IN THE SUPREME COURT OF FLORIDA

CHARLES KENNETH FOSTER,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

Case No. 82,335

APPEAL FROM SENTENCE OF DEATH FROM THE FOURTEENTH JUDICIAL CIRCUIT, BAY COUNTY, FLORIDA

REPLY BRIEF OF APPELLANT

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TABLE OF CONTENTS

TABLE OF CITATIONS

ARGUMENT

I.

DEATH IS A DISPROPORTIONATE SENTENCE FOR MR. FOSTER

The State cites certain cases which it claims are comparable to Mr. Foster's and which this Court has found that death is proportionate. Mr. Foster will examine each of these cases.

Dillbeck v. State, ____ So.2d ____, 19 Fla.L.Weekly S 408, 410 (Fla. 1994) involved a person who had escaped from prison. The crime for which Dillbeck was sent to prison was the 1979 killing of a police officer. After Dillbeck's escape he tried to seal a car. In the process of stealing the car Dillbeck killed the woman by repeatedly stabbing her. This case is substantially different than Foster's in two respects. First, the case in aggravation was more pronounced: there were five aggravators as opposed to just three in Foster's case.

Second, Foster had a much more compelling case for mitigation. While many of the same factors were present in Dillbeck and Foster, there was a significant difference on the mental health issues. The kind and long standing nature of Mr. Foster's mental illnesses were not present in Dillbeck.

Walls v. State, 641 So. 2d 381, 391 (Fla. 1994) contains the same distinctions with Foster's case as does Dillbeck. The penalty determination included six aggravators. This Court described the killing as "little better than the execution-style slaying of a helpless woman, who already had been bound and gagged, who had been

terrorized by hearing her boyfriend's murder, who was helpless and in tears, and who obviously posed no threat whatsoever to Walls."

This, of course, is not even remotely close to what happened in the killing of Mr. Lanier. In addition, Foster's case in mitigation was stronger. Compare also Green v. State, 641 So.2d 391, 396 (Fla. 1994) (three aggravating circumstances, no mitigators-death sentence proportionate); Wyatt v. State, 641 So.2d 355, 360 (Fla. 1994) (three aggravating circumstances, "minimal mitigating evidence." Wyatt was an escaped prisoner convicted of robbery and kidnapping.)

The remaining cases cited by the State on page 23 of the Answer Brief are equally unpersuasive. Haliburton v. State, 561 So.2d 248, 252 (Fla. 1990) involved four aggravators and apparently no mitigation of consequence, for none was discussed in the Court's opinion.

The State's citation to Floyd v. State, 497 So.2d 1211, 1216 (Fla. 1986) is curious. This Court vacated the death sentence and remanded for a new sentencing hearing. When the case returned to this Court after the death sentence was reimposed, this Court affirmed. 569 So.2d 1225, 1228 (Fla. 1990). Once again, there was a finding of nothing in mitigation. 497 So.2d at 1229.

Neither Duest v. State, 462 So.2d 446, 449-450 (Fla. 1985) or Lusk v. State, 446 So.2d 1038, 1043 (Fla. 1984) support the State's position. In Duest, this Court upheld a death sentence based on four aggravating circumstances and nothing in mitigation. In Lusk, this Court sustained a sentence of death based on three aggravators

and no mitigation. This Court commented that "the instant murder was committed by Lusk while was serving three consecutive life sentences imposed in 1977 for a prior first-degree murder and two armed robberies with a pistol." 446 So.2d at 1043. In fairness, neither of these cases can be compared to Kenny Foster.

The State's attempt to isolate any particular factor is wrong.

> It must be emphasized that the procedure to be followed by the trial judges and juries is not a mere count process of X number of aggravating circumstances and Y number of mitigating circumstances, but rather a reasoned judgment as to what factual situations require the imposition of death and which can be satisfied by life imprisonment in light of the totality of the circumstances present.

State v. Dixon, 283 So.2d 1, 10 (Fla. 1973).

II.

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

The State, in its Answer Brief, argued the following in support of the trial court.

> 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." (Page 26).

These statements are a blatant mischaracterization and are, of course, legally wrong. This Court has repeatedly said that a finding of competency to stand trial and sanity at the time of the offense is not related to the mental health mitigators. Ferguson v. State, 417 So.2d 631, 638 (Fla. 1980); Campbell v. State, 571 So.2d 415, 418-419 (Fla. 1990).

None of the testimony presented by Mr. Foster suggests that he killed Mr. Lanier during the course of a seizure. Rather, the testimony establishes two propositions concerning Mr. Foster's seizures: (a) there is sudden, rage-like behavior sometimes associated with his seizures, not during the seizures but before or after the seizures; and (b) his seizure disorder is symptomatic of underlying organic brain damage, which in combination with other

disorders periodically impairs Foster's ability to appreciate and control his behavior, especially suicidal, self-mutilative, and violent behavior. In this respect, the seizure disorder is a sign of brain damage, but the brain damage, not the seizure disorder itself, is the underlying cause of out-of-control, irrational behavior.

