IN THE SUPREME COURT OF FLORIDA

CHARLES KENNETH FOSTER,
PETITIONER

CASE NO.: SC01-767
LOWER TRIBUNAL NO.: 75-486

VS.

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

PETITION FOR WRIT OF HABEAS CORPUS—INEFFECTIVE ASSISTANCE OF APPELLATE AND POST-CONVICTION COUNSEL

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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
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RESPONDENTS
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PETITION FOR WRIT OF HABEAS CORPUS—INEFFECTIVE ASSISTANCE OF APPELLATE AND POST-CONVICTION COUNSEL

The Petition of Charles Kenneth Foster respectfully shows:

1. The basis for invoking the jurisdiction of this Florida Supreme Court is ineffective assistance of Appellate and Post-Conviction counsel based on fundamental due process errors. Article 1, Section 13, and Article 5, Section 3(b)(9), Constitution of the State of Florida. See Rose v. Dugger, 508 So.2d 321 (Fla. 1987).

See also Criminal Rule of Procedure 3.850(h) wherein habeas corpus is available when it appears a 3.850 motion is inadequate or ineffective.

2. The facts on which Petition relies are as follows:

Development of Mr. Foster's case through the State and Federal Courts, including Appellate decisions, is found in Appendix 1.

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

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

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

Defendant suddenly began hitting the victim and accusing him of taking advantage of his sister. (Gail was not his sister). Defendant then held a knife to the

victim's throat and cut his neck, causing it to bleed profusely. They dragged the victim from the trailer into the bushes where they laid him face down and covered him with pine branches and leaves. They could hear the victim breathing so defendant took a knife and cut the victim's spine.

The girls and defendant then drove off in the Winnebago and found the victim's wallet underneath a mattress. The defendant and the girls split the money found in the wallet and left the vehicle parked in the parking lot of a motel.

The next morning, Anita Rogers went to the sheriff's Department and reported what had happened. She had been committed to a mental institution when she was 13 years of age and was not charged with any offense in this case.

Defendant was charged by an indictment with the offenses of first-degree murder and robbery.

The defendant testified and during his description of the events of the evening testified as follows:

> "I reckon I'll just cop out. I have done it, killed him deader than hell. I ain't going to set up here, I am under oath and I ain't going to tell no fucking lies. I will ask the Court to excuse my language. I am the one that done it. They didn't have a damn thing to do with it. It was premeditated and I intended to kill him. I would have killed him if he hadn't had no money and I know I never told you about it, but I killed him." (Appendix 2)

Excerpts of trial testimony of Anita Rogers and Gail Evans appears in Appendix 3 and Appendix 4.

The jury returned verdicts finding defendant guilty of robbery, premeditated murder in the first degree, and felony murder. After the sentence hearing, the jury returned an advisory verdict unanimously recommending that defendant receive the death penalty. (Appendix 5)

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

On August 12, 1993, Defendant was again sentenced to death, and the Florida Supreme Court affirmed the sentence on June 16, 1995 and Rehearing was denied June 19, 1995. See Foster v. State, 654 So.2d 112 (Fla. 1995). Certiorari was denied by the United States Supreme Court on October 10, 1995. Foster v. Florida, 516 U.S. 920, 116 S.Ct. 314, 133 L.Ed.2d 217 (1995). (Appendix 1)

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

S.Ct. 314, 133 L.Ed.2d 217 (1995). (Appendix 1) (Judgment and Sentence—Appendix 6)

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

Defendant requests this court take judicial notice of the original trial transcript previously filed herein.

3. Nature of Relief Sought: Remand to trial court for resentencing without robbery aggravator and with appropriate Cruel, Calculated, Premeditated instruction.

4. Argument in Support of the Petition and Citations of Authority: There is no evidence to support Petitioner's conviction for robbery and use of that factor as an aggravator in assessing the death penalty violates the V, VI and XIV Amendments of the United States Constitution, and Article 1, Section 9, Constitution of the State of Florida.

