

IN THE SUPREME COURT OF FLORIDA

CASE NO. 96,658

JOHN ERROLL FERGUSON, etc.,

Appellant,

vs.

THE STATE OF FLORIDA,

Appellee.

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AN APPEAL FROM THE CIRCUIT COURT OF THE  
ELEVENTH JUDICIAL CIRCUIT, MIAMI-DADE COUNTY, FLORIDA

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**ANSWER BRIEF OF APPELLEE**

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**CERTIFICATE REGARDING FONT SIZE AND TYPE**

The undersigned attorney hereby certifies that this Answer Brief of Appellee is typed in Times New Roman, 14-point type.

## STATEMENT OF THE CASE AND FACTS

### A. Direct Appeals and Historical Facts

The Defendant was convicted of six (6) counts of murder for the execution-style killings of six people in Carol City (Carol City murders). Ferguson v. State, 417 So. 2d 639 (Fla. 1982). The historical facts of these crimes were set forth by this Court as follows:

On July 27, 1977, at approximately 8:15 p.m. the defendant, posing as an employee of the power company, requested permission from Margaret Wooden to enter her Carol City home and check the electrical outlets. After gaining entry and checking several rooms, the defendant drew a gun and tied and blindfolded Miss Wooden. He then let two men into the house who joined the defendant in searching for drugs and money.

Some two hours later, the owner of the house, Livingston Stocker, and five friends returned home. The defendant, who identified himself to Miss Wooden as "Lucky," and his cohorts tied, blindfolded and searched the six men. All seven victims were then moved from the living room to the northeast bedroom.

Shortly thereafter, Miss Wooden's boyfriend, Miller, entered the house. He too was bound and searched. Then he and Miss Wooden were moved to her bedroom and the other six victims returned to the living room.

At some point one intruder's mask fell, revealing his face to the others. Miller and Wooden were kneeling on the floor with their upper bodies lying across the bed. Wooden heard shots from the living room then saw a pillow coming

toward her head. She was shot. She saw Miller get shot then heard the defendant run out of the room. She managed to get out and run to a neighbor's house to call the police.

When the police arrived they found six dead bodies. All had been shot in the back of the head, their hands tied behind their backs. One of the victims, Johnnie Hall, had survived a shotgun blast to the back of his head. He testified to the methodical execution of the other men.

On September 15, 1977, the defendant and three co-defendants were indicted for the offense. Adolphus Archie, the "wheel-man", was allowed to plead guilty to second degree murder and a twenty-year concurrent sentence on all counts in exchange for testimony at trial. He testified he had dropped the defendant, Marvin Francois, and Beauford White in the Carol City area to "rip off" a drug house. He didn't see the actual shooting but later saw weapons and jewelry in Beauford's and Francois' possession.

Ferguson, *supra*, 417 So. 2d at 640-641.

The Defendant was also separately convicted of two (2) counts of murder for the killing of a young couple in Hialeah (Hialeah murders). Ferguson v. State, 417 So. 2d 631 (Fla. 1982). The historical facts of these murders were set forth by this Court as follows:

The facts reveal that the two victims were seated in an automobile and while seated therein a gunshot was fired through the window striking Brian Glenfeld in the arm and chest area. A significant amount of bleeding followed and

this victim's blood was found throughout many areas of the front of the automobile as well as on the clothing of Belinda Worley. Following the shooting, the female victim ran many hundreds of feet from the car in an attempt to allude [sic] the defendant and was finally overtaken in some rather dense overgrowth and trees. She was subjected to many physical abuses by this defendant, including but not limited to, sexual penetration of her vagina and anus. The discovery of embedded dirt in her fingers, on her torso both front and back and in many areas within her mouth and the findings of hemorrhaging around her vagina and anal cavity would indicate that she put up a significant struggle and suffered substantially during the perpetration of these indignities upon her body. Expert testimony indicates that she was a virgin at the time of the occur[r]ence of this crime. The position of her body and the location of the wounds on her head would indicate that she was in a kneeling position at the time she was shot through the top of the head. She was left in a partially nude condition in the area where the crime was committed to be thereafter fed upon by insects and other predators. Physical evidence would substantiate that following the attack upon Belinda Worley the defendant went back to the car and shot Brian Glenfeld through the head.

Ferguson, supra, 417 So. 2d 636.

This Court affirmed the convictions in both cases, but remanded for reconsideration of the sentence by the judge, because it could not be determined whether there had been a proper consideration of mitigating factors. After a consolidated resentencing hearing, the trial court again imposed all eight (8) sentences

of death. This Court affirmed on appeal. Ferguson v. State, 474 So.2 d 208 (Fla. 1985).

