IN THE SUPREME COURT OF FLORIDA

JERMAINE A. FOSTER,

Appellant,

v.

Case No. SC03-1331
Lower Tribunal No. CR93-0346

STATE OF FLORIDA,

Appellee.
_____/

ON APPEAL FROM THE CIRCUIT COURT
OF THE NINTH JUDICIAL CIRCUIT,
IN AND FOR ORANGE COUNTY, FLORIDA

SUPPLEMENTAL ANSWER BRIEF OF APPELLEE

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STATEMENT OF THE CASE

On March 4, 1993, Appellant was indicted on the following charges relating to an incident which occurred November 29, 1992:

(1) First degree murder, victim Anthony Faiella;
(2) First degree murder, victim Anthony Clifton;
(3) Attempted first degree murder, victim Michael Rentas;
(4) Kidnapping, victim Anthony Faiella;
(5) Kidnapping, victim Anthony Clifton
(6) Kidnapping, victim Michael Rentas;
(7) Kidnapping, victim Tammy George.

(R[1] 1-4). Appellant was convicted as charged. After a penalty phase, the jury recommended the death penalty by a vote of 12-0. Appellant appealed, raising the following issues:

(1) The death penalty is disproportionate;

(2) The trial court improperly balanced the aggravators against the mitigators;

(3) The trial court erred in denying defendant's motion for mistrial based on the wrongful admission of hearsay evidence over defense objection;

(4) The trial court erred by allowing witnesses to testify about other crimes or bad acts;

(5) The trial court erred in excusing a juror for cause over defense objection;

(6) The trial court erred in instructing the jury that it could consider whether the murder was heinous, atrocious, or cruel;

[1] Cites to the original record on appeal will be "R." Cites to the supplemental record after relinquishment proceedings will be "SR."

(7) The trial court erred in refusing to strike jurors for cause;

(8) The trial court erred in finding that the murders were committed in a cold, calculated, and premeditated manner;

(9) The trial court erred in overruling objections to the introduction of racial prejudice into the proceedings;

(10) The trial court erred in considering separately that the murder was for pecuniary gain and that the murder occurred during the course of a kidnapping;

(11) A new trial is warranted because of prosecutorial misconduct; and

(12) Section 921.141, Florida Statutes (1993), is unconstitutional.

Foster v. State, 679 So. 2d 747 (Fla. 1996). This Court upheld the convictions and death sentence. The Petition for Writ of Certiorari was denied by the United Stated States Supreme Court on March 17, 1997. *Foster v. Florida*, 520 U.S. 1122 (1997)

On January 15, 1998, Appellant filed a Motion to Vacate Judgment of Conviction and Sentence with Special Request for Leave to Amend (R 29-77). The motion was a Ashell@ motion which alleged the Office of Capital Collateral Review was unable to file a complete motion due to lack of funding and inability to access public records. A second Motion to Vacate Judgment of Conviction and Sentence was filed June 1, 2000, raising the following claims:

(1) Mr. Foster was denied the effective assistance of Counsel, pretrial, and at the guilt phase of his trial, in violation of the Sixth, Eighth and Fourteenth Amendments, counsel failed to adequately investigate and prepare the defense case and challenge the state=s case. The court and state rendered counsel ineffective. As a result, the convictions herein are not reliable.

(2) Mr. Foster was denied his right to the effective assistance of counsel and mental health experts during the guilty phase of his capital case when critical information regarding Mr. Foster=s mental state was not provided to the jury, all in violation of Mr. Foster=s rights to due process and equal protection under the Fourteenth Amendment to the United States Constitution, as well as his rights under the Fifth, Sixth, and Eighth Amendments.

(3) Mr. Foster=s trial was fraught with procedural and substantive errors which cannot be harmless when viewed as a whole, since the combination of errors deprived him of a fundamentally fair trial as guaranteed under the Sixth, Eighth and Fourteenth Amendments.

(4) Mr. Foster=s counsel was ineffective by counsel=s failure to object to and thereby not preserving for appeal the trial court=s finding that the murders were committed in a cold calculated and pre-meditated manner without a pretense of moral or legal justification.

(5) Mr. Foster=s sentence of death is premised upon fundamental error because the jury received inadequate or improper guidance concerning the aggravating circumstances to be considered. Florida=s statute setting forth the aggravating circumstances to be considered in a capital case is facially vague and overbroad in violation of the Eighth and Fourteenth Amendments.

