

IN THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA,)
)
)
 PLAINTIFF/APPELLEE,
)

)
 v.
)

CASE NO. 96,658

)
 JOHN ERROLL FERGUSON, OR)
 DOROTHY FERGUSON, INDIVIDUALLY)
 AND AS NEXT FRIEND ON BEHALF OF)
)
 JOHN ERROLL FERGUSON)
)
)
 DEFENDANT/APPELLANT.)

)

REPLY BRIEF OF APPELLANT

THE STATE'S ANSWER BRIEF IS REMARKABLE MORE FOR WHAT IT CONCEDES THAN FOR WHAT IT ARGUES. EFFECTIVELY, THE STATE DOES NOT CONTEST THAT CARTER V. STATE, 706 SO. 2D 873 (FLA. 1997), SHOULD BE APPLIED RETROACTIVELY. NOR DOES THE STATE DISPUTE THAT JOHN FERGUSON IS CURRENTLY SUFFERING FROM SCHIZOPHRENIA, AND THAT THAT FACT ALONE ALMOST CERTAINLY PROVES HE WAS SUFFERING FROM SCHIZOPHRENIA IN 1989 DURING HIS INITIAL 3.850 PROCEEDINGS. RATHER THAN CHALLENGE THESE FUNDAMENTAL POINTS, THE STATE ARGUES THAT FERGUSON ALREADY RECEIVED THE BENEFIT OF CARTER THROUGH JUDGE SNYDER'S 1988 HEARING ON HIS COMPETENCE.

THE STATE IS WRONG. AS EXPLAINED AT LENGTH IN FERGUSON'S OPENING BRIEF, JUDGE SNYDER'S EARLIER RULING CANNOT PRECLUDE RENEWED CONSIDERATION OF FERGUSON'S COMPETENCE FOR TWO INDEPENDENT REASONS: IT WAS REACHED IN THE ALTERNATIVE, AND IT WAS NOT REVIEWED ON APPEAL. THE STATE BARELY ADDRESSES THESE ARGUMENTS, APPARENTLY CLAIMING THAT THEY ARE INAPPLICABLE. IT BASES THIS CONCLUSION UPON

TWO DECISIONS EXPLAINING THE RELATIONSHIP BETWEEN COLLATERAL ESTOPPEL AND DOUBLE JEOPARDY IN CRIMINAL CASES. NOT ONLY DO THESE DECISIONS FAIL TO UNDERCUT FERGUSON'S ARGUMENT, BUT, AS EXPLAINED BELOW, THEY ARE IRRELEVANT TO THIS CIVIL PROCEEDING.

THE FACT IS THAT DUE TO JUDGE SNYDER'S AND THIS COURT'S EARLIER RELIANCE UPON JACKSON V. STATE, 452 So. 2d 533, 537 (FLA. 1984), FERGUSON NEVER RECEIVED A FULL AND FAIR HEARING ON HIS COMPETENCE TO ASSIST POST-CONVICTION COUNSEL WITH KEY FACTUAL ISSUES RAISED IN HIS PETITION. THE RECORD PLAINLY DEMONSTRATES THAT FERGUSON WAS AND IS INCOMPETENT. FERGUSON IS ENTITLED TO RENEWED CONSIDERATION OF THAT ISSUE IN LIGHT OF CARTER.

I. JUDGE SNYDER'S 1989 RULING ON FERGUSON'S COMPETENCE CANNOT PRECLUDE RECONSIDERATION OF THE ISSUE AT THIS TIME IN LIGHT OF CARTER.

THE STATE DEVOTES MUCH OF ITS BRIEF TO BLOCK QUOTATIONS FROM JUDGE SNYDER'S 1989 ORDER DENYING FERGUSON'S MOTION TO STAY POST-CONVICTION PROCEEDINGS. AS A RESULT OF JUDGE SNYDER'S RULING ON COMPETENCY, THE STATE ARGUES, FERGUSON IS NOT ENTITLED TO THE

RELIEF REQUESTED BECAUSE HE “OBTAINED THE BENEFIT OF CARTER A DECADE EARLIER, DURING HIS 1987 POST-CONVICTION PROCEEDINGS.” ANSWER BRIEF OF APPELLEE (“ANSWER BRIEF”) AT 19. AS FERGUSON POINTED OUT AT LENGTH IN HIS OPENING BRIEF, HOWEVER, THE MOST ELEMENTARY PRINCIPLES OF ISSUE PRECLUSION DICTATE THAT THIS COURT CANNOT NOW RELY UPON JUDGE SNYDER’S 1989 RULING. THE STATE VIRTUALLY IGNORES THOSE ARGUMENTS, BUT THEY ARE SQUARELY APPLICABLE.

