IN THE SUPREME COURT OF FLORIDA

CHARLES KENNETH FOSTER,

Appellant,

v. CASE NO. 82,335

STATE OF FLORIDA,

Appellee.

_____/

ON APPEAL FROM THE CIRCUIT COURT
OF THE FOURTEENTH JUDICIAL CIRCUIT
IN AND FOR BAY COUNTY, FLORIDA

ANSWER BRIEF OF APPELLEE

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STATEMENT OF THE CASE AND FACTS

The Appellee accepts Mr. Foster's statements regarding jurisdiction and the course of proceedings, but does not accept his statement of the "facts" beyond its value as representing Mr. Foster's latest theory of the case. The operative facts of the case are as follows:

> Anita Rogers, 20 years of age, and Gail Evans, 18 years of age, met defendant and the victim, Julian Lanier, at a bar. They knew defendant, but the victim was a stranger.
>
> The girls, after a discussion, agreed to go to the beach or somewhere else to drink and party with the men. The victim bought whiskey and cigarettes, after which the four of them left in the victim's Winnebago camper. The victim was quite intoxicated and surrendered the driving chore to Gail. The defendant and the girls had planned for Gail to have sex with the victim and make some money. Gail parked the vehicle in a deserted area and, after some conversation concerning compensation, the victim and Gail began to disrobe.
>
> Defendant suddenly began hitting the victim and accusing him of taking advantage of his sister. Defendant then held a knife to the victim's throat and cut his neck, causing it to bleed profusely. They dragged the victim from the trailer into the bushes where they laid him face down and covered him with pine branches and leaves. The could hear the victim breathing so defendant took a knife and cut the victim's spine.
>
> The girls and defendant then drove off in the Winnebago and found the victim's wallet underneath a mattress. The defendant and the girls split the money found in the wallet and left the vehicle parked in the parking lot of a motel.
>
> The next morning Anita Rogers went to the Sheriff's Department and reported what had happened . . .

Foster v. State, 369 So.2d 928, 928-929 (Fla. 1979).

At trial, Foster initially attempted to rely upon the defense of "seizure", as well as an effort to portray Ms. Rogers and Ms. Evans as co-conspirators. On the witness stand, however, Foster abandoned this defense and confessed:

> I reckon I'll just cop out. I have done it, killed him deader than hell. I ain't going to set up here, I am under oath and I ain't going to tell no fucking lies. 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 and I know I never told you about it, but I killed him.

369 So.2d at 929.

Mr. Foster's original trial resulted in a 12-0 recommendation of death from the advisory jury and a death sentence from the trial judge (as actual sentencer). Id. In sentencing Foster, the trial judge found two statutory aggravating factors ("murder during a felony" and "heinous, atrocious or cruel"), and no mitigating factors. Id.

After extended state and federal collateral review,[1] Foster was granted a new "penalty phase" trial in Foster v. State, 518 So.2d 901 (Fla. 1987), due to perceived Hitchcock v. Dugger, 481 U.S. 393 (1987), error.

The new penalty phase hearing produced the following evidence and testimony:

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[1] Foster v. State, 400 So.2d 1 (Fla. 1981); Foster v. Strickland, 707 F.2d 1339 (11th Cir. 1983); Foster v. Dugger, 823 F.2d 402 (11th Cir. 1987).

(1) Joseph Coram

Mr. Coram was formerly an investigator with the Bay County Sheriff's Office (R 941). Mr. Coram was assigned to the investigation shortly after two women (Evans and Childers) reported the murder of a "Mr. Todd" (R 941-942). Coram went to the crime scene, discovering a large puddle of blood on the ground and the brush-covered body of Mr. Lanier (R 944).

Mr. Coram eventually interviewed Mr. Foster (after Foster's arrest) and received a detailed confession (R 947). Mr. Foster did not claim to be ill and he demonstrated a good memory (R 948). (Mr. Foster's detailed confession appears in Volume I of this record from pages 5-7). An important feature of this confession is Foster's statement that he wore one of the girls' rings during the murder rather than his own (R 5-7).

(2) Juanita ("Anita") Childers

Ms. Childers' (now Mrs. Rogers) original trial testimony was read into the record (R 952, et seq.).

Anita had only known Kenny Foster about eighteen months prior to the murder (R 954). On July 14, 1975, Anita was supposed to meet her friend, Gail Evans, at the Bayshore Bar (R 954). The date was for 9:30, but Anita did not appear until 11:15 (R 954). The two friends had no plans to meet Foster at all (R 955).

Shortly after her arrival Foster came into the bar with a "Mr. Todd" (R 956). The foursome decided to go "party", and Gail was supposed to make some money off of Mr. Todd (R 957).

