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Appendix A

Florida Supreme Court Opinion affirming the state circuit court denial of postconviction relief. *Foster v. State,* 235 So. 3d 294 (Fla. 2018).

Appendix B

Circuit Court Order Summarily Denying Successive Motion for Postconviction Relief. *Foster v. State*, Case No. 96-CF-1362B (Order dated April 27, 2017).

APPENDIX A

235 So.3d 294
Supreme Court of Florida.

Kevin Don FOSTER, Appellant,
v.
STATE of Florida, Appellee.

No. SC17–1141
|
[January 29, 2018]

Synopsis
Background: Motion was filed for post-conviction relief following affirmance of death sentence, 778 So.2d 906. The Circuit Court, Lee County, Joseph Cardwell Fuller, Jr., J., No. 361996CF001362000BCH, denied motion. Movant appealed.

[Holding:] The Supreme Court held that Supreme Court's Hurst, 136 S.Ct. 616, decision invalidating capital sentencing scheme did not apply retroactively to death sentence that became final in 2001.

Affirmed.

Pariente, J., concurred in result and filed statement.

Lewis and Canady, JJ., concurred in result.

West Headnotes (1)

[1] **Courts** ⇐ In general;retroactive or prospective operation
United States Supreme Court's *Hurst*, 136 S.Ct. 616, decision invalidating capital sentencing scheme as violating Sixth Amendment did not apply retroactively to death sentence that became final in 2001. U.S. Const. Amend. 6.

Cases that cite this headnote

An Appeal from the Circuit Court in and for Lee County, Joseph Cardwell Fuller, Jr., Judge—Case No. 361996CF001362000BCH

Attorneys and Law Firms

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Opinion

PER CURIAM.

***295** We have for review Kevin Don Foster's appeal of the circuit court's order denying Foster's motion filed pursuant to Florida Rule of Criminal Procedure 3.851. This Court has jurisdiction. See art. V, § 3(b)(1), Fla. Const.

Foster's motion sought relief pursuant to the United States Supreme Court's decision in Hurst v. Florida, — U.S. —, 136 S.Ct. 616, 193 L.Ed.2d 504 (2016), and our decision on remand in Hurst v. State (Hurst), 202 So.3d 40 (Fla. 2016), cert. denied, — U.S. —, 137 S.Ct. 2161, 198 L.Ed.2d 246 (2017). This Court stayed Foster's appeal pending the disposition of Hitchcock v. State, 226 So.3d 216 (Fla. 2017), cert. denied, — U.S. —, 138 S.Ct. 513, — L.Ed.2d — (2017). After this Court decided Hitchcock, Foster responded to this Court's order to show cause arguing why Hitchcock should not be dispositive in this case.

After reviewing Foster's response to the order to show cause, as well as the State's arguments in reply, we conclude that Foster is not entitled to relief. Foster was sentenced to death following a jury's recommendation for death by a vote of nine to three, and his sentence of death became final in 2001. Foster v. State, 778 So.2d 906, 912 (Fla. 2000). Thus, Hurst does not apply retroactively to Foster's sentence of death. See Hitchcock, 226 So.3d at 217. Accordingly, we affirm the denial of Foster's motion.

The Court having carefully considered all arguments raised by Foster, we caution that any rehearing motion containing reargument will be stricken. It is so ordered.

LABARGA, C.J., and QUINCE, POLSTON, and LAWSON, JJ., concur.

PARIENTE, J., concurs in result with an opinion.

LEWIS and CANADY, JJ., concur in result.

PARIENTE, J., concurring in result.
I concur in result because I recognize that this Court's opinion in Hitchcock v. State, 226 So.3d 216 (Fla. 2017), cert. denied, — U.S. —, 138 S.Ct. 513, — L.Ed.2d — (2017), is now final. However, I continue to adhere to the views expressed in my dissenting opinion in Hitchcock.

All Citations

235 So.3d 294, 43 Fla. L. Weekly S47

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APPENDIX B

IN THE CIRCUIT COURT FOR THE TWENTIETH JUDICIAL CIRCUIT IN AND FOR LEE COUNTY, FLORIDA

STATE OF FLORIDA,
Plaintiff,

vs. **CASE NO: 96-CF-1362B**

KEVIN DON FOSTER,
Defendant.
_____/

FINAL ORDER DENYING SUCCESSIVE 3.851 MOTION

THIS CAUSE comes before the Court on Defendant's "Successive Motion to Vacate Judgment Of Conviction And Sentence Pursuant To Florida Rule Of Criminal Procedure 3.851 With Special Request For Leave To Amend," filed on January 12, 2017. The State filed a response to the successive motion on February 21, 2017. A case management conference was held on March 14, 2017. Being otherwise fully advised, the Court finds as follows:

1. The facts of this case are outlined in the initial Florida Supreme Court opinion on direct appeal, Foster v. State, 778 So. 2d 906 (Fla. 2000).

