ORIGINAL

# IN THE SUPREME COURT OF OHIO

**STATE OF OHIO,**

Plaintiff,

v.

**STANLEY L. FITZPATRICK,**

Defendant.

**Case No. 2002-0506**

***DEATH PENALTY CASE***

FILED
SEP 16 2014
CLERK OF COURT
SUPREME COURT OF OHIO

## SECOND MOTION TO SET EXECUTION DATE

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## MOTION TO SET EXECUTION DATE[1]

### I. Procedural Summary

Fitzpatrick was indicted on June 19, 2001, by the Hamilton County Grand Jury on one count of aggravated murder of an individual under thirteen years of age under Ohio Revised Code ("O.R.C.") § 2903.01(C) and two counts of aggravated murder with prior calculation and design under O.R.C. § 2903.01(A). Count one included the under thirteen years of age specification, O.R.C. § 2929.04(A)(9), while the second and third counts included the specification of purposeful killing or attempt to kill two or more persons under O.R.C. § 2929.04(A)(5). Fitzpatrick was also indicted on one count of attempted murder under O.R.C. § 2923.02(A) and aggravated robbery under O.R.C. § 2911.01. Each of these counts included a firearm specification. Fitzpatrick was further indicted on one count of aggravated burglary under O.R.C. § 2911.11(A)(1) and one count of aggravated robbery under O.R.C. § 2911.01(A)(1).

Fitzpatrick's case went before a Hamilton County jury on February 4, 2002. After jury selection, opening statements were held on February 6, 2002. After opening statements, Petitioner asked for a jury waiver and changed his plea to guilty on all charges. His case proceeded before a three-judge panel. On February 11, 2002, the panel accepted Fitzpatrick's plea of guilty on all counts and specifications. Upon completion of the mitigation phase, the judges returned a sentence of death on each of the aggravated murder counts, concurrent nine years in prison for the other four felonies, and two consecutive three year terms for the firearm specifications.

[1] This is re-filing of the motion originally filed on 6-25-14. The State withdrew the motion on 7-21-14 to accommodate defense counsels' request for additional time to determine representation issues.

## II. Factual Summary

This Court summarized the facts as follows:

Appellant, Stanley Fitzpatrick, murdered his girlfriend, Doreatha Hayes, her 12-year-old daughter Shenay, and a neighbor, Elton Rose. While leaving the crime scene, he attempted to kill a police officer. Fitzpatrick pleaded guilty to three counts of aggravated murder with death specifications. He appeals his convictions and death sentence.

Prior to the murders, Fitzpatrick lived with Doreatha and Shenay Hayes at 867 Chicago Avenue in the village of Lincoln Heights. On Thursday, June 7, 2001, Fitzpatrick killed Shenay and Doreatha. On June 10, 2001, he confessed these crimes to his cousin Marvin Thomas.

Fitzpatrick told Thomas that 12-year-old Shenay had come home and caught him smoking crack. Fitzpatrick claimed that Shenay had attacked him with a knife and was accidentally stabbed in the ensuing altercation. The coroner later testified that Shenay had been stabbed three times in the back of the neck and once near her ear.

As Shenay gasped for breath, Fitzpatrick ran into the next room. A few minutes later, he came back and struck Shenay repeatedly in the head with an ax handle, fracturing her skull, "so that he wouldn't hear the sounds that she was making." At some point, Fitzpatrick wrapped a ligature around Shenay's neck. Nevertheless, according to Fitzpatrick, she was still "making sounds" when Fitzpatrick wrapped her in a blanket and a carpet and put her in a bedroom closet. Shenay died of the combined effect of the stab wounds, blows to the head, and strangulation.

Later that evening, Fitzpatrick beat Doreatha Hayes to death. He told Marvin Thomas that, after Doreatha came home, "we got into it as usual." Fitzpatrick said that during the argument, he hit her in the head with an ax handle or an ax. She fell to the floor, and he hit her repeatedly in the face. When Doreatha stopped making noises, Fitzpatrick moved her body to another bedroom and placed a mattress on top of it.

