IN THE SUPREME COURT OF FLORIDA

CASE NO.: 64, 362

JOHN ERROLL FERGUSON,

Appellant,

-vs-

STATE OF FLORIDA,

Appellee.

APPELLANT'S INITIAL BRIEF

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STATEMENT OF THE CASE AND OF THE FACTS

A. NATURE OF THE CASE AND COURSE OF PROCEEDINGS

This is an appeal by Defendant, JOHN E. FERGUSON, of the resentencing in which Judge Herbert Klein entered a sentence of death on May 27, 1983. This case was originally tried before the Honorable Richard S. Fuller and before a jury on two counts of first degree murder; one count of involuntary sexual battery; one count of robbery; one count of attempted robbery; one count of unlawful possession of a firearm while engaging in a criminal offense; and two counts of unlawful possession of a firearm by a convicted fellon. (R 1-5a). On October 7, 1978, the jury returned its verdict of guilt and on the same date returned its advisory sentence of death. On November 2, 1978, the Court entered its findings in support of death. The Defendant then appealed directly to the Supreme Court in Case No. 55498. On July 15, 1982, this Court rendered its written opinion affirming the guilty verdict, but reversing and remanding the cause to the lower court for purposes of determining an appropriate sentence in light of its decision. This Court found that the lower court erred in applying one of the mitigating factors and in failing to appropriately apply the mitigating factors. This Court held:

> "However, in our review capacity, we must be able to ascertain whether the trial judge properly considered and weighed these mitigating factors. Their existence would not, as a matter of law, invalidate a death sentence, for a trial judge in exercising a recent judgment could find that a death sentence is appropriate. It is improper for us, in our review capacity, to make such a judgment.

> A judgment of conviction is affirmed. The death sentence is vacated and the cause is remanded to the trial court for the purpose of determining an appropriate sentence. An additional sentence advisory verdict by a jury is not required."

On April 19, 1983, Judge Herbert Klein held a hearing for the purposes of resentencing. At that time, the Defendant made a motion to bring in witnesses to testify as to the mitigation factors. (T 4/19/83 5) Judge Klein denied that motion referring to this Court's indication that another advisory jury would not be necessary. (T 4/19/83 6) The resentencing hearing was therefore limited to argument by both counsel. On May 27, 1983, Judge Klein entered his findings in support of the death sentence. Judge Klein applied mitigating factor (B) stating "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." (R 19)

The Defendant was found insolvent and undersigned counsel was appointed for the purposes of this appeal on August 24, 1983. (R 21) A notice of appeal was filed on September 15, 1983. (R 22)

B. STATEMENT OF FACTS

The limited purpose of this appeal is to review the resentencing of Defendant by Judge Herbert Klein. Defendant therefore adopts the statement of facts previously submitted

in Appellant's Brief, Case No. 785428. Briefly, Defendant was convicted of killing two persons who were seated in an automobile in a remote area. The female victim was also raped, and had various pieces of jewelry removed from her body. For the purposes of this appeal, facts relative to the mitigating factors are of extreme importance and therefore are set forth herein. There was a total of eight expert witnesses who testified regarding the Defendant's mental competence. They all conducted interviews of the Defendant and many of them had prior experience with the Defendant in terms of evaluation and treatment. (T 956-1288)

Defendant FERGUESON has had a psychiatric history dating back at least to 1971. (T 957-959) He suffers from a major mental illness known as paranoid schizophrenia. (T 957) In 1971, Defendant FERGUESON had a severely damaged ability to distinguish between right and wrong. (T 958-959) Among the symptoms of his mental illness, were the following: (1) Delusions that angels influenced him and spoke to him (T 966); (2) ideas that his attorney was to fight the devil on his behalf, and the fear that his attorney was perhaps himself the devil (T 996); (3) a delusion that people in jail were attempting to poison him (T 997); (4) Defendant FERGUESON acted like a wild animal (T 1027); delusions that people were out to hurt him, damage him, and destroy him (T 1070). Defendant FERGUESON even had scars on his legs where he had cut himself open to purge himself of people inhabiting his body. (T 998) He had, additionally, slit his wrist under the direction of the angels. (T 998)

