IN THE SUPREME COURT OF FLORIDA

CHARLES KENNETH FOSTER,

Appellant,

CASE NO. SC01-240

v.

STATE OF FLORIDA,

Appellee
_____/

ANSWER BRIEF OF APPELLEE
APPEAL FROM DENIAL OF 3.850 MOTION

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PRELIMINARY STATEMENT

Petitioner, CHARLES KENNETH FOSTER, the defendant in the trial court, will be referred to as petitioner or by his proper name. Respondent, the State of Florida, will be referred to as the State.

Pursuant to Rule 9.210(b), Fla. R. App. P. (1997), this brief will refer to a volume according to its respective designation within the Index to the Record on Appeal. A citation to a volume will be followed by any appropriate page number within the volume. The symbol "IB" will refer to appellant's initial brief and will be followed by any appropriate page number. All double underlined emphasis is supplied.

STATEMENT OF THE CASE AND FACTS

In 1975, Charles Kenneth Foster was found guilty of first-degree murder and sentenced to death. His conviction and death sentence were affirmed on direct appeal. *Foster v. State*, 369 So.2d 928 (Fla. 1979). The facts of the case are recited in this Court initial opinion, *Foster v. State*, 369 So.2d 928, 928-929 (Fla. 1979):

> 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 the 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. They 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. She had been committed to a mental institution when she was 13 years of age and was not charged with any offense in this case.
>
> Defendant was charged by an indictment with the offenses of first-degree murder and robbery.
>
> The defendant testified and, during his description of the events of the evening, testified as follows:

> 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.

Foster raised a *Witherspoon*[1] challenge to the exclusion of certain prospective jurors because of their conscientious objection to the death penalty. This Court rejected that challenge based on existing precedent in accord with *Witherspoon*[2] and a Florida Statute, § 913.13, Florida Statutes (1975), which provided that a person who has beliefs which preclude him from finding a defendant guilty of an offense punishable by death is not qualified as a juror in a capital case. Foster next asserted that the gruesome and inflammatory photographs admitted into evidence were unduly prejudicial. This Court, while stating that the photographs were "indeed gruesome and offensive", they were relevant and therefore admissible. The *Foster* Court noted that one photograph introduced during the penalty phase showed that the death blow was delivered with such tremendous impact that it severed the victim's spinal cord; however, this was evidence of the "atrocious manner in which the victim was murdered and the deliberate, cold-blooded intent of the defendant" and therefore, the photograph was properly admitted. Foster next claimed that Florida's death penalty statute was

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[1] *Witherspoon v. Illinois*, 391 U.S. 510, 521-23, 88 S.Ct. 1770, 1776-7, 20 L.Ed.2d 776 (1968)

[2] *Campbell v. State*, 227 So.2d 873 (Fla. 1969) and *Paramore v. State*, 229 So.2d 855 (Fla.1969)

unconstitutional. Foster attacked the prosecutor's discretion in bringing the charge and in plea bargaining, the jury's discretion to convict of a lesser offense and the governor's discretion in granting clemency. This Court rejecting these attacks citing *State v. Dixon*, 283 So.2d 1 (Fla.1973), *Alford v. State*, 307 So.2d 433 (Fla.1975) and *Proffitt v. Florida*, 428 U.S. 242, 96 S.Ct. 2960, 49 L.Ed.2d 913 (1976). Foster contended that the trial court erred in finding that the aggravating circumstances outweighed the mitigating circumstances. Foster argued that the felony was committed while his under the influence of extreme mental or emotional disturbance and the trial court did not consider this mitigating factor. Foster presented the testimony of a psychiatrist and his former wife to establish his mental and emotional instability. The trial court also considered three psychiatric reports.[3] This Court agreed with the trial court that the mitigating circumstances were not sufficient to overcome the heinous nature of the homicide. The *Foster* Court found the death penalty appropriate citing and discussing *Sullivan v. State*, 303 So.2d 632 (Fla.1974) and observing that where a defendant had a lengthy history of violence (just as defendant Foster), had demonstrated callous indifference to human life, and where his acts were for pecuniary gain, the death penalty was properly imposed. *Foster*, 369 So.2d at 931 *citing Henry v. State*, 328 So.2d 430 (Fla. 1976). This Court affirmed the conviction and sentence.

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[3] There was no presentence report filed in the case or considered by the trial judge. *Foster*, 369 So.2d at 931

Foster sought certiorari review in the United States Supreme Court which was denied. *Foster v. Florida*, 444 U.S. 885, 100 S.Ct. 178, 62 L.Ed.2d 116 (1979). The Governor Graham of Florida signed a death warrant on May 5, 1981, authorizing Foster's execution on June 3, 1981. Foster, on May 12, 1981, filed a 3.850 motion for post-conviction relief in circuit court in Bay County. The trial court, Judge Larry A. Bodiford, denied the motion for postconviction relief without evidentiary hearing. The trial court also denied the application for stay of execution.

Foster appealed. In *Foster v. State*, 400 So.2d 1 (Fla. 1981), this Court affirmed the denial of the motion for post-conviction relief without an evidentiary hearing. Foster asserted that trial counsel was ineffective for (1) failing to investigate certain readily available medical records; (2) improperly advising him regarding the consequences of pleading of not guilty by reason of insanity by telling him that he would spend the rest of his life in the "nuthouse" and (3) failing to present expert witnesses who could testify as to his mental incompetency. Foster also argued that he was taking the prescription drug, valium, and was incompetent during the trial. This Court held that Foster was competent to stand trial because the "record conclusively shows that this assertion of incompetency during the trial is without merit". This Court outlined the colloquy prior to Foster taking the stand regarding the insanity defense and that defense counsel, after Foster took the stand and "confessed his guilt", requested that the trial court determine both Foster's competency at this

point and Foster's sanity at the time of the murder. In rejecting the ineffectiveness claim, this Court explained that trial counsel presented both Foster's former wife and one psychiatrist regarding Foster's mental health. Regarding the ineffectiveness claims, the Court explained that counsel was not ineffective in focusing on the wife's "lay language" testimony rather than the expert's "doctor language" because this was "a matter of judgment". Moreover, trial counsel, during the penalty phase, presented a written report of Committee Finding Incompetency; a petition for involuntary hospitalization and a hospitalization certificate containing a diagnosis. Applying the standards set forth in *Knight v. State*, 394 So.2d 997 (Fla.1981), this Court found that the trial counsel provided reasonably effective assistance of counsel. The Foster Court also rejected a claim that this Court reviewed material which was unknown to Foster because such a claim is not a proper ground for a 3.850 post-conviction motion which is properly limited to an attack on the judgment and sentence, not any action of the Florida Supreme Court. Additionally, such a claim had previously been rejected in *Brown v. Wainwright*, 392 So.2d 1327 (Fla. 1981)(rejecting a claim that the Florida Supreme Court's reviewing pre-sentence investigations, psychiatric evaluations, contact notes made in the corrections system or psychological screening reports by corrections personnel was improper). The Court also rejected "other issues" which were or should have been raised on direct appeal but did not specifically identify them.

Foster filed a petition for a writ of habeas corpus in the United States District Court for the Northern District of Florida. On May 29, 1981, the District Court ordered an evidentiary hearing be held on two claims of ineffective assistance of trial counsel: (1) counsel's alleged failure to adequately investigate insanity defense and (2) counsel's alleged failure to adequately investigate mental illness as a mitigating factor and stayed the execution. *Foster v. Strickland*, 515 F.Supp. 22 (N.D.Fla. 1981). The Court explained that Foster alleged there were extensive psychiatric records, including at least seven prior commitments, which counsel did not discover or present at trial. Additionally, two psychiatrists examined Foster and found he may have been insane at the time of the offense yet counsel did not present this evidence in the guilt phase. During the penalty phase, where mental impairment is extremely important because it is a mitigating factor, counsel did not put into evidence Foster's extensive psychiatric history. The federal court held an evidentiary hearing on June 18, 1981 on three claims of ineffectiveness.

