

**IN THE SUPREME COURT OF FLORIDA**

**CHARLES KENNETH FOSTER,  
APPELLANT**

**CASE NO.: SC01-240  
LOWER TRIBUNAL NO.: 75-486**

**VS.**

**STATE OF FLORIDA,  
APPELLEE**

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**INITIAL BRIEF OF APPELLANT**

**APPEAL FROM DENIAL OF 3.850 MOTION FOR POST-CONVICTION  
RELIEF WITHOUT EVIDENTIARY HEARING**

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## **PRELIMINARY STATEMENT**

The parties will be referred to as they stood in the trial court, and the following symbols used:

PC

Post Conviction Record on Appeal

T

Original Trial Transcript

Appendix

## SUMMARY OF ARGUMENT

Defendant, Charles Kenneth Foster, appeals the Order denying his 3.850 Motion for Post-Conviction Relief without an evidentiary hearing.

His Motion alleged a systematic and unconstitutional exclusion of pregnant women or those with young children by the state and trial court. The defendant also asserts that jury verdicts of guilt of felony-murder and premeditated murder violate double jeopardy standards. This argument is bolstered by a lack of evidence of the crime of robbery or evidence to support a felony-murder theory.

Defendant also asserts a Brady or discovery violation for the state's failure to disclose a physician's letter to the sheriff as to defendant's "obvious mental disturbance." This mitigation evidence was favorable to defendant, and its non-disclosure prevented defendant's use of strong mental mitigation.

The state's jury notes relating to exclusion of women and Dr. Stewart's letter were obtained only by a recent Public Records request and search by defense's registry counsel investigator.

The trial court erred in denying defendant's post-conviction motion without an evidentiary hearing.

The other issues raised in the Motion regarding cruel and unusual punishment (23 years on death row and electric chair as cruel and unusual

punishment) are submitted for possible future Federal claims, although present law appears to reject such claims.

## STATEMENT OF THE CASE AND FACTS

Development of Mr. Foster's case through the State and Federal Courts, including Appellate decisions, is found in Exhibit A of his Amended 3.850 Motion for Post-Conviction Relief. (PC 22-23) and (Appendix 1) Copy of Amended 3.850 Motion (PC 01-21) without exhibits appears in Appendix 2. Conformed copy of the trial court's order denying 3.850 relief appears at (PC 87-98 and Appendix 3.)

A summary of the facts at trial (appears in 369 So.2d 928 (Fla. 1979) (Appendix 1) revealed the following:

Anita Rogers, 20 years of age, and Gail Evans, 18 years of age, met defendant and the victim, Julian Lanier, at a bar. They knew defendant, but the victim was a stranger.

The girls, after a discussion, agreed to go to the beach or somewhere else to drink and party with the men. The victim bought whiskey and cigarettes, after which the four of them left in the victim's Winnebago camper. The victim was quite intoxicated and surrendered the driving chore to Gail. The defendant and the girls had planned for Gail to have sex with the victim and make some money. Gail parked the vehicle in a deserted area and, after some conversation concerning compensation, the victim and Gail began to disrobe.

Defendant suddenly began hitting the victim and accusing him of taking advantage of his sister. (Gail was not 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.”

The jury returned verdicts finding defendant guilty of robbery, premeditated murder in the first degree, and felony murder. After the sentence hearing, the jury returned an advisory verdict unanimously recommending that defendant receive the death penalty. (PC 24-25)

Thereafter, Defendant's case was subject to several post-conviction applications and both State and Federal appeals. (See PC 22-58 and Appendix 1). The decision of Foster v. State, 614 So.2d 455 (Fla. 1992) remanded the case to enter a new sentencing order pursuant to Rogers and Campbell v. State, 571 So.2d 415 (Fla. 1990) and Lucas v. State, 568 So.2d 18 (Fla. 1990).

On August 12, 1993, Defendant was again sentenced to death, and the Florida Supreme Court affirmed the sentence on June 16, 1995 and Rehearing was denied June 19, 1995. See Foster v. State, 654 So.2d 112 (Fla. 1995). Certiorari was denied by the United States Supreme Court on October 10, 1995. Foster v. Florida, 516 U.S. 920, 116 S.Ct. 314, 133 L.Ed.2d 217 (1995).

