IN THE SUPREME COURT OF FLORIDA

CASE NO. SC12-1987

JOHN ERROL FERGUSON,
Appellant,
v.
STATE OF FLORIDA,
Appellee.

DEATH WARRANT SIGNED, EXECUTION SCHEDULED FOR OCTOBER 16, 2012 AT 6:00PM

ON APPEAL FROM THE CIRCUIT COURT OF THE ELEVENTH JUDICIAL CIRCUIT, IN AND FOR MIAMI-DADE COUNTY, STATE OF FLORIDA

INITIAL BRIEF OF APPELLANT

BENJAMIN J.O. LEWIS*
HOGAN LOVELLS US LLP
875 Third Avenue
New York, NY 07054-2891
Tel.: (212) 909-0646
Fax: (212) 918-3100

E. BARRETT PRETTYMAN, JR.*
CHRISTOPHER T. HANDMAN*
HRISHIKESH HARI, FL BAR NO. 91134
HOGAN LOVELLS US LLP
555 Thirteenth Street, N.W.
Washington, D.C. 20004
Tel.: (202) 637-5600
Fax: (202) 637-5910
chris.handman@hoganlovells.com

Counsel for Appellant
John Errol Ferguson

September 25, 2012

*Admitted pro hac vice

TABLE OF CONTENTS

TABLE OF CONTENTS—Continued

TABLE OF CONTENTS—Continued

TABLE OF AUTHORITIES

Page(s)

CASES

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

INTERNATIONAL CASES

TABLE OF AUTHORITIES—Continued

STATUTES

RULE

TABLE OF AUTHORITIES—Continued

CONSTITUTIONAL PROVISIONS

OTHER AUTHORITIES

TABLE OF AUTHORITIES—Continued

PRELIMINARY STATEMENT

This appeal comes from the Circuit Court on the summary denial of a Rule 3.851 motion. The following symbols will be used to designate references to the record in this appeal:

- "R." refers to the record on Appeal for Florida Supreme Court Case No. 76458 (Ferguson's initial post-conviction proceedings under Fla. R. Crim. P. 3.851);

- "RCC." refers to the Record on Appeal for Florida Supreme Court Case No. 55137 (the Carol City case);

- "Ex." refers to documents that were introduced in Ferguson's federal habeas proceedings and were attached to Ferguson's 3.851 Motion in the Circuit Court below.

REQUEST FOR ORAL ARGUMENT

Ferguson is under a death warrant with an execution date scheduled for October 16, 2012, at 6:00pm. This appeal raises novel and complex questions about the constitutionality of Florida's lethal-injection statute; the constitutionality of the clemency process (or lack thereof) attending Ferguson's death warrant; and the constitutionality of the death warrant itself. The resolution of these issues will determine whether Ferguson lives or dies. Oral argument will substantially aid this Court in resolving those complex and critical issues.

STATEMENT OF THE CASE AND FACTS

I. NATURE OF THE CASE

John Ferguson had a childhood defined by poverty, abuse, and privation. Ferguson began showing signs of psychosis in his early teens; those mental disturbances took a turn for the worse when he was shot in the head at age 21. R.3011. Immediately after returning from the hospital, he began to exhibit profound mental instability, irrationality, and inexplicable hostility. R.1536, 2943-44, 2968-69, 2976-78, 3011-15.

The severe trauma of Ferguson's childhood and more than 40 diagnoses of psychosis and schizophrenia illustrate the severity and deep rooted nature of his mental illness. Forced to move nearly a dozen times to escape violent men — first his alcoholic father, later his mother's multiple boyfriends — Ferguson spent his formative years shuttling among squalid one-bedroom houses or apartments. Eight family members (and sometimes additional strangers) would cram into these blighted accommodations. R.2922-23, 2958, 2963. The conditions were, in short, deplorable.

When drunk, Ferguson's abusive and alcoholic father would grab his mother by her hair and "throw [her] upside the wall." R.2924. Ferguson was five years old when the police forcibly removed his father from the family's one-bedroom house, R.2924-25; his mother then moved Ferguson and his siblings into a housing

project where she frequently disciplined him with an iron cord, R.2926, 2995, and regularly left them in the care of an older sibling who beat him. R.2957, 2991-93, 3001.

For a time, Ferguson and his siblings lived with one of his mother's boyfriends, who would abuse his mother in front of Ferguson. R.2930, 2932-33. Ferguson was forced to intervene to "protect [his] mother" when he was thirteen. R.2933, 2961. The family then spent two years on the run while his mother's abusive boyfriend continued to track them, attacking and beating Mrs. Ferguson, stabbing her with a knife, and once shooting at the family's home. R.2961, 2974.

His home life followed a sad and familiar pattern: Once Mrs. Ferguson found a new boyfriend or reconciled with an abusive one, she would often abandon Ferguson and his siblings. For instance, when Ferguson was about 11 years old, his mother deserted him and several of his siblings in an empty house overrun by snakes, scorpions, and chickens, R.2963, 3063, and lacking electricity or indoor plumbing, R.2934, 2963, 3063. The State describes this building euphemistically as "a family friend's farm." State Resp. 5. Ferguson and two of his sisters were so agitated and lonely in that house that one day they attacked and killed the chickens in the yard because, as another sister explained, we "couldn't take it out on anybody else." R.3063. Ferguson's childhood was, indeed, traumatic. The State's attempt to characterize it differently does not withstand even minimal scrutiny.

After being shot in the head at age 21, Ferguson spent the next decade in and out of state mental hospitals – mostly in. R.3093, 3098. All seven psychiatrists who had examined him during that period concluded that he was "a paranoid schizophrenic," R.81-83; "suffer[ed] from a major mental disorder," R.88-89; experienced "hallucinations and a delusional system," *id.*; that his "[j]udgment and insight were grossly impaired[,]" *id.*; and did not "know[] right from wrong," R.99. They uniformly recommended that he remain hospitalized; he was a "dangerous person both to himself and to others." R.103. And yet, despite these repeated warnings by court-appointed psychiatrists, Ferguson was deemed "mentally competent" and discharged in 1976.

The psychiatrists proved prescient. On July 27, 1977, Ferguson, Marvin Francois, and another man entered a home in Carol City, Florida looking for drugs and money. After Francois's mask slipped and revealed his face, six of the eight people in the house were shot and killed. Francois himself killed at least five of the six victims. RCC 712. The evidence linked Ferguson to only one shot, which grazed one victim who was treated and released from the hospital the next day. RCC 351. Ferguson had tried to dissuade Francois from killing anyone, RCC 447, and had attempted to comfort some of the victims. RCC 321-323, 343, 351.

Six months later, on January 8, 1978, two bodies were found in Hialeah, Florida. When Ferguson was arrested pursuant to a warrant related to the Carol

City murders on April 5, 1978, the police found a gun in his possession capable of firing bullets matching those used to kill the two in Hialeah.

II. COURSE OF PROCEEDINGS

Ferguson was tried in the Circuit Court for the Eleventh Judicial Circuit In and For Miami-Dade County, Florida (the "Circuit Court") on six counts of first degree murder in the Carol City case and two counts of first degree murder in the Hialeah case (among other charges). The cases were tried before separate juries, but the same judge presided over both trials and Ferguson's initial sentencing proceedings. Constitutional errors riddled the proceedings, most notably on the part of Ferguson's counsel, who failed to investigate Ferguson's childhood or history of mental illness and thus failed to introduce this substantial mitigating evidence during the penalty phase. R.3035, 3051, 3165-66.

Both juries found Ferguson guilty of first-degree murder. He was sentenced to death. It was 1978.

Ferguson immediately appealed.[1] This Court issued a decision nearly four years later, on July 5, 1982. It affirmed the convictions but, because the trial court had misconceived certain mitigating factors and relied on invalid aggravating factors, reversed Ferguson's capital sentences. *Ferguson* v. *State*, 417 So. 2d 631 (Fla. 1982); *Ferguson* v. *State*, 417 So. 2d 639 (Fla. 1982).

[1] The grounds for this and all other appeals are stated in more detail in Ferguson's 3.851 petition filed in the Circuit Court. Ferguson Mot. 4-8.

On remand, a new judge, unfamiliar with either case, reimposed all eight capital sentences. His decision rested solely on his review of a cold record, without a jury, evidentiary hearing, or even oral argument. Even so, nearly a year passed before the judge reached a decision. Ferguson appealed, and this Court affirmed. *Ferguson* v. *State*, 474 So. 2d 208 (Fla. 1985). At the end of this direct appeal process, Ferguson had been on death row for more than seven years.

Ferguson sought post-conviction relief under Florida Rule of Criminal Procedure 3.851 by filing a motion in the Circuit Court in 1987. His counsel soon thereafter moved to stay those proceedings on the grounds that Ferguson was incompetent to assist counsel. The Circuit Court sat on the motion for a stay for more than a year and ultimately denied it. It eventually denied Ferguson's 3.851 motion, too. This Court affirmed. *Ferguson* v. *State*, 593 So. 2d 508 (Fla. 1992).

On March 20, 1995, Ferguson filed a federal habeas proceeding and his counsel concurrently moved to stay proceedings due to his continued incompetence. After four years of near inactivity – not even a blip on the docket from September 1996 through March 1999 – the U.S. District Court for the Southern District of Florida denied Ferguson's motion for a stay. Ferguson filed a Second Amended Petition and again moved to stay proceedings based on his incompetence. After holding an evidentiary hearing to determine Ferguson's

competency, the District Court denied Ferguson's motion for a stay and his habeas petition in the same ruling.

Ferguson appealed, filing his opening brief with the Eleventh Circuit on September 22, 2005. Nearly four years later, on August 26, 2009, the Eleventh Circuit affirmed the District Court's denial of the habeas petition. *Ferguson* v. *Sec'y for Dep't of Corr.*, 580 F.3d 1183 (11th Cir. 2009). Ferguson's timely request for review by the United States Supreme Court was denied on June 1, 2010. *Ferguson* v. *McNeil*, 130 S. Ct. 3360 (2010).

On September 5, 2012, Florida Governor Rick Scott signed a warrant for Ferguson's execution, prompting his Rule 3.851 motion in the Circuit Court.

III. DISPOSITION IN THE CIRCUIT COURT

Ferguson's initial Rule 3.851 motion, which undergirded the post-conviction and habeas appeals that took 23 years to wend their way through the state and federal courts, focused on the constitutional infirmity of his trials and initial appeals.

Not so with the Rule 3.851 motion at issue here. In his current motion to vacate his sentence, Ferguson asserted the following grounds for post-conviction relief: (1) Florida's execution protocol and recent amendment thereto are invalid because they unconstitutionally delegate power from the state legislature to the Department of Corrections; (2) Florida's death warrant selection process is

unconstitutional under the Eighth and Fourteenth Amendments; (3) Ferguson was unconstitutionally denied an opportunity to participate in his clemency investigation and proceedings; and (4) Ferguson's punishment – to be executed after the State has kept him cooped up in a cramped 9x6 cell on death row for 34 years – is cruel and unusual, and therefore violates the Eighth and Fourteenth Amendments to the United States Constitution. Ferguson Mot. at 9-10.

These issues became ripe only because Governor Scott signed Ferguson's execution warrant. *See Johnson* v. *Bredesen*, 130 S. Ct. 541, 544 (2009) (Stevens, J., joined by Breyer, J., respecting the denial of certiorari) ("[A] *Lackey* [excessive delay] claim, like a claim that one is mentally incompetent to be executed, should, at the very least, not accrue until an execution date is set."); *Jones* v. *State*, 845 So. 2d 55, 74 (Fla. 2003) (claim related to whether execution will pass Eighth Amendment muster is "not ripe for review" where death warrant had not yet been signed). Had Ferguson requested review of these claims before Governor Scott signed the warrant, the Circuit Court would have deemed his motion premature: It would have been impossible to predict (1) whether the Department of Corrections would receive any guidance from the Florida legislature regarding how to execute an inmate by lethal injection; (2) what warrant-selection process the Governor would use; (3) whether Ferguson would receive a fair clemency hearing *immediately* before execution; and (4) how long Ferguson would be on death row.

Now that Governor Scott has scheduled Ferguson's execution, the claims raised here are finally ripe for adjudication. Fla. R. Crim. P. 3.851(d)(2)(A); *Rivera* v. *State*, 995 So. 2d 191 (Fla. 2008) (no bar to state post-conviction motions where movant can show that the grounds asserted were not known and could not have been known at the time of the previous motion).