"Mr. Todd" was Julian Lanier. Lanier was too drunk to drive, so Evans drove his Winnebago (R 958). Anita and Foster were in the back of the camper (R 958). Foster advised Anita of his intent to rob (and harm) "Mr. Todd" and asked Anita to swap rings with him (R 958-959). Foster's ring had a "K" on it and Foster feared leaving a telltale mark on the victim's body (R 970).

When the foursome reached the murder scene Mr. Lanier asked Ms. Evans for sex, and argued with her over the issue of prepayment (R 961). When Gail Evans relented on the prepayment issue, Foster launched his attack upon Lanier (for trying to have sex with his "sister") (R 961). Foster beat up Lanier and produced a knife (R 961). Foster cut Lanier's throat, causing blood to spurt onto Anita (some three feet away) (R 963). Foster knocked Lanier to the floor and grabbed Lanier's genitals, causing Lanier to react and Foster to renew his attack (R 963). Lanier was dragged outside (R 963). His body was covered with branches (R 965). Foster "cursed" the old man for "not dying" and uncovered him and severed his spine (R 965).

Foster searched Lanier's vehicle, found Lanier's wallet and split the money therein three ways (R 966). The trio then disposed of the knife, bloody sheets and victim's clothing (R 967). The Winnebago was left at a motel (R 967). The trio swam in the ocean and a motel pool to remove any blood from their clothes (R 968-969).

(3) Gail Evans

Gail Evans' 1975 testimony was also read. Gail Evans knew Foster a long time (R 982). Gail was to meet Anita for a night of partying (R 984). Anita was late (R 984). After Anita arrived, Foster showed up at the bar with "Mr. Todd" (R 984).

Gail's story tended to follow Anita's (R 985-990). She recalled, however, that "Mr. Todd" asked Foster not to kill him ("don't do it"), during the fight (R 992).

Gail Evans appeared at the hearing and testified to having no recollection of Foster mutilating Lanier's body by cutting off Lanier's penis (R 1007-1015).

(4) Bill Lewis

Mr. Lewis testified to the taking of various photographs.

(5) Dr. Sybers

The medical examiner gave testimony relevant to the "heinous, atrocious or cruel" aggravating factor.

The victim had "striking contusions" and edema around both eyes (R 1072). Lanier's nose was broken (R 1073), there were lacerations to his forehead (R 1073), there were two stab wounds on the left of his neck (R 1073), and one behind his right ear (R 1073). Lanier had a defensive wound on his hand (R 1082).

The drag marks on Lanier's body were red, indicating that he was alive at the time (R 1076-1077).

Lanier would have lived twenty to thirty minutes after the neck wound (R 1085), and five minutes after his spine was severed (R 1086). When tested, Lanier's blood alcohol level was .18 (R 1092).

The cause of Lanier's death was respiratory arrest (R 1091).

(6) Charles Foster

The advisory jury heard Foster's open-court confession (R 1096-1102).

The defense then called its mitigating witnesses:

(1) Andre Childers

The ex-husband of Anita Childers, and a friend of Foster's brother. Childers testified that Anita claimed Foster cut off Lanier's penis (R 1118), and also that Foster was prone to irrational fits of violence (R 1126). The only incident actually witnessed by Childers was when Foster punched him (R 1126).

(2) Connie Thames

Connie Thames allegedly spoke to Anita in 1982, and was told that Foster went berserk (R 1131). Connie alleged that Anita knew that Foster had gone to a clinic and obtained drugs earlier on the day of the murder (R 1130). Connie alleged that Anita told her that the girls were to "prostitute" Lanier[2] and that Foster was to go along for protection (R 1131).

Ms. Thames also claimed that Anita said that Foster swapped rings during the fight rather than before it (R 1131). Ms. Thames also changed the details of the final killing, alleging that Foster was lying in bed due to a pending seizure and had to go outside to finish off Mr. Lanier (R 1132).

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[2] Ms. Thames refers to the victim as "Lanier", yet the two witnesses always called Lanier "Mr. Todd".

On cross, Ms. Thames alleged that she was unaware of the fact that in 1982 Ms. Childers was a heavy drug addict (R 1134-1136). Thames also said that Anita never said that Lanier was drunk or was grabbed (in the genitals) by Foster (R 1138).

(3) Dr. Vallely

The first defense expert, Dr. Vallely is a psychiatrist who saw Foster in 1988, thirteen years after the crime (R 1154). Vallely opined that Foster has neurological deficits, brain damage and a borderline personality disorder (R 1169-1172).