Defendant FERGUSON was on multiple occassions deemed incompetent and insane by various psychiatrists and psychologists who evaluated him. He was hospitalized for his psychiatric condition for the period of 1971 through 1974. Nevertheless, in the opinion of Dr. Marquit, the hospitalization would have had little affect on Defendant FERGUSON insofar as once he was out of the hospital milleiu, within three (3) days or more, he would be psychotic. (T 1045) During his hospitalization, Defendant was given top doses of Psychotropic medication. (T 1075) When not taking medications, the Defendant tended to "decompensate quickly". (T 1077)

Although, practically all of the doctors agreed that Defendant FERGUSON was dangerous to himself and others, and was suffering from a mental illness, there was dispute as to the nature of the mental illness, the impact of the illness on his ability to discern right from wrong, and whether or not Defendant FERGUSON was malingering a more serious illness than he actually suffered.

Dr. Paul Jarrett, a psychiatrist, saw Defendant, FERGUSON in 1971 and then again in 1978. (T 957) In 1971, he diagnosed Defendant FERGUSON as paranoid schizophrenic. In August of 1978, Dr. Jarrett evaluated Defendant. At the time of the interview, it was the opinion of Dr. Jarrett that Defendant suffered from a major mental illness, paranoid schizophrenia. (T 968) He nevertheless, found the Defendant competent to stand trial. (T 988)

Dr. Jeffrey Elenewski, a clinical psychologist, administered psychological tests and conducted an evaluation of the Defendant. (T 993) His overall impression of the Defendant was that FERGUSON was a grossly paranoid individual with a delusional system that everyone wanted to kill him. (T 998) He diagnosed FERGUSON as paranoid schizophrenic suffering from a delusional system and hallucinations. (T 999) He indicated that FERGUSON's disorganization was so great, and the number of psychotic events so numerous, that FERGUSON was probably suffering from a vary active psychotic condition in January, 1978. (T 1001-1002) It was his opinion that FERGUSON could not distinguish right from wrong or distinguish reality from fantasy. (T 1002) Nor could he do so in January, 1978. It was Dr. Elenewski's opinion that Defendant FERGUSON was legally insane in January, 1978. (T 1003)

Dr. Syvil Marquit, a clinical psychologist, interviewed Defendant FERGUSON and administered various psychological tests, including the Marquit Verbal Thematic Association Test. (T 1024) It was Dr. Marquit's opinion that Defendant FERGUSON was generally psychotic. (T 1033) Dr. Marquit further sought to determine whether or not Defendant was malingering. It was his opinion based on the Rorshach Test that the Defendant definitely was not malingering. (T 1036) Further, the Marquit test, the doctor asserted, would catch all malingering. (T 1037) Nevertheless, it was his opinion that Defendant's answers were consistent with shcizophrenia and concluded that Defendant is a paranoid shcizophrenic. (T 1038-1039) The doctor testified that Defendant

FERGUSON could not have known right from wrong in all psychological probability. (T 1048)

Dr. Arthur Stillman, a psychiatrist, first examined Defendant FERGUSON in March, 1975, at which time he determined that he was dealing with a grossly disturbed paranoid schizophrenic. (T 1069-1070) At the time of that evaluation, it was his opinion that FERGUSON did not know right from wrong, and that he was insane at the time. He considered FERGUSON a danger to himself and to others. (T 1071) At that time, it was Dr. Stillman's opinion that Defendant FERGUSON would not recover, much less, be cured, in the foreseeable future. (T 1072) In April, 1975 he again saw FERGUSON and determined that the probability of recovery was minimal. (T 1072) Dr. Stillman testified that FERGUSON was hospitalized for a three year period (1971 through 1974) and given intense chemical therapy. He indicated that it took the three year period of intense therapy to produce remission of "a rather intense serious disturbance". (T 1074)

In July, 1976, he found Defendant FERGUSON to be in chemical remission, or legally sane. (T 1076) Nevertheless, he still considered FERGUSON a danger to himself and others because of FERGUSON's tendency to decompensate quickly. (T 1077)