On September 21, 2012, the Circuit Court denied each of Ferguson's claims. The court rejected Ferguson's separation-of-powers argument as untimely, determining that the exception to 3.851's one-year statute of limitations articulated in *Jones* v. *State*, 845 So.2d 55 (Fla. 2003), did not necessarily extend to arguments other than a competency claim. The court also failed to address the merits of the persuasive decision recently issued by the Arkansas Supreme Court in *Hobbs* v. *Jones*, --- S.W. 3d ---, 2012 Ark. 293 (Ark. 2012). That decision is important because a sister Supreme Court found an almost identical lethal-injection statute to be unconstitutional under an almost identical state constitutional provision. The court also denied Ferguson's argument that the Florida lethal-injection regime violates separation of powers because it delegates the authority not only to set but also to change the protocol without any prior administrative or meaningful judicial review. The court found that "even a 'last minute' change of protocol, as allowed and provided for in Florida's lethal injection statute, is not a violation of Separation of Powers." Opinion at 4.

With respect to Ferguson's second claim that Florida's arbitrary death warrant selection process violates the Eighth and Fourteenth Amendments, the court held that "the law allows death row inmates with mental health issues to be legally executed." Opinion at 5. The court disregarded the evidence presented by Ferguson showing that the Governor and the State were in collusion, and that the State's attorneys were aware that Ferguson's death warrant was next to be signed days before Ferguson was informed. The court found that Ferguson "fail[ed] to allege the advantage gained by the State in receiving this supposed 'head start', or the disadvantage accorded [Ferguson] as a result of this contact." Opinion at 6.

Despite its recognition of clemency as "'the "fail safe" in our criminal justice system,'" designed to "prevent[] miscarriages of justice where judicial process has been exhausted," *Harbison* v. *Bell*, 556 U.S. 180, 192 (2009) (citing *Herrera* v. *Collins*, 506 U.S. 390, 411-12, 415 (1993)), Ferguson's argument that he was unconstitutionally denied an opportunity to participate in his clemency investigation and proceedings also was denied in the lower tribunal as "time-barred." Opinion at 9. However, the court recognized that Ferguson's claim would have been meritorious if not time-barred, finding that he "may have been entitled to an evidentiary hearing for the limited purpose of determining whether or not [he] received a 'full clemency hearing' within the meaning of *Johnston* [v. *State*, 27 So. 3d 11 (Fla. 2010)] and *Marek* [v. *State*, 8 So. 3d 1123 (Fla. 2009)],

and this Court's rulings may have differed on [his] motion for competency determination and his demands for public records." Opinion at 9-10. Declining to acknowledge that claims regarding clemency only become ripe near the time a death warrant is signed, however, the court ultimately found that his clemency claim should have been raised at the time his appellate remedies had been exhausted – one year after his petition for writ of certiorari was denied by the United States Supreme Court. *Id.*

Finally, the lower court denied Ferguson's claim that keeping him on death row for 34 years and then executing him constitutes cruel and unusual punishment under the Eighth Amendment, blaming Ferguson's "exercise of his constitutional rights through the appellate process, as well as occasional findings of incompetency" for the delay. Opinion at 10.

The Circuit Court also denied Ferguson's motion for determination of competency pursuant to Florida Rule of Criminal Procedure 3.851(g), which Ferguson had filed alongside his motion to vacate his sentence. Though it found that "Mr. Ferguson undoubtedly suffers from mental illness which is documented from the time prior to the murders," the court determined that Ferguson had not met his burden under Rule 3.851(g) because his claim regarding denial of an opportunity to have and participate in a full clemency hearing was untimely. Competency Opinion at 2.

Ferguson now appeals these determinations.

SUMMARY OF ARGUMENT

I. The Department of Corrections was able to quietly implement a fundamental change to the State's lethal-injection protocol the day before the Governor signed Mr. Ferguson's death warrant. It was able to smuggle in this radical change in procedure without any public comment or scrutiny because the agency enjoys unfettered power to determine how this State puts people to death. That, though, is the sort of decision that only the political branches can make; unelected agency officials—insulated from direct accountability—enjoy no ability under this State's Constitution to make those determinations in the first instance. And for good reason: Delegations of legislative authority are permissible *only* when minimal standards and guidelines are in place to protect against abuse of the delegated power. *See Florida Dep't of State, Div. of Elections* v. *Martin*, 916 So. 2d 763, 770 (Fla. 2005). Florida's lethal-injection statute disregards this structural constitutional mandate.

The Circuit Court wrongly believed this question settled. It is not; certainly no case has analyzed the potential for political-accountability mischief with these sorts of unconstitutional delegations. But more importantly, a recent decision from the Arkansas Supreme Court, striking down a nearly identical lethal-injection statute under a nearly identical constitutional provision, presents this Court with an

ideal vehicle to restore the constitutional balance to this State's death-penalty practices. *Hobbs* v. *Jones*, --- S.W.3d ---, 2012 Ark. 293 (Ark. 2012).

The Circuit Court likewise erred when it summarily rejected Ferguson's separation-of-powers argument as "time-barred." Opinion at 3. That is because Ferguson's claim did not ripen until the Governor signed his death warrant. *Jones* v. *State*, 845 So. 2d 55 (Fla. 2003); *Brown* v. *Vail*, 237 P.3d 263 (Wash. 2010) (en banc).

II. When Governor Scott signed the death warrant denying clemency for Mr. Ferguson, he relied on a 25-year-old incomplete and patently deficient clemency investigation that contained zero input from Mr. Ferguson. The reason Mr. Ferguson did not participate in that process? The State itself concluded—twice—that he was mentally incompetent and postponed the clemency proceedings. As the Circuit Court found below, the record shows that the State only made two attempts to conduct a clemency interview with Mr. Ferguson way back in the 1980's; both of those clemency efforts were thwarted due to Mr. Ferguson's conceded incompetence. After that, the State simply gave up. And it did so even though its official clemency procedures required that it conduct a clemency interview with Mr. Ferguson. To the best of counsels' knowledge, the State never made any further attempts to interview him in the intervening 25 years.

Given the record, the Circuit Court wisely found that an evidentiary hearing might be appropriate to determine whether Mr. Ferguson received a "full clemency hearing." But the Circuit Court denied an evidentiary hearing because it mistakenly found this claim to be time-barred, even though this claim could not possibly have become ripe until Governor Scott denied clemency in the death warrant. Yet, even if this claim became ripe before the death warrant was signed, the statute of limitations was tolled due to the State's ongoing denial of due process and Mr. Ferguson's incompetence. As Mr. Ferguson's claim is timely and well-supported, the proper course of action is for this Court to remand to the Circuit Court for an evidentiary hearing.

III. A State may not go about picking who lives and who dies through a system that functions like "little more than a lottery system." *Furman* v. *Georgia*, 408 U.S. 238, 293 (1972) (Brennan, J., concurring). But that is exactly how Florida's warrant-selection process, as applied to Ferguson, worked here. To begin with, there is absolutely no guidance or objective metric by which Florida's Governor picks who should die. Unlike the law in virtually every other state with the death penalty, Florida leaves this decision entirely to the Governor. Yet because the State ultimately executes just a fraction of the inmates on death row, who gets picked by the Governor to die and who is left to live out his days in prison is a function of sheer whim and caprice. And the Governor's refusal to

consider warrant-eligible inmates on an individual basis results in the arbitrary and capricious infliction of the death penalty. The Eighth and Fourteenth Amendments, and the decisions of the Supreme Court, prohibit his execution in this capricious manner.

IV. Ferguson's death sentence should also be set aside because his de facto punishment – 34 years spent alone in a concrete cell on death row, followed by execution – is cruel and unusual. Capital punishment only passes Eighth Amendment muster when an execution's deterrent and retributive effects justify its imposition. Here, executing Ferguson after his protracted incarceration will not further any legitimate penological objective to a sufficiently greater extent than can be accomplished by requiring Ferguson to spend the rest of his life in prison. "A penalty with such negligible returns to the State would be patently excessive and cruel and unusual punishment violative of the Eighth Amendment." *Furman* v. *Georgia*, 408 U.S. 238, 312 (White, J., concurring).

The Circuit Court erred when it held otherwise. First, it incorrectly concluded that this Court has addressed Ferguson's argument before. Though on occasion this Court has held that the mere passage of time (though never as long as 34 years) does not amount cruel and unusual punishment, it has never determined whether an unnecessarily prolonged confinement on death row, *followed by an execution without legitimate penological objectives*, amounts to a violation of the

Eighth Amendment. Second, the Circuit Court ignored the many domestic and international opinions that have repeatedly rejected the constitutionality of punishment similar to, but ultimately less severe than, Ferguson's. At bottom, without binding precedent resolving the issue and faced with significant case law suggesting that Ferguson's claim has merit, this Court must assess whether deterrent and retributive objectives will be served by executing a mentally ill, 64-year-old man who has been on death row since 1978. Ferguson submits that these objectives will not be served, and that as a result, executing him would violate the Eighth Amendment.

V. Despite finding that Mr. Ferguson "undoubtedly suffers from mental illness," the Circuit Court improperly denied counsel for Mr. Ferguson's Motion for Determination of Competency under Florida Rule of Criminal Procedure 3.851(g). The Circuit Court's reasoning – that Mr. Ferguson's clemency process claim was time-barred and thus did not require his input – was flawed. Mr. Ferguson's clemency-process claim is timely, and a competent Mr. Ferguson may be able to shed much light on the major factual questions regarding his clemency process that the Circuit Court forthrightly conceded remain open. This Court should accordingly remand to the Circuit Court for a determination on the merits given the timeliness of Mr. Ferguson's clemency claim.

STANDARD OF REVIEW

This Court reviews *de novo* a denial of a Rule 3.851 request for a stay of execution. *Stephens* v. *State*, 748 So. 2d 1028, 1034 (Fla. 1999); *State* v. *Glatzmayer*, 789 So. 2d 297, 301 n.7 (Fla. 2001). This Court should "accept the allegations of the defendant as true to the extent that they are not refuted by the record." *Walton* v. *State*, 77 So. 3d 639, 642 (Fla. 2011), *reh'g denied* (Dec. 20, 2011); *Schoenwetter v. State*, 46 So. 3d 535 (Fla. 2010), *reh'g denied* (Oct. 6, 2010). Deference must be given only to those "findings of fact based on competent, substantial evidence." *Stephens*, 748 So. 2d at 1034.

ARGUMENT

I. FLORIDA'S LETHAL-INJECTION STATUTE VIOLATES THE STATE'S SEPARATION-OF-POWERS PRINCIPLE.

Florida's lethal-injection statute, Fla. Stat. § 922.105 (2012), delegates sweeping authority to the state Department of Corrections (DOC) without providing any guidance on the application of that broad authority, in violation of the Florida Constitution's strict separation-of-powers principles. The DOC's most recent revisions to the lethal-injection protocol – issued on the eve of John Ferguson's execution warrant – only compound the constitutional violation. Indeed, those eleventh-hour departmental revisions embody exactly the capricious administrative decisionmaking the separation-of-powers principle is supposed to protect against.

The very recent decision of the Arkansas Supreme Court – finding that State's virtually identical lethal-injection protocol violates its virtually identical separation-of-powers rule – provides this Court with a renewed opportunity to restore constitutional balance to this State's capital process. Both common sense and this State's Constitution demand that the political branches – not unelected agency officials – make the hard choices about how this State goes about putting fellow humans to death. Ferguson's death sentence should be vacated or stayed.

A. Florida's Lethal-Injection Statute Delegates Boundless Authority To The DOC, Violating Established Separation-Of-Powers Rules.

The Florida Constitution, like its federal counterpart, expressly specifies that "[n]o person belonging to one branch shall exercise any powers appertaining to either of the other branches unless expressly provided [in the constitution itself]." Fla. Const. art. II, § 3 (2010). This unambiguous constitutional language has given rise to a "strict separation of powers doctrine." *Diaz* v. *State*, 945 So. 2d 1136, 1143 (Fla. 2006) (internal citation omitted). Under Florida's strict separation-of-powers principles, a legislature may make a limited delegation of power to a state agency, *so long as* the delegation does not include "the power to enact a law or the right to exercise unrestricted discretion in applying the law." *Sims* v. *State*, 754 So. 2d 657, 668 (Fla. 2000). Agencies carrying out legislative directives thus may do so only "pursuant to some minimal standards and guidelines ascertainable by reference to the enactment." *Askew* v. *Cross Key Waterways*, 372 So. 2d 913, 925

(Fla. 1978). Requiring Florida's legislature to articulate those "minimal standards and guidelines" protects against abuse of the delegated power and "enables courts to perform their constitutional duties * * * [to] determin[e] whether the executive branch is acting in accord with the Legislature's intent." *Florida Dep't of State, Div. of Elections* v. *Martin*, 916 So. 2d 763, 770 (Fla. 2005).