Vallely noted that Foster's behavior met the three components of "psychotic" behavior, particularly the component relating to "payoffs" (R 1172). The term "payoff" meant that Foster's behavior did not produce a reward or benefit to him (R 1172). Vallely felt Foster's crime reflected an inability to conform to social standards of behavior (R 1190-1191).

Dr. Vallely would not say that Foster was insane (R 1192), or that he did not know what he was doing (R 1195). Vallely just felt that Foster could not help himself (R 1195). Vallely attached no significance to Foster switching rings or planning the crime (R 1194).

Vallely had to agree that Foster's "seizure" defense was goal-oriented (R 1205), and that Foster's in-court apology for swearing during the confession reflected socially accepted conduct (R 1206). Vallely kept alleging a loss of memory regarding Dr. Sapoznikoff's[3] reports (R 1210-1211), would not

[3] Dr. Sapoznikoff examined Foster at the time of the original trial and, in fact, had known Foster for years prior to that. Sapoznikoff said Foster was sane. (R 33-36).

agree with Sapoznikoff's opinions because he "wasn't there" (R 1209), and agreed that he saw Foster under different conditions, thirteen years after the fact (R 1212).

On redirect, Vallely alleged that one could have goal-oriented behavior during an irresistible impulse (R 1230).

(4) James Ward

Foster's cousin, James Ward, testified that Foster told him he heard "the devil" (R 1244). Ward said Foster's family drank (R 1241), and Foster's father once "whipped" him (R 1242).

(5) Ed Burch

Foster's uncle alleged Foster's family was so poor they lived in a house with no plumbing and relied upon a mule and buggy for transportation (R 1248).

(6) James Foster

Foster's brother claimed that, as a small child, Foster fell out of the family car, a late model 1948 Plymouth.

(7) Don Mace

A co-worker described a seizure which incapacitated Foster (R 1273-1276).

(8) Patricia Gilliland

Ms. Gilliland was a nurse who described Foster's appearance when admitted to her clinic (R 1286).

(9) Larry Foster

Another brother, this one testifying to Foster's drug use, seizures, and working as a performing clown (R 1292).

(10) Charles Lindsey

A clinic employee who testified to Foster's appearance while at Bay Medical Center (R 1313-1317).

(11) Francis Foster

Foster's ex-wife testified that as a young man Foster baby-sat his siblings while his parents worked (R 1325). She alleged that Foster was popular, but mentally ill (R 1325-1343).

On cross, Ms. Foster admitted that many instances of "self-mutilation" by Foster involved the defendant cutting himself while in jail and agreed that such conduct could get Foster transferred to a hospital (R 1346).

(12) Barbara Mace

A neighbor, Ms. Mace, testified to Foster being "depressed" (R 1349-1355).

(13) Dr. Merikangas

Dr. Merikangas, a psychiatrist, testified that Foster was brain damaged, had reactive hypoglycemia, epilepsy and a "borderline personality disorder" (R 1359).

Dr. Merikangas was a strident defense advocate, a stance which, as in other cases (see argument, below) no doubt cost him in terms of credibility.

On direct examination, for example, Merikangas freely answered questions, did not engage in arcane quibbling over adjectives, and noted whenever possible those areas with which he was in agreement with Dr. Sapoznikoff and Dr. Mason. (See, i.e., R 1367).

On cross-examination, all of this changed. At the outset, Merikangas quibbled with the prosecutor over the term "security risk." (R 1384). To the state, it meant that Foster was an inmate charged with a major offense and thus subject to recognized security measures, while Merikangas read "security risk" as meaning that his client was a "risk to himself" (i.e., sick).

When the state began to confront Merikangas with reports by Dr. Sapoznikoff and Dr. Mason, Merikangas suddenly refused to even acknowledge that the gentlemen were doctors, (R 1385-6), even though on direct, while cooperating with defense counsel, Merikangas had had no such problem. (R 1367). Only after more quibbling did Merikangas state that he would "grant" that the doctors were doctors but without vouching for their credentials. (R 1386).

Merikangas also suddenly alleged ignorance of the testimony of the neutral experts at trial. (R 1388). He also revealed that he did not review all of the court files while providing his "diagnosis". Instead, he allegedly looked only at the parts of the file "relevant to" his diagnosis, (R 1389) as provided by defense counsel. (R 1389).

When asked if any specific portion of Foster's brain was damaged, Merikangas said the damage was "generalized" (R 1390). When a follow-up question asked the doctor if he had located any specific damage, Merikangas said he did not know what the word "locate" meant! (R 1390). Merikangas said he requested an "M.R.I." scan on Foster. (R 1391). When asked the result, the doctor brushed off the question by saying, "The M.R.I. scan does not show the kind of damage I'm looking for." (R 1391). On further questioning, the doctor stated that the M.R.I. can exclude "the entire textbook of neurology." (R 1391). Then the doctor confessed that Foster's M.R.I. was completely normal (R 1392). The "doctor" was quick to note that the normal scan does not rule out "personality disorders."[4] (Id.).