After remand, the trial court again resentenced Foster to death (Appendix 4), and this was affirmed in Foster v. State, 654 So.2d 112 (Fla. 1995). Certiorari was denied by the United States Supreme Court in Foster v. Florida, 516 U.S. 920, 116 S.Ct. 314, 133 L.Ed.2d 217 (1995).

Defendant was appointed registry counsel on September 9, 1998, and an investigator, Michael Glantz, was appointed on December 12, 1998. A 3.850 shell motion had been filed by previous collateral counsel on September 9, 1998.

The Amended 3.850 Motion for Post-Conviction Relief was filed September 7, 1999. (PC 1-21) (Appendix 2) The State responded July 7, 2000. (PC 81-86)

Huff hearing was held on the Motion on November 27, 2000 before the Honorable Don Sirmons, Circuit Court Judge, Bay County, Panama City, Florida.

Defendant sought to simplify and condense issues raised in the previous shell motion and Claims I—XXX were included in the amended 3.850 merely to show that they were raised in the shell motion and not to address them in the amended 3.850 motion. (PC 3) Thus, Defendant's grounds under Paragraph 14, grounds A, B, C, D, E, and F (PC 12-18) of the amended 3.850 motion are the sole issues on this appeal.

Defendant concedes that his Amended 3.850 Ground D (PC 16), Defendant's confinement on Death Row for over 23 years constitutes cruel and unusual punishment and Ground E (PC 17) Electric Chair—cruel and unusual punishment have been resolved legally against defendant since the filing of his 3.850 motion. Ground A—Constitutionally Flawed Harmless Error is raised for Florida Supreme Court reconsideration or possible Federal proceedings.



However, these issues are preserved for possible Federal Review since they involve death issues as applied to a person with severe mental deficiencies (Defendant was diagnosed as having...“serious organic problems secondary to head trauma and poor prenatal care,” and ... “organic mental disorders.” (PC 73) It further appears that the issue of execution of mentally retarded persons is presently before the United States Supreme Court.

Through public records disclosure of the prosecutor’s files, Defendant’s investigator, appointed December 12, 1998, obtained a previously undisclosed document of the original venire in his case. (PC 59-67) The amended 3.850 motion alleged that this document contained prosecution notes of the venire pre-selection process in Bay County. (PC 12) The jury list revealed that women were systematically excluded if they were pregnant or had small children. (PC 13)

It was further alleged that neither defendant or his counsel was present at this pre-selection process, no record of the event was made, except the list located ...“through public records disclosure by current counsel’s investigator, Michael Glantz.” (PC 14) Thus, claim was made that there was no documentation of this issue except the State’s venire notes. (PC 14 and PC 59-67) The trial court denied Defendant an evidentiary hearing on this issue. (PC 95-96) (Appendix 3)

Claim C, Ground III of the amended 3.850 claimed a double jeopardy issue. (PC 15) This issue related to separate jury verdicts of guilt as to both felony

murder and premeditated murder. (PC 15) Again, no evidentiary hearing on this was granted.

Ground F of the amended 3.850 alleged a Brady Rule Violation. (PC 17) This claim was also based upon Defendant's investigator, Michael Glantz, obtaining from the prosecutor's files pursuant to Public Records disclosure a letter from a jail physician, Dr. Russell Stewart, dated July 31, 1975, finding "obvious mental disturbance." Defendant alleged that this discovery violation (Brady) "...independent evidence from a medical expert not retained by the Defendant would likely have resulted in a different outcome than death either from jury recommendation or judicial decision." (PC 18) Again, the trial court rejected this claim without an evidentiary hearing.

From the Order Denying Post-Conviction Relief, December 27, 2000 (PC 87), Defendant filed timely Notice of Appeal to the Florida Supreme Court on January 22, 2001. (PC 99)

## ISSUE I

**THE TRIAL COURT ERRED IN DENYING  
DEFENDANT’S 3.850 MOTION FOR POST  
CONVICTION RELIEF WITHOUT A HEARING  
BASED UPON HIS ALLEGED VIOLATION OF HIS  
RIGHT TO AN IMPARTIAL JURY (CONTRARY  
TO THE V, VI AND XIV AMENDMENTS UNITED  
STATES CONSTITUTION, AND ARTICLE I,  
SECTIONS 9 AND 16 CONSTITUTION OF THE  
STATE OF FLORIDA)**

**(STANDARD OF REVIEW – INDEPENDENT  
STANDARD—3.850 ALLEGATIONS NOT  
CONCLUSIVELY REBUTTED BY THE RECORD)**

Failure of the trial court to permit an evidentiary hearing on this issue is reversible error. The amended 3.850 motion sufficiently alleges that the state’s jury notes were not available until the public records review of the state’s files by conflict counsel’s investigator. (PC 12-15) Those notes revealed a systematic exclusion of pregnant women or women with young children.