On July 2, 1981, the district court denied the federal habeas corpus petition. *Foster v. Strickland*, 517 F.Supp. 597 (N.D.Fla. 1981). The district Court explained the facts of the crime as follows:

> There was little doubt from the beginning that early in the morning of July 15, 1975, Foster killed Julian Lanier. Foster and Lanier met the evening before in Tot's Bar where they got acquainted over a few drinks. At Lanier's suggestion Foster agreed to find some women who would hire out for recreational sex. They traveled in Lanier's camper to the Bay Shore Bar where Foster, with Lanier's financial backing, found two women who agreed to their proposition.

> The foursome drove to a secluded place to party. There the party ended. Foster beat Lanier bloody and then, after talking to him briefly, slit his throat. While Foster and the women were covering Lanier with leaves and branches, Lanier made sounds of life which inspired Foster to slice his cervical spine.

Foster, 517 F.Supp. at 599. The district court noted that five day after the murder, Foster gave a detailed confession to Bay County Sheriff's Office Investigator Joe Coram. After Foster's counsel filed a Suggestion of Insanity, the court appointed three psychiatrists to examine Foster. The court found Foster competent to stand trial on the basis of the psychiatrists' reports. During the trial Foster took the stand and confessed. Foster testified:

> 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 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.

Foster, 517 F.Supp. at 601. After Foster's confession, counsel moved for a continuance and for additional psychiatric examinations. The motion was denied. Foster was taking ten milligrams of Valium three times a day during trial. Foster did not inform counsel of this fact until shortly after the trial.

The district court addressed five claims ineffectiveness: (1) failure to investigate and raise an insanity defense and to present mitigating psychiatric evidence during the trial's sentencing phase; (2) failure to raise Foster's alleged incompetency at trial; (3) mentioning the parole considerations of a life sentence without requesting an appropriate limiting instruction; (4) failure to

request an instruction telling the jury to disregard evidence of Foster's criminal past and (5) failure to object to the questions which elicited the testimony about earlier crimes.

The court rejected the failure to investigate claims because the facts showed that counsel in fact obtained the medical records and that counsel talked with Foster's mother. Counsel did not talk with Foster's siblings but counsel was aware of such of the information the siblings provided through his community contacts and most of this information was also in the medical records counsel reviewed.

As to counsel's failure to question Foster's competency to stand trial, Foster argued that counsel was ineffective for allowing the trial court based on the written reports of the three psychiatrists rather than asking for a hearing and putting the psychiatrists on the stand. Counsel did not ask for a hearing because he felt it would be useless because most psychiatrists would not change their opinion once it was down in writing. The district court judge relying on his own trial experience examining "a large number of psychiatrists" again and concluded that counsel's decision was "a realistic, effective decision." *Foster*, 517 F.Supp. at 601.

Foster next argued counsel was ineffective for failing to notice Foster's use of Valium. The district court first specifically found that contrary to Foster's claim that he slept through much of the trial, Foster did not sleep during trial. The district court observed that if counsel had filed a motion for new trial alleging incompetence based on Foster's taking Valium, the motion would have

been "a motion destined for denial". The court observed that the dosage of Valium Foster was taking would have no effect other than "to relax him a bit" and that Foster had been seriously abusing much stronger drugs. *Foster*, 517 F.Supp. at 602. Foster next asserted that counsel was ineffective for failing to present an insanity defense. The court rejected this assertions because the decision not to present an insanity defense was Foster's, not counsel's. Counsel wanted to plea not guilty by reason of insanity or attempt to convince the jury to return a second degree murder verdict using the psychiatric evidence available. Foster rejected an both strategies because he wanted to "walk or burn". Counsel explained the insanity defense and its consequences. He accurately informed Foster that given Foster's long history of violence and the brutality of the murder it was highly likely he would be confined for a good while in a mental hospital. This possibility of confinement caused Foster to reject an insanity defense. Foster unrealistically was convinced he could talk his way out of jail because despite his many arrests Foster had never been convicted. Foster reasoning was that it will be my word against the womens'. Counsel pointed out the fallacy of Foster's logic and tried many times to change Foster's mind. Counsel explained the strength of the State's case. Counsel explained that the State had two eyewitnesses and Foster's confession would be devastating. Counsel properly provided Foster an informed evaluation of potential defenses. Foster insisted on not following counsel's advice. After properly advising Foster and trying to convince him to follow

the advice, counsel had no choice but to honor Foster's wishes and forego the insanity defense and not present the psychiatric evidence. *Foster*, 517 F.Supp. at 603. Foster also challenged counsel effectiveness during the penalty phase for failing to present evidence of the two statutory mental mitigators. However, counsel did presented this evidence specifically focusing upon extreme mental or emotional disturbance. Counsel reasoned that expert psychiatric testimony would be difficult for an unsophisticated Bay County jury to understand, consequently put Foster's ex-wife on the stand. He felt she would evoke the jury's sympathy while presenting evidence from which he could also argue the psychiatric mitigating factors. She testified about Foster's self-mutilation and suicidal urges and the apparent lack of reason for his actions. She testified:

> He is a very sick person and I have begged for help for him and so has his mother and we could not get any help from nobody. They would rather put him in the electric chair and kill him than send him to an institution where he can get help. He has been to the mental health unit on a whole lot of occasions and they let him out and they give him pills to calm his nerves and the Judge won't do anything. He promised that he would. I have talked to Dr. Mason and he promised he would and I talked to Dr. Cluxton and he promised he would. And Everybody at the Bay County Sheriff's Department knows me and any time I have ever had any occasion to talk to any of them, asking them to do something for him and nobody will. And they still won't because it's much easier to just go ahead and electrocute him and get it over with so they don't have to worry about somebody whose mind is bad. If he had T.B. or anything they would put him in an institution and they would help him where he couldn't hurt anybody but just because his mind is bad people don't understand that. They think it's all right just to go ahead and get him out of society. But why didn't they get him out of society before a crime like this had to be committed.

Foster, 517 F.Supp. at 603-604. Counsel also put Dr. Mason, one of the examining psychiatrists, on the stand. Dr. Mason testified that Foster had received psychiatric treatment four times since 1968, that he had been diagnosed paranoid, and was suicidally depressed. Records of a 1970 proceeding to determine Foster's competency were also introduced. Counsel's argument actually began during voir dire where he asked several jurors whether they would consider mental or emotional disturbance as a mitigating factor in sentencing. The Court characterized counsel's use of Foster's ex-wife's testimony was particularly persuasive. Counsel argued in closing:

> You know, I would like to almost join that girl that was on that stand in crying out; in crying out as much money as we spend. And it's a shame that I live in a society that thousands and thousands and thousands and literally millions of dollars that are spent that we don't that we don't know much about the mind. You know the reasons that officials haven't done anything I guess, we are treating minds about like the Indians treated boils with some wet moss. We are not even to the stage of treating the mind to where we can lance a boil, much less have penicillin. We know less about the mind than anything else. Yet in our ignorant society the State askes (sic) you to kill a person.
>
> That little girl cried out. She cried out if you are sick with tuberculosis, if you are sick with tuberculosis we treat it and we do. In my generation we have learned how to treat this. And I don't believe that forever we will continue to treat the mind by putting wet moss on it. I think that we are on the threshold of treating the human mind. And I think the reason for twenty-five years of holding a person in this thing with somebody that was compassionate and somebody says well during this period of time, you know, laws could be amended but if we are going to keep them there and I am asking for the life. I am asking for each of you to recommend to this Court that this life be saved because mitigating and extenuating circumstances exist.