> The evidence presented at trial established that in early April of 1996, a few teenagers organized a group called the "Lords of Chaos." The original membership of the group was made up of Foster, Peter Magnotti and Christopher Black, the latter two of whom were attending Riverdale High School ("Riverdale") at the time. Foster, the leader of the Lords of Chaos, was not a student. The group eventually grew to later include among other Riverdale students, Derek Shields, Christopher Burnett, Thomas Torrone, Bradley Young, and Russell Ballard as additional members. Each member of the Lords of Chaos had a secret code name. Foster's code name was "God." The avowed purpose of the group was to create disorder in the Fort Myers community through a host of criminal acts.
>
> On April 30, 1996, consistent with its purpose, the group decided to vandalize Riverdale and set its auditorium on fire. Foster, Black, and Torrone entered Riverdale and stole some staplers, canned goods, and a fire extinguisher to enable them to break the auditorium windows. Leading the group, Foster carried a gasoline can to start the fire in the auditorium while the other group members, Shields, Young, Burnett, Magnotti, and Ballard, kept watch outside.

The execution of the vandalism was interrupted at around 9:30 p.m., when, to the teenagers' surprise, Riverdale's band teacher, Mark Schwebes, drove up to the auditorium on his way from a school function nearby. Upon seeing the teacher, Foster ran, but Black and Torrone were confronted by Schwebes who seized the stolen items from them. Schwebes told them that he would contact Riverdale's campus police the next day and report the incident. Schwebes then left to have dinner with a friend, David Adkins. [*1]

*1: Adkins testified that he saw Schwebes' vehicle parked at the spot where Black and Torrone were caught by Schwebes at about 9:30 p.m. He also saw someone running from the general location of Schwebes' vehicle.

When Black and Torrone rejoined the others, Black declared that Schwebes "has got to die," to which Foster replied that it could be done and that if Black could not do it, he would do it himself. Foster was apparently concerned that the arrest of Black and Torrone would lead to exposure of the group and their criminal activities.

Subsequently, Black suggested that they follow Schwebes and make the killing look like a robbery. However, upon further discussion, the group decided to go to Schwebes' home and kill him there instead. Foster then told the group that he would go home and get his gun. They obtained Schwebes' address and telephone number through a telephone information assistance operator, and confirmed this information by calling and identifying Schwebes' voice on his answering machine. They then went to Foster's home where they obtained a map to confirm the exact location of Schwebes' address, and procured gloves and ski masks in preparation for the killing. Foster decided to use his shotgun for the killing, and replaced the standard birdshot with #1 buckshot, a more deadly ammunition. The group also retrieved a license tag they had stolen earlier to use during the crime.

Black, Shields, Magnotti, and Foster agreed to participate in the murder, and at 11:30 p.m., drove to Schwebes' home. Shields agreed to knock at the door and for Black to drive. When the group finally arrived there, Foster and Shields walked up to Schwebes' door, and as Shields knocked, Foster hid with the shotgun. As soon as Schwebes opened the door, Shields got out of the way, Foster stepped in front of Schwebes and shot him in the face. As Schwebes' body was convulsing on the ground, Foster shot him once more.

Although there were no other eyewitnesses, two of Schwebes' neighbors heard the shots and a car as it left the scene. [*2] Paramedics arrived at the scene almost immediately and declared Schwebes dead. The medical examiner confirmed that Schwebes died of shotgun wounds to his head and pelvis, and that Schwebes would have died immediately from the shot to the face.

*2: The two witnesses testified to hearing a car with a loud muffler leaving immediately after the two shots. Shield's car had a bad muffler. One testified to seeing a car drive away.

On the way to Foster's home after the killing, the group stopped to remove the stolen tag, and Foster wiped off the tag to remove any fingerprints before discarding it. Once home, the four of them got into a "group hug" as Foster congratulated them for successfully sticking to the plan. Foster then called Burnett and Torrone and boasted about how he blew off part of Schwebes' face and to watch for it in the news. The next day, on May 1, 1996, while at Young's apartment, the six o'clock news reported the murder, and Foster continuously laughed, hollered, and bragged about it. Young testified that Foster said that he looked Schwebes right in the eyes before shooting him in the face and then watched as this "red cloud" flowed out of his face.

