

IN THE SUPREME COURT OF FLORIDA

**FILED**

SID J. WHITE

NOV 20 1984

CONSOLIDATED CASES:

64, 362 & 65, 961

CLERK, SUPREME COURT.

By \_\_\_\_\_  
Chief Deputy Clerk

*bee*

JOHN ERROLL FERGUSON,

Appellant,

-vs-

STATE OF FLORIDA,

Appellee.

APPELLANT'S SUPPLEMENTAL BRIEF

JOEL LUMER, ESQ.  
Suite 711  
19 W. Flagler Street  
Miami, Florida 33130

Telephone: 374-4340

KATHLEEN PHILLIPS, ESQ.  
Second Floor  
3081 Salzedo Street  
Coral Gables, Florida 33134

Telephone: 441-0870

TABLE OF CONTENTS

	<u>PAGE</u>
TABLE OF CONTENTS -----	i
TABLE OF THE CASES -----	ii
STATEMENT OF THE CASE -----	1
STATEMENT OF THE FACTS -----	2
<u>ARGUMENT I</u> -----	5
THE LOWER COURT COMMITTED ERROR IN REFUSING TO ALLOW AN EVIDENTIARY HEARING FOR THE PURPOSE OF RESEN- TENCING	
<u>ARGUMENT II</u> -----	5
THE COURT ERRED IN APPLYING THE AGGRAVATING FACTOR OF A COLD AND CALCULATING MURDER	
<u>ARGUMENT III</u> -----	5
FERGUSON'S RIGHT TO CONFRONT WITNESSES WAS VIOLATED WHEN THE COURT BELOW CONSIDERED EVIDENCE NOT OF RECORD IN THIS CASE	
CONCLUSION -----	7
CERTIFICATE OF SERVICE -----	7

TABLE OF THE CASES

	<u>PAGE</u>
<u>Ferguson v. State, -----</u> 417 So.2d 639 (Fla. 1982)	1
<u>Hutchins v. Wainwright, -----</u> 715 F.2d 512 (11th Cir. 1983)	5
<u>McKingly v. Wainwright, -----</u> 719 F.2d 1525 (11th Cir. 1983)	5
<u>United States v. Barkowitz, -----</u> 662 F.2d 1127 (5th Cir. 1981)	6
<u>United States v. Hainowitz, -----</u> 706 F.2d 1549 (11th Cir. 1983)	6

STATEMENT OF THE CASE

This is an appeal of the resentencing of Defendant, JOHN E. FERGUSON to the maximum penalty of death. On July 15, 1982, this Court reversed Defendant's original death sentence entered by Judge Richard Fuller. Ferguson v. State, 417 So.2d 639 (Fla. 1982). The case was remanded for reconsideration of certain mitigating factors. On April 19, 1983, a resentencing hearing was held before Judge Herbert Klein (without a jury or presentation of additional evidence). On May 27, 1983, Judge Klein entered his Findings in Support of Death Sentence, resentencing Defendant FERGUSON to death. (Supp. R. 1-11) On September 17, 1984, a corrected order of insolvency and appointment of counsel for purpose of appeal was entered and on October 10, 1984, this Court ordered that the instant case be consolidated with Case No. 78-5428 which is presently pending. (Supp. R. 21) The following brief is therefore a supplement to appellant's brief previously filed in Case No. 78-5428 (Supreme Court number 64, 362).

STATEMENT OF THE FACTS

Appellant, JOHN E. FERGUSON, adopts the statement of facts as set forth in his original brief on direct appeal in this case and, to the extent applicable, adopts the statement of facts as outlined in his brief filed in this consolidated proceeding, case no. 64, 362.

In addition, Appellant FERGUSON further states the following: On September 15, 1977, Appellant FERGUSON was indicted on six counts of homicide which were alleged to have taken place in July, 1977. (R, 1-8a). On April 10, 1978, Defendant FERGUSON was arraigned and pleaded not guilty. (R, 12) On April 24, 1978, the lower court appointed three experts for the purpose of evaluating Appellant FERGUSON's mental status. (R, 46). An additional expert was appointed on May 12, 1978 (R, 80). The experts appointed were three psychiatrists: Drs. Harry Graff, Charles Mutter, and Albert Jaslow; and a psychologist, Dr. Norman Reichenberg.

These doctors filed reports with the Court which became the basis for the decision of Judge Fuller's finding Appellant FERGUSON competent to stand trial. (See Appendix at 1, 2 and 3). Further, in his findings in support of death sentence, Judge Fuller considered these reports in determining that FERGUSON "was not under the influence of any extreme mental or emotional disturbance and his capacity to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was not substantially

impaired". Fuller, used an erroneous standard in evaluating the evidence as it applied to that mitigating factor. Ferguson v. State, 417 So.2d 639 (Fla. 1982).