When the prosecutor challenged Merikangas on the ability of doctors to diagnose alcoholism, Merikangas said that alcoholism affected the "mind", not the "brain", and that the only way to test for alcoholism was to run blood tests on a "falling down drunk" and then ask witnesses if the patient was "always" this way. (R 1393).

Turning to the crime itself, Merikangas again utilized highly subjective assessment criteria. For example, Merikangas did not see "planning" or "logic" in Foster's exchange of rings (the "K" ring for class ring swap), but only because Merikangas

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[4] The M.R.I. did, however, rule out the physical and neurological damage Merikangas was hired to testify to, no doubt why Merikangas tried to discredit the very test he ordered as unnecessary. (R 1391).

did not think that Foster was correct in suspecting that the "K" ring might leave a mark on the victim. (R 1407).

Merikangas also suggested that Foster could have used a tire iron on the victim rather than a fist. (R 1408). The doctor used the same subjective criteria to criticize "how" Foster "robbed" Lanier (i.e. holding a knife to him) as "inefficient." (R 1409).

In sum, Merikangas picked and chose only those snippets of Foster's records which supported his diagnosis and rejected the rest.

It should be noted that Doctors Mason and Sapoznikoff provided reports on Foster's mental condition at the time of the trial (R 1818, 1822) and found Foster sane and competent. While the hired experts saw Foster briefly and over a decade after trial, Dr. Sapoznikoff knew Foster and had treated Foster for years. (R 33-36). The doctor found Foster sane, competent, and was unable to verify his "seizure" story. (Id.) Dr. Mason found Foster's stories inconsistent (R 37-38) and felt Foster was sane too.

At the close of the testimony and arguments the court instructed the advisory jury regarding various statutory aggravating factors, including the "cold, calculated and premeditated" factor. Due to defense objections regarding the CCP instruction, the court expanded the instruction to include this caveat:

> 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).

The advisory jury recommended a death sentence by an 8-4 vote. The trial judge sentenced Foster to death.

In a lengthy and detailed order the Court found the following aggravating factors: (1) murder during a felony (robbery); (2) murder was heinous, atrocious or cruel (R 1554-1556), and (3) murder was cold, calculated and premeditated (R 1556-1557).

The original resentencing order noted mitigating factors mentioned by Foster but did not discuss them, prompting another remand.

On remand, the court, in its order of August 12, 1993, found that most of the "mitigating factors" were established by the defense, but were entitled to little weight. Those factors were: (1) "abusive family background"; (2) poverty; (3) physical illness; (4) love for his family; (5) alcohol or drug addiction; (6) "troubled personal life"; (7) physical injuries; (8) "lack of childhood development"; (9) "effect of death of loved ones; (10) learning disabilities; (11) "potential for positive relationships", and (12) remorse. (R 359-367).

The lack of weight stemmed in part from the lack of any nexus between some of the factors and the crime, and in part from Foster's deliberate and carefully preplanned conduct which refuted the alleged mental illness factors. (Id.).

SUMMARY OF ARGUMENT

The Appellant raises three points in this action.

First, he alleges that death is not a proportional sentence for first-degree murder. The claim cannot be legally or factually supported.

Second, Foster alleges that the trial court erred in detecting conflict in the opinions of Drs. Vallely and Merikangas. This argument goes to the interpretation of a comment by Dr. Vallely and any subsequent rehabilitation of the witness. Even if the court "erred", however, its error was harmless.

Third, Foster challenges the court's special jury instruction on the "CCP" factor. Again, the instruction was sufficient but, even if it was not, any error was harmless.

ARGUMENT

POINT I

THE DEATH PENALTY WAS NOT A DISPROPORTIONATE SENTENCE FOR THE BRUTAL MURDER OF JULIAN LANIER

The first point on appeal is a challenge to the basic findings of fact which have guided this appeal from Foster v. State, 369 So.2d 928 (Fla. 1979), through Foster v. State, 614 So.2d 455 (Fla. 1992). This Court's last decision clearly affirmed the operative facts and stands as the law of this case. It is, therefore, inappropriate for Foster to now try and reargue settled facts.

In an analogous case, Waterhouse v. State, 596 So.2d 1008 (Fla.), cert. denied, ___ U.S. ___, 113 S.Ct. 418, 121 L.Ed.2d 341 (1992), this Court held:

> We previously rejected on direct appeal two of the arguments Waterhouse raises in this appeal. For that reason we reject his claim that the evidence does not support a finding that the crime was especially heinous, atrocious or cruel. Similarly, we reject the argument that the trial court improperly doubled factors . . .

