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Foster v. Flor[ida]* 123 S. Ct. 470 (2002)

I. Introduction

Charles Kenneth Foster (“Foster”) has been on death row for over twenty-seven years.¹ On October 4, 1975, Foster was found guilty and sentenced to death for stabbing his victim in the throat and ultimately severing his spinal cord.² Foster sought review from the United States Supreme Court to consider his claim that the lengthy delay between his sentencing and his execution constitutes a violation of the Eighth Amendment’s provision against cruel and unusual punishment.³ The United States Supreme Court denied Foster’s petition for a writ of certiorari.⁴

* The Supreme Court Reporter misspelled Florida as “Florida.” See Foster v. Flor[ida], 123 S. Ct. 470 (2002).

1. Foster v. Flor[ida], 123 S. Ct. 470, 471 (2002) (denying certiorari) (Breyer, J., dissenting). In the past twenty-seven years Foster has appealed or attempted to appeal eighteen times. See Foster v. State, 369 So.2d 928, 932 (Fla. 1979) (affirming judgments and sentences of trial court); Foster v. Florida, 444 U.S. 885 (1979) (denying certiorari); Foster v. State, 400 So.2d 1 (Fla. 1981) (denying motion for stay of execution); Foster v. Strickland, 515 F. Supp. 22, 24 (N.D. Fla. 1981) (granting stay of execution five days before scheduled execution date until habeas petition could be heard); Foster v. Strickland, 517 F. Supp. 597, 599 (N.D. Fla. 1981) (denying habeas petition); Foster v. Strickland, 707 F.2d 1339, 1347-51 (11th Cir. 1983) (affirming denial of habeas petition); Foster v. Strickland, 466 U.S. 993 (1984) (denying certiorari); Foster v. Strickland, 467 U.S. 1268 (1984) (denying rehearing); Foster v. Wainwright, 457 So.2d 1372 (Fla. 1984) (denying habeas petition); Foster v. Dugger, 823 F.2d 402, 403 (11th Cir. 1987) (affirming denial of habeas petition); Foster v. State, 518 So.2d 901, 902 (Fla. 1988) (granting new sentencing proceedings to consider non-statutory mitigators); Foster v. Dugger, 487 U.S. 1241 (1988) (denying certiorari); Foster v. State, 614 So.2d 455, 458 (Fla. 1993) (remanding in part for a third sentencing proceeding because of a defective sentencing order); Foster v. Florida, 510 U.S. 951 (1993) (denying certiorari); Foster v. State, 654 So.2d 112, 115 (Fla. 1995) (affirming outcome of third sentencing proceeding); Foster v. Florida, 516 U.S. 920 (1995) (denying certiorari); Foster v. State, 810 So.2d 910 (Fla. 2002) (affirming denial of post-conviction relief and denial of habeas relief); Foster, 123 S. Ct. at 470 (denying certiorari).

2. Foster, 517 F. Supp. at 599. There was little debate regarding Foster’s guilt or innocence; at trial, Foster remarked on the stand, “I have done it, killed him deader than hell. . . . 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.” Foster v. State, 369 So.2d 928, 929 (Fla. 1979).

3. Foster, 123 S.Ct. at 471.

4. Id. at 470.

II. Analysis/Application

The majority of the Court did not consider the merits of Foster's claim.⁵ Three years before *Foster*, the Court denied certiorari to a similar claim in *Knight v. Florida*.⁶ The defendant in *Knight* argued that extended incarceration on death row amounted to cruel and unusual punishment under the Eighth Amendment.⁷ The dissents and concurrences in the Court's denial of certiorari in *Foster* echoed the concurrence and dissent offered in *Knight*.⁸ In *Foster*, Justice Thomas concurred to point out what he considered the utter lack of support for Foster's "novel claim."⁹ Justice Thomas continued and stated that one cannot avail oneself of the procedural safeguards in the capital system and then contest the inevitable delay of execution.¹⁰ According to Justice Thomas, the anxieties of death row could be avoided if the defendant would simply submit to his execution and satisfy the will of the people.¹¹ Justice Thomas justified this opinion with a description of Foster's gruesome offense.¹² The Justice's statements skirted the somewhat disturbing notion that the level of constitutional procedure afforded to a defendant decreases in proportion to the heinousness of his crime.

Justice Thomas also made the practical point that if defendants could challenge the length of their stay on death row, courts would be much more reluctant to grant re-hearings and appeals.¹³ Justice Thomas's point is a serious one. If executions were held to be unconstitutional if twenty years elapse after the original sentencing, defense attorneys would naturally do all they could to delay at every stage of potential relief while appellate courts might rush decisions or deny hearings to maintain a defendant's execution eligibility.

Because of the excessive number of years Foster spent awaiting death, Justice Breyer dissented and urged the Court to consider the possibility of an

5. *Id.* at 470 (citing *Singleton v. Commissioner*, 439 U.S. 940, 942-46 (containing Justice Frankfurter's reasons for a denial of certiorari which included, "[p]ertinent considerations of judicial policy here come into play. A case may raise an important question but the record may be cloudy. It may be desirable to have different aspects of an issue further illumined by the lower courts. Wise adjudication has its own time for ripening")).

6. *Knight v. Florida*, 528 U.S. 990 (1999) (denying certiorari). The Court's denial of certiorari was accompanied by a concurrence from Justice Thomas which posited essentially the same arguments as the Justice made in *Foster*. *Id.* at 990-93. (Thomas, J., concurring). Justice Breyer argued that after almost twenty-five years on death row, *Knight's* claim of cruel and unusual punishment should be reviewed by the court. *Id.* at 993-99. (Breyer, J., dissenting).

7. *See id.* at 990-92.

8. *Foster*, 123 S. Ct. at 470-72.

9. *Id.* at 470.

10. *Id.* at 470-71.

11. *Id.* at 471.

12. *Id.* Justice Thomas stated that "this judgment would not have been made had petitioner not slit Julian Lanier's throat, dragged him into bushes, and then, when petitioner realized that he could hear Lanier breathing, cut his spine." *Id.*

13. *Id.* at 471.

Eighth Amendment violation.¹⁴ Justice Breyer pointed to the international arena to argue that excessive time spent on death row could be a cruel and unusual punishment.¹⁵ Foster has been issued two death warrants and three judicial reprieves, one such reprieve occurring only days before his scheduled execution.¹⁶ The anxiety and uncertainty that a death row prisoner suffers for, on average, eleven to twelve years, has more than doubled for Foster.¹⁷ The Justice flirted with the notion of a double punishment in this case because, “[i]f executed, Foster, now 55, will have been punished both by death and also by more than a generation spent in death row’s twilight.”¹⁸

It is difficult to foresee a more extreme case than Foster’s; therefore, it seems the Court has decided it will not rule on the issue of whether or not the death row phenomenon violates the Eighth Amendment. Nevertheless, Justice Thomas’s words could prove to be an accurate harbinger if states decide not to execute a prisoner after a certain amount of time; the procedural mechanisms that currently allow defendants like Foster eighteen attempts to gain relief could be given short shrift in such a system.

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14. *Foster*, 123 S. Ct. at 471.

15. *Id.* at 471-72 (discussing that other nations have found that a fifteen-year-delay can make execution a cruel punishment and that Canada will consider the years spent on death row when deciding whether to extradite capital defendants to the United States).

16. *Id.* at 472; *Foster v. Strickland*, 515 F. Supp. 22, 24 (N.D. Fla. 1981).

17. *Foster*, 123 S. Ct. at 471.

18. *Id.* at 472.