A. JUDGE SNYDER’S EARLIER RULING CANNOT PRECLUDE

RECONSIDERATION OF APPELLANT’S COMPETENCE BECAUSE IT WAS MADE IN THE ALTERNATIVE.

THE STATE CONCEDES -- AS IT MUST -- THAT JUDGE SNYDER’S COMPETENCE FINDING WAS EXPLICITLY MADE IN THE ALTERNATIVE. JUDGE SNYDER NOT ONLY FOUND THAT FERGUSON WAS COMPETENT; HE ALSO HELD, IN MISPLACED RELIANCE UPON JACKSON, THAT A POST-CONVICTION DEFENDANT WAS NOT ENTITLED TO BE COMPETENT -- A LEGAL RULING THAT SINCE HAS BEEN SPECIFICALLY OVERRULED BY THIS COURT.

AS A RESULT, JUDGE SNYDER’S COMPETENCY DETERMINATION

PLAINLY CANNOT HAVE PRECLUSIVE EFFECT.^{1/} “IF A JUDGMENT OF A COURT OF FIRST INSTANCE IS BASED ON DETERMINATIONS OF TWO ISSUES, EITHER OF WHICH STANDING INDEPENDENTLY WOULD BE SUFFICIENT TO SUPPORT THE RESULT, THE JUDGMENT IS NOT CONCLUSIVE WITH RESPECT TO EITHER ISSUE STANDING ALONE.” RESTATEMENT (SECOND) OF JUDGMENTS § 27 CMT. I (1982) (EMPHASIS ADDED). THIS PRINCIPLE IS BASED UPON THE CONCERN THAT AN ALTERNATIVE DETERMINATION MAY NOT HAVE BEEN AS CAREFULLY CONSIDERED AS IT WOULD HAVE BEEN IF IT PROVIDED THE SOLE BASIS FOR A JUDGMENT. SEE BRIEF OF APPELLANT AT 15 (FILED JANUARY 27, 2000); SEE ALSO COMAIR ROTRON, INC. V. NIPPON DENSAN CORP., 49 F.3D 1535, 1538 (FED. CIR. 1995) (DECLINING TO APPLY COLLATERAL ESTOPPEL TO ALTERNATIVE HOLDING; RECOGNIZING THAT “A DETERMINATION THAT IS SUPPORTABLE ON ALTERNATIVE GROUNDS MAY NOT HAVE BEEN AS THOROUGHLY CONSIDERED ON ALL OF THE POSSIBLE GROUNDS”); PARKLANE

^{1/} The State makes one misguided attempt to dispute this argument by claiming that collateral estoppel is solely a double jeopardy concept. Answer Brief at 22-23. That argument is incorrect and irrelevant, as addressed below. See infra Section I.C.

HOSIERY CO. v. SHORE, 439 U.S. 322, 326 N.5 (1979) (JUDGMENT IN PRIOR SUIT PRECLUDES RELITIGATION ONLY OF ISSUES “NECESSARY TO THE OUTCOME OF THE FIRST ACTION”).

IT IS ABUNDANTLY CLEAR THAT JUDGE SNYDER BELIEVED -- ERRONEOUSLY, WE NOW KNOW -- THAT FERGUSON WAS NOT ENTITLED TO BE COMPETENT TO ASSIST COUNSEL IN POST-CONVICTION PROCEEDINGS. SEE R. AT 5:5; R. AT 5:13.^{2/} CONSEQUENTLY, HE DID NOT BELIEVE THAT HIS RULING ON THE FACTUAL QUESTION, WHETHER FERGUSON WAS IN FACT COMPETENT, WAS NECESSARY TO HIS JUDGMENT. AS A RESULT, SUBSEQUENT COURTS CANNOT ACCORD PRECLUSIVE EFFECT TO HIS JUDGMENT. HAD JUDGE SNYDER BELIEVED THAT FERGUSON WAS ENTITLED TO BE COMPETENT, HIS JUDGMENT WOULD HAVE DEPENDED ON THE COMPETENCY FINDING. UNDER THAT CIRCUMSTANCE, JUDGE SNYDER MIGHT HAVE CONDUCTED THE HEARING

^{2/} Documents included in the Record of Appeal are cited herein as "R. at [Vol.]:[Page]." The five-volume Record of Appeal consists of Volumes 1-4, containing pages 1-516, (Volume 4 was added after Appellant's January 27, 2000, Motion to Supplement the Record), and one unnumbered volume, containing pages 1-38. The unnumbered volume is cited herein as Volume 5.