Id. at 1017.

In Magill v. State, 428 So.2d 649, 652 (Fla.), cert. denied, 464 U.S. 865 (1983), this Court held:

> Appellant next argues that the trial court erred in finding three of the aggravating circumstances. He argues that the first, second and fourth aggravating factors are supported by the same evidence and thus are improperly cumulative. The validity of these aggravating circumstances was approved of in Magill I and was not a factor in our remand to the trial court. We need not, therefore, address this issue.

(emphasis added).

In Menendez v. State, 419 So.2d 312, 315 (Fla. 1982), the Court was even more explicit:

> Appellant contends that there is no evidence to support the finding that the murder was committed for pecuniary gain. . . . The state accordingly responds to this argument by saying that appellant may not attempt to reopen this issue which was settled in the initial appeal. We agree and adhere to our earlier conclusion that there was sufficient evidence to establish that the murder was committed in the course of a robbery.

Mr. Foster's egregious restatement of the facts is based upon an alleged (unverified) conversation between one of his friends (Ms. Thames), and Anita Childers many years after the crime. Even if Foster could reargue the settled facts of this case, no rational finder of fact would take this dubious hearsay over the record evidence.

The murder at bar took place during a planned "rolling" of the victim. In addition to the felony murder aggravating factor, this Court found both the "heinous, atrocious or cruel" ("HAC") factor and the "cold, calculated and premeditated" ("CCP") factor (quoting the trial court):

> The circumstances of the killing indicate a consciousless and pitiless regard for the victim's life and was unnecessarily tortuous to the victim, Julian Franklin Lanier. The victim did not die an instantaneous type of death. The victim was severely beaten prior to death. His nose was fractured, his face was severely bruised and his eyes were swollen shut from edema from hemorrhage and swelling resulting from the beating. 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." There is evidence that one of the girls present asked the defendant not to do it. The defendant

then proceeded to stab the victim in the throat. There 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.

After stabbing the victim in the throat, the defendant grabbed the victim by his testicles, or genitals, in order to move the victim outside. The victim groaned or moaned and the defendant stabbed the victim in the throat a second time. This second wound cut the victim's internal and external jugular veins. The victim could have lived from 20 to 30 minutes after this wound was inflicted.

Neither of these wounds to the neck severed the victim's vocal cords. There is evidence that the victim asked the defendant not to do it again before he was stabbed a second time.

After the second stab wound, the victim was dragged into the woods where he was covered with bushes. The marks on the victim's body indicated to the medical examiner, that the victim was either alive or dead a very short time before he was being dragged. It is consistent with what happened next to assume the victim was alive.

After the victim was covered in the woods, one of the girls accompanying the defendant reported to the defendant that she could hear the victim breathing. The defendant when went back to the victim, who was lying face down, uncovered him and cut the victim's spine with a knife. As described by one witness, there was no air coming from the body of the victim after she heard "the cracking" of the spine. The medical examiner indicated the victim could have lived 3 to 5 minutes after his spinal cord was severed.

This evidence establishes that the murder was especially heinous, atrocious or cruel.

The trial court relied on these same facts to find the murder to be cold, calculated and premeditated. In addition, the court relied on Foster's witness stand confession and Anita Rogers' trial testimony. Rogers testified that prior to the attack, Foster asked her to exchange class rings with him. Foster's ring bore the initial "K." He told

> Rogers that he wanted to switch rings because his ring would have left "K" impression on the victim, thus identifying him as the perpetrator. As the prosecutor argued to the jury, if Foster had not intended to kill the victim, it would have made no difference if there were "K" impressions on the victim because he would have been alive to identify Foster. These facts establish the existence of a careful plan or prearranged design to kill. (footnote omitted). Rogers v. State, 511 So.2d 526, 533 (Fla. 1987), cert. denied, 484 U.S. 1020, 108 S.Ct. 733, 98 L.Ed.2d 681 (1988).

Foster, supra, at 460-1.

Mr. Foster attempted to counter this evidence by taking a few alleged "facts" from Foster's past and recasting (doubling) those facts into as many harmonic "mitigating factors" as possible. For example, Foster allegedly had a "tough youth" but "loved his family" anyway. This was enough to allegedly support the following "factors": (1) "abusive family background" (TR 11); (2) poverty (TR 11); (4) love for his family (TR 11); (6) "troubled personal life (TR 11); (8) "lack of childhood development (TR 12); (9) "effect of death of loved ones" (TR 12), and (10) "learning disabilities".