An autopsy showed that Doreatha had at least 13 "chop wounds": five on her head, five on her left forearm, one on her right wrist, and one on each hand. Doreatha's wounds were consistent with her having been struck with State's Exhibit 12, a hatchet that police later found in the basement of 867 Chicago Avenue. Blood on the hatchet, and on a hammer also found at 867 Chicago Avenue, had a DNA profile matching Doreatha's.

At approximately 10:30 p.m. on June 9, Fitzpatrick walked across Chicago Avenue and rang the doorbell of Elton and Betty Rose. Looking through the

window, Mrs. Rose recognized Fitzpatrick standing on her front porch, and, calling through the door, she asked him what he wanted. Fitzpatrick said, "[I]t's Doreatha's boyfriend. * * * Doreatha would like to see your husband. She said to tell him to come over to the house." Mrs. Rose summoned her husband, Elton Rose ("Rose"). Rose went across the street with Fitzpatrick and entered 867 Chicago Avenue, where Fitzpatrick killed him.

Rose died from lacerations of the brain caused by blunt-impact injuries to his head. He sustained numerous lacerations and skull fractures caused by at least ten separate blows to the back and right side of his head. These injuries were consistent with Rose having been struck with the blunt side of State's Exhibit 12, the hatchet. Blood on the hatchet had a DNA profile consistent with Rose's.

Five or ten minutes after he had left with Rose, Fitzpatrick rang the Roses' doorbell again. He told Mrs. Rose, "[Y]our husband wants you to come across the street." When Mrs. Rose asked why, Fitzpatrick had no answer, and Mrs. Rose did not believe him, so she said, "[G]o tell my husband to come to the door."

Fitzpatrick turned away from Mrs. Rose. He appeared to be "looking around * * * to see if there was anyone watching him." Suddenly, he "took off," back across the street.

Just then, at 10:50 p.m., Sergeant Deangelo Sumler of the Lincoln Heights Police Department drove up in his cruiser. Sumler had been dispatched to 867 Chicago Avenue in response to a "silent 911" call. Sumler saw Mrs. Rose and noted that she looked "distraught," so he pulled over to talk to her.

Mrs. Rose pointed out Fitzpatrick standing on the sidewalk in front of 867 Chicago Avenue. Fitzpatrick approached Sumler and said, "[C]ome on in, he needs some help." Sumler asked Mrs. Rose what was going on. She replied, "[M]y husband is over there." Fitzpatrick repeated that "he needed some help" and ran inside 867 Chicago Avenue. Sumler followed Fitzpatrick into the house.

When he went in, Sumler saw Fitzpatrick pointing a .38-caliber revolver at him. Although Sumler had not drawn his gun, Fitzpatrick told him to drop it. Sumler raised his hands. He then backed up to the door, pushed it open, and ran outside. Fitzpatrick fired twice at Sumler.

Sumler sought cover behind a large metal trash container. Fitzpatrick came out, aimed at Sumler, and fired a third shot. Sumler fired back. Fitzpatrick then got into Sumler's cruiser and drove off.

Fitzpatrick abandoned the stolen cruiser after driving into some bushes. He then entered the home of Montika Pitts. When Pitts encountered him inside her home, she asked what he wanted. Fitzpatrick's response was to scream at Pitts and then grab her throat. They scuffled, and Fitzpatrick shoved Pitts outside. When Pitts re-

entered her home, to protect her child, who was asleep in the house, Fitzpatrick fled. Later, Fitzpatrick robbed Marjorie Duff of her car at knifepoint. He then fled in Duff's car, which was later found abandoned in Cincinnati.

As mentioned previously, on June 10, 2001, Fitzpatrick confessed to committing the murders to his cousin Marvin Thomas. Thomas then called the Hamilton County Sheriff's Department. He told a detective that Fitzpatrick was in a motel in Sharonville, Ohio.

Police officers went to Fitzpatrick's motel room and spoke with him through the door. Fitzpatrick eventually surrendered. Duff's car keys were found in Fitzpatrick's room.

Later that day, Detective Patrick Dilbert interviewed Fitzpatrick at the Hamilton County Sheriff's Department. Fitzpatrick waived his Miranda rights and agreed to speak with Dilbert. Fitzpatrick told Dilbert that "he'd been up for several days smoking crack," that he lived at 867 Chicago Avenue, and that he had been either fired, suspended, or placed on probation by his employer on June 5.