DIFFERENTLY OR CONSIDERED THE RESULT MORE CAREFULLY. THIS
UNCERTAINTY PREVENTS THE STATE FROM NOW RELYING UPON JUDGE
SNYDER'S RULING TO BAR LITIGATION OF FERGUSON'S COMPETENCE. SEE
RESTATEMENT (SECOND) OF JUDGMENTS §_27 CMT. I (1982).

IN FACT, THERE IS SIGNIFICANT REASON TO BELIEVE THAT JUDGE
SNYDER'S COMPETENCY RULING MIGHT HAVE BEEN DIFFERENT IF IT HAD BEEN
NECESSARY TO THE JUDGMENT. SUBSEQUENT EVENTS HAVE MADE IT CLEAR
THAT JUDGE SNYDER MUST HAVE BEEN WRONG WHEN HE CONCLUDED IN 1988
THAT FERGUSON WAS NOT SUFFERING FROM A MAJOR MENTAL ILLNESS. EVERY
SINGLE ONE OF FERGUSON'S TREATING PHYSICIANS, AND EVERY EXAMINING
PHYSICIAN WHO HAS SEEN FERGUSON OVER TIME, NOW BELIEVES THAT HE
SUFFERS FROM SCHIZOPHRENIA. R. AT 2:247-252. AND, SINCE 1988,
FERGUSON HAS BEEN THE SUBJECT OF AT LEAST THREE LEGAL PROCEEDINGS IN
WHICH THE STATE OF FLORIDA EXPERTS TESTIFIED THAT -- AND THE STATE
FOUND THAT -- HE WAS INCOMPETENT AND SUFFERING FROM SCHIZOPHRENIA.
SEE BRIEF OF APPELLANT AT 27-28. THUS, EVEN THE STATE NOW CONCEDES
THAT FERGUSON SUFFERS FROM SCHIZOPHRENIA.

THE STATE DOES NOT DISPUTE THAT FERGUSON IS CLEARLY SCHIZOPHRENIC AT THIS TIME. RATHER, WITHOUT CITATIONS, IT CLAIMS THAT FERGUSON’S CURRENT MENTAL ILLNESS HAS “NO BEARING ON WHETHER THE DEFENDANT WAS PROPERLY FOUND TO BE COMPETENT [IN 1988],” AS COMPETENCY “IS FLUID.” ANSWER BRIEF AT 25. THAT IS SIMPLY NOT TRUE. AS EXPLAINED AT LENGTH IN FERGUSON’S OPENING BRIEF, THE FACT THAT FERGUSON CURRENTLY SUFFERS FROM SCHIZOPHRENIA IS ALL BUT CONCLUSIVE EVIDENCE THAT HE WAS ALREADY SCHIZOPHRENIC IN 1988. SEE BRIEF OF APPELLANT AT 29-31.^{3/} THE STATE DOES NOT CONTEST THIS CONCLUSION. AND SCHIZOPHRENIA RENDERS ONE INCOMPETENT IN A MANNER THAT IS NOT “FLUID” -- SCHIZOPHRENIA IS A PERMANENT AFFLICTION THAT CANNOT BE CURED. SEE ID. AT 30. THUS, IT IS APPARENT FROM THE RECORD THAT JUDGE SNYDER’S FINDING OF COMPETENCE WAS CLEARLY ERRONEOUS, PERHAPS AS A RESULT OF HIS FAILURE FULLY TO CONSIDER THE ISSUE ON ACCOUNT OF THE ALTERNATIVE LEGAL BASIS FOR HIS CONCLUSION. _

^{3/} In men, the age of onset of schizophrenia is the early to mid-20s; Ferguson was 40 years old when Judge Snyder found him competent in February 1989.

B. JUDGE SNYDER'S RULING CANNOT HAVE PRECLUSIVE EFFECT

BECAUSE IT WAS NOT REVIEWED ON APPEAL.

WHILE IT AT LEAST ADDRESSES THE ISSUE, THE STATE ALSO UTTERLY FAILS TO REBUT THE ARGUMENT THAT FERGUSON IS ENTITLED TO RENEWED CONSIDERATION OF HIS COMPETENCE BECAUSE THAT PORTION OF JUDGE SNYDER'S RULING WAS NOT REVIEWED ON APPEAL.