Dr. Stillman examined the Defendant in August of 1978, and found him still disturbed with medical evidence of being actively psychotic. (T 1077-1078) Despite medication, FERGUSON was psychotic and unable to assist his attorney in his

own defense. (Id.) It was Dr. Stillman's opinion that FERGUSON was not at all malingering, and that he showed characteristic responses to stress, which he had seen before in other examinations. He therefore determined that there was no reason to believe that there was any malingering involved. (T 1079) It was his opinion in August, 1978, that Defendant FERGUSON was at that time psychotic. (T 1080) He determined that FERGUSON was insane and incompetent in January, 1978, and could not at that time, discern the difference between right and wrong, nor adhere to the right. (T 1082-1083)

Dr. Charles Mutter, a psychiatrist who testified for the State, saw Defendant FERGUSON on four occassions. (T 1101) Dr. Mutter first saw Defendant FERGUSON in July, 1971, and found that he suffered from paranoid schizophrenia and recommended hospitalization. (T 1101) In February, 1973, he again saw FERGUSON and had the same evaluation. He found FERGUSON to be dangerous to himself and to others on both occasions. (T 1102) In March, 1975, Dr. Mutter saw Defendant FERGUSON and also had the same opinion. (T 1102) In May, 1978, Dr. Mutter was consulted regarding this case, and evaluated Defendant FERGUSON At that time, he found FERGUSON to be guarded and suspicious. (T 1104) Although suspiciousness is characteristic of paranoid schizophrenia, Dr. Mutter found this to be a sign of Defendant's malingering because he seemed to withold or falsify information. (T 1105) It was his opinion at that time, that Defendant FERGUSON was in a state of remission, and that he was not psychotic as of May, 1978. (T 1111) Dr. Mutter

II

QUESTION PRESENTED

WHETHER THE DEFENDANT HAS PRESENTED ANY ERROR IN THE RESENTENCING BY THE TRIAL COURT?

opinion, Dr. Graff felt that FERGUSON could assist in his own defense, yet had not benefitted from previous psychiatric care. (T 1154) Further, he felt Defendant FERGUSON to be hostile and very dangerous. (T 1154) Graff based his opinion on one and a quarter hour of interview with the Defendant, and without benefit of psychological testing. (T 1166)

Dr. Norman Reichenberg, a clinical psychologist testifying for the State, saw Defendant FERGUSON in January, 1971 and then again in May, 1978. In 1971, Dr. Reichenberg testified that Defendant FERGUSON suffered from an emotional disorder commensurate with impulse disorder functioning. (T 1198) In 1971, therefore, Dr. Reichenberg found that FERGUSON merely suffered from severe personality problems. (T 1199)

In May, 1978, Dr. Reichenberg reported that Defendant was functioning in an organized and intergrated fashion suffering from an anti-social personality, and not paranoid schizophrenia. (T 1210-1211) It was his opinion that FERGUSON did not suffer from a psycosis and was therefore aware of right and wrong. (T 1212) Dr. Reichenberg even testified that technically Defendant FERGUSON is competent and always has been. (T 1231) He found FERGUSON to have no organic brain disorder. (T 1247)

Dr. Albert Jaslow, a psychiatrist testifying on behalf of the State, first saw Defendant FERGUSON in February, 1973. (T 1253) In 1973, he found that the Defendant was incompetent and not capable of assisting in his defense. (T 1254) At that time he found Defendant FERGUSON to be psychotic. (T 1254) Jaslow testified he next saw Defendant FERGUSON in 1978, and found Defendant to be no longer psychotic, and in fact, competent

and able to assist in his own defense. (T 1254) Dr. Jaslow found that Defendant FERGUSON at the time of the evaluation, could determine right from wrong, and that there was nothing to suggest that FERGUSON was any different in January, 1978, the date of the crime in question. (T 1256) Dr. Jaslow's opinion was based in part of an erroneous assumption that the Defendant was not on psychotropic medications. (T 1266)

Thus, the testimony regarding Defendant FERGUSON mental capacity ranged from that he was totally psychotic and grossly disturbed, to that he was not and never had been psychotic, and, if anything, was merely a sociopath.

