

IN THE SUPREME COURT OF FLORIDA

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APR 18 1994

CHARLES KENNETH FOSTER,

CLERK, SUPREME COURT

Appellant,

By
Chief Deputy Clerk

vs.

CASE NUMBER: 82, 335

STATE OF FLORIDA,

APPEAL FROM SENTENCE OF
DEATH, CIRCUIT COURT FOR
THE 14TH JUDICIAL CIRCUIT
BAY COUNTY, FLORIDA

Appellee.

BRIEF FOR APPELLANT

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TABLE OF CONTENTS

	<i>Page(s)</i>
TABLE OF CONTENTS	i
TABLE OF CITATIONS	ii-iii
STATEMENT OF THE CASE	
A. Jurisdiction	1
B. Course of Proceedings and Disposition in the Lower Tribunal . . .	1-2
C. Statement of the Facts	2-27
 SUMMARY OF THE ARGUMENT	 28
ARGUMENT	
I. DEATH IS A DISPROPORTIONATE SENTENCE FOR MR. FOSTER	29-43
II. THE SENTENCING JUDGE ERRED IN CONCLUDING A CONFLICT EXISTED IN EXPERT OPINION RELATING TO THE MENTAL HEALTH MITIGATORS	44-50
 CONCLUSION	 51
 CERTIFICATE OF SERVICE	 51

TABLE OF CITATIONS

<i>Case Cited</i>	<i>Page(s)</i>
DUGGER V. FOSTER 487 u.s. 1240 (1988)	1
FITZPATRICK V. STATE 527 So.2d 809 (Fla. 1988)	Passim
FOSTER V. DUGGER 513 So.2d 901 (Fla. 1987)	1
FOSTER V. FLORIDA 444 U.S. 885 (1979)	1
FOSTER V. STATE 369 So.2d 928 (Fla. 1979)	1
FOSTER V. STATE 614 So.2d (Fla. 1992)	2, 30
HITCHCOCK V. DUGGER 481 U.S. 393 (1987)	1
HUCKABY V. STATE 343 So.2d 29 (Fla. 1977)	32
KRAMER V. STATE 619 So.2d 274 (Fla. 1993)	42
NIBERT V. STATE 573 So.2d 1059 (Fla. 1990)	40, 49
MENENDEZ V. STATE 419 So.2d 312 (Fla. 1982)	29
MILLER V. STATE 373 So.2d 882 (Fla. 1979)	34
PENN V. STATE 574 So.2d 1079 (Fla. 1991)	38
SANTOS V. STATE 629 So.2d 939 (Fla. 1994)	41, 42

SANTOS V. STATE 591 So.2d 160 (Fla. 1991)	41
SMALLEY V. STATE 546 So.2d 720 (Fla. 1989)	41
SONGER V. STATE 544 So.2d 1010 (Fla. 1989)	29, 41
STATE V. DIXON 283 So.2d 78 (Fla. 1973)	29

Other Sources Cited

Rule 9.030(1)(a)(i) Florida Rules of Appellate Procedure	1
Article V, Section 3(b)(1) Florida Constitution	1
Article XVII Florida Constitution	42, 43

STATEMENT OF THE CASE

A. Jurisdiction

This is a direct appeal from a sentence of death imposed by the trial court. This Court has jurisdiction pursuant to Rule 9.030(1)(A)(i), Fl.R.App.P. and Article V, Section 3(b)(1), *Florida Constitution*.