(6) Mr. Foster was denied his right to a fair and impartial jury by prejudicial pretrial publicity, by the lack of an adequate change of venue and by events

> in this courtroom during trial hereby rendering trial counsel ineffective and therefore, the trial court erred.
>
> (7) The penalty phase jury instructions unconstitutionally shifted the burden to Mr. Foster to prove that death was an inappropriate penalty.
>
> (8) The jury=s recommendation of death was tainted by the state and court=s failure to instruct the jury regarding the statutory mitigating circumstances that the crime was committed while Mr. Foster was under the influence of extreme mental or emotional disturbance, thereby rendering his counsel ineffective.

A Supplemental Motion to Vacate Judgment of Conviction and Sentence was filed September 25, 2000, raising the following additional points:

> (1) Mr. Foster was denied the effective assistance of Counsel, pretrial, and at the guilt phase of his trial, in violation of the Sixth, Eighth and Fourteenth Amendments, counsel fail to fully investigate and prepare by a defense of voluntary intoxication as it effected Mr. Foster=s mental disability and lack of mental capacity to commit and appreciate the consequences of his actions.

(R 418-421). An evidentiary hearing was set for November 30, 2000. Appellant moved to continue the hearing twice: once because counsel was having hip replacement surgery (R 428), and, after the hearing was re-scheduled for March 28-30, 2001, because counsel was unable to prepare for hearing because of physical therapy after the surgery (R 437). The evidentiary hearing was re-scheduled for January 30, 2002. On January 23, 2002, Appellant filed a Motion for Leave to Amend, stating that

Janet Vogelsang met with Appellant=s attorneys in 1993, during which time one attorney made a racial slur (R 448). Furthermore, the attorneys were not interested in the visual aids she prepared for trial (R 449). The motion was denied (R 453-464).

An evidentiary hearing was held January 30-February 1, 2002 (R 450-452, 629-1003). The Motion to Vacate was denied on July 8, 2002 (R 514-542). Appellant filed a Motion for Rehearing on July 22, 2002 (R 543-546). The motion was denied on July 30, 2003 (R 616-622). Appellant appealed the order, and this Court heard oral argument on August 31, 2004.

By order dated October 14, 2004, this Court relinquished jurisdiction to the trial court for the purpose of holding an evidentiary hearing on the allegations set forth in the motion for leave to amend. (SR1). The trial court held an evidentiary hearing January 20-21, 2005. At the end of the hearing, the court heard arguments. The State argued that the amended motion was an untimely successive motion and procedurally barred, in addition to arguments on the merits (SR473-474). Collateral counsel argued that since the Florida Supreme Court remanded for a hearing, they had rejected the State's arguments on procedural bar (SR474). On March 4, 2005, the trial court entered an order denying relief on the amended motion to vacate (SR52-60). This appeal follows.

STATEMENT OF THE FACTS

Racial slur by Mr. Smallwood. Janet Vogelsang signed an affidavit in 2002, stating that Mr. Smallwood made a racial slur (SR190, Defense Exhibit 8). Supposedly, Mr. Smallwood made a comment that "Jermaine is just another dumb nigger, and who cares any way about all this mitigation, the jury is not going to listen anyway." (SR 135). She never documented the fact that she heard the comment. She did not know where they were when the comment was made or who was present (SR190). Vogelsang could not recall whether Mr. Smallwood made the racial comment at their first or second meeting (SR132-133). She only knew that "it was made pretty early on and other people were present." (SR133). She could not remember the exact comment. The affidavit stated that Mr. Smallwood "in effect" made the comment (SR191). Volgelsang never made any note of the comment (SR192). She did not tell the judge (SR203). There was no pattern of racism or discrimination, just a dismissive attitude (SR203-204). She did not think the comment was significant enough to report because there was no racism or pattern of racist behavior (SR208). This case was not the first time Vogelsang accused an attorney of making a racial slur (SR212). Furthermore, she had been found biased by a judge (R252).

Vogelsang's perception of Mr. Smallwood and Mr. Kelley was that they did not understand what mitigation was in terms of how extensive it needs to be (SR136). She felt the racial comment was indicative of a broader attitude of "what difference does it make, it's not going to matter anyway." (SR137).

Most of Vogelsang's contact was with Mr. Kelley because he was in charge of the penalty phase (SR197). Vogelsang admitted on cross-examination that Mr. Smallwood did not show a pattern of racial bias (R252).

