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

REPLY BRIEF FOR APPELLANT

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ARGUMENT IN REPLY TO ANSWER BRIEF OF APPELLEE

A. MR. FOSTER DID NOT INAPPROPRIATELY INJECT GUILT-INNOCENCE ISSUES INTO THE RESENTENCING TRIAL OR RAISE ISSUES FOR THE PURPOSE OF DELAY

The attorney general argues that Mr. Foster filed the Rule 3.850 motion and the motion to preclude use of the prior testimony of Anita Rogers in an attempt to transform his resentencing trial into a guilt-innocence proceeding, to create "residual doubt" about guilt. Answer Brief of Appellee (hereafter, "AB"), at 21-23. Since guilt-innocence questions have no place in a Florida capital sentencing proceeding, King v. State, 514 So.2d 354, 357-58 (Fla. 1987), the attorney general suggests that this is reason enough to deny any relief in connection with the Rule 3.850 motion (addressed in Point I of the Brief for Appellant) or the motion to preclude use of Ms. Rogers' previous testimony (addressed as a denial of the Sixth Amendment right to confrontation in Point II of the Brief for Appellant). The attorney general has mischaracterized and distorted Mr. Foster's position in relation to these issues.

The Rule 3.850 motion does raise questions pertaining to guilt and innocence and the validity of Mr. Foster's original conviction. Nevertheless, it bears a direct relationship to the resentencing proceeding, for one of the grounds of conviction was felony murder, and one of the aggravating circumstances relied on by the State in the resentencing was the felony murder circumstance, Fla. Stat. § 921.141 (5)(d). Mr. Foster could challenge the use of this aggravating circumstance only by attacking the conviction, and that, in part, is what the Rule 3.850 did.[1]

[1]The Rule 3.850 motion alleged that Mr. Foster would not have been convicted of felony murder if the jury had known the facts suggesting that he was not involved in any underlying felony, and that these facts were not presented because of the prosecutor's Brady violation or defense counsel's ineffective assistance.

In the resentencing proceeding, Mr. Foster continued to raise the question about whether he committed a felony murder through the motion to preclude the State from using the previous testimony of Anita Rogers. This motion was focused on Ms. Rogers' testimony, because her testimony was critical to the three aggravating circumstances which the State sought to establish:

(1) She alone provided the evidence that Mr. Foster intended to rob the victim. There was no other evidence that the murder occurred during the commission of a felony.

(2) She alone provided the evidence of the heightened premeditation necessary to establish the cold, calculated, premeditated aggravating circumstance. As we explained in Point XI of the Brief for Appellant, at 68-73, Rogers' testimony about the exchange of rings with Mr. Foster was the State's most important evidence in support of this circumstance.

(3) She provided evidence important to the heinous atrocious, or cruel aggravating circumstance as well, for the testimony which established the felony murder circumstance and which was crucial to the cold, calculated circumstance also supported the State's theory on the heinous, atrocious, or cruel circumstance. One of Mr. Foster's defenses to this circumstance was to show that the heinousness of the murder was a product of mental illness, thus invoking the ameliorative rule of Huckaby v. State, 343 So.2d 29 (Fla. 1977). See Point **X** in the Brief for Appellant. Ms. Rogers' testimony about his planning and premeditating a felony and murder tended to prove that the heinousness of the murder was not connected to mental illness.

In short, Ms. Rogers' credibility as a witness was critical to the State's case in

aggravation. The motion to preclude, based upon the violation of Mr. Foster's right to confrontation, sought to force the State to put Ms. Rogers' testimony on live so that her credibility could be tested and her testimony impeached. While the concerns raised in connection with Ms. Rogers' resentencing testimony overlapped the Rule 3.850 motion, they were plainly not focused on "doubt about guilt" in the resentencing trial. They were focused on the evidence central to the State's proof of aggravating circumstances. To the extent that Mr. Foster's challenge to Rogers' testimony in support of the aggravating circumstances also raised questions about guilt -- because it questioned whether he committed the murder in the commission of a felony or planned and premeditated the murder -- his challenge did not inappropriately interject guilt-innocence issues into the resentencing proceeding.

The attorney general also suggests that Mr. Foster's Rule 3.850 motion, motion to preclude use of Rogers' previous testimony, and motion for production of Rogers' and Evans' mental health records (addressed in Point IV of the Brief for Appellant) were all filed "at the last minute" and "for delay." AB, at 25-26. Such a suggestion ignores the record and is an inappropriate attempt to prejudice the Court against Mr. Foster by the present-day version of "red-baiting" in capital cases.