B. Course of Proceedings and Disposition in the Lower Tribunal

This case began in 1975, when Mr. Foster was convicted and sentenced to death for the murder of Julian Lanier. He was also sentenced to life in prison on a separate robbery count. (R (75) - 44, 45) This Court affirmed Mr. Foster's convictions and sentences. *Foster v. State*, 369 So.2d 928 (Fla. 1979), *cert. denied*, *Foster v. Florida*, 444 U.S. 885 (1979)

In 1987, this Court granted Mr. Foster a new sentencing phase trial, determining that the original one violated the holding of *Hitchcock v. Dugger*, 481 U.S. 393 (1987). *Foster v. Dugger*, 518 So.2d 901 (Fla.1987), *cert. denied*, *Dugger v. Foster*, 487 U.S. 1240 (1988)

In June of 1990, the new sentencing proceeding began, culminating in an 8-to-4 jury recommendation for death. (R. 1731) The trial court followed the recommendation and imposed a sentence of death on June 18, 1990. (R. 1904 - 1910)

On direct appeal from this sentence, this Court required the trial court to enter a new sentencing order

that addressed the mitigating factors offered in evidence at the trial. *Foster v. State*, 614 So.2d 455, 465 (Fla. 1992)

In accordance with this mandate, the trial court entered a new sentencing order. (R 359-367) From this sentence imposing death, Mr. Foster filed a timely notice of appeal. (R 369-370)

C. *The Facts*

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) 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.¹ *Id.* Kenny Foster was also drunk, (R. 1009); according to Ms. Evans, he was "too drunk to drive." *Id.*

On the way out of Callaway in Mr. Lanier's Winnebago, Mr. Foster supposedly told Ms. Rogers that he planned "to

¹ Mr. Lanier's autopsy revealed his blood alcohol level was ".18". (R-1092)

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)

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] you stupid mother fucker, are you going to try and fuck my sister." (R. 990) *Accord*, (R. 961) (Rogers, quoting Mr. Foster) ("you are 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)

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, threatened 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."² (R. 963)

² Ms. Evans agreed: "[Blood] was all going all over the place out of his neck. It was just pouring out." (R. 991)

Mr. Foster then knocked Mr. Lanier to the floor and grabbed him by the genitals to throw him out of 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 way. (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.³

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 threatened to kill Mr. Lanier from the very beginning of the assault, not just after he pulled out his knife. (R. 990) Although Ms. Evans also remembered that Mr. Lanier never offered any resistance -- "he couldn't," (R. 991) -- she believed that he did speak 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. 991-91) -- Ms. Evans thought she heard Mr. Lanier "ask[] [Mr. Foster]

³ 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)

not to do it." (R. 922) 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 the infliction of more than one wound at the time. Mr. Foster 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) They found Mr. Lanier's wallet and the three split the money: Mr. Foster gave the woman \$20 each and kept \$40 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 a 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 sheriff's 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)

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)

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, there was one thing Mr. Foster could not explain. The transcript of the confession to Coram revealed that he did not know why or how the assault began:

Gail and Mr. [Lanier] . . . was on the other bed across from us [Ms. Rogers and him]. I don't know what the hell started us to fighting.

(R. 1781) Moreover, he did not remember saying anything to Mr. Lanier -- he had no memory of the accusation of sexually assaulting his sister -- but "just remember[ed] hitting him." (R. 1784) Finally, he did not have any idea how long the camper had been out in the woods before the "fight started." *Id.*

Several years after the 1975 trial, Anita Rogers was married to Donne Goodman. (R. 1128) For about five months, Ms. Rogers and Mr. Goodman lived with Mr. Goodman's sister, Connie Thames. (R. 1128-29) On several occasions during this time, Ms. Rogers spontaneously talked with Ms. Thames about the events of the night of July 14-15, 1975. On one occasion Ms. Rogers told 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)

[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 got up and went outside and removed the dirt and the palmetto leaves and cut his jugular vein.

(R. 1132)

In talking to Ms. Thomas after the crime, Ms. Rogers explained that she and Mr. Evans, not Mr. Foster, has 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 has 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)

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.*

In this confession to Joe Coram, Mr. Foster stated that he did not rob Mr. Lanier. (R. 950)

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, 92), 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*) In no way did these accounts explain the wounds to Mr. Lanier's right forehead.

After Mr. Foster stabbed Mr. Lanier in the neck, Ms. Rogers described the bleeding: "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 fasion 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 pressure. In other words, blood does not squirt or 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)

2. *Mitigation*

The story of Kenny Foster's life is a story of disability and struggle against disability.