The police found Foster's shotgun, a ski mask, gloves, and a newspaper clipping of the murder in the trunk of Magnotti's car. According to Burnett, he was directed by Foster to put those items in Magnotti's trunk. Foster's fingerprint was found on the shotgun, the latex gloves, and the newspaper. Burnett and Magnotti's prints were also found on the newspaper.

Foster's mother, Ruby Foster ("Ms. Foster"), testified on direct examination that Foster called her from home at about 4:30 p.m. on the day of the murder. When she got home that night, at 9 p.m., Foster was there. She later left the house at about 9:45 p.m., but found Foster home when she returned a little past 11 p.m. She made another trip to the Circle K store and returned at about 11:20 p.m. once again to find Foster where she had left him. On cross-examination, however, Ms. Foster admitted that she merely assumed Foster was at home when he called her. Additionally, all of the participants in the conspiracy and the murder testified that when they met at Foster's home on the night of the murder, no one was in the home and Foster had to disable the alarm apparatus upon entering.

All the members of the Lords of Chaos who participated in the murder and the conspiracy cooperated with the State through various plea agreements [*3] and testified to the above facts at trial against Foster with regard to the make-up of the group, Foster's leadership role in the group, criminal acts committed by the group prior to the murder, and his leadership and mastermind role in the conspiracy and the ensuing murder. Foster was convicted for the murder of Schwebes.

Foster, 778 So.2d at 909-912 (some footnotes omitted).

2. A jury convicted Defendant of first-degree murder and recommended a sentence of

death by a vote of nine to three. The trial court followed the recommendation, and sentenced Defendant to death. The trial court found two aggravating factors, and found that the mitigating factors did not outweigh the aggravating factors. Defendant's conviction and sentence were affirmed on direct appeal by the Florida Supreme Court. *See* Foster v. State, 778 So. 2d 906 (Fla. 2000). Defendant did not file a petition for writ of certiorari with the United States Supreme Court.

3. Defendant filed an initial motion for postconviction relief on September 27, 2001. An evidentiary hearing was held on April 26-29, 2011. The trial court denied the motion on July 5, 2011. The Florida Supreme Court affirmed the denial. Foster v. State, 132 So.3d 40 (Fla. 2013).

4. In this current successive motion, Defendant raised four claims that he is entitled to relief under Hurst v. Florida, 136 S. Ct. 616 (2016) and Hurst v. State, 202 So.3d 40 (Fla. 2016). A case management conference was held on March 14, 2017. Having determined that the claims raised are purely legal arguments which do not require an evidentiary hearing, the Court makes the following findings as to Defendant's claims.

5. **As to Claim I**, Defendant argued that in light of Hurst v. Florida, his death sentence violates the Sixth Amendment. Defendant argued that his sentence was erroneous because all factors required to impose the sentence were not found unanimously by a jury, the jury was told its recommendation was only advisory, and the jury was not instructed it could dispense mercy. Defendant argued that fundamental fairness required applying Hurst v. Florida retroactively to his case because "anything less than full retroactivity leads to disparate treatment amongst Florida capital defendants" (Motion pp. 16-17). Defendant noted that several pre-Ring cases for which sentences were overturned in collateral proceedings pending during Hurst are receiving the

benefit of Hurst, yet he is not. Defendant argued that the jury verdict was 9-3, and the trial judge, not the jury, found the existence of the aggravating and mitigating factors, so the error was not harmless beyond a reasonable doubt because the State could not show that no juror would have voted for a life sentence had the jury been properly instructed.

6. The State argued that no harmless error analysis was necessary, since the Hurst decisions do not apply retroactively to this case, and thus there was no constitutionally cognizable error.

7. Defendant argued that although his case was final before Ring v. Arizona, 536 U.S. 583 (2002), he is still entitled to have the Hurst decisions apply retroactively to his case, citing Mosley v. State, ___ So.3d ___, 2016 WL 7406506, *45 (Fla. 2016). Defendant contended that Mosley created two classes of defendants entitled to retroactive application of Hurst v. Florida - those whose cases were final after Ring was decided, and those whose cases were final before Ring, but who preserved a Ring claim. Defendant argued that, while he did not have an opportunity to preserve a Ring claim, he should still receive retroactive application because his case was final after Apprendi v. New Jersey, 530 U.S. 466 (2000), upon which the ruling in Ring was based. Defendant argued that fundamental fairness, as argued in Mosley, also required retroactive application of the Hurst decisions to his case. However, a plain reading of the opinion does not support that argument. In Mosley, the Florida Supreme Court held that for defendants whose cases were final after Ring, and who raised Ring claims in vain, Hurst v. Florida applied retroactively. Id. at *25 ("Defendants who were sentenced to death under Florida's former, unconstitutional capital sentencing scheme after Ring should not suffer due to the United States Supreme Court's fourteen-year delay in applying Ring to Florida"). Mosley