The opinions of Dr. Mason and Dr. Sapoznikoff are not in conflict with the opinions of Dr. Vallely and Dr. Merikangas. Dr. Mason and Dr. Sapoznikoff evaluated Mr. Foster's trial competency and sanity in 1975 and found that he was competent and sane. R. 1921, 1922. However, one must look beyond Mason's and Sapoznikoff's pretrial letters -- to the many-year history of their and others' treatment of Mr. Foster -- to appreciate that Mason and Sapoznikoff and others also found the same underlying disorders as Dr. Vallely and Dr. Merikangas. This history is compiled in Defendant's Exhibits 1 and 2, and it reveals (a) that Mr. Foster was consistently diagnosed as psychotic (sometimes more specifically, as paranoid schizophrenic or schizophrenic), as having organic brain dysfunction, and as having a dysfunctional and disordered personality, and (b) that these disorders were frequently associated with his suicidal, self-mutilative and violent behavior. The conflict that the State sees between Mason and Sapoznikoff on the one hand and Vallely and Merikangas on the other is the product of superficial reference to pretrial reports having nothing to do with the probing questions called for when inquiring into mitigating circumstances. The most telling proof of this is that the State

did not call Dr. Mason or Dr. Sapoznikoff -- or any other expert -- to try to rebut the testimony of Dr. Vallely and Dr. Merikangas.

Any diminution of the weight given the statutory mental health mitigators was error. Spencer v. State, 19 Fla.L.Weekly S 460, 463 (Fla. 1994).

In Spencer, two experts testified during the penalty phase that Spencer suffered from chronic alcohol and substance abuse, paranoid personality disorder and biochemical intoxication. The experts tested, interviewed and evaluated Spencer, examined the evidence in the case and reviewed Spencer's life history. Both experts concluded that the statutory mental health mitigators were present. The trial court did not find either of these, finding the "experts opinions . . . speculative and conclusory."

As to this issue, this Court reversed, finding the expert testimony was uncontroverted. This was so even though "there is evidence that Spencer contemplated this murder in advance."

III.

THE CCP INSTRUCTION GIVEN AT THE PENALTY PHASE TRIAL WAS UNCONSTITUTIONAL AND THE ERROR WAS NOT HARMLESS

The State has properly conceded that Mr. Foster preserved this issue for review. It should now be clear that the instruction given was unconstitutional. Walls v. State, 641 So.2d 381, 387 (Fla. 1994). The trial court's additional comment that Foster'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 purpose of this aggravating circumstance" (R-1523) did not cure the problems identified in Jackson v. State, 19 Fla.L.Weekly S 370, 371 (Fla. 1994).

The State's argument is clearly wrong as to the harmlessness of this error. There is no evidence in the record that "Foster planned Lanier's death well in advance." State Answer Brief, page 27. (emphasis supplied) It may be true that Foster planned a robbery, but there is no evidence he planned to kill Lanier "well in advance." See Castro v. State, 19 Fla.L.Weekly S 435, 437 (Fla. 1994).

It is also not true that "Foster swapped rings with Childers long before his pretextual accusation that Lanier was attempting to have sex with his sister." State Answer Brief, page 27-28. (emphasis supplied)

Walls, 641 So.2d at 387-388 sets out the "four elements that must exist to establish cold calculated premeditation."

1. "The killing was the product of cool and calm reflection and not an act prompted by emotional frenzy, panic or a fit of rage."

The record establishes that a jury could have found that Foster's act of killing was the result of a "loss of emotional control". Walls, 641 So.2d at 388. See also Spencer v. State, 19 Fla.L. Weekly 460, 463 (Fla. 1994).

2. "A careful plan or prearranged design to commit murder before the fatal incident."

The only evidence of this is the switching of rings with Juanita Childers. The ambiguity of this evidence has been addressed in Foster's initial supplemental brief. (Pages 10-12).

3. "Heightened premeditation"; "Exhibit degree of deliberate ruthlessness."

There is no evidence to suggest that Foster's act was deliberately ruthless.

4. "No pretense of moral or legal justification."

There is evidence in this record that a properly instructed jury could have found that Foster acted with a "colorable claim ... that would constitute an excuse, justification, or defense as to the homicide." Walls, 641 So.2d at 388.

Foster stated out loud that he thought Lanier was sexually assaulting his sister. While this was objectively not true, the evidence supports that he believed it to be true; that is, " ... having the appearance of truth." Walls, 641 So.2d at 388, note 4.

CONCLUSION

Mr. Foster requests this Court to vacate his sentence of death and remand to the trial court with directions to impose a sentence of life imprisonment with no possibility of release for 25 years.

STEVEN L. SELIGER

CERTIFICATE OF SERVICE

A true copy of the foregoing has been furnished by U.S. Mail to Mark Menser, Assistant Attorney General, Department of Legal Affairs, The Capitol, Tallahassee, Florida 32399-1050, this 30th day of November, 1994.

Steven L. Seliger