Kenny Foster was born two months premature into a terribly dysfunctional family 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, Kenny was slow in 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) 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 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) Kenny was getting drunk three or four times a

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.⁴ (R. 1261) Every time his Uncle Ed saw him, Kenny was drinking or "using that stuff," and it "affected his mind." (R. 1262) Throughout his adult years, Kenny's 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 conversations with dead relatives 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

⁴ 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*.

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 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, threw 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 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 22 years old, he was admitted seven times to in-patient mental health facilities for psychiatric treatment. (R. 1358-59) See also *Defendant's Exhibit 1* (discharge summaries from the mental health unit of Bay County Memorial Hospital), *Exhibit 2* (record of involuntary, nine-month hospitalization in Florida State Hospital in Chattahoochee), and *Exhibit 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 which 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), (R-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 . . . developed 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.⁵ That is the kind of brain damage 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

⁵ Dr. Merikangas is referring to the documentation of these childhood disorders contained in Mr. Foster's school records, *Defendant's Exhibit 10*. See also (R. 1361) (describing these records in detail).

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 them to getting payoffs and being able to grow and being able to develop as a normal member of society[,], that their development is borderline. Sometime it's 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 psychosis⁶ -- 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

⁶ 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)

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:

[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 reemphasized the interrelationship between Mr. Foster's psychotic paranoia and brain damage by noting that some of Mr. Foster's previous doctors "refer to psychotic organic brain damage 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] could 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. Also, because it's important to note that the low blood sugar can, that he has,⁷ is made worse by alcohol. The natural things that alcohol does is to lower your blood sugar so 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

⁷ Dr. Merikangas also found that Mr. Foster suffered from reactive hypoglycemia, or abnormally low blood sugar. (R. 1360, 1362-63)

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 was 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 call 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. 1351) Not many months before that he had shared a similar anguish with Greg 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 THE ARGUMENT

This appeal is primarily about the legal issue left unresolved by this Court's prior treatment of this case. *Foster v. State*, 614 So.2d 455, 465 note 10 (Fla. 1992). That footnote indicated that since the case was being remanded to the trial court for the preparation of a new sentencing order, this court declined "to address Foster's argument with respect to proportionality."

Quite simply, death is a disproportionate punishment for Mr. Foster's killing of Julian Lanier. In comparing his case to others this Court has reviewed over the years, it is not one of the "most aggravated, the most indefensible of crimes" *State v. Dixon*, 283 So.2d 1, 8 (Fla. 1973). To the contrary, the record of mitigation before this hearing compels this Court to "examine the appropriateness of the sentence of death in light of the fresh record developed on resentencing." *Fitzpatrick v. State*, 527 So.2d 809, 812 (Fla. 1989).

I.

DEATH IS A DISPROPORTIONATE
SENTENCE FOR MR. FOSTER

State v. Dixon, 283 So.2d, 78(Fla. 1973) set this Court's proportionality review standard.

Death is a unique punishment in its finality and in its total rejection of the possibility of rehabilitation. It is proper, therefore, that the Legislature has chosen to reserve its application to only the most aggravated and unmitigated of most serious crimes.

* * *

Review of a sentence of death by this Court, provided by Fla. Stat. ss. 921.141, F.S.A., is the final step within the state judicial system. Again, the sole purpose of the step is to provide the convicted defendant with one final hearing before death is imposed. Thus, it again presents evidence of legislative intent to exact the penalty of death for only the most aggravated, the most indefensible of crimes.

See *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 appropriate-

ness of the sentence of death in light of the fresh record developed on resentencing.

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

This Court has upheld the trial court's finding of three aggravators: the murder was committed during the course of a robbery, it was especially heinous, atrocious or cruel, and it was cold, calculated and premeditated. *Foster v. State*, 614 So.2d 455, 460-461 (Fla. 1992). The weight to be given these factors must be explored based on all of the evidence presented as to how and why the killing occurred.