does not hold that Hurst applies retroactively for cases which were final before Ring was decided, even if a Ring claim was made. In Asay v. State, ___ So.3d ___, 2016 WL 7406538 (Fla. 2016), the Florida Supreme Court held that Hurst did not apply retroactively for any capital case final before Ring, because a new penalty phase for decades-old cases would be less complete and less accurate than the original proceedings. The Florida Supreme Court has not held that fundamental fairness acts as an alternative basis for retroactivity. On the contrary, the Florida Supreme Court cited fundamental fairness in Mosley only when analyzing why cases final after Ring should receive retroactive application of Hurst v. Florida, since it had previously ruled in Asay that Hurst v. Florida did not apply retroactively to cases final before Ring. No Florida Supreme Court case since Mosley has held that fundamental fairness can be used to make a retroactive application of Hurst to cases final before Ring. While Defendant cited to the concurring and dissenting opinions in Asay and Mosley in support of retroactive application to his case, this Court is bound by the majority opinions of the Florida Supreme Court. Hurst v. Florida does not apply retroactively to Defendant's case. *See* Gaskin v. State, ___ So.3d ___, 2017 WL 224772 (Fla. 2017) (Hurst does not apply retroactively to a defendant whose case was final before Ring was decided, regardless of that defendant having raised and preserved Ring claims); Bogle v. State, ___ So.3d ___, 2017 WL 526507 (Fla. 2017). To the extent Defendant argued he was entitled to retroactive application of Hurst because his case was final after Apprendi, this Court declines to extend the rulings of the Florida Supreme Court. To the extent Defendant argued that the retroactivity of Hurst v. State has not been decided, and that it should be held retroactive to his case, the Court declines to extend the rulings of the Florida Supreme Court.

8. Since the Hurst decisions do not apply retroactively to Defendant's case, he is not entitled to relief as a matter of law, and his death sentence does not violate the Sixth Amendment. To the extent Defendant argued the jury was not instructed it could dispense mercy, the Florida Supreme Court has held that even if a jury is not instructed it could dispense mercy, jury instructions are sufficient if they adequately informed the jury of the requisite findings required. Knight v. State, 2017 WL 411329; Hall v. State, ___ So.3d ___, 2017 WL 526509, *22-23 (Fla. 2017); King v. State, ___ So.3d ___, 2017 WL 372081 (Fla. 2017); Kaczmar v. State, ___ So.3d ___, 2017 WL 410214 (Fla. 2017). The jury instructions in this case did so. A copy of the jury instructions are attached. This Court has no authority to find decisions of the Florida Supreme Court unconstitutional. Therefore, **Claim 1 is DENIED.**

9. **As to Claim II,** Defendant argued that in light of Hurst v. State, his death sentence violates the Eighth Amendment. Defendant argued that the lack of juror unanimity regarding the sentence constituted cruel and unusual punishment because he is in a protected class of defendants for whom one or more jurors voted in favor of life, so he is ineligible for the death penalty.

10. The State argued that this claim is procedurally barred, because the U.S. Supreme Court has never held that the Eighth Amendment requires unanimous jury verdicts in capital cases. The State argued that the U.S. Supreme Court overruled Spaziano v. Florida 468 U.S. 447 (1984) in Hurst solely to the extent that it allowed a sentencing judge to find aggravating factors independent of a jury's factfinding, and did not overrule it on Eighth Amendment grounds. The State noted that the Florida Supreme Court is required by the Florida Constitution's conformity clause to interpret Florida's prohibition against cruel and unusual punishment in conformity with

the U.S. Supreme Court's holdings on the Eighth Amendment. To the extent Defendant raised fairness, the State argued that the accuracy of Defendant's death sentence was not at issue, such that fairness did not demand retroactive application of Hurst.

