IN THE SUPREME COURT OF FLORIDA

JERMAINE FOSTER,

Appellant,

vs. CASE NUMBER SC03-1331

STATE OF FLORIDA,

Appellee.
_________________________/

APPEAL FROM THE CIRCUIT COURT
IN AND FOR ORANGE COUNTY, FLORIDA

INITIAL BRIEF OF APPELLANT

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DESIGNATIONS IN BRIEF

R	REFERS TO RECORD ON APPEAL
TT	REFERS TO TRIAL TRANSCRIPT INCLUDED IN THE RECORD ON APPEAL

ISSUES

D. WHETHER TRIAL COUNSEL WAS INEFFECTIVE FOR THEIR FAILURE TO RAISE AND ESTABLISH A VOLUNTARY INTOXICATION DEFENSE COUPLED WITH THE DEFENDANT'S MENTAL STATE TO SHOW A LACK OF REQUISITE INTENT TO COMMIT THE OFFENSE OF FIRST DEGREE MURDER

E. WHETHER THE TRIAL COURT ERRED IN DENYING, WITHOUT FURTHER HEARING TESTIMONY, THE DEFENDANT'S MOTION FOR REHEARING ON THE BASIS OF THE NEWLY DECIDED CASES OF <u>ATKINS v. VIRGINIA</u>, 536 US 304 (2002) AND <u>RING v. ARIZONA</u>, 536 US 586 (2002)

F. WHETHER THE TRIAL COURT ERRED IN NOT PERMITTING THE AMENDMENT OF THE DEFENDANT'S MOTION TO VACATE JUDGMENT AND SENTENCE ON THE BASIS OF RACIAL BIAS AND PREJUDICE EXPRESSED BY DEFENDANT'S TRIAL COUNSEL

STATEMENT OF THE CASE

This is an appeal from the denial of the Appellant's Motion to Vacate Judgment and Sentence after an Evidentiary Hearing as well as a denial of Appellant's Motion For Rehearing Without Evidentiary Hearing.

SUMMARY OF ARGUMENT

1. The trial court erred in ruling that the Appellant's trial counsel adequately prepared and presented evidence of his mental defect as influenced by his voluntary intoxication at the time of the offense.

2. Further, the trial court erred in denying Appellant's Motion to Vacate Judgments of Conviction and Sentences as well as the denial of Appellant's Motion for Rehearing based on Ring v. Arizona, 536 US 586 (2002) and Atkins v. Virginia, 536 US 304 (2002) as decided by the Supreme Court after the Appellant's evidentiary hearing.

3. Lastly, the trial court erred in failing to permit the Appellant to amend his Motion for Post Conviction Relief on the basis of evidence of racial bias and prejudice on the part of Appellant's trial counsel, as newly discovered evidence.

STATEMENT OF FACTS

The Appellant, JERMAINE FOSTER, was convicted and sentenced to death for two murders and other related offenses. Foster v. State, 679 So2d 742 (FL 1996). This court has upheld this conviction. The defendant filed his initial Motion for Post Conviction Relief With Special Request for Leave to Amend on January 14, 1998 (R 29-76). On June 1, 2000 the defendant filed his Motion to Vacate Judgment and Sentence (R 407-417) and Supplemental Motion to Vacate Judgment and Sentence on September 25, 2000 (R 418-421). The trial court held a Huff Hearing on August 28, 2000 where the parties agreed to hold an evidentiary hearing, and a discovery timetable was established. The evidentiary hearing was held on January 30, 2002 through February 1, 2002 (R Volumes V, VI).

During the conducting of discovery in preparation for the evidentiary hearing, defense counsel met with Janet Vogelsang, who was retained by trial counsel to function as a mitigation expert and perform an investigation into the defendant's background, family history, and mental health. During her trial preparation, Vogelsang met with defense counsel on three brief occasions. During one of those meetings, one of the defense attorneys, Mr. Smallwood, was alleged to have made racially prejudicial statements.

Smallwood is alleged to have said, "mitigation would not matter and the defendant was just another nigger who killed two people and the jury would not believe it" (R 443, 448). These statements came to light during the discovery process and counsel believes this time frame was between September, 2001 and early November, 2001. At that time, Vogelsang was reluctant to come forward with such an accusation. According to Vogelsang's affidavit, she was not permitted to use visual aids and other materials necessary for an effective presentation in mitigation, which essentially meant that little or no mitigation was presented. As a result of the late 2001 conversations, post conviction counsel convinced the witness to put her allegations in the form of an Affidavit which was filed with the trial court as an Exhibit to JERMAINE FOSTER's Motion to Amend his Motion for Post Conviction Relief and add these allegations as a ground or basis for a new trial (R. 442-449). This motion was heard and denied by the trial court before the evidentiary hearing (R. 465-466).

At the evidentiary hearing, the defendant presented facts to establish JERMAINE FOSTER suffered from diminished capacity as well as organic brain damage and had an IQ of 75. Further, it was proven that he was intoxicated through the use of drugs and alcohol. His diminished capacity, exacerbated by the alcohol and drugs, prohibited him from forming the

specific intent necessary for a conviction of the offenses charged. The trial attorneys did not formally present an intoxication defense nor did they present it in mitigation along with the diminished capacity issues.