Race was an issue from the beginning of the case. The case was a "very high profile sensationalized case" that was first tried in Federal court because it was the first case prosecuted under the new Federal carjacking statute (SR347). Defense counsel was so concerned about the racial aspect that they moved to change venue. Foster was black and the victims were Hispanic. Three Hispanic boys were shot in a field, but a black woman with them was set free unharmed (SR348). Venue was changed to Orange County which was still not satisfactory because of the publicity from the Federal trial (SR348). Defense counsel filed a second motion for change of venue (SR349). Kelley was certain they shared their concerns about race with Vogelsang (SR350).

When Kelley reviewed Vogelsang's affidavit alleging a racial slur, he was surprised (SR368). The statement was never made in his presence (SR369). The only time Vogelsang met with Smallwood that Kelley was not present was the first meeting at Fibber McGee's. Gary Phillips was present at Fibber McGee's (SR369). There was no reason for Smallwood to meet with Vogelsang without Kelley, since Kelley was responsible for the penalty phase (SR369). Vogelsang never mentioned any concerns about Smallwood having racial bias (SR370).

When Vogelsang met with Smallwood at Fibber McGee's, it was a very brief meeting. Gary Phillips had picked up Vogelsang at the airport and was driving her to her hotel. They stopped at Fibber McGee's for about five minutes. Phillips did not hear Smallwood make any type of racial comment (SR401). Both Phillips and Smallwood testified the latter was never alone with Vogelsang during the time they were at the restaurant (SR402, 436). Mr. Smallwood stated that Phillips brought Vogelsang into the restaurant, they were introduced, Smallwood told her Kelley would meet with her the next day, and they left (SR436). They did not talk about the case (SR437). The next day they all met at the office and Vogelsang, Phillips, and Kelley went to Auburndale to interview family members (SR437). Smallwood

testified he was never alone with Vogelsang (SR438). He never made the statement she attributed to him (SR440).

Phillips never heard any such comment during the time he worked with Smallwood and Kelley (SR402, 403, 405). Phillips was hired to seek out mitigation and was told to do whatever was necessary to assist in finding mitigation and to assist the mitigation experts (SR402).

Failure to use Vogelsang exhibits. The day of trial, Mr. Kelley met with Vogelsang behind the courtroom to discuss the visual aids (SR135). Vogelsang prepared a chart which was an accumulation of risk factors (SR154, Defense Exhibit 5). There was nothing that prevented her from testifying to the risk factors if she was permitted by the judge (SR157). Vogelsang recalled that there was an objection to her testifying to information from other people (SR157). Vogelsang was not allowed to use the charts in her testimony (SR165). Vogelsang is usually on the stand for five hours on average (SR172). She has testified as long as a day and a half (SR172). Mr. Kelley only did a brief run-through with her the day before she testified. She typically likes to do a complete run-though with visual aids and her complete testimony (SR173).

Mr. Kelley told Vogelsang the judge was not going to allow the charts. Vogelsang told him other attorneys had argued for the visual aids to be used but not admitted as exhibits (SR178).

Vogelsang recalled the judge ruling that she could not testify as to what people told her in interviews or what was in the records, but could only give a general summary of her findings (SR241-242). The judge ruled she could not talk about any of the specifics of Foster's life in terms of what she learned from interviews or records (R242).

Mr. Kelley met with Vogelsang before she testified and went over all the documents and records. Vogelsang identified certain risk factors. Kelley outlined the risk factors and transferred them to a chart. He used that chart when he argued the case, and it was introduced as an exhibit at the 2002 evidentiary hearing (SR356).[2] Kelley produced the chart from conversations with Vogelsang (SR358-359). In fact, Vogelsang was present when Kelley wrote down the risk factors she wanted to testify about (SR359). Kelley listed all the risk factors Vogelsang said applied to Foster. The day of the hearing, Vogelsang came in about ten minutes before she was supposed to testify. She had one or two charts which she wanted to use. Kelley told Vogelsang he already had his own chart which he

[2] A digital photo of the chart was introduced as State Exhibit 2.

preferred to use because it had all the risk factors she wanted to testify about (SR360). Vogelsang did not have the charts at the deposition the day before and had not brought them into the office (SR446-447). Mr. Smallwood saw Vogelsang's charts, and they covered the same ground as Kelley's charts (SR441). When Kelley gave closing argument, he would discuss each statutory and nonstatutory mitigator and point to the chart (SR442).