Foster's alleged drug use and connected personality disorder, of course, were cited for (3) physical illness (TR 11); (5) alcohol or drug addiction (TR 11), and (7) physical injuries (TR 12).

Then, of course, came two factors of a very dubious nature: (11) potential for positive relationships, and (12) remorse.

These factors were found, but assigned little weight for obvious reasons.

First, Foster's alleged "poverty" included his Uncle Ed's story that Foster was born in the mid-1940's to a family so poor that they traveled by mule. Then, however, Foster's brother testified that at age 4 (around 1948 or so) Foster hit his head falling out of the family's 1948 Plymouth. (Apparently the mule was otherwise engaged that day). Also, according to other witnesses, both of Foster's parents held jobs. Thus, while Foster's family could well have been "poor", they hardly seemed destitute to the point of forcing Foster into a life of crime.

Second, there was simply no nexus between Foster's "mitigation" and this crime. Indeed, it is almost offensive (rather than mitigating) to suggest that any cold-blooded killer should be spared because he loves his own family, is saddened when his own relatives die, or, absurdly, "has the potential for positive relationships." Mr. Lanier had a family, also. Payne v. Tennessee, 501 U.S. ___, 111 S.Ct. 2597, 115 L.Ed.2d 720 (1991).

Third, Foster's allegedly "tough" youth provides no excuse for this crime. Rogers v. State, 511 So.2d 526 (Fla. 1987); Sochor v. State, 580 So.2d 595 (Fla. 1991); Valle v. State, 581 So.2d 40 (Fla. 1990). As noted by the sentencer, the mere fact of a difficult childhood does not explain or ameliorate Foster's crime or the brutal manner in which it was committed.

The principal mitigating evidence relied upon by Foster was his history of mental "illness" and the testimony of his two recently-hired experts, Dr. Vallely and Dr. Merikangas.[5]

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[5] In his brief, Foster refers to Merikangas as a doctor deemed an

The two newly-hired defense experts examined Foster over a decade after the crime and provided a helpful diagnosis which contradicted the findings of Drs. Mason, Sapoznikoff and Crandall in 1975 (R 23, 33-36, 37-38).

Dr. Merikangas, it should be noted, freely answered defense questions while avoiding questions by the State (compare R 1353-1382, 1383-1416). Merikangas would not even agree that the doctors who saw Foster in 1975 were psychiatrists (R 1386-1387), yet he gave unblinking credence to any information given by the defense.

Dr. Vallely was no better, ascribing Foster's crime to an irresistible impulse, while rationalizing that Foster could engage in goal-directed conduct in the course of such an impulse (R 1195).

The court was faced with the penalty phase equivalent of a "psychiatric shouting match", see Chestnut v. State, 538 So.2d 820 (Fla. 1989), given the dispute between the new experts and the record reports. The court was free to reject any incredible testimony. Rose v. State, 617 So.2d 291 (Fla. 1993), and was not bound by the opinion of any expert. See Card v. State, 497 So.2d 1169 (Fla. 1986) (defendant not proven incompetent just because new experts disagree with old experts); Strickland v. Francis, 738 F.2d 1542 (11th Cir. 1984); Wallace v. Kemp, 757 F.2d 1102

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outstanding expert by this Court in Fitzpatrick v. State, 527 So.2d 809 (Fla. 1988). No matter how Merikangas was perceived in 1988, he has been otherwise described as a "biased" witness given to "preposterous" opinions. Johnston v. State, 583 So.2d 657 (Fla. 1991); Bertolotti v. Dugger, 883 F.2d 1503 (11th Cir. 1989).

(11th Cir. 1985); Johnston v. State, 583 So.2d 657 (Fla. 1991); Carroll v. State, ___ So.2d ___ (Fla. 1994), 19 Fla.L.Weekly S187; Bates v. State, 506 So.2d 1033 (Fla. 1987).

Here, after careful consideration of all the experts' opinions,[6] the trial court reasonably concluded that Foster had a history of mental illness but was not operating under "extreme" or "substantial" impairment (TR 11). This conclusion was reasonable since all five experts agreed that Foster did not suffer from a psychosis, did not have a seizure (he could not physically attack Lanier during a seizure), and that he knew what he was doing during the murder and was capable of controlled, goal-oriented behavior.