The testimony at the evidentiary hearing established that the defendant, JERMAINE FOSTER, was intoxicated and suffered from diminished mental capacity. LEONDER HENDERSON, a codefendant who was available to the defense team prior to and at FOSTER's trial, established the voluntary intoxication of the defendant beyond a doubt. HENDERSON testified at the evidentiary hearing that it was his and FOSTER's everyday regime to wake up about 9:00AM and smoke a joint (marijuana), then shower and smoke another joint, whereupon they would go out and sell drugs during the day in an area known as "The Hill". They would smoke another one or two joints on their way to the "Hill"; the place they sold drugs and would smoke marijuana intermittently, all day (R 653, 659, 663). This was what they did every day as well as on the day of the murders. HENDERSON further testified that they went to Kissimmee and used more marijuana prior to the murders (660). When they arrived in Kissimmee, they purchased a bottle of Christian Brothers brandy, which they also drank. HENDERSON knew FOSTER very well. They lived together and he knew how FOSTER acted when intoxicated and in his opinion that night,

FOSTER was intoxicated (R 672). Mr. Henderson's testimony was available to the defense team but never used or even explored.

At the evidentiary hearing, FOSTER called two recognized experts in Florida and nationally, Dr. Henry Dee, Ph.D., a neuropsychologist, and Dr. Jonathan Lipman, a Neuropharmacologist. Dr. Dee testified that he had done a number of tests on FOSTER to determine his intellectual ability and functioning as part of his testimony in mitigation, but only in mitigation. He never examined JERMAINE FOSTER until after the guilt phase of the trial, as he was not retained until two or three months prior to the actual trial; and he advised at the evidentiary hearing that had he been brought in a timely manner, he would have suggested a Toxicologist or Neuropharmacologist to evaluate FOSTER and would have specifically sought out Dr. Lipman. He would have made those recommendations had he been advised of the amounts of drugs and alcohol used by FOSTER during the time leading up to the offense and his history of use over the past years. Dr. Dee testified that his testing of FOSTER showed him, at best, to be a slow and even a dull individual. FOSTER's neurological deficiencies were substantial and he arguably was retarded or at least borderline mentally retarded (R 705) with a full score Intelligence Quotient of 75. Dr. Dee further testified that FOSTER's mental processes that night were very limited (R 739). The

doctor further advises that when one correlated the intellectual functions of FOSTER with the use of drugs (marijuana and crack cocaine) and alcohol he consumed on the day of the offenses and leading up to it, FOSTER's intellectual functions were going to be further compromised and significantly impaired, substantially impaired, if not obliterated (R 709). Further, that FOSTER would only know on reflection that he did something wrong and would not have that realization at the time of the act, but upon reflection only (R 709). The doctor also advised that JERMAINE FOSTER suffered from organic brain damage that further exacerbated his ability to function mentally.

At the evidentiary hearing, JERMAINE FOSTER also called Dr. Jonathan Lipman who testified as an expert that the organic brain damage found by Dr. Dee underlies JERMAINE FOSTER's deficiencies and this is what is important (R 757). Dr. Lipman calculated on the basis of the testimony of LEONDER HENDERSON and Gwen Lawson, both available at trial, as well as Dr. Dee's testing, that Jermaine Foster's blood alcohol level was .204 or about three times the legal limit to function normally at the time of the offense. This did not even include the drug consumption by FOSTER. Dr. Lipman further testified that a person who has pre-existing impairments, like Jermaine Foster, in their cognitive functioning, intellectual

functioning and neuropsychological functioning, is going to be additionally impaired by drugs that are known to produce deficits in those particular functions, specifically marijuana, cocaine and alcohol (R 766). Jermaine Foster had an organic toxicity or state of brain impairment due to poisoning (R 765). Dr. Lipman testified that a neuropsychologist and toxicologist should have been brought into the Foster case at the guilt phase (R 769). But it is clear one was not even considered by Mr. Smallwood's testimony that they "just didn't do it".

Although not available at trial, therefore considered newly discovered evidence, is the testimony of Gerald Booker. He testified that he was the leader of this band that night. (R 839-840, 841). That he told Jermaine Foster to "do them" (R 843). This factor is important in light of Dr. Dee's testimony about Jermaine Foster's mental functions and that he would do what he was told by Booker since he looked up to him and thought of him as a role model. Further, that given his state of intoxication and admiration of Booker, he did what he was told.

JERMAINE FOSTER did exactly what he was told to do by Mr. BOOKER. BOOKER provided him with the gun and ordered him to kill the witnesses. Yet, Mr. BOOKER received a life sentence and JERMAINE FOSTER was sentenced to death.

I.

THE TRIAL COURT ERRED IN DENYING APPELLANT'S MOTION TO VACATE JUDGMENTS OF CONVICTION AND SENTENCES OF DEATH DUE TO COUNSEL'S INEFFECTIVENESS IN FAILING TO PRESENT A DEFENSE OF VOLUNTARY INTOXICATION IN CONJUNCTION WITH THE APPELLANT'S MENTAL DISABILITY

The trial court determined, in its ruling denying the Appellant's Motion to Vacate Judgments of Convictions and Sentences of Death, that Chestnut v. State, 538 So2d 820 (Fla 1989) was controlling law in the State of Florida and therefore the Appellant's trial counsel acted properly and did not provided ineffective counsel to the Appellant, by not preparing a defense for Mr. FOSTER which included voluntary intoxication as it was affected by mental disability.