A grand jury indicted Fitzpatrick on one count of aggravated murder under R.C. 2903.01(C) (child murder) and two counts of aggravated murder under R.C. 2903.01(A) (prior calculation and design). Each aggravated murder count carried a single death specification. The specification to Count One (the Shenay Hayes murder) alleged that Fitzpatrick had purposefully caused the death of a person who was under the age of 13 and that Fitzpatrick had been the principal offender. See R.C. 2929.04(A)(9). The specification to Count Two (Doreatha Hayes) alleged that the murder was part of a course of conduct involving the purposeful killing of or attempt to kill two or more people. See R.C. 2929.04(A)(5). The specification to Count Three (Elton Rose) also alleged a course of conduct. The indictment also included one count of attempted murder (Deangelo Sumler), two counts of aggravated robbery (Sumler's cruiser and Marjorie Duff's car), and one count of aggravated burglary (Montika Pitts's residence).

Fitzpatrick initially pleaded not guilty. He requested a jury trial, and a jury was seated. However, during the defense's opening statement, Fitzpatrick decided to change his plea to guilty. Counsel recommended against a guilty plea, but Fitzpatrick told counsel that if they did not stop the proceedings, he would.

Fitzpatrick's remarks to the trial judge made clear his insistence on pleading guilty:

"What I told you, I want it done. I don't want to wait till no lunch or the next day or nothing."

* * *

"I told them what I wanted to happen, and that save you some tax money or whatever, you know. * * * Seriously. Tell the jury or whatever, they don't have to go through this, be cut right down. * * * You ain't got to sit here and put my family through this * * *, you know."

* * *

"This is - just make it over with, man."

* * *

"I just told you what I wanted to do. I plead guilty. I killed them, but I don't remember what happened to Doreatha and Shenay."

Defense counsel informed the court that the defense had discussed Fitzpatrick's competence with two psychiatrists and a psychologist, and had reviewed medical records from two other psychiatrists. The defense was unable to find any basis to assert that Fitzpatrick was incompetent.

After Fitzpatrick signed a jury waiver, the jury was discharged and a three-judge panel was selected. The panel went over each count in the indictment with Fitzpatrick, explaining the maximum sentence for each charge. The court explained to him that by pleading guilty, he would waive his rights to a jury trial, to confront witnesses before a jury, to present witnesses in the guilt phase, and to hold the state to its burden of proving guilt beyond a reasonable doubt to a jury, and his privilege against self-incrimination. The court noted that Fitzpatrick would be entitled to confront witnesses that testified for the prosecution, present witnesses in a penalty phase (if there was one), and that the prosecution would have to prove to the three-judge panel that he was guilty beyond a reasonable doubt of the aggravated murders and specifications. Fitzpatrick said he understood the court's explanations, had consulted with his counsel, was satisfied with his counsel's work, and wished to plead guilty. The court then allowed him to withdraw his earlier plea and enter a plea of guilty to all counts and specifications in the indictment.

The state then presented evidence, as required by R.C. 2945.06 ("If the accused pleads guilty of aggravated murder, a court composed of three judges shall examine the witnesses, determine whether the accused is guilty of aggravated murder or any other offense, and pronounce sentence accordingly"). See State v. Green (1998), 81 Ohio St.3d 100, 1998 Ohio 454, 689 N.E.2d 556. Witnesses included Detective Dilbert, Sergeant Sumler, Betty Rose, Montika Pitts, Marjorie Duff, and Dr. Robert Pfalzgraf, Chief Deputy Coroner of Hamilton County. Also testifying were Anthony Barner, who was Shenay Hayes's father, and Deputy Sheriff David Linder, an evidence technician.

> The panel found Fitzpatrick guilty of all charges and specifications. The panel then held a mitigation hearing. The state reintroduced its evidence from the plea hearing. Fitzpatrick presented three witnesses and made an unsworn statement, and the state called one rebuttal witness. After the mitigation hearing, the panel sentenced Fitzpatrick to death.

Ohio v. Fitzpatrick, 102 Ohio St. 3d 321, 321-25, ¶¶ 1-32, 810 N.E.2d 927 (2004).