Foster, 517 F.Supp. at 604.

As the district Court observed, "if counsel introduced Foster's medical history and testimony of his relatives as Foster says he should have, a great deal of highly prejudicial evidence would have come along". The jury would have learned that Foster once took his mother's car from her at knifepoint; that he raped two women, one of whom was his sister-in-law and that he had been arrested a number of times for violent crimes. The district court concluded: the decision to try talking the jury into a life sentence through use of emotional testimony, psychiatric testimony, and a good old-fashioned appeal to mercy was reasonable. "Another lawyer may have done it differently. Another lawyer may have done it better. Another lawyer may have done it worse." However, trial court was not ineffective. *Foster*, 517 F.Supp. at 605. The district court also addressed the additional ineffectiveness claims and several other matters.

The Eleventh Circuit affirmed the district court's denial of relief. *Foster v. Strickland*, 707 F.2d 1339 (11th Cir.1983). Foster asserted four claims: (1) ineffective assistance of counsel counsel in the guilt and penalty phases of his trial; (2) the constitutionality of instructions to the jury on the weighing of aggravating against mitigating circumstances; (3) the Florida Supreme Court' use of non-record material in reviewing his sentence; and (4) the constitutionality of jury instructions allegedly limiting consideration of non-statutory mitigating circumstances. On rehearing, the Eleventh Circuit denied all issues. Foster then sought certiorari relief in the United States

Supreme Court which was denied. *Foster v. Strickland*, 466 U.S. 993, 104 S.Ct. 2375, 80 L.Ed.2d 847 (1984). Foster filed a successive federal habeas which was also denied. *Foster v. Dugger*, 823 F.2d 402 (11th Cir.1987), *cert. denied*, 487 U.S. 1241, 108 S.Ct. 2915, 101 L.Ed.2d 946 (1988).

In *Foster v. Wainwright*, 457 So.2d 1372 (Fla. 1984), this Court denied the petition for writ of habeas corpus. Foster argued that availability of information to Florida Supreme Court concerning defendants convicted of capital crimes which was not presented at trial and was not part of trial record or record on appeal was unconstitutional. This Court found this argument to be meritless.[4] The Court rejected an incompetency claim because the evidence presented in the habeas petition was cumulative to evidence presented at the trial. Foster further argued based on *Magill v. State*, 386 So.2d 1188 (Fla.1980), that the trial court failed to articulate any mitigating circumstances considered by him before imposing the death sentence. The Court rejected a proportionality argument because the issue was addressed on direct appeal.

In *Foster v. State*, 518 So.2d 901 (Fla. 1987), this Court remanded for a resentencing because the trial court failed to consider nonstatutory mitigation. Foster asserted a *Caldwell v.*

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[4] The record contains an June 20, 1977 order from this court directing the trial judge, Judge Spears, to file a statement regarding whether he considered any evidence in violation of *Gardner v. Florida*, 430 U.S. 349, 97 S.Ct. 1197, 51 L.Ed.2d 393 (1977) when imposing the death sentence. The record contains a May 10, 1979 order stating that the trial court filed a response on June 29, 1977 stating that he did not consider any information not available to Foster or his counsel.

Mississippi, 472 U.S. 320, 105 S.Ct. 2633, 86 L.Ed.2d 231 (1985) violation. The Court found that the prosecutor's comment to jury that its recommendation was only advisory did not diminish jury's sense of responsibility. Foster also claimed that his sentencing proceeding violated *Lockett v. Ohio*, 438 U.S. 586, 98 S.Ct. 2954, 57 L.Ed.2d 973 (1978) and *Hitchcock v. Dugger*, 481 U.S. 393, 107 S.Ct. 1821, 95 L.Ed.2d 347 (1987). Foster asserted as nonstatutory mitigating factors his long history of mental illness, his intoxication at the time of the murder, and his remorse for the crime. *Foster*, 518 So.2d at 902 n.2 Foster argued that neither the jury nor the judge considered this nonstatutory mitigating evidence. The Court noted that the jury instruction condemned in Hitchcock was given and that the trial court limited mitigation to statutory mitigating factors. The Court remanded for a new sentencing proceeding at which all mitigating evidence may be presented to the judge and jury. This court affirmed the denial of Foster's second postconviction motion, but we granted his habeas petition and ordered resentencing based on the Hitchcock error.

The United States Supreme Court denied certiorari on the *Caldwell* issue. *Dugger v. Foster*, 487 U.S. 1240, 108 S.Ct. 2914, 101 L.Ed.2d 945 (1988).

In *Foster v. State*, 614 So.2d 455 (Fla. 1992), this Court again remanded for a new sentencing order to be entered. Foster appealed the death sentence imposed after resentencing and the trial court's summary denial of his motion for postconviction relief. Following the jury's 8-4 recommendation, the trial judge imposed the death

penalty. The trial court found three aggravating circumstances: (1) the murder was committed during the course of a robbery; (2) the murder was cold, calculated, and premeditated; and (3) the murder was especially heinous, atrocious, or cruel. Foster offered thirteen mitigating circumstances. The trial court found that the mitigation did not outweigh the aggravating circumstances. *Foster*, 614 So.2d at 458 n.2. Thereafter, the court summarily denied the 3.850 motion without an evidentiary hearing.

The *Foster* Court first address the claim that the trial court erred in denying his 3.850 motion without an evidentiary hearing. Foster alleged a violation of *Brady v. Maryland*, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963) arguing that the state failed to disclose that it offered Gail Evans and Anita Rogers deals in exchange for their testimony at trial and an ineffectiveness claim. This Court found the motion to be an abuse of process. The Court noted that this was Foster's third postconviction motion. Foster had failed to show any justification for his failure to raise the present claims in his earlier postconviction motions. Moreover, both the *Brady* claim and the ineffectiveness claim required that Foster establish prejudice and he could not in light of his confession. Foster also claimed that the trial court erred in finding the murder to be especially heinous, atrocious, or cruel and cold, calculated and premeditated. After quoting the trial court factual findings regarding the murder, the Court held that "[t]hese facts establish the existence of a careful plan or prearranged design to kill." *Foster v. State*, 614 So.2d at 461.

Foster next claimed that the jury instructions improperly limited the consideration of mitigating evidence to "extreme" emotional disturbances. This Court rejected this claim, finding no reasonable likelihood that the jurors understood the instruction to preclude them from considering any relevant evidence. Foster then argued that the jury instruction given in heinous, atrocious and cruel was improper and this Court agreed but found the error harmless because "Foster's killing of Julian Lanier was especially heinous, atrocious, and cruel by any standard." Foster next asserted that the court erred in failing to strike three venire members for cause. However, Foster exercised peremptory challenges to excuse these three jurors. This Court then rejected a *McCleskey v. Kemp*, 481 U.S. 279, 107 S.Ct. 1756, 95 L.Ed.2d 262 (1987) claim because Foster offered nothing to suggest that the state attorney's office acted with purposeful discrimination in seeking the death penalty in his particular case. Finally, Foster claimed that the trial court's sentencing order fails to evaluate all the proposed mitigating factors. This Court noted that it could not determine whether the trial court found that either of the two statutory mental mitigating circumstances existed or whether found any of the mitigating circumstances to exist or what weight was given to them. This Court remanded the case for the trial judge to enter a new sentencing order following the dictates of *Rogers v. State*, 511 So.2d 526 (Fla.1987) and *Campbell v. State*, 571 So.2d 415 (Fla.1990).