Florida's lethal-injection statute is hopelessly devoid of any such "minimal standards and guidelines." *Askew*, 372 So. 2d at 925. It issues two unadorned directives: first, that a death sentence "shall be executed by lethal injection, unless the person sentenced to death affirmatively elects to be executed by electrocution"; and second, that "[t]he sentence shall be executed under the direction of the Secretary of Corrections or the secretary's designee." Fla. Stat. § 922.105(1). That is all the statute says. It offers no guidance to the DOC (or its "designee") on how to carry out the lethal-injection protocol, nor any standards for its application. The statute does not "articulate any factors to be considered" in determining the appropriate policy. *Martin*, 916 So. 2d at 771. And it does not place any "meaningful limitations * * * on [the DOC's] purported authority." *B.H.* v. *State*, 645 So. 2d 987, 994 (Fla. 1994). Indeed, even the Florida Governor's Commission on the Administration of Lethal Injection – which convened to issue a report following the debacle of an inmate's 34-minute execution in 2006 – already has *acknowledged* that the legislature's lethal-injection directive is devoid of guidance:

"Chapter 922 does not delineate with any detail how Florida's death penalty by lethal injection is to be implemented. The promulgation of procedures and protocols for implementing the death penalty by lethal injection was left to the discretion of the Department of Corrections." Governor's Commission on Administration of Lethal Injection, *Final Report with Findings and Recommendations*, at 2 (Mar. 1, 2007). That is exactly right. It is also constitutionally impermissible. The statute leaves the execution of Florida's death-row inmates to the boundless discretion of an unaccountable executive agency.

This Court should step in to correct that constitutional error. Other courts, applying nearly identical facts and law, already have. About three months ago, the Arkansas Supreme Court struck down that state's lethal-injection statute as violating the separation-of-powers principles under its state constitution. *Hobbs* v. *Jones*, --- S.W.3d ---, 2012 Ark. 293 (Ark. 2012). The court in *Hobbs* held that Arkansas' lethal-injection statute provided the Arkansas Department of Corrections (ADOC) with "no sufficient guidelines," thereby granting the ADOC unconstitutionally "unfettered discretion" in selecting the chemicals that would be used. *Id.* As the Arkansas Supreme Court explained, "[a] statute that, in effect, reposes an absolute, unregulated, and undefined discretion in an administrative agency bestows arbitrary powers and is an unlawful delegation of legislative powers." *Id.* (citation omitted).

The *Hobbs* decision is critical because both Florida and Arkansas apply the same basic separation-of-powers principles under each state's respective constitution[2] and nondelegation doctrines.[3] Like Florida's "strict separation of powers doctrine," *Diaz*, 945 So. 2d at 1143, Arkansas courts similarly hold that "[t]he doctrine of separation of powers is a basic principle upon which our government is founded, and should not be violated or abridged." *Hobbs*, 2012 Ark. 293 at 10 (citation omitted). And Florida's lethal-injection statute is identical to Arkansas's in all relevant particulars. Indeed, the only substantive difference between the two states' respective lethal-injection schemes is that the Arkansas statute had actually provided *more detailed* instructions to the state corrections department, including specifying that "[t]he sentence of death is to be carried out by intravenous lethal injection of one (1) or more chemicals, as determined in kind and amount in the discretion of the Director of the Department of Correction," and listing a number of drugs that may be used in a lethal-injection protocol. Ark. Code § 5-4-617(a)(1), (a)(1)(2) (2012). Yet the Arkansas Supreme Court

---

[2] *Compare* Ark. Const. art. 4, §§ 1-2, *with* Fla. Const. art. II, § 3. *See also Hobbs*, 2012 Ark. 293 at 10 (explaining that "discretionary power may be delegated * * * as long as reasonable guidelines are provided," and that "[t]his guidance must include appropriate standards"); *State* v. *Bruton*, 437 S.W.2d 795, 796 (Ark. 1969) (statute vesting state penitentiary board with power to define prisoners' felonious behavior and set punishment was unconstitutional because it gave no guidelines to board).

[3] *Compare Hobbs*, 2012 Ark. 293 at 10, *with Askew*, 372 So. 2d at 925.

concluded that even *with* that additional supporting detail, Arkansas's lethal-injection protocol was unconstitutional. Florida's lethal-injection statute offers far less even than that constitutionally deficient Arkansas statute; indeed, as this Court has observed, Florida's statute provides less specificity than most other states' parallel statutes. *Sims*, 754 So. 2d at 669.

Hobbs is recent, relevant, instructive – and correct. This Court should adopt the modern understanding – and emphatic rejection – of the extraordinarily broad delegation of power embodied in Florida's lethal-injection statutory scheme.

B. *Sims* And *Diaz* Should Be Overruled.

The recent decision in *Hobbs* also provides this Court with an opportunity to revisit the flawed rationales set forth in *Sims* and *Diaz*. This Court in *Sims* described Florida's lethal-injection statute as merely "lack[ing] * * * specific details." *Sims*, 754 So. 2d at 670; *see also Diaz*, 945 So. 2d at 1143. But the lethal-injection statute is not merely missing "details." It lacks any guiding principles whatsoever. The fact that the lethal-injection statute specifies that the result of carrying out the statute is death, as the *Sims* Court suggested at that time, is not nearly sufficient. Reasonable "minimal standards and guidelines ascertainable by reference to the enactment" *must* be provided alongside delegations of legislative power. *Askew*, 372 So. 2d at 925. The lethal-injection statute contains no such standards and guidelines; even the Governor's own Lethal-

Injection Commission now has acknowledged as much. *See* Commission Report at 2 ("Chapter 922 does not delineate with any detail how Florida's death penalty by lethal injection is to be implemented. "); *see also Askew*, 372 So. 2d at 925. It is incumbent on the Legislature in the first instance to give direction to an executive agency. Outsourcing that core legislative function – leaving it to the agency's discretion to "promulgat[e] * * * procedures and protocols for implementing the death penalty by lethal injection," Governor's Commission Report at 2 – is precisely what the separation-of-powers principle forbids.

And for good reason. If courts permit the Legislature to abdicate lawmaking authority to the Executive – particularly over topics as vital as capital punishment – they undermine basic democratic self-governance and political accountability. As the Supreme Court has emphasized in an analogous context, a legislature should not be able to dodge hard questions by outsourcing its lawmaking function to others; the legislature, and only the legislature, should "suffer the consequences if [its] decision turns out to be detrimental or unpopular." *New York* v. *United States*, 505 U.S. 144, 168 (1992). How the State should put to death a human being is precisely the sort of weighty issue that the political branches need to resolve. Passing the buck to an unelected bureaucrat in the DOC to make that fundamental decision erodes the very values in political accountability, self-governance, and democratic rule of law that the Florida Constitution was designed to promote.

The *Sims* Court (and the *Diaz* Court, following *Sims'* lead) also improperly assumed that an unconstitutional delegation of power could be saved if the legislature had delegated to an administrative body with particular subject-matter expertise. *Sims*, 754 So. 2d at 670. That again was the wrong inquiry: The "crux of the issue" is that "the legislature is not free to redelegate to an administrative body so much of its lawmaking power as it may deem expedient," no matter what the agency's expertise. *Askew*, 372 So. 2d at 924.

The Arkansas Supreme Court in *Hobbs* took the right approach when it recently found the Arkansas lethal-injection statute unconstitutional. And under the same approach, governed by substantively identical Florida law, Florida's lethal-injection statute is invalid. This Court should reverse the Circuit Court's ruling, quash the lethal-injection protocol, and stay Ferguson's execution.

C. The Department's Hasty Revision Of Its Lethal-Injection Protocol Exacerbates The Separation-Of-Powers Violation.

Florida's lethal-injection statute delegates to the DOC not only the authority to set the protocol for all lethal injections, but also to *change* that protocol without prior consultation, administrative review, or, most important, any meaningful judicial review. *See, e.g.*, *Lightbourne* v. *McCollum*, 969 So. 2d 326, 330 (Fla. 2007) (noting that the DOC revised its lethal-injection procedures in 2007 pursuant to findings of a DOC task force and the recommendations of the Governor's Commission). The DOC recently exercised its unconstitutionally broad

prerogative to change its execution protocols – the day before the Governor signed Ferguson's death warrant, to be precise.

On September 4, 2012, one day before Ferguson's death warrant was signed, Florida issued a revised protocol for execution by lethal injection, introducing a brand-new drug to be used in Ferguson's impending execution. *See* State's Notice of Filing and copy of September 4, 2012 (Sept. 7, 2012). Such last-minute alterations of execution protocol are constitutionally dubious, to say the least. *See* *Cook* v. *State*, 281 P.3d 1053, 1058 (Ariz. Ct. App. 2012). As the Arizona Supreme Court explained in *Cook*, "eleventh hour" revisions to an execution protocol "could have the practical consequence of obstructing judicial review of its changes[,]" thereby "threaten[ing] to 'usurp the powers[]' of the Judiciary, that is, its duty to exercise judicial review." *Id.* (quotation omitted).

The Circuit Court's analysis of Ferguson's argument on this point is wrong.[4] According to the Circuit Court, last-minute changes in the protocol are "allowed

[4] The court correctly concluded that this aspect of Ferguson's separation-of-powers claim was timely. Opinion at 4. The court also addressed an Eighth Amendment argument that it conceded Ferguson was not advancing. The Circuit Court opined, unbidden, that a change to a lethal-injection protocol three weeks before an execution does not violate the Eighth Amendment. *Id.* (citing *Valle* v. *State*, 70 So. 3d 530 (Fla. 2011)). The court then noted that vecuronium bromide – the drug substituted in the new lethal-injection protocol issued on September 4, 2012 – has been included in another state's protocol. But Ferguson explained in his Reply brief, and the court conceded in its Opinion, that he was "not raising an Eighth Amendment claim at this time." Ferguson Reply at 4-5; Opinion at 4. The

and provided for in Florida's lethal injection statute." Opinion at 4. Yes. That is the problem. That the statute tolerates such changes to the protocol is the *very reason* the statute is unconstitutional – not what saves it. This Court should find that Florida's lethal-injection statutory scheme, and the DOC's late-breaking revisions to the protocol, violate the Florida Constitution. The Florida legislature's abdication of its lawmaking responsibility warrants the invalidation of Fla. Stat. Ann. § 922.105 and a stay of Ferguson's execution.

D. Ferguson's Separation-Of-Powers Argument Is Timely.

The Circuit Court found Ferguson's separation-of-powers argument time-barred. Opinion at 3. That was error. Ferguson's challenge turns on whether the delegation to the DOC of the power to execute him violates the Florida Constitution. His claim therefore did not begin to run until the Governor signed his death warrant.

This Court has held that a death row inmate's competency for execution cannot be determined until it has all the facts *relevant at that time* before it for review. *Jones* v. *State*, 845 So. 2d 55 (Fla. 2003). Similarly, until a death row inmate knows under which lethal-injection protocol he is to be executed – which he will not know until his death warrant is signed – his claim is not ripe for review. Particularly in the two years since Ferguson's petition for certiorari was denied by

---

court's comments on a claim Ferguson did not present to it are thus concededly immaterial.

the United States Supreme Court, *Ferguson* v. *McNeil*, 130 S. Ct. 3360 (2010), the nature of executions in Florida and this country has been in total flux. Ferguson could hardly have anticipated when – if ever – his number would be arbitrarily called and he would be inflicted with whichever protocol happened to be in place at that time.

In analyzing a similar question, the Washington Supreme Court held that to determine the validity of a lethal-injection statute, "the protocol itself must be analyzed in its most current form." *Brown* v. *Vail*, 237 P.3d 263, 268 (Wash. 2010) (en banc) (holding that the challenge to the lethal-injection protocol was not time barred). *Brown* applied a three-year statute of limitations pursuant to Wash. Rev. Code Ann. § 4.16.080 (2012) for actions "for any other injury to the person or rights of another not hereinafter enumerated." *Id.*; *see also* Fla. Stat. Ann. § 95.11 (2012) (providing for a four-year statute of limitations for "[a]ny action not specifically provided for in these statutes"). Likewise, because the protocol under which Ferguson is set to be executed was issued only *days* before he filed his 3.851 petition, it clearly is within the statute of limitations provided for by Florida law. *Brown*, 237 P.3d at 268 (calculating the time for statute-of-limitations purposes as beginning when the execution protocol was amended).

Ferguson's claim was timely; in fact, coming just days after the protocol change itself, it was swift.

II. FERGUSON WAS UNCONSTITUTIONALLY DENIED AN OPPORTUNITY TO PARTICIPATE IN HIS CLEMENCY INVESTIGATION AND PROCEEDINGS.

Clemency proceedings must comport with basic due-process requirements. Ferguson's clemency proceeding did not.

When Governor Scott issued Ferguson's death warrant, he denied clemency at the same time. But the last clemency investigation of which Ferguson's counsel was aware was conducted about 25 years ago. It also was incomplete. The Circuit Court found as a matter of fact that the State's only two attempts on record to conduct a clemency interview with Ferguson in the late 1980's were unsuccessful because State mental health professionals found him to be incompetent to participate in a clemency interview. Opinion at 2.