Prior to Vogelsang's testimony, the State objected to Vogelsang testifying to what other people told her (SR362). There were no family members willing to testify (SR361, 446). Some of the family members came to court, but they all said they did not want to testify (SR384). Kelley was "terrified to put them on the stand if it was against their will to testify." (SR385) The State objections to hearsay testimony were sustained. Defense counsel moved to continue the trial in order to convince family members to testify. The motion to continue was denied (SR352, State Exhibit 4).[3] Kelley told Vogelsang she could testify as to her findings but could not go into specifics. One of Vogelsang's charts had information that was

[3] State Exhibit 4 is a copy of the penalty phase index and the relevant section of the penalty phase during which the State objected to hearsay testimony. The trial judge took judicial notice of the transcript which was part of this Court's record on appeal in Case No. 84,228 (SR363).

objectionable under the terms of the motion (SR364). The last time Mr. Kelley saw Vogelsang's charts, she had them (SR364).

Mr. Kelley questioned Vogelsang about risk factors and she was not precluded from testifying about risk factors (SR243, 365). She testified with no objection from the State (SR244, 365). Kelley checked his chart to make sure Vogelsang covered every risk factor (SR365). When she was testifying for Alf Catholic, the State objected, the objection was sustained, and the jury advised to disregard her testimony (SR245, 366). When the State's objection to her testimony in Catholic's case was sustained, that concerned Kelley. He did not want any State objections in his case during which the jury would be instructed to disregard the testimony (SR367).

Kelley believed Vogelsang was a very effective witness (SR366). The trial judge found mitigation based on her testimony (SR367).

Failure to provide materials to Janet Vogelsang. Vogelsang was qualified as a clinical social worker with expertise in conducting biopsychosocial assessments. She was retained in this case on September, 1993, at which time she went over her checklist and things she needed in order to do the biopsychosocial assessment (SR111). Her first meeting with Mr. Smallwood was in December (SR132). They talked on the phone

frequently (SR194-195). Vogelsang also spoke with Gary Phillips, the investigator (SR196). There were phone calls and interviews which Vogelsang did not record or request payment (SR198).

Recognizing that no investigator can acquire all the records, Vogelsang would usually have three to five three-ring binders filled with records on family members and extended family members (SR117). She liked to meet as many family members as possible (SR118). Gary Phillips, the defense investigator, took Vogelsang around to meet family members (SR130).

Vogelsang wrote the attorneys a letter on December 19, 1993, stating that the number of hours authorized by the court "barely scratch the surface of what is required for a complete psychosocial assessment." Further, other attorneys had a schedule prepared for her upon her arrival and that even Gary Phillips was lost. Vogelsang said she would not return to Florida unless more hours were authorized, and the attorneys would have to pay all travel costs up front. (Defense Exhibit 3). The letter was designed to alert the attorneys to further records she needed (SR143). She remembered going to the attorneys' office and finding records the attorneys didn't even know would be helpful to her (SR143).

Vogelsang like to have two interviews with each family member (SR144). She made a list of records she needed from the attorneys. She had medical, school, AFDC, DCF, and legal records on Foster (SR145-146). She had medical, school and mental health records for Samuel McDonnell, medical and school records for Linda McIntosh (Foster's mother), school records for Thadeus Burnham, and school records for Rosemary. She felt that the family records file came up short (SR145). She wanted records across two or three generations: grandparents, uncles, aunts and cousins, so she could look for patterns (SR145). She wanted AFDC and HRS records on family members (SR146). Vogelsang had photos of Sally Foster's house (SR148). She did not receive information on Foster's two children (SR150). She did receive Linda McIntosh's medical and school records. She received Foster's father's school records (SR218).

Vogelsang interviewed Linda McIntosh, Gloria Hubbard, Rosemary Foster, and Thadeus Burnham. She wanted to interview Corey Hubbard, family members of Mike Bellamy, a friend of Foster's that was shot and killed; Mary Lee, the sister of Linda McIntosh; Richard McIntosh, Foster's stepfather; teachers and neighbors (SR151-152). Vogelsang interviewed two aunts, both grandmothers, and one grandfather. She interviewed Foster's father, two cousins, and Foster's brother Tyree (SR216). She

interviewed two HRS workers (SR216). Social workers were afraid to go to Foster's neighborhood, and it was possible records of his past were either nonexistent or deprived (SR217).

The attorneys only provided Vogelsang with 100-150 pages of documents (SR152). She normally has hundreds of pages and sometimes thousands (SR153). She liked to work eight to twelve months on a case, but only had seven months to work on this case (SR153). She was unable to make a complete evaluation (SR154).