In *Foster v. State*, 654 So.2d 112 (Fla. 1995), affirmed the death sentence following the trial court's issuance of a new sentencing order. The trial court found three aggravators: (1) the crime for which the defendant is to be sentenced was committed while he was engaged in the commission of or attempt to commit, the crime of robbery; (2) The crime for which the defendant is to be sentenced was especially heinous, atrocious or cruel and (3) the capital felony for which the defendant is to be sentenced was a homicide and was committed in a cold, calculated and premeditated manner without any pretense of any moral or legal justification. The trial court found fourteen nonstatutory mitigators: (1) Foster murdered Lanier while he was under the influence of emotional or mental disturbance but not extreme emotional or mental disturbance; (2) Foster's capacity to appreciate the criminality of his conduct or to conform his conduct to the requirement of the law was impaired but not substantially; (3) Foster has an abusive family background; (4) Foster's poverty; (5) Foster's physical illnesses; (6) Foster's love for, and love by, his family; (7) Foster's alcohol and/or drug addiction; (8) Foster's troubled personal life; (9) Foster's physical injuries; (10) Foster's lack of childhood development; (11) Foster's struggle with the death of loved ones; (12) Foster's learning disabilities; (13) Foster's potential for positive sustained human relationships and (14) Foster's remorse for the crime. The trial court, supporting it finding that the murder was heinous, atrocious and cruel, stated:

> the circumstances of this killing indicate a consciousless and pitiless regard for the victim's life and was

> unnecessarily torturous 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 the 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 she could hear the victim breathing. The defendant then 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

The trial court, supporting it finding that the murder was cold, calculated and premeditated, stated:

> prior to beginning to beat the victim, had switched his personal ring with a "K" on it with one of the girls' rings in order not to leave the "K" impression on the victim's skin. One of the girls testified that the defendant had told her he planned to rob the victim before the beating began.

The trial court quoted Foster testimony confessing to the murder:

> "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."

The trial court found the facts of the murder, together with the defendant's testimony, established the heightened degree of premeditation required for the cold, calculated and premeditated aggravator.

Foster raised three claims: 1) the death penalty is not proportionate; 2) the trial court erred in concluding that a conflict existed regarding expert opinion relating to the mental health mitigators; and 3) the jury instruction on cold, calculated, and premeditated was constitutionally impaired. The *Foster* Court found that death was proportionate. This Court rejected the second claim noting that it is the trial court's function to determine whether a particular mitigating circumstance was proven and the weight to be given. As to the standard jury instruction on cold, calculated and premeditated, this Court explained that the instruction was the same one held to be invalid in *Jackson v. State*, 648 So.2d 85 (Fla.1994). This Court held that the jury instruction on cold, calculated, and premeditated was improper but the error was harmless. This Court reasoned that it was "particularly telling that after having concealed Lanier's body with bushes, Foster then proceeded to cut Lanier's spine with a knife when he realized that Lanier was still breathing" and "Foster had ample time to reflect on his actions and their attendant consequences, after concealing Lanier's body and before cutting

Lanier's spine". This Court found "compelling evidence of the heightened level of premeditation required to establish the cold, calculated, and premeditated aggravator. In view of the fact that the trial court found no statutory mitigators and three strong aggravators, this Court found, beyond a reasonable doubt, that the invalid cold, calculated and premeditated jury instruction did not affect the jury's consideration and that its recommendation would have been the same if the requested expanded instruction had been given. The error was harmless because, given these facts, the murder could only have been cold, calculated, and premeditated.

The United State Supreme Court denied certiorari on October 10, 1995. *Foster v. Florida*, 516 U.S. 920,116 S.Ct. 314,133 L.Ed.2d 217 (1995).

Foster then filed a 3.850 motion on September 9, 1998. An amended motion was filed on September 7, 1999. The trial court held a *Huff* hearing. The trial court summarily denied all five claims.

SUMMARY OF ARGUMENT

ISSUE I

Foster asserts that the trial court's exclusion of pregnant women and parents of young children denied his right to a jury comprised of a fair cross-section of the community. The trial court denied fair cross-section claim because parents of young children are not a recognized segment of the community for cross-section purposes. First, while the trial court did not address any bar, the fair cross-section issue is procedurally barred. This claim relates to the jury trial held in 1975. The statute Foster challenges existed at the time. Foster should have brought the challenge in his direct appeal. Secondly, as the trial court ruled, this Court has repeatedly rejected the claim that this subsection violates a defendant Sixth Amendment right to a fair cross section of the community to by permitting expectant mothers or the parents of a young child to be excused from jury duty. Expectant mothers and parents of children under 6 years old are not distinctive groups. While ethnic minorities are distinctive groups, pregnant woman are not. Race and gender are immutable characteristics; however, pregnancy is not an immutable characteristic. Indeed, it is a temporary condition. Parents of older children are not excluded and therefore, no distinctive quality of parenthood is lost by the exclusion of parents of young children. The classes excluded under this subsection, *i.e.*, pregnant woman and parents of children under 6 years, are not constitutionally significant.

Foster also asserts that trial counsel was ineffective for failing to discover and litigate the venire exclusion issue. Trial counsel is not ineffective for recognizing that controlling precedent prohibited this claim from being successful. It is not deficient performance to refuse to argue a position with controlling precedent against that position. Trial counsel merely recognized the reality that the argument is a non-starter. Nor was there any prejudice to Foster. If trial counsel had argued that the statute violated the fair cross-section requirement, the trial court would have simply denied the claim. And this Court would have affirmed the trial court's denial based on its prior precedent. Thus, the trial court properly denied both the fair cross-section and ineffectiveness claim.

ISSUE II

Foster asserts that jury findings of both premeditated murder and felony murder violate double jeopardy. The double jeopardy claim is procedurally barred. The only claims that are properly part of this appeal are issues related to the resentencing. Foster should have raised this claim in his direct appeal or first post-conviction motion. Furthermore, Foster is confusing jury findings with convictions. The single conviction for first degree murder does not violate double jeopardy. A threshold requirement for a valid double jeopardy claim is that there be <u>two</u> convictions for the same offense. Foster does not met this threshold because he was convicted of only one count of first degree murder. Foster was

not convicted for both premeditated murder and felony murder; rather, here there was only one adjudication for the single death. The single conviction does not violate double jeopardy. Thus, the trial court properly summarily denied Foster's double jeopardy claim.

ISSUE III

Foster asserts a violation of *Brady v. Maryland*, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963) regarding a letter from a jail physician to the sheriff written shortly after the crime which stated that Foster was obviously mentally disturbed. The trial court denied the claim explaining that the letter was not uniquely known to the state and that Foster could not establish prejudice. *Brady* does not apply if the evidence in question is available to the defendant from other sources. Nor can Foster establish prejudice. Foster alleges that the prejudice is that the letter was from an "independent" expert, however, the reports of numerous "independent" experts were presented to the trial court. The reports include discharge summaries from the mental health unit of Bay County Memorial hospital, a mental evaluation from a nine month involuntary commitment to Florida State Hospital at Chattahoochee and records from involuntary commitment proceedings. These reports were from psychiatrists who had been treating Foster prior to the crime. They were independent experts. The letter only states Foster was obviously mentally disturbed; it does not contain a detailed diagnosis like the reports. The letter was not merely

cumulative; rather, it is of significantly less value than the reports actually presented. Thus, the trial court properly summarily denied the *Brady* claim.

ISSUE IV

Foster asserts that executing a defendant after an extended stay on death row is cruel or unusual punishment. Foster further asserts that electrocution constitutes cruel or unusual punishment. This Court has previously rejected the claim that it is cruel or a violation of an international treaty to execute a defendant after an extended stay on death row. The electrocution claim is procedurally barred because it was not raised on direct appeal. Additionally, this Court has repeatedly held that the electric chair does not constitute cruel or unusual punishment. Moreover, the legislature has amended the statute to provide for lethal injection as an alternative to the electric chair. The availability of this alternative forecloses any challenge to the electric chair as cruel or unusual punishment. The trial court properly concluded that this issue is purely a matter of law and properly summarily denied both claims.

