IN THE FLORIDA SUPREME COURT
CASE NO. SC01-767

CHARLES KENNETH FOSTER, *Petitioner*

v.

MICHAEL W. MOORE, *Respondent.*

RESPONSE TO PETITION FOR WRIT OF HABEAS CORPUS

COMES NOW, Respondent, Michael W. Moore, by and through undersigned counsel and responds as follows to the petition for writ of habeas corpus. For the reasons discussed, the petition should be denied.

FACTS AND PROCEDURAL HISTORY

The facts of the case and its procedural history are recited in the accompanying answer brief.

Timeliness

Fosters' habeas is properly filed. According to the rules of appellate procedure,

Fla. R. App. P. 9.140(b)(6)(e), "all petitions for extraordinary relief over which the supreme court has original jurisdiction, including petitions for writ of habeas corpus, shall be filed simultaneously with the initial brief in the appeal from the lower tribunal's order on the defendant's application for relief under Florida Rule of Criminal Procedure 3.850." This rule became effective on January 1, 1997. *Amendments to the Rules of Appellate Procedure*, 685 So.2d 773, 777 (Fla. 1996). So, all habeas petitions filed after 1996 must be accompanied with the 3.850 motion. *But see Robinson v. Moore*, 773 So.2d 1, n.1 (Fla. 2000)(denying the State's motion to dismiss; holding that a habeas petition unaccompanied with the 3. 850 motion was properly before the Court and rejecting the claim that because Robinson failed to file his writ of habeas corpus with his 3.850 motion it was not properly before the court because Fla. R. Crim. P. 3.851(b)(2) applies only to death-sentenced individuals whose convictions and sentences became final after January 1, 1994 but discussing only the rules of criminal procedure not the rules of appellate procedure). Because Fosters' habeas petition was filed with his 3.850 motion in accordance with Fla. R. App. P. 9.140(b)(6)(e), it is properly before this Court.

INEFFECTIVE ASSISTANCE OF APPELLATE COUNSEL

In *Rutherford v. Moore*, 774 So.2d 637 (Fla. 2000), this Court explained that

the standard for proving ineffective assistance of appellate counsel mirrors the ineffectiveness assistance of trial counsel standard established in *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). Appellate counsel's performance will not be deficient if the legal issue that appellate counsel failed to raise was meritless. This Court noted that a habeas petition is the proper vehicle to assert ineffective assistance of appellate counsel. *See also Freeman v. State*, 761 So.2d 1055 (Fla. 2000).

First, Foster is improperly attempting to use habeas corpus to relitigate issues already addressed by this Court in the direct appeal. *Happ v. Moore*, slip op. at 9 (Fla May 3, 2001)(stating the "writ of habeas corpus is not to be used to reargue issues which have been raised and ruled upon by this Court"). This entire petition is barred by the law of the case doctrine.

Foster claims that appellate counsel was ineffective for failing to challenge the sufficiency of the evidence to support the robbery conviction and the use of the robbery as an aggravator. However, as Foster acknowledges, his appellate counsel did raise both these issues. Appellate counsel attacked the use of the robbery as an aggravator in issue I. IB at 26-27. Appellate counsel also challenged the sufficiency of the evidence to establish robbery in issue III. Counsel cannot be found ineffective for failing to do something that, in fact, he did. Furthermore, appellate counsel cannot

be ineffective for failing to convince the Court to rule his way. *Freeman v. State*, 761 So.2d 1055 (Fla. 2000), *citing, Swafford v. Dugger*, 569 So.2d 1264, 1266 (Fla.1990)(observing that if "appellate counsel raises an issue, failing to convince this Court to rule in an appellant's favor is not ineffective performance.").

Petitioner's actual claim seems to be that appellate counsel did not more extensively argue the point and did not cite any caselaw in support of this claim. Specifically, Foster seems to assert that appellate counsel was ineffective for failing to cite *Mahn v. State*, 714 So.2d 391 (Fla. 1998) in support of this claim. The initial brief in Foster was filed in May 1976. The *Mahn* case was decided in 1998. Additionally, all the "robbery as an afterthought" cases were decided after the direct appeal in this case. It is not deficient performance for an appellate attorney to fail to cite to caselaw that did not exist at the time of briefing. Indeed, it is clearly impossible for counsel to cite caselaw that does not yet exist.