IT IS WITHOUT QUESTION, AND APPARENTLY CONCEDED BY THE STATE, THAT IF A JUDGMENT IS APPEALED, ISSUE PRECLUSION "ONLY WORKS AS TO THOSE ISSUES SPECIFICALLY PASSED UPON BY THE APPELLATE COURT." HICKS V. QUAKER OATS CO., 662 F.2D 1158, 1168 (5TH CIR. 1981), REH'G DENIED, 668 F.2D 531 (5TH CIR. 1982) (EMPHASIS ADDED); SEE BRIEF OF APPELLANT AT 19-20. THERE IS NO QUESTION THAT FERGUSON APPEALED JUDGE SNYDER'S DETERMINATION THAT HE WAS NOT ENTITLED TO BE COMPETENT TO ASSIST POST-CONVICTION COUNSEL. FERGUSON ARGUED TO THIS COURT THAT POST-CONVICTION PROCEEDINGS SHOULD BE STAYED PENDING "A VALID DETERMINATION THAT [HE WAS] COMPETENT TO ASSIST HIS COUNSEL IN THE PROCEEDINGS." SEE EXHIBIT 1 (BRIEF OF APPELLANT FILED

APRIL 8, 1991) AT (I). AS PART OF THAT ARGUMENT, FERGUSON ASSERTED THAT, "[A]S A MATTER OF LAW, A CAPITAL DEFENDANT MUST BE COMPETENT TO ASSIST IN POST-CONVICTION PROCEEDINGS." SEE ID. AT 21-23. THE STATE RESPONDED BY ARGUING, IN SUPPORT OF JUDGE SNYDER'S HOLDING, THAT "THERE IS NO RIGHT TO COMPETENCY TO ASSIST COUNSEL IN POST-CONVICTION PROCEEDINGS." APPENDIX TO ANSWER BRIEF AT 3.

THIS COURT SUMMARILY REJECTED FERGUSON'S ARGUMENT, FINDING "WITHOUT MERIT" THE CLAIM THAT "THESE PROCEEDINGS SHOULD BE STAYED PENDING ANOTHER DETERMINATION THAT FERGUSON IS COMPETENT TO PROCEED." FERGUSON V. STATE, 593 So. 2D 508, 513 (FLA. 1992) (EMPHASIS ADDED). THE STATE CLAIMS THAT THE COURT CLEARLY WAS NOT RELYING ON JACKSON THROUGH THIS HOLDING, SINCE "[T]HE DEFENDANT'S CLAIM WAS THAT YET ANOTHER POST-CONVICTION HEARING WAS NECESSARY, WHICH THIS COURT REJECTED." ANSWER BRIEF AT 24.

THE STATE IS COMPLETELY WRONG. ON APPEAL, FERGUSON DID NOT REQUEST "YET ANOTHER POST-CONVICTION HEARING" ON HIS COMPETENCE. RATHER, HE ARGUED THAT THIS COURT SHOULD FIND ON THE

RECORD THAT HE WAS NOT COMPETENT TO ASSIST COUNSEL. SEE EXHIBIT 1 AT 23; 33-34; 99._^{4/} IT APPEARS THAT THIS COURT DID NOT EVEN REACH THAT ISSUE. INSTEAD, IN RULING THAT FERGUSON WAS NOT ENTITLED TO “ANOTHER” COMPETENCY HEARING ON THE BASIS OF WHICH “THESE PROCEEDINGS SHOULD BE STAYED” (EMPHASIS ADDED), THIS COURT HELD THAT FERGUSON, WHO HAD A COMPETENCE DETERMINATION BEFORE TRIAL, WAS NOT ENTITLED TO ANOTHER COMPETENCY HEARING AT THE POST-CONVICTION STAGE. THAT RULING HAS SINCE BEEN OVERRULED BY CARTER.

IN ANY EVENT, THE COURT’S HOLDING IS AT BEST AMBIGUOUS, AND CERTAINLY DID NOT CLEARLY AFFIRM JUDGE SNYDER’S FACTUAL DETERMINATION THAT FERGUSON WAS COMPETENT. WITHOUT A “SPECIFIC” RULING ON THAT ISSUE, THE COURT CANNOT PRECLUDE FERGUSON FROM

^{4/} Ferguson did request that the Court remand for a hearing on one issue -- the ex parte contacts between the judge and prosecution. See Exhibit 1 at 34. He did not, however, request an additional competency hearing.