11. Since the Hurst decisions do not apply retroactively to Defendant's case, he is not entitled to relief as a matter of law, and his death sentence does not constitute cruel and unusual punishment. Therefore, **Claim II is DENIED.**

12. **As to Claim III**, Defendant argued that the Florida Supreme Court cases permitting partial retroactivity inject arbitrariness into the capital sentencing scheme and violate the Eighth Amendment. Defendant argued that in Furman v. Georgia, 408 U.S. 238 (1972), the U.S. Supreme Court held that the death penalty could be not imposed in an arbitrary or capricious manner. This Court is bound by the decisions of the Florida Supreme Court, and it is outside of this Court's authority to find Florida Supreme Court decisions unconstitutional. Since the Hurst decisions do not apply retroactively to Defendant's case, he is not entitled to relief as a matter of law. Therefore, **Claim III is DENIED.**

13. **As to Claim IV**, Defendant argued that Hurst v. State and Perry v. State, 41 Fla. L. Weekly S449 (Fla. 2016), are new law that would apply at resentencing, and require the Court to revisit previously raised postconviction claims. Defendant argued that his previously presented postconviction claims must be re-visited and re-evaluated in light of the new Florida law which would govern at resentencing. Defendant cited to Hildwin v. State, 141 So.3d 1178 (Fla. 2014) and Swafford v. State, 125 So.3d 760 (Fla. 2013) in arguing that the standard for newly discovered evidence – whether a different outcome was probable – should be applied by the Court to reconsider all his prior postconviction claims in light of the requirement that the jury

must now make all findings unanimously. Defendant believed that the prejudice analysis would be different now, and that the prior postconviction claims would be granted because there was a reasonable probability that on resentencing, at least one juror would again vote for a life sentence. The State argued that the cases relied on by Defendant apply to claims of newly discovered evidence, not to claims of new law. The State argued that Hurst "does not operate to breathe new life into previously denied postconviction claims." Response p. 21. As the State pointed out, Defendant cited to no legal authority which would authorize, much less require, this Court to reconsider previously denied postconviction claims. Defendant has not claimed the existence of any newly discovered evidence. Since Hurst does not apply retroactively to this case, Defendant is not entitled to relief as a matter of law. Therefore, **Claim IV is DENIED.**

14. The following are attached hereto: relevant portions of the penalty phase transcript.

Accordingly, it is

ORDERED AND ADJUDGED that Defendant's "Successive Motion to Vacate Judgment Of Conviction And Sentence Pursuant To Florida Rule Of Criminal Procedure 3.851 With Special Request For Leave To Amend," is DENIED. Defendant may file a notice of appeal within thirty (30) days of the date this order is rendered.

DONE AND ORDERED in Chambers at Fort Myers, Lee County, Florida, this 3/15 day of April, 2017.

Joseph Fuller
Circuit Judge

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the above Order has been furnished to **Stephen D. Ake**, capapp@myfloridalegal.com, Stephen.ake@myfloridalegal.com, Office of the Attorney General, 3507 East Frontage Road, Suite 200, Tampa, FL 33607-7013; **Scott Gavin**, gavins@ccsr.state.fl.us, Capital Collateral Regional Counsel, Southern Region, 1 East Broward Blvd., Ste. 444, Fort Lauderdale, FL 33301; **Jason Kruszka**, kruszkaj@ccsr.state.fl.us, Capital Collateral Regional Counsel, Southern Region, 1 East Broward Blvd., Ste. 444, Fort Lauderdale, FL 33301; **Cynthia Ross**, serviceSAO-Lee@sao.cjis20.org, Office of the State Attorney, P.O. Box 399, Ft. Myers, FL 33902-0399; and **Administrative Office of the Courts** (XIV), 1700 Monroe St., Ft. Myers, FL 33901; this 27th day of April, 2017.

LINDA DOGGETT
Clerk of Court

By: J. Garcia
Deputy Clerk

life.

What other mercy do we have but forgiveness, redemption and salvation. Every person is a miracle of life and every person is God's child. Thank you.

THE COURT: Members of the jury, it's now my opportunity advise the jury as to what punishment should be imposed upon the Defendant for the crimes of first degree premeditated murder. As you have been told, the final decision as to what punishment shall be imposed is the responsibility of the judge; however, it's your duty to follow the law that will now be given you by the Court and render to the Court an advisory sentence based upon your determination as to whether sufficient aggravating circumstances exist to justify the imposition of the death penalty, and whether sufficient aggravating circumstances exist to outweigh
any mitigating circumstance found to exist.

Although your recommended sentence is advisory, the Court will give it great weight in considering its ultimate sentence. Your advisory sentence should be based upon the testimony you have heard while trying the guilt or innocence of the Defendant and evidence presented to you in these proceedings.