In the 1980's – which marked the last known time the State attempted to initiate a clemency process in Ferguson's case – the Florida Parole and Probation Board's directive for capital-punishment cases contained a "Waiver of Executive Clemency Interview" form to be signed by all condemned inmates who did not wish to conduct clemency interviews. Ferguson Mot., Ex. H.[5] The current rules are stronger yet; as the Circuit Court noted, under current Florida Rule of

[5] The Florida Parole Commission is charged with "assist[ing] the [Parole] Board in making informed decisions" on clemency, including creating "a broad picture of the applicant's history and activities." 2007-2008 Fla. Parole Comm'n Annual Report at 24. The Parole Commission describes this role as "[q]uasi-[j]udicial"; it conducts hearings and takes statements, all of "which might otherwise be performed by a judge in the State Court System." *Id.* at 18.

Executive Clemency 15.B, "the clemency investigation 'shall' include an interview with the inmate." Opinion at 7.

This Court will look in vain for either the waiver or the interview. That is because, as the Circuit Court found, the State only made two attempts to conduct clemency interviews with Ferguson in 1986 and 1987, both of which were aborted due to Ferguson's mental incompetency. Opinion at 2.

The Florida Parole Commission convened on September 12, 1986 to conduct a clemency interview with Ferguson. Ferguson 3.851 Mot., Ex. A, at 1. Before the interview began, however, Dr. Laura Parado and Dr. Eduardo Infante, two mental health professionals employed by the State, examined Ferguson and determined that he was not competent to participate in the Commission's interview:

> [W]e found [Ferguson] to be incompetent to go into any kind of hearing or court, because [he] doesn't even know who a judge is; he doesn't know the name of his lawyer he is working with. And when we asked him what important event is going on today and he doesn't know what's going on. [*Id.* at 4].

The Commission postponed Ferguson's clemency interview in light of the State's doctors' assessment.

A year passed. On October 2, 1987, the Commission again attempted an evaluation. Ferguson again was found to be incompetent to participate. Ferguson

Mot., Ex. B at 1; Ex. C; Ex. G. To counsels' knowledge, the State has made no further attempts to interview Ferguson.[6]

Ferguson thus was never allowed to utter a single word in support of clemency. Consequently, the Circuit Court held that if Ferguson's claim is timely – and as we discuss below, it plainly is – the question whether he received a "full clemency hearing" at all may require an evidentiary hearing. Opinion at 6-9. Given the extreme shortcomings in Ferguson's clemency process, this Court should stay Ferguson's execution and remand his case to the Circuit Court for further proceedings.

A. Ferguson's Clemency Proceeding Did Not Meet Minimal Due Process Standards.

The clemency process is "the fail-safe of our criminal justice system." Opinion at 8 (citing and quoting *Harbison* v. *Bell*, 129 S. Ct. 1481, 1490 (2009) (internal quotation omitted)). Clemency is not a "matter of mercy alone," *Harbison*, 129 S. Ct. at 1490, and not just an option granted merely at the Governor's whim. It is an essential component of capital process; without it, the very legitimacy of a state's capital-sentencing scheme is suspect. *Harbison*, 129 S. Ct. at 1488-90. That is why even the State was constrained to concede in its

---

[6] Ferguson's requests for records from the relevant Executive agencies regarding his clemency proceedings were denied by the Circuit Court. The Circuit Court noted that its decision on Ferguson's records request "may have differed" if it had not found Ferguson's clemency claim barred. Opinion at 10.

briefing below that "some minimal procedural due process requirements should apply to clemency." *Johnston*, 27 So. 3d at 25 (quoting *Marek* v. *State*, 14 So. 3d 985, 998 (Fla. 2009) (quoted at State Resp. 31).

The Circuit Court concluded, however, that "[t]he Governor has unfettered discretion to deny clemency." Opinion at 7 (quoting *Gore* v. *State*, 91 So. 3d 769, 779 (Fla. 2012)). But the court asked and answered the wrong question. The relevant inquiry is not who ultimately makes the clemency determination, but rather whether the *process* leading up to that clemency determination is fundamentally fair. "[I]f a State establishes postconviction proceedings, these proceedings must comport with due process." *Ohio Adult Parole Authority* v. *Woodard*, 523 U.S. 272, 293 (1998) (Stevens, J., concurring) (plurality opinion); *see also id.* at 289 (noting that "some *minimal* procedural safeguards apply to clemency proceedings") (O'Connor, J., concurring) (plurality opinion) (emphasis in original); *Turner* v. *Epps*, 460 F. Appx. 322, 331 (5th Cir. 2012) (explaining that "[i]t is clear that some minimal due process safeguards do apply to clemency procedures") (citing *Woodard*, 523 U.S. at 288-289) (O'Connor, J., concurring) (plurality opinion).[7]

[7] The Circuit Court also cited this Court's 1977 decision in *Sullivan* v. *Askew* for the anachronistic proposition that the Executive retains "sole, unrestricted, unlimited discretion" over what the *Sullivan* court then described as an "act of grace." 348 So. 2d 312, 315 (Fla. 1977) (cited in Opinion at 8). But subsequent United States and Florida Supreme Court decisions have concluded that at least

The Circuit Court's citations to *Johnston*, *Marek*, and *Gore* also miss the mark for another reason as well. Opinion at 8-9. This Court found in each of those cases that the inmates were afforded full clemency hearings. *See Johnston*, 27 So. 3d at 24 (finding that inmate "was given a full clemency hearing"); *Marek*, 8 So. 3d at 1129 (finding that a "full clemency proceeding was conducted"); *Gore*, 91 So. 3d at 779 (finding that inmate received an initial clemency process free from deficiency). Here, in contrast, Ferguson received *no* clemency hearing – none.

The Circuit Court also cited Florida Rule of Executive Clemency 15.C, which provides that "[f]ailure to conduct or complete the [clemency] investigation pursuant to these rules shall not be a ground for relief for the death penalty defendant." Opinion at 7. But the Florida Board of Executive Clemency cannot by fiat overturn United States Supreme Court precedent. Failing to complete a clemency investigation violates the most minimal due process requirements.

Despite making findings of fact that the two clemency proceedings on record occurred in 1986 and 1987, and that both were cut short for Ferguson's lack of competency, the Circuit Court nonetheless rejected Ferguson's argument "that Governor Scott could not rely on any clemency investigation done in the late l980's, over twenty (20) years ago." Opinion at 9. But in *Harbison* v. *Bell*, the

---

some minimal due-process requirements apply to clemency; it is not a mere "act of grace," and discretion is not "unlimited." *Sullivan* v. *Askew*, 348 So. 2d 312, 315 (Fla. 1977).

United States Supreme Court explained that a condemned prisoner's federal habeas counsel may, during the habeas stage, develop "the basis for a persuasive clemency application" by gathering "extensive information about [the condemned's] life history and cognitive impairments that was not presented during his trial or appeals." 556 U.S. at 193. Clemency cannot fulfill the "fail safe" function the *Harbison* Court described unless the decisionmaker considers the entire record – including the record developed during collateral litigation, which, in Ferguson's case, took place well after his clemency investigation was conducted. Ferguson Mot. 6-8.

Because the record fails to show what, if anything, Governor Scott considered when he determined in Ferguson's death warrant that "executive clemency is not appropriate," his determination warrants no deference. If Governor Scott conducted any further investigation regarding clemency for Ferguson, counsel was not given notice of it. And if the Governor did not conduct any further investigation, then he impermissibly relied upon a decades-old, incomplete clemency investigation lacking any input from Ferguson himself due to his incompetence. Either way, it is clear that the State's clemency process in Ferguson's case did not conform to the most minimal due-process requirements.

The Circuit Court also observed that Ferguson "was represented by counsel at the time the clemency process was initiated." Opinion at 2. But the fact that

Ferguson was represented by counsel was a nullity. *Ferguson was incompetent.* As the State's own psychiatrists said when determining whether he was competent to undergo the clemency process in 1986 and 1987: Ferguson "doesn't even know who a judge is; he doesn't know the name of his lawyer," Ferguson Mot. Ex. A at 4:14-15, and he "does not know his lawyer's name and has only a vague idea of what a lawyer's function is." Ex. G. To say that the "fail safe" mechanism of clemency here functioned because this *concededly* incompetent man happened to have a lawyer in 1987 would render this mechanism an empty guarantee. *See District Attorney's Office for the Third Judicial Dist.* v. *Osborne*, 557 U.S. 52, 69-70 (2009) (asking whether a state's procedures for postconviction relief " 'transgress[] any recognized principle of fundamental fairness in operation' ") (quoting *Medina* v. *California*, 505 U.S. 437, 448 (1992)); *cf. Young* v. *Hayes*, 218 F.3d 850, 853 (8th Cir. 2000) (clemency process violated due process standards where the State "deliberately interfered with the efforts of petitioner to present evidence to the Governor").

The burden of conducting clemency proceedings that satisfy due-process requirements falls upon the State, not Ferguson. A clemency process in which the condemned prisoner's voice is not heard does not meet these requirements.

B. Ferguson's Clemency Claim is Not Time-Barred.

Citing Florida Rule of Criminal Procedure 3.851(d)(1)(B), the Circuit Court concluded that Ferguson's clemency due-process claim was time-barred. Opinion at 9. That was incorrect.

Rule 3.851(d)(1)(B) states that "Any motion to vacate judgment of conviction and sentence of death shall be filed by the prisoner within 1 year after the judgment and sentence become final * * * on the disposition of the petition for writ of certiorari by the United States Supreme Court." The Circuit Court concluded that because Ferguson's certiorari petition was denied on June 1, 2010, this claim should have been raised by June 1, 2011. Opinion at 9. But earlier this year, this Court ruled on the merits of a clemency claim substantially similar to Ferguson's that was raised over a year after the inmate's certiorari petition was denied, without making a finding that the claim was time-barred. *Gore*, 91 So. 3d at 770, 772, 778-79. The inmate's certiorari petition there was denied in 2009; and there, as here, he raised his clemency claim after the Governor signed the inmate's death warrant denying clemency in 2012.

The approach this Court took in *Gore* was entirely sensible; a clemency claim of this nature can only become ripe once the Governor denies clemency. Indeed, it would be perverse and inefficient to require an inmate to challenge to his clemency process before he even knows whether he has been denied clemency.

But there are still further reasons why Ferguson's claim was timely. Among them, the Governor's failure to grant a clemency hearing before issuing a death warrant constituted a continuing infraction akin to a continuing tort under Florida law, making Ferguson's claim timely. Under Florida's continuing-tort doctrine, the statute of limitations on an action continually resets for each day an infraction goes uncorrected. *See Seaboard Air Line R. Co.* v. *Holt,* 92 So.2d 169, 170 (Fla. 1956) (allowing victim of continuing tort to bring claims for damages suffered during the three year period immediately preceding filing of claim, despite the fact that the three year statute of limitations began running more than three years before date of claim); *Halkey-Roberts Corp.* v. *Mackal*, 641 So.2d 445, 447 (Fla. Dist. Ct. App. 1994) (citing *Seaboard Air Line R. Co.* v. *Holt* and applying the continuing-tort doctrine). The continuing-tort doctrine is ultimately a pragmatic doctrine; it avoids the harsh consequences of forcing an individual to forgo a remedy for a *present and continuing* injustice merely because the initial wrongdoing can be traced back further. That rule sensibly applies to garden-variety torts. It makes even more sense when applied to procedures that regulate how the State goes about deciding whom to kill and whom to spare. Thus, even assuming that Ferguson's clemency claim somehow became ripe before Governor Scott signed Ferguson's death warrant, he should be allowed to claim for violations of his right to a fair clemency process immediately preceding that warrant. This

includes Governor Scott denying clemency for Ferguson in the death warrant without soliciting or receiving *any* input from Ferguson, which in and of itself was a violation of Ferguson's right to the clemency process that conformed to the standards of due process.

Finally, the running of any time bar under Rule 3.851 should be tolled when the Court-acknowledged incompetency of the inmate prevents counsel from fully investigating a claim within the stated time limit.

* * *

The Circuit Court found that "had the [clemency] claim not been time-barred," Ferguson "may have been entitled to an evidentiary hearing for the limited purpose of determining whether or not [he] received a 'full clemency hearing' within the meaning of [*Johnston* v. *State*, 27 So. 3d 11 (Fla. 2010)] and [*Marek* v. *State*, 14 So. 3d 985 (Fla. 2009)]." The Circuit Court's determination that Ferguson's clemency claim was time-barred was incorrect. The proper course of action, then, as the Circuit Court itself suggested, is for this Court to remand this claim to the Circuit Court for an evidentiary hearing.

III. THE CIRCUIT COURT ERRED IN RULING THAT FLORIDA'S WARRANT-SELECTION SYSTEM, AS APPLIED TO FERGUSON, DID NOT VIOLATE THE EIGHTH AND FOURTEENTH AMENDMENTS.

Ferguson's Motion pointed to multiple reasons why Florida's warrant selection process as applied to him is unconstitutional. In response, the State failed

to address the bulk of Ferguson's points. The Circuit Court nonetheless rejected Ferguson's argument without any discussion. That was wrong.

