court made no mention of how long it took for these events to occur, or the nature of pain or suffering endured by the victim.

The limiting instruction that was proposed by Mr. Foster would have properly guided the jury in its determination of whether the "heinous, atrocious and cruel" aggravating circumstance existed. The trial court erred in not using the proposed instruction and compounded the error by using an instruction that was inadequate given the facts of this case.

X. THE TRIAL COURT REFUSED TO INSTRUCT THE JURY THAT A FINDING THAT MR. FOSTER SUFFERED MENTAL ILLNESS WOULD EITHER VACATE OR SIGNIFICANTLY REDUCE THE WEIGHT OF THE "HEINOUS, ATROCIOUS OR CRUEL" AGGRAVATING CIRCUMSTANCE, IF FOUND; MOREOVER, THE TRIAL COURT ITSELF DID NOT MAKE ANY FINDINGS AS TO THE EFFECT OF MR. FOSTER'S MENTAL ILLNESS ON THE WEIGHT IT GAVE THE "HEINOUS, ATROCIOUS OR CRUEL" AGGRAVATING CIRCUMSTANCE

In Huckaby v. State, 343 So.2d 29 (Fla. 1977), the Court held that evidence of a capital defendant's mental illness could substantially reduce the weight to be given the aggravating

circumstances of "heinous, atrocious and cruel" and "risk of serious bodily harm to others." After finding the existence in the record of the mitigating factors of Mr. Huckaby's "extreme mental or emotional disturbance" and "substantially impaired" behavior, and balancing these factors against the two noted aggravating factors, the Court found that the mitigating factors substantially outweighed the aggravating factors and vacated the sentence of death. The Court reasoned:

> Our decision here is based on the causal relationship between the mitigating and aggravating circumstances. The heinous and atrocious manner in which this crime was perpetrated, and the harm to which the members of the Huckaby family were exposed, were the direct consequence of his mental illness, so far as the record reveals.

Id. at 34 (emphasis added).

Pursuant to Huckaby, Mr. Foster's counsel proposed to the trial court the following alternative jury instructions:

> In determining whether the State has proven this [the 'heinous, atrocious or cruel'] aggravating factor beyond a reasonable doubt, you should consider whether Mr. Foster had a mental illness that was a factor in the manner in which the crime was committed. Should you find that Mr. Foster had a mental illness and that the mental illness had some influence on whether murder was committed in a heinous, atrocious or cruel manner, you cannot find that this aggravating circumstance has been established.

Proposed Jury Instruction 5A, at R. 1954.

> If you find that the crime was committed in a heinous, atrocious or cruel manner, you should consider whether Mr. Foster's mental illness played a role in the manner in which the crime was committed. Should you find that Mr. Foster's mental illness had some influence on his behavior during the commission of the murder, then you should give this aggravating circumstance little weight.

Proposed Jury Instruction 5B, at R. 1955.

The obvious import of these instructions was to make sure that the jury was instructed, pursuant to Huckaby, to either negate or, alternatively, substantially discount the weight of the "heinous, atrocious or cruel" aggravating circumstance. Nonetheless, the trial court refused to give the proposed instructions, thereby creating the substantial risk that the jury recommended a sentence of death when Huckaby would have dictated a lesser sentence.[37]

---

[37] It is important to note that the general instruction to weigh aggravating and mitigating circumstances cannot cure the omission of a Huckaby-based instruction. Without being told, the jury would not know about the policy judgment reflected in Huckaby -- that there had been "a legislative determination to mitigate the death penalty in favor of a life sentence for those persons whose responsibility for their violent actions has been substantially diminished as a result of mental illness, uncontrolled emotional state of mind, or drug abuse." Miller v. State, 373 So.2d 882, 883 (Fla. 1979). Accordingly, a Huckaby-based instruction would have to be given to direct the jury concerning the special weighing considerations when the heinousness of a crime is a function of mental illness, as here.

Compounding the error was the trial court's failure to make any findings with respect to how much weight it gave the "heinous, atrocious or cruel" aggravating circumstance in light of its finding of the existence of the "extreme mental or emotional disturbance" and "substantially impaired behavior" mitigating factors.[38] Assuming, since the court refused to charge the jury pursuant to Huckaby, it did not consider taking into account the "causal relationship" between the aggravating and mitigating factors in question, the court created reversible error in giving too much weight to aggravating factors whose weight was substantially -- if not totally -- reduced by the evidence of mental illness.

Because the jury was never instructed, and the trial court never expressly considered, the weight to be given the "heinous, atrocious and cruel" aggravating circumstance in light of a finding of mitigating circumstances concerning mental illness, the trial court violated Huckaby and rendered the death penalty in this case arbitrary and capricious in violation of the eighth and fourteenth amendments.

XI. THE COURT ERRED IN FINDING THE "COLD, CALCULATED, AND PREMEDITATED" AGGRAVATING CIRCUMSTANCE, AND ITS INSTRUCTIONS TO THE JURY CREATED A SUBSTANTIAL RISK THAT THE JURY, TOO, WOULD MIS-APPLY THIS AGGRAVATING CIRCUMSTANCE

A. The Court's Finding

The Court found that the murder of Mr. Lanier "was committed in a cold, calculated and premeditated manner without any pretense of any moral or legal justification." R. 1907. The facts relied on to establish this aggravating circumstance were the following:

(1) the sequence of events in Mr. Foster's assault of Mr. Lanier -- the severe beating of Lanier's face, followed by a threat to kill Lanier and a knife wound to the neck, followed by the infliction of another knife wound to the neck after the discovery that Lanier was not dead, and finally, after the discovery that Lanier still was not dead, the infliction of the knife wound that severed Lanier's spine, R. 1905-06 (incorporated by reference at R. 1907);

(2) Mr. Foster's statement of his intent to rob Mr. Lanier, R. 1907;

(3) Mr. Foster's switching his "K" ring for Ms. Rogers' ring prior to the assault

---

[38] The trial court's failure to express in its sentencing order the weight given the aggravating and mitigating circumstances is in violation of this Courts rulings in Rogers and Campbell, supra.

"in order not to leave the 'K' impression on the victim's skin," id., and

(4) Mr. Foster's witness-stand statement that the homicide "was premeditated and I intended to kill him...." Id,

Under this Court's decisions limiting the application of the cold, calculated, premeditated aggravating circumstance, and under the facts established beyond a reasonable doubt in this case, the court erred in finding this circumstance.

The sequence of events that took place during the course of the assault established, at most, ordinary premeditation. In **Rogers** v. State, 511 So.2d 526, 533 (Fla. 1987), cert. denied, **484** U.S. **1020** (1988), the Court held that this aggravating circumstance must be based upon "heightened premeditation..., which must bear the indicia of 'calculation.'" Further explaining this standard, the Court "conclude[d] that 'calculation' consists of a careful plan or prearranged design...." Id. With this limitation, the Court has consistently rejected the finding of the circumstance when, as in Mr. Foster's case, "[the defendant's] actions took place over one continuous period of physical attack." Campbell v. State, 571 **Sodd** 415, 418 (Ha. 1990).

The boundaries of this limiting principle demonstrate that the circumstance cannot be based on the sequence of events encompassed within Mr. Foster's assault upon Mr. Lanier. An assault will be deemed "one continuous period of physical attack," Campbell v. State, 571 So.2d at 418, even if there are brief interludes between phases of the assault. Thus, in Farinas v. State, **569** So.2d **425** (Fla. 1990), the defendant shot the victim once from a distance. Id. at **427.** He then walked over to her and attempted to shoot her again, but his gun jammed three times. Id, After unjamming the gun the third time, he fired the two fatal shots. Id. Despite the respite in the assault occasioned by the original distance between the defendant and the victim and the jamming of the gun, it did not "afford[] [Farinas] time to contemplate his actions, thereby establishing heightened premeditation." Id. at 431.

In Jackson v. State, 530 So.2d **269** (Fla. 1988), the defendant's assault bore a great deal of similarity to Mr. Foster's assault. The assault began when

> Jackson grabbed Moody [the victim] and put a knife to his neck.... [He] then forced Moody to the floor and directed [a third person] to remove his wallet and keys. As the sixty-four year old Moody begged for mercy, he was bound, gagged, and then choked with a belt until he was unconscious. After Moody regain consciousness, Jackson beat him in the face with a cast on his forearm and then straddled his body and repeatedly stabbed him in the chest.

Id. at 270. The repeated efforts to kill the victim following the discovery that he was not dead, coupled with interludes during which the defendant thought the victim was dead, makes Jackson indistinguishable from Mr. Foster's case. Yet this sequence did not provide enough

of a break in the attack to afford the defendant sufficient time to contemplate his actions to establish the heightened premeditation necessary for the cold, calculated, premeditated circumstance. The finding of the circumstance in Jackson was set aside. 530 So.2d at 273.

One other case illustrates yet again why the sequence of Mr. Foster's assault cannot support a finding of the cold, calculated, premeditated circumstance. In Thompson v. State, 565 So.2d 1311 (Fla. 1990), the defendant awoke and decided to kill his lover, who was still asleep. However, thirty minutes passed between the time Thompson awoke and the time of the killing. Id. at 1318. Despite this passage of time,

> there [was] no evidence in the record to show that Thompson contemplated the killing for thirty minutes. TO the contrary the evidence indicates that Thompson's mental state was highly emotional rather than contemplative or reflective.

Id. The record demonstrated precisely the same thing in Mr. Foster's case. In this context, Thompson's final actions, similar to Mr. Foster's, also fell short of establishing heightened premeditation: "[Thompson] said he shot [the victim] as she lay sleeping, then he stabbed her because she was still moving and he wanted her to feel no pain." Id. at 1313.