The mandate was issued on October 15, 1985.

### **B. Prior Post-Conviction Proceedings**

On October 15, 1987, the Defendant, through his mother, Dorothy Ferguson, as next friend, filed a motion for post-conviction relief, attacking his convictions and sentences in both the Carol City and Hialeah cases. (R. 6). The Defendant requested that the state post-conviction court stay these proceedings, on the grounds that he was incompetent. (R. 7).

The post-conviction court appointed at least six (6) mental health experts to examine the Defendant for competency during the post-conviction proceedings. (R. 7-8). The Defendant additionally retained three (3) mental health experts of his own. (R.9). The post-conviction court also ordered numerous physical tests to be conducted on the Defendant, including a magnetic resonance imaging of the brain (MRI), a CAT scan, an electroencephalogram (EEG), a complete neurological sensory examination, a complete neuropsychological evaluation, a complete physical, and complete blood tests. (R. 8). After the completion of all evaluations and testing, the court conducted a three (3) day evidentiary hearing “on the question of the Defendant’s competency to



participate in these post-conviction proceedings.” Id.

During the evidentiary hearing to determine the Defendant’s competence to participate in post-conviction proceedings, the court heard the testimony of two psychiatrists, two psychologists, one psychiatrist/neurologist, one neurologist, one document examiner as to the Defendant’s various correspondence, and five (5) corrections officers who had observed the Defendant at both Florida State Prison and in the Dade County jail. (R. 8, 11). The post-conviction court summarized the evidence presented as follows:

In 1978, at the time of the Defendant's trials, the Defendant was examined by four psychiatrists: Dr. Stillman found the Defendant incompetent, and Drs. Jaslow, Mutter and Graff found the Defendant competent. The Defendant was also examined by three psychologists: Drs. Elenewski and Marquit found the Defendant incompetent, and Dr. Reichenberg found him competent. Judge Fuller, the original trial judge, found the Defendant competent to stand trial.

Prior to the evidentiary hearing in August of 1988, the Defendant was examined by three experts retained by his counsel, Drs. Merikangas, Stillman and Elenewski. Only Drs. Merikangas and Elenewski testified at the hearing. The Defendant was also examined by five court-appointed doctors, Drs. Miller, Corwin, Haber, Scheinberg and Lesser. All the court-appointed doctors testified at the hearing, with the exception of Dr. Lesser.

Dr. Merikangas, a psychiatrist and neurologist, testified that the Defendant suffers from schizophrenia, chronic paranoid type, and is incompetent to participate in these proceedings. Dr. Merikangas initially concluded after his physical, neurological and psychiatric examination of the Defendant, that the Defendant had a paranoid psychosis with signs of brain damage. He specifically stated that the Defendant was suffering from a neurologic condition that was leading to his further deterioration. Dr. Merikangas testified at the hearing, that after learning of the results of the tests ordered by the Court that although he still found evidence of "neurological soft signs", he concluded that the Defendant is a paranoid schizophrenic, but is not suffering from a progressive neurological disease.

Dr. Elenewski, a psychologist, concluded that the Defendant is a chronic paranoid schizophrenic and that much of his behavior has an organic flare to it. Dr. Elenewski found the Defendant to be incompetent. Dr. Elenewski had first examined the Defendant in August of 1978, prior to his trial in Case No. 78-5428, and found him incompetent at that time, specifically stating that the Defendant had a severely limited capacity to comprehend his attorney's instructions and advice and to collaborate with counsel in maintaining a consistent legal strategy. Yet, less than two weeks after that opinion was rendered, the Defendant was able to testify in a rational and understandable manner in a motion to suppress. In his 1988 evaluation, Dr. Elenewski reported that the Defendant told him that he was in a mental hospital, not in Florida State Prison, that the prison guards were trying to poison his food, and that he did not watch television because the guards were sending messages over the television. No corroboration was presented by the Defendant of the alleged symptoms.

Dr. Corwin, a court-appointed psychiatrist testified that the Defendant has an active psychosis which goes back to 1971.

