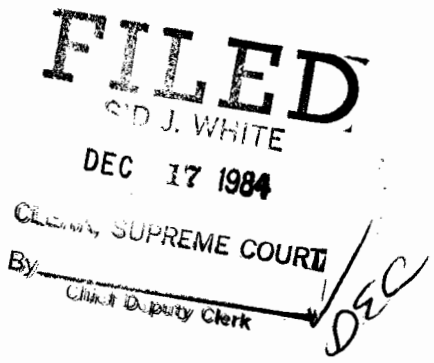
IN THE SUPREME COURT OF FLORIDA

CASE NOS. 64,362 and 65,961



JOHN ERROLL FERGUSON,

Appellant,

vs.

THE STATE OF FLORIDA,

Appellee.

CONSOLIDATES APPEALS FROM THE CIRCUIT COURT OF THE ELEVENTH JUDICIAL CIRCUIT IN AND FOR DADE COUNTY, FLORIDA CRIMINAL DIVISION

SUPPLEMENTAL BRIEF OF APPELLEE, THE STATE OF FLORIDA

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PREFACE

The Appellee, the State of Florida, was the prosecution in the court below. The Appellant, JOHN ERROL FERGUSON, was the defendant in the court below. In this brief, the parties will be referred to as they appear before the trial court.

The following symbols are used in this brief:

(R) For the Record-on-Appeal in Case No. 64,362, bound under separate cover, previously transmitted herein consisting of Pages R1-R30.

(T) For the Transcript-of-Proceedings in Case No. 64,362 consisting of pages T1-T18.

(SR) For the Supplement Record-on-Appeal for both Case No. 64,362 and Case No. 65,961, consisting of pages SR1-SR22.

(ST) For the Supplemental Transcript of Proceedings in both cases and consisting of pages ST1-ST23.

I

STATEMENT OF THE CASE

The Defendant was originally charged by indictment and convicted of two (2) counts of first degree murder and sentenced to death for the so-called "Opa-Locka" murders. See, Ferguson v. State, 417 So.2d 631 (Fla. 1982). Similarly the Defendant was also indicted, convicted and sentenced to death upon six (6) counts of first degree murder in the so-called "Carol City" murders. See, Ferguson v. State, 417 So.2d 639 (Fla. 1982).

In the "Carol City" case the trial court found eight (8) aggravating circumstances and no statutory mitigation. 417 So.2d at 642-645. On July 5, 1982 the Supreme Court of Florida affirmed the convictions for first degree murder and affirmed six (6) of the eight aggravating circumstances. Id. cf., 641-646. The Supreme Court also agreed that five (5) of the seven (7) statutory mitigating circumstances had no basis whatsoever in the present cause. Id., cf., 645. However, the Supreme Court vacated the death sentences and remanded for resentencing upon a proper consideration of the mitigating circumstances 921.141(6)(b) and (f) relating to the Defendant's mental state and his ability to appreciate the criminality of his conduct. Id., at 645-646. The trial court had improperly used a "sanity" type analysis in rejecting these claims. Id.

Similarly, in the "Opa Locka" case although not accurately reflected in this Court's opinion, the trial court also found seven (7) aggravating circumstances and no statutory mitigation. cf., 417 So.2d at 636. Again, the Supreme Court of Florida affirmed the convictions for first degree murder and affirmed six (6) of the seven aggravating circumstances. Id., cf., 634-638. The Supreme Court also again agreed that five of the seven statutory mitigating circumstances have no basis whatsoever in the Opa Locka case. Id., cf., 636-637. However again the Court vacated the death penalties to enable the trial court to properly consider the mitigating circumstances under Section 921.141 (6)(b) and (f) as in the "Carol City" case.

Upon remand, the present causes were heard and argued together. See T1-17. The trial court perceived that in both the Opa Locka murders and in the Carol City killings, the trial court should take into consideration and apply the correct standard of review under Sections 921.141 (6)(b) and (f). See, T4-T6. The trial Court specifically declined to conduct a retrial of the present causes, but instead reviewed the entire record[1]. Id.

[1]To that end, the present records include the entire record-on-appeal in the Opa Locka murders and the Carol City killings, respectively.

With respect to the Defendant's demand for the opportunity to offer more evidence, the trial court demanded an offer of proof, T8-T9, to which defense counsel responded thus:

> "MR. HACKER: Judge, I would like to call the detectives who induced from Mr. Ferguson a confession which proved to be the turning point in the case and now that we had sufficient time to allow their recollection to be refreshed with regard to the freeness and voluntariness of his confession, to bring them in to see, if, number one, he did waive his rights as per Miranda, his Miranda rights, and whether he did in fact confess, and number three whether in their opinion he is a person who should not be sentenced to the electric chair."
>
> T9.