The statute in effect at Defendant Foster’s trial was declared unconstitutional in Alachua County Court Executive v. Anthony, 418 So. 2d 264 (Fla. 1982). In denying Defendant’s amended 3.850, Judge Sirmons concluded that the Alachua case addressed “equal protection” issues and therefore did not ... “compromise the integrity of the jury.” (PC 96) Alachua very clearly declares the statute under

which defendant's female jurors were excluded unconstitutional. Unconstitutional means unconstitutional, and a constitutionally carved out exception to Defendant cannot be logically sustained.

Cases cited by the trial court do not realistically address the issue presented here. Women were excluded under an unconstitutional statute, and any gender exclusions of that degree violate constitutional equal protection standards to an "impartial jury" under the Sixth Amendment, United States Constitution. Likewise such exclusion violates Article 1, Section 16, Constitution of the State of Florida. Also, the trial court's "equal protection distinction" does not find support in the United States Supreme Court. In Batson v. Kentucky, 106 S.Ct. 1712, 90 L.Ed.2d 69, 476 U.S. 79 (1986) the court held:

By denying a person participation in jury service on account of his race, the State also unconstitutionally discriminates against the excluded juror. Moreover, selection procedures that purposefully exclude black persons from juries undermine public confidence in fairness of our system of justice. Pp. 1716-1718.

The same equal protection principles as are applied to determine whether there is discrimination in selecting the venire also govern the State's use of peremptory challenges to strike individual jurors from the petit jury.

Taylor v. Louisiana, 419 U.S. 522, 95 S.Ct. 692, 95 S.Ct. 692 (1975) struck Louisiana's jury pool law based upon its exclusion of women (except those who requested to serve).

The Supreme Court held:

We accept the fair-cross-section requirement as fundamental to the jury trial guaranteed by the Sixth **\*\*698** Amendment and are convinced that the requirement has solid foundation. The purpose of a jury is to guard against the exercise of arbitrary power--to make available the commonsense judgment of the community as a hedge against the overzealous or mistaken prosecutor and in preference to the professional or perhaps overconditioned or biased response of a judge. Duncan v. Louisiana, 391 U.S., at 155--156 , 88 S.Ct. at 1450-- 1451. This prophylactic vehicle is not provided if the jury pool is made up of only special segments of the populace or if large, distinctive groups are excluded from the pool. Community participation in the administration of the criminal law, moreover, is not only consistent with our democratic heritage but is also critical to public confidence in the fairness of the criminal justice system. Restricting jury service to only special groups or excluding identifiable segments playing major roles in the community cannot be squared with the constitutional concept of jury trial. 'Trial by jury presupposes a jury drawn from a pool broadly representative of the community as well as impartial in a specific case....(T)he broad representative character of the jury should be maintained, partly as assurance of a diffused impartiality and partly **\*531** because sharing in the administration of justice is a phase of civic responsibility.' Thiel v. Southern Pacific Co., 328 U.S. 217, 227, 66 S.Ct. 984, 90 L.Ed. 1181 (1946) Frankfurter, J., dissenting).

\* \* \*

Yet a flavor, a distinct quality is lost if either sex is excluded. The exclusion of one may indeed make the jury less representative of the community than would be true if an economic or racial group were excluded.

The Florida Supreme Court in McArthur v. State, 351 So.2d 972 (Fla. 1977) held that F.S. 40.01(1) did not exclude a constitutionally significant class, in as much as no distinctive quality of parenthood or sex is lost by the exclusion.

Subsequently, however, the Florida Supreme Court in Alachua County v. Anthony, 418 So.2d 264 (Fla. 1982) declared F.S. 40.013(4) unconstitutional based upon its gender-based classification. It is important to note the court's language in striking down the statute.