## III. State Court Post-Conviction Procedural History

On April 1, 2002, Fitzpatrick filed his Notice of Appeal in this Court. He asserted twelve Propositions of Law in his appeal. On July 7, 2004, this Court issued a Judgment Entry affirming Fitzpatrick's conviction and sentence. This Court conducted a *de novo* review of the death sentence pursuant to O.R.C. § 2929.05 and held that the aggravating circumstances outweighed the mitigating factors as a matter of law and that death sentences were not disproportionate. *State v. Fitzpatrick*, 120 Ohio St. 3d at 334, 339-40, ¶¶ 82, 116-21. Fitzpatrick sought review by *certiorari* in the United States Supreme Court, which declined to consider the case. *Fitzpatrick v. Ohio*, 545 U.S. 1130 (2005).

Fitzpatrick then filed an Application for Reopening with this Court to reopen his appeal pursuant to Ohio Supreme Court Practice Rule XI § 5(A) and *Ohio v. Murnahan*, 63 Ohio St. 3d 60, 584 N.E.2d 1204 (1992), based on ineffective assistance of appellate counsel. The Application for Reopening was denied on February 16, 2005. *Ohio v. Fitzpatrick*, 105 Ohio St. 3d 1436, 822 N.E. 2d 808 (2005).

On November 22, 2002, Fitzpatrick filed his Petition for Post-Conviction Relief under O.R.C. § 2953.21 in the Hamilton County Court of Common Pleas, pleading fifteen Grounds for Relief. The Court of Common Pleas for Hamilton County found that Fitzpatrick was not entitled to relief on any of his claims and denied the petition for post-conviction relief. Fitzpatrick filed a notice of appeal with the First District Court of Appeals from the denial of post-conviction relief

on October 30, 2003. On appeal he raised four Assignments of Error. On October 22, 2004, the Court of Appeals affirmed the decision of the Court of Common Pleas. *Ohio v. Fitzpatrick*, No. C-0303804, 2004 WL 2367987, at *14 (Ohio App. Oct. 22, 2004). Fitzpatrick then appealed to the Ohio Supreme Court which declined to review the judgment of the lower courts. *Ohio v. Fitzpatrick*, 105 Ohio St. 3d 1499, 825 N.E.2d 623 (2005).

## IV. Federal Court Procedural History

Fitzpatrick filed his Notice of Intention to seek habeas relief in Federal Court on July 26, 2005, and followed with the Petition for Writ of Habeas Corpus on June 9, 2006. He filed an Amended Petition on June 23, 2006.

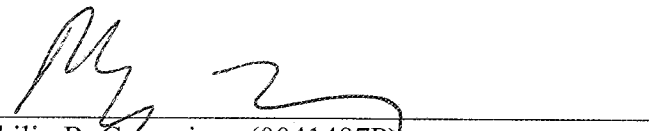
His petition was ultimately rejected. *Fitzpatrick v. Bradshaw*, 2009 WL 3734143 S.D. Ohio, 2009 (Nov. 5, 2009). The Sixth Circuit Court of Appeals affirmed. *Fitzpatrick v. Robinson*, 723 F.3d 624 (C.A. 6Ohio), July 19, 2013. On April 28, 2014, the United States Supreme Court denied certiorari. *Fitzpatrick v. Robinson, Warden*, 13-8394, 134 S.Ct. 1939, 723 F.3d 624, 82 USLW 3630.

## V. Relief Sought

As Fears has fully exhausted all available legal challenges to his conviction and death sentence, the State of Ohio respectfully requests this Court to set a date for Fitzpatrick's execution.

Respectfully Submitted,

Joseph T. Deters (0012084P)
Prosecuting Attorney



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**CERTIFICATE OF SERVICE**

On the 15 day of September, 2014, a copy of the foregoing was sent via first class, U.S. mail to Mark A. Vander Laan, Dinsmore & Shohl LLP, 255 East Fifth Street, Suite 1900, Cincinnati, Ohio 45202, Angelina N. Jackson, Dinsmore & Shohl LLP, 10 N. Ludlow Street, Suite 1100, Dayton, Ohio 45402, and to James Schuster, Roetzel & Andress, LPA, 1375 East Ninth Street, Cleveland, Ohio 44114, Timothy Young Office of the Ohio Public Defender, 250 East Broad Street, Suite 1400, Columbus, Ohio 43215.

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