As Ferguson explained at length in his moving papers, Florida's warrant selection process, as applied to him, results in the arbitrary and capricious infliction of the death penalty, due to the sheer randomness with which the Governor makes life-and-death decisions and the Governor's failure to consider warrant-eligible inmates on an individual basis. Without some scheme imposing objective criteria to determine who dies by the State's hand and who dies from natural causes while living out his final years on death row – as a majority of Florida inmates do – the death warrant process is "little more than a lottery system." *Furman* v. *Georgia*, 408 U.S. 238, 293 (1972) (Brennan, J., concurring). Indeed, the response to Ferguson's question, "why me?" appears to be straight from a lottery ad: "hey, you never know";[8] or "it could be you."[9] The Eighth and Fourteenth Amendments, and the decisions of the Supreme Court, prohibit his execution in this capricious manner.

There are four principal reasons why Florida's current death scheme violates the Eighth and Fourteenth Amendments: (1) the process by which Florida determines who should receive a death warrant is virtually unheard of in this

---

[8] New York Lotto. *See* http://nylottery.ny.gov/wps/portal.

[9] United Kingdom lottery. *See* http://www.national-lottery.co.uk/player/p/home.ftl.

country and permits the Governor and the Attorney General's office unfettered discretion to determine who dies; (2) Florida's death warrant selection process contains no oversight or objective criteria by which to determine who lives and who dies; (3) the infliction rate of the death penalty in Florida is now so low that the death penalty is an extremely unusual way to meet one's maker, even among death row inmates; and (4) Florida's death scheme improperly grants the Governor unfettered discretion to draw out how long a prisoner must live under the agony of mortal uncertainty – never knowing whether the next day will be the day one's number is called. Such cruelly arbitrary methods for doling out death are the very forms of barbarism against which the Eighth Amendment guards. Ferguson's sentence should be vacated.

A. The Arbitrary Imposition Of The Death Penalty Is Prohibited By The Eighth Amendment.

The Eighth Amendment, in tandem with the Fourteenth, prohibits States from imposing cruel and unusual punishments. *Robinson* v. *California*, 370 U.S. 660 (1962). In *Furman*, the United States Supreme Court held that the death penalty must be imposed fairly and consistently in order to pass constitutional muster: the "Eighth and Fourteenth Amendments cannot tolerate the infliction of a sentence of death under legal systems that permit this unique penalty to be so wantonly and so freakishly imposed." 408 U.S. at 310 (Stewart, J., concurring). Death penalty procedures which are "little more than a lottery system" were

prohibited as they were held to violate the protections afforded by the Eighth Amendment. *Id.* at 293 (Brennan, J., concurring). The infliction of the death penalty is cruel and unusual – and thus forbidden by the Eighth Amendment – when its recipient is "capriciously selected" and its imposition is akin to being "struck by lightning." *Id.* at 309 (Stewart, J., concurring). The *Furman* Court ruled the relevant capital statutes unconstitutional, stating that the laws contained no standards to govern who receives the penalty. The Court thus established a substantive Eighth Amendment right preventing the arbitrary imposition of the death penalty.

The Court subsequently held in *Gregg* v. *Georgia* that the imposition of the death penalty could be constitutional, *provided* that satisfactory procedures were in place to reduce the risk of its arbitrary infliction. 428 U.S. 153 (1976). When, in the same year as *Gregg*, the Court considered Florida's then-existing death-penalty scheme, the Court relied on the existence of such safeguards in upholding Florida's scheme. *Proffitt* v. *Florida*, 428 U.S. 242 (1976). The existence of meaningful protections is an irreducible requirement for a death penalty scheme to be constitutional. And the absence of meaningful protections invites the arbitrary imposition of the death penalty, at odds with the Eighth Amendment.

B. Florida's Warrant-Selection Process Lacks Any Meaningful Safeguards.

The vast majority of states in this country place responsibility for scheduling execution dates on the judicial branch. Florida is an outlier. In Florida, the Governor selects which inmate next will receive a warrant for his death. Fl. Stat. § 922.052. Apart from Florida, we are aware of only two other states, New Hampshire and Pennsylvania, which grant their respective Governors comparably unconstrained discretion to select the next candidate for execution.[10] Yet even New Hampshire and Pennsylvania require their Governors to adhere to constraints and conditions that are manifestly lacking in Florida's death scheme. Florida's death scheme stands alone. Its unique and antiquated system, so out of sync with the practices of other states in this country, is constitutionally deficient.

The flaws in Florida's warrant selection process are heightened in Ferguson's case due to his mental health issues. As this Court found almost two decades ago, "Ferguson undoubtedly has some mental problems." *Ferguson* v. *Singletary*, 632 So. 2d 53, 58 (Fla. 1994). That was 18 years ago; and last week the Circuit Court issued an even sterner factual conclusion: "Ferguson undoubtedly suffers from mental illness which is documented from the time prior

[10] *See* N.H. Rev. Stat. § 630:5 XVII (2012) (vesting the authority to determine the time of an execution in "[t]he [G]overnor and council or their designee"); 61 Pa. Cons. Stat. § 4302 (requiring the Governor to select a time for execution within certain time constraints).

to the murders committed." Opinion at 2. Part of the Governor's analysis of who should receive a death warrant must surely concern the utility of the punishment *as applied to the individual inmate in question*. Retribution, after all, is the justification for imposing the death penalty (along with deterrence, which is equally insubstantial here). In assessing the retributive benefits from selecting Ferguson for a death warrant, the Governor should have considered Ferguson's mental state as it directly impacts his culpability and the resulting benefits if any, to the State of exacting retribution. Ferguson's mental health issues go to his understanding of the cause, nature and effect of the punishment and reduce the retributive benefits to the State.

Procedural safeguards and minimal due process apply, even to the exercise of functions entrusted to the Governor's discretion. *See Woodard*, 523 U.S. at 289-90 (O'Connor, J., concurring in part and concurring in the judgment). Ferguson's mental health issues, acknowledged by this Court and the Circuit Court alike, should have been a key factor in determining whether Ferguson should have been issued a death warrant. The lack of any objective criteria in the warrant selection process, as applied to Ferguson, results in precisely the sort of arbitrary imposition of capital punishment prohibited in *Furman*.

The Circuit Court rejected Ferguson's argument that Florida's warrant-selection process lacks meaningful safeguards in just one operative sentence:

"[T]hese arguments have been made and rejected by the Florida Supreme Court." Opinion at 5. That is not so. Ferguson's arguments about the capricious application of the death-warrant process to him were simply not raised in *Gore*, 91 So. 3d 769, or in *Valle* v. *State*, 70 So. 3d 530 (Fla. 2011); nor could they have been, since Ferguson is presenting an as-applied claim. The Circuit Court erred in rejecting Ferguson's arguments.

Ferguson's execution would violate the Eighth and Fourteenth Amendments because of the unconstitutional manner in which he was selected for execution. If the Court finds that the Governor's arbitrary selection of Ferguson does not offend the Eighth Amendment, Ferguson at least should be given the opportunity to be heard as to why discretion should be exercised in his favor. *See Cleveland Bd. of Educ.* v. *Loudermill*, 470 U.S. 532, 542 (1985) (observing that the right to due process entails " 'notice and opportunity for hearing appropriate to the nature of the case.' ") (quoting *Mullane* v. *Central Hanover Bank & Trust Co.*, 339 U.S. 306, 313 (1950)); *Ford* v. *Wainwright*, 477 U.S. 399, 424 (1986) (Powell, J., concurring in part and concurring in the judgment) ("[F]undamental fairness is the hallmark of the procedural protections afforded by the Due Process Clause.").

In defending Florida's unusual warrant-selection process, the State argued below, as is its wont, that the Governor's untrammeled discretion in warrant-related matters is somehow immune from Eighth Amendment scrutiny. That is

simply incorrect.[11] The Supreme Court has frequently struck down penal statutes passed by state legislatures and signed into law by Governors for violating the Eighth Amendment. *See, e.g.*, *Furman,* 408 U.S. 238; *Woodson* v. *North Carolina,* 428 U.S. 280 (1976); *Roper* v. *Simmons,* 543 U.S. 551 (2005); *Graham* v. *Florida,* 130 S. Ct. 2011 (2010); *Miller* v. *Alabama,* 132 S. Ct. 2455 (2012). And the Supreme Court itself has applied Eighth Amendment scrutiny directly to the Executive branch. *See, e.g.*, *Baze* v. *Rees,* 553 U.S. 35 (2008). The manner in which the Executive branch directs an execution be carried out is simply not removed from constitutional protection. Florida cannot, by operation of its unique warrant selection process, seek to cloak the process from any meaningful judicial review.

This Court should reach the merits of Ferguson's claim and grant him the relief sought.

C. Counsel For The State Play An Improper Role In The Warrant Selection Process.

The Circuit Court acknowledged the distinct possibility of "communication or leaking of information between the Governor's Office and the State." Opinion at 6. Indeed, this is not the first case in recent Florida capital proceedings to assert such improper collusion. *See Valle* v. *State*, 70 So. 3d 530 (Fla. 2011). Yet the

[11] Nor should the State be permitted to conflate the *warrant-selection* process with the *clemency* process (which, as we have explained above, is deficient for reasons all its own).

Circuit Court denied Ferguson's request for disclosure or an evidentiary hearing to investigate the scope of the "leaking." The Circuit Court also made the conclusory finding that Ferguson had failed to allege the resulting benefits to the State and disadvantages to Ferguson. But the benefits and disadvantages are self-evident. *See Dillbeck* v. *State*, 643 So. 2d 1027, 1030 (Fla. 1994) ("No truly objective tribunal can compel one side in a legal bout to abide by the Marquis of Queensberry's rules, while the other fights ungloved."). To the extent that the benefits of such "leaks" are not self-evident, Ferguson should have been entitled to inquire further into the nature of the collaboration.

Ferguson made certain express requests in his Motion: that the Court order the State's counsel to preserve all documents relating to their knowledge of Ferguson's death warrant, including the relevant metadata; that the Court order the State's counsel to produce all responsive documents with metadata unadulterated and intact; and that the Court hold an evidentiary hearing into when the State's counsel became aware of Ferguson's pending death warrant, who informed them, and what preparations the State's counsel made for forthcoming litigation. Ferguson Mot. at 31-32. The State failed to oppose Ferguson's requests. The Circuit Court should have granted them. And because the Circuit Court failed to do so, this Court should reverse the Circuit Court and order it be done.

D. The Circuit Court Neglected To Address Ferguson's Argument That The Infrequency of Executions in Florida Renders Ferguson's Death Warrant Unconstitutional.

Ferguson offered a detailed argument as to why Florida's infrequent rate of executions rendered the death penalty an impermissibly unusual penalty in Florida. The Circuit Court did not address the argument. Instead, it stated only that "[t]he analysis of this claim is the same as for claims III.B and III.E." Opinion at 6. Claim III.B. relates to clemency proceedings conforming to due process requirements; it has no relevance to Ferguson's argument on the rate of executions in Florida. And there is no Claim III.E. The Circuit Court committed clear error in rejecting Ferguson's argument, and it should be reversed on this ground as well.

For the benefit of this Court, Ferguson restates his argument that Florida's low infliction rate renders its death scheme unsustainable.

Justice Stewart observed in his concurring *Furman* opinion that the infliction of the death penalty was unconstitutional when it was akin to being "struck by lightning." *Furman*, 408 U.S. at 309 (Stewart, J., concurring). The infrequency of executions in Florida has rendered the death penalty precisely that. Ferguson was selected from over 400 death-row inmates, a chance of less than 0.25 per cent, to receive the ultimate punishment. At the current rate,[12] even if there were no further additions to death row, it would take the State of Florida over 200 years to

[12] Over the past two years, Florida has executed four inmates. *See* http://www.dc.state.fl.us/oth/deathrow/execlist.html.

dispose of its current death-row population. Old age is now a more potent killer on Florida's death row than lethal injection. PolitiFact, "What's killing inmates on Florida's death row?", *Tampa Bay Times* (January 25, 2011).[13]

In the face of such a low infliction rate, the rationale for the ultimate punishment decreases as any deterrent value declines and the benefits to the State drop. This affects the Court's Eighth Amendment analysis. There can be no doubt that lethal injection in Florida is now an "unusual" punishment, rarely inflicted even upon the death row population. As the rationale supporting the death penalty decreases to the vanishing point, the punishment itself becomes unconstitutionally cruel. And because the Eighth Amendment's meaning is informed by evolving standards of decency, *see Gregg*, 428 U.S. at 173, this Court should look at the justification for the death penalty today as it applies to Ferguson's individual circumstance and in the face of diminishing returns to the State.