Although section 40.013(4) is not being challenged in this proceeding on sixth amendment grounds, we note that courts look with disfavor on broadly drawn automatic exemptions from jury service. In Duren v. Missouri, 439 U.S. 357, 99 S.Ct. 664, 58 L.Ed.2d 579 (1979), the United States Supreme Court declared unconstitutional an exemption available upon request to all women because of their important role in the home and family life. In Lee v. Missouri, 439 U.S. 461, 99 S.Ct. 710, 58 L.Ed.2d 736 (1979), the Court ordered that the Duren decision be retroactively applied to all juries sworn after the 1975 ruling in Taylor v. Louisiana, 419 U.S. 522, 95 S.Ct.692, 42 L.Ed.2d 690 (1975), which set out the basic constitutional guidelines for jury selection.

Our affirmance of the First District Court of Appeal's decision holding this automatic exemption unconstitutional does not mean that individuals, male or

female, with child-rearing responsibilities should not be granted an exemption from jury service under the discretionary provisions of section 40.013(6). We expect the trial judges of this state to recognize that one who has the responsibility of caring for small children has a legitimate ground for requesting and receiving an exemption under that section.

The case of Parker v. State, 456 So.2d 436 (Fla. 1984) seems to reject this claim, but the court stated it could not consider the issue because a transcript of the hearing wherein the issue was raised was not provided (Emphasis supplied).

Foster was not granted an evidentiary hearing below although strong grounds were asserted at the Huff hearing.

Defendant also alleged that trial counsel was ineffective for failure to discover and litigate the venire exclusion issue. (PC 14) This alone should have triggered an evidentiary hearing.

In Gaskin v. State, 737 So. 2d 509 (Fla. 1999) the court held:

In his postconviction motion Gaskin raised several claims of ineffective assistance of counsel. [FN10] He asserted that counsel rendered ineffective assistance \*514 during the penalty phase by failing to present important mitigating evidence by failing to provide Dr. Harry Krop, the mental health expert, with sufficient background information to properly assess Gaskin's mental condition, by failing to specifically address aggravating and mitigating factors in his closing argument to the jury, and by failing to request a limiting instruction on the doubling of aggravating circumstances. Gaskin contends the trial

court should have held an evidentiary hearing on these claims. We agree.

See also Peede v. State, 748 So. 2d 253 (Fla. 1999) holding:

“To uphold the trial court’s summary denial of claims raised in a 3.850 motion, the claims must be either facially invalid or conclusively refuted by the record. See Fla. R.Crim.P. 3.850(d). Further, where no evidentiary hearing is held below, we must accept the defendant’s factual allegations to the extent they are not refuted by the record. See Lightbourne v. Dugger, 549 So. 2d 1364, 1365 (Fla. 1989).”

The leading case in Florida on the issue of denial of the evidentiary hearing is Freeman v. State, 761 So. 2d 1055 (Fla. 2000)

Freeman holds:

Freeman further complains defense counsel was ineffective in failing to produce a qualified expert witness to testify to his drug and alcohol problems. Despite the fact that Freeman had a substantial history of drug and alcohol abuse and admitted to smoking marijuana on the morning Collier was killed, the only expert defense counsel presented during the penalty phase was a clinical psychologist who was not qualified to give an opinion on the effects of drug and alcohol abuse. The court also dismissed this claim, stating that more mitigation was not necessarily better. With Freeman’s substantial history of drug and alcohol abuse, defense counsel may have been ineffective for failing to present an expert witness who was qualified to give an opinion on this issue. There is a reasonable doubt as to the effect such a witness might have had on the jury’s recommendation. Therefore, the court should have held an evidentiary hearing.



See also Bethea v. State, 767 So.2d 630 (Fla. 5<sup>th</sup> DCA 2000).

Defendant urges this court to grant him an evidentiary hearing to develop the jury-gender and related ineffective assistance of counsel issues.

## ISSUE II

**THE TRIAL COURT ERRED IN DENYING  
DEFENDANT’S 3.850 GROUND III VIOLATING  
DOUBLE JEOPARDY CLAIM AND IN DENYING  
AN EVIDENTIARY HEARING THEREON  
(CONTRARY TO THE V AND XIV AMENDMENTS  
UNITED STATES CONSTITUTION, AND SECTION  
9, ARTICLE 1, CONSTITUTION OF THE STATE  
OF FLORIDA)**

**(STANDARD OF REVIEW—INDEPENDENT  
STANDARD—3.850 ALLEGATIONS NOT  
CONCLUSIVELY REBUTTED)**

On October 3, 1975, Defendant was found guilty by separate verdicts of Premeditated Murder (PC 68) and Felony Murder (PC 69) arising out of the same murder.