The State of Florida has for one hundred years permitted evidence of voluntary intoxication concerning a defendant's mental state. Garner v. State, 9 SO. 835 (1891). Now the cases of Chestnut v. State, 538 So2d 820 (FL 1989), Bias v. State, 653 So2d 380 (Fla. 1995) and Gurganus v. State, 451 So2d 817 (Fla 1984) must be assessed and reviewed when discussing

mental defect and intoxication. The trial court seeks to justify its ruling by saying that the voluntary intoxication of Jermaine Foster was presented in opening statements by defense counsel by advising the jury that FOSTER was smoking marijuana and drinking gin (R 535), and by getting a jury instruction as to voluntary intoxication, as well as raising it in closing argument. This type of analysis is critically flawed in that the court instructs the jury that what the attorneys argue in opening statements and closing arguments is not evidence. How then can a mere statement, without evidence, in an opening statement and closing argument be sufficient evidence to establish effectiveness of counsel? It cannot.

In Florida "when specific intent is an element of the crime charged, evidence of voluntary intoxication, or for that matter evidence of any condition relating to the ability to form a specific intent is relevant" Gurganus v. State, 451 So2d 817 (Fla 1984), Circan v. State, 201 So2d 706 (Fla 1967) and Garner , supra. The trial court follows the State's argument that Chestnut, supra is controlling law (at the time of the offense) and that diminished capacity evidence (alone) is inadmissible to negate specific intent. This may be true, but in this case, we have much more than mere diminished capacity; we have voluntary intoxication coupled with diminished capacity bordering on mental retardation. The Chestnut court

was obviously a divided court. Justices Grimes, Erlich, McDonald and Shaw concurred and Overton, Barkett and Kogan dissented. In light of this Court's later ruling in Bias v. State, 653 So2d 380 (FL 11995), the dissent in Chestnut appears to be the more well-reasoned argument specifically since bias is a unanimous decision of the court. Further, Chestnut did not have the added factors of drugs and alcohol to further deepen Chestnut's mental disability. The defense experts in Chestnut relied only on his intelligence being in the lower fifth percentile of the general population. In this case, FOSTER was placed in the lower sixth percentile coupled with the alcohol and drug ingestion (R 705). Evidence of any condition relating to the accused's ability to form a specific intent is relevant, Gurganus, supra. The clear majority of jurisdictions have held that organic brain damage such as Foster's, is admissible at least in first-degree murder cases on the issue of specific intent. See People v. Wingo, 14 Cal. 3d 169, 534 P.2d 1001, 121 Cal. Rptr. 97 (1975); Beckstead v. People, 133 Colo. 72, 292 P.2d 189 (1956); State v. Burge, 195 Conn. 232, 487 A.2d 532 (1985); State v. Clokey, 83 Idaho 322, 364 P.2d 159 (1961); Wilson v. State, 263 Ind. 469, 333 N.E.2d 755 (1975); State v. Plowman, 386 N.W.2d 546 (Iowa Ct.App. 1986); Todd v. Commonwealth, 716 S.W.2d 242 (Ky. 1986); Commonwealth v. Grey, 399 Mass. 469, 505 N.E.2d 171 (1987); People v.

Mangiapane, 85 Mich. App. 379, 271 N.W.2d 240 Ct.App.19780; State v. Anderson, 515 S.W.2d 534 (Mo.1974); Starkweather v. State, 167 Neg.477, 93 N.W.2d 619 (1958); State v. Roman, 168 N.J. Super.344, 403 A.2d 24 (Super.Ct.App.Div. 1979); State v. Holden, 85 N.M. 397, 512 P.2d 970 (Ct.App.), **cert. denied**, 85 N.M. 380, 512 P.2d 953 (1973); People v. Morales, 125 A.D.2d 605, 509 N.Y.S.2d 658 (1986), **appeal denied**, 70 N.Y.2d 651, 518 N.Y.S.2d 1044, 512 N.E.2d 570 (1987), State v. Nichols, 3 Ohio App.2d 182, 209 N.E.2d 750 (CT.App.1965); State v. Schleigh, 210 Or.155, 310P.2d 341 (1957); Commonwealth v. Terry, 513 Pa. 381, 521 A.2d 398, **cert. denied**, 482 U.S. 920, 107 S.Ct. 3198, 96 L.Ed.2d 685 (1987); State v. Correra, 430A.2d 1251 IR.I. 1981); Cowles v. State, 510 S.W.2d 608 (Tex.Crim.App.1974); State v. Romero, 684 P.2d 643 (Utah 1984); State v. Smith, 136 Vt. 520, 396 A.2d 126 (1978); State v. Edmon, 28Wash.App. 98,621 P.2d 1310 (1981); State v. Flattum, 122 Wqis.2d, 361 N.W.2d 705 (1985); Kind v. State, 595 P.2d 960 (Wyo.1979). The deficiencies of these attorneys in not having the defendant examined in a timely manner and not raising specific defenses was prejudicial to JERMAINE FOSTER and constitutes ineffectiveness under the Constitution.