ISSUE V

Foster argues that any harmless error analysis in any death case violates due process. Foster asserts that this Court conducted a flawed harmless error analysis on the cold, calculated and premeditated aggravator in his direct appeal from a resentencing,

Foster v. State, 654 So.2d 112 (Fla. 1995). The trial court summarily denied the claim explaining that the propriety of this Court's harmless error analysis is not cognizable in postconviction proceedings. Secondly, this Court and the United States Supreme Court have both held that harmless error analysis is proper in a death case. Thus, this Court's harmless error analysis performed in the direct appeal did not violate due process and the trial court properly summarily denied this claim.

ARGUMENT

ISSUE I

DID THE TRIAL COURT PROPERLY SUMMARILY DENY THE FAIR CROSS-SECTION CLAIM? (Restated)

Foster asserts that the trial court's exclusion of pregnant women and parents of young children denied his right to a jury comprised of a fair cross-section of the community. The trial court denied fair cross-section claim because parents of young children are not a recognized segment of the community for cross-section purposes citing *Vasil v. State*, 374 So.2d 465 (Fla. 1979).

STANDARD OF REVIEW

The standard of review for a summary denial of a 3.850 is *de novo*. *Cf. State v. Glatzmayer*, 26 Fla.L.Weekly S279 n.7 (Fla. May 3, 2001) citing Philip J. Padovano, Florida Appellate Practice § 9.4 (2nd ed.1997). An order denying an evidentiary hearing is sufficient if it sets forth a clear rationale explaining why each claim was summarily denied. *Asay v. State*, 769 So.2d 974, 989 (Fla. 2000), citing *Diaz v. Dugger*, 719 So. 2d 865, 868 (Fla. 1998)(stating that a summary denial of a motion to vacate will be affirmed where the law and competent substantial evidence supports its findings). A trial court does not have to attach specific portions of the record to the order summarily denying postconviction relief where the reasons for denial are clearly spelled out in the order. *Patton v. State*, 25 Fla. L. Weekly S749 (Fla. September 28, 2000); *Sireci v. State*, 773 So.2d 34,773 So.2d 41, n.15 (Fla. 2000)(rejecting an argument that the trial court

failed to cite to or attach the portions of the record that refute the claim because while the trial court did not attach portions of the record, it did state its rationale citing *Anderson v. State*, 627 So.2d 1170, 1171 (Fla.1993)).

Furthermore, while Foster was not granted a evidentiary hearing following his fourth motion for post-conviction relief in state court, Foster has had an evidentiary hearing in federal court to explore numerous ineffective assistance of counsel claims. *Foster v. Strickland*, 517 F.Supp 597 (N.D. Fla. 1981). This Court affirmed the denial of Foster's third postconviction motion finding it an abuse of process. *Foster v. State*, 614 So.2d 455 (Fla.1992). This fourth post-conviction motion is likewise an abuse of the process.[5] Thus, the trial court properly summarily denied all five claims presented on appeal.

FAIR CROSS-SECTION

This issue is procedurally barred. This claim relates to the jury trial held in 1975. The statute Foster challenges existed at the time. Foster should have brought the challenge in his direct appeal. Issues that could have been raised on direct appeal but were not are noncognizable claims through collateral attack. *Hall v. State*, 742 So.2d 225, 226 (Fla. 1999).

[5] Even the "shell" motion appears to be untimely. Certiorari was denied in the United States Supreme Court on October of 1995 yet the shell motion was not filed until three years later in 1998.

The right to a jury trial includes a right that the jury be drawn from a representative cross-section of the community without the systematic exclusion of large, distinct and identifiable segments of the community. *Taylor v. Louisiana*, 419 U.S. 522, 530, 95 S.Ct. 692, 697, 42 L.Ed.2d 690 (1975)(invalidating sections of Louisiana's constitution and criminal procedure code which precluded women from serving on a jury unless they expressly requested in writing to serve). To make a prima facie case that the fair cross-section requirement has been violated, a defendant must show that: (1) the group allegedly excluded is a distinctive part of the community, (2) the representation of this group in venires from which juries are selected is not fair and reasonable in relation to the number of such persons in the community, and (3) this underrepresentation is due to systematic exclusion of the group in the jury selection process. *Duren v. Missouri*, 439 U.S. 357, 364, 99 S.Ct. 664, 58 L.Ed.2d 579 (1979)).

The persons disqualified or excused from jury service statute, § 40.013(4), Florida Statutes, provides:

> Any expectant mother and any parent who is not employed full time and who has custody of a child under 6 years of age, upon request, shall be excused from jury service.

First, this claim does not require an evidentiary hearing. The statute itself established that the two groups, expected mothers and parents of young children, are systemically excluded.[6] Whether

[6] The exhibit attached to the motion is a prospective jury list with handwritten notes from the original trial in 1975. The notes say ex and pregnant or ex and a 4 year old child, etc.

a statute violates the fair cross-section requirement is purely an issue of law. Such a claim does not require an evidentiary hearing. Whether a defendant has been denied the right to a jury selected from a fair cross-section of the community is reviewed de novo. *United States v. Phillips*, 239 F.3d 829, 842 (7th Cir. 2001).

This Court has repeatedly rejected the claim that this subsection violates a defendant Sixth Amendment right to a fair cross section of the community to by permitting expectant mothers or the parents of a young child to be excused from jury duty. *Johnson v. Dugger*, 523 So.2d 161, 163 (Fla. 1988), citing *Henderson v. State*, 463 So.2d 196 (Fla. 1985) and *Hitchcock v. State*, 413 So.2d 741 (Fla. 1982).

In *Hitchcock v. State*,413 So.2d 741 (Fla. 1982), this Court held that persons with young children do not comprise a constitutionally significant class and therefore excluding such persons does not infringe upon a defendant's right to a jury composed of a fair cross-section of the community. The *Hitchcock* Court relied on *McArthur v. State*, 351 So.2d 972, 975 (Fla.1977), which held that held that mothers with young children do not comprise a constitutionally significant class and therefore, excluding such women does not infringe upon a defendant's right to a jury composed of a fair cross-section of the community. *McArthur* explained that to evoke constitutional concern, the group excluded must be sufficiently distinctive and concluded that mothers of young children are not so distinctive as to evoke Sixth Amendment concerns. Hitchcock cited *Duren v. Missouri*, 439 U.S. 357, 99

S.Ct. 664, 58 L.Ed.2d 579 (1979), which held a Missouri statute which exempted all women from jury service unconstitutional. The *Hitchcock* Court distinguished the Florida statute which provided only a limited exemption for particular women. The *Hitchcock* Court found "nothing in *Duren* which makes it necessary to recede from the Court's previous rulings on this issue." *Hitchcock*, 413 So.2d at 745.

This claim fails the first prong of *Duren* which requires that the group excluded be a distinctive part of the community. Expectant mothers and parents of children under 6 years old are not distinctive groups. While ethnic minorities are distinctive groups, pregnant woman are not. Race and gender are immutable characteristics; however, pregnancy is not an immutable characteristic. Indeed, it is a temporary condition. Following the logic of *McArthur* with the newer version of the statute, parents of older children are not excluded and therefore, no distinctive quality of parenthood is lost by the exclusion of parents of young children. The classes excluded under this subsection, *i.e.*, pregnant woman and parents of children under 6 years, are not constitutionally significant.

Foster's reliance on *Alachua County Court Executive v. Anthony*, 418 So.2d 264 (Fla. 1982) is misplaced. This Court has rejected this exact assertion in *Henderson v. State*, 463 So.2d 196, 201 (Fla. 1985). As the *Henderson* Court explained, *Alachua County Court Executive*, held that the exemption for mothers with small children violated equal protection grounds for not treating

similarly situated fathers the same way. As the *Henderson* Court noted, the Sixth Amendment was not involved in *Alachua County Court Executive* and the case did not announce any right of defendants that would support such an argument. *Parker v. State*,456 So.2d 436, 442 (Fla. 1984)(rejecting this same argument and stating "[d]efendant's reliance on *Alachua County Court Executive v. Anthony*, 418 So.2d 264 (Fla.1982), is misplaced, because that case concerned denial of equal protection to male parents). Thus, the trial court properly summarily denied this claim.