In sum, therefore, three very strong statutory aggravating factors weighed in against irrelevant mitigating factors having little or no actual nexus to the crime. Foster did not kill Lanier during a seizure and he did not kill Lanier because his father's house was not a mansion. Foster brutally murdered Lanier, according to a careful scheme, and took his money. Foster killed his victim, hid the body, returned to sever Lanier's spine, re-hid the body, split the victim's money three ways, threw away the evidence, cleaned himself up, ate dinner and

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[6] From (R 1196-1200), Dr. Vallely admitted that his diagnosis would be wrong if Foster's confession was true, but then tried to repair his testimony, concluding that Foster's confession contained "no payoff" and was itself evidence of illness. Vallely's tactical opinion of how Foster should defend himself and the "sanity" of telling the truth is typical of unreliable psychological opinion. See Winick, Incompetency to Stand Trial: An Assessment of Costs and Benefits, 39 Rutgers Law Review No. 2/3 (1987).

went home. By no stretch of the imagination was Foster incompetent.

In terms of proportionality, this case compares with Dillbeck v. State, ___ So.2d ___ (Fla. 1994), 19 Fla.L.Weekly S408. In Dillbeck, the defense established nine "mitigating factors" akin to Foster's[7] and, like Foster, attributed his knife attack upon the victim to an impulse control deficit. These factors could not overcome Dillbeck's aggravating factors (i.e., prior conviction for violent crime, murder during a felony, "avoid arrest" and HAC).

This case is also analogous to Armstrong v. State, ___ So.2d ___ (Fla. 1994), 19 Fla.L.Weekly S408. In that case, the aggravating factors of "defendant was under sentence", "prior conviction for violent crime", "murder during a felony", "avoid arrest" and the victim's status as an officer more than offset such mitigating evidence as Armstrong's "sickly and troubled childhood", "good character" and "assistance to his family".

In Walls v. State, ___ So.2d ____ (Fla. 1994), 19 Fla.L.Weekly S377, the death penalty was upheld in the presence of six aggravating factors and nine mitigating factors, including Walls' lack of a criminal record, Walls' age, Walls' "emotional handicap", Walls' "low IQ", Walls' confession, his "loving family", his "kindness" and the fact that he was a good worker.

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[7] (1) mental impairment; (2) abused childhood; (3) fetal alcohol syndrome; (4) mental illness, (5) the defendant was treatable; (6) imprisonment in a violent jail when young; (7) loving family; (8) good behavior, and (9) remorse.

The sheer pitilessness and unnecessary torture attending this knife attack clearly compares with such cases as Haliburton v. State, 561 So.2d 248 (Fla. 1990); Floyd v. State, 497 So.2d 1211 (Fla. 1986); Duest v. State, 462 So.2d 446 (Fla. 1985), or Lusk v. State, 446 So.2d 1038 (Fla. 1984). Here, as in the cited cases, the victim died slowly (in fact, Mr. Lanier suffocated due to his spine being severed), and, given his defensive wounds and plea for mercy, had time to anticipate his death.

Under any reasonable standard, death was and is a clearly proportionate sentence.

POINT II

THE TRIAL COURT DID NOT COMMIT REVERSIBLE ERROR IN CONCLUDING THAT THE EXPERT OPINIONS WERE IN CONFLICT

During the direct examination of Dr. Vallely, defense counsel asked the doctor if he was aware of Mr. Foster's dramatic confession (on the witness stand) during trial. Dr. Vallely answered "yes", and in response to the next question (the impact of the confession on his diagnosis, if true) said:

> I'm not sure, to be perfectly honest with you. Kenny's statement at that time says 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.

(R 1196).

This "Freudian slip" was devastating to the defense, which immediately began to field damage control questions to its expert (about his being "confused" by the questions) (R 1196-1200).

The bottom line is that the trial judge clearly saw Dr. Vallely's inadvertent admission as an honest answer and relied upon that answer as showing some inconsistency in the opinions of Foster's hired experts to wit:.

> The evidence in support of these statutory mitigating factors consisted of the testimony of Doctors James Merikangas and James F. Vallely. Both mental health experts opined a diagnosis of severe borderline personality disorder and agreed that the defendant had long standing brain damage and psychosis. However, the Court does note there is a conflict in the evidence on the questions of whether the capital felony was committed while the defendant was under the influence of extreme mental or emotional disturbance and the capacity of the defendant to appreciate the criminality of his conduct to the requirements of law was substantially impaired. The conflict rises between the testimony of the experts presented by the defendant and the statement the defendant made in court, referred to in Paragraph 3 of the aggravating circumstances, in which the defendant stated his intention to kill the victim. In particular the Court notes the testimony of Dr. James F. Vallely, who stated that if what the defendant said on the stand is true, then his facts are not true and his opinion changed. The following dialogue took place on cross examination.
>
> Q: 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 the 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.
>
> Dr. Vallely then went on to state that he believed that the defendant didn't really know what happened and Dr. Vallely didn't think the in court statement was true. This Court finds from reviewing the entire record in this case that the defendant's in court statement is true and therefore this Court will find the defendant's expert testimony insufficient to support a finding that the defendant was under the influence of extreme mental or emotional disturbance or that his capacity to appreciate the criminality of his conduct was substantially impaired. However, due to the testimony of these two experts, the Court will find that there is sufficient evidence presented by the defendant to establish the existence of these two factors, as non-statutory mitigating factors by removing the adjectives "extreme" and "substantial" from consideration by this Court. Based upon the defendant's statement in court, the Court therefore gives these two non-statutory mitigating circumstances little weight in relation to the aggravating circumstances.