RAISING IT AT THIS TIME. SEE HICKS, 662 F.2D AT 1158.^{5/}

**C. THE STATE'S ARGUMENT AGAINST ISSUE PRECLUSION IS TOTALLY
INAPPOSITE.**

**IN ITS ONLY EFFORT TO COUNTER THESE ARGUMENTS, THE STATE
ASSERTS THAT COLLATERAL ESTOPPEL IS PART OF THE FIFTH AMENDMENT'S
GUARANTEE AGAINST DOUBLE JEOPARDY, 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."^{6/} ANSWER BRIEF AT 22. FROM**

^{5/} The State suggests that, if the competency ruling was not addressed on appeal, the proper remedy would be a review of the ruling at this time. Answer Brief at 24-25. The State is incorrect because, as explained in Ferguson's opening brief and above, the competency ruling cannot be relied upon at this time for another, independent reason -- it was reached in the alternative. However, Ferguson argued in his opening brief that Judge Snyder's ruling was clearly erroneous. If the Court wishes to review Judge Snyder's ruling at this time, Ferguson relies upon the argument in his opening brief in this appeal, as well as the arguments he made to this Court on appeal in 1991. See Exhibit 1 at 23-33.

^{6/} While Ferguson's brief uses the term "issue preclusion," the State refers to "collateral estoppel." The two terms generally have the same meaning; issue preclusion encompasses both direct and collateral estoppel, and is considered the more modern term. See 18 Charles Allen Wright et al., Federal Practice and

THERE, AND WITHOUT ANY FURTHER CITATION, THE STATE ASSERTS THAT “[COLLATERAL ESTOPPEL] HAS NO APPLICABILITY AT ALL TO THESE POST-CONVICTION PROCEEDINGS,” WHICH ARE GOVERNED BY FLA. R. CRIM. P. 3.850 AND 3.851.

THE STATE PROVIDES NO ACTUAL AUTHORITY FOR THE PROPOSITION THAT COLLATERAL ESTOPPEL DOES NOT APPLY TO THESE POST-CONVICTION PROCEEDINGS. FIRST, THE DOUBLE JEOPARDY CASES IT CITES RELATE ONLY TO THE DEFENSIVE USE OF COLLATERAL ESTOPPEL TO AVOID CRIMINAL PROSECUTION. THEY DISCUSS NO LIMITS ON THE DOCTRINE OF COLLATERAL ESTOPPEL, AND, UNLIKE THE NUMEROUS CASES CITED IN FERGUSON’S OPENING BRIEF, THEY NEITHER MENTION NOR BEAR UPON THE USE OF COLLATERAL ESTOPPEL IN CIVIL PROCEEDINGS SUCH AS THIS ONE.^{7/} SECOND, THE STATE CITES NO AUTHORITY TO SUGGEST THAT BECAUSE OF

Procedure §_4416 (West 1981).

^{7/} Post-conviction proceedings are civil in nature, not criminal. See, e.g. Dykes v. State, 162 So. 2d 675 (Fla. 1st DCA 1964).

RULES 3.850 OR 3.851 (OR ANY OTHER AUTHORITY), COLLATERAL ESTOPPEL DOES NOT APPLY TO THESE PROCEEDINGS. IN FACT, THOSE RULES PROVIDE THAT A CRIMINAL DEFENDANT CAN RE-OPEN PREVIOUSLY REJECTED CLAIMS WHERE, AS HERE, THERE HAS BEEN A CHANGE IN THE LAW. SEE RULE 3.850(B)(2).^{8/} AS SET FORTH IN FERGUSON’S OPENING BRIEF, ISSUE PRECLUSION DOES APPLY TO THESE PROCEEDINGS, AND PREVENTS JUDGE SNYDER’S 1989 COMPETENCY FINDING FROM BARRING RELITIGATION OF FERGUSON’S COMPETENCE AT THIS TIME. SEE BRIEF OF APPELLANT AT 14-22.

II. CARTER V. STATE SHOULD BE APPLIED RETROACTIVELY TO STAY FERGUSON’S 3.850 PROCEEDINGS.

NEXT, THE STATE ARGUES THAT THE LOWER COURT WAS CORRECT NOT TO DECIDE THE RETROACTIVITY OF CARTER BECAUSE “[T]HE RETROACTIVITY OF CARTER WAS NOT AND IS NOT AT ISSUE IN THE INSTANT CASE.” ANSWER BRIEF AT 27. THAT CLAIM IS BASELESS. THE STATE DOES NOT CONTEST THAT CARTER WOULD HAVE APPLIED TO FERGUSON HAD IT BEEN DECIDED PRIOR TO HIS 3.850 PROCEEDINGS. BUT CARTER HAD NOT YET BEEN

^{8/} For the same reason, Ferguson’s Motion to Reinstate is not a second or successive motion. See Brief of Appellant at 35-36.