Accordingly, the sequence of events encompassed by Mr. Foster's assault on Mr. Lanier cannot establish the cold, calculated, premeditated circumstance.[39]

The next factor relied on by the judge in Mr. Foster's case -- Mr. Foster's plan to rob Mr. Lanier -- has expressly been rejected as establishing the cold, calculated, premeditated circumstance. See Harvey v. State, 529 So.2d 1083, 1087 (Fla. 1988) ("[t]hat [defendants] planned the robbery in advance and even cut the phone lines before going ... to the [victims'] home would not, standing alone, demonstrate a prearranged plan to kill"). See also Reed v. State, 560 So.2d 203, 207 (Fla. 1990) ("intent ... to burglarize [victims'] house" does not establish cold, calculated, premeditated circumstance).

The next factor relied on by the judge, the exchange of rings, comes close to establishing the circumstance. The prosecutor's argument concerning this factor puts it in the strongest light for the State:

---

[39] In one case, Swafford v. State, 533 So.2d 270,277 (Fla. 1988), cert. denied, 489 U.S. 1100 (1989), the Court appeared to rely on a brief respite during an otherwise continuous attack --a pause to reload the gun -- as providing sufficient contemplative time to establish heightened premeditation. In Farinas v. State, 569 So.2d at 431 n.8, however, the Court rejected the suggestion that the pause to reload a gun was enough of a break to establish heightened premeditation. Swafford also involved a plainly articulated plan to kill the victim -- even before she was found. 533 So.2d at 273. Thus, the result in Swafford should not be seen as based on the pause to reload the gun.

> [Mr. Foster] goes to Juanita, says. hey, I got this ring with a "K" on it, let me borrow your big Notre Dame class ring. Why is he doing that? Because he is going to be beating somebody with that ring.
>
> He does, not want to leave that "K" impression in the skin which will be a telltale sign as to who has done this.
>
> Now, if he has no intent at that time to kill Mr. Lanier after he robs him, what difference would it make if he left the "K" impression on Mr. Lanier's head, forehead or body. It would make none because Mr. Lanier would be alive today to testify that that man is the one.
>
> No, he took that branding iron off his hand so he would not leave a telltale sign or a clue on that dead body. He intended right at that point in time to kill this man.

R. 1463. If the facts were established beyond a reasonable doubt as the prosecutor characterized them, these facts might be sufficient to establish the "prearranged design" necessary to establish the cold, calculated, premeditated circumstance. See, e.g., Mendyk v. State, 545 So.2d 846, 847-48, 850 (Fla. 1989). However, the facts did not establish beyond a reasonable doubt that Mr. Foster's reason for exchanging the rings was that he intended to kill Mr. Lanier.

The source of the prosecutor's argument was the testimony of Ms. Rogers concerning the exchange of rings. That testimony must be examined carefully, for it contains a critical ambiguity. It was given during Ms. Rogers' direct examination:

> Q. Now, then did Kenny have your ring on, this Notre Dame class ring at the time he was beating the old man?
>
> A. Yes.
>
> Q. Did you ask him anything about that?
>
> A. After he did it I said was that what you wanted my ring for and he said yes. I said, well, let me have it back.
>
> Q. Why didn't he use his own ring?
>
> A. I don't know. His ring, you know, was harder than mine.
>
> Q. Did you ask him about why he didn't use his own ring?
>
> A. Yes.
>
> Q. What did he say?
>
> A. He said because it would have left "K"'s all over him and they would have known it was me.

R. 969-70 (emphasis supplied).

Significantly, Ms. Rogers was asked the same question twice -- "why didn't [Mr. Foster] use his own ring" -- and gave a different answer each time. The first answer was, "I don't know. His ring, you know, was harder than mine." That answer implied that the purpose for

the exchange of rings was to protect Mr. Foster's finger or hand during the beating of Mr. Lanier. He wanted a ring, to make the beating more severe. However, he wanted a softer ring -- Ms. Rogers' -- to lessen the chance of injury to his finger. The second answer was the only one the prosecutor wanted the jury to remember: "because [Mr. Foster's] ring would have left 'K's' all over [Mr. Lanier] and they would have known it was me." The implication of this answer is, as the prosecutor argued, that Mr. Foster planned to eliminate the person he was going to beat.

This Court has explained that if the crucial evidence of heightened premeditation is susceptible to "equally reasonable" inferences -- one establishing heightened premeditation and the other inconsistent with heightened premeditation -- "the evidence does not support beyond a reasonable doubt a finding that this aggravating circumstance exists." Thompson v. State, 565 So.2d at 1318. Accord, Reed v. State, 560 So.2d at 207 (where the defendant's statement of criminal intent left open the possibility that he intended to commit a burglary, rather than a murder, the aggravating circumstance could not be established beyond a reasonable doubt).

Here, the two answers given by Ms. Rogers to the question, "why didn't [Mr. Foster] use his own ring [during the beating of Mr. Lanier]," left open the possibility that Mr. Foster contemplated, and planned, an aggravated assault instead of a murder.[40] Accordingly, the exchange of rings set of facts does not establish the cold, calculated, premeditated circumstance beyond a reasonable doubt.

The last factor relied on by the trial judge in finding this aggravating circumstance is equally unavailing. Mr. Foster's witness-stand declaration that the killing "was premeditated," and, "I intended to kill him," establishes nothing more than premeditation. It does not in any way establish when Mr. Foster formed the intent to kill Mr. Lanier, or that the intent to kill was formed in "a careful plan or prearranged design," Rogers, 511 So.2d at 533. See Hamblen v. State, 527 So.2d 800, 805 (Fla. 1988) ("[w]hile the evidence unquestionably demonstrates premeditation, we are unable to say that it meets the standard of heightened premeditation

---

[40] It is worth noting that Ms. Rogers' first answer is also consistent with her out-of-court statements to Connie Thames and Andre Childers, while her second answer is not. Ms. Rogers told Connie Thames that Mr. Foster exchanged rings with her in the midst of the assault, which is consistent with his harder ring hurting his finger, and inconsistent with a prearranged design to kill. In addition, Ms. Rogers told both Ms. Thames and Andre Childers about the bizarre start of the assault and how crazy Mr. Foster was at that time. If Ms. Rogers truly believed her second answer to the question about why the rings were exchanged, she, like the prosecutor, see R. 1464-65, would have seen Mr. Foster's "flashback" as a ruse.

and calculation required to support this aggravating circumstance").

For these reasons, the trial court erred in finding the cold, calculated, premeditated aggravating circumstance.

B. The Instructions To The Jury

In keeping with Rogers and its progeny, Mr. Foster sought an instruction on the cold, calculated, and premeditated aggravating circumstance that would guide the jury's consideration of this factor in two crucial ways:

(1) The circumstance could be found only if "the state ... prove[d] that the homicide was the result of a careful plan or prearranged design." Defendant's Proposed Instruction No 6; R. 1956.

(2) The "heightened premeditation" reflected in a "careful plan or prearranged design" to kill was different from the premeditation necessary to be convicted of murder in the first degree. "Premeditation" was, therefore, to be defined and contrasted with "heightened premeditation." Id.; R. 1956-57.

The trial judge rejected Mr. Foster's proposed instruction, R. 1432-33, and gave the following instruction instead:

> [T]he crime for which the defendant is to be sentenced was committed in a cold, calculated and premeditated manner without any pretense of moral or legal justification.
>
> I further instruct you that the defendant's conviction for first degree, premeditated murder is insufficient in and of itself to require a finding that the homicide was cold, calculated and premeditated for the purposes of this aggravating circumstance.

R. 1523.

This instruction failed to provide the crucial guidance necessary for the limited application of this aggravating circumstance. Pursuant to it, the jury was left to define for itself what "premeditation" was and what more had to be found, beyond "mere" premeditation, to establish this circumstance. Left wholly to their own, unguided discretion, the jury could very well have made the same mistakes the trial judge made in finding that this circumstance had been established:

(1) That Mr. Foster's persistent attack against Mr. Lanier, repeatedly attempting to kill him until he was dead, established the Circumstance;

(2) That Mr. Foster's pre-existing plan to rob Mr. Lanier was enough to raise the murder to a "cold, calculated, premeditated" crime; and

(3) That Mr. Foster's assertion that the murder was premeditated and

intentional was enough, standing alone, to establish the circumstance.

Under the court's instruction, therefore, the jury's recommendation of a death sentence for Mr. Foster violated his Eighth and Fourteenth Amendment right to have his sentence determined by a sentencer whose discretion has been channeled "by 'clear and objective standards' that provide 'specific and detailed guidance,' and that 'make rationally reviewable the process [by which his sentence was imposed].'" Godfrey v. Georgia, 446 U.S. 420, **428 (1980).** His death sentence was in fact "[t]he standardless and unchanneled imposition of [a] death sentence[] in the uncontrolled discretion of a basically uninstructed jury...." Id. at 429.

XII. ARTICLE I, SECTION 10 OF THE CONSTITUTION OF THE UNITED STATES AND ARTICLE X, SECTION 9 OF THE CONSTITUTION OF THE STATE OF FLORIDA FORBID APPLICATION OF § 921.141 (5)(i), FLA. STAT. **(1987)** TO MR. FOSTER'S CASE

At the time of the offense for which Mr. Foster stands convicted, § 921.141(5)(i) did not exist. In fact, prior to the statute's enactment, the Court had held that a murder committed in a cold, calculated or premeditated manner without any pretense of moral or legal justification could not be construed as an aggravating factor. Menendez v. State, **368** So.2d **1278** (Fla. 1979); Riley v. State, **366** So.2d 19 (Fla. 1978).

Both Article I, § 10, of the Constitution of the United States and Article X, § 9, of the Constitution of the State of Florida forbid application of laws ex post facto. A law violates the ex post facto proscription if it is criminal or penal in nature, retroactively applied and disadvantageous to the defendant. Miller v. Florida, 482 U.S. **423** (1987); Weaver **v.** Graham, 450 U.S. 24 (1981). Under these criteria, § 921.141(5)(i) is an ex post facto law that cannot be applied to Mr. Foster's case.

Unquestionably, § 921.141(5)(i) is criminal or penal in nature because it affects the gravity of punishment. Further, the use of this aggravating factor in Mr. Foster's case would be retroactive, since it would be "appl[ied] to events occurring before its enactment." Weaver, 450 U.S. at 29. Finally, its application would work to Mr. Foster's disadvantage.