Dr. Corwin had previously, in 1974, found the Defendant to be schizophrenic and incompetent. In his evaluation in June of 1988, Dr. Corwin reported that although the Defendant made statements that were consistent with schizophrenia, he more frequently than not, did not reply to the questions in a manner which was consistent with schizophrenia. Dr. Corwin testified that it was also possible that the Defendant has contrived to exaggerate his condition for his own purpose, to escape the electric chair. Dr. Corwin concluded that with this combination of events, the Defendant was incompetent because it would be difficult for his attorneys to consult with him and for him to participate in these proceedings. Dr. Corwin, however, did not testify that the Defendant did not have the ability to assist counsel or to understand the proceedings.

Dr. Scheinberg, the court-appointed neurologist, found no evidence of a neurological impairment or disease in the Defendant, including no evidence of "soft neurological signs." The tests ordered by the Court revealed no brain damage, and were all generally within normal limits.

Dr. Haber, a court-appointed psychologist, opined that the Defendant was malingering, not giving a true, factual and actual recital of his symptoms and condition. Dr. Haber's opinion was based on his examination of the Defendant, along with various materials provided by the parties, including letters allegedly written by the Defendant in prison. Dr. Haber concluded that although the Defendant may suffer from some disorders, in particular an antisocial personality disturbance, and is in need of some sort of treatment, the Defendant is competent for these proceedings. Dr. Haber testified that the Defendant presented symptoms which were normally indicative of organic as opposed to mental illness, yet there was no evidence to support a diagnosis of organic brain damage. Dr. Haber stated that the Defendant's behavior was inconsistent with the illness

that he exhibited and not credible.

Dr. Miller, a court-appointed psychiatrist, also concluded that the Defendant was competent to participate in these proceedings and able to assist his counsel if he wanted to. Dr. Miller did not believe that the Defendant was suffering from any major mental illness, but if he was mentally ill, the Defendant presented an exaggerated set of symptoms far beyond any that he might in fact have. Dr. Miller's opinion was based on the same materials provided to Dr. Haber. Dr. Miller testified that the symptoms exhibited by the Defendant, including memory impairment, were not consistent with a person being a paranoid schizophrenic if that person is not otherwise brain impaired. He stated that the negative results on the neurological tests did not support a conclusion of brain damage.

There was testimony before the Court from five corrections officers who had the opportunity to view the Defendant at both Florida State Prison and in the Dade County Jail. Richard Barrick, the corrections officer from Florida State Prison, testified that he observed none of the strange behavior which the Defendant showed Dr. Elenewski. He testified that the Defendant acted like the average prisoner, in that he would listen to the radio, watch television, talk to other prisoners, answer appropriately when addressed by the officers, and would even play chess or checkers with the other prisoners. The four corrections officers from the Dade County Jail, Janice Smith, Eddie Ford, Kenneth Williams, and Mark Ford, testified that the defendant had conversations with them about what was on television, that he would act rationally, would usually eat his food, and was very aware of his telephone privileges. Both Eddie Ford and Mark Ford testified that the only time the Defendant acted or spoke irrationally in their presence was when he was being transported for his psychiatric evaluations.

There was also evidence before the Court from the jail and prison records. Included in those records are notes that Drs. Paredo and Alcantara, two prison psychiatrists, in October of 1986, prior to a clemency hearing, determined that the Defendant was suffering from paranoid delusions and did not know what clemency meant. However, another prison psychiatrist, Dr. Sotomayer, who saw the Defendant two weeks before and two weeks after Drs. Paredo and Alcantara, found the Defendant to be coherent, rational, oriented to time and place and diagnosed him to be an antisocial personality. Also included in the jail and prison records are various writings which through the testimony of Frank Norwitch, the questioned documents examiner, are very likely attributable to having been written by the same person. It is reasonable to infer from Mr. Norwitch's testimony, and that of David Clark, an institutional counselor at Florida State Prison, that if the same person wrote or dictated those documents, then it was the Defendant. Both Drs. Miller and Haber testified that the person who presented all the symptoms to them, which the Defendant did, would not have been able to write or compose those letters with the thought process that is necessary over that period of time. (R. 9-12).

After the above summary of evidence, the post-conviction court found the petitioner to be competent, as follows:

## **FINDINGS OF FACT AND CONCLUSIONS OF LAW**

In determining whether the Defendant is presently competent to proceed with these post-conviction proceedings, this Court has utilized the test established in Dusky v. United States, 362 U.S. 402, 80 S.Ct. 788, 4 L.Ed.2d 824 (1960), for determining a defendant's competency to stand trial. The test is whether a defendant "has sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding--and whether he has a rational as well as factual understanding of the proceedings against him." Id. at 402. See also Hill v. State, 473 So. 2d 1253 (Fla. 1985).