The record reveals that the Rule 3.850 motion was filed when it was because it was the product of Mr. Foster's pretrial investigation, which continued up to the day before the Rule 3.850 motion was filed, when the deposition of Gail Evans was taken. R. 28-32. As the record reflects, the revelations that occurred in the Evans deposition were the catalyst for the Rule 3.850 motion. Id. The motion to preclude the use of Rogers' previous testimony and the motion for production of Rogers' and Evans' mental health records were filed when they were because of the State Attorney's equivocation about whether to produce Rogers' and Evans'

testimony by calling them anew as live witnesses or by introducing their previous testimony. *See*, e.g., **R. 82, 96-97, 793-96, 803.** Indeed, when both of these matters arose in the motions conference on the morning the trial began, the court deferred consideration of them until it was clear what testimony the State planned to offer from the women and whether any of it would be admitted. See R. 95-98. Neither the prosecution nor the trial court ever evinced a concern that these matters should have been taken up earlier.

The attorney general's allegation of "delay"thus has no place in this proceeding and should not be given its intended effect of prejudicing the Court against Mr. Faster or his attorneys.

B. THE TRIAL COURT'S DECISION TO EXCLUDE MS. ROGERS' 1989 CONVICTIONS, WHICH WERE PROFFERED FOR IMPEACHMENT, WAS NOT INFLUENCED BY THE METHOD OF PROOF OF THE PRIOR CONVICTIONS

The attorney general attacks Mr. Foster's argument that the trial court erred in excluding the evidence of Anita Roger's 1989 convictions, see Point III in the Brief for Appellant, by asserting that the proof of the prior convictions was inadequate. AB, at 23. This attack is wholly misplaced, for the record establishes that the State Attorney stipulated that the method of proving Ms. Rogers' 1989 convictions -- through an FDLE printout with a notation that the charges resulted in a plea of guilty -- was adequate. R. 859-60. Thus, the method of proving Rogers' convictions had nothing to do with the trial courts' ruling on the admissibility of the convictions,

C. MR. FOSTER DID NOT FAIL TO PRESERVE HIS CLAIM THAT THE SENTENCING ORDER REFLECTED INADEQUATE CONSIDERATION OF MITIGATING CIRCUMSTANCES

The attorney general argues that Mr. Foster's claim that the sentencing order reflected

inadequate consideration of mitigating circumstances, Point V in the Brief for Appellant, is barred for two reasons: (1) he failed to object to the sentencing order after it was announced, and (2) the case upon which he bases his claim, Campbell v. State, 571 So.2d 415 (Fla. 1990), does not apply retroactively. AB, at 29.

This argument is misplaced. While this Court does enforce a contemporaneous objection rule, it has never been applied to require trial court objections to a judge's sentencing order in a death case. None of the cases cited by the attorney general, AB, at 29, hold that the contemporaneous objection rule applies in such a situation. Nor, to counsel's knowledge, has any case so held. Further, Mr. Foster's argument is not based primarily on Campbell but rather, on Rogers v. State, 571 So.2d 526 (Fla. 1987). Accordingly, there is no retroactivity question.

D. THE ATTORNEY GENERAL'S MISCHARACTERIZATION OF THE EVIDENCE OF MR. FOSTER'S MENTAL DISABILITIES IS A FANCIFUL EFFORT TO AVOID THE FINDING THAT DEATH IS A DISPROPORTIONATE SENTENCE

The attorney general has grossly mischaracterized the evidence of Mr. Foster's mental disabilities, which was accurately set forth in the Brief for Appellant, at 9-17. To avoid any confusion, these mischaracterizations must be sorted out.

The attorney general says that our evidence focused on Mr. Foster's seizure disorder and hypothesized that Foster killed Mr. Lanier while he was having a seizure. AB, at 38-39. The attorney general then points out that there is no support for the theory that the murder occurred in the midst of a seizure, either from psychiatrists who were Mr. Foster's treating physicians at the time of the crime -- Dr. Mason and Dr. Sapoznikoff -- or from the lay persons who on other occasions had observed Foster's seizures. AB, at 39-40. Finally, using the

preceding analysis as a springboard, the attorney general argues that Mr. Foster's experts' opinions are not rooted in the evidence about Mr. Foster's life and the intrusion of mental illness into his life. AB, at 41-43.