Vogelsang admitted on cross-examination that she reviewed reports from the sheriff's office, FBI, depositions, and arrest records on Foster and his mother; however, those records were not in her file of 100-150 pages of documents (SR214-216). At trial, Vogelsang testified she reviewed Foster's mental health records. She did not have them in her file (SR218). McIntosh's and Rosemary's school records were not in the file even though Vogelsang reviewed them (SR219, 221). Vogelsang reviewed many records in the attorney files but did not make copies of them (SR220). Therefore, the records would not be included in her 100-150 pages of files (SR220). Vogelsang saw the arrest records of Corey Lisbon and Gary London (cousins), Gloria Hubbard and Rosamary Foster (aunts), John London (uncle), and Thadeus Burnham (father), at the attorneys' office but did not make copies (SR223). Vogelsang reviewed the depositions of

Tammy George, Michael Rentas, and Leondra Henderson but did not have them in her file (SR224-225).

Vogelsang met with the attorneys for six and one-half hours on January 14, 1994, eleven hours on March 19,[4] eleven hours on March 20 and eleven hours on March 21 (SR226). She received Federal Express delivery packages on two or three occasions well before trial (SR227). Vogelsang billed for one-and-one-half hours reviewing records on December 3, 1993, during her first trip to Orlando, eight hours on December 19, 1993, and three-and-a half hours on January 12, 1994 (SR228-230). In fact, neither Mr. Smallwood nor Mr. Kelley ever refused to provide anything she asked for. Some records simply could not be obtained (SR241).

Mr. Kelley retained Ms. Vogelsang to work in conjunction with Dr. Dee to formulate an assessment of Foster's abilities, background, and how environmental factors affected his behavior (SR342). Before Vogelsang became actively involved, Mr. Kelley and Gary Phillips, the investigator, went to Auburndale, Winter Haven, Lakeland, and "all over the place" to try to find relatives (SR342, 346, 374). Kelley first contacted Vogelsang in September, 1993 (SR344). He maintained contact by telephone

[4] Vogelsang later clarified that part of this time was spent reviewing records (R240).

and sent her everything they had at the time on the case. He tried to provide Vogelsang with everything she wanted (SR344). She never complained to him that she was dissatisfied with anything (SR351, 383). Kelley even traveled to Auburndale with Vogelsang and spent an entire day with her discussing Foster's background (SR351).

On Vogelsang's first visit, Gary Phillips met her at the airport and Mr. Smallwood met with her that night at a small local restaurant in Kissimmee named Fibber McGee's (SR345). Both Kelley and Smallwood met with Vogelsang the next day, and Kelley gave her a general description of Foster's background. Beginning around age eight to ten, Foster grew up on the streets. He had no formal parenting. Kelley told Vogelsang that the areas she would be visiting were not nice areas (SR346).

When Kelley received the December 19 letter from Vogelsang, he called her (SR352). He did not recall receiving an original checklist (SR372). Gary Phillips had never seen a checklist (R416). Vogelsang expressed concern about certain school records or hospital records they had attempted to get (SR353). Kelley sent Gary Phillips to obtain the records and they were sent to Vogelsang (SR354). Kelley would tell Phillips what records to get and Phillips would follow up (SR416). The people on

Vogelsang's December 19, 1993, list were interviewed on January 13, 1994 (SR422).

Vogelsang visited the area one or two more times. Kelley may have accompanied her on some of the additional interviews (SR354). She never repeated her concerns (SR355). Kelley could remember nothing that she requested that she did not receive (SR368). He tried to get everything she wanted and sent her everything he could get (SR373).

Gary Phillips, the defense investigator attempted to gather any and all records Vogelsang requested. Some of the records she asked for simply did not exist or were not available (SR405-406). Both Kelley and Vogelsang would give Phillips direction on records to collect. Phillips collected everything he could and more (SR406). Phillips obtained releases from Foster and other people from all over Auburndale, Winter Haven and Lakeland. He then would serve the release and return to pick up available records (SR407). Vogelsang would not be with him most of the time he was retrieving records (SR407). Phillips visited six people on January 13 with Vogelsang (SR407). There were some potential witnesses that could not be found (SR408). It was not possible to make appointments with these people, so it was "luck of the draw sometimes" whether they were found at home (SR408).