DECIDED, AND THE JUDGE WHO CONDUCTED FERGUSON'S 3.850 PROCEEDINGS CONCLUDED, CONTRARY TO WHAT CARTER WOULD HOLD, THAT FERGUSON WAS NOT ENTITLED TO BE COMPETENT TO ASSIST COUNSEL. WE NOW KNOW THAT JUDGE SNYDER WAS WRONG -- WHAT WE DO NOT KNOW IS HOW THAT FACT MAY HAVE AFFECTED HIS COMPETENCE INQUIRY.

IN RESPONSE TO FERGUSON'S LENGTHY ARGUMENTS ON THE RETROACTIVITY OF CARTER, THE STATE SIMPLY NOTES THAT THE DECISION DOES NOT MENTION ANY CONSTITUTIONAL BASIS. THAT DOES NOT MATTER. AS FERGUSON'S OPENING BRIEF EXPLAINED, "[I]T IS WELL-ESTABLISHED THAT A DECISION NEED NOT EXPLICITLY RELY UPON A PROVISION OF THE FLORIDA OR UNITED STATES CONSTITUTIONS TO BE 'CONSTITUTIONAL IN NATURE.'" SEE BRIEF OF APPELLANT AT 39-40 (CITING AUTHORITY). RATHER, COURTS LOOK TO THE PRINCIPAL UPON WHICH THE DECISION WAS PREMISED -- IN THIS CASE, THE RIGHT TO DUE PROCESS OF LAW -- A PRINCIPAL THAT IS UNQUESTIONABLY CONSTITUTIONAL IN NATURE. THE STATE FAILS TO DISTINGUISH, OR EVEN ACKNOWLEDGE, THIS OR THE OTHER EXTENSIVE AUTHORITY CITED BY FERGUSON. SEE BRIEF OF APPELLANT AT 32-46. FOR ALL OF THE REASONS

SET FORTH IN FERGUSON'S OPENING BRIEF, CARTER SHOULD BE ACCORDED RETROACTIVE EFFECT.

III. FERGUSON'S ASSISTANCE IS REQUIRED WITH SEVERAL CRITICAL FACTUAL ISSUES.

FINALLY, THE STATE IS INCORRECT WHEN IT CLAIMS THAT FERGUSON'S 3.850 PETITION RAISES NO FACTUAL ISSUES THAT REQUIRE HIS ASSISTANCE. SEE ANSWER BRIEF AT 28-29. IN FACT, FERGUSON'S PETITION RAISES PIVOTAL FACTUAL ISSUES THAT CANNOT BE FULLY LITIGATED WITHOUT FERGUSON'S ASSISTANCE.

FIRST, CONSULTATION WITH FERGUSON IS NECESSARY TO INVESTIGATE HIS INEFFECTIVE ASSISTANCE OF COUNSEL CLAIMS. THE STATE POINTS OUT THAT "ANOTHER POST-CONVICTION JUDGE CONDUCTED EXTENSIVE EVIDENTIARY HEARINGS ON THESE CLAIMS." ID. AT 28. HOWEVER, THE JUDGE WHO CONDUCTED THAT HEARING HAD ALREADY CONCLUDED THAT FERGUSON HAD NO RIGHT TO BE COMPETENT TO ASSIST POST-CONVICTION COUNSEL. ALTHOUGH EXPERTS AND SOME FAMILY MEMBERS WERE AVAILABLE, THE INEFFECTIVE ASSISTANCE HEARING OCCURRED WITHOUT ANY INPUT FROM FERGUSON. THE RECORD SHOWS THAT FERGUSON'S INPUT WAS CRITICAL TO