It is hard to imagine a more misleading and distorted characterization of the evidence.

First, none of the testimony presented by Mr. Foster suggests that he killed Mr. Lanier during the course of a seizure. Rather, the testimony establishes two propositions concerning Mr. Foster's seizures: (a) there is sudden, rage-like behavior sometimes associated with his seizures, not during the seizures but before or after the seizures; and (b) his seizure disorder is symptomatic of underlying organic brain damage, which in combination with other disorders periodically impairs Foster's ability to appreciate and control his behavior, especially suicidal, self-mutilative, and violent behavior. In this respect, the seizure disorder is a sign of brain damage, but the brain damage, not the seizure disorder itself, is the underlying cause of out-of-control, irrational behavior.

Second, the opinions of Dr. Mason and Dr. Sapoznikoff are not in conflict with the opinions of Dr. Vallely and Dr. Merikangas. Dr. Mason and Dr. Sapoznikoff evaluated Mr. Foster's trial competency and sanity in 1975 and found that he was competent and sane. R. 1821, 1822. However, one must look beyond Mason's and Sapoznikoff's pretrial letters -- to the many-year history of their and others' treatment of Mr. Foster -- to appreciate that Mason and Sapoznikoff and others also found the same underlying disorders as Dr. Vallely and Dr. Merikangas. This history is compiled in Defendant's Exhibits 1 and 2, and it reveals (a) that Mr. Foster was consistently diagnosed as psychotic (sometimes more specifically, as paranoid schizophrenic or schizophrenic), as having organic brain dysfunction, and as having a dysfunctional and disordered personality, and (b) that these disorders were frequently

associated with his suicidal, self-mutilative, and violent behavior. The conflict that the attorney general sees between Mason and Sapoznikoff on the one hand and Vallely and Merikangas on the other is thus the product of superficial reference to pretrial reports having nothing to do with the probing questions called for by the inquiry into mitigating circumstances. The most telling proof of this is that the State did not call Dr. Mason or Dr. Sapoznikoff -- or any other expert -- to try to rebut the testimony of Dr. Vallely and Dr. Merikangas.

Finally, Dr. Vallely's and Dr. Merikangas' opinions are firmly and deeply rooted in Mr. Foster's life history. A multitude of lay witness described the disabilities suffered by Mr. Foster and how those disabilities impaired his life. See Brief for Appellant, at 9-13. Their testimony made the expert testimony virtually unnecessary, for they made clear that Mr. Foster's self-destructive and violent behavior was the product of serious illness, not meanness of spirit. Expert opinion could not have been more deeply rooted in the real evidence of Mr. Foster's life.

Accordingly, the Court should not be misled by the attorney general into viewing the evidence of Mr. Foster's mental disabilities as inconsistent with similar evidence in those cases, cited in the Brief for Appellant, at 75-78, in which the Court has found death a disproportionate sentence.

E. MR. FOSTER HAS PROPERLY PRESERVED HIS CLAIM THAT THE TRIAL COURT ERRED IN FAILING TO EXCUSE THREE JURORS FOR CAUSE

The attorney general has again misrepresented the record in arguing that Mr. Foster has failed to preserve his claim that the trial court erred in denying challenges for cause with respect to three jurors.

Under Florida law, error in denying a challenge for cause is preserved by a showing

"that all peremptories had been exhausted and that an objectionable juror had to be accepted." Pentecost v. State, 545 So.2d 861, 863 n. 1 (Fla. 1989). Mr. Foster has made such a showing:

(1) He exhausted all of his peremptories. R. 781.

(2) He twice requested additional peremptories, and his requests were denied. R. 666-67, 782.

(3) Two jurors sat on the jury whom he had sought to excuse for cause: Sanvanda Dillard, R. 132-36 (challenged for her knowledge that Mr. Foster was sentenced to death in his first trial), and Frances Kay Redmond, R. 531 (challenged for her bias in favor of the death penalty). See Trotter v. State, 576 So.2d 691, 93 (Fla. 1990) (holding that the showing that an objectionable juror had to be accepted can be made by showing that "an individual ... actually sat on the jury ... whom the defendant ... challenged for cause").

The merits of Mr. Foster's claim must, therefore, be decided.

WHEREFORE, for these reasons and for those set forth in the Brief for Appellant, 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 under Rule 3.850, and 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,

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OF SERVICE

I, RICHARD H. BURR, hereby certify that a copy of the foregoing brief 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 11th day of November, 1991.

_____
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