Although the Court has held that retroactive application of § 921.141(5)(i) does not violate the ex post facto clause, see Combs v. State, 403 So.2d **418** (Fla. 1981), that case is not apposite here since it did not involve ***the re-sentencing of a defendant*** who was originally sentenced under the old law. Moreover, Combs was decided prior to Miller **v.** Florida, in which the Supreme Court held that the Ex Post Facto Clause of the Constitution required Florida to apply its sentencing guidelines in effect at the time of the crime, rather than the

law in effect at the time of the sentencing. 450 U.S. at 435-36. Accordingly, Mr. Foster respectfully requests that the Court reconsider the issue of whether the retroactive application of § 921.141(5)(1) -- at least to cases like his -- is forbidden.

XIII. DEATH IS A DISPROPORTIONATE SENTENCE FOR KENNY FOSTER

Mr. Foster asks that the Court "consider the circumstances [of his case] in light of our other decisions and determine whether the death penalty is appropriate." Menendez v. State, 419 So.2d 312, 315 (Fla. 1982).

Mr. Foster's case, like several others in which new sentencing trials were held and death reimposed, comes back to this Court on a very different record, which includes much more mitigating evidence than was introduced in the first trial. See, e.g., Songer v. State, 544 So.2d 1010, 1011 (Fla. 1989); Fitzpatrick v. State, 527 So.2d 809, 812 (Fla. 1988); Proffitt v. State, 510 So.2d 896, 897 (Fla. 1987).

> Thus, while it is true that [the Court] upheld the sentence of death on the original direct appeal, the additional [mitigating evidence] allows [the Court] to examine the appropriateness of the sentence of death in light of the fresh record developed on resentencmg.

Fitzpatrick v. State, 527 So.2d at 812.

In Mr. Foster's case, unlike most cases in a posture similar to his, there is another significant change in the record that makes the current record a fresh one. The emergence of new facts, together with the new light they have cast on old facts, has raised troublesome questions about exactly what took place on the night that Julian Lanier was killed. In the process, the confidence which must exist in relation to the aggravating circumstances in order for the death sentence to be sustained -- that this case is among "the most aggravated, the most indefensible of crimes," State v. Dixon, 283 So.2d 1, 8 (Fla. 1973) -- has been eroded. We turn first to these unsettling facts.

Before the new sentencing trial, there was nothing unsettled about the crime and the various actors' roles in relation to it. Kenny Foster was the sole bad actor. He formulated a plan to assault, rob, and kill Julian Lanier during the course of the time he, Lanier, Anita Rogers, and Gail Evans were socializing in a bar.

The plan was carried out without a hitch. After Mr. Lanier's camper was parked in a remote area of the county, Foster began his attack upon Lanier with what appeared to be a ruse -- accusing Lanier of trying to have sex with his sister when Lanier made sexual advances toward Gail Evans. He then beat Lanier severely. Encountering no resistance, he threatened

to kill Lanier, then pulled out a knife and cut Lanier's throat; When signs of life still came from Lanier, Foster cut his throat again. With Lanier still breathing even after that, Foster thrust his knife through Lanier's spinal column, severing his spinal cord.

Throughout the assault, Anita Rogers and Gail Evans portrayed themselves as horrified, helpless, frightened bystanders, who occasionally mustered the courage to ask Foster to stop and who were coerced by their fear of Foster to help remove Mr. Lanier's body from the camper, to cover it once it was on the ground, and to help conceal the evidence of the crime once it was over.

These once-settled facts have been shaken to their roots by the facts that emerged or were re-illuminated in the new sentencing trial.

The credibility of Ms. Rogers' and Ms. Evans' accounts of events has been drawn into grave question. Two critical new witnesses emerged, Donnie Goodman and Connie Thames, who had had extensive contact with Ms. Rogers during the 1980's. To them, she revealed something never revealed before, and she gave a strikingly different account of the events that evening. She revealed that she and Ms. Evans had a deal with the police: in exchange for their testimony, they would not be charged in connection with the crime. In light of what was once the settled view of the crime, this would have seemed implausible. That began to change, however, with the additional information Ms. Rogers imparted to Connie Thames. She told Thames that the plan for taking Mr. Lanier's money that night was her and Gail's, not Kenny's. In addition, she described Mr. Foster as "flipp[ing] out" and experiencing "flashbacks" about the rape of his sister that night, and that these events are what started a wholly unexpected assault by him against Mr. Lanier. She also mentioned that Mr. Foster had a seizure that night. Finally, although she mentioned the exchange of rings to Thames, she noted it only as something that occurred during a brief pause in the attack on Mr. Lanier by Mr. Foster, not as evidence of a prearranged plan to assault and kill Mr. Lanier.

This information led to additional new, but consistent, information. Andre Childers confirmed that the women believed the assault on Mr. Lanier was the result of Mr. Foster's "flipp[ing] out." Gail Evans herself confirmed the same thing in new live testimony.

Old facts were then re-examined in light of these new facts, and the old facts strongly confirmed the outlines of a newly emerging picture of the crime.

Despite extensive interviewing by the police on the day of the crime, neither Ms. Rogers nor Ms. Evans mentioned anything about a plan to rob or assault Mr. Lanier.

Nothing was said to the police about an exchange of rings between Ms. Rogers and Mr. Foster. The police were clearly looking for an underlying felony and tried to procure such information from Ms. Evans a few days later. She provided it, but at trial she denied any knowledge about such a felony. However, Ms. Rogers, who had not previously revealed any such information, provided it for the first time in her trial testimony.

When re-examined in light of the new facts, longstanding evidence of Mr. Lanier's wounds also raised new questions. Mr. Lanier sustained at least two knife wounds which nobody's account of the assault attributed to Mr. Foster. Moreover, Anita Rogers' account of how she got blood on her clothing -- from a spurting neck wound -- was demonstrated by the state medical examiner to have been impossible.

Even Kenny Foster's witness-stand account of having a seizure that night, which seemed to be a lie in light of his subsequent witness-stand confession, was cast in a new light. Anita Rogers' revelations to Connie Thames confirmed that he did have a seizure that night.

With all of this, the picture of this crime is no longer settled. Anita Rogers' and Gail Evans' trial testimony has been contradicted by Ms. Rogers' subsequent revelations. It now appears that Ms. Rogers and Ms. Evans played an active role in the crime, both in the underlying felony and in the stabbing of Mr. Lanier. Mr. Foster, on the other hand, appears to have been grossly impaired -- indeed, driven that night by the unfortunate combination of alcohol and multiple mental and neurological disabilities.

Just as Mr. Foster's lesser role in the crime has emerged, powerful mitigation has emerged in a way that was hardly even foreshadowed in the original trial.

Mr. Foster has suffered multiple handicapping conditions in his life -- a premature and nearly fatal birth, a family of origin that was riddled with alcoholism and was so dysfunctional that it could not provide for its children's most basic needs (food, clothing, health care), a family of origin that so abused him physically and emotionally during his formative years that the infamous boys' school at Marianna felt like a safe haven to him. His handicaps have extended to his mental and neurological functioning. He has brain damage and an associated borderline personality disorder, with occasional episodes of psychosis. He is an alcoholic. He has hypoglycemia. In combination, these disabilities have on many occasions caused him to, as Dr. Merikangas put it, "go berserk," sometimes hurting people, but at least as often only destroying property. There is little doubt that that is what caused Mr. Foster's violent assault against Mr. Lanier in the early morning hours of July 15, 1975.

Even with all this, however, Mr. Foster has maintained a foothold in humanity. He has been noted for his exceptional kindness toward and nurturing of children, for his charitable spirit, for his generosity, and, painfully, for his agonizing insight into the danger that his condition posed to others.

On all these facts, death is just as disproportionate for Kenny Foster as it was for Earnie Fitzpatrick, whose mental disabilities are strikingly similar to Mr. Foster's and about whose disabilities, like Mr. Foster's, there is no dispute. Fitzpatrick v. State, 527 So.2d at 811-12. And death is just as disproportionate -- for these same reasons -- as it was for James Penn, Penn v. State, 574 So.2d 1079, 1083 (Fla. 1991); Billy Ray Nibert, Nibert v. State, 574 So.2d 1059, 1061-63 (Fla. 1990); and Leonard Smalley, Smalley v. State, 546 So.2d 720, 722-23 (Fla. 1989).

Finally, the disproportionality of the death sentence for Mr. Foster can be appreciated in one other way, by reflecting upon what happened at the recent trial, Despite the multiple, egregious violations of his right to confront Ms. Rogers and Ms. Evans, which could well have tipped the balance toward death, despite the mandate that the jury find the felony murder aggravating circumstance, and despite the numerous errors in misguiding and misinstructing the jury, four jurors nevertheless voted for life. None voted for life in Mr. Foster's first trial. This significant movement toward life reflects just how different the facts now are in Mr. Foster's case. It is this difference upon which Mr. Foster rests, and upon which this Court is empowered and exhorted to reduce his sentence to life.

XIV. THE TRIAL COURT'S REFUSAL TO ALLOW MR. FOSTER THE OPPORTUNITY TO EXPOSE THE RACIALLY DISCRIMINATORY USE OF THE DEATH PENALTY IN BAY COUNTY, AND THE COURT'S REFUSAL TO PRECLUDE THE IMPOSITION OF THE DEATH PENALTY AGAINST MR. FOSTER FOR THAT REASON, DEPRIVED HIM OF FUNDAMENTAL DUE PROCESS

Mr. Foster moved to preclude the State Attorney's Office in Bay County from seeking the death penalty against him based on the stark statistical proof and ovenvhelming qualitative data revealing that the death penalty had been sought in his case pursuant to the local prosecutor's long-held practice of treating white life as more valuable than black life. The trial court denied Mr. Foster's motion,[41] holding his use of statistical proof had been rejected

---

[41] Mr. Foster presented three motions to the court. The first moved to enjoin the State Attorney from seeking to use the death penalty. The second moved to have issued subpoenas duces tecum far the depositions of various prosecutors in the State Attorney's

in McCleskev v. Kemp, **481 U.S. 279 (1987),** and that the alleged facts did not make out a prima facie claim of race discrimination by the prosecutor.[42] Mr. Foster submits that the court was in error.