As Justice Brennan put it in *Furman*, "[w]hen the punishment of death is inflicted in a trivial number of cases in which it is legally available, the conclusion is virtually inescapable that it is being inflicted arbitrarily. Indeed, it smacks of little more than a lottery system." 408 U.S. at 293. So too here. Florida's "method" for distinguishing between those killed by the State and those left to die

---

[13] *Available at* http://www.politifact.com/florida/statements /2011/jan/25/dean-cannon/whats-killing-inmates-floridas-death-row/(accessed September 10, 2012).

by Mother Nature's hand has no reason to it, only caprice. Ferguson's execution is prohibited by the Eighth and Fourteenth Amendments.

E. The Circuit Court Erred in Declining To Address Ferguson's Claim That Florida's Death Warrant Process Impermissibly Grants The Governor The Unfettered Power To Determine The Length Of Pre-Execution Incarceration Of Death Row Inmates.

The death penalty in Florida now effectively entails life without parole with the promise of either lethal injection or death of old age. As discussed below in the excessive-delay section of this brief, Ferguson has been subjected to an excessive cumulative punishment of decades of incarceration, *followed by* the death penalty. The Governor plays the principal role in determining the length of the incarceration element of this hybrid punishment. Yet there are no restraints whatsoever on the Governor's exercise of this power.

The Circuit Court did not take up Ferguson's argument about the unconstitutionally improper extension of gubernatorial power, re-branding it instead as a *Lackey* claim. Opinion at 6-7. That again was not correct. Ferguson's argument that the governor's sole authority to define his time on death row exceeds constitutional limits is distinct from his other claims, and given the stakes, it deserves more than passing consideration.

The Court should reverse the Circuit Court and conclude that Florida's warrant-selection scheme, as applied to Ferguson, violates the Eighth and Fourteenth Amendments.

IV. EXECUTING AN INMATE AFTER KEEPING HIM ON DEATH ROW FOR 34 YEARS VIOLATES THE EIGHTH AMENDMENT'S PROHIBITION ON CRUEL AND UNUSUAL PUNISHMENTS.

The Eighth Amendment of the United States Constitution forbids punishments that are "cruel" and "unusual." U.S. Const. amend. VIII. John Ferguson has now spent *34 years* under sentence of death. That is, by any measure, unusual: Inmates executed across the United States in 2010 spent an average of 14 years and 10 months on death row.[14] *See Elledge* v. *Florida*, 525 U.S. 944, 119 S. Ct. 366, 366 (1998) (Breyer, J., dissenting) ("Twenty-three years under sentence of death is unusual – whether one takes as a measuring rod current practice or the practice in this country and in England at the time our Constitution was written."). From our research, it appears that Ferguson has been on death row longer than *any other defendant* who has challenged his punishment on excessive-delay grounds.

But an unusual punishment does not necessarily flout Eighth Amendment requirements. The punishment must also be cruel. Here, it is. Members of the Supreme Court have called executions following delays much *shorter* than Ferguson's "particularly cruel." *E.g.*, *Elledge*, 525 U.S. 944, 119 S. Ct. at 367 (Breyer, J., dissenting) (citing *Lackey* v. *Texas*, 514 U.S. 1045, 115 S. Ct. 1421 (1995) (Stevens, J., respecting the denial of certiorari)).

[14] Tracy L. Snell, *Capital Punishment, 2010—Statistical Tables*, Bureau of Justice Statistics, 1 (Dec. 2011), http://bjs.ojp.usdoj.gov/content/pub/pdf/cp10st.pdf.

Ferguson has lived under a death sentence, alone in a 6-by-9-foot concrete cell, for more than three decades, much of that attributable to government action or inaction. He is now an old man. And it is now unconstitutional to execute him.

A. Imposing The Death Penalty On Ferguson Serves No Legitimate Penological Objective.

When the Supreme Court reinstated the death penalty in 1976, it reaffirmed the obvious: "[D]eath as a punishment is unique in its severity and irrevocability." *Gregg*, 428 U.S. at 187. Although the Court has concluded that the Eighth Amendment does not categorically prohibit such extreme punishment, it has repeatedly articulated an important qualification to the death penalty's application: executing a prisoner must serve some legitimate penological purpose that cannot be served otherwise. If "the punishment serves no penal purpose more effectively than a less severe punishment," *Furman*, 408 U.S. at 280 (Brennan, J., concurring), then it is excessive and unnecessary within the meaning of the Eighth Amendment.

Only two justifications can support the application of the death penalty: "retribution and deterrence of capital crimes by prospective offenders." *Gregg*, 428 U.S. at 183.[15] When a proposed execution "ceases realistically to further these

[15] Retribution is not blood vengeance; death cannot be imposed by because a community seeks an eye for an eye. Instead, retribution reflects a general understanding that some crimes merit severe punishment and that an execution can, in some circumstances, serve as an effective expression of the community's moral outrage. *See Gregg*, 428 U.S. at 183 (embracing model of retribution that focuses on the "expression of society's moral outrage at particularly offensive conduct);

purposes * * *, its imposition would then be the pointless and needless extinction of life with only marginal contributions to any discernible social or public purposes," violating the Eighth Amendment. *Furman*, 408 U.S. at 312-313.

Since *Gregg*, the Supreme Court has repeatedly assessed whether the death penalty can be imposed constitutionally by examining an execution's retributive and deterrent effects. In *Roper* v. *Simmons*, 543 U.S. 551 (2003), for example, the Court was faced with resolving whether the Eighth Amendment permitted the state of Missouri to execute a man who was a juvenile at the time he committed a capital crime. It concluded that death in those circumstances was unconstitutional because the "penological justifications for the death penalty apply to them with lesser force than to adults." *Id.* at 571. Specifically, "the case for retribution [was] not as strong with a minor as with an adult," since the offender's "culpability or blameworthiness is diminished, to a substantial degree, by reason of youth and immaturity." *Id.* And as for deterrence, "the same characteristics that render juveniles less culpable than adults suggest as well that juveniles will be less susceptible to deterrence." *Id.* Because "neither retribution nor deterrence provide[d] adequate justification for imposing the death penalty," the Eighth Amendment prohibited its application to juveniles. *Id.* at 572. Notably, the Court

---

Furman, 408 U.S. at 343 (1972) (Marshall, J., concurring, noting that "the Eighth Amendment * * * was adopted to prevent punishment from becoming synonymous with vengeance").

did not ask whether the deterrent and retributive effects were reduced to *zero* in the case of a juvenile offender. Instead, the fact that neither penological objective was as strongly served in the case of juveniles as it was with adults was enough to convince the Court that individuals who committed crimes when they were juveniles could not be executed. *Id.*

The Supreme Court conducted the same analysis and reached the same conclusion when it abolished the death penalty for the mentally retarded. In *Atkins* v. *Virginia*, 536 U.S. 304 (2002), the Court was "not persuaded that the execution of mentally retarded criminals [would] measurably advance the deterrence or the retributive purpose of the death penalty * * * such punishment [was] excessive." *Id.* at 321. It explained, "in the light of our 'evolving standards of decency,' * * * [we hold that] the Constitution 'places a substantive restriction on the State's power to take the life' of a mentally retarded offender." *Id.* (citation omitted). Put simply, the death penalty passes Eighth Amendment muster only when it can be justified by its retributive and deterrent effects.

These two penological goals do not justify executing John Ferguson. Ferguson has lived on death row for decades. Just as in *Roper* and *Atkins*, the deterrent and retributive purposes of executing him have both dimmed. As Justice Stevens has explained, "neither ground" – retribution or deterrence – "retains any force for prisoners who have spent 17 years under a sentence of death." *Lackey*,

514 U.S. at 1045; *see also Valle* v. *Florida*, 132 S. Ct. 1, 1 (2011) (Stevens, J., dissenting from denial of stay, and observing that "[t]he commonly accepted justifications for the death penalty are close to nonexistent in a case" with such a delay where appellant was not responsible for much of the delay). Here, of course, Ferguson has spent twice as long under a death sentence as the prisoner in *Lackey*. And "the longer the delay, the weaker the justification for imposing the death penalty in terms of the punishment's basic retributive or deterrent purposes." *Knight* v. *Florida*, 528 U.S. 990 (1999) (Breyer, dissenting from denial of certiorari).

Executing Ferguson, decades after his crime, will not deter would-be-criminals any more than would the prospect of spending 34 years alone in a 6-by-9-foot concrete cell. *See Furman*, 408 U.S. at 354 (Marshall, J., concurring); *Lackey*, 514 U.S. 1045, 115 S. Ct. at 1421-22. As for retribution: Community outrage peaks when a crime occurs. It wanes in the years (here, decades) that follow. And the diminished frustration that may still linger in community is not more sated by a long-delayed execution than it is by 34 years on death row followed by life imprisonment. Moreover, even if there were some lingering retributive purpose in executing Ferguson, it would not be enough to render the death penalty constitutional: Retribution cannot be the sole objective of capital

punishment. *Furman*, 408 at 344 ("[R]etribution for its own sake is improper.") (Marshall, J., concurring).

When the death penalty "ceases realistically to further these purposes, * * * its imposition would then be the pointless and needless extinction of life with only marginal contributions to any discernible social or public purposes." *Furman*, 408 U.S. at 312 (White, J., concurring). And "[a] penalty with such negligible returns to the State would be patently excessive and cruel and unusual punishment violative of the Eighth Amendment." *Id.* The "diminished justification for carrying out an execution after the lapse of so much time" renders Ferguson's execution unconstitutional. *Thompson* v. *McNeil*, 129 S. Ct. 1299, 1300 (2008) (Stevens, J., respecting the denial of certiorari).

B. Prolonged Confinement On Death Row *Followed By Execution* Is Cruel And Unusual.

Just as the penological objectives underlying the death penalty cannot justify executing an inmate after 34 years, they cannot justify the punishment that Ferguson will actually incur if he is executed now: the combination of death row for 34 years followed by execution.

Death row is a horrific existence even for inmates who are otherwise mentally sound. *See*, *e.g.*, *Furman*, 408 U.S. at 288 (1972) (Brennan, J., concurring) ("[T]he prospect of pending execution exacts a frightful toll"); *Solesbee* v. *Balkcom*, 339 U.S. 9, 14 (1950) (Frankfurter, J., dissenting) ("In the

history of murder, the onset of insanity while awaiting execution of a death sentence is not a rare phenomenon"). Florida's death row is no exception. Indeed, one Florida Supreme Court justice has expressly counseled against holding prisoners there for years at a time:

> [P]risoners who have been sentenced to death are maintained in a six-by nine-foot cell with a ceiling nine and one-half feet high. These prisoners are taken to the exercise yard for two-hour intervals twice a week. Otherwise, these prisoners are in their cells except for medical reasons, legal or media interviews, or to see visitors (allowed to visit from 9 a.m. to 3 p.m. on weekends only). These facilities and procedures were not designed and should not be used to maintain prisoners for years and years. [*Swafford* v. *State*, 679 So. 2d 736, 744 n.8 (Fla. 1996) (Wells, J., concurring in part and dissenting in part) (citations omitted).]

Ferguson's severe psychological disorders make his life on death row even worse than the terrible norm. He is a paranoid schizophrenic. His delusions include his firmly held view that everyone is conspiring to actively kill him by doing things like poisoning his food. R.1581. In addition to his paranoid delusions, he hallucinates that snakes come out of his cell walls to torment him. Ex. D, at 2. His mental impairments have also affected his physical health. In 1994, Ferguson was too paranoid to eat. He believed his food was poisoned and lost 22 pounds in two weeks. Ex. E, at 1, 7. He was sent to a psychiatric institution for roughly six months so that his medication could be adjusted; after that intervention, he started to eat again. *Id.* at 6. But for over a decade, he has not

been able to take antipsychotic medication because the prolonged use of the medication caused neurological damage. *Id.* at 4 (explaining tardive dyskinesia onset in 1994, which over time caused prison doctors to discontinue prescribing antipsychotic medication); Ex. F, at 3 (Ferguson "consistently refuse[d] any medications other than [a] mild tranquilizer."). For roughly the past 12 years, Ferguson has experienced death row as an untreated paranoid schizophrenic. That is why this Court concluded that "Ferguson undoubtedly has some mental problems." *Ferguson*, 632 So. 2d at 58. And that is why the Circuit Court, for its part, now has made a factual finding that "*Mr. Ferguson undoubtedly suffers from mental illness* which is documented from the time prior to the murders committed." Opinion at 2.