By not having the Appellant examined in a timely manner and not raising these specific intent defenses, the Appellant was prejudiced and that

prejudice constitutes ineffectiveness. It cannot be said by talking about it in opening and closing and getting a jury instruction counsel satisfied his duty to fully and adequately represent a person charged with First Degree Murder. The experts called at the evidentiary hearing testified that the extent of the Appellant's intoxication, coupled with his mental retardation, is tantamount to insanity at the time of the offenses. Yet the trial court ignores the experts. The State argues that the state of the law at the time of the trial prohibits defense counsel from raising the defenses argued by the Appellant in the Evidentiary Hearing. Since the trial court, at the actual trial gave a voluntary intoxication jury instruction, it is apparent that at the time, evidence of voluntary intoxication was permissible. Defense counsel had the ability to raise these defenses even without calling the Appellant to the stand. This conduct cannot be reasoned or based upon a tactical decision. Had they had the Appellant examined before the guilt phase, they could have used the available testimony of Leondra Henderson and Gwen Lawson as to the ingestion of drugs and alcohol thereby establishing the voluntary intoxication and the evidence of any condition relating to Foster's ability to form specific intent would have been relevant. It would be at this point Dr. Dee and Dr. Lipman could have testified as to the joint effect of the drugs and alcohol combination coupled with his mental retardation. This was not

done or even contemplated. Trial attorneys, especially capital defense attorneys, have a duty to investigate their case and not necessarily rely on the client for information, which is what these attorneys did in the preparation of this case. Part of this preparation and investigation is the examination of the defendant by one or more experts before trial, not after the guilt phase is completed. This examination, had it been done before trial, would have shown organic brain damage coupled with the constant, daily ingestion of mind altering drugs and alcohol. Not to do it must be negligence, it must be deemed ineffectiveness and it does meet the tests enunciated in Strickland v. Washington, 466 US 669 (1984).

The trial court, in ruling on appellant's motions says, "Trial counsel cannot be faulted for not raisng a non-meritorious defense…" (R 520) But in so concluding, the court ignores the fact that it must look not only at the mental defect issue, but the intoxication issue as well, as they compliment and contaminate each other. It is the combination that makes the Appellant's point meritorious and trial counsel's performance ineffective. Had trial counsel had the Appellant examined prior to trial and considered the combination of mental retardation and consumption of alcohol and drugs, that defense could have been raised and presented by experts. The defense called no one. The experts called at the evidentiary hearing clearly

established a defense for Jermaine Foster. When Dr. Dee testified that given the intellectual impairments present, Foster's intellectual functioning and the use of alcohol and drugs that Foster was "significantly impaired, substantially impaired and did not know right from wrong." This type of evidence establishes an insanity defense. Had trial counsel taken the time and effort to retain an expert early, specifically Dr. Dee, and had the Appellant been properly examined before trial, these factors would have been known, and a proper, meaningful defense raised on the Appellant's behalf.

There appears to be a direct correlation between the defense's lack of preparation and the statements attributed to Mr. Smallwood, by Janet Vogelsang, the clinical social worker retained to be a mitigation expert. These statements clearly show racial bias and prejudice (R 448). Although counsel denied making said statements, the type of diligence in the preparation of the case makes that type of statement much more believable and very relevant to the amount of preparation and method of preparation of the attorneys.

The Appellant would argue that the lack of preparation on the part of defense counsel, in not timely retaining experts, not timely having the Appellant examined properly and thoroughly, led to his conviction and

sentence of death. The Appellant prays that this Court sees through the facade of what was or was not existing case law and look at the totality of the circumstances. The Appellant had a viable defense and it was not raised or even explored. The combination of his mental disability/retardation coupled with the amount of intoxicants ingested clearly made the Appellant incompetent at the time of the offense. The uncontroverted experts called at the evidentiary hearing both say, and confirm, that had they been brought into the case in a timely, pre-trial manner, they could have established a defense for Jermaine Foster. This surely casts doubt on the reliability of the verdict and clearly casts doubt on the reliability of the sanctions of death. For this reason alone, the judgments and sentence of death should be reversed and a new trial ordered.

II

THE TRIAL COURT ERRED IN NOT GRANTING A REHEARING ON THE APPELLANT'S MOTION FOR REHEARING BASED ON THE NEWLY DECIDED CASES OF RING AND ATKINS

After the evidentiary hearing and the filing of arguments in this matter, the United States Supreme Court decisions in Ring v. Arizona, 536 US 304 (2002) and Atkins v. Virginia, 122 S.Ct. 2242 (2002) were published. Post-conviction counsel, on the basis of those decisions requested a rehearing which was essentially summarily denied regardless of the testimony heard by the court on the issue of mental retardation which would have and could have been expanded given a proper forum by the trial court. Further, mental evaluation testimony would have and could have established that JERMAINE FOSTER was not competent at the time of the murders of which he was accused, convicted and sentenced to death.

The Appellant will first discuss Ring v. Arizona, 536 US 304 (2002) as it applies to these proceedings.

Ring held unconstitutional a capital sentencing scheme that makes imposition of the death sentence contingent upon the finding of an aggravating circumstance and assigns responsibility for finding that

circumstance to the judge. The Supreme Court based its holding and analysis in Ring on its earlier decision in Apprendi v. New Jersey, 530 US 466 (2000), where it held that "…it is unconstitutional for a legislature to remove from the jury the assessment of facts that increase the prescribed range of penalties to which a criminal defendant is exposed." Capital sentencing schemes like those in Florida and Arizona, violate the notice and jury trial rights guaranteed by the Sixth and Fourteenth Amendments because they do not allow the jury to reach a verdict with respect to an "aggravating factor that is an element of the aggravated crime" punishable by death, Ring at p. 605. The question is not whether death is an unauthorized punishment,[1] but whether the "facts increasing punishment beyond the maximum authorized by a guilty verdict standing alone…" are found by a judge or jury. "All of the facts which must exist in order to subject the defendant to a legally prescribed punishment must be found by the jury" Ring (quoting Apprendi 530 US at 501).