Character witnesses. The State presented 11 character witnesses who testified that neither Mr. Smallwood nor Mr. Kelley have ever shown any indicia of racial bias. Judge Belvin Perry, Chief Judge of the Ninth Judicial Circuit, had known Mr. Smallwood and Mr. Kelley for sixteen years (SR87). Judge Jon Morgan knew Mr. Smallwood for twenty-five years (SR122). Judge Draper had known Mr. Smallwood twenty years (SR184). Judge Miller knew Mr. Smallwood for twenty three years and was his supervisor when they both worked at the Office of the State Attorney (SR234). Rose Thomas, Osceola County's first female road deputy who was currently Probation and Parole supervisor, had known Mr. Smallwood for twenty-six years (R278). Gwendolyn Wiggins had known both Mr. Smallwood and Mr. Kelley for fifteen years (R293). Jerome Goodwin, Kissimmee Police Department, had know the attorneys for twenty-four years (R301). Zettie McCrimmon had known Mr. Smallwood twenty years (R313). Evan McKissic, first black teacher hired in Osceola County, was Don Smallwood's seventh grade teacher (SR325-26). Anna Pinellas, director of housing and grants for Osceola County, had known Mr. Smallwood twenty years (SR331). Nelson Winbush, coach and assistant principal, knew Mr. Smallwood and his family (SR338). Both attorneys were described as "color-blind" or "race neutral" (SR91, 308), whose reputation in the community for truth and

veracity was excellent (SR91, 184, 186, 236, 280, 295, 329) and who had never been known for making racial comments or having any racial bias (SR127, 185, 235, 280, 296, 329, 334).

SUMMARY OF THE ARGUMENT

The trial court addressed two main issues at the evidentiary hearing: whether Mr. Smallwood made a racial slur, and whether racial bias caused Mr. Smallwood and Mr. Kelley to render ineffective assistance of counsel. There were two allegations of prejudice alleged: that Mr. Kelley failed to use Ms. Vogelsang's charts and that he failed to provide requested material and information to Vogelsang.

First, this amended motion raising these issues was untimely, successive, and is procedurally barred.

Second, the issues have no merit. There was no racial slur. Even if something Mr. Smallwood said could be perceived as a racial remark, it did not indicate prejudice and did not affect Mr. Kelley's performance in the penalty phase. The testimony presented at the evidentiary hearing showed that counsel provided Ms. Vogalsang with all available materials and conducted a complete investigation. The issue regarding the charts has no merit: Mr. Kelley used his own hand-written chart rather that Ms. Vogelsang's.

ARGUMENT

ISSUE I

THE ISSUES RAISED IN THIS APPEAL ARE PROCEDURALLY BARRED AND HAVE NO MERIT.

As argued in the answer brief previously argued before this court, this issue is procedurally barred. The motion was untimely and successive. The State re-asserted the arguments at the hearing and re-asserts the arguments here. Further, the allegations raised in the motion to amend have no merit. The testimony showed Mr. Smallwood did not make a racial slur and was never alone with Ms. Vogelsang. Even if something he said could be misconduct as a racial remark, there was no effect on Mr. Kelley's performance in the penalty phase.

The trial judge order stated:

> Motion for Leave to Amend
>
> This Motion was filed one week prior to the evidentiary hearing on Mr. Foster's Motion to Vacate Judgment of Conviction and Sentence. Through collateral counsel, Mr. Foster alleged the existence of newly discovered evidence which was not previously available to either appellate or collateral counsel, and argued that it established counsel's ineffective in both the guilt and penalty phases of the trial, as well as the denial of the constitutional right to due process. Specifically, Mr. Foster submitted the affidavit of defense expert Janet Vogelsang, who had been retained to prepare a social investigation to be presented to the jury in the event of a conviction at trial.

Ms. Vogelsang informed collateral counsel, during the investigative stage of the postconviction proceedings, that defense counsel refused to provide her with the necessary material she needed to properly investigate and render an opinion. She proceeded with her assignment, but believed that her opinion was incomplete and that it had been thwarted by defense counsel. She further stated that at one of her meetings with defense counsel, when she asked about materials she needed to complete her investigation, attorney Donald Smallwood told her "that mitigation would not matter and the defendant was just another nigger who killed two people and the jury would not believe it." (See Affidavit of Janet Vogelsang, attached to Mr. Foster's Motion for Leave to Amend as Exhibit "A.")

Mr. Foster argues that Mr. Smallwood's statements showed his bias and prejudice against black people and denied him due process, in that his own attorney presumed him guilty because of his race and therefore, did not adequately represent him. He further argues that these allegations go to the heart of effective representation of any defendant in a criminal proceeding, and any attorney espousing such prejudice should not be considered effective.

Ms. Vogelsang also stated in her affidavit that defense counsel refused to permit her to use visual aids she prepared to illustrate her testimony. Mr. Foster argues there is nothing in the record to establish that the court did not permit the visual aids or that counsel even attempted to enter them into evidence. He concludes that this allegation also establishes that he was denied due process of law by his own counsel at the penalty phase of his trial.