Foster's reliance on *Parker v. State*, 456 So.2d 436, 442 (Fla. 1984), is equally misplaced. Foster acknowledges that the *Parker* Court "seems" to reject this argument. There is no "seems" about it. *Parker* rejected this claim as an alternative holding. The *Parker* Court observed, "we have previously ruled contrary to defendant's position." *Id citing Hitchcock v. State*, 413 So.2d 741 (Fla. 1982) and *McArthur v. State*, 351 So.2d 972 (Fla. 1977). The *Parker* Court then distinguished *Alachua County Court Executive v. Anthony*, 418 So.2d 264 (Fla.1982) as a case concerning denial of equal protection, not denial of a fair cross-section. The *Parker* Court further noted that Parker's reliance on *Alachua County Court Executive* was "misplaced". This Court later again rejected this exact claim in *Henderson v. State*, 463 So.2d 196, 201 (Fla. 1985).

INEFFECTIVENESS

Foster then asserts that trial counsel was ineffective for failing to discover and litigate the venire exclusion issue. To

prove a claim of ineffective assistance of counsel, petitioner must establish that: (1) counsel's performance was deficient and (2) prejudice because counsel's errors were so serious as to deprive the defendant of a trial whose result is reliable. The prejudice prong requires the defendant to show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome. *Cherry v. State*, 781 So.2d 1040, 1048 (Fla. 2000), citing, *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). Ineffective assistance of counsel claims are reviewed de novo. *Stephens v. State*, 748 So.2d 1028 (Fla. 1999).

Trial counsel is not ineffective for recognizing that controlling precedent prohibited this claim from being successful. It is not deficient performance to refuse to argue a position with controlling precedent against that position. Trial counsel merely recognized the reality that the argument is a non-starter. Nor was there any prejudice to Foster. If trial counsel had argued that the statute violated the fair cross-section requirement, the trial court would have simply denied the claim. And this Court would have affirmed the trial court's denial based on *Henderson v. State*, 463 So.2d 196, 201 (Fla. 1985); *Parker v. State*, 456 So.2d 436, 442 (Fla. 1984); *Hitchcock v. State*, 413 So.2d 741 (Fla. 1982) and *McArthur v. State*, 351 So.2d 972 (Fla. 1977). Thus, the trial court properly denied both the fair cross-section and ineffectiveness claim.

ISSUE II

DID THE TRIAL COURT PROPERLY SUMMARILY DENY THE CLAIM THAT JURY FINDINGS OF BOTH PREMEDITATED AND FELONY MURDER VIOLATE DOUBLE JEOPARDY? (Restated)

Foster asserts that jury findings of both premeditated murder and felony murder violate double jeopardy. The trial court found this claim to be procedurally barred citing *Rutherford v. State*, 727 So.2d 216, 218 n.2 (Fla. 1998)(affirming summarily denial of double jeopardy claim as procedurally barred because double jeopardy claim was unsuccessfully raised his on direct appeal). The trial court also ruled that the single conviction did not violate double jeopardy citing *Lamb v. State*, 532 So.2d 1051 (Fla. 1988).

First, the double jeopardy claim is procedurally barred. Issues that could have been raised on direct appeal but were not are noncognizable claims through collateral attack. *Hall v. State*, 742 So.2d 225, 226 (Fla. 1999). This is post-conviction appeal from a resentencing. The only claims that are properly part of this appeal are issues related to that resentencing.

Furthermore, there is no need for an evidentiary hearing to resolve the double jeopardy claim. The issue is purely a matter of law that does not require any factual development. Courts do not conduct evidentiary hearings on issues that are solely a matter of law because there is no additional fact finding required and no factual dispute to resolve. Therefore, no evidentiary hearing is required. Double jeopardy claims present a pure question of law

reviewed de novo. *United States v. Duarte-Acero*, 208 F.3d 1282, 1284 (11th Cir. 2000).

Furthermore, Foster is confusing jury findings with convictions. The single conviction for first degree murder does not violate double jeopardy. A threshold requirement for a valid double jeopardy claim is that there be two convictions for the same offense. Foster does not met this threshold because he was convicted of only one count of first degree murder.

The first degree murder statute, § 782.04(1)(a), Florida Statutes, is an alternative conduct statute. The statute allows the state to prove one crime, the crime of murder, in two different ways. Premeditated murder and felony murder are alternative theories of liability, not separate convictions.

In *Lamb v. State*, 532 So.2d 1051 (Fla.1988), this Court held that a jury finding of guilt as to both premeditated murder and felony murder does not violate double jeopardy. Lamb argued that he could not be indicted and found guilty of both first-degree premeditated and felony murder stemming from a single death. This Court rejected the claim reasoning that "there is no reason why a defendant cannot premeditate a murder committed during the course of a felony." This Court found that the trial court correctly adjudicated him guilty of only one murder and affirmed Lamb's conviction. *Lamb*, 532 So.2d at 1052.

By contrast, in *Gaskin v. State*, 591 So.2d 917, 920 (Fla. 1991), this Court held that a defendant cannot be convicted for both premeditated murder and felony murder. Gaskin was convicted

of four counts of murder for the death of two persons. He was convicted of both premeditated and felony murder for each of the two deaths. This Court explained that each death will support only one adjudication.

Foster's reliance on *Wittemen v. State*, 735 So.2d 538 (Fla. 2d DCA 1999), is misplaced. Wittemen was convicted of premeditated first-degree murder, first-degree felony murder, and armed robbery. All three convictions arose out of the same incident which involved only one murder. The trial court vacated Wittemen's sentence for felony murder but not the adjudication. The second district, relying on this Court's decision in *Lamb v. State*, 532 So.2d 1051 (Fla.1988), agreed that convictions for both premeditated and felony murder for the same single murder violate double jeopardy and remanded for entry of an order vacating the conviction for felony murder.

Here, there was only one adjudication. As in *Lamb*, there was a finding by the jury that the State proved the one murder both ways. Here, in compliance with *Gaskin*, Foster was not convicted for both premeditated murder and felony murder; rather, here there was only one adjudication for the single death. The single conviction does not violate double jeopardy. Thus, the trial court properly summarily denied Foster's double jeopardy claim.[7]

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[7] Appellant attempts to relitigate the insufficiency of the evidence to support the robbery albeit as part of his double jeopardy claim. This insufficiency issue was raised on direct appeal. Foster may not relitigate this same claim in his 3.850 motion by attempting to cloth it as a double jeopardy claim. *Arbelaez v. State*, 775 So.2d 909, 918 (Fla. 2000)(concluding that

ISSUE III

DID THE TRIAL COURT PROPERLY SUMMARILY DENY THE BRADY CLAIM REGARDING A LETTER FROM AN EXAMINING PHYSICIAN? (Restated)

Foster asserts a violation of *Brady v. Maryland*, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963) regarding a letter from a jail physician written to the sheriff shortly after the crime which stated that Foster was obviously mentally disturbed. The trial court denied the claim explaining that the letter was not uniquely known to the state and that Foster could not establish prejudice.