In applying the Apprendi test, the Ring court said, " The dispositive question is not one of form but of effect" Ring at 602. The question is not whether death is an authorized punishment in first-degree murder cases, but

[1] Both the Florida and Arizona statutes provide for a range of punishments, the most severe of which is death, compare Florida Statute 775.082 (1) (1979) with Arizona revised statute annotated 13-1105 (c).

whether the "…facts increasing punishment beyond the maximum are authorized by a guilty verdict standing alone…" Ring, 605, also found by the judge or jury. "If a state makes an increase in a defendant's authorized punishment contingent on the finding of a fact, that fact must be found by a jury beyond a reasonable doubt." Ring at 602. "All the facts which must exist in order to subject the defendant to a legally prescribed punishment must be found by the jury." Ring (quoting Apprendi at 499).

The Supreme Court in Ring held that Arizona's sentencing statute could not survive Apprendi because "a defendant convicted of first degree murder in Arizona cannot receive a death sentence unless a judge makes a factual determination that a statutory aggravating factor exists. Without that critical finding, the maximum sentence to which the defendant is exposed is life imprisonment and not the death penalty." Ring at 595. Ring also overruled Walton v. Arizona, 497 US 639 (1990) to the extent that it allowed a sentencing judge without a jury, to find an aggravating circumstance necessary for imposition of death.

When applying Ring to Florida's capital sentencing scheme, we must look at the fact that Ring overruled Walton and thereby overruled the basic principle in Hildwin v. Florida, 490 US 638 (1989) which upheld Florida's capital sentencing scheme on grounds that the Sixth Amendment does not

require that the specific findings authorizing imposition of the sentence of death be made by the jury. Ring at 598. Further, Ring undercuts the reasoning of this court's decision in Mills v. Moore, 786 So2d 532 (Fla 2001) by recognizing that Apprendi applies to capital sentencing schemes, and that states may not assail the Sixth Amendment requirements of Apprendi by simply specifying death or life imprisonment as the only sentencing options, and lastly, that the relevant and dispositive question is whether under a state law death is authorized by a guilty verdict alone. Ring 604-605.

Section 775.082 of the Florida Statutes provides "that a person convicted of first degree murder must be sentenced to life in prison…unless the proceedings held to determine sentence according to the procedure set forth in Florida Statute 921.141 result in a finding BY THE COURT that such person shall be punished by death, and in the latter event such person shall be punished by death." This court has continuously held that Sections 775.082 and 921.141 do not allow imposition of a death sentence upon a jury's verdict of guilt, but only upon the finding of sufficient aggravating circumstances by the Court.

In Florida, statutes requiring the finding of an aggravating circumstance before imposition of the death penalty requires the judge, after

discharge of the jury and not withstanding the recommendation of a majority of the jury, to make three findings of fact Florida Statute 921.141 (3). First, the trial judge, not the jury, must find the existence of at least one aggravating circumstance. Second, the judge, not the jury, must find the aggravating circumstance sufficient to justify death. Third, the judge, not the jury, must find, in writing, that there are insufficient mitigating circumstances to outweigh the aggravating circumstances. If the Court does not make the findings requiring a death sentence, the Court shall impose a sentence of life imprisonment in accord with Florida Statute 775.082.

Those factors enunciated in Ring directly conflict with Florida's sentencing scheme and counsel should have been permitted, through rehearing, to argue Ring before the trial court to make the proper record, as this was new law which is retroactive.

It is clear that Florida juries do not make factual findings; they merely render an advisory sentence to the Court. Florida Statute 921.141 (2). The role of a Florida jury in capital sentencing, is insignificant under Apprendi and Ring because the plain meaning of the death penalty statute makes the jury's advisory recommendation one not supported by findings of fact Combs v. State, 525 So2d 853 (Fla. 1998). This is the primary requirement of Ring.

This Court has rejected the premise that aggravating circumstances be determined by a jury. Engel v. State, 438 So2d 803 (Fla. 1983) and Davis v. State, 703 So2d 1055 (Fla. 1977). Florida Statute 921.141 (2) and (3) requires the judge to set forth the findings on which the death sentence is based, but asks the jury to render an advisory sentence. Since our statute does not require any specific number of jurors to agree that the state has proven the existence of a given aggravator we cannot say the jury found proof of its existence beyond a reasonable doubt. This scheme makes the sentencing order an evaluation by the trial judge of the aggravating and mitigating factors that form the basis of a life or death sentence. Morton v. State, 789 So2d 324 (Fla. 2001). The U.S. Supreme Court told us in Walton "A Florida trial court no more has the assistance of a jury's findings of fact with respect to sentencing issues than does a trial judge in Arizona." The trial judge in Florida relies on evidence not submitted to the jury, Porter v. State, 400 So2d 5 (Fla, 1981). Additionally, the trial court's findings must be made independently of the jury's recommendation. Grossman v. State, 545 So2d 833 (Fla. 1985).

It is clear that Florida's juries are not required to render a verdict on the actual elements (aggravators) of capital murder. Florida's many aggravating factors operate as the equivalent of an element of a greater

offense and Florida law does not require the jury to reach a verdict on any of the factual determinations required before a death sentence can be imposed. Florida Statute 921.141 (2) does not call for a jury verdict but for an advisory sentence. This was stated that "The jury's sentencing recommendation is only advisory. The trial court is to conduct its own weighing of aggravators and indicators. Combs v. State, 525 So2d 853 (Fla. 1988) quoting Spaziano v. Florida, 468 US 447 (1984).