Defense counsel's offer of proof was however rejected because counsel was only speculating as to what the "evidence" he offered might show:

> "THE COURT: You are proffering to the Court that these detectives will come in now and say he should not be sentenced to death and the confession they took was not voluntary and what else?
>
> MR. HACKER: I am not proffering that they are going to say this. I want to find out if they are going to say this.
>
> THE COURT: Take their depositions, Mr. Hacker. It is not a good proffer. It is a guess. Okay, let us get on."
>
> Id.

The trial court further rejected the Defendant's offer of proof as concerning matters not "proper" evidence for the present sentencing proceedings[2]. See, T10.

Subsequently, defense counsel confined his offer of mitigating circumstances to a statement that the Defendant was on thorazine during the Opa Locka trial and then made an argument that the mitigating circumstances relating to the Defendant's mental condition as described in the various medical reports were not rebutted by any State evidence. See, R11-R13. Defense counsel was not restricted by the trial court as to any matter in mitigation which he wished to offer:

> "THE COURT: Anything further?
>
> "MR. HACKER [First Defense Counsel]:
>
> One minute, Your Honor. One last thing I want to say, Your Honor, as far as the mitigating discussion I just had with the Court is concerned, at no time has the State of Florida produced any evidence whatsoever on sentence to rebut this mitigating factor, this psychiatric evidence.
>
> Other than that, Judge, we have nothing further to say.

[2]There was apparently an earlier hearing on the issue of what witnesses the Defendant wished to present in mitigation, see, T5, lines 12-19, but the Defendant's present counsel has failed to present said transcript for appellate review.

"THE COURT: Anything further?

"MR. MATERS [Second Defense Counsel]: Judge, I believe Mr. Hacker has spoken on mitigating factors (B) and (F) which we feel overcome the aggravating factors and we use the same argument for both cases.

"THE COURT: Okay.?"

T13.

Upon the foregoing, the trial court announced its intent to reimpose the death penalties in both cases because, "[t]he aggravating circumstances in these cases far outweigh the possibility of impairment. . ." [Emphasis added]. In its written order in the Opa Locka case the trial court finds the presence of six aggravating circumstances and finds a seventh aggravating circumstance under Section 921.141(5)(h). See, R13-R16. Again in mitigation the trial court found no evidence of five of the seven statutory mitigating factors. R16; R19. With regard to mitigation under Section 921.141(6)(b) and (f) the trial court concludes thus:

"Therefore, there is some evidence to indicate that the felony was committed while the defendant was under the influence of extreme mental disturbance and that the capacity of the defendant to appreciate the criminality of his conduct so as to conform his conduct to the requirements of law may have been substantially impaired."

R15.

Similarly in the Carol City murders the trial court found the six aggravating circumstances present and a seventh aggravating factor under 5 (h) and rejected five of the seven statutory mitigating circumstances, SR2-SR10. However as in the Opa Locka murders the trial court also found that there was "some evidence" of mitigating factors under Sections 921.141 (6)(b) and (f). See, SR7-SR9.

The foregoing orders of the trial court were filed on May 27, 1983. Id. One hundred and seven (107) days later the present counsel filed her Notice of Appeal. R22. Furthermore, although these causes were considered together at all times below, only one Notice of Appeal was initially filed and only in the Opa Locka case. Id. This Notice of Appeal was also first filed in the Third District Court of Appeals as 3d DCA Case No. 83-2224. The Third District promptly issued an Order to Show Cause as to why the case should not be dismissed as untimely filed. The Defendant's present counsel instead apparently filed a Notice of Voluntary Dismissal.

On September 21, 1984, almost sixteen months after the trial court's order was filed, the present counsel was appointed and filed her Notice of Appeal in the Carol City murders. The present appeals follow.

therefore, rendered the opinion that in January, 1978, Defendant FERGUSON knew the difference between right and wrong. (T 1116) He based his opinion upon his examination and past experience with the Defendant. (T 1116)

Nevertheless, Dr. Mutter testified that from 1971 through 1975, Defendant FERGUSON was medically insane and considered extremely dangerous. (T 1127) In 1975, Dr. Mutter had testified that FERGUSON was so sick, he would not regain his sanity in the foreseeable future. (T 1128-1129)

Despite Dr. Mutter's opinion that FERGUSON was malingering and was in fact legally sane at the time of the evaluation, he nevertheless found that Defendant FERGUSON suffered from delusions, (T 1129), found him rambling and inappropriate of affect, and guarded (T 1130-1131), found he had underlying persecutory delusions (T 1132), found that FERGUSON's judgment and insight were impared (T 1133). It should be noted that Dr. Mutter's conclusion that Defendant FERGUSON was sane, and not psychotic, contradicts his previous evaluations of FERGUSON, this last opinion being based upon only an hour and forty minutes of interview. (T 1139) It is further interesting to note that in the interim period, Dr. Mutter received a letter from the State Attorney, which apparently suggested malingering. (T 1141)

Dr. Henry Graff, also a psychiatrist testifying for the State, saw Defendant FERGUSON in May, 1978, pursuant to a Court Order. (T 1147) Dr. Graff's opinion was the entire exam was an attempt by FERGUSON to malinger. (T 1152) In his

III

ARGUMENT

THE DEFENDANT HAS FAILED TO PRESENT ANY ERROR IN THE TRIAL COURT'S RESENTENCING.