Contrary to Foster's assertion, the prejudice prong of *Brady* is routinely resolved by this Court and other appellate courts without an evidentiary hearing being held. Brady claims are reviewed *de novo*. *United States v. Hughes*, 230 F.3d 815, 819 (5th Cir. 2000). To establish a *Brady* violation, petitioner must establish that the letter was "(1) favorable to the accused, either because it is exculpatory, or because it is impeaching; (2) it must have been suppressed by the State, either willfully or inadvertently and (3)

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the claim was merely a recouching of the claim already presented on direct appeal and rejected by this Court and thus was procedurally barred in a postconviction proceeding); *Shere v. State*, 742 So.2d 215, 218 n.7 (Fla. 1999)(concluding that the claim was procedurally barred because on direct appeal this Court held that the aggravator was supported by the evidence). Thus, the claim is procedurally barred by the law of the case doctrine. Furthermore, the insufficiency claim it is meritless. Foster asserts that there is no evidence of robbery in light of the defendant's testimony that he didn't rob the victim. The jury is not required to believe a defendant's version of the crime. *Woods v. State*, 733 So.2d 980, 986 (Fla. 1999)(noting that the jury is not required to believe the defendant's version of the facts where the State has produced conflicting evidence).

prejudice must have ensued. *Way v. State*, 760 So.2d 903, 910 (Fla.2000)(quoting *Strickler v. Greene*, 527 U.S. 263, 281-82, 119 S.Ct. 1936, 144 L.Ed.2d 286 (1999), *cert. denied*, 121 S.Ct. 1104 (2001). Prejudice is measured by determining whether the favorable evidence could reasonably be taken to put the whole case in such a different light as to undermine confidence in the verdict. In applying the test, the evidence must be considered in the context of the entire record. *Rose v. State*, 26 Fla.L. Weekly S210 (Fla. April 5, 2001)

However, *Brady* does not apply if the evidence in question is available to the defendant from other sources. *United States v. Davis*, 787 F.2d 1501, 1505 (11th Cir.1986); *United States v. Brothers Const. Co. of Ohio*, 219 F.3d 300, 316 (4th Cir. 2000)(finding evidence was not Brady material because it was available through the FOIA); *United States v. Clark,* 928 F.2d 733, 738 (6th Cir 1991)(stating that no *Brady* violation exists where the evidence is available to defendant from another source); *United States v. Farkas*, 867 F.2d 609 (4th Cir.1989)(concluding federal regulations, which are published in the Federal Register and the Code of Federal Regulations, are not *Brady* material). Where information is equally available to all parties, the evidence can not be said in any meaningful sense to be "suppressed" as required by *Brady*. *United States v. Brown*, 628 F.2d 471, 473 (5th Cir. 1980) (observing that in "no way can information known and available to the defendant be said to have been suppressed by the Government.")

In *Baxter v. Thomas*, 45 F.3d 1501, 1506 (11th Cir. 1995), the

Eleventh Circuit rejected a *Brady* claim because the defendant was equally aware of the information. Baxter asserted that the prosecution failed to disclose an order from a prior criminal case in which he was found temporarily incompetent to stand trial. The Eleventh Circuit explained that Baxter himself was aware of the order. *Baxter*, 45 F.3d at 1507.

Here, Foster himself, like Baxter, was aware that a physician had treated him in jail shortly after the murder. Indeed, Foster was aware of this information before the prosecutor. Thus, here, like *Baxter*, there was no *Brady* violation.

Nor can Foster establish prejudice. Foster alleges that the prejudice is that the letter was from an "independent" expert, however, the reports of numerous "independent" experts were presented to the trial court. These reports include discharge summaries from the mental health unit of Bay County Memorial hospital, mental evalution from a nine month involuntary commitment to Florida State Hospital at Chattahoochee and records from involuntary commitment proceedings. These reports were from psychiatrists who had been treating Foster prior to the crime. They were independent experts. More importantly, unlike the jail physician who is not identifies as a psychiatrist, these reports were from psychiatrists. The letter from Dr. Stewart only contained the phrase that Foster "obviously is mentally disturbed" without a diagnosis or identification of the mental disturbance. By contrast, the reports contain detailed diagnosis. The progress notes from a 1968 hospitalization contain a diagnosis of

schizophrena and treatment with Thorazine. A report from a 1970 involuntary hospitalization at Florida State Hospital contains a detailed mental history and a diagnosis of "schizophrenia, paranoid type". A discharge summary from 1972 by Dr. Sapoznikoff's of Bay County Memorial Hospital ruled out psychosis but diagnosed Foster as "emotionally unstable personality with psychopathic traits" and contained information that any seizure disorder was controlled by Dilantin. A second discharge summary from 1973 also from Dr. Sapoznikoff's following an apparent suicide attempt diagnosed Foster as "emotionally unstable personality with psychopathic traits" and contained information that any seizure disorder was controlled by Dilantin. The discharge summary from Dr. Mason of Bay County Memorial in early 1974 diagnosed Foster as a "latent schizophrenic or emotionally unstable personality" and "he was suffering from a psychotic organic brain syndrome" and that Foster became psychotic when he uses alcohol. A second discharge summary from Dr. Mason of Bay County Memorial in late 1974 diagnosed Foster as a "paranoid schizophrenic" with a long history and noted his treatment with Haldol. The letter was not merely cumulative; rather, it is of significantly less value than the reports actually presented. Thus, no prejudice ensued.

Foster also asserts a discovery violation. Foster is confused regarding the nature of discovery violations. The rules of discovery are designed to prevent trial by surprise. A discovery violation means that the State uses incriminating evidence at trial or a resentencing without disclosing that evidence to the defense.

The letter was not admitted at trial. Therefore, by definition, no discovery violation occurred. Cf. *Rose v. State*, 26 Fla.L. Weekly S210 (Fla. April 5, 2001)(in a resentencing where photographs were not introduced at the original proceeding but were introduced at the resentencing, stating that the claim appears to constitute a Richardson claim as well as a *Brady* issue but then clarifying that two different set of photographs were involved). Thus, the trial court properly summarily denied the *Brady* claim.

ISSUE IV

DID THE TRIAL COURT PROPERLY SUMMARILY DENY THE CRUEL AND UNUSUAL PUNISHMENT CLAIM CONCLUDING THAT THE ISSUE WAS PURELY A MATTER OF LAW? (Restated)

Foster asserts that executing a defendant after an extended stay on death row is cruel or unusual punishment. Foster further asserts that electrocution constitutes cruel or unusual punishment. The trial court denied this claim because it was "without merit" citing *Knight v. State*, 746 So.2d 423, 437 (Fla. 1998), *cert. denied*, 528 U.S. 990, 120 S.Ct. 459, 145 L.Ed.2d 370 (1999).

This issue is also does not require an evidentiary hearing. The cruel or unusual punishment challenge does not require any additional factual development. The only fact necessary to support this claim is that the defendant has been on death row since 1975. (Postconviction motion at 16). This fact is established by the judgment and sentence and is not in dispute. Such a claim is purely a matter of law that does not require an evidentiary hearing. Thus, no hearing is required to resolve this issue. A claim that a punishment violates the Eighth Amendment's ban against cruel and unusual punishment ir reviewed *de novo*. *Windham v. Merkle*,163 F.3d 1092, 1106 (9th Cir. 1998).

