

**IN THE SUPREME COURT OF FLORIDA**

CHARLES KENNETH FOSTER,  
PETITIONER

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

VS.

**MICHAEL W. MOORE, SECRETARY,  
DEPARTMENT OF CORRECTIONS, AND  
THE STATE OF FLORIDA,  
RESPONDENTS**

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**APPELLANT'S REPLY BRIEF**

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IN THE SUPREME COURT OF FLORIDA

CHARLES KENNETH FOSTER,  
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CASE NO.: SC01-240  
LOWER TRIBUNAL NO.: 75-486

VS.

STATE OF FLORIDA,  
APPELLEE

**APPELLANT’S REPLY BRIEF**

ISSUE NO. 1

THE TRIAL COURT ERRED IN DENYING DEFENDANT 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)

APPELLANT FOSTER, urges that a summary denial of Foster’s 3.850 was in order under the abuse of writ theory or that the issue should have been raised on direct appeal.

APPELLANT FOSTER, submits that the issue was not revealed until public records disclosure of the State Attorney files by present conflict counsel. These notes are nowhere else in the record and were not previously available until public records disclosure. Those notes revealed systematic exclusion of pregnant women and women with young children with ex parte participation by the State Attorney. The exemption statute is not automatic but is exercised “upon request” emphasis

added.

It appears that the State's notes revealed excuses were done automatically or at least shows no record of requests being made by the person. There is a vast difference between such person being told they are excused as opposed to their hardship request to be excused.

Accordingly, APPELLANT FOSTER urges this Court to grant an evidentiary hearing to establish the systematic exclusion.

The ineffective assistance of counsel claim also requires an evidentiary hearing on this issue.

## **ISSUE NO. 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)**

APPELLANT FOSTER argues that only one conviction for first-degree murder is sufficient. APPELLANT FOSTER urges that an evidentiary hearing is warranted since the robbery aggravator is so significant to imposition Foster's death penalty and because it appears that the pecuniary gain motive (robbery) was automatically applied.

**ISSUE NO. 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**

**3.85- ALLEGATIONS NOT CONCLUSIVELY REBUTTED)**

APPELLANT FOSTER'S Brady and discovery violation clearly demand an evidentiary hearing. Summary denial is simply not warranted because the information (Doctor's letter) was never in possession of Defendant until public records disclosure. That Defendant may have been aware of examination by the jail physical does not establish that he or trial counsel knew of the letter of Doctor Stewart that rendered an evaluation. Additionally, it is significant that the letter was not supplied in discovery and the State's argument that it was available is unsupported by the evidence. The letter was discovered by conflict counsel's investigator's review of the State's file.

The discovery issue needs to be determined in an evidentiary hearing just as any discovery violation is tested in a Richardson hearing.

**ISSUE NO. IV**

**THE TRIAL COURT ERRED IN DENYING DEFENDANT  
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 I, SECTIONS 9 AND 17 CONSTITUTION OF THE STATE  
OF FLORIDA**

APPELLANT FOSTER concedes that this issue has been determined adversely to him.

**ISSUE NO. 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 )**

APPELLANT FOSTER asks this Court to revisit the harmless error review because of the problem raised in Issue III, Double Jeopardy/Felony Murder Aggravator. It appears that the felony murder conviction created an automatic aggravator and the Court should have considered the case with two less aggravators – Pecuniary Gain and cold, calculated, and premeditated.



Respectfully submitted,

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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 MICHAEL MOORE, SECRETARY, Department of Corrections, 2601 Blair Stone Road, Tallahassee, Florida 32399-2500; 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 July, 2001.

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**CERTIFICATE OF COMPLIANCE**

**I HEREBY CERTIFY** that the foregoing APPELLANT’S REPLY BRIEF 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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