Although his judgment and sentence was for First Degree Murder, it does not specify for which of the two verdicts.

The Second District in Wittemen v. State, 735 So.2d 539 (Fla. 2<sup>nd</sup> DCA 1999) held:

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. We agree with Wittemen that convictions for both premeditated and felony murder for the same single murder violate double jeopardy. *See Lamb v. State*, 532 So.2d 1051 (Fla. 1988). While the State correctly conceded this below, it appears that the trial court vacated only Wittemen’s sentence for

felony murder and not the adjudication. Therefore, on this issue we reverse and remand so that the trial court can enter an order vacating Wittemen's conviction for felony murder. Wittemen's other claims relating to double jeopardy are without merit.

The jury verdict as to Felony Murder (Robbery) is without support as Defendant's statement revealed the following:

“Well, if the judge will accept my plea of guilty and guarantee I will be electrocuted for taking this man's life, that's what I want. I got this robbery charge, you know, we didn't rob that man.” (Transcript Original Trial, T-460) (Appendix 7)

The only other testimony going to that issue was that of Anita Rogers (Childers), who said Defendant stated he was going to “rip the old man off.” (Original Trial Record, T-256) Mrs. Rogers testified she found the victim's wallet underneath a mattress and gave it to the Defendant. (T 263) This took place after the murder when the two women and defendant drove from the scene. (T 263-265) (Direct Testimony appears at T 249-268, Appendix 5)

Gail Evans, the other witness to the slaying, did not establish a robbery in her testimony. (T 417-440) (Appendix 6)

Application of the felony robbery aggravator becomes increasingly problematic because it is impossible to determine whether or not it was automatically applied.

The felony robbery issue was raised in Defendant's initial appeal, but not addressed in this court's decision in Foster v. State, 369 So.2d 928 (Fla. 1979). This argument is more than procedural because the aggravator of "while engaged in commission of a robbery or attempted robbery" was used as was cold, calculated, premeditated. However, the cold, calculated, premeditated instruction was considered constitutionally flawed, but harmless. Thus, Foster stands convicted of first degree murder based on two verdicts, and it is likely the court or jury misapplied or granted undue weight to aggravators by considering both felony murder and cold, calculated, premeditated as established beyond a reasonable doubt.

This issue should be addressed in an evidentiary hearing particularly because proof of robbery was not established.

### ISSUE III

**THE COURT ERRED IN FAILING TO GRANT AN EVIDENTIARY HEARING ON DEFENDANT’S 3.850 MOTION FOR POST CONVICTION RELIEF AS TO CLAIM (F) BRADY RULE—DISCOVERY VIOLATION (CONTRARY TO DUE PROCESS PROVISIONS OF THE V AND VI AMENDMENTS UNITED STATES CONSTITUTION AND ARTICLE 1, SECTIONS 9 AND 16 CONSTITUTION OF THE STATE OF FLORIDA)**

**(STANDARD OF REVIEW—INDEPENDENT STANDARD—3.850 ALLEGATIONS NOT CONCLUSIVELY REBUTTED)**

Defendant alleged that he recently discovered Brady material from inspection of the prosecution files pursuant to public records demand. The item found was a letter from Dr. Russell T. Stewart, M.D. to Sheriff Easterling dated July 31, 1975. (PC 79) It was alleged that Dr. Stewart was a jail physician who examined Defendant while awaiting trial. Dr. Stewart found “obvious mental disturbance,” according to his report. (Appendix 8)

Contrary to the trial court’s finding that defendant failed to allege the outcome would be different, Defendant’s 3.850 motion specifically claimed: “Independent evidence from a medical expert not retained by the Defendant would likely have resulted in a different outcome than death from jury recommendation or judicial decision.” (PC 18) (Emphasis supplied)

The trial court's referral to a previous 3.850 Brady claim is off the mark. Here, the Brady claim (or discovery violation) relates to innocence of the death penalty and not the guilt phase of the trial. Obviously, Brady material helpful to the defense for sentencing must not be withheld. Anyone who has tried criminal cases involving experts will surely agree that the best results are obtained from an unbiased independent expert or favorable evidence from the opponent's expert. At the very least, an evidentiary hearing must be given to develop this claim.

It cannot be said that the files and records conclusively rebut Defendant's claim. See Peede v. State, 748 So.2d 253 (Fla. 1999) and Freeman v. State, 761 So.2d 1055 (Fla. 2000).