A. The Trial Court Misconstrued The Proof Mr. Foster Offered To Show Race Discrimination

The evidence relied on by Mr. Foster varied from the evidence in McCleskey in two significant respects. First, the statistical evidence was much narrower in scope. Second, the evidence did not consist entirely of statistics. These differences were highly significant under the Supreme Court's opinion in McCleskey.

1. The Supreme Court rejected the broad scope of the McCleskev statistics but would accept the-narrow scope of the statistics proffered by Mr. Foster

The McCleskev Court was greatly concerned over the broad sweep of the statistical study that was the sole evidentiary proffer in that case. The Court noted that any racial inference drawn from those statistics "would extend to all capital cases in Georgia, at least where the victim was white and the defendant was black." 481 U.S. at **293.** While the Court acknowledged that it had accepted the use of general statistics as proof of intent to discriminate in the context of Title VII and jury venire selection cases, even where such proof was not "stark," it distinguished the use of statistical proof in those cases, on grounds that "the statistics related to fewer entities, and fewer variables are relevant to the challenged decisions." Id. at **293-95** (footnotes omitted).

In contrast, the statewide sweep of the McCleskev statistics took in too much to be meaningful:

> It is also questionable whether any consistent policy can be derived by studying the decisions of prosecutors. . . . Since decisions whether to prosecute and what to charge necessarily are individualized and involve infinite factual variations, coordination among district attorney offices across a State would be relatively meaningless. Thus, any inference from statewide statistics to a prosecutorial "policy" is of doubtful relevance.

481 U.S. at 295 n. 15. In the same footnote, the Court explained that a statistical study would be relevant if it was narrowed to encompass only a single entity -- like a district attorney in

---

Office. In its Orders dated May 1 and May 2, 1990, the trial court denied these motions. Next, Mr. Foster unsuccessfully moved to be permitted to make a proffer of evidence in support. R. 1562-64. He appeals from the denial of all three motions.

[42] The court also seemed to suggest that Mr. Foster had failed to make out a prima facie case because he was white and his victim was white. The Supreme Court has already answered the question in favor of Mr. Foster in McCleskev, 481 U.S. at **291** n. 8.

a particular county. As the Court explained in the employment and jury selection context:

> The decisions of a jury commission or of an employer over time are fairly attributable to the commission or the employer. Therefore, an unemlained statistical discrepancy can be said to indicate a consistent policy of the decisionmaker.

Id. (emphasis added).

The statistical evidence proffered by Mr. Foster meets the McCleskey Court's test of relevance since it focuses exclusively on the practice of the State Attorney's Office in Bay County. It focuses solely on the patterns of this one prosecutor's office and in many instances the statistical proffer eliminates all outside influences, such as juries. This evidence was directly proffered to show that the State Attorney's Office in Bay County seeks the death penalty in general, and sought it against Mr. Foster in particular, in a racially discriminatory manner.

The relevance of the use of more narrowly focused statistics to infer the discrimination of decisionmakers in the criminal justice system was observed in Fuller v. Georgia State Bd. of Pardons and Paroles, 851 F.2d 1307 (11th Cir. 1988). There the Court of Appeals noted that the appellant's statistical proffer on the Georgia Parole Board, was sufficiently narrow. The Court of Appeals, in distinguishing McCleskey's statistical proffer from the one before it, reasoned that

> Fuller's challenge is more specific than McCleskey's because it focuses on the decisions of a sin le entity, the Georgia Parole Board, rather than the decisions of many unique jurors. %he Supreme Court noted that an unexplained statistical showin Oof disparate racial treatment by a single entity over a period of time could raise the in erence of an equal protection violation.

Fuller, 851 F.2d at 1310 (citing McCleskey, 481 U.S. at 295 n. 15).

2. Unlike in McCleskey, Mr. Foster sought not to rely solely upon statistical evidence to make out his claim of intentional race discrimination

The evidence Mr. Foster sought to proffer in his motion is much richer than the evidence proffered in McCleskey since it includes various nonstatistical information that sheds light on and gives further corroboration to the inference of race discrimination that can be drawn from the stark patterns exhibited in Mr. Foster's raw data.

In his preclusion motion, Mr. Foster conducted a qualitative analysis, showing that in his and other cases involving white victims, the State Attorney's Office pursued prosecution much more vigorously and fully. Mr. Foster demonstrated that the stark patterns of race-of-victim-based discrimination revealed by these numbers cannot be explained by any qualitative differences between the murders committed against black people and those committed against white people. The black-victim murders during the relevant time period

varied in the same degrees of severity as the white-victim murders in the county.

Mr. Foster further gave depth and meaning to his qualitative analysis by demonstrating that even in those black-victim cases that were charged as capital offenses, the dearth of resources that the prosecution was willing to commit to them resulted in a first degree murder charge never being obtained. Mr. Foster did more than just make the accusation, he showed that when white-victim murders were prosecuted as capital offenses, massive resources were poured into the cases, resulting in first degree murder convictions and the imposition of the death penalty. No such effort was mounted in the few black-victim murders that were prosecuted as capital offenses.

Mr. Foster further presented information that suggested that the State Attorney's Office's racially disparate treatment of murder cases was part and parcel of a racial bias that permeated the office. Prosecutors from that office routinely struck blacks from jury venires by use of peremptory challenges. The office's first black employee, an investigator, was not hired until 1980, and he left after experiencing employment discrimination. And the office tolerated open racial bigotry, from comments referring to black murder victims as "just another dead nigger," to racial epithets and jokes.

Lastly, Mr. Foster brought forth evidence that racial discrimination in the State Attorney's Office's selection of cases to prosecute capitally was accepted as part of an enduring legacy of racial discrimination by public officials, decisionmakers and employers in Bay County. Such evidence of a racially hostile environment has been accepted in the context of employment, school and voting discrimination and is equally relevant in the context of prosecutorial discrimination. See Busby v. City of Orlando, 931 F.2d 764, 785-86 (11th Cir. 1991) (racial slurs of fellow employees relevant to whether "work atmosphere [was] polluted with racial discrimination"); Brown v. Topeka Bd. of Ed., 671 F. Supp. 1290, 1305-06 (D.Kan. 1987), reversed on other grounds, 892 F.2d 851 (10th Cir. 1989)(community racial attitudes relevant to whether local district met duty of racial integration); Jeffers v. Clinton, 730 F. Supp. 196, 210-12 (E.D. Ark. 1989)(malicious prosecution, employment/school discrimination, racial appeals and epithets in campaigns, all deemed relevant to voting rights inquiry).

B. Mr. Foster's Evidentiary Proffer Clearly Establishes A Prima Facie Case Of Race Discrimination In Selection Of Capital Prosecutions By The Bay County State Attorney

While the McCleskey Court recognized the importance of vesting discretion in prosecutors, it did not view prosecutorial discretion as some impenetrable barrier. The Court

held that "[b]ecause discretion is essential to the criminal justice process, we would demand exceptionally clear proof before we would infer that the discretion has been abused." **481 U.S.** at **297.** Mr. Foster had the proof in his motion that McCleskey required. He had raw data that was so "stark" that, as in Gomillion v. Lightfoot, **364** U.S. 339 **(1960),** prosecutorial racial discrimination was "a conclusion [that was] irresistable, tantamount for all practicable purposes to a mathematical demonstration." **364** U.S. at **341.**

1. Statistical evidence established a prima facie case

The statistical evidence proffered by Mr. Foster was simply overwhelming. Between 1975 and 1987, it **was** starkly evident that racial discrimination was guiding the State Attorney's decision on which cases to prosecute as capital cases. The race of the victim was clearly the single most important factor guiding the prosecutor's decision in who should get the death penalty during this 12 year period. Even though black people were murder victims in **40%** of all cases, all 17 death sentences that were imposed were for white-victim homicides. Nearly **1** of every **4** white-victim homicides resulted in the death penalty and none -- 0 -- of the black-victim murders did.

This outrageous pattern was not just an aberrant fluke of the State Attorney's prosecutorial decision-making on death penalty cases. It was part of the race-based decision-making that guided -- and determined the outcome of -- every first-degree murder charge in Bay County during the relevant time period. For example, white-victim defendants were **4** times more likely **(60** to **15)** to be charged with first degree murder than black-victim defendants. Of those defendants who were charged with first degree murder, white-victim defendants were **6** times more likely **(41** to **7)** to go **to** trial. And of those defendants who went to trial, white-victim defendants were **26** times more likely (26 to 1) to be convicted of first degree murder.[43]

The obvious inference to be drawn from these raw numbers is that the prosecution regularly chose white-victim cases for higher degrees of homicide, and prosecuted those cases more vigorously than black-victim cases. While a prosecutorial decision may be based on many factors, an inference of discrimination can be drawn by such a clear showing of racial disparity.

Against this backdrop of stark, race-based patterns of prosecutorial decision-making,

---

[43] For an elaboration of the statistics comparing black-victim and white-victim homicides, the Court's attention is invited to the original motion filed with the trial court, R. 1882-1907.

Mr. Foster asserts that the murder for which he has been convicted and condemned is not materially worse, more aggravated, or more egregious than the murders prosecuted in four "similarly situated" black-victim cases that did not result in the State Attorney seeking the death penalty. In State v. Clinton Whitfield, Jr. (No. 79-740), the defendant broke into the victim's home and ultimately killed her by beating her to death. In State v. Michael Ray Comer (No. 82-855), the defendant broke into the victim's home and stabbed her to death, as did the defendants (or someone) in State v. Donald Wayne Comer and James Elwood Polite (No. 84-0525). And in State v. David Brett Leopard (No. 84-0869), the defendant burglarized the victim's residence which also served as his medical office, stole various prescription drugs, and stabbed the victim (a physician) to death.