January 20-21, 2005 Evidentiary Hearing

a. Character Witnesses

The State presented a parade of witnesses who testified that Donald Smallwood's reputation for truth and veracity is excellent and that he has absolutely no racial bias. These witnesses included Belvin Perry,

Jr. (chief judge of the Ninth Judicial Circuit, which includes Orange and Osceola Counties); Jon Morgan (county judge in Osceola County); Carol Draper (county judge in Osceola County); Jeffords Miller (circuit judge in Osceola County for 17 years); Andrea Walton (assistant director of personnel for the city of Kissimmee); Rose Thomas (first female road deputy in Osceola County); Gwendolyn Wiggins (legal secretary at Kissimmee city hall); Jerome Godwin (Kissimmee police officer for 24 years); Zeddie McCrimmon (Kissimmee police officer for 27 years); Evan McKissic (Retired teacher); Anna Pinelas (community development block grant program and housing advisory board in Kissimmee); and Nelson Winbush (manager of children's baseball team).

Collateral counsel Frank Bankowitz raised no objection to the first five witnesses, but when Rose Thomas took the stand, Mr. Bankowitz moved to strike her testimony, and continued doing so with the rest of the witnesses. He vigorously challenged the State's right to present so many character witnesses, and further argued that none of the witnesses could name anyone specifically with whom he or she had ever discussed Donald Smallwood and Nick Kelley's reputation for truth and veracity or their lack of racial bias. Over the defense's objection, this Court allowed the State to proceed with all of the witnesses. However, it has limited consideration of their testimony, finding that their opinions regarding Mr. Smallwood and Mr. Kelley are relevant, but not dispositive of the issues raised in the Motion for Leave to Amend. What is abundantly clear is that every member of this group of mostly African-Americans[5] is convinced that neither Mr. Smallwood nor Mr. Kelley has any racial bias whatsoever, and that both attorneys have demonstrated themselves to be zealous advocates for clients of all races. The Court finds no reason to conclude otherwise.

b. Alleged Racial Slur

[5] Judges Draper, Morgan, and Miller are Caucasian.

As she stated in her affidavit, Ms. Vogelsang testified that Donald Smallwood made the comment that Mr. Foster was "just another young nigger and nobody is going to listen anyway." She acknowledged that she might not be recounting the conversation exactly word for word, but to the best of her recollection, this was "in effect" what Mr. Smallwood had said. She further testified that she got the impression the attorneys did not understand what mitigation was, in terms of how extensive it needed to be or the details which were essential for the bio-psychosocial assessment. She believed their attitude was: "'What good will this do? What difference will it make? Why bother?" And, she also believed the racial comment was part of a broader response which reflected their attitude toward mitigation, although she acknowledged she did not observe a pattern of ongoing racism or bias.

Mr. Smallwood testified that when he received a copy of Ms. Vogelsang's affidavit, he responded by filing his own affidavit denying her allegations. He remained adamant that he never made such racial comments or expressed the opinion that it was not worth it to do mitigation. Mr. Kelley and Mr. Phillips likewise testified that they never heard Mr. Smallwood make racial comments or deride the value of mitigation, during the preparation for Mr. Foster's trial or at any other time.

Mr. Kelley testified that this case was first tried in federal court under the new (at the time) carjacking statute, and during that time, it generated high publicity. Furthermore, there had also been a recent incident in Osceola County in which a group of African-Americans kidnapped a group of Hispanics, creating an atmosphere of racial tension. He and Mr. Smallwood decided to file a motion for change of venue of the state trial, fearing that a jury in Osceola County would be racially biased against their client and seeking to protect him from the harmful effects of such prejudice. The case was ultimately moved to Orange County, although they found this move insufficient and unsatisfactory.

If the alleged racial slur was made, and Ms. Vogelsang found it so troubling as to indicate the attorneys' failure to advocate zealously on behalf of a defendant who was facing the death penalty, logic dictates that she would have documented it and reported it immediately, as required by the ethical code of her profession. It is extremely significant that she did not do so. Instead, she allowed the trial to proceed, Mr. Foster to be convicted and sentenced to death, and the state supreme court to affirm his conviction. Altogether, she waited several years before filing her affidavit about the alleged racial slur, until she was contacted by collateral counsel during the investigatory stages of the postconviction proceedings. This Court concludes that the weight of the evidence presented at the evidentiary hearing leads to the conclusion that Mr. Smallwood did not make any racial slurs against Mr. Foster. Alternately, if the comment was made, the Court finds that Ms. Vogelsang's interpretation of it was incorrect, because at most, it demonstrated the attorneys' concern for the manner in which a potential Osceola County jury would perceive Mr. Foster, given the racial tensions in Osceola County at the time and the publicity the case had generated. There is simply no support for the proposition that the statement reflected the manner in which the attorneys personally viewed him.