Before the new sentencing trial in 1990, 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, Mr. Foster began his attack upon Mr. Lanier with what appeared to be a ruse -- accusing Mr. Lanier of trying to have sex with his sister when Mr. Lanier made sexual advances toward Gail Evans. He then beat Mr. Lanier severely. Encountering no resistance, he threatened to kill Mr. Lanier, then pulled out a knife and cut Mr. Lanier's throat. When signs of life still came from Mr. Lanier, Mr. Foster cut his throat again. With Mr. Lanier still

breathing even after that, Mr. Foster thrust his knife through Mr. 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.

The new information revealed during the 1990 sentencing hearing, demonstrates in the first instance, that this case is not among "the most aggravated, the most indefensible of crimes." This is especially true when the substantial mitigating evidence is factored into the penalty equation.

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 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.

Ms. Rogers further told Ms. Thames that the plan for taking Mr. Lanier's money that night was hers and Gail's, not Kenny's. In addition, she described Mr. Foster was "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. While Ms. Rogers also mentioned the exchange of rings to Ms. 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. 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.

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.

All of the evidence points to Mr. Foster being grossly impaired that night. Anita Rogers confirmed to Connie Thames that Mr. Foster had a seizure that night.

In *Huckaby v. State*, 343 So.2d 29 (Fla. 1977), this Court decided that evidence of a causal relationship between

a defendant's mental illness and the heinousness of the crime was relevant to the weight given the aggravating circumstance.

Huckaby was convicted of sexually assaulting his three daughters for more than 14 years. Every incident of sexual assault involved either actual or threatened use of force. The children, including his sons, "described a nightmarish family life of brutality, fear and sexual assaults which had continued for about 20 years before any family member gathered the courage to seek help." Huckaby at 31.

Huckaby had a long-standing mental illness. He was discharged from the United States Navy in 1944 for a mental illness that predated his enlistment. For the next 30 years, there was no apparent public display of mental illness symptoms. In 1974, Mr. Huckaby's behavior changed following injuries received from a two-story fall. His family reported that he was irrationally violent and got him admitted to a psychiatric unit. Later he was Baker Acted to a state mental hospital, where he was diagnosed as being schizophrenic. There was also an indication of a possible organic problem with his brain functions. After two months of treatment at the state mental hospital, including medication, Mr. Huckaby was released because the hospital believed he was no longer a menace to society.

Based on this set of facts, the sentencing court found no mitigating circumstances. This Court reversed that

finding.

There was almost total agreement on Huckaby's mental illness and its controlling influence on him. Although the defense was unable to prove legal insanity, it amply showed that Huckaby's mental illness was a motivating factor in the commission of the crimes for which he was convicted. Our review of the record shows that the capital felony involved in this case was committed while Huckaby was under the influence of extreme mental or emotional disturbance, and that while he may have comprehended the difference between right and wrong his capacity to appreciate the criminality of his conduct and to conform it to the law was substantially impaired. These findings constitute two mitigating circumstances which should have been weighed in determining his sentence

In addition, this Court found that the causal link between Huckaby's mental illness and the heinousness of the crimes substantially discounted the weight to be given to how the crime was committed.

Miller v. State, 373 So.2d 882, 886 (Fla. 1979) reflects this policy in weighing the importance of mental health mitigation. "To the contrary, a large number of the statutory mitigating factors reflect a legislative determination to mitigate the death penalty in favor of a life sentence for those persons whose responsibility for the violent actions has been substantially diminished as a result of a mental illness, uncontrolled state of mind, or drug abuse."

The causal link between Mr. Foster's disabilities and the killing of Mr. Lanier was explained by Dr. Merikangas,

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. 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. Also, because it's important to note that the low blood sugar can, that he has,⁸ is made worse by alcohol. The natural things that alcohol does is to lower your blood sugar so 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.

⁸ Dr. Merikangas also found that Mr. Foster suffered from reactive hypoglycemia, or abnormally low blood sugar. (R 1360, 1362-1363).

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

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 training 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 occasionally episodes of psychosis. He is an alcoholic. He has hypoglycemia. In combination, these difficulties 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.