Additionally, in the appellate context, the prejudice prong of *Strickland* requires a showing that the appellate court would have afforded relief on appeal. *United States v. Phillips*, 210 F.3d 345, 350 (5th Cir. 2000). A habeas petitioner cannot establish prejudice unless the issue was a "dead bang winner". *Moore v. Gibson*, 195 F.3d 1152, 1180 (10th Cir. 1999), *cert. denied*, 530 U.S. 1208, 120 S.Ct. 2206, 147 L.Ed.2d 239 (2000)(explaining that appellate counsel's performance is only deficient and

prejudicial if counsel fails to argue a "dead-bang winner"). Foster must show that he would have won a reversal from this Court had the "robbery as an afterthought" claim been more extensively argued to establish prejudice.

Foster cannot establish prejudice. Under this Court's current robbery as an afterthought caselaw, the robbery conviction and aggravator would be affirmed. In *Mahn v. State*, 714 So.2d 391 (Fla. 1998), this Court held that the taking of property after a murder, where the motive for the murder was not the taking of property, is not robbery. Mahn was convicted of killing his father's girlfriend and her son. Mahn confessed to the murders, explaining that he acted out of hate and frustration with his father. The *Mahn* Court agreed that the robbery was an "afterthought" because there was no evidence that the crimes were motivated by a desire to take property. *See also Knowles v. State*, 632 So.2d 62, 66 (Fla. 1993)(rejecting robbery aggravator where Knowles engaged in apparently senseless shooting of a young girl he did not even know immediately before shooting his father and taking his father's truck); *Clark v. State*, 609 So.2d 513, 515 (Fla.1992)(rejecting robbery aggravator where Clark killed the victim another purpose but took cash and boots from the victim after he was murdered); *Parker v. State*, 458 So.2d 750, 754 (Fla.1984)(rejecting robbery aggravator where the motive was to keep the victim from implicating them in the death of another victim rather than to steal the jewelry).

In two recent cases, however, this Court has affirmed robbery convictions against "afterthought" challenges where the takings were part of the motive or plan for the murders. *Zack v. State*, 753 So.2d 9, 18 (Fla. 2000)(affirming denial of motion for judgment of acquittal on the robbery conviction where following the rape and murder, Zack stole easily pawnable items and the theft of the car was a part of the plan); *Beasley v. State*, 774 So.2d 649 (Fla. 2000)(affirming felony murder conviction with robbery being the underlying felony). The *Beasley* Court emphasized that if the motive for the murder was the taking of property even if the taking occurs after the murder, then that is robbery. *Beasley*, 774 So.2d at 662.

Here, as in *Beasley*, while the killing occurred first, the motive for the murder was the robbery. One of the State's witness, Rogers, testified that Foster stated his intention to rip the old man off prior to the murder. Here, as this Court recognized in its first opinion, the "defendant committed the homicide in an effort to fulfil his intentions and complete his desire, i.e. 'ripping the victim off'". *Foster*, 369 So. 2d at 931. Here, unlike *Mahn*, there was evidence that the crimes were motivated by a desire to take property.

Thus, even if counsel could have cited case that did not exist at the time of the appeal, the outcome of the appeal would have remained the same. Petitioner's felony murder conviction based on the underlying robbery would have been affirmed and the

finding of the robbery aggravator also would have been affirmed. Thus, there was no prejudice to Foster from counsel's failure to more extensively brief the issue. Thus, Foster's appellate counsel was not ineffective.

Foster also asserts that this Court failed to engage in "a specific factual analysis that the crime of robbery was committed"; rather, this Court "simply stated aggravators were established beyond a reasonable doubt". (Pet. at 5). This is not a proper claim of ineffective assistance of appellate counsel. Foster is attacking the sufficiency of this Court analysis, not his counsel's performance. Appellate counsel's performance cannot be analyzed based on what this Court chooses to write. Appellate counsel has no control over how this Court addresses the claims that counsel raises and therefore, cannot be ineffective on this basis. Furthermore, even if the *Foster* Court had not written a single sentence on the issue, this does not mean that this Court did not fully consider the sufficiency of evidence to establish robbery and the robbery as an aggravator challenges presented by appellate counsel in the direct appeal. As this Court has explained, the "absence of discussion in our written opinion" . . . is not an indication that we did not carefully review the entire record and each argument made by appellate counsel in the direct appeal. *Jackson v. State*, 452 So.2d 533, 536 (Fla. 1984). Appellate counsel was not ineffective.