All of these crimes involved burglary/robbery motives, and all of them involved beating and stabbing victims to death. Therefore, these crimes were similar to Mr. Foster's crime in the level of aggravation. Cf. Fuller, 851 F.2d at 1310 (petitioner not similarly situated to white inmates who got parole, thus no basis for comparison). In at least one respect, each of the black-victim crimes was more aggravated, because in each, the victim had nothing to do with setting in action the course of events that led to his or her death. The victim in Mr. Foster's case, however, did play a part in his own demise by soliciting Mr. Foster's assistance in satisfying his sexual desires. While the victim's behavior did not render Mr. Foster innocent, his behavior was not nearly as blameless as the victims' behavior in these other four black-victim cases. Those victims were just sitting at home, in a place they had every right and reason to believe was safe, when they were attacked. Yet, the Bay County State Attorney never sought the death penalty in those horrendous cases.

A significant factor that accounts for the difference between the prosecutor's treatment of Mr. Foster's white-victim case and the treatment of these four black-victim cases is race discrimination. Racially-biased decision-making has so skewed the prosecution of death cases in Bay County that there is a palpable risk that the decision to seek the death penalty against Mr. Foster was as much the product of racial bias as of appropriate considerations. Neither the Constitution of the United States nor of the State of Florida can tolerate such a risk, for prosecutorial decisions may not be "'deliberately based on [the] unjustifiable standard . . . [of] race."' Bordenkircher v. Haves, 434 U.S. 357,364 (1978)(quoting Ovler v. Boles, 368 **U.S.** 448, 456 **(1962)).**

2. Mr. Foster's non-statistical qualitative information also helps to establish a prima facie case

Other facets of the operation of the State Attorney's Office reveal that racial bias permeated that environment. Until 1980, no black person had ever worked in that Office -- in any position. The person who was hired, investigator Ernest Jordan, left on account of employment discrimination. Also prevalent in the Office were the use of racial epithets and jokes. Mr. Jordan had been refered to by the Chief Investigator, Wayne White, as "our token nigger." Mr. White also liked to refer to black-victim murders as "just another dead nigger."

The racial bias that skewed the decisions of the State Attorney did not exist in a vacuum. It was part of the larger racial bias that infected the thinking of many officials and decision-rnakers in Bay County. The County has a history of school discrimination, poor municipal services in the black community, job discrimination, and police brutality.

In summary, given the stark reality of the numerical and percentage differences between white-victim and black-victim cases in Bay County, coupled with the racial bias and prejudice in the prosecutor's office and the surrounding community, Mr. Foster should prevail since "[r]acial prejudice has no place in our system of justice and has long been condemned by this Court." Robinson v. State, 520 So.2d 1, 7 (Fla. 1988). Mr. Foster submits that the facts alleged in his motion rise to the level of the "exceptionally clear proof' that the McCleskey Court held must be shown before an inference of discrimination may be drawn.

Even if the Court were to find that these facts did not rise to the pinnacle erected by McCleskey, they do reveal something that should be troublesome to any court genuinely concerned about race discrimination. This Court has previously recognized that the Florida Constitution can offer a more far-reaching basis for enforcement of equal protection than the United States Constitution. See, e.g., Slappy v. State, 522 So.2d 18, 20-21 (Fla. 1988)(Florida constitutional guarantee of impartial jury required a higher standard of review of prosecutor's purported race-neutral reasons for using its peremptory strikes to remove blacks than is required under federal constitution). We urge the Court to act on this tradition, to call race discrimination race discrimination, to take its lead from the constitution of this State, and not to feel like its hands are tied by McCleskey. Mr. Foster's case should be remanded for plenary consideration of this claim.

XV. THE TRIAL COURT CREATED REVERSIBLE ERROR IN ITS FAILURE TO STRIKE THREE **VENIRE MEMBERS** FOR **CAUSE**

A. Venire Members Pope, Pelland and Minor Should Have Been Excused For Cause Since The Record of Their Voir Dire Examinations Clearly Shows That Reasonable Doubt Existed As To Their Ability To Be Impartial

1. Carol Ann Pope

Jury venire member Carol Ann Pope should have been excused for cause on account of her bias towards imposing the death penalty. While her remarks during voir dire were not as expressive as those of venire members Varnie and Wallace, who were struck for cause because of their bias towards death, the answers she gave to the majority of questions revealed that she could not lay aside her bias in favor of death if she was chosen to sit on the jury.

In this regard, the test for jury impartiality is not whether the voir dire of a venire member definitively establishes her inability to be impartial, but rather whether the voir dire leaves "reasonable doubt" about her ability to be impartial. In Hill v. State, 477 So.2d 553 (Fla. 1985), the Court reiterated:

> The test for determining juror competency is whether the juror can lay aside any bias or prejudice and render his verdict solely upon the evidence presented and the instructions on the law given to him by the court.

Id. at 555 (quoting Lusk v. State, 446 So.2d 1038, 1041 (Fla. 1984)).

In applying the jury-competency test, the Court in Hill also reiterated that trial courts must follow the rule set forth in Singer v. State, 109 So.2d 7 (Fla. 1959):

> [I]f there is a basis for any reasonable doubt as to any juror's possessing that state of mindwhich will enable him to render an impartial verdict based solely on the evidence submitted and the law announced at the trial[,] he should be excused on motion of a party, or by [the] court on its own motion.

Id. at 24.

Based on the responses of Ms. Pope during voir dire, there was certainly "reasonable doubt" as to her ability to be impartial. Upon initial questioning by Mr. Foster's counsel, Ms. Pope revealed that she was biased in favor of imposing death in Mr. Foster's case because she believed that persons like him had abused the court system through continuous appeals and stays of execution.

> Q. ... Could you describe for us just a little bit about ... the basis of your belief in favor of the death penalty are?
>
> A. ... I do feel strongly about what continues to be appeals, appeals, appeals[,] stays, stays stays. I feel like when a person has been found guilty of a crime and that the death penalty has been issued, I think it should, you know, go through.

R. 173.

This response by Mrs. Pope created reasonable doubt about her ability to be impartial, and that doubt was never erased by her subsequent statements. In response to a defense question as to whether it would be "hard" for her to vote for a life sentence in a case where

the death sentence was reversed on account of the "kinds of appeals" she found deplorable, Ms. Pope responded:

> A. Well it would be a hard decision. The evidence would really have to be there.
>
> Q. I'm sorry, the evidence for a life sentence would really have to be there.
>
> A. Right. That's what I'm saying. For me.

R. 175.

While Mrs. Pope then went on to deny that she had a "tilt towards death" in a case like Mr. Foster's, she nevertheless agreed with defense counsel's statement that "there would be kind of an extra burden to overcome" before she "would be willing to impose a life sentence." (Id.)

Mrs. Pope further raised reasonable doubt about her ability to be impartial when she was asked whether she could impose a life sentence with the possibility of parole eligibility after 25 years.

> Q. If you learned that there is a possibility of parole in Florida after a long time, after 25 years there's a possibility of parole, nothing automatic about it, but there is a possibility, how would you -- what would your opinion be about that?
>
> A. That is difficult. I really -- I can't give you a flat answer on that.
>
> Q. It sounds like it would be hard for you to recommend a life sentence if it was that kind of a life sentence.
>
> A. That's correct. Knowing if the person had already been found guilty. Yes, it would be hard.

R. 177.

The State tried to rehabilitate Mrs. Pope by asking her whether she could follow the instructions of the trial court and make a decision based on the evidence. She answered in the affirmative. R. 178-79. Such a response, however, in and of itself did not establish that Mrs. Pope could be impartial. As the Court in Hill noted:

> [T]he statement of a juror that he can readily render a verdict according to the evidence, notwithstanding an opinion entertained, will not alone render him competent if it otherwise appears that his formed opinion is of such a fixed and settled nature as not readily to yield to the evidence.

477 So.2d at 555-56 (quoting Singer, 109 So.2d at 22).

When re-questioned by defense counsel, it was clear that the reasonable doubt that existed with respect to Mrs. Pope's ability to be impartial had not gone away.

> Q. I just want to be sure I understand the things you told me in light of what Mr. Paulk has said. You did say, I think -- I just want to be sure that I'm not misunderstanding -- that if a person had been convicted of murder before

and there was no doubt about guilt, sentenced to death, and for some reason many years later the case came back for [a] new sentencing decision, there would be some added burden to convince you that life was the right sentence instead of death. I believe -- I'm pretty sure that's what you said, I just want to be sure.

A. Yes I did say that, yes. You're correct on that. There would be an added burden. I don't mean to emphasize that really strongly because, like I say, I don't know why this has happened.

Q. I'm not asking you to make any judgment about Mr. Foster's case, but we're just trying to understand how you feel about things because that's real important.

A. But you're correct, I did answer you that way.

Q. Thanks. And that still is your answer; is that right?

A. Yes.

R. 180.

After Mrs. Pope reiterated that she placed an added burden on Mr. Foster, the trial court questioned her on her ability to be impartial. The court's questions, however, fell woefully short of any detailed questioning for juror competency under the test set forth in Lusk. The entire voir dire by the trial court is as follows:

THE COURT: May I ask you, Mrs. Pope in response to the last question by Mr. Burr, what Mr. Paulk was asking you about, if I instruct you on what your views are as a juror in this case, if you're selected on the jury, would you be able to perform your duties as a juror in light of your last answer to Mr. Burr's question?

JUROR POPE: Yes.

THE COURT: Would it interfere, impair your performance of your duty as a juror?

JUROR POPE: No.

THE COURT: Okay. Thank you.

R. 181.

Again, however, after the trial court finished questioning Mrs. Pope, she revealed that she still held a presumption that death was the appropriate punishment, and that Mr. Foster carried an extra burden as far as she was concerned. When asked follow-up questions by the defense, Mrs. Pope at first stated that she could cast aside her opinion but she ultimately conceded that she was unsure of her ability to be impartial.