Based on all these facts, death is not the proportionate sentence for Mr. Foster. An appropriate case to compare with Mr. Foster is Earnie Fitzpatrick. *Fitzpatrick v. State*, 527 So.2d 809 (Fla. 1988)

This Court set out the facts in Fitzpatrick's case.

On April 29, 1980, Fitzpatrick took a bus to a real estate office with the intent to carry out a plan. His plan called for him to take a hostage from the real estate office, march the hostage up the street to a bank, and then rob the bank using the hostage as a shield. The plan called for Fitzpatrick to escape into the crowd, get lost in the post-robbery confusion, and then take a bus home.

When Fitzpatrick entered the office with a gun taped into his hand, he held a secretary hostage in the office and announced his plan to use her as a shield to protect himself. At that point a delivery boy entered the office and Fitzpatrick held him hostage as well. Hearing the commotion from an adjoining office, David Parks called the sheriff's department. Parks then entered the office where Fitzpatrick was holding the hostages and attempted to diffuse the situation by offering Fitzpatrick his car and some money. Fitzpatrick refused the offer and locked himself and the three hostages in an inner office to await the arrival of the police. He stated that he would have to shoot the police officers, the hostages and himself.

Two deputies arrived later. One deputy named Smith knocked on the door of the office where Fitzpatrick was holding the hostages and announced that he was from the sheriff's department. Shots were fired from within the office, and one bullet passed through the wall near Deputy Smith's head. A second deputy named Heist pointed his gun at Fitzpatrick's head through a partition near where Fitzpatrick was standing. Surprised, Fitzpatrick whirled around and fired, hitting Deputy Heist in the head, mortally wounding him. Parks jumped up and attempted to wrestle the gun away from Fitzpatrick. Fitzpatrick fired three more shots, hitting Parks once. Deputy Smith fired two shots, hitting Fitzpatrick in the shoulder.

Following a jury recommendation of death for the killing of Deputy Heist, the trial court imposed death. The sentencing court found five aggravators and the two mental health mitigators.

This Court found a record "replete with evidence of Fitzpatrick's substantially impaired capacity, his extreme emotional disturbance . . . At the scene of the crime, Fitzpatrick was described as "psychotic", "high", "spacey", "panicky" and "wild".

The expert and lay testimony agreed that Mr. Fitzpatrick was a severely disturbed person whose ability to conform his conduct to the requirements of law was substantially impaired.

The same conclusions were reached about Kenny Foster. Interestingly, one of the professionals who participated in the examination of Mr. Fitzpatrick also participated in Mr. Foster's case. Dr. Merikangas, the neurologist (who is also a psychiatrist) was called by this Court as being "among the foremost expert in [his] respective field." This Court reduced Mr. Fitzpatrick's sentence to life.

In *Penn v. State*, 574 So.2d 1079, 1084 (Fla. 1991), this Court also reduced his death sentence to life. James Penn killed his mother by beating her to death with a hammer. Penn had moved into his mother's house with his young son about two weeks before the murder.

The night of the murder, Penn left the house looking to buy drugs. He returned, took a bottle of liquor and left again. He then came back and stole some of his mother's jewelry from her room. The next time he came back to the house he killed his mother in her room. Penn then stole various items, including his mother's credit cards. He used the credit cards to buy stuff and pawned other things he had taken.

In a series of confessions the following day, Penn stated he stole the property to get drugs and that he had smoked six or seven pieces of crack cocaine that night.

In sentencing Mr. Penn to death, the trial court found the murder to have been both heinous, atrocious or cruel and cold, calculated and premeditated. This Court struck the latter aggravation. In mitigation, the sentencing judge found that Penn had acted under the influence of extreme mental or emotional disturbance.

As aggravated as the actual killing was in this case,⁹ the Court reduced the sentence to life. "On the circumstances of this case, including Penn's heavy drug use and his wife's telling him that his mother stood in the way of their reconciliation, this is not one of the least aggravated and most aggravated murders."