A FULL, COMPLETE, AND MEANINGFUL PRESENTATION OF THE CLAIM. AS FERGUSON'S OPENING BRIEF EXPLAINS, TRIAL COUNSEL PRESENTED ALMOST NO MITIGATION EVIDENCE CONCERNING FERGUSON'S LONG HISTORY OF MENTAL ILLNESS AND FAMILY PROBLEMS. POST-CONVICTION COUNSEL NEEDS COMPLETE AND COHERENT DISCLOSURE FROM FERGUSON TO UNDERSTAND THE FULL EXTENT OF HIS DEALINGS WITH TRIAL COUNSEL TO DETERMINE, AMONG OTHER THINGS, WHETHER TRIAL COUNSEL EVER EVEN INVESTIGATED FERGUSON'S MENTAL HEALTH BACKGROUND, OR WHETHER FERGUSON PROVIDED FULL DISCLOSURE OF HIS MENTAL HEATH AND FAMILY BACKGROUND TO TRIAL COUNSEL BUT THAT INFORMATION WAS NEVER PRESENTED TO THE JURY. SEE BRIEF OF APPELLANT AT 48. INDEED, JUST LAST MONTH THE SUPREME COURT HELD THAT TRIAL COUNSEL HAD BEEN CONSTITUTIONALLY INEFFECTIVE FOR FAILING TO DISCOVERY OR PRESENT MITIGATING EVIDENCE IN THE SENTENCING PHASE OF A DEATH PENALTY TRIAL. SEE WILLIAMS V. TAYLOR, ___ S. CT. ___, NO. 98-8384 2000 WL 385369, AT *16-17 (APRIL 18, 2000) (COUNSEL FAILED TO DISCOVER OR PRESENT EVIDENCE OF, AMONG OTHER THINGS, CRIMINAL NEGLECT OF DEFENDANT AS A CHILD, SEVERE

CHILDHOOD BEATINGS OF DEFENDANT BY HIS FATHER, AND THE INCARCERATION OF DEFENDANT'S PARENTS WHEN HE WAS A CHILD).

THE STATE MAKES THE SAME ARGUMENT CONCERNING FERGUSON'S HITCHCOCK CLAIMS. ACCORDING TO THE STATE, FERGUSON "HAS NOT STATED WHAT ADDITIONAL INFORMATION FROM THE DEFENDANT WOULD BE NECESSARY." ANSWER BRIEF AT 28. IN FACT, THIS COURT'S EARLIER OPINION ON FERGUSON'S HITCHCOCK CLAIM MAKES IT CLEAR THAT INFORMATION ONLY FERGUSON CAN PROVIDE IS NECESSARY TO A FULL AND FAIR HEARING ON HIS HITCHCOCK CLAIM. THIS COURT HELD THAT THE HITCHCOCK ERROR ALLEGED BY FERGUSON WAS HARMLESS BECAUSE "[T]HE ADDITIONAL MITIGATING EVIDENCE PRESENTED AT THE 3.850 HEARING WAS RELATIVELY INSIGNIFICANT." FERGUSON, 593 So. 2D AT 512. FOR EXAMPLE, THIS COURT SAID, "THERE WAS NO TESTIMONY THAT FERGUSON HIMSELF WAS BEATEN OR ABUSED [AS A CHILD]." ID. IF FERGUSON INDEED WERE ABUSED AS A CHILD, THAT FACT COULD BE SIGNIFICANT MITIGATION EVIDENCE. SEE WILLIAMS, SUPRA AT 13. SUCH EVIDENCE WOULD ALMOST CERTAINLY HAVE TO COME FROM FERGUSON HIMSELF. HOWEVER, FERGUSON WAS UNAVAILABLE TO

ASSIST POST-CONVICTION COUNSEL, AND AS A RESULT, COUNSEL WAS UNABLE FULLY TO PRESENT HIS HITCHCOCK CLAIM. SEE R AT 1:26-27 (TESTIMONY OF FERGUSON'S POST-CONVICTION COUNSEL REGARDING FERGUSON'S INABILITY TO PROVIDE ASSISTANCE IN FORMULATING A 3.850 PETITION).

ADDITIONALLY, FERGUSON'S ASSISTANCE IS NEEDED TO DEVELOP FACTUAL INFORMATION RELATED TO POLICE CORRUPTION AND BRADY VIOLATIONS. SEE BRIEF OF APPELLANT AT 50-53. TO DISPUTE THAT CLAIM, THE STATE POINTS TO THIS COURT'S RULING IN BREEDLOVE V. STATE, 580 So. 2d 605 (FLA. 1991). IN FACT, THE COURT'S RULING IN BREEDLOVE HAS NO BEARING ON FERGUSON'S CASE. IN BREEDLOVE, THE DEFENDANT BASED A BRADY CLAIM ON THE PROSECUTION'S FAILURE TO REVEAL AN ONGOING RICO INVESTIGATION AGAINST TWO POLICE OFFICERS WHO TESTIFIED AT HIS TRIAL. SIGNIFICANTLY, ONE OF THESE SAME OFFICERS, ZATRAPALEK, ALSO TESTIFIED AT FERGUSON'S TRIAL. THE COURT REJECTED BREEDLOVE'S CLAIM ON TWO GROUNDS. FIRST, IT CONCLUDED THAT THE PROSECUTOR WAS NOT ON NOTICE OF THE INVESTIGATION OF EITHER OFFICER, AND THEREFORE DID NOT SUPPRESS ANY EVIDENCE. HOWEVER, THE COURT REACHED THAT CONCLUSION