c. Failure to Provide Mitigation Materials

Ms. Vogelsang testified that she provided defense attorneys Donald Smallwood and Nick Kelley with a checklist of records she needed to complete a bio-psycho-social assessment and identify risk factors which can affect an individual's life, but they "refused" to provide her with all of the materials she needed. She contended that she wrote letters to the attorneys, expressing her concern about the need for additional records and suggesting there was much to be done.

Among the records she identified as missing were AFDC and HRS records, birth records of Mr. Foster's mother, and records pertaining to other specific individuals.

In summary, she believed she was deprived of records which could have provided extensive details regarding Mr. Foster's family history and environment.

Attorneys Nick Kelley and Donald Smallwood, together with investigator Gary Phillips, each testified at the evidentiary hearing. All denied receiving any sort of checklist from Ms. Vogelsang, and all asserted that they made every effort to provide her with everything she requested during her meetings with them.

Mr. Kelley handled the penalty phase of the trial. He testified that when Ms. Vogelsang wrote the letter requesting additional materials, he directed Mr. Phillips to retrieve whatever he could, and the package was sent to her via Federal Express. He did not recall her expressing any dissatisfaction with anything he and Mr. Smallwood were doing, nor did he recall her complaining that she was not receiving the information she needed. He further testified that while Mr. Foster's family members cooperated during the investigative interviews, they did not want to testify at trial, and that he was "terrified" to subpoena them and put them on the stand if they did not want to be there. Ms. Vogelsang wanted to testify about her conversations with them, but the trial judge sustained the State's objection to this. Nevertheless, Ms. Vogelsang was allowed to testify, without objection, to the risk factors she believed were present in Mr. Foster's life, and Mr. Kelley believed she was an effective witness as the trial judge did find mitigation based in part on her testimony.

Mr. Phillips testified that both attorneys understood the true value of mitigation and never refused to provide Ms. Vogelsang with any of the items she requested. Some of the records, quite simply, did not exist, in part because social workers were often afraid to go to the part of town where Mr. Foster and his family lived.

Mr. Smallwood testified that he did not talk directly with Ms. Vogelsang about the records she needed, as Mr. Kelley was directing the penalty phase of the case. However, from the beginning, he believed that

> significant mitigating factors existed. He noted that Mr. Foster was young and, in his opinion, involved with others who dominated him. When they met at the jail, Mr. Foster was crying and remorseful, and he was determined to do everything he could to spare Mr. Foster from the death penalty. He believed that Mr. Kelley and Mr. Phillips followed up on each potential mitigating factor, and provided all the information they could locate to Ms. Vogelsang.
>
> Returning to the issue of Ms. Vogelsang's personally prepared visual aids, Mr. Kelley testified that he told her he preferred to use his own chart, which he had created after meeting with her to discuss the risk factors. In addition, he was concerned that her chart contained hearsay information which would not have been admissible at trial, although he acknowledged he might not have explained this to her. He wanted her testimony to stand before the jury without objection, which it did until attorney Chris Smith (who represented co-defendant Alf Catholic) tried to use her testimony in his case. During that examination, Ms. Vogelsang offered specific details, to which the State objected, and the jury was told to disregard her remarks, exactly the scenario Mr. Kelley had wished to avoid.
>
> In summary, this Court finds no support for the proposition that Mr. Foster's attorneys refused to provide Ms. Vogelsang with records she requested, which were within their power to obtain, or for the proposition that they sabotaged her testimony in any way with respect to her visual aids.
>
> (SR 53-60).

These findings are supported by competent, substantial evidence. Foster has failed to prove there was any racial slur, or racist mindset, or prejudice by such slur or mindset.

CONCLUSION

WHEREFORE, based upon the foregoing argument and authorities, the Appellee respectfully requests that this court affirm the trial court order.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by E-Mail and U.S. Regular Mail to **Frank J. Bankowitz, Esq.**, 126 E. Jefferson St., Orlando, Florida 32801, this 13th day of June, 2005.

_____
COUNSEL FOR APPELLEE

CERTIFICATE OF FONT COMPLIANCE

I HEREBY CERTIFY that the size and style of type used in this brief is 12-point Courier New, in compliance with Fla. R. App. P. 9.210(a)(2).

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