For these reasons, it is clear that Florida's capital sentencing scheme is unconstitutional under Ring. Therefore, it was error for the trial court to disregard Ring and deny the Appellant a rehearing.

The Appellant, in his Motion for Rehearing, also brought before the trial court issues as to Atkins v. Virginia, 536 US 304 (2002) and its application to the Appellant's case. This was also summarily denied, on the basis of Bodison v. Moore, 833 So2d 693 (Fla. 2002).

The U.S. Supreme Court held in Atkins that the Eighth Amendment prohibits the execution of mentally retarded offenders. This ruling overruled Penry v. Lynaugh, 492 US 302 (1989). When the Supreme Court announces a new constitutional rule that "places beyond the authority of the state the power to impose certain penalties, that rule is retroactive under Witt v. State, 387 So2d 922 (Fla 1980). In Witt, this court summarized Florida's criteria for determining whether a change in the decisional law must be applied retroactively in post-conviction proceedings by jury.

> "To summarize, we today hold that an alleged change of law will not be considered in a capital case under Rule 3.850 unless the change (a) emanates from this court or the United States Supreme Court, (b) is constitutional in nature, and (c) constitutes a development of fundamental significance."

When we apply the Witt criteria to Atkins, it is clear that Atkins is retroactive, and therefore applies to Jermaine Foster and because Atkins falls within the purview of Witt as it emanates from the U.S. Supreme Court; next it is constitutional in nature as it goes to the basis of the right to protection

from cruel and unusual punishment as guaranteed by the Eighth Amendment; and lastly, its purpose is to safeguard the basic protections of the Eighth Amendment.

There is a strong public interest in assuring an accurate determination of mental retardation in capital cases in order to avoid wrongful executions Ake v. Oklahoma, 470 US 68, (1985). Therefore, a full hearing on JERMAINE FOSTER's Atkins issues was mandated. Since actual mental retardation has never been raised in any proceeding, trial, direct appeal and post conviction until the Appellant's Motion for Rehearing, it should have been fully addressed by an evidentiary hearing.

The issue of mental retardation as it applies to Jermaine Foster under Atkins is clearly evident. At the evidentiary hearing, Foster was attempting to show that his diminished capacity was further exacerbated by the drugs and alcohol he consumed. The defense was not trying to prove mental retardation although it is clear from the record that at least a prima facie case of mental retardation was established. Once this prima facie showing was established, a full hearing on all Atkins issues should have been granted.

First of all, the Appellant established, without rebuttal, that Jermaine Foster's intelligence quotient was 75 (R 704-705). Atkins requires a finding of 75 or below as to intelligence quotient. Further, Dr. Dee made a finding

that Jermaine Foster was mentally retarded. (R 705). He also considered other facts such as reading, writing, driving a car and keeping a checkbook. (R705-706). Dr. Dee testified that the Appellant never had the mental functioning to do every day chores. (R706) Although Atkins discusses the age of eighteen or before when symptoms must be established, the defense did not have that opportunity at the evidentiary hearing as, again, Atkins was not in existence, to establish that specific factor. But the Appellant established all of the Atkins criteria except age. Although Dr. Dee did testify that Jermaine Foster never had the mental functioning (R 706) to perform every day tasks.

At no time in the past, has the Appellant's mental retardation been addressed until the Motion for Rehearing brought about by the decision in Atkins. The evidence presented at the post-conviction evidentiary hearing clearly established that the Appellant is entitled to a full evidentiary hearing on the retardation issue. The Appellant brought forth sufficient evidence though Dr. Henry Dee to establish a prima facie case requiring a full hearing on that issue.

Dr. Dee testified "by the standards of the American Association of Mental Retardation…that Foster's 75 IQ would have been considered a score low enough to consider mental retardation" (R 705) " they say that 75,

or so, or below is the place at which we begin to think about mental retardation and have to assess areas of adoptive functions such as skills of every day living…(R705). Skills [such as] reading and writing and driving and keeping a checkbook. If you have a deficit in more than two areas or lower IQ you are considered mentally retarded." (R 705). He was asked whether Foster had the mental functioning to do the every day chores and his answer was "He never had. No." (R 706). He was always dependent on others and this was shown "by going from one relative to another basically to live, throughout his childhood." (R706). This testimony establishes sufficient criteria under Atkins to have granted a full hearing on the issue of mental retardation.

Florida Statute Annotated 231.137 establishes the threshold for determining mental retardation in conjunction with the imposition of a death sentence.

> "...the term mental retardation means significantly sub-average general intellectual functioning existing concurrently with deficits in adaptive behavior and manifested during the period from conception to age 18. The term "significantly sub-average general intellectual functioning" for the person of this section means performance that as 2 or more standard deviations from the mean score on a standardized intelligence test specified in the Rules of the Dept. of Children & Families Services. The term "adaptive behavior" means the effectiveness

> or degree with which an individual meets the standards
> personal independence and social responsibility expected
> of his age, cultural group and community."

This statute was passed in 2001 and had probably never been previously used at the time of the evidentiary hearing in this case. This is a new world in death penalty litigation. People diagnosed with mental retardation are susceptible to suggestions and readily acquiesce to other adults or authority figures and they have problems of moral development and moral understanding as well as understanding the consequences of their actions. 77 DEC Fla BJ 63. This fits JERMAINE FOSTER's profile as seen through Dr. Dee as well as the testimony of GERARD BOOKER.