ARGUMENT

I. THE LOWER COURT COMMITTED ERROR IN REFUSING TO ALLOW AN EVIDENTIARY HEARING FOR THE PURPOSES OF RESENTENCING

This case was remanded for resentencing so that the lower court could give appropriate consideration to the mitigating factor relative to Defendant's mental state.[1] Judge Fuller had misconceived the standard applicable to assessing the existence of the mitigating factors, erroneously applying the test for insanity. Ferguson v. State, 417 So.2d 631 (Fla. 1982). On remand, Judge Herbert Klein resentenced Defendant FERGUSON to death without benefit of an evidentiary hearing. Rather, Judge Klein relied on the record in making his findings. (R 13)

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[1] At the time of sentencing, Section 921.141(6)(B)(F) were applicable which provided: "(B) The capital felony was committed while the Defendant was under the influence of extreme mental or emotional disturbance"; and "(F) The capacity of the Defendant to appreciate the criminality of his conduct, or to conform his conduct to the requirements of law was substantially impared."

Significantly, in reassessing the evidence as to Defendant FERGUSON mental capacity, Judge Klein made the following statement, after a discussion of the psychiatric testimony reflected in the transcript:

> "Therefore, there is some evidence to indicate that the felony was committed while the Defendant was under the influence of extreme mental disturbance in 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 impared.

(R 19, emphasis added)

The importance of this "finding" is that it is not a finding. The Court completly evades the ultimate finding but rather reiterates excerpts of the testimony. No conclusion is made. It is impossible to ascertain whether the Court applied, or did not apply this criteria to Defendant FERGUSON.

In fact, Judge Klein had no choice other than to present his "finding" in the fashion that he did. He could not arrive at a conclusion because to do so, would require resolution of multiple inconsistencies in the psychiatric testimony. Resolving those inconsistencies, meant resolving credibility issues. That, the Court could not do on the basis of a cold transcript.

This Court has held that it is a function of the trier of fact to evaluate and weigh testimony and evidence, based on its observation of the bearing, demeanor, and credibility of witnesses. Shaw v. Shaw, 334 So.2d 13 (Fla. 1976); See Also, Palardy v. Igrec, 388 So.2d 1053 (Fla. 4th DCA 1980); Cannon v.

Cannon, 323 So.2d 9 (Fla. 1st DCA 1975). This is why an appellate court is precluded from substituting its factual findings for those of the lower court. This Court pointed out in Shaw that:

> "It is not the function of the appellate court to substitute its judgment for that of the trial court, through reevaluation of the testimony in evidence from the record on appeal before it."

Shaw, supra at 16.

In this case, the lower court was the trier of fact for the purposes of resentencing. Nevertheless, in effect, the lower court attempted to act almost as a reviewing court, making findings based only on a transcript, fraught with witness inconsistencies and issues of credibility.

It is for those reasons that the rule of law in Florida is that a successor judge cannot make findings or render a final decree even though the testimony is transcribed at trial, and preserved. Bradford v. Foundation and Marine Construction Co., 182 So.2d 447 (Fla. 2nd DCA 1966). The Court in Bradford pointed out that although a successor judge may complete any acts uncompleted by his predecessor, the successor judge may do so only where "they do not require the successor to weigh and compare testimony". Bradford, supra at 449; 48 CJS "Judges" Section 56(A)(1947). The Bradford court held that even though a statute allowed for a successor judge to hear and determine all matters pending before his predecessor, nevertheless, the Court would not interpret that statute to allow for the successor judge to weigh and compare testimony of witnesses whom he did not see or hear. Thus, the Court held that where oral testimony is produced, and the cause is left undetermined, the successor judge cannot render

a verdict without a trial de novo unless, the parties stipulate otherwise. Bradford, supra at 449 (Citations ommitted); See Also, Tomkins Land and Housing, Inc. v. White, 431 So.2d 259 (Fla. 2nd DCA 1983); Euart v Fernsell, 438 So.2d 422 (Fla. 4th DCA 1983).