In applying the foregoing legal standard to the evidence presented concerning the Defendant's competency, this Court finds that the Defendant has failed to meet his burden to prove the fact of his incompetency. See Muhammad v. State, 494 So. 2d 969 (Fla. 1986); Johnson v. State, 440 So. 2d 464 (Fla. 1st DCA 1983); Price v. Wainwright, 759 F.2d 1529 (11th Cir. 1985). This Court finds that there is substantial competent evidence to find that the Defendant does not suffer from a major mental illness, and that he has the present ability to understand the proceedings and to assist counsel if he so chooses.

This Court finds that the more credible evidence demonstrates that the Defendant is malingering, and as Dr. Miller stated, is trying to portray himself as a "very sick puppy" without any lucid moments. The evidence of the Defendant's behavior in prison and jail shows otherwise, and is consistent with what Dr. Haber described as a sickness or remission of convenience. Drs. Haber's and Miller's opinions are logical and supported by the testimony of the lay witnesses.

This finding is based on a review of all the evidence

and testimony presented and necessitates an acceptance of Drs. Haber's and Miller's findings that the Defendant is competent to proceed with those post-conviction proceedings and a rejection of Drs. Merikangas, Elenewski and Corwin's findings to the contrary.

(R. 12-13).

After having made the above factual findings and expressly concluding that the Defendant was competent to proceed, the post-conviction court stated that, in the “alternative,” competency was not at issue in post-conviction proceedings:

**ADDITIONAL CONCLUSIONS OF LAW**

Although this court has determined that the Defendant is competent to proceed with these post-conviction proceedings, this court finds that the Defendant’s motion to stay the post-conviction proceedings should be denied on the alternative grounds that incompetency is not an issue for a court to address when a motion for post-conviction relief is filed.

(R. 13).

Having found the Defendant competent, the post-conviction court then allowed him to supplement his motion for post-conviction relief. (R. 17). The court then conducted extensive evidentiary hearings on, inter alia, the claims of 1) ineffective

assistance of counsel at both penalty phases, for failure to investigate and present evidence of deprived family background and mental health mitigation; 2) alleged Hitchcock v. Dugger, 481 U.S. 393 (1987), error; 3) Brady v. Maryland, 373 U.S. 83 (1963) violation for failure to disclose evidence as to some of the police officers' collateral crimes; and, 4) ineffective assistance of counsel for failure to object to the State's use of peremptory challenges. There were no further claims of incompetence. Ferguson v. State, 593 So. 2d 508 (Fla. 1992). The trial court then denied relief.

### **C. Appeal of Prior Post-Conviction Proceedings**

This Court affirmed the denial of post-conviction relief. Ferguson v. State, 593 So. 2d 508 (Fla. 1992). On this appeal, with respect to competency, the Brief of Appellant raised the issue first, as follows:

I. THESE RULE 3.850 PROCEEDINGS SHOULD BE STAYED PENDING A VALID DETERMINATION THAT FERGUSON IS COMPETENT TO ASSIST HIS COUNSEL IN THE PROCEEDINGS.

Initial Brief of Appellant, FSC Case No. 76,458, (IB) at p. 5.<sup>1</sup>

The Defendant then initially introduced the above argument as follows:

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<sup>1</sup> Pursuant to Fla. Stat. 90.202(1), the Appellee hereby respectfully requests that this Court take judicial notice of the parties' prior pleadings.



As shown below, (a) Judge Snyder's ex parte contacts with the prosecution regarding the competency proceedings taint the judge's competency rulings and require that they be set aside; (b) Judge Snyder's determination that competency is irrelevant in Rule 3.850 proceedings is incorrect as a matter of law; and (c) Judge Snyder's determination that Ferguson is competent to assist his counsel in these proceedings is not supported by, and is contrary to, the record. For all these reasons, until a valid determination has been made that Ferguson is competent to assist his counsel, the proceedings should be abated, and this Court need not reach the merits of the issues addressed in the proceedings.

Initial Brief of Appellant, Case No.76,458, at pp. 6-7 (emphasis added).

The Defendant then fully briefed each of the above cited subarguments. Argument (c), which attacked the evidentiary basis for the post-conviction judge's findings of competence, was set forth at pp. 23-34 of the Initial Brief. The Appellant concluded, "for all the foregoing reasons, this Court should conclude that Ferguson is not competent to assist his counsel in these proceedings and should therefore abate the proceedings." Initial Brief, FSC Case No. 76,458, at pp. 33-34.