Hegwood v. State, 575 So.2d 170 (Fla. 1991) holds that one must prove that had the evidence been disclosed, a reasonable probability exists that the outcome of the proceedings would have been different. One must be given an evidentiary hearing to prove that claim.

See Brady V. Maryland, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963).

Defendant's claim also asserts failure to produce the letter a discovery violation. That, in and of itself, requires an evidentiary hearing.

See Pomeranz v. State, 703 So.2d 465 (Fla. 1997) and State v. Schopp, 653 So.2d 1016 (Fla. 1995) and BTG v. State, 694 So.2d 767 (Fla. 1<sup>st</sup> DCA 1997).

In Pomeranz v. State, 703 So.2d 465 (Fla. 1997) following State v. Schopp, 653 So.2d 1016 (Fla. 1995), the court held:

“In determining whether a *Richardson* violation is harmless, [we] must consider whether there is a reasonable possibility that the discovery violation procedurally prejudiced the defense.” *State v. Schopp*, 653 So.2d 1016, 1020 (Fla.1995). A defendant is procedurally prejudiced

if there is a reasonable probability that the defendant’s trial preparation or strategy would have been materially different had the violation not occurred. Trial preparation or strategy should be considered materially different if it reasonably could have benefited the defendant. In making this determination every conceivable course of action must be considered. If the reviewing court finds that there is a reasonable possibility that the discovery violation prejudiced the defense or if the record is insufficient to determine that the defense was not materially affected, the error must be considered harmful. In other words, only if the appellate court can say beyond a reasonable doubt that the defense was not procedurally prejudiced by the discovery violation can the error be considered harmless.

Clearly, Dr. Stewart’s report could reasonably have benefited the defendant and his penalty trial preparation and strategy would have resulted in obtaining Dr. Stewart’s testimony for the jury or the court for sentencing consideration. There exists more than a reasonable possibility that the discovery violation prejudiced Foster’s defense.

A summary rejection of this claim cannot be harmless because of the significance of this letter.

Both Pomeranz and Schopp resulted in harmless error findings, but in those cases the material was cumulative. Mental mitigation of Dr. Stewart would not be cumulative. He was not a defense expert. Schopp also states that in the vast majority of cases an appellate court cannot be certain that this type error is harmless, and thus a Richardson hearing is required in those cases.

Schopp held:

“Thus, if the record is insufficient for the appellate court to determine that the defense was not prejudiced by the discovery violation, the state has not met its burden and the error must be considered harmful.”



## ISSUE IV

### **THE TRIAL COURT ERRED IN DENYING DEFENDANT'S 3.850 MOTION CLAIMS D. CRUEL AND UNUSUAL PUNISHMENT—23 YEARS ON DEATH ROW, AND E. CRUEL AND UNUSUAL PUNISHMENT—ELECTRIC CHAIR (CONTRARY TO THE V, VIII AND XIV AMENDMENTS UNITED STATES CONSTITUTION AND ARTICLE 1, SECTIONS 9 AND 17 CONSTITUTION OF THE STATE OF FLORIDA)**

The Florida Supreme Court has previously ruled against these claims. These issues are submitted to the Florida Supreme Court for re-consideration and possible future United States Constitutional review.

In Knight v. State, 746 So.2d 423 (Fla. 1999) the Florida Supreme Court held:

Finally, Knight claims that to execute him after he has already endured more than two decades on **death row** is unconstitutionally **cruel** and **unusual** punishment. He also argues that Florida has forfeited its right to execute Knight under binding norms of international law. Although Knight makes an interesting argument, we find it lacks merit. As the State points out, no federal or state courts have accepted Knight's argument that a prolonged stay on **death row** constitutes **cruel** and **unusual** punishment, especially where both parties bear responsibility for the long delay. *See, e.g., White v. Johnson*, 79 F.3d 432 (5<sup>th</sup> Cir.1996); *State v. Smith*, 280 Mont. 158, 931 P.2d 1272 (1996). We also note that the Arizona Supreme Court recently rejected this precise claim. *See State v. Schackart*, 190 Ariz. 238, 947 P.2d

315, 336 (1997) (finding “no evidence that Arizona has set up a scheme prolonging incarceration in order to torture inmates prior to their execution”), *cert. Denied*, 525 U.S. 862, 119 S.Ct. 149, 142 L.Ed.2d 122 (1998). Second, we also consider that irrespective of the status of this case, Knight has been and will remain incarcerated on death row for his 1980 murder of Officer Burke until that case is finalized. We similarly reject Knight’s claim under international law.