The aggravating circumstances that you may

consider are limited to any of the following that are established by the evidence. One, the capital felony was committed for the purpose of avoiding or preventing a lawful arrest or effecting an escape from custody.

Two, the capital felony was committed in a cold, calculated, premeditated manner without any pretense of moral or legal justification.

Cold means the murder was the product of a calm and cool reflection.

Calculated means having a careful plan or prearranged design to commit murder. As I have previously defined for you, a killing is premeditated if it occurs after the Defendant consciously decides to kill. The decision must be present in the mind at the time of the killing. The law does not fix the exact period of time that must pass between the formation of the premeditated intent to kill and the killing. The period of time must be long enough to allow reflection by the defendant. The premeditated intent to kill must be formed before the killing.

However, in order for this aggravating circumstance to apply a heightened level of premeditation demonstrated by a substantial period of reflection is required. A pretense of moral or legal

justification is any claim of justification or excuse that, though insufficient to reduce the degree of murder, nevertheless rebuts the otherwise cold, calculated, or premeditation of the murder.

If you find the aggravating circumstances do not justify the death penalty, your advisory sentence should be one of life imprisonment without the possibility of parole. Should you find sufficient aggravating circumstances do exist, it will then be your duty to determine whether mitigating circumstances exist that outweigh the aggravating circumstances.

Among the mitigating circumstance you may consider if established by the evidence are: One, the age of the Defendant at the time of the crime, and; two, the existence of any other factors in the Defendant's background that would mitigate against imposition of the death penalty.

Now, each aggravating circumstance must be established beyond a reasonable doubt before it may be considered by you in arriving at your decision. If one or more aggravating circumstances are established, you should consider all the evidence tending to establish one or more mitigating circumstance and give that evidence such weight as

you feel it should receive in reaching your conclusion as to the sentence that should be imposed.

A mitigating circumstance need not be proved beyond a reasonable doubt by the Defendant. If you are reasonably convinced that a mitigating circumstance exists, you may consider it as established.

The sentence that you recommend to the Court must be based upon the facts as you find them from the evidence and the law. You should weigh the aggravating circumstances against the mitigating circumstances and your advisory sentence must be based on the circumstances.

In these proceedings it's not necessary that the advisory sentence of the jury be unanimous. The fact that the determination of whether you recommend a sentence of death or sentence of life imprisonment in this case can be reached by a single ballot should not influence you to act hastily or without due regard to the gravity of the proceedings.

Before your ballot you should carefully weigh, sift and consider the evidence, and all of it, realize a human life is at stake, and bring to bear your best judgment in reaching your advisory

sentence. If majority of the jury determine Kevin D. Foster should be sentenced to death, your advisory sentence will be a majority of the jury by a vote of blank, advise and recommend to the Court that it impose the death penalty upon Kevin D. Foster. On the other hand, if by six or more votes, you, the jury determines Kevin D. Foster should not be sentenced to death, your advisory sentence will be: The jury advises and recommends to the Court that it impose a sentence of life imprisonment upon Kevin D. Foster without possibility of parole.

You will now retire to consider your recommendation. When you have reached an advisory sentence in conformity with these instructions, that for of recommendation should be signed by your foreperson and returned to the Court. They are as follows: In the Circuit Court of the Twentieth Judicial Circuit in and for Lee County, Florida, criminal action of the State of Florida versus Kevin D. Foster, 96-1362 CFB advisory majority of the jury by a vote of blank advises and recommends to the Court it impose a death penalty upon Kevin D. Foster, date line, and signature line, for the foreman.

The other one reads in the Circuit Court of the Twentieth Judicial Circuit in and for Lee County,

case number 96-1362CFB advisory verdict, advisory jury verdict rather. The jury advises and recommends to the Court it impose sentence of life imprisonment upon Kevin D. Foster without the possibility of parole. The date line and signature line for the foreman.

If in fact you need any of the exhibits that have been previously introduced into evidence and used during these proceedings, write it on a slip of paper which the bailiff will give, you knock on the door and he will bring it to me and provide that information.

In addition, if you have any questions you're to follow the same procedure. At this stage I would ask that Mr. Piro and Mr. Bergner, you're the two alternates, you will stand down at this time and the remaining will retire to the jury room and resume with your deliberation. At this time would you please begin your deliberations.

(Whereupon, the jury retired to the jury room and the following proceedings were conducted in the absence of the jury:)

THE COURT: Okay, we will be in recess until they return.

(Whereupon, court was in recess waiting the