The State's answer brief, in turn, expressly noted that the judge had made detailed findings that Ferguson was competent and:

Thus, if the evidence supports the initial conclusion that Ferguson was competent, the issue of whether competency

is required for Rule 3.850 proceedings is little more than unnecessary academic exercise in this case. It would be significant only if this Court rejects the lower court's conclusion that Ferguson was competent.

Answer Brief, FSC Case No. 76,458, at pp. 24-25. The State then also exhaustively briefed the evidentiary basis in support of the post-conviction court's finding of competence. Id. at pp. 28-40.

This Court, in accordance with the phraseology utilized by the Defendant in framing the issue on appeal, held:

Ferguson also raises the following claims: (1) these proceedings should be stayed pending another determination that Ferguson is competent to proceed; . . . These claims are without merit and may be summarily denied.

Ferguson, 593 So. 2d at 513.

Thereafter, the Defendant filed a petition for writ of habeas corpus in this Court, which was also denied. Ferguson v. Singletary, 632 So. 2d 53 (Fla. 1993). The Defendant then pursued federal remedies, and his petition for a writ of habeas corpus is pending in the federal district court.

#### **D. Second Post-Conviction Proceedings in the Court Below**

On July 9, 1999, the Defendant filed a Motion to Reinstate Certain Post-Conviction Claims and Stay Further 3.850 Proceedings. (Motion) (SR 2).<sup>2</sup> The lower court held a hearing on the motion on August 18, 1999. (R. 20-36). The defense position was that its motion should be treated as “a new 3.850 on the grounds that there has been a change in the law in light of Carter.” (R. 24). According to the Defendant, the prior 1987 post-conviction finding of competency had no “collateral estoppel effect.” Id. As the prior judge had made an “alternative” ruling, “you can’t be sure that the court considered each ruling as carefully as it would have, if they were [the] only grounds for decision.” Id. The Defendant added, “since the judge at that time understood the law to be Jackson, if there was no right to be competent, we can’t be sure that he fully considered the issue the way he would have if he had believed there is a constitutional right as set forth in Carter to be competent. That is why it wasn’t a full and fair hearing.” (R. 32-33).

The lower court denied the motion, and stated it would provide “a brief order to that effect.” (R. 35). Said order was filed on September 16, 1999, and states:

During a three day hearing conducted in 1988, the  
presiding Judge, Arthur Snyder, conducted an evidentiary

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<sup>2</sup> The symbol SR. refers to the 3-volume supplement record on appeal, dated December 15, 1999.

hearing regarding the examination of the defendant by numerous doctors and the performance of various tests to determine the defendant's competency. Following the rather extensive proceeding, Judge Snyder provided a fourteen page Order, in which, among other things, the Court found the Defendant to be competent and malingering. A copy of Judge Snyder's Order Denying Motion to Stay Post-Conviction Proceedings is attached hereto. The Defendant took a direct appeal to the Florida Supreme Court which affirmed Judge Snyder's rulings.

In the instant Motion, the Defendant seeks to re-litigate those matters claiming, without a scintilla of evidence, that Judge Snyder did not adequately review the Defendant's competency based upon the Judge's conclusion in his order that the Defendant's Motion to Reinstate Certain Post Conviction Claims and Stay Further 3.850 Proceedings should be denied "on the alternative ground that incompetency is not an issue for a court to address when a motion for post-conviction relief is filed". Without dealing with the merits of that statement, either now or at the time it was made, a review of the Order reveals a well-thought-out, well-reasoned, and detailed order supported by competent, substantial evidence. The Defendant was given a full and fair evidentiary hearing in which there was testimony from all relevant doctors with regard to the Defendant's competency. It is without question that the Defendant was provided with due process of law and that Judge Snyder properly concluded, as it was his right to do, that the defendant was competent and malingering.

Accordingly, this Court having found the Defendant's current motion to be completely without merit, it is hereby

**ORDERED AND ADJUDGED** that said Motion be, and the same is, **DENIED**.

(R. 3-4). The Defendant has appealed.

## **SUMMARY OF ARGUMENT**

The Appellant is attempting to relitigate post-conviction proceedings in the trial court which have been final for many years. Contrary to the Appellant's argument, the Appellant received a full and fair competency hearing in conjunction with those former post-conviction proceedings; the hearing conducted by the lower court was not, in any way, inadequate. Furthermore, the Appellant sought and obtained full appellate review of those former post-conviction proceedings, including the extensive competency hearing, in this Court. There is no basis for either this Court or the trial court to revisit that which was fully litigated many years ago. The lower court properly summarily denied the Defendant's claim as a successive attempt to raise issues previously raised and rejected on the merits.