(R 362-363).

That interpretation of the testimony is not subject to review because it is just that; an interpretation of live testimony by a trier of fact who saw and heard the witness. See, e.g., Tibbs v. State, 397 So.2d 1120 (Fla. 1981) (appellate courts do not reweigh testimony from cold transcripts); Sireci v. State, 587 So.2d 450 (Fla. 1991) (". . . it is the trial court's duty to resolve conflicts in the evidence", regarding the existence of mitigation); Ponticelli v. State, 593 So.2d 483, 491 (Fla. 1991) (trial court may reject expert testimony on mitigation, unless such contradicted by other evidence).

When the entire gamut of expert testimony is reviewed against the known facts, the Court's decision was clearly correct.

Foster was examined by honest, neutral experts at the time of his trial. Indeed, no one knew Foster better than Sapoznikoff, who had treated Foster for years prior to the crime. Every neutral doctor who has tested Foster has consistently rendered the same opinion. Foster was sane and competent at the time of the murder and was not in the throes of one of his unverified "seizures." Also, the grand mal seizures reported by Foster all involved incapacitating behavior. Thus, during a grand mal seizure, Foster could not speak to the victim, hold a weapon, stab the victim, carry the victim outside, bury the victim with branches, uncover the victim, cut the victim's spine, go back to the camper, find the victim's wallet, split up his money, or hide evidence. (See, R 23-38 as well as Childer's testimony at R 952-971).

It should also be noted that the trial judge found that Foster had mental problems but simply lowered their mitigating impact (R 363). Again, Dr. Vallely assisted by noting that a person with Foster's "irresistible impulses" was fully capable of goal-oriented, sane, behavior at the same time he was "out of control" (R 1230).

Foster's evidence was inherently contradictory, biased and unworthy of belief. No error has been demonstrated.

POINT III

THE APPELLANT IS NOT ENTITLED TO RELIEF ON THE "JURY INSTRUCTION" ISSUE

The State agrees that Foster preserved this issue for appellate review but notes two important grounds for denying relief.

First, the trial judge did not simply read the standard jury instruction used in Jackson v. State, ___ So.2d ___ (Fla. 1994), 19 Fla.L.Weekly S215. Instead, the court gave an expanded instruction (quoted at page 12, above) which specifically told the advisory jury that the CCP factor is not automatically proven simply by proving "first-degree murder" (R 1523).

In Boyde v. California, 494 U.S. 370 (1990), the Supreme Court recognized officially that which common sense already dictated; the Court held that juries do not "parse instructions" as lawyers do in an effort to construct confusion. Here, there was nothing to indicate that the jury was confused or misled. That brings us to the second point.

The murder at bar was so plainly cold, calculated and premeditated that any error in instructing the advisory jury (whose opinion did not bind the sentencer anyway), was certainly harmless beyond any reasonable doubt. Henderson v. Singletary, 617 So.2d 313 (Fla. 1993); Walls v. State, ___ So.2d ___ (Fla. 1994), 19 Fla.L.Weekly S377; Griffin v. State, ___ So.2d ___ (Fla. 1994), 19 Fla.L.Weekly S365; Fennie v. State, ___ So.2d ___ (Fla. 1994), 19 Fla.L.Weekly S371.

Foster planned Lanier's death well in advance. Foster swapped rings with Childers long before his pretextual accusation

(that Lanier was attempting to have sex with his sister). Foster yelled out as he initiated his attack. From the time Foster took Lanier to the girls to the time they drove Lanier to a secluded spot, to the time they traded rings to the time they hid Lanier's body, this entire episode reflected Foster's heightened premeditation.

CONCLUSION

The sentence imposed upon Charles Kenneth Foster should be affirmed.

Respectfully submitted,

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Certificate of Service

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Mail to Mr. Richard H. Burr, NAACP Legal Defense and Educational Fund, Inc., 99 Hudson Street, 16th Floor, New York, New York 10013; and to Mr. Steven L. Seliger, 16 North Adams Street, Quincy, Florida 32351, this 29th day of September, 1994.

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