⁹ Footnote 7 of the court's opinion says that the "mother sustained 31 separate wounds, mostly to the head." There were "defensive wounds on her hands and that it could have taken up to 45 minutes for her to die."

Mr. Foster's case is no more aggravated and possesses substantially greater mitigation.

Billy Ray Nibert killed one of his drinking buddies by stabbing him 17 times. Based on the manner of death, the trial court found the murder was committed in an especially heinous, atrocious or cruel manner. *Nibert v. State*, 574 So.2d 1059 (Fla. 1990)

Evidence was presented that Nibert had a drinking problem and was drinking the night of the murder. Mental health examinations demonstrated that the statutory mental health mitigators were present. The sentencing judge refused to find these factors based on the uncontroverted evidence and sentenced Nibert to death.

The factual information rejected by the sentencing court was found persuasive by this Court. This mitigation evidence included physical abuse as a child and the statutory mental health mitigators. The mental health diagnosis included physical components, specifically that Mr. Nibert had suffered from "chronic and extreme alcohol abuse". Further, it was clear that drinking had played a role in the murder.

Similarly, Mr. Foster's case "involves substantial mitigation, and [this Court has] held that substantial mitigation may make the death penalty inappropriate even when the aggravating circumstance of heinous, atrocious or cruel has been proved." *Nibert*, at 1063.

Leonard Smalley was convicted of the premeditated first-degree murder of a 28-month-old child. Essentially, Mr. Smalley killed the child by repeatedly dunking her head in water and subjecting her to other physical abuse. In aggravation, the State proved the killing was heinous, atrocious or cruel. The trial court sentenced Mr. Smalley to death.

In its proportionality review, this Court decided "that the entire picture of mitigation and aggravation was that of a case which does not warrant the death penalty." *Smalley v. State*, 546 So.2d 720, 723 (Fla. 1989) The factors in mitigation included his drug usage and the mental health mitigators. *See also Songer v. State*, 544 So.2d 1010, 1012 (Fla. 1989)

In *Santos v. State*, 629 So.2d 838 (Fla. 1994), Carlos Santos killed his daughter and the child's mother. The murders were the culmination of a history of domestic problems. In the penalty phase, there was unrebutted testimony from the psychologists that Mr. Santos' conduct at the time of the murder was both "under extreme emotional distress [and] had an impaired capacity to appreciate the criminality of his conduct, and had an impaired capacity to conform his conduct to the requirements of law." *Santos v. State*, 591 So.2d 160, 161 (Fla. 1991) On second look, this Court found that "there can be no possible conclusion other

than that death is not proportionally warranted here . . . " *Santos*, 629 So.2d at 840.

This is similarly true in Mr. Foster's case. The robbery-murder pales by comparison to the un rebutted factors in mitigation.

In *Kramer v. State*, 619 So.2d 274 (Fla. 1993), the victim was killed by being beaten on the head with a blunt instrument. The victim had a blood alcohol level of .23. The victim had defensive wounds on his body "and that blood splatter evidence showed the victim had been attacked while in passive positions, including lying face down."

Ultimately, Mr. Kramer confessed to killing the man but claimed he did so in self-defense. The jury convicted him of first-degree murder and recommended death by a vote of nine-to-three. The trial court sentenced Mr. Kramer to death, finding two aggravators -- (1) conviction of a prior violent felony, and (2) that the murder was heinous, atrocious or cruel. The trial court found many factors in mitigation, including that he was emotionally stressed when the crime was committed; his capacity to conform his behavior to lawful standards was severely impaired at the time of the crime; and that he suffered from the effects of alcoholism and drug use.

This Court found that the death sentence for Mr. Kramer constitutionally "unusual", in violation of Article 1,

Section 17 of the *Florida Constitution*, The factual basis for this Court's finding is strikingly similar to Mr. Foster's case.