## ARGUMENT

### THE LOWER COURT PROPERLY DENIED THE DEFENDANT'S MOTION SEEKING TO REOPEN POST-CONVICTION PROCEEDINGS.

This Court, in Carter v. State, 706 So. 2d 873, 875 (Fla. 1997), held that, “a judicial determination of competency is required when there are reasonable grounds to believe that a capital defendant is incompetent to proceed in post-conviction proceedings in which factual matters are at issue, the development or resolution of which requires the defendant’s input.” The Appellant contends that Carter allows him to reopen the prior 1987 post-conviction proceedings and obtain another competency hearing. The Appellant has ignored the fact that despite Carter having been decided in 1997, the Defendant herein obtained the benefit of Carter a decade earlier, during his 1987 post-conviction proceedings. The Appellant in fact obtained “a judicial determination of competency” prior to the filing and resolution of his substantive post-conviction claims.

As set forth in the Statement of Facts at pp. 4-5, the 1987 post-conviction judge, upon motion by defense counsel, appointed at least six (6) mental health experts to examine the Defendant for competency. The Defendant retained three (3) additional experts of his own. Upon request by the defense, the judge also ordered numerous

tests such as an MRI, a CAT scan, an EEG, a neurological sensory exam, neuropsychological evaluation, blood tests, etc. After such extensive preparation, the post-conviction court then conducted a 3-day evidentiary hearing “on the question of Defendant’s competency to participate in these post-conviction proceedings.” (R. 8). At said hearing, the post-conviction court considered and evaluated testimony from two (2) psychiatrists, two (2) psychologists, one (1) psychiatrist/neurologist, one (1) neurologist, one (1) document examiner on the defendant’s various correspondence, and five (5) corrections officers, who throughout the years had observed the Defendant’s behavior at both Florida State prison and the Dade County jail. (R. 8, 11). The post-conviction judge then meticulously summarized the evidence presented, along with its strengths and weaknesses, as detailed in pp. 5-9, herein. See also R. 9-12. Based upon said evidence, the judge found that, “there is substantial competent evidence to find that the Defendant does not suffer from a major mental illness, and that he has the present ability to understand the proceedings and to assist counsel if he so chooses.” (R. 12) (emphasis added). The judge had expressly utilized the same criteria required in Carter:

In determining whether the Defendant is presently competent to proceed with these post-conviction proceedings, this Court has utilized the test established in Dusky v. United States, 362 U.S. 402, 80 S.Ct. 788, 4 L.Ed. 2d 824 (1960), for determining a defendant’s competency to



stand trial. The test is whether a defendant “has sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding—and whether he has a rational as well as factual understanding of the proceedings against him.” Id. at 402. See also Hill v. State, 473 So. 2d 1253 (Fla. 1985).

(R. 12). After having expressly concluded that the Defendant was competent, the post-conviction court stated that in the “alternative,” competency was not at issue in post-conviction proceedings:

**ADDITIONAL CONCLUSIONS OF LAW**

Although this court has determined that the Defendant is competent to proceed with these post-conviction proceedings, this court finds that the Defendant’s motion to stay the post-conviction proceedings should be denied on the alternative grounds that incompetency is not an issue for a court to address when a motion for post-conviction relief is filed.

(R. 13) (emphasis added).

As is abundantly clear from the above, the Appellant received the benefit of Carter in his prior post-conviction proceeding. The lower court’s summary dismissal of the Defendant’s attempt to relitigate the very same issues raised and rejected in his prior post-conviction proceedings was proper under Florida law. See Fla.R.Crim.P. 3.851, 3.850(f) (“A second or successive motion may be dismissed if the judge finds

that it fails to allege new or different grounds for relief and the prior determination was on the merits”); Mills v. State, 684 So.2d 801, 804, n. 3 (Fla. 1996); Clark v. State, 569 So. 2d 1265 (Fla. 1990).