This Court has previously rejected the claim that it is cruel or a violation of an international treaty to execute a defendant after an extended stay on death row. *Booker v. State*, 773 So.2d 1079, 1096 (Fla. 2000), *cert. denied*, 2001 WL 243444 (May 14, 2001)(rejecting claim for a defendant who had spent "over two decades on death row"); *Knight v. State*, 746 So.2d 423, 437

(Fla.1998), *cert. denied*, 528 U.S. 990, 120 S.Ct. 459, 145 L.Ed.2d 370 (1999)(rejecting claim for a defendant who had "endured more than two decades on death row"). As the *Knight* Court explained, both federal or state courts have rejected such claims. *Knight*, 746 So.2d at 437, *citing White v. Johnson*, 79 F.3d 432 (5th Cir.1996); *State v. Smith*, 931 P.2d 1272 (Mont. 1996); *State v. Schackart*, 947 P.2d 315, 336 (Ariz. 1997), *cert. denied*, 525 U.S. 862, 119 S.Ct. 149, 142 L.Ed.2d 122 (1998). The California Supreme Court has recently held that two decades on death row did not amount to cruel and unusual punishment. *People v. Anderson*, - P.3d - (Cal. May 14, 2001). The *Anderson* Court explained that the appeals process is a constitutional safeguard, not a constitutional defect. The California Supreme Court observed that any delay argument was "untenable" because if the death sentence is reversed on appeal, a defendant has suffered no conceivable prejudice and if the death sentence is affirmed, the delay has prolonged his life. The *Anderson* Court noted that a defendant can have no conceivable complaint about his extended incarceration because life without possibility of parole is the minimum sentence. In other words, a defendant would been facing prolonged incarceration regardless of the delay.

As another court observed, the delay in capital cases, in large part, "is a function of the desire of our courts, state and federal, to get it right, to explore exhaustively, or at least sufficiently, any argument that might save someone's life." *Chambers v. Bowersox*, 157 F.3d 560, 570 (8th Cir. 1998)(stating

that a fifteen year delay does not "even begin to approach a constitutional violation"). There is nothing unusual about a significant period between a death penalty being imposed and the execution. Unfortunately, it is all too usual for defendants to be executed only after an extended length of time on death row. Thus, an extended stay on death row is not cruel or unusual.

The electrocution claim is procedurally barred. *Hall v. State*, 742 So.2d 225, 226 (Fla. 1999)(reasoning that execution by electrocution is cruel or unusual punishment or both under the Florida and United States Constitutions, is procedurally barred because it was not raised on direct appeal). Additionally, this Court has repeatedly held that the electric chair does not constitute cruel or unusual punishment. *Bryant v. State*, 26 Fla. L. Weekly S218 (Fla. April 5, 2001); *Holland v. State*, 773 So.2d 1065, 1079 (Fla. 2000); *Provenzano v. Moore,* 744 So.2d 413 (Fla.1999), *cert. denied,* 528 U.S. 1182, 120 S.Ct. 1222, 145 L.Ed.2d 1122 (2000); *Jones v. State*, 701 So.2d 76, 79 (Fla.1997). Moreover, since this Court's decision in *Provenzano*, the legislature has amended the statute to provide for lethal injection as an alternative to the electric chair.[8] The availability of this alternative forecloses any challenge to the electric chair as cruel or unusual punishment. *Stewart v. LaGrand*, 526 U.S. 115, 119 S.Ct.

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[8] The execution of death sentence statute, § 922.10, Florida Statutes (2000), provides in pertinent part:

> A death sentence shall be executed by electrocution or lethal injection in accordance with s. 922.105.

1018, 143 L.Ed.2d 196 (1999)(holding petitioner waived Eighth Amendment claim that gas chamber was cruel and unusual punishment by choosing to be executed by gas rather than lethal injection). The trial court properly concluded that this issue is purely a matter of law and properly summarily denied this claim based on this Court's precedent.

ISSUE V

DID THE TRIAL COURT PROPERLY SUMMARILY DENY THE CLAIM THAT THIS COURT'S HARMLESS ERROR ANALYSIS VIOLATED DUE PROCESS? (Restated)

Foster argues that any harmless error analysis in any death case violates due process. Foster asserts that this Court conducted a flawed harmless error analysis on the cold, calculated and premeditated aggravator. In Foster's direct appeal from a resentencing, *Foster v. State*, 654 So.2d 112 (Fla. 1995), this Court found that the jury instruction on the cold, calculated, and premeditated aggravator was improper based on *Jackson v. State*, 648 So.2d 85 (Fla. 1994) because the instruction did not adequately explain the difference between the premeditation required to convict for first-degree murder and the heightened premeditation required to find the CCP aggravator. However, this Court found that the error was harmless.[9] The trial court summarily denied the claim explaining that the sufficiency of this Court's harmless

[9] The *Foster* Court explained that the giving of an erroneous CCP instruction could be harmless, if the State establishes "beyond a reasonable doubt that the invalid CCP instruction did not affect the jury's consideration or that its recommendation would have been the same if the requested expanded instruction had been given." The *Foster* Court concluded that the error was harmless because the murder could only have been cold, calculated, and premeditated. This Court found it "particularly telling" that after having concealed Lanier's body with bushes, Foster then proceeded to cut Lanier's spine with a knife when he realized that Lanier was still breathing and that Foster had "ample" time to reflect on his actions and their attendant consequences, after concealing Lanier's body and before cutting Lanier's spine, which was "compelling evidence of the heightened level of premeditation required to establish the cold, calculated, and premeditated aggravator." *Foster*, 654 So.2d at 115.

error analysis may not be raised in a postconviction motion citing *Shere v. State*, 742 So.2d 215, 218 n. 7 (Fla.1999) and ruled that the constitution permits appellate courts to affirm a death sentence after striking an aggravator by performing a harmless error review citing *Clemons v. Mississippi*, 494 U.S. 738, 110 S.Ct. 1441, 108 L.Ed.2d 725 (1990).

This issue is also does not require an evidentiary hearing. Harmless error analysis is an appellate concept that does not require any additional factual development. Any additional evidence developed after the sentencing is irrelevant because the fact finder would not have heard the additional evidence. Such a claim is purely a matter of law that does not require an evidentiary hearing. Thus, no hearing is required to resolve this issue.

First, as the trial court noted, the propriety of this Court's harmless error analysis is not cognizable in postconviction proceedings. *Sireci v. State*, 773 So.2d 34, 40 n.12 (Fla. 2000)(explaining that challenges the sufficiency of this Court's harmless error analysis on direct appeal, may not be appropriately raised in a motion for postconviction relief citing *Shere v. State*, 742 So.2d 215, 218 n. 7 (Fla.1999)(finding that defendant's claim challenging the sufficiency of this Court's harmless error analysis on direct appeal cannot be raised in a motion for postconviction relief). Because the issue is not cognizable, there is no standard of review.

Secondly, this Court and the United States Supreme Court have both held that harmless error analysis is proper in a death case. *Demps v. Dugger*, 714 So.2d 365, 367(Fla. 1998)(rejecting a claim that the harmless error analysis violated *Clemons v. Mississippi*, 494 U.S. 738, 110 S.Ct. 1441, 108 L.Ed.2d 725 (1990) and affirming a death sentence after striking two aggravators citing *White v. Dugger*, 565 So.2d 700, 702 (Fla.1990)); *Jones v. United States*, 527 U.S. 373, 402, 119 S.Ct. 2090, 2109, 144 L.Ed.2d 370 (1999)(concluding in a direct appeal of a federal death penalty case that any error in the nonstatutory aggravators of victim vulnerability and victim impact was harmless and explaining that harmless error review of a death sentence may be performed in at least two different ways: (1) an appellate court may choose to consider whether absent an invalid factor, the jury would have reached the same verdict or (2) it may choose instead to consider whether the result would have been the same had the invalid aggravating factor been precisely defined citing *Clemons v. Mississippi*, 494 U.S. 738, 753-54, 110 S.Ct. 1441, 108 L.Ed.2d 725 (1990)). Thus, this Court's harmless error analysis performed in the direct appeal did not violate due process and the trial court properly summarily denied this claim.

CONCLUSION

The State respectfully requests that this Honorable Court affirm the trial court's denial of the 3.850 motion.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing ANSWER BRIEF has been furnished by U.S. Mail to JOSEPH F. McDERMOTT Esq., 7116-A Gulf Blvd., St. Pete Beach, FL 33706 this 29th day of May, 2001.

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Counsel certifies that this brief was typed using Courier New 12.

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