Q. Ma'am, it sounds like your feeling about the process and the delay and if someone's been found guilty (sic). You feel that way. How long have you felt that way? Is this something you know you've thought about over the course of new reports and this type of thing?

A. Well, to be perfectly honest, to use as an example, Ted Bundy. That long.

Q. Did you feel strong about that opinion that you have?

A. Yes.

Q. Okay. And do you feel like that's a solid opinion that you hold? I mean you feel that you're right about that opmion, don't you?

A. For me.

Q. Yes.

A. Yes.

. . . .

Q. And your opinion about this delay and things like that and your opinion that well they would really have to have good evidence for me to vote for life if that's the situation. You would carry that into the jury box, wouldn't you say?

A. Not that strongly, I don't believe so. No I feel like if I was brought into that jury box and that this person is here for whatever reason I would look at the evidence. I'm not, you know, that staunch and close-minded.

Q. You would look at the evidence and you indicated to Mr. Paulk, you would try to make up your own mind based on the evidence.

A. I know it's hard when they use that phrase, you know, reasonable doubt. That is difficult.

Q. But would you agree with me that to do that, to listen to just the evidence, you would have to just about cut away this opinion that you've held and that you feel strongly about? You would have to do that?

A. Yes, probably.

Q. And that might be hard for you to do.

A. Yeah. It might be.

Q. And I know that you've indicated to the judge that you would sure try to do that.

A. Um hum.

Q. But, ma'am, can you tell us for certain that you could do that?

A. You mean that I could absolutely just, you know, wipe out that opinion, is what you're saying?

Q. That that opinion would in no way come into your mind, the influence of any type --

A. Oh. Okay. Yes, I think I can say that. I can make up my own mind, you know. It can be changed, it can be made up. You know, I'm not close-minded.

Q. Right. I'm not talking about how you go about making your decision, I understapd that. But hope that all jurors make up their own mind. But what we're talking about, you know, is this opinion or could you cut that away.

A. I don't know.

Q. Okay.

A. I don't know.

MR. CARR: Thank you.

R. 182-85.

The Court has long held, since Singer, that where prospective jurors have preconceived opinions that cannot be cast aside beyond a reasonable doubt, they cannot be considered impartial. In Singer, as here, the trial court's questions elicited answers from the prospective juror that he considered himself competent to serve on the jury. Nonetheless, the Court held that such answers were insufficient to erase the reasonable doubt created by the venire member's original response to questions concerning his ability to be impartial. Faced with circumstances very similar to the dire examination of Mrs. Pope, the Court in Singer reasoned:

> It is difficult for any person to admit that he is incapable of being able to judge fairly and impartially. We think Mr. Shaw on voir dire examination did as much as he could to honestly express that he was of such state of mind, consciously or subconsciously, that he was not sure he could render a verdict without being influenced by the opinion he had formed from what he read and heard about the case and because of knowing the decedent's family.
>
> Nor do we feel that his subsequent statements, in response to questions from the trial judge, that he was competent to serve as a juror were sufficient to overcome the effect of what he had previously said as to his state of mind.
>
> There is such reasonable doubt as to the impartiality of Mr. Shaw and his being able to render a verdict on the evidence and law given at the trial free of the influence of his opinions and prejudices that we feel he should have been excused from the jury when challenged for cause by the defense.

109 So.2d at 24-25.

While Singer involved a preconceived opinion as to guilt, the Court held in Hill that preconceived opinions in favor of death are just as -- if not more -- detrimental.

> We are unable to distinguish the circumstances under which error was found in Singer from the circumstances in this record. It is exceedingly important for the trial court to ensure that a prospective juror who may be required to make a recommendation concerning the imposition of the death penalty does not possess a preconceived opinion or presumption concerning the appropriate punishment for the defendant in a particular case. A juror is not impartial when one must overcome a preconceived opinion in order to prevail. When any reasonable doubt exists as to whether a juror possesses the state of mind necessary to render an impartial recommendation as to punishment, the juror must be excused for cause.

477 So.2d at 556. Accord, Floyd v. State, 569 So.2d 1225, 1230 (Fla. 1990).

The voir dire of Mrs. Pope is also indistinguishable from the circumstances of Singer. She found it difficult to admit her bias and thus readily answered that she was competent to serve when she was questioned by the State and the trial court. However, she returned to her original position each time the defense questioned her. She even conceded at the end of voir dire that she "[did]n't know" that she could case aside her preconceived view that death was

the appropriate punishment. Looking at the record as a whole, this Court cannot say beyond a reasonable doubt that Mrs. Pope was unbiased.

In Hamilton v. State, 547 So.2d 630 (Fla. 1989), a case on point with Mr. Foster's, the Court also looked at the entire voir dire and held that a juror's re-assertion of a fixed opinion about guilt, after telling the trial court that she could be impartial, demonstrated reasonable doubt about her ability to be impartial.

> We recognize that the juror eventually stated that she could base her verdict on the evidence at trial and the law as instructed by the court. Nonetheless her responses, when viewed together, establish that this prospective juror did not presume Hamilton was innocent. Even after the juror responded affirmatively to questioning by the trial judge regarding whether she could hear the case with an open mind, she again asserted that she had a fixed opinion as to guilt or innocence.
>
> ....
>
> Although the jury in this case stated in response to questions from the bench that she could hear the case with an open mind, her other responses raised doubt as to whether she could be unbiased. For example, the juror's statement that Hamilton would be required to introduce evidence to convince her that he was not guilty pointedly demonstrates the juror's preconceived opinion of guilt.... It is clear that the juror did not possess the requisite impartial state of mind necessary to render a fair verdict and thus should have been dismissed from the jury pool.

Id. at 632-33.

Based on Singer and its progeny, the trial court's failure to excuse Mrs. Pope for cause deprived Mr. Foster of a fair trial. In the context of this case, as in Hill, the trial court's refusal to strike for cause can be accorded no deference since it failed to carry out the Singer test. The trial court itself never asked Mrs. Pope whether she could cast aside her opinion and solely pass judgment based upon the evidence presented and the trial court's instructions on the law. Instead, the court made passing reference to the State's questioning of Mrs. Pope, and asked her merely would she be able to perform her duties, and whether her views would impair her ability to perform. Critically, the trial court never explained to Mrs. Pope what her duties were as a juror, and never asked in light of those duties whether she could cast aside her bias towards the death penalty. Nor did the trial court ask any more searching questions after Mrs. Pope ultimately conceded that she was uncertain as to whether she could cast aside her preconceived opinion. Under the circumstances, "the trial judge in this case failed to apply the rules of law set forth in Singer. Consequently, his discretionary authority is not in issue in this proceeding." Hill, 477 So.2d at 557.

Finally, Mrs. Pope's voir dire examination stands in stark contrast to those cases where the trial courts appropriately concluded that there was no reasonable doubt about juror impartiality. See, e.g., Brown v. State, 565 So.2d 304, 307 (Fla. 1990)(juror impartial beyond

reasonable doubt since his responses to questions raised by both prosecution and defense established that he held no preconceived view that death was appropriate); Penn v. State, 574 So.2d 1079 (Fla. 1991)(jurors ultimately demonstrated their competency to serve; no abuse of discretion in denying defense motion to strike based on bias towards death).

2. Marion Pelland

Jury venire member Marion Pelland should also have been excused for cause on the basis of her clear predisposition towards imposing the death penalty for all premeditated murders. Her entire voir dire shows that she could not put aside this preconceived opinion, beginning with the answers she gave to initial questions posed by defense counsel.

> Q. Tell us a bit more about your -- more generally if you could -- about your belief in the death penalty. Are they pretty strong too?
>
> A. Yes, I think without putting a lot of thought into it you know, I think that certain crimes should have certain sentences and murder being the death sentence and rape probably, you know, without -- once convicted, without question.
>
> Q. Is that how you think it ought to be, that if you're convicted of murder, no matter -- I mean if it's true that that happened, no matter why it happened, that you ought to be sentenced to --
>
> A. No, no, no, no. Absolutely not. In self-defense and things, no. I believe each case would be different. But cold-blooded, premeditated murder.
>
> Q. If it's cold-blooded and premeditated, would you then agree that no matter what else, death ought to be the sentence.
>
> A. I think that's what I believe.

R. 273-74.

When questioned by the State, Mrs. Pelland expressed the same unwavering belief in the death penalty for premeditated murders. Moreover, when asked whether she could set aside her beliefs, Mrs. Pelland made clear that Mr. Foster would have to overcome this preconceived opinion through a showing of "special circumstances".

> Q. In response to Mr. Burr's questions to you. Okay.. It's been 15 years and this man has been convicted of a first degree premeditated murder. Are you telling me that right now you would automatically recommend to the judge that the judge impose the death penalty or can you set and wait and find out whether you should vote to recommend death?
>
> A. Well I think that if you've been convicted of first degree murder that there should be guidelines already set. Then you would not even have to do this; okay? As far as hearing the evidence, I'm sure if I heard the evidence and I saw things differently I would be able to see through that and know. I don't know what happened, but I have never been to a murder trial or anything so just in every day living and reading the newspapers and all the things you know people discuss, that's how I feel at this moment.
>
> . . . .

All right. Let me ask the question this way. Without having heard a thing, would you make a recommendation to that judge --

A. I have an opinion right now.

Q. Okay.

A. I do have an opinion right now.

Q. What is that opinion right now?

A. Death penalty.

Q. Okay. Could you set and listen to the facts and set aside that opinion and recommend --

A. I think that I would be able to under certain circumstances.

Q. Okay. Thank you.

R. 277-79.

In response to the State's question as to whether she could be objectively reasonable in considering Mr. Foster's sentence, Mrs. Pelland stated that she thought she could grant him a life sentence if he met "special circumstances." As the Court in **Hill** noted, a juror is not objective and certainly "not impartial when one side must overcome a preconceived opinion in order to prevail." **477** So.2d at 556. Moreover, Mrs. Pelland only thought that she could lay aside her opinion, demonstrating that there was still reasonable doubt as to her ability to be impartial.