The Appellant, in the lower court, argued that “collateral estoppel” did not preclude the relitigation of his claims, because of the “alternative” ruling by the prior post-conviction court pursuant to Jackson v. State, 452 So. 2d 533 (Fla. 1984). The Appellant has taken the same position in this Court, as seen in his reliance upon Downs v. State, 645 So. 2d 66 (Fla. 4th DCA 1994). See also Brief of Appellant at p. 19. The doctrine of “collateral estoppel,” however, is part of the guarantee against double jeopardy, as embodied in the Fifth Amendment, and serves to preclude the State from prosecuting a second charge when it has previously suffered an adverse finding as to some fact which is essential to the prosecution of this second charge. Simpson v. Florida, 403 U.S. 384 (1971); State v. McCord, 407 So. 2d 1147 (Fla. 1981); Davis, supra. It has no applicability to these post-conviction proceedings. As noted above, these proceedings are governed by Fla.R.Crim.P. 3.851 and 3.850, which preclude relitigation of claims raised and rejected in prior post-conviction proceedings. The Defendant herein received “a judicial determination of competence,” as required in Carter, 706 So. 2d at 875, in the prior proceedings. The fact that the judge made an

“alternative” ruling, after having ruled upon the merits and expressly found the Defendant competent, has no bearing on this case.

The Appellant’s claim that he was deprived of the right to appeal the prior post-conviction court’s factual findings is equally without merit. The relevant portions of the Appellant’s brief in the prior appellate proceedings in this Court have been detailed herein at pp. 12-14. The Appellant in that brief expressly argued that the finding of competency after the 3-day evidentiary hearing at issue, was not “a valid determination,” because the judge should have been recused,<sup>3</sup> and his findings were “not supported by” the “record.” Initial Brief of Appellant, FSC Case No. 76458, at pp. 5-7. The Appellant had then requested that all post-conviction proceedings, be “stayed,” “until a valid determination has been made that Ferguson is competent to assist his counsel.” *Id.* This Court, in accordance with the Appellant’s own phrasing of the issue, then rejected the claim as “without merit,” having characterized the claim

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<sup>3</sup> The Appellant had claimed that an instance of “ex parte” by the judge in trying to facilitate the scheduling of the tests requested by the defense, in light of the difficulties with defense counsel being an out-of-state practitioner, was grounds for recusal. A motion for recusal had been filed a year after counsel had first been apprised, and was denied. Appellant then filed for a writ of prohibition which was unanimously denied by this Court. Ferguson v. Singletary, FSC Case No. 74,186. A petition for a writ of certiorari in the United States Supreme Court was likewise denied. 107 L.Ed. 2d 341 (1989).

as “(1) these proceedings should be stayed pending another determination that Ferguson is competent to proceed.” 593 So.2 d at 513.

The Appellant now claims that the above use of the word “another” means that this Court had held that the Defendant was only entitled to one competency determination at trial, and not to “another” during post-conviction proceedings, in accordance with Jackson. See Brief of Appellant at p. 21. The Appellant’s construction, in light of the briefs of the parties, and the record herein, is utterly without merit. The record before this Court reflected both a competency hearing at trial, and another 3-day hearing during post-conviction proceedings. The Defendant’s claim was that yet another post-conviction hearing was necessary, which this Court rejected.

In the alternative, if, in fact, this Court concluded that, for some reason, the substantive question of Ferguson’s competence was not considered in the 1992 appeal, the remedy would not be that which was requested in the lower court - i.e., further trial court hearings on competency. The competency issue was fully litigated in the trial court in a full and fair and extensive evidentiary hearing. There is a full record of that competency hearing from the 1992 appeal. The substantive issue of competency was fully briefed in this Court by both parties in the 1992 appeal. The State, in the

Appendix to this Brief, has included the argument regarding the sufficiency of evidence at the previous competency hearing. Whether in an independent habeas corpus proceeding in this Court, or, as part of this proceeding, the most relief that could conceivably exist, under any circumstances, would be the appellate review of the previous determination that Ferguson was competent. That should not be a license to consider any allegations from new experts who did not testify at that hearing, as there has been no showing that the extensive evidentiary hearing on competency was in any way inadequate. Thus, to the extent needed, the State relies on its prior argument, from the 1992 appeal, that the record reflects, by substantial, competent evidence, that the Defendant was competent at the relevant times in 1988.

Furthermore, to the extent that the Appellant may be relying on hospitalizations or opinions of experts years after the prior post-conviction proceedings in 1988, the State would note that not only have these opinions never been tested in any court, but that such events have no bearing on whether the Defendant was properly found to be competent at that time. Competency, as noted by the lower court, is fluid, and a person can be competent at one time, and incompetent at another time. (R. 25). The issue of competency herein relates solely to what was established at the prior hearing.

In sum, the lower court properly dismissed the instant attempt to relitigate an issue previously raised and rejected on the merits in accordance with the very case law now relied upon by the Appellant. The only complaint herein is that the prior post-conviction court gave the Appellant the benefit of Carter 10 years before the decision was announced by this Court.