In addition to all this, Ferguson already has spent a longer time on death row than any other inmate yet executed in Florida. Indeed, in the past 10 years, all executions in Florida have been for prisoners with sentences handed down *after* Ferguson's. And since 1988, only four prisoners have been executed who were sentenced before Ferguson, none of whom were on death row as long.[16]

Being housed for decades under intolerable circumstances may itself amount to cruel and unusual punishment. *See Hutto* v. *Finney*, 437 U.S. 678 (1978). But

[16] Florida Dep't of Corrs., *Execution List: 1976 - present*, http://www.dc.state.fl.us/oth/deathrow/execlist.html (last visited Sept. 9, 2012).

this Court need not decide whether the conditions on Florida's death row are so deplorable that they independently violate Ferguson's Eighth Amendment rights. Ferguson's punishment, after all, is not only 34 years on death row, or execution; it is 34 years on death row *followed by execution*. *See Foster* v. *Florida*, 537 U.S. 990, 123 S. Ct. 470, 472 (2002) (Breyer, J., dissenting and stating that execution would result in a punishment of both "death and * * * by more than a generation spent in death row's twilight"). Put simply, tormenting a mentally unstable man with the prolonged psychological anguish of 34 years under the constant threat of death – and then, finally, executing him – "is unacceptably cruel." *Thompson*, 129 S. Ct. at 1300 (Stevens, J., respecting the denial of certiorari).

C. Contrary To The Circuit Court's Assessment, No Florida Court Has Addressed The Constitutional Question Posed Here: Whether An Execution Following 34 Years Of Confinement Amounts To Cruel And Unusual Punishment.

In rejecting Ferguson's excessive-delay claim, the Circuit Court failed to grasp the distinction between Ferguson's claim and all other claims previously presented to this Court.

The State argued below, and the Circuit Court appears to have held, that excessive-delay claims have been examined by this Court before. Opinion at 10. The Circuit Court was correct, as far as it goes: On occasion, this Court has indeed reviewed claims that prolonged confinement on death row is unconstitutional, and has generally concluded that the mere passage of time (although none so long as 34

years) does not constitute cruel and unusual punishment. *See Valle*, 70 So. 3d at 552; *Tompkins* v. *State*, 994 So. 2d 1072, 1085 (Fla. 2008); *Gore* v. *State*, 964 So. 2d 1257, 1276 (Fla. 2007).[17] But these holdings do nothing to bolster the Circuit Court's conclusion. Ferguson does not contend that the 34 years he has spent on death row qualifies as a cruel and unusual punishment. He argues that his unnecessarily prolonged confinement on death row, *followed by an execution without legitimate penological objectives*, amounts to a violation of the Eighth Amendment. This Court has never appraised such an argument.

Indeed, *no* Court capable of issuing precedent that binds the Circuit Court or this Court has ever held that long-term solitary confinement followed by execution always withstands constitutional scrutiny. That question remains wide open. *See Foster*, 537 U.S. 990, 123 S. Ct. at 470 (noting that the Supreme Court's "denial of a petition for a writ of certiorari does not constitute a ruling on the merits."). By citing precedent that does not resolve the issue presented here, the Circuit Court shirked its obligation to review the merits of Ferguson's Eighth Amendment claim. This Court should step in where the Circuit Court did not. *See Ard* v. *Ard*, 395 So. 2d 586, 587 (Fla. Ct. App. 1981) (noting that the "requirement for following []

[17] *See also Johnston* v. *State*, 27 So. 3d 11, 27 (Fla. 2010); *Booker* v. *State*, 969 So. 2d 186, 200 (Fla. 2007); *Elledge* v. *State*, 911 So. 2d 57, 76 (Fla. 2005); *Lucas* v. *State*, 841 So. 2d 380, 389 (Fla. 2003); *Foster* v. *State*, 810 So. 2d 910, 916 (Fla. 2002); *see also Porter* v. *State*, 653 So. 2d 374, 380 (Fla. 1995) (rejecting *Lackey* claim with no discussion).

precedent" does not shield a court from its "obligation to consider and act on the merits of [an] issue on which there exists no such controlling precedent"). It is time for this Court to "serve as [a] laborator[y] in which the issue receives further study before it is addressed by th[e] [Supreme] Court." *Lackey*, 514 U.S. 1045, 115 S. Ct. at 1422 (internal quotation marks omitted).

D. Contrary To The Circuit Court's Conclusion, Courts And Judges Have Indeed Held That Execution Following Prolonged Confinement On Death Row Is Cruel.

The Circuit Court also erred when it held that "no federal or state courts have accepted [the] argument that a prolonged stay on death row constitutes cruel and unusual punishment." Opinion at 10. The Massachusetts Supreme Court has in fact held that the death penalty is cruel, and therefore violates the Massachusetts Constitution,[18] in large part because " 'the prospect of pending execution exacts a frightful toll during the inevitable long wait between the imposition of sentence and the actual infliction of death.' " *District Attorney for Suffolk Dist.* v. *Watson*, 411 N.E.2d 1274, 1283 (Mass. 1980) (quoting *Furman*, 408 U.S. at 287-288 (Brennan, J., concurring)). In his concurrence, Justice Braucher amplified the Court's holding, emphasizing that "[s]ince death sentences will rarely be carried out, and since they will be carried out only after agonizing months and years of

[18] *Compare* U.S. Const. amend VIII (forbidding "cruel and unusual punishment"); *with* Mass. Decl. Rights art. 26 ("No magistrate or court of law, shall * * * inflict cruel or unusual punishments.").

uncertainty, the punishment is cruel and unusual." *Id*. at 1287 (Braucher, J., concurring).

The Massachusetts Supreme Court is not alone. Judge Fletcher of the U.S. Court of Appeals for the Ninth Circuit has questioned the constitutionality of prolonged death-row confinement followed by execution. Pointing out the diminished penological purposes of executing a prisoner so long after the imposition of the death sentence, Judge Fletcher concluded that the court should have granted a stay in order to give such a claim "the consideration it deserves." *Ceja* v. *Stewart*, 134 F.3d at 1368, 1373 (9th Cir. 1998) (Fletcher, J., dissenting from denial of stay).

Concurring in *State* v. *Smith*, 31 P.2d 1272 (Mont. 196), Justice Leaphart of the Montana Supreme Court also saw merit in an excessive-delay argument. He highlighted the "serious questions as to how long a defendant can be expected to languish on death row while the State and trial courts are afforded repeated opportunities to comply with due process." *Id.* at 1291 (Leaphart, J. concurring). And Justice Rose of the Supreme Court of Wyoming has gone further, concluding that the length of time spent by some inmates on death row "constitutes cruelty that defies the imagination." *Hopkinson* v. *State*, 632 P.2d 79, 210 (Wyo. 1981) (Rose, J., dissenting in part and concurring in part) (internal quotation marks omitted).

International courts, whose views have informed the law of the United States since the Declaration of Independence, *see Sosa* v. *Alvarez-Machain*, 542 U.S. 692, 729-30 (2004), also consistently hold that executions following prolonged death-row confinements are cruel and unusual punishments. Time and again, U.S. courts facing death-penalty issues are guided by international norms. For example, the Supreme Court's decision to abolish the juvenile death penalty in *Roper* repeatedly referenced the evolving practices of other countries to determine what qualified as cruel and unusual punishment. 543 U.S. at 575-578. The Court in *Atkins* similarly took note of the international community's rejection of the death penalty for persons with mental retardation. 536 U.S. at 316 n.21. And decades earlier, in *Trop* v. *Dulles*, 356 U.S. 86 (1958), the Supreme Court noted "virtual unanimity" within the international community that denationalization constitutes cruel and unusual punishment. *Id.* at 102.

Foreign courts have repeatedly rejected the protracted incarceration of condemned prisoners under a sentence of death in extreme conditions of confinement. The Privy Council of the British House of Lords – comprising judges of England's highest court who are the most authoritative interpreters of English common law – has rejected the notion that execution after excessive delay could ever be justified. *Pratt & Morgan* v. *Att'y Gen. for Jamaica*, [1994] 2 AC 1,

4 All E.R. 769 (P.C. 1993) (en banc).[19] Sitting en banc for the first time in 50 years, seven members of the Privy Council unanimously concluded that executing two inmates who had been on death row for fourteen years would constitute "torture or * * * inhuman or degrading punishment" in violation of section 17(1) of the Jamaican Constitution, a document rooted in the English common law tradition. Slip op. at 13, 20. The Privy Council explained:

> There is an instinctive revulsion against the prospect of hanging a man after he has been held under sentence of death for many years. What gives rise to this instinctive revulsion? The answer can only be our humanity; we regard it as an inhuman act to keep a man facing the agony of execution over a long extended period of time. [*Id.* at 16.]

The Privy Council thus commuted the sentences of the two men to life imprisonment, later using the same reasoning to commute the sentences of 198 additional criminal defendants.[20]

To reach this result, the Privy Council surveyed English common law and concluded that extended imprisonment on death row and the repeated setting of

---

[19] American Courts have for over a century looked to the decisions of the Privy Council for guidance. *See, e.g.*, *United States* v. *Raddatz*, 447 U.S. 667, 679 (1980) (citing Privy Council decision with approval); *Kilbourn* v. *Thompson*, 103 U.S. 168, 186-187 (1880) (same); *see also Fisher* v. *United States*, 328 U.S. 463, 486-488 (1946) (Frankfurter, J., dissenting) (discussing Privy Council decisions and concluding that "[t]his Court in reviewing a conviction for murder * * * ought not be behind * * * the Privy Council").

[20] *See* Brian D. Tittemore, *The Mandatory Death Penalty in the Commonwealth Caribbean and the Inter-American Human Rights System: An Evolution in the Development and Implementation of International Human Rights Protections*, 13 Wm. & Mary Bill Rts. J. 445, 465-66 (2004).

execution dates were not condoned at common law. And common law in turn bears strongly on the analysis relevant here: Those historic traditions gave rise to the 1689 English Bill of Rights, which "is the antecedent" of the cruel and unusual punishment clause of our Eighth Amendment. *Harmelin* v. *Michigan*, 501 U.S. 957, 966 (1991) (Scalia, J., concurring).

The Supreme Courts of various countries throughout the world whose legal systems share our English common-law roots have similarly concluded that prolonged death-row detention is unconstitutional. In *Catholic Commission for Justice & Peace in Zimbabwe* v. *Attorney General*, No. S.C. 73 (Zim. 1993), for example, the Zimbabwe Supreme Court held that prolonged death row incarceration constituted "inhuman or degrading punishment" in violation of its constitution, and thus forbade the execution of four prisoners confined under death sentence for between four and six years. Slip op. 9, 45-46. In reaching its decision, the court considered many of the same facts relevant here, such as the "physical conditions endured daily" on death row and "the mental anguish" of the condemned prisoners. *Id.* at 4-5; *see also Umni Krishnan* v. *State of Andhra Pradesh and Others AIR*, (1993) 1993 S.C. 217 (India); *Att'y Gen.* v. *Susan Kigula & 417 Ors*, Const. App. No. 03 of 2006, [2009] UGSC 6 (Uganda) 47-49; *Godfrey Ngotho Mutiso* v. *Republic*, [2010] eKLR, Crim. App. No. 17 of 2008 (Kenya 2010) [18].

The European Commission on Human Rights over two decades ago blocked extradition from Europe to the United States of a man charged with capital murder in Virginia. *Soering* v. *United Kingdom*, 11 Eur. H.R. Rep. 439 (1989). As the Commission explained, the protracted delays in carrying out death sentences in Virginia – which at that time the Commission thought to average six to eight years – constituted inhuman and degrading punishment in violation of Article 3 of The European Human Rights Convention Charter. *Id*. at 26. Like other foreign courts, the Commission cited "the very long period of time spent on death row in such extreme conditions, with the ever present and mounting anguish of awaiting execution of the death penalty" as grounds for its decision. *Id.* at 35; *see also* *United States* v. *Burns*, (2001) 2001 SCC 7 (Can.) [122] (holding that delay of execution is a "relevant consideration" in determining that it would be inconsistent with "principles of fundamental justice" to extradite a defendant to the United States unless United States assured that death penalty would not be sought).

Foreign courts thus have long understood what Ferguson urges the Court to conclude here: It is cruel and unusual, and a callous violation of fundamental English common-law traditions and mores, to execute a man after requiring him to spend 34 years on death row. Ferguson's death warrant should be vacated, as should his death sentence.

E. The State's Responses All Are Unavailing.

The State is likely to urge this Court to deny Ferguson's excessive-delay claim on two grounds: (1) that his claim is untimely; and (2) that the excessive delay in Ferguson's execution is attributable to his decision to pursue his appellate rights, not to the State, such that the State should not be held responsible for the delay. The Circuit Court did not rely on either of these arguments. And for good reason: They are both factually and legally wrong.

1. Ferguson's Claim Is Timely.

The State argued below that Ferguson's excessive-delay claim is time-barred because he did not file it within one year of the date when his conviction and sentence became final and cannot point to newly discovered evidence or a newly recognized constitutional right. State Resp. 34. That argument is meritless. Ferguson's excessive-delay claim ripened the day the Governor issued a warrant for his execution.