INEFFECTIVENESS OF POST-CONVICTION COUNSEL

Foster claims ineffective assistance of post-conviction counsel for failing to demonstrate that no evidence of a robbery exited. Pet. at 8. However, there is no constitutional right to post-conviction counsel in state post-conviction proceedings in capital cases. *Murray v. Giarratano*, 492 U.S. 1, 109 S.Ct. 2765, 106 L.Ed.2d 1 (1989)(applying *Pennsylvania v. Finley*, 481 U.S. 551, 107 S.Ct. 1990, 95 L.Ed.2d 539 (1987) to capital cases and holding neither the Eighth Amendment nor the due process clause requires states to appoint counsel for indigent death row inmates seeking state postconviction relief). Where there is no constitutional right to counsel there can be no claim of ineffectiveness of counsel. *Coleman v. Thompson*, 501 U.S. 722, 752, 111 S.Ct. 2546, 115 L.Ed.2d 640 (1991); *Wainwright v. Torna*, 455 U.S. 586, 102 S.Ct. 1300, 71 L.Ed.2d 475 (1982)(explaining that if petitioner has no constitutional right to counsel to pursue discretionary review by Florida Supreme Court, he was not deprived of effective assistance of counsel when counsel failed to do so).

Nor is there a state constitutional right to effective assistance of counsel. *Graham v. State*, 372 So.2d 1363, 1366 (Fla.1979). The Florida Legislature has provided funding to assure representation in capital collateral proceedings and enacted legislation specifically mandating that courts "monitor the performance of assigned

counsel to ensure that the capital defendant is receiving quality representation". *Arvelaez v. Butterworth*, 738 So.2d 326, 327-328 (Anstead, J., concurring). Moreover, even if a claim of ineffective assistance of post-conviction counsel existed, Foster could not establish ineffectiveness. Post-conviction counsel cannot be ineffective for failing to prove that no evidence of robbery existed when there was evidence of robbery. Contrary to petitioner's claim, Rogers' testimony regarding Foster's statement prior to the murder that Foster was going to "rip the man off" was indeed, sufficient evidence of intent. Pet at 6. Additionally, Foster directed Rogers to look for items immediately after the murder. Rogers then immediately looked for and discovered the wallet. As this Court found in its first opinion, Foster "committed the homicide in an effort to fulfill his intentions and complete his desire, *i.e.,* 'ripping the victim off.'" *Foster v. State*, 369 So.2d 928, 931 (Fla. 1979).

Moreover, the issue was procedurally barred. Post-conviction counsel would have been attempting to relitigate an issue already raised and decided in the direct appeal in post-conviction proceedings. Post-conviction counsel is not deficient for declining to relitigate procedurally barred claims. Happ v. Moore, slip op. at (Fla. May 3, 2001)(counsel cannot be ineffective for failure to raise issues that are procedurally barred). Thus, post-conviction counsel's performance was not deficient.

Furthermore, there can be no prejudice because the outcome of the post-

conviction proceedings would have been the same regardless of whether post-conviction counsel attempted to raise the issue or not, *i.e.,* Foster would have been denied relief on this claim. There can be no prejudice because if counsel had attempted to raised the procedurally barred claim, both the trial court and this court would have held that it was barred. This Court would not have granted relief on a claim that was barred by the law of the case doctrine from being considered by this Court. Thus, Foster cannot establish prejudice either. Thus, Foster could not establish ineffectiveness of post-conviction counsel even if such a claim was permitted.

CONCLUSION

The State respectfully requests that this Honorable Court deny the petition.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing response to petition for writ of habeas corpus has been furnished by U.S. Mail to JOSEPH F. McDERMOTT Esq., 7116-A Gulf Blvd., St. Pete Beach, FL 33706 this _29th_ day of May, 2001.

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CERTIFICATE OF FONT AND TYPE SIZE

Counsel certifies that this brief was typed using Courier New 12.

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