Upon remand for resentencing, Judge Herbert Klein did not allow the presentation of evidence but resentenced based on the record of both case number 78-5428 and the instant case record. (See T. 4/19/83 at 4-6) In outlining what he was going to consider, Judge Klein stated:

I have in fact read the record and it has taken me a long time to get to this. It was a very lengthy record and I needed time to read it. I have read all of the doctor's reports including some of the old reports from back in 1971 and 1973, by Dr. Jazlow, and we have Dr. Jarritz, Dr. Mutters, Dr. Rickenberg and many of these on more than one occasion dating as far back as 1971,

In his prepared findings, Judge Klein referred to reports relative to FERGUSON's mental status prepared by Drs. Graff, Mutter, Jaslow, and Reichenberg. (Supp. R. 7) In addition, he took into consideration reports and/or testimony of doctors who examined and reported on FURGUSON after the trial of this case, those were doctors Stillman, Jarrett, Marquit and Welenski. (Supp. R. 7) Further, Judge Klein took into account the report of a subsequent examination by Dr. Jaślow. Judge Klein stated:

Dr. Albert Jazlow, examined the defendant on May 8, and August 24, 1978. Dr. Jazlow had previously examined the defendant in 1973, when he found the defendant incompetent. Dr. Jazlow found in the May 8, 1978, examination that the defendant was evasive and trying to present a psychotic picture but that there was no evidence that this was so. Dr. Jazlow again examined the defendant and his opinion that he was competent, was strengthened, and Dr. Jaslow found that "there was nothing really offered by the patient that

would suggest that he had been psychotic or otherwise incompetent during the time in question, and other materials describing such a period of time certainly suggest that he had the ability to understand what was happening, knew the possible consequences of his actions and was quite controlled and aware of the meaning of the circumstances during that period."

(Emphasis the Court's; Supp. R. 8).

Judge Klein therefore took into consideration reports and/or recorded testimony which were not of record in the instant case.

After considering the foregoing evidence, Judge Klein concluded:

Therefore, there is some evidence 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 the law may have been substantially impaired.

(Supp. R. 9)

In preparing his findings, Judge Klein adopted word for word the lengthy finding of Judge Fuller relative to the heinous and atrocious aggravating factor. Additionally, he adopted Judge Fuller's findings relative to mitigating factors (d) and (e). (Supp. R. )

Judge Klein applied the additional and subsequently enacted aggravating factor (h) finding FERGUSON to have acted in a cold and calculating manner (Supp. R. 6) This factor had not been presented in the initial trial or penalty phase and therefore Appellant FERGUSON was given no opportunity to respond to this factor.

ARGUMENT I

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

Appellant FERGUSON adopts Argument I as presented in Appellant's brief in the consolidated case number 78-5428, Supreme Case Number 64, 362.

ARGUMENT II

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

Appellant FERGUSON adopts Argument II as presented in Appellant's brief in the consolidated case number 78-5428, Supreme Case No. 64, 362.

ARGUMENT III

FERGUSON'S RIGHT TO CONFRONT WITNESSES WAS  
VIOLATED WHEN THE COURT BELOW CONSIDERED  
EVIDENCE NOT OF RECORD IN THIS CASE

The Sixth Amendment of the United States Constitution gives the right of an accused to confront witnesses against him or her. This right applies to state as well as federal trials. McKingly v. Wainwright, 719 F.2d 1525 (11th Cir. 1983). This is a fundamental right, the purpose of which is to not only allow the defendant a chance to cross-examine but also to allow the factfinder the opportunity to observe and judge the credibility of the witness. Hutchins v. Wain-



wright, 715 F.2d 512 (11th Cir. 1983). Even restrictions on cross-examination can eviscerate the Sixth Amendment right to confront witnesses and compel reversal. United States v. Haimowitz, 706 F.2d 1549 (11th Cir. 1983); United States v. Barkowitz, 662 F.2d 1127 (5th Cir. 1981).

In this case, FERGUSON has been denied his right to confront witnesses against him. In August, 1978, Dr. Jaslow was appointed for the purpose of determining FERGUSON's competency to stand trial in case number 78-5428. (Appendix 4) The report reveals that he relied on psychological reports prepared for case number 78-5428. Dr. Jaslow then testified at the trial in case number 78-5428, that is, subsequent to the instant case. The subject of his testimony was FERGUSON's sanity at the time of the incident which was the subject of case number 78-5428. FERGUSON had no opportunity to confront or rebut the facts of the August 24, 1978 report which was used against him for purposes of resentencing in this case. The focus of the testimony not only of Dr. Jaslow, but of the other doctors appointed in the subsequent case, was the issue of FERGUSON's sanity in 1978. The opinions rendered by Drs. Stillman, Jarrett, Marquit, and Elenewski were based on examinations conducted after the trial and sentencing in the instant case. Reliance on this testimony violated FERGUSON's Sixth Amendment rights to confront witnesses against him and to be able to effectively cross-examine them relative to this issue of sentencing in this case.

CONCLUSION

The procedures used in resentencing were improper and violative of Appellant FERGUSON's constitutional rights. As a result, the death penalty imposed should be vacated. At minimum, FERGUSON is entitled to an evidentiary hearing in which mitigating factors can be effectively presented and can be weighed using the proper standards.

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 19 day of November, 1984.

LAW OFFICE OF KATHLEEN PHILLIPS  
Attorney for Appellant

By: *Kathleen Phillips*  
KATHLEEN PHILLIPS, ESQ.  
3081 Salzedo Street  
Second Floor  
Coral Gables, Florida 33134  
  
(305) 441-0870

LAW OFFICE OF JOEL LUMER, ESQ.  
Attorney for Appellant  
711 Biscayne Building  
19 W. Flagler Street  
Miami, Florida 33130

(305) 374-4340