The State recognizes that the Appellant has also complained that the lower court's reliance upon the prior finding of competence was "misplaced," that the court should have "reach[ed]" the issue of Defendant's prior competence, and should have overruled the prior judge's findings. Brief of Appellant at pp. 23-32. However, such a procedure would clearly violate Florida's prohibition against successive post-conviction motions which seek to relitigate issues previously raised and rejected, and would further seriously damage the basic concepts of law of the case and finality. The instant case is, after all, a classic case of relitigation. The Appellant has even suggested that another determination of Ferguson's 1988 competency be made where, "[t]he same witnesses who testified [in 1988] could be recalled, if necessary, and the same reports submitted into evidence." Brief of Appellant at p. 46. Of course, according to the Appellant, "the factual conclusions" drawn by the prior judge should be "owed no deference; they were not necessary to the judgment and were clearly erroneous." Id.

There is no authority for ignoring the factual findings of the judge who assessed the credibility of witnesses. Walls v. State, 641 So. 2d 381, 389-90 (Fla. 1994). The lower court's summary denial of any request to overrule prior findings affirmed by this Court, was in accordance with Fla.R.Crim.P. 3.850(f). It was also in accordance with the stated purpose for Carter: "The timely commencement and resolution of post conviction proceedings." 706 So. 2d at 877.

Likewise, the Appellant's complaint that the lower court did not decide "whether Carter could be applied retroactively to Ferguson," is also without merit. Brief of Appellant at p. 32. The retroactivity of Carter was not and is not at issue in the instant case. As is abundantly clear herein, this Defendant received the benefit of Carter a decade prior to its announcement by this Court. The lower court thus properly declined to reach the issue. The State would note, however, that the decision does not mention any "constitutional" basis. The purpose, as set forth in Carter, was as follows:

We adopt these procedures in the hope of ensuring the consideration of all viable collateral claims a death-row inmate may have, thereby furthering society's interest in the proper imposition of the death sentence while at the same time promoting the timely commencement and resolution of postconviction proceedings.

706 So. 2d at 876-77.

Finally, the “factual circumstances” alleged to require the Defendant’s consultation and assistance herein are entirely without merit. Appellant has first stated that consultation with the Defendant is necessary to establish ineffective assistance of counsel for failing to investigate mental health and childhood abuse background, and to show that the Hitchcock error was not harmless. The Appellant has neglected to mention that after being found competent in the prior proceedings, another post-conviction judge conducted extensive evidentiary hearings on these claims. Trial counsel had had several mental health experts examine the Defendant, had spoken with these experts, and had reviewed reports detailing the Defendant’s mental health history. They had also delved into his family background by interviewing family members. 593 So.2d at 510-13. These witnesses and yet other experts and family members were also available to post-conviction counsel, and in fact utilized at the evidentiary hearing. Id. Appellant has not stated what additional information from the Defendant would be necessary.

The Appellant also claims assistance from the Defendant to be necessary for the resolution of a prior Brady claim involving collateral crimes by some of the investigatory police officers (the Alonso prosecution). The first and foremost element



of a Brady violation is, however, the State's suppression of information. Breedlove v. State, 580 So. 2d 605, 606-607 (Fla. 1991). The Appellee fails to see how the Defendant can assist in establishing that the State suppressed evidence. Moreover, Breedlove, supra, addressed the same Brady claim arising out of the Alonso prosecution, and in the context of Breedlove's 1979 jury trial and conviction. This Court concluded that the prosecution, at the time of the trial, was not on notice of the detectives' crimes, and thus did not suppress any evidence. The Court further held that the evidence of the Alonso officers' collateral crimes was not admissible, and thus not material under Brady. Lastly, the Appellant has stated that the Defendant could assist in establishing a Batson v. Kentucky, 476 U.S. 77 (1986), violation. Batson, however, was decided years after the trial herein, and is not applicable retroactively, pursuant to Allen v. Hardy, 478 U.S. 295 (1986). This kind of legally barred claim does not require any assistance from the Defendant either. Carter, 706 So. 2d at 876, n. 4.

### **CONCLUSION**

Based on the foregoing, the order of the lower court denying post-conviction relief should be affirmed.

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**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that a true and correct copy of the foregoing Answer Brief of Appellee was mailed this 17th day of March, 2000, Hogan & Hartson, L.L.P., 555 13th Street, N.W. Washington, D.C. 20004.

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FARIBA N. KOMEILY