Although this issue was raised at trial by Motion for Directed Verdict and Petitioner's Initial Appeal (Appendix 7), the court did not specifically address this in its decision in Foster v. State, 369 So.2d 298 (Fla. 1979). (Appendix 1)

The court simply stated aggravators were established beyond a reasonable doubt without a specific factual analysis that the crime of robbery was committed. Petitioner's initial appellate counsel failed to cite a single case in support of his argument, and subsequent post-conviction counsel completely failed to pursue this glaring deficiency in Petitioner's post-trial proceedings. Neither does Rogers' testimony that Petitioner was going to "rip the man off" consist of proof of intent to rob.

Throughout his post-conviction proceedings, Petitioner is reminded of his confessions in and out of court, but he clearly stated he didn't rob the man. The killing motive was a drunken rage over Petitioner's misperception that the man was going to have sex with his sister. Taking money from a wallet found by Anita Rogers was at most an afterthought theft, and not robbery.

Florida's leading case on taking property after use of force is Mahn v. State, 714 So.2d 391 (Fla. 1998).

The court held:

> Mahn argues, and we agree, that the evidence fails to establish an intent to commit a robbery or theft at the time of the homicide. He points out that there was no evidence that the crimes were motivated by a desire to take property. The evidence reflects that Mahn took the money and automobile after the homicides in a desperate and frenzied effort to flee.

* * *

Recently, in *Jones v. State*, 652 So.2d 346 (Fla. 1995), we again explained the requirement that the threat or force element of robbery be part of a continuous series of events with the taking of the property.

* * *

Further, while the taking of property after the use of force can sometimes establish a robbery, *id.*, we have held that taking of property after a murder, where the motive for the murder was not the taking of property, is not robbery. *Knowles*, 632 So.2d at 66; *Clark*, 609 So.2d at 515; *Parker v. State*, 458 So.2d 750, 754 (Fla. 1984)

In *Jones*, we rejected the defendant's "afterthought" argument, noting that the evidence established that after murdering his employers, Mr. and Mrs. Nestor, Jones rolled Mr. Nestor over in order to take his wallet and sometime thereafter rifled through Mrs. Nestor's purse and took some valuables. 652 So.2d at 350. Ultimately, we found Jones' statement to an attending nurse that he killed "those people" because they "owed" him money, dispositive of his "afterthought" claim. *Id.*

* * *

He took the money and car after the violence to effect his escape from the scene. We find that a robbery was not proven beyond a reasonable doubt. *See State v. Law*, 559 So.2d 187, 188 (Fla. 1989) ("A motion for judgment of acquittal should be granted in a circumstantial evidence case if the state fails to present evidence from which the jury can exclude every reasonable hypothesis except that of guilt.")

See Snowden v. Singletary, 135 F.3rd 732 (11th Cir. 1998) holding that Federal habeas corpus lies to correct a due process violation whenever evidence is material in a sense of crucial, critical, or highly critical, and constitutes a denial of fundamental fairness.

See also Davis v. Zant, 36 F.3rd 1538 (11th Cir. 1994) holding Federal habeas corpus review appropriate to correct plain error.

Petitioner asserts the inadequacy of his appellate and post-conviction counsel in failing to demonstrate to this court that no evidence of a robbery existed. The motive for the slaying was not robbery in the words of petitioner and in failure of any witness or evidence to show theft was anything but an afterthought.

The performance of appeal and post-conviction counsel for Petitioner do not meet the standards of Strickland v. Washington, 80 L.Ed.2d 674 (1984).

Wherefore, Petitioner prays this court issue Writ of Habeas Corpus and remand his case for resentencing without the robbery aggravator or unconstitutional Cruel, Calculated, Premeditated instruction.

Excerpts of Petitioner's Statement to Detective Coram are as follows:

> Q. Kenny, is there anything you wish to add to or take away from this statement at this time?

A. Well, if the judge will accept my plea of guilty and guarantee I will be electrocuted for taking this man's life, that's what I want. I got this robbery charge, you know, we didn't rob that man.

Q. You didn't take any money out of the man's wallet after you killed him?

A. No Sir.

Q. You realize that what you did was against the law don't you?

A. Yes sir. Anybody knows you can't take nobody's life and that's why I want to die for it. I mean I ain't crazy. I don't know if I got demons in me or not, but I believe I do. I went to church Sunday night to get them taken out.

Q. Has everything you have told me been the truth to the best of your ability to remember?

A. Yes sir.

____

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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 April, 2001.

____
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CERTIFICATE OF COMPLIANCE

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

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