This rule of law is not unique to Florida. For example, in United States v. Nugent, 100 F.2d 215 (6th Cir. 1938), a case brought under the Tucker Act, the judment was invalid where evidence was heard by one judge and findings and conclusions and a decision made by a different judge. The rational for the decision was based upon the unique opportunity of the trial judge to resolve conflicting evidence. As the Court pointed out:

> "The trial judge has the right and duty to observe the barring and demeanor of the witnesses, and where the evidence is conflicting, he may take these things into account. Such personal observations cannot be transfered to the printed page, and yet the judge may, and often must, give them weight in making his decision.
>
> In the present instance, it is difficult to see how the judge who entered the findings had any proper opportunity to decide any question affected by the credibility of the witnesses.

Nugent, supra at 217(emphasis added).

These concepts apply with even more force in criminal cases, and most specially in death penalty cases. The death penalty is qualitatively different from prison sentences. Woodson v. North Carolina, 428 U.S. 280 (1976). The qualitative difference

in the death penalty calls for a greater degree of reliability when the death penalty is imposed. Lockert v. Ohio, 438 U.S. 586 (1978). The United States Supreme Court has attempted to ensure:

> that the prisoner sentenced to be executed is afforded process that will guarantee, as much as is humanly possible, that the sentence was not imposed out of whim, passion, prejudice or mistake.

Eddings v. Ohio, 455 U.S. 71 (1982), O'Connor, J. concurring.

In this instance, the likelihood of mistake was great where resentencing took place based on evidence which was found only on the printed page. The possibility of resolving credibility issues incorrectly was great.

In Lockert v. Ohio, supra, the Supreme Court held that the Eight Amendment requires individualized consideration of mitigating factors. Id., at 606. The Court based its opinion on the fact that the:

> imposition of death by public authority is so profoundly different from all other penalties, we cannot avoid the conclusion that an individualized decision is essential in capital cases. The need for treating each Defendant in a capital case with that degree of respect due the uniqueness of the individual is far more important than in non-capital cases... The non-availability of corrective or modifying mechanisms with respect to an executive capital sentence underscores the need for individualized consideration as a constitutional requirement in imposing the death sentence.

Lockert, supra at 605.

The individualized consideration required by Lockert was missing in this case. Sentencing based upon a cold record does not afford the type of consideration constitutionaly required in a case where death is the possible penalty. The lower

court which was required to rebalance the mitigating and aggravating factors, could not accurately carry out its function when it was unable to resolve the inconsistent testimony presented. It is even clear from Judge Klein's findings that he declined to resolve those credibility issues.

II.

THE COURT ERRED IN APPLYING THE AGGRAVATING FACTOR OF A COLD AND CALCULATING MURDER

This factor is not to be utilized in every premeditated murder prosecution. Herring v. State, 446 So.2d 1049, 1057 (Fla. 1984). Proof of the aggravating circumstance of a "cold, calculated and premeditated manner without any pretense of moral or legal justification" requires a showing of a state of mind beyond that of the ordinary premeditation required for a first degree murder conviction. Maxwell v. State, 443 So.2d 967, 971 (Fla. 1983). The state of mind we have in this case is one under the influence of extreme mental disturbance (R 19), not one that operates in a cold and calculating manner.

Where the commission of a murder "is susceptible to other conclusions than finding it committed in a cold, calculated, and premeditated manner" this factor is not properly found. Peavy v. State, 442 So.2d 200, 202 (Fla. 1983). The murder in the present case is susceptible to the conclusion that it was committed by a person in a deranged state just as much as it is susceptible to the conclusion that it was committed in a cold, calculated and premeditated manner. As such, this factor was improperly applied to the case at bar.

Speaking to this aggravating circumstance, the court said in McCray v. State, 416 So.2d 804, 807 (Fla. 1982):

> That aggravating circumstance ordinarily applies in those murders which are charactarized as

> executions or contract murders, although that description is not intended to be all-inclusive.

