No. 12-_____

IN THE

# Supreme Court of the United States

JOHN ERROL FERGUSON,
*Petitioner*,

v.

SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS,
*Respondent.*

**EMERGENCY CAPITAL CASE**
**EXECUTION SCHEDULED FOR**
**OCTOBER 23, 2012, 6:00 P.M.**

## APPLICATION FOR STAY OF EXECUTION


BENJAMIN J.O. LEWIS
HOGAN LOVELLS US LLP
875 Third Avenue
New York, NY 10022
(212) 909-0646

E. BARRETT PRETTYMAN, JR.
PATRICIA A. BRANNAN
CHRISTOPHER T. HANDMAN*
CATHERINE E. STETSON
LINDSAY D. BREEDLOVE
MARISA F.L. CRUZ
SARAH M. CUMMINGS
KATHRYN L. MARSHALL
HOGAN LOVELLS US LLP
555 Thirteenth Street, N.W.
Washington, DC 20004
(202) 637-5719
chris.handman@hoganlovells.com

*Counsel for Petitioner*
**Counsel of Record*

TO: THE HONORABLE CLARENCE THOMAS,
ASSOCIATE JUSTICE OF THE UNITED STATES SUPREME COURT

Petitioner John Errol Ferguson through undersigned counsel, hereby respectfully submits this application for a stay of execution, scheduled for tonight at 6 PM, and hereby moves the Circuit Justice for the Eleventh Circuit, Associate Justice Clarence Thomas, for a stay of his execution pending disposition of his pending and forthcoming petitions for writs of certiorari.

## INTRODUCTION

On Saturday, the District Court below entered a stay of execution because it found that John Ferguson's habeas petition is "not successive and is nonfrivolous," and that "[t]he issues raised merit full, reflective consideration." App. 13a. That standard for granting a stay of execution faithfully follows this Court's decision in *Barefoot* v. *Estelle*, 463 U.S. 880 (1983), that a non-successive petition warrants a stay of execution so long as it raises "non-frivolous claims of constitutional error." *Id.* at 888. But a panel of the Eleventh Circuit—which divided 2-1 over the merits—last night vacated that stay. And in doing so, it criticized the District Court for applying the wrong standard for assessing whether a stay is warranted. Instead, it applied the more stringent four-prong preliminary-injunction test that calls for a "substantial likelihood" of prevailing on the merits.

This Court should grant a stay so that it has time to consider an important and recurring question: Whether a federal habeas petition that raises a competency-to-be-executed claim under *Ford* v. *Wainwright*, 477 U.S. 399 (1986), should be assessed under the *Barefoot* standard for non-successive petitions when

considering a stay of execution. This question is so important because it largely dictates whether the categorical prohibition on executing the insane that this Court announced in *Ford* will continue to have any practical significance. That is because, by definition, "*Ford*-based incompetency claims, as a general matter, are not ripe until after the time has run to file a first federal habeas petition." *Panetti* v. *Quarterman*, 551 U.S. 930, 943 (2007). Because a *Ford* claim almost invariably will *not* be presented in a first petition, many lower federal courts—including the panel below—refuse to apply the more favorable standard under *Barefoot* and *Lonchar* v. *Thomas*, 517 U.S. 314 (1996), when ruling on stays. That has the practical effect of rendering *Ford* claims second-class constitutional claims; they must clear a significantly higher hurdle that no other claim must.

And that has real consequences. As we explain in our pending petition in No. 12-6812, many States—like Florida below—breeze through the entire *Ford* and *Panetti* process in a matter of weeks. Those abbreviated procedures are "seriously inadequate for the ascertainment of the truth." *Panetti*, 551 U.S. at 954. Unless the federal courts have the flexibility to grant stays based on a "non-frivolous" *Ford* claim, there is a substantial risk that the insane will be executed—contrary to the categorical rule this Court announced in *Ford*.

The divided panel decision below also confirms the deep conflict over the scope and meaning of *Panetti* that we raise in No. 12-6812. Judge Wilson in dissent emphasized that that he "ha[d] doubts about whether the Florida courts correctly applied *Panetti*." App. 8a. Those doubts are well founded, as our pending petition

demonstrates. This Court should therefore grant a stay of execution until it can rule on that petition and Ferguson's forthcoming petition challenging the decision below.

## FACTS AND PRIOR PROCEEDINGS

Much of the important background for this application is set forth in Ferguson's pending Petition for a Writ of Certiorari filed on October 18, 2012 (No. 12-6812). Rather than canvass Ferguson's extensive mental-health history and the whirlwind of state procedures to assess his competency-to-be-executed claim, we pick up with the rulings from the State courts, which led to the current federal habeas petition now at issue.