The Defendant raises two claims directed to both the Opa Locka case and the Carol City case and one claim which is directed only to the Carol City case. The Defendant complains in both cases a) that the trial erred in refusing to conduct an evidentiary hearing for purposes of resentencing and b) that the trial court erred in finding the additional aggravating circumstance that the murders in both cases were committed in a cold, and calculating manner under Section 921.141 (5)(h). The Defendant finally complains that the trial court erred in considering psychiatric reports from the Opa Locka murders in considering the presence of mitigation under Sections 921.141 (6)(b) and (f) for the Carol City murders which were tried three months earlier.

a) Necessity of a Evidentiary Hearing

When the issue of whether to conduct an evidentiary hearing was renewed on the record presently before this Court, the trial court ordered defense counsel to make an offer of proof. Defense counsel's offer of proof related to whether or not the Defendant's confession (in the Opa Locka case) was voluntary and counsel suggested that the

detectives could also be asked as to whether or not they thought the death penalty was warranted. See, T9. Defense counsel also made a brief statement that the Defendant was sedated with Thorazine during the trial in the Opa Locka case. See, T11.

First of all, to the extent that the Defendant's offer of proof relates to the substantive convictions it is improper and irrelevant to this Court's resentencing order in both cses. Secondly the "mitigation" offered, that the Defendant was on Thorazine during the Opa Locka trial, is wholly irrelevant to the Carol City case and is not a "relevant" factor in mitigation in either case within the meaning of Lockett v. Ohio, 438 U.S. 586, 98 S.Ct. 2954, 57 L.Ed.2d 973 (1978). Additionally since counsel was purely speculating as to whether the detectives in the Opa Locka case had an opinion favorable to the Defendant or any opinion at all as to the application of the death penalty, this was insufficient as an offer of proof to require the trial court to go forward with any proceeding at all. Moreover, assuming the Defendant was on Thorazine and the detectives said that the Defendant should not be executed, no rational trier of fact would not impose the death penalty in the circumstances of both cases. See, White v. State, 403 So.2d 331 (Fla. 1981).

Finally, this Court's reversals in both the Opa Locka case and the Carol City were limited to reconsidering the

penalty to be applied herein while properly assessing the mitigating factors under Sections 921.141(6)(b) and (f) relating to the Defendant's mental state and his ability to appreciate the criminality of his conduct. See, 417 So.2d at 636-637 and 645-646. The trial court's refusal to reopen this matter up into a full retrial is entirely correct in view of the limited purpose of this court's order and the meager "offer of proof" made by the Defendant as to possible mitigation. See, Dougan v. State, 398 So.2d 439 (Fla. 1981), cert. den., 454 U.S. 882, 102 S.Ct. 367, 70 L.Ed.2d 193 (1981); Songer v. State, 365 So.2d 696 (Fla. 1978), cert. den., 441 U.S. 956, 99 S.Ct. 2185, 60 L.Ed.2d 1060 (1979); cf., also, Spaziano v. State, 433 So.2d 508 (Fla. 1983), affirmed, ___U.S.___, 104 S.Ct. 3154, ___L.Ed.2d____ (1984); see, also, Barclay v. Florida, ___U.S.____, 103 S.Ct. 3418, at 3436, n.24, 77 L.Ed.2d 1134 (1983)(citing the "limited review" standard in Dougan v. State, supra, with approval). All other issues before the trial court were res judicata and bound by "law of the case." See Barclay v. State, 411 So.2d 1310 (Fla. 1982), affirmed, Barclay v. Florida, supra. The trial court therefore properly refused to reopen the case for an evidentiary hearing.