Maxwell v. State, supra, and Washington v. State, 432 So.2d 44, 48 (Fla. 1983), tend to indicate that this factor is to be applied in those instances where the defendant has a prior plan to kill the victim rather than when the victim is killed in the frenzy and passion of the accompanying criminal activity. This is also the teaching of Harris v. State, 438 So.2d 787, 798 (Fla. 1983), in which this court disagreed with a finding that a murder was cold and calculating where "the state presented no evidence that this murder was planned." In the case at bar there is no evidence that the murders were planned.

Hill v. State, 422 So.2d 816 (Fla. 1982), is distinguishable from the case sub judice. In Hill, the defendant announced before the criminal episode that he was going to rape the victim and "get rid of her." Hill, supra at 818. No such announcement or preplanning was done by the defendant here. Lightbourne v. State, 438 So.2d 380 (Fla. 1983), is also distinguisable. Lightbourne involved an execution type murder. The defendant cut the telephone cords in the victim's house after entering. He entered at a time when others wouldn't be there and he held a pillow at the victim's head when firing his weapon in order to muffle the sound. With these facts, the court was able to say: "The evidence was sufficient to show premeditated design." Lightbourne, supra at 391. No such design exists in the present case.

Appellant is familiar with this court's decision in Combs v. State, 403 So.2d 418 (Fla. 1981), but wishes to preserve the issue as to whether the application of §921.141(5)(i), Fla. Stat. (1979), to his case violates the prohibition against ex post facto criminal statutes. The crime is alleged to have taken place on January 8, 1978. The trial began on September 27, 1978 and the sentence was first imposed on November 2, 1978. In his first findings Judge Richard Fuller made no mention of this aggravating factor as it was not included in the law at that time. It was only at the second sentencing, after a remand by this court, that this additional factor became applicable to this case.

Once the right of appeal is established by a state, use fo that avenue of appeal cannot be the basis for imposing unconstitutional penalties on a criminal defendant. North Carolina v. Pearce, 395 U.S. 711, 724 (1969) and a defendant in a capital case cannot be punished more severely for exercising the rights that he is guaranteed under the due process of law or the constitution. United States v. Jackson, 390 U.S. 570, 582-583 (1968). Because the defendant in the present case exercised the right to appeal his conviction and won a remand, he has been subjected to sentencing criteria that increase the number of aggravating factors that can support a sentence of death. This works to the detriment of the defendant and this detriment results solely from the remand for a new sentencing.

In Combs v. State, supra at 421, this court said:

> ...paragraph (i) to section 921.141(5), in fact only reiterates in part what is already present in the elements of premeditated murder...

In Jent v. State, 408 So.2d 1024, 1032 (Fla. 1982), this court said:

> The level of premeditation needed to convict in the penalty phase of a first-degree murder trial does not necessarily rise to the level of premeditation in subsection (5)(i).

These two passages appear to conflict with one another. If the statement in Jent is correct, this might eliminate the logical underpinning of the holding in Combs that the retroactive application of paragraph (i) does not violate the prohibition against ex post facto criminal laws. Appellant desires to preserve this contention for review beyond the Florida Supreme Court.

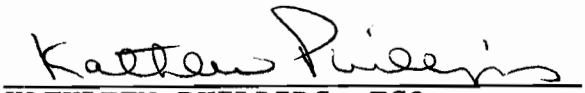
CONCLUSION

The lower court erred in failing to provide Defendant FERGUSON with an evidentiary hearing for the purpose of resentensing. An evidentiary hearing was required because the successor judge could not reweigh the testimony as to mitigating factors simply by reviewing the transcript. Further, the court inappropriately applied the aggravating factor of cold and calculating. The facts of this case did not warrant the finding in view of the State's failure to adduce evidence in this regard. Even were the factual basis there, the application of this factor was a retroactive application of a criminal statute, and therefore was improper and reversible error.

I HEREBY CERTIFY that a true and correct copy of the foregoing has been mailed on this date to the Office of the State Attorney, 1351 N.W. 12th Street, Miami, Florida and to the Office of the Attorney General, 401 N.W. 2nd Avenue, Miami, Florida.

RESPECTFULLY SUBMITTED on this 30th day of July, 1984.

LAW OFFICE OF KATHLEEN PHILLIPS
Attorney for Appellant

By: 
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