**State Court Decisions.** The state trial court that heard Ferguson's competency-to-be-executed claim expressly found that Ferguson had a "genuine" Prince of God delusion and a "documented history of paranoid schizophrenia." App. 40a. The court nevertheless concluded, based on those subsidiary facts, that Ferguson was competent to be executed. It held that Ferguson's multiple delusions about his role as the Prince of God were simply "relatively normal Christian belief[s]." App. 41a. Therefore, in the court's view, "there is no evidence that he does not understand what is taking place and why it is taking place." *Id.*

Ferguson appealed. His principal argument was that the Circuit Court had applied the wrong standard to the competency inquiry. This Court's decision in *Panetti* v. *Quarterman*, 551 U.S. 930, 958, 960 (2007), changed the Eighth Amendment's competency baseline by requiring a more rigorous inquiry into a

condemned prisoner's rational understanding of the reasons for and consequences of his punishment, not just whether the prisoner is "aware of the punishment they are about to suffer and why they are to suffer it." But the Commission, the State, and the Circuit Court all had applied the pre-*Panetti* standard set forth in *Provenzano* v. *State*, 760 So. 2d 137 (Fla. 2000).

The Florida Supreme Court affirmed. In conflict with *Panetti*, the Florida Supreme Court ruled that competency turns on whether "the prisoner lacks the mental capacity to understand the fact of the pending execution and the reason for it." App. 18a-19a (citing *Provezano* and quoting Fla. R. Crim. P. 3.812(b)). The court, however, dismissed that conflict because it "disagree[d]" that *Panetti* "constitute[d] a change" to the way Florida has always gone about assessing competency. App. 20a. According to the Florida Supreme Court, even after *Panetti*, "the Eighth Amendment requires only that defendants be aware of the punishment they are about to receive and the reason they are to receive it." App. 22a (citing *Ford*, 477 U.S. at 422 (Powell, J., concurring)).

**Federal Challenges To The State Courts' Decisions.** The day after the Florida Supreme Court handed down its decision, Ferguson sought certiorari review in this Court (No. 12-6812) (petition pending). There, Ferguson explained that the Florida Supreme Court's decision squarely conflicts with *Panetti* and exacerbates confusion in the lower courts about the scope and meaning of *Panetti*'s "rational understanding" formula.

One day after seeking direct review in this Court of the Florida Supreme Court's decision, Ferguson filed a petition under 28 U.S.C. § 2254 in the U.S. District Court for the Southern District of Florida. Largely tracking the arguments that Ferguson had articulated in his cert petition in No. 12-6812, the habeas petition in District Court contended that the Florida Supreme Court's decision is both (i) contrary to clearly established Federal law and (ii) a decision based on an unreasonable determination of the facts in light of the state court record. 28 U.S.C. § 2254(d)(1), (2). Ferguson sought an immediate stay of the looming October 23 execution date.

On Saturday, October 20, 2012, the District Court entered an electronic order granting a stay and set the case for expedited argument on the merits—to occur Friday, October 26, 2012. In granting that stay, the District Court found that Ferguson's habeas petition "is not successive and is nonfrivolous." App. 13a. More than that, the court concluded that "[t]he issues raised merit full, reflective consideration." *Id.*

On Monday, October 22, the District Court followed up its electronic minute entry with a formal written order. App. 9a-12a. The court first recognized that "[b]ecause a claim of incompetency to be executed does not become ripe until execution is imminent, the petitioner's claim that he is incompetent to be executed is properly before the court, even though petitioner had filed a previous habeas petition challenging the imposition of the initial death sentence." App. 10a. Faithfully applying this Court's decision in *Panetti*, the District Court held that

"[t]he statutory bar on 'second or successive' application[s] does not apply where, as here, a petition is comprised solely of a *Ford*-based incompetency claim in an application filed when the claim first became ripe." *Id.*

The Court then went on to apply the standard for determining whether a stay is appropriate in a first habeas petition. It correctly noted that it "must determine whether a stay of execution is necessary in order to permit a 'fair hearing' on the petitioner's claim that the Florida Supreme Court's decision is contrary to or constitutes an unreasonable application of the precedent set by the United States Supreme Court." App. 11a. Based on the substantial questions raised by Ferguson's petition, the Court concluded that "[a] stay is necessary to permit that 'fair hearing.' " *Id.*

Yesterday, at 8