Against this backdrop, the trial court did nothing to ferret out whether Mrs. Pelland could actually lay aside her presumption in favor of the death sentence. The trial court did not even inquire as to what Mrs. Pelland meant by "special circumstances." After explaining to Mrs. Pelland how the sentencing process worked in capital case, the trial court only asked the following question.

Q. Well, could you clarify then in terms of -- in light of that, the burden being on the State to prove the aggravating circumstances beyond a reasonable doubt. Do you think you could follow that instruction.

A. I really think I could.

R. 280.

This one statement by Mrs. Pelland -- that she could follow the court instructions on finding aggravating circumstances -- was insufficient to erase the reasonable doubt raised by her other answers to voir dire questions. See Singer, 109 So.2d at **24.** Importantly, in response to a follow-up question by the defense, Mrs. Pelland conceded that she could not wipe away her bias in favor of the death penalty.

MR. BURR: Would you in your mind right now as you sit hear, though the judge has not told you what an aggravating circumstance -- what they are, would you think that the fact that. a murder, if it was premeditated, that that for you would be an aggravating circumstance in the sense that it pushes you towards seeking death as the right thing?

JUROR PELLAND: I'm trying to be honest here. Premeditated is pretty strong. I'm afraid so, maybe.

MR. BURR:. So the fact that it was premeditated to you would be an aggravating circumstance, wouldn't it.

JUROR PELLAND: Um hum.

R. 281-82.

After Mrs. Pelland had reiterated once again that she believed that a conviction for premeditated murder "pushed" her towards the death penalty and that she would view premeditation as if it were an aggravating factor, the trial court did nothing to test further whether Mrs. Pelland could actually lay aside her preconceived view of premeditated murder as an aggravating factor and consider only the aggravating factors proffered by the State. Thus reasonable doubt ultimately remained as to whether she could be impartial.

The voir dire responses of Mrs. Pelland are not qualitatively different than those the Court observed in Floyd, where a venire member's "unqualified predisposition to impose the death penalty for all premeditated murders warranted excusal for cause." 569 So.2d at 1230, Since, even after the trial court's questioning of Mrs. Pelland, there remained reasonable doubt about her ability to lay aside her bias, she should have been excused for cause. See Hamilton, 547 So.2d at 632-33; Hill, 477 So.2d at 554-56.

3. Thomas Minor

The trial court's refusal to excuse Thomas Martin for cause was perhaps the most egregious instance where the importance of juror impartiality was ignored. Mr. Minor, who had been in fights with Mr. Foster in junior high school, had an inherent prejudice against Mr. Foster, yet the trial court refused to recognize it,

Mr. Minor revealed his prior encounter with Mr. Foster during his responses to questions from defense counsel.

MR. CARR: [D]o you feel like you know anything about the case?

JUROR MINOR: I went to Jr. High School with Mr. Foster.

. . . .

MR. CARR: Do you remember those years?

JUROR MINOR: Very well.

MR. CARR: What observations do you have of Mr. Foster?

JUROR MINOR: We didn't get along very well.

MR. CARR: Anything specific about that?

JUROR MINOR: Well, we had a couple of fights.

. . . .

MR. CARR: Do you remember who the aggressor was in your mind, you or Mr. Foster?

JUROR MINOR: Of course.

. . . .

MR. CARR: And in your mind at the time you feel like Mr. Foster started it?

JUROR MINOR: Yes.

R. 489-90.

While Mr. Minor went on to state that he could be fair in judging whether Mr. Foster should be sentenced to death, the Court in Singer held that such statements do not end the analysis of juror competency.

> [A] juror's statement that he can and will return a verdict according to the evidence submitted and the law announced at the trial is not determinative of his competence, if it appears from other statements made by him or from other evidence that he is not possessed of a state of mind which will enable him to do so.

109 So.2d at 24.

Upon closer scrutiny of Mr. Minor's voir dire examination, the record shows that he made various additional revelations and acknowledgements that left in serious doubt his ability to be an impartial juror. For example, when asked by defense counsel had he talked to anyone about an article he read concerning Mr. Foster's case, Mr. Minor revealed that he had spoken to another schoolmate about Mr. Foster. R. 503-04. Mr. Minor further acknowledged that he did not want to sit on the jury because it would have required him to "soul search" himself. R. 504. Lastly, Mr. Minor, conceded that he still presently harbored some personal dislike for Mr. Foster based on their childhood fights. R. 506. While Mr. Minor tried to trivialize each of these revelations, they clearly demonstrated that he had read an article about Mr. Foster's case; that he had thought enough about his childhood fights with Mr. Foster to contact another former classmate; that he had misgivings about his ability to serve as a juror; and that after 30 years he still harbored some personal dislike for Mr. Foster. Simply put, Mr. Minor's responses revealed that reasonable doubt existed as to his ability to be impartial.

Beyond the revelations in Mr. Minor's responses to questions posed to him, there was

obvious inherent prejudice within him on account of his having been in fights with Mr. Foster that were -- by Mr. Minor's account -- the result of Mr. Foster's aggressive behavior. Given this fact, it would have been impossible for Mr. Minor to disentangle his emotions from such a close, heated relationship and weigh and consider the evidence in Mr. Foster's case impartially and fairly. This is particularly the case here since critical evidence in dispute at Mr. Foster's sentencing trial centered on whether or not he was the aggressor who led the murder and robbery. For example, the jury had to decide whether the acts of Mr. Foster were part of an impulsive, uncontrollable pattern of behavior brought on by his mental illness, or instead were the deliberate acts of a killer.

A factfinder's personal association with a person for whom he must make factfinding -- either for or against -- has always been considered inherently prejudicial. In Williams v. State, 556 S.W.2d 63 (Tx. Ct. Crim. App. 1978), the Texas Court of Criminal Appeals dealt with a similar case where a venire person had also had a past, non-positive relationship with a criminal defendant. The venire member, like Mr. Minor, admitted initially that he was somewhat prejudiced against the defendant but later stated that his ability to function as a juror would not be impaired. In reversing the trial court's denial of a motion to strike for cause, the Court of Criminal Appeals held:

> While a trial court may hold a juror qualified who states that he can lay aside any opinion which he may have formed, no such discretion vests in the court with reference to a juror with bias or prejudice toward an accused....
>
> When it appears that the feeling had by the proposed juror is really one of prejudice, and that is directed toward the accused, it is not ordinarily deemed possible for such a juror to be qualified by stating that he can lay aside such prejudice.

556 S.W.2d at 65.

Moreover, in the context of determining whether death is the appropriate sentence, the reliability of the trial process, including the selection of the jury, is crucial. See Hill v. State, 477 So.2d at 556 (juror impartiality is "exceedingly important" in the context of capital sentencing). In a capital sentencing trial, therefore, when there is any doubt about a juror's impartiality -- as there exists with respect to Mr. Minor -- any resulting death sentence must be vacated. See, e.g., Turner v. Murray, 476 U.S. 28, 34-36 (1986)(risk of racial prejudice created unacceptable risk that death penalty may have been meted out arbitrarily). For all these reasons, Mr. Minor should have been excused for cause,

B. The Failure To Excuse Venire Members Pope, Pelland and Minor Was Not harmless Error

Mr. Foster submits that it was not harmless error for the trial court to fail to strike

venire members Pope, Pelland and Minor for cause. It would not have been harmless error "because it abridged [Mr. Foster's] right to peremptory challenges by reducing the number of those challenges available [to] him." **Hill,** 477 So.2d at ***556.*** The Court has held that it is reversible error for a trial court to force a party to use its peremptory challenges on persons who should have been excused for cause, provided that party subsequently exhausts all his peremptory challenges and additional challenges are sought and denied. See Floyd, **569** So.2d at **1230;** Reillv v. State, **557** So.2d 1365, **1367** (Fla. **1990);** Moore v. State, 525 So.2d **870,** 872-73 (Fla. **1988); Hill, 477** So.2d at 556.

Here, Mr. Foster has met the necessary requirements for a showing that the trial court's failure to excuse the three venire members for cause was not harmless error. Mr. Foster exhausted his ten peremptory challenges. R. 781, He used three of the ten against these jurors. R. **759-60;** 761; **762.** Finally, his request for additional challenges was denied. R. 667, 782.

XVI. THE TRIAL COURT IMPROPERLY EXCUSED **FOR** CAUSE A VENIRE MEMBER WHOSE OPPOSITION TO THE DEATH PENALTY DID NOT PREVENT OR SUBSTANTIALLY IMPAIR HER ABILITY TO PERFORM JURY OBLIGATIONS

Venire member Beth Deluzain was impermissibly struck from the jury venire on the erroneous grounds that her opposition to the death penalty rose to the level of exclusion under Witherspoon v. Illinois, 391 U.S. **510** (1968) and Wainwright v. Witt, **469 U.S.** 412 **(1985).**

From the very beginning, Mrs. Deluzain expressed that she was not completely against the death penalty. In response to questions from the State, she explained that she could impose the death sentence under severe enough circumstances.

Q. **...** Are you against or are you in favor of the death penalty?

A. That's not an easy question.

Q. No, ma'am it's not.

JUROR DELUZAIN: It's not something you think about a lot. Probably in special circumstances I am in favor of the death penalty.

. . . .

MR. PAULK Can you think of a case where the murder would be aggravating enough for you to recommend death?

JUROR DELUZAIN: Yes, and, in fact, I have thought about it if you want to hear it. I think that you need some **sort** of ultimate deterrent for, let's say, a

prison setting, something like that so that, you know, after somebody is incarcerated you can't just continue to do whatever you want and know that there is no death penalty, so to that extent I am in favor of the death penalty. Outside of that setting, I'm not sure I am.

. . . .

MR. **PAULK:** ... Okay, is there anything short of that, that example, where you feel like you could impose or vote to impose the death penalty.

JUROR **DELUZAIN:** I haven't considered all of the possibilities but I don't think so.