b) The Trial Court's Finding Of An Additional Aggravating Circumstance

The evidence that the present murders were committed in a "cold, calculated and premeditated manner without any

pretense of moral or legal justification" has always been present on these records. See, Spaziano v. State, supra. There is no error therefore in the trial court's consideration of it on remand for resentencing. Id. Additionally, nothing in the federal or state constitution prohibits the application of the new aggravating circumstance under 5 (h) to any pending cause presented for sentencing. See, Preston v. State, 444 So.2d 939, at 946 (Fla. 1984); Justus v. State, 438 So.2d 358 (Fla. 1983), cert. den., ___U.S.____, 104 S.Ct 1332, ___L.Ed.2d____(1984). The trial court's application of 5(h) to these murders was therefore procedurally correct. Id., Furthermore, the application of 5 (h) is particularly appropriate to the utter lack of any moral or legal justification for the manner in which each of the eight (8) victims were executed. See, Herring v. State, 446 So.2d 1049 (Fla. 1984)(shot helpless victim fatally a second time); Routley v. State, 440 So.2d 1257 (Fla. 1983) (execution type murders); Mason v. State, 438 So.2d 374 (Fla. 1983), cert. den., ___U.S.____, 104 S.Ct. 1330, ___ L.Ed.2d___(1984)(no evidence that victim in any way provoked the attack); Lightbourne v. State, 438 So.2d 380 (Fla. 1983), cert. den., ___U.S.___, 104 S.Ct. 1330, ___L.Ed.2d___ (1984)(phone lines cut; execution style murder with pillow to conceal sound); Bolender v. State, 422 So.2d 833 (Fla. 1982), cert. den., ___U.S.____, 103 S.Ct. 2111, 77 L.Ed.2d 315 (1983)(defendant held victims at gunpoint for hours then beat and tortured them until they died).

c) Trial Court's Review of All Psychiatric Evidence.

The present cases were considered below at all times as a single proceeding to determine whether the Defendant should be executed once. Everything with regard to the psychiatric reports in the Opa Locka case inured solely to the benefit of the Defendant in the Carol City case. The trial court recognized that the Opa Locka reports as to sanity at the time of the crime did not relate to the Carol City murders, but nevertheless used them "in the interests of justice," to the extent that they benefitted the Defendant:

> "Prior to the trial in this case the Court appointed three Psychiatrists who examined the defendant; Doctors Harry Graff, Charles Mutter and Albert Jaslow. The Court also appointed Doctor Norman Reichenberg to do psychological testing, and report the results of such testing.
>
> Subsequent to the trial in the instance case and prior to the trial and sentencing in case number 78-5428, being Supreme Court Case 55,498, at least two Psychiatrists, Dr. Arthur Stillman and Dr. Paul Jarrett and two Psychologist Dr. Syvil Marquit and Dr. Jeffrey J. Elenewski, also examined the defendant. While not required to, this Court, in the interest of justice, is taking into consideration these four later named Doctors in determining a sentencing; three of whom have rendered the opinion that the defendant is psychotic and was psychotic at the time of the offense." [Emphasis added].
>
> SR7.

Based upon all of the expert reports the trial court found contrary to its predecessor, that there was, "some evidence" to support a finding of statutory mitigation under 6(b) and 6 (f). The Defendant should not be heard to complain as to a matter, which he only received an unwarranted benefit.

d.) Whether the Death Penalty is Appropriate.

Although the Defendant has failed to assert this issue, consistent with this Court's statutory obligation, Section 921.141(4), Florida Statutes, the State would submit that no rational authority would not impose the death penalty in the totality of circumstances in each case, where there are seven (7) aggravating circumstances in each case and only "some evidence" of two factors in mitigation. See, e.g., Herring v. State; Lusk v. State, 446 So.2d 1034 (Fla. 1984); Bottoson v. State, 443 So.2d 962 (Fla. 1983); see, also, Sullivan v. State, 441 So.2d 609 (Fla. 1983); State v. Washington, 453 So.2d 389 (Fla. 1984); Booker v. State, 397 So.2d 910 (Fla. 1981).

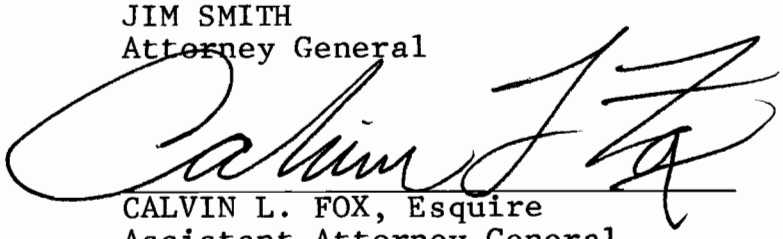
IV

CONCLUSION

WHEREFORE, upon the foregoing, the Appellee, THE STATE OF FLORIDA, prays that this Honorable Court will issue its order affirming the judgments below.

RESPECTFULLY SUBMITTED, on this 14th day of December, 1984, at Miami, Dade County, Florida.

JIM SMITH
Attorney General



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V

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoin BRIEF OF APPELLEE was caused to be served by mail upon JOEL LUMER, Esquire, Suite 711, 19 W. Flagler Street, Miami, Florida 33130 and KATHLEEN PHILLIPS, Esquire, Second Floor, 3081 Salzedo Street, Coral Gables, Florida 33134, on this 14th day of December, 1984.

CALVIN L. FOX, Esquire
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ss/