The factors establishing alcoholism, mental stress, severe loss of emotional control, and potential for productive functioning in the structured environment of prison are dispositive here. While substantial competent evidence supports a jury finding of premeditation here, the case goes little beyond that point. The evidence in its worst light suggests nothing more than a spontaneous fight, occurring for no discernible reason, between a disturbed alcoholic and a man who was legally drunk. This case hardly lies beyond the norm of the hundreds of capital felonies this Court has reviewed since the 1970s. See *Teffeteller v. State*, 439 So.2d 840, 846 (Fla. 1983), *cert. denied*, 465 U.S. 1074, 104 S.Ct. 1430, 79 L.Ed.2d 754 (1984). Our law reserves the death penalty only for the most aggravated and least mitigated murders, of which this clearly is not one. Accordingly, death is not a proportional penalty here.

Kramer, 619 So.2d at 278.

II

THE SENTENCING JUDGE ERRED IN CONCLUDING
A CONFLICT EXISTED IN EXPERT OPINION
RELATING TO THE MENTAL HEALTH MITIGATORS

The trial court's sentencing judgment of June 18, 1990 and August 12, 1993 are identical in every respect except one. In discussing the mitigation, the trial court found that the mental health experts agreed, without contradiction, that Mr. Foster suffered from "severe borderline personality disorder and agreed that the defendant had long standing brain damage and psychosis."
(R-363)

The trial court said the evidence presented by the mental health experts was "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."
(R-364)

This purported evidentiary insufficiency was a statement by a defense psychologist James Vallely.

[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 than 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 trial court then stated that "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." (R-364)

It is important to read the entire testimony of Dr. Vallely that bears on this point.

Q. I'm sorry, I think I've confused you with my question. 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 Winnegbago 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, of that, could he remember the murder (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 cause 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 beginning of logical thread that runs all the way through this as a goal directive event. 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 and so it's not, there's no connection to a plan as I can see.

(R-1196-98)

First, the trial court's conclusion that Mr. Foster's 1975 trial confession was "true" is beside the point. There is certainly no inherent contradiction between a premeditated murder and a finding that the statutory mental health mitigators have been established.

As a matter of reviewing capital cases, this court has often found a direct relationship between the method of death used by the defendant and their mental illness. The connection in Mr. Foster's has been previously made but it bears repeating; but for his mental disabilities coupled with alcohol, Julian Lanier would not have been killed.

Second, both Dr. Valley and Dr. Merikangas were in complete agreement as to what was wrong with Mr. Foster and how his mental and physical illnesses affected his behavior on the night Julian Lanier was killed.

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 out bursts of violence, destruction of property, or self-mutilation. Dr. Merikangas and Dr. Vallely found this to be the most compelling explanation fo the murder. 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. Also, because it's important to note that the low blood sugar can, that he has, is made worse by alcohol. The natural things that alcohol does is to lower your blood sugar so 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 were not 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]).

Once the mental health evidence is properly considered, this Court must find the trial court erred in excising the qualifiers from the mental health mitigators. The trial court found that Mr. Foster's "expert testimony [was] 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 impaired." (R-364) (emphasis supplied)

This mitigating evidence was competent and uncontroverted and thus the trial court "must find the mitigating circumstance has been proved." *Nibert v. State*, 574 So.2d 1059, 1062 (Fla. 1990) All of the supporting evidence was also present - long term alcohol abuse; and that he was drinking heavily both that day and at the time the murder took place.

The State did not present any evidence that disputed the existence of these factors. The trial court's finding both that the statutory mental health mitigating factors


were not proved and their nonstatutory subgroups were entitled to but "little weight in relation to the aggravating circumstances" was error. (R-364)

CONCLUSION

For the reasons expressed in this initial brief, Mr. Foster requests this Court to vacate his sentence of death and impose a sentence of life imprisonment with no possibility of release for 25 years.

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CERTIFICATE OF SERVICE

I **HEREBY CERTIFY** that a copy of the foregoing has been furnished by to **Mark Menser**, Assistant Attorney General, Department of Legal Affairs, The Capitol, Tallahassee, Florida 32399-1050. 4/12/94


STEVEN L. SELIGER