R. **464-66.**

Mrs. Deluzain had clearly expressed that she was not entirely foreclosed **to** voting for the death penalty, and could do so under appropriate circumstances. Her view was further reiterated in her responses to questions from defense counsel.

MR. BURR: ... [T]hinking about it in the context of the duty of citizenship, is there a kind of case you could conceive of outside the prison setting where you might be able to vote for the death penalty?

. . . .

JUROR DELUZAIN: ... I don't think I would ever close the door on any possibility, just to be as honest as I can. I can't frankly imagine it, you know, aside from the instance that I gave you. Perhaps you could stand up and give me fifteen examples and I would say, oh, yeah, in that case I would have thought about those. Does that answer your question?

MR. BURR: Well you would not be closed off to the possibility of voting for the death sentence in a case outside of the prison context if it was in your scale, if it came up to the kind of cases that's as bad as prison would be?

JUROR DELUZAIN: No, I would not necessarily be closed off should I be introduced to something that has not entered my thinking heretofore.

R. 467-68.

Mrs. Deluzain made clear that her views about the death penalty would not impair her ability to function on the jury, and that she was not "closed off' to considering factors in favor of death that she had not previously perceived.

The State then asked Mrs. Deluzain one last question which became the basis for its motion to strike her for cause.

MR. PAULK: ... Is yourfeelings [sic] against the death penalty such that you could set aside that feeling and if the murder [w]as aggravated enough vote for the death penalty? I mean, can you set aside your opposition to the death penalty?

JUROR **DELUZAIN:** Honestly, **I'm** not sure that I can.

R. **470.**

Subsequently, the trial court granted the State's motion to excuse Mrs. Deluzain for cause. The following colloquy took place with respect to that motion.

> MR. PAULK: Your Honor, I would move to strike her for cause. I think hex last answer was that she honestly didn't think that she could set aside her feelings for the death penalty.
>
> MR. BURR: Your Honor that's not the test. The test is whether she could give a fair consideration and she said several times that she could. She clearly has strong feelings about the death penalty but the t[e]st under Witherspoon and Witt is not whether you have strong feelings that would be difficult to set aside. The question is whether you think you could fairly make a decision despite those feelings and she said several times that she could, so we would oppose the challenge

R. 471.

The Supreme Court in Witherspoon held that venire members who have general objections to the death penalty could not be excluded from jury service since it would leave a jury composed primarily of people "uncommonly willing to condemn a man to die." 391 U.S. at 521. The Court concluded that

> a sentence of death cannot be carried out if the jury that imposed or recommended it was chosen by excluding veniremen for cause simply because they voiced general objections to the death penalty or expressed conscientious or religious scruples against its infliction.

Id. at 522.

The Court later held in Witt that the proper standard for determining when a prospective juror could be excluded for cause because of his or her views on capital punishment was whether the juror's views would "prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath." 469 U.S. at 424 (quoting Adams v. Texas, 448 U.S. 38, 45 (1980)). Examining the entire voir dire examination of Mrs. Deluzain, it is clear that her view against the death penalty was not so entrenched that it would "prevent or substantially impair" her ability to function as a juror. She noted continually that her mind was open to the possibility of voting for imposing the death sentence in situations beyond the one example she gave if she found the factors in aggravation to be sufficient. See Sanchez-Velasco v. State, 570 So.2d 908, 915-16 (Fla. 1990)(venirepersons who indicated unequivocally that they could not put aside convictions and follow the law properly excluded; "no venireperson was eliminated who indicated in any way that he or she could follow the law.")

While Ms. Deluzain's last response indicated that she was not sure if she could set aside her opposition to the death penalty, that statement cannot be taken out of context. Mrs. Deluzain was never directly asked by the State whether she could follow the law and impose a death sentence if the aggravating factors were found to outweigh the mitigating factors. While the prosecutor began in his final inquiry to ask that question, Mrs. Deluzain's last

remark was purely in response to the prosecutor's question: "can you put aside your opposition to the death penalty?" The prosecutor himself, in moving for Mrs. Deluzain's exclusion, interpreted her response to be limited as such ("she honestly didn't believe she could set aside her feelings for the death penalty"). Moreover, the trial court never made any inquiries of Mrs. Deluzain to determine if her general opposition to the death penalty would have impaired her ability to follow the law. Simply put, Mrs. Deluzain was never asked any question -- nor did she give any response --that would have demonstrated that she could not function properly as a juror under the Witt standard.

While "determinations of juror bias cannot be reduced to question-and-answer sessions which obtain results in the manner of a catechism," Witt, 469 U.S. at 424, the rest of the voir dire examination gives no hint that Mrs. Deluzain would be so closed-minded as to be unable to function as a juror. In fact, the rest of the voir dire examination portrays the exact opposite: she was willing to consider imposing the death penalty in at least one circumstance and displayed a repeated willingness to consider its imposition in other situations.

Mrs. Deluzain's voir dire responses stand in stark contrast to the responses of those venirepersons that the Court found were properly stricken for cause in Randoph v. State, 562 So.2d 331 (Fla. 1990), and Lambrix v. State, 494 So.2d 1143 (Fla. 1986). In Randolph, the challenged venireperson had "vacillated badly" on the question of whether she could impose the death penalty under any circumstance. The Court correctly concluded that "given juror Hampton's equivocal answers, we cannot say that the record evinces juror Hampton's clear ability to set aside her own beliefs 'in deference to the rule of law.'" 562 So.2d at 336-37 (quoting Buchanan v. Kentucky, 483 U.S. 402 (1987)). Likewise, in Lambrix, the challenged venireperson "repeatedly wavered when questioned about her ability to vote in favor of the death penalty," 494 So.2d at 1146. In determining that the venireperson's opposition to capital punishment would "substantially impair her ability to act as an impartial juror," id., the Court particularly noted that "[t]he fact that Mrs. Hill told the trial judge that she could not vote for the death penalty under any circumstances is controlling." Id.

The synthesis of the Court's rulings in Sanchez-Velasco, Randolph and Lambrix yields the following rule for determining whether or not a venire member is Witherspoon/Witt excludable: if venire members respond in any way that they can follow the law and are not closed-minded with respect to their ability to impose the death sentence under particular situations, they cannot be subject to exclusion for cause; if, however, venire members

equivocate and leave the impression that they cannot impose the death penalty under any circumstances, then they are excludable for cause. This rule comports with and serves to protect both the defendant's sixth amendment right to have a jury that is not just comprised of people "who are uncommonly willing to condemn a man to die," Witherspoon, 391 U.S. at 521, and "the State's legitimate interest" in removing potential jurors who would "frustrate [it] . . . in administering constitutional capital sentencing schemes by not following their oaths." Witt, 469 US. at 423.

Mr. Foster submits that the "reasonable doubt" standard of Singer and its progeny, which is sufficient for striking a venire member whose responses leave a reasonable doubt that he would not be impartial on account of bias towards guilt or the death penalty, has no place in the Witherspoon/Witt context where a mutual balance of interests must be maintained. Where the only interest is the protection of the defendant's constitutional right to a presumption of innocence or to have his capital sentence reliably determined free of any juror bias, then the reasonable doubt standard serves its purpose since the State has no countervailing interest that must also be protected. But where the State and the defendant both have interests that are equally critical and must both be protected, the reasonable doubt standard is not sufficient. It would effectuate a return to the wholesale exclusion of jurors that Witherspoon sought to cure, since -- by definition -- any venireperson who is opposed to the death penalty raises reasonable doubt as to his or her ability to impose a capital sentence.

If reasonable doubt is, however, the standard by which the Court will engage both the question of whether a venire member was a Witherspoon excludable and whether a venire member was biased in favor of guilt or death, then the reasonable doubt standard must be applied equally and fairly in both situations to avoid a due process violation. In Mr. Foster's case, the trial court fell woefully short of applying "reasonable doubt" equitably in its assessment of motions to excuse venire persons for cause. With respect to the defendant's motions to excuse venire members Pope, Pelland, and Minor for cause, the trial court showed a callous disregard for Singer's reasonable doubt standard. Yet with respect to the State's motion to exclude venire member Deluzain, the trial court showed a hyper-vigilance and adherence to the reasonable doubt standard. Such an unexplainable difference in the application of law upon similarly situated perons works a denial of due process. See McLaughlin v. Florida, 379 U.S. 184, 192 (1964); DeAyala v. Florida Farm Bureau Cas. Ins., 543 So.2d 204, 206 (Fla. 1989).

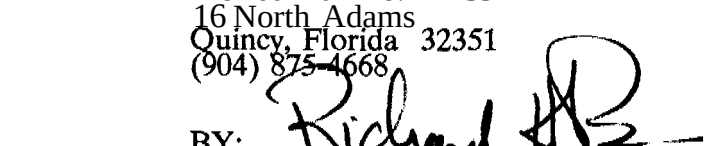
CONCLUSION

For the foregoing reasons, Mr. Foster respectfully requests that the Court vacate the judgment of conviction under Rule 3.850, or, in the alternative, remand for an evidentiary hearing pursuant to Rule 3.850, **or, in** the alternative, reduce the sentence of death to a sentence of life imprisonment, or, **in** the alternative, vacate the sentence of death **and** remand for a new sentencing trial.

Respectfully Submitted,

RICHARD H. BURR
Florida Bar No. 407402
STEVEN W. HAWKINS
NAACP Legal Defense and
Educational Fund, Inc.
99 Hudson Street, 16th Floor
New York, New York 10013
(212) 219-1900

STEVEN L. SELIGER
Florida Bar No. 244597
16 North Adams
Quincy, Florida 32351
(904) 875-4668

BY: 
Counsel for Appellant

CERTIFICATE OF SERVICE

I, RICHARD H. BURR, hereby certify that a copy of the foregoing motion has been served upon counsel for Appellee by sending a copy by United States Mail to Mark Menser, Esquire, Assistant Attorney General, Department of Legal Affairs, The Capitol, Tallahassee, Florida 32399-1050, this 19th day of September, 1991.

Richard H. Burr
Counsel for Appellant