Unlike Knight, however, Defendant Foster’s post-conviction relief was largely successful in obtaining new sentence proceedings due to trial court errors.

Jones v. State, 701 So.2d 76 (Fla. 1997) held death by electrocution not to be cruel and unusual punishment. Interestingly, the Jones decision was by a narrow margin—four to three. The dissenting justices viewed the electric chair as outmoded, and Justice Harding recommended lethal injection as an alternative.

It would appear that lethal injection adopted by the Florida legislature would find support among the dissents. However, Defendant requests this court to revisit the issue of the death penalty as constituting cruel and unusual punishment regardless of the method used.

Justices Brennan and Marshall in Glass v. Louisiana, 105 S.Ct. 2159, 85 L.Ed.2d 514, 471 U.S. 1080 (1985) in their dissent from denial of certiorari observed the following:

“I adhere to my view that the death penalty is in all circumstances cruel and unusual punishment prohibited

by the Eighth and Fourteenth Amendments, *Gregg v. Georgia*, 428 U.S. 153, 227, 96 S.Ct. 2909, 2950, 49 L.Ed.2d 859 (1976) (BRENNAN, J., dissenting), and would therefore grant certiorari and vacate Glass' death sentence in any event. One of the reasons I adhere to this view is my belief that the "physical and mental suffering" inherent in *any* method of execution is so "uniquely degrading to human dignity" that, when combined with the arbitrariness by which capital punishment is imposed, the trend of enlightened opinion, and the availability of less severe penological alternatives, the death penalty is always unconstitutional. *Furman v. Georgia*, 408 U.S. 238, 287-291, 92 S.Ct. 2726, 2751-2753, 33 L.Ed.2d 346 (1972).

Obviously, reasonable minds disagree as to the application of the death penalty. See *Provenzano v. Moore*, 744 So.2d 413 (Fla. 1999) upholding use of the electric chair and dissents by Justices Shaw, Anstead and Pariente.

## ISSUE V

**WHETHER THE SUPREME COURT ENGAGED  
IN A CONSTITUTIONALLY FLAWED  
HARMLESS ERROR ANALYSIS IN THE  
DEFENDANT’S LAST APPEAL. FOSTER V.  
STATE, 654 So.2d 112 (Fla. 1995)**

**(CONTRARY TO THE V AND VI AMENDMENTS TO THE  
UNITED STATES CONSTITUTION, AND SECTION 9,  
CONSTITUTION OF THE STATE OF FLORIDA)**

This issue included in Defendant’s 3.850 Motion is more appropriately addressed in his Petition for habeas corpus proceeding filed herewith. However, Defendant requests this court revisit and reconsider this issue because of its interrelation with Issue Number III—Double Jeopardy violation, and the felony murder aggravator. If there is legally no evidence of a robbery or felony-murder, then the cold, calculated, premeditated aggravator was misapplied under the harmless error standard and the unconstitutionally applied cold, calculated, premeditated instruction.

If defendant’s case had been submitted to a jury without the robbery aggravator and with an appropriate cold, calculated, premeditated instruction, the eight to four death recommendation would likely be favorably different. Likewise, the sentencing judge would be more apt to impose a life sentence without the robbery aggravator.

## CONCLUSION

Defendant seeks reversal and remand for evidentiary hearing as to all issues. His issues as to impartial jury and Brady-discovery violations warrant reversal for a resentencing, particularly without the Felony-Murder-Robbery aggravator used in his sentencing orders.

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**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that a copy of the foregoing has been furnished by regular U.S. Mail to the Office of the Attorney General, Attention: RICHARD MARTELL, ASST ATTORNEY GENERAL, The Florida Capitol Building, Plaza Level One, Tallahassee, Florida 32399-1050, and The Office of the State Attorney, Bay County, Attention: ALTON PAULK, ASA, P O Box 1040, Panama City, FL 34202 this the \_\_\_\_\_ day of April, 2001.

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## CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that the foregoing INITIAL BRIEF OF APPELLANT complies with Rule 9.100(1) and Rule 9.210(a)(2), FLORIDA RULES OF APPELLATE PROCEDURE, and that this Brief has been submitted in **Times New Roman 14-point font**.

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