ONLY AFTER REVIEWING THE INTERNAL INVESTIGATION FILES TO SEARCH FOR EVIDENCE OF THE PROSECUTOR'S KNOWLEDGE, A STEP THAT HAS NOT BEEN TAKEN IN FERGUSON'S CASE. SECOND, THE COURT HELD THAT THE ALLEGEDLY SUPPRESSED EVIDENCE WAS NOT MATERIAL. BREEDLOVE WAS CONVICTED OF KILLING A MAN DURING A RESIDENTIAL BURGLARY; HE SOUGHT TO USE THE ALLEGEDLY SUPPRESSED EVIDENCE SOLELY TO IMPEACH THE OFFICERS ON THE GROUNDS THAT THE ONGOING INVESTIGATION MOTIVATED THEM TO ASSIST THE STATE. THE COURT FOUND THAT THE OFFICERS' CRIMINAL CONDUCT AND THE SUBSEQUENT INVESTIGATION OF THAT CONDUCT WERE "TOTALLY UNRELATED TO [BREEDLOVE'S] CASE." ID. AT 609.

HERE, IN CONTRAST, THE OFFICERS' CRIMINAL CONDUCT AND THE INVESTIGATION OF THAT CONDUCT MAY BE HIGHLY RELEVANT TO FERGUSON'S CASE. THE CAROL CITY MURDERS WERE ALLEGED TO HAVE BEEN DRUG RELATED, AND THREE OF THE DETECTIVES WHO TESTIFIED AT FERGUSON'S TRIAL, INCLUDING ZATRAPALEK, WERE THEMSELVES ENGAGED IN A DRUG TRAFFICKING CONSPIRACY IN THE MIAMI-DADE COUNTY AREA. SEE BRIEF OF APPELLANT AT 50-53. IT MAY BE POSSIBLE WITH FERGUSON'S HELP TO

ESTABLISH THAT THE POLICE OFFICERS' CRIMINAL ACTIVITY EXTENDED TO SOME INVOLVEMENT IN THE CAROL CITY MURDERS THEMSELVES, A PLAUSIBLE THEORY IN LIGHT OF THE FACT THAT HOMICIDE DETECTIVES HAD ALLEGEDLY ARRANGED FOR THE KILLING OF BETWEEN SEVEN AND TWENTY PEOPLE AS PART OF THEIR DRUG-RELATED CONSPIRACY. Id. AT 52. THIS IS PRECISELY THE TYPE OF MATERIAL EVIDENCE THAT CAN BE FULLY DEVELOPED ONLY WITH FERGUSON'S ASSISTANCE.

CONCLUSION

**FOR THE REASONS STATED IN THIS BRIEF AND FERGUSON'S
OPENING BRIEF, THE JUDGMENT OF THE TRIAL COURT SHOULD BE REVERSED.**

RESPECTFULLY SUBMITTED,

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DATE: MAY 2, 2000

CERTIFICATE OF SERVICE

**I HEREBY CERTIFY THAT ON THIS 2ND DAY OF MAY,
2000, COPIES OF APPELLANT'S REPLY BRIEF WERE SERVED BY
FIRST CLASS MAIL, POSTAGE PRE-PAID, UPON THE FOLLOWING:**

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CERTIFICATE OF FONT STYLE AND SIZE

**I HEREBY CERTIFY THAT THIS BRIEF IS PRINTED IN
TIMES NEW ROMAN 14 POINT TYPE.**

KRISTEN DONOGHUE

IN THE SUPREME COURT OF FLORIDA

APPEAL FROM SEPTEMBER 10, 1999, ORDER OF JUDGE ALEX E.

FERRER OF THE CIRCUIT COURT OF THE 11TH JUDICIAL CIRCUIT,

IN AND FOR DADE COUNTY, FLORIDA

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STATE OF FLORIDA,

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PLAINTIFF/APPELLEE,

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REPLY BRIEF OF APPELLANT

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