When Ferguson filed his initial post-conviction motion the year after his sentence became final, it was 1987. He had been on death row for nine years. The factual predicate for his excessive-delay claim – *the excessive delay* – had not yet occurred. An "excessive delay" claim filed on the ninth year of Ferguson's now 34-year tenure on death row would have been surely rejected by the Court, as either meritless or premature or both. And once the trial court rejected Ferguson's

excessive-delay claim on the merits, it would have been exceedingly difficult for Ferguson to bring the claim again once he had actually spent an excessive time on death row. *See Marek* v. *State*, 8 So. 2d 1123, 1129 n.3 ("Florida courts[] [have a] policy of not allowing defendants to relitigate claims in state court that have been adjudicated previously on their merits."). The contention that Ferguson should have brought his excessive-delay claim before the delay was excessive presents Ferguson with an impossible catch-22.

Arguing that Ferguson's claim is untimely also misperceives the event that triggers an appropriately filed excessive-delay claim. That event is not the one-year anniversary of a final conviction and sentence. Nor is it the year after, or the year after that. Nor was it Justice Stevens' 1995 dissent in *Lackey*. The triggering event that makes an excessive-delay claim ripe is the signing of the execution warrant. That is particularly true here, where the claim Ferguson has raised turns on more than just the passage of time. Instead, his specific claim is that it is unconstitutional to confine him to death row for 34 years and *then* sign a death warrant that purports to finally cut the rope by which the Damoclean Sword has hung above his head for more than three decades.

Closely analogous decisions confirm that this claim is indeed timely. This Court, for example, has recognized that claims specifically tied to facts as they exist at the time of an execution are not ripe until the execution warrant is signed.

See, e.g., *Lawrence* v. *State*, 969 So. 2d 294, 300 n.9 (Fla. 2007) (explaining that before execution, claim that defendant is incompetent to be executed "is not yet ripe for review."). Just as in *Lawrence*, the facts that matter to Ferguson's excessive-delay claim are those that exist when the execution warrant is signed. Because the claim is just now ripe, it is properly before this Court.

2. Ferguson Is Not And Should Not Be Held Responsible For The Excessive Delay In This Case.

The State argued that Ferguson brought his 34-year confinement on himself by challenging his conviction and sentence. Surely the State does not suggest that a condemned prisoner waives his Eighth Amendment right to challenge his execution because he pursued his appeal rights. And in any event, the State's contention is both factually inaccurate and legally wrong.

As the Circuit Court explicitly held, "this Defendant has not filed frivolous or successive claims." Opinion at 10. He has to this point only exhausted his basic appellate rights: one direct appeal and one round of post-conviction review. His claims were not idle exercises of clever counsel. Nor were they attempts by a bored inmate to amuse himself at the expense of the court system. He has not filed a series of successive Rule 3.851 motions or successive federal habeas petitions. He has not engaged in gamesmanship. He has pursued his rights vigorously and to the extent allowed by the laws of Florida and the United States – nothing more.

The cause of the excessive delay is, in fact, the State, and the court system itself. To begin with, the Florida Supreme Court initially overturned Ferguson's death sentence, after a four-year appeal process, concluding "the [trial] judge applied the wrong standard in determining the presence or absence" of mitigating factors. *See Ferguson* v. *State*, 417 So. 2d 631, 637 (Fla. 1982). The four years Ferguson spent pursuing that appeal are therefore attributable to the State.

From 1995 through 2010, Ferguson spent 15 years pursuing a federal habeas relief. Review of the federal dockets in the Southern District of Florida and Eleventh Circuit reveals that of those 15 years, the federal courts took 4,328 days – more than 11 years – to rule on fully briefed motions and appeals. None of that delay can be attributed to Ferguson.

Ferguson also raised weighty constitutional objections to his conviction and sentencing proceedings. Serious concerns about Ferguson's competency, shared by nearly every doctor who examined him, led Ferguson's counsel to argue multiple times throughout the appeal process that Ferguson was not competent to proceed. These arguments were not grounded in fantasy: No fewer than 20 doctors in the last 45 years, most of them appointed by the State, have concluded that Ferguson has suffered from severe mental illness throughout his life. Ferguson Mental-Health History Supplemental Filing 1-3 (Sept. 14, 2012). As the Circuit Court acknowledged, "findings of incompetency * * * are in part, an

explanation for his lengthy time on death row." Opinion at 10. And as the Circuit Court itself found as a matter of *present* fact, "Mr. Ferguson *undoubtedly* suffers from mental illness which is documented from the time prior to the murders committed." 3.851(g) Opinion at 2. His counsel were thus not playing games; they sought to dutifully protect Ferguson's constitutional right to proceed only when he was competent to do so.

Finally, it would be, in a word, "intolerable" for the State to suggest or the Court to hold that Ferguson should be stripped of his Eighth Amendment rights to be free from cruel and unusual punishment because he pursued his constitutional right to seek habeas corpus relief. *Simmons* v. *United States*, 390 U.S. 377, 394 (1968).[21] As the Circuit Court found, when Ferguson pursued these appeals he was "exercis[ing] * * * his constitutional rights." Opinion at 10. And a defendant cannot be forced to surrender one constitutional right "in order to assert another." *Simmons*, 390 U.S. at 394 (defendant cannot be forced to choose between

[21] Although the right to seek habeas relief does not appear in the Bill of Rights, it qualifies as an individual right guaranteed by the Constitution. *E.g.*, *McDonald* v. *City of Chicago*, 130 S. Ct. 3020, 3084 n.20 (2010) (Kennedy, J., concurring in part and in the judgment) (citing U.S. Const. art. I, § 9, cl. 2 as an example of an "individual[] right" protected by the Constitution "outside the Bill of Rights"). And when Ferguson filed a federal post-conviction petition under 28 U.S.C. § 2254, he was exercising his constitutional right to pursue habeas corpus relief. *Cf. Wyzykowski* v. *Dep't of Corr.*, 226 F.3d 1213, 1215 (11th Cir. 2000) (holding that unduly impinging on the right to § 2254 relief would violate the Suspension Clause).

forfeiting Fourth Amendment claim and waiving Fifth Amendment privilege against self-incrimination); *see also Lefkowitz* v. *Cunningham*, 431 U.S. 801, 807-08 (1977) (state cannot force forfeiture of one constitutional right as price for exercising another).

And yet the State's argument effectively presents Ferguson with that "intolerable" choice – after the fact, no less. The State contends that because Ferguson pursued his constitutional rights to seek habeas relief, he cannot now pursue his constitutional rights to be free from cruel and unusual punishment. When states present defendants with such choices, the Supreme Court has deemed their actions impermissibly coercive. *Lefkowitz*, 431 U.S. at 807-08. And the State here did not even present Ferguson with such a choice. Instead, it seeks to penalize him for exercising one constitutional right by depriving him of his right to exercise another.

V. AFTER EXPRESSLY FINDING THAT "MR. FERGUSON UNDOUBTEDLY SUFFERS FROM MENTAL ILLNESS," THE CIRCUIT COURT ERRED BY SUMMARILY DENYING THE MOTION FOR DETERMINATION OF COMPETENCY.

The Circuit Court made two express findings of fact that necessarily precluded summary dismissal. First, the Circuit Court unambiguously found, as a matter of fact, that that "Mr. Ferguson *undoubtedly* suffers from mental illness which is documented from the time prior to the murders committed." 3.851(g) Opinion at 2. Second, the court found that there was a question of fact as to

whether Ferguson had received the clemency procedure to which he is entitled precisely because he had been found incompetent—twice—to proceed in clemency. As these two findings mandate further investigation of Ferguson's current mental state, the Circuit Court erred in denying Ferguson's Motion for Determination of Competency and its decision should be reversed.

The Circuit Court improperly denied Ferguson's Motion for Determination of Competency under Florida Rule of Criminal Procedure 3.851(g). Counsel's recent observations of Ferguson's mental incapacity, combined with Ferguson's decades-long history of mental illness, made clear to counsel that Ferguson is currently incompetent. Ferguson is unable to assist in the factual development of his case, including but not limited to his claim that his clemency process did not conform to the requirements of due process. Yet the Circuit Court denied this motion, despite finding that Ferguson "undoubtedly suffers from mental illness, which is documented from the time prior to the murders in [this case]." 3.851(g) Opinion at 2. The Circuit Court's lone rationale was that Ferguson's clemency claim was time-barred, and thus "there are no factual matters at issue, the development or resolution of which require the prisoner's input," as required by Rule 3.851(g). *Id.* at 1-2.

This ruling was wrong, as we explain. But it is important to recognize that the ruling was divorced entirely from the merits of the claim. In fact, the Circuit

Court explicitly found that, if Ferguson's clemency process claim were not time-barred, "then it is possible that the Defense would have been able to demonstrate a need for Mr. Ferguson's competent input on exactly what his clemency process has involved." *Id*. at 2. The Circuit Court similarly found that Ferguson "may have been entitled to an evidentiary hearing" to determine whether Ferguson received a "full clemency hearing" if the court had not found the claim to be time-barred. 3.851(g) Opinion at 9-10. Clearly, Ferguson's input would be invaluable were the Circuit Court to hold such an evidentiary hearing. As the Circuit Court recognized, there are several major open factual questions regarding Ferguson's clemency process, such as "what proceedings he may have had, whether there was a hearing, whether there was a subsequent evaluation [after 1987], [and] whether he was ever interviewed." Sept. 18, 2012 Hearing, Tr. 8:4-7. Input from a competent Ferguson may be able to shed light on several of these fundamental questions regarding this claim. Because, as detailed *supra* Section II, Ferguson's clemency process claim is not time-barred, the proper course of action is for this Court to remand to the Circuit Court for a new ruling on counsel for Ferguson's Motion for Determination of Competency given the timeliness of Ferguson's clemency claim.

In addition, the Circuit Court improperly invoked a timeliness condition that appears nowhere in the plain language of Rule 3.851(g). To be absolutely clear: Rule 3.851(g) contains no such condition precedent – none – to a competency

hearing. The Circuit Court erred in reading into the Rule a requirement that the drafters omitted. *See Knowles* v. *Beverly Enterprises-Florida, Inc*., 898 So. 2d 1, 7 (Fla. 2004) (Florida courts may not "rewrite the statute or ignore the words chosen by the Legislature so as to expand its terms"); *Holly* v. *Auld*, 450 So. 2d 217, 219 (Fla. 1984) (Florida courts "are without power to construe an unambiguous statute in a way which would extend, modify, or limit its express terms") (internal quotation omitted). Rule 3.851(g) requires a competency hearing to be held if there are reasonable grounds to believe that an inmate is incompetent and there are factual issues of which the inmate's input would aid resolution. The Circuit Court held that there are reasonable grounds to doubt Ferguson's competency and that there are factual questions at issue. The sole reason the Circuit Court denied relief was because it deemed these findings irrelevant because Ferguson's claim was held to be time-barred. However, Ferguson's input is required to determine whether his claim is time-barred. Therefore, the Circuit Court erred in denying further investigation of Ferguson's ability to assist counsel.

In addition, the Circuit Court erred in concluding that Ferguson's clemency claim was raised belatedly. The Governor's failure to grant a clemency hearing prior to issuing a death warrant was a continuing infraction. Ferguson's time to bring his clemency claim therefore only started to run once the warrant was handed down and the Governor had publicly declared his determination not to award

Ferguson the due process he was due. To conclude otherwise would place a time limit on an inmate's right to demand clemency when the entitlement to a clemency hearing is a right without temporal limitation.

Finally, the running of any time bar under Rule 3.851 should be tolled when the Court-acknowledged incompetency of the inmate prevents counsel from fully investigating a claim within the stated time limit. Thus, Ferguson's clemency claim is not time-barred and his input is sorely needed in its resolution. This Court should reverse the Circuit Court's decision on Ferguson's Motion for Determination of Competency when such striking questions remain about Ferguson's mental health.

CONCLUSION

For all of the foregoing reasons, the judgment below should be reversed and the death warrant vacated or stayed.

/s/

E. BARRETT PRETTYMAN, JR.*
CHRISTOPHER T. HANDMAN*
HRISHIKESH HARI, FL BAR NO. 91134
HOGAN LOVELLS US LLP
555 Thirteenth Street, N.W.
Washington, D.C. 20004
Tel.: (202) 637-5600
Fax: (202) 637-5910
chris.handman@hoganlovells.com

Counsel for Appellant
John Errol Ferguson

BENJAMIN J.O. LEWIS*
HOGAN LOVELLS US LLP
875 Third Avenue
New York, NY 07054-2891
Tel.: (212) 909-0646
Fax: (212) 918-3100

September 25, 2012

*Admitted pro hac vice

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing motion has been served by electronic mail on Penny H. Brill, Assistant State Attorney, pennybrill@miamisao.com; Scott A. Browne, Assistant Attorney General, Scott.Browne@myfloridalegal.com; and Stephen D. Ake, Assistant Attorney General, Stephen.Ake@myfloridalegal.com on this 25th day of September, 2012.

/s/
Christopher T. Handman

CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with the font requirements of Rule 9.210(a)(2) of the Florida Rules of Appellate Procedure.

/s/ _____
Christopher T. Handman