Regardless of what is in place now, the case of Penry v. Lynaugh, 492 US 302 (1989), in effect at the time of the defendant's conviction and sentencing to death, holds that the defense is able to offer mitigating evidence of mental retardation during the guilt and penalty phase of a capital trial. The defense for JERMAINE FOSTER did not raise this issue during the guilt phase or during the penalty phase.

Unfortunately for Jermaine Foster, the Florida Statute states that it does not apply to a defendant who was sentenced to death prior to the effective date of the act. Fla. Stat. 921.137 (8) (2001). But, since Atkins is clearly retroactive, the Appellant is entitled to a full hearing on the issues of

his mental retardation and therefore, the Appellant's Motion for Rehearing on the Atkins issues alone should have been granted.

III.

WHETHER THE TRIAL COURT ERRED IN NOT PERMITTING THE AMENDMENT OF THE DEFENDANT'S MOTION TO VACATE JUDGMENT AND SENTENCE ON THE BASIS OF RACIAL BIAS AND PREJUDICE EXPRESSED BY DEFENDANT'S TRIAL COUNSEL

The answer to this issue is a resounding yes. During the discovery stages prior to the evidentiary hearing, counsel for the Appellant consulted with JANET VOGELSANG, a clinical social worker expert retained by trial counsel to prepare an evaluation of the Appellant. This meeting took place between late September and early November, 2001. In January of 2002, Vogelsang provided counsel with an Affidavit attached to Appellant's Motion to Amend his Motion for Post Conviction Relief (R442-449). Ms. Vogelsang has claimed that trial counsel, in at least one meeting during the preparation stages of Appellant's defense stated "that mitigation would not matter and the defendant was just another nigger who was going to get the death penalty anyway and mitigation doesn't matter anyway, the jury doesn't listen" (R448).

The statements of trial counsel to Ms. Vogelsang came to light after the Appellant, JERMAINE FOSTER, filed his final Motion to Vacate

Judgment and Sentence. These were not matters known to Appellate counsel as Appellate counsel does not traditionally interview and question trial witnesses when preparing the Appellant's brief. This evidence was never previously disclosed by the witness and totally unknown. It is obvious that it existed for a long time and that it was evidence, but to say as the trial court did in denying the Motion to Amend that it was not timely raised is ridiculous. It is just what the term implies, "newly discovered". The trial court cites this court in its decision of Glock v. Moore, 776 So2d 243.250 (Fla, 2001) stating "in order to be considered newly discovered, the evidence 'must have been unknown by the trial court, the parties or by counsel at the time of trial, and it must appear that defendant or his counsel could not have known [of it] by use of diligence". The statement of Vogelsang was not included in any of the twenty-five (25) boxes of records obtained on behalf of JERMAINE FOSTER in preparation for the Motion for Post Conviction Relief. It was a statement not uttered to any person until the Affidavit of Vogelsang and conversations with post-conviction counsel within the short time before the filing the Motion to Amend and the Affidavit. Clearly less than months before the filing of the Motion to Vacate was heard by the trial Court.

It is clear as stated by the trial court, that this report was continuously available over the two years prior to the motion being filed. But, it is also patently obvious that this person had no focus point in the presentation of whether the Appellant's mental state and intoxication played a role or should have been the focal point of the defense. It is just not something that one would look at in determining whether trial counsel was ineffective or in establishing a reason for ineffectiveness of trial counsel. Under the trial court's reasoning, the recantation by a witness of an elemental fact of a case that arises later would not be grounds to reverse and grant of evidentiary hearing because the witness was available and could have been questioned earlier. This is not the type of evidence or statement that is easily discussed or even put in writing by anyone. Racial slurs or statements have no place in our judicial system.

The trial court was clearly wrong in not allowing the requested amendment especially in light of the magnitude of how the statement of defense counsel could have and did affect his performance on behalf of JERMAINE FOSTER.

In reviewing a trial court's ruling on an ineffective assistance claim, this court defers to findings of fact based on competent, substantial evidence and independently review deferring and prejudice as mixed questions of law

and fact. Gore v. State, 846 So2d 401 (Fla, 2003); Stevens v. State, 748 So2d 1028 (Fla, 1999). "Claims of ineffective assistance of trial counsel require a showing of deficient performance and prejudice. Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). First a defendant must establish conduct on the part of counsel that is outside the broad range of competent performance under prevailing performance standards, Gore v. State, 846 So2d 461, 467 (Fla, 2003). Second, the deficiency must be shown to have so affected the fairness and reliability of the proceedings that conficence in the outcome is undermined Gore supra. The two prongs are related in that "the benchmark for judging any claim of ineffectiveness must be whether counsel's conduct so undermined the proper functioning of the adversarial process that the trial court be relied on as having produced a just result". Rutherford v. State, 727 So2d 216, 219 (Fla, 1998).

In applying these standards to JERMAINE FOSTER's case and the statements of trial counsel, as well as trial counsel's failure to raise any defense for the Appellant, except for lack of formal intent, these expressions of racial animus seriously affected the fairness and reliability of the proceedings, and therefore, any confidence in the jury's verdicts of guilt must be undermined. This court has strongly re-affirmed that the principle

that racial prejudice has no acceptable place in our justice system. State of Florida vs. Davis, 2004 W.L. 306044 (Fla); Rowell v. Allstate Insurance Co., 652 So2d 354, (Fla, 1995).

"A racially or religiously biased individual harbors certain negative stereotypes which, despite his protestations to the contrary, may well prevent him or her from making decisions solely based on the facts and law that our jury system requires. Davis, supra. "The necessity of vigilance against the influence of racial prejudice is particularly active when the justice system serves as the mechanism by which a litigant is required to forfeit his or her very life." Davis, supra. This Court is Robinson v. State, 520 So2d 1 (Fla, 1998) vacated a death sentence merely because a prosecutor suggested that a black defendant preyed on white women. Thus it emphasized, "The risk of racial prejudice infecting a criminal trial takes on greater significance in the context of a capital sentencing proceeding." Robinson.

In reviewing the trial record previously before this court, it is apparent that trial counsel did not raise any formidable defense for JERMAINE FOSTER, the appellant. It is established in the record, before this court, that Dr. Lipman testified that had he been consulted, he could have, and did at the evidentiary hearing, established that JERMAINE FOSTER, due to his mental disease or defect, and his use of alcohol and mind altering drugs,

suffer from a condition at the time of this offense, which rendered him incompetent. With his low mental functioning ability, coupled with his inability to process right from wrong, he was not competent at the time of the offense. This was a viable defense which was never explored or attempted to be developed and which the Appellant claims relates directly to trial counsel's racial prejudices or bias as stated in the Affidavit of Janet Vogelsang. (R 448). It is clear that no defense was raised except lack of intent and not by witness testimony, and even in the penalty phase, there was no great effort put into preparation or establishment of mitigation. This is because, in the words of trial counsel "it doesn't matter anyway, the jury does not listen". (R 448). It is evident from the record that counsel's expression of racial bias or prejudice affected his performance in the guilt and penalty phases of FOSTER's trial. This created an unacceptable risk that prejudice clouded counsel's judgment and diminished the force of his advocacy. Therefore, it satisfies both prongs of the Strickland test and the conviction and sentence should be reversed and a new trial granted.

For the trial court to, in essence, say that racial prejudice that comes to light five years post conviction is procedurally barred and therefore not relevant, is a black eye on the judicial system in the Ninth Judicial Circuit of Florida. To say it cannot be raised as newly discovered evidence is a

travesty. It is simply an extension of that prejudice to disregard it and not allow counsel to raise it. Although most cases deal with racial bias that has occurred on the record, this case deals with the racial prejudice in that it shows the inner beliefs of a person designated to protect and defend the rights of the accused, no matter what his color or creed. It happened in a private meeting at counsel's office with an expert who was to prepare social evidence to be used at trial to help the defendant and counsel expresses his thoughts of how it doesn't really matter because the defendant is "just another nigger" (R 448). In other words, don't bother, don't do your job, there is no sense trying, we have already lost because of the defendant's skin color.

Again, for the same reasons as stated in the Appellant's motion (R 442-449), this information was newly discovered with the Affidavit of Ms. Vogelsang. Was it there before? Yes. Was there a reason to inquire along racial lines of this or any other witness at any time, in any prior proceeding? The answer is no. We all like to believe this type of attitude does not pervade the thinking of an allegedly enlightened society. Especially among those designated to protect the rights of others. This injustice was clearly available, but who knew it was there? Who would have thought to ask about it?

Additionally, it was not known, and would not have been readily obvious that Vogelsang was not allowed to use charts and other materials she had prepared to use at trial until this affidavit. The materials were not placed in the trial record or referred to in her testimony. This is another indicator that counsel was not functioning on the highest level for his client as an advocate for his life. This was a very disturbing and heinous act or series of acts by JERMAINE FOSTER and it took place at that time, in a rural county known for its open ranges, ranches and cowboys; an area where race may be an issue, and apparently, was an issue. Racial prejudice and bias should be factors that should be allowed to be argued at any time they are found and not limited by procedural grounds. It is the old "form over substance" argument. Racial prejudice has no place in our court system and no place in the hearts of its advocates. For this reason alone, JERMAIN FOSTER should get a new trial or at least the trial court should have permitted its inclusion in the evidentiary aspects of the hearing or Appellant's Motion for Post Conviction Relief.

CONCLUSION

At the evidentiary hearing in this matter, held on Appellant's Motion to Vacate Judgments and Sentences of death, it was proven beyond a reasonable doubt that had the proper preparation and investigation been done for JERMAINE FOSTER, he would have at least had a fighting chance at trial. Trial counsel was not familiar with the law or the issues of mental defect and intoxication. But, then again, trial counsel did not investigate the mental status of JERMAINE FOSTER at all. If only they had properly and timely had him evaluated by Dr. Henry Dee, instead of waiting to the penalty phase, they would have known that there was a true issue as to his competency and the time of the act. They would have known of his mental retardation. However, because he was "just another nigger who killed someone", it did not matter.

The trial attorneys fall short in every aspect of their preparation and presentation of JERMAINE FOSTER's case to the jury. It appears from the totality of the circumstances that they just did not care. Their racial prejudice and bias showed through.

On the basis of the evidence presented at the evidentiary hearing, especially in conjunction with Ring and Atkins and State v. Davis,

JERMAINE FOSTER has not only established that he should not be executed, he has established beyond a doubt that he is entitled to a new trial.

WHEREFORE, JERMAINE FOSTER respectfully requests that he be granted a new trial or in the alternative, at the very least, a new sentencing hearing.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing has been furnished to Scott Browne, Attorney General's Office, 3507 E. Frontage Rd., #200, Concourse Center 4, Tampa, FL, 33607 this ____day of March, 2004.

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CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that the foregoing complies with the font requirements of Florida Rule of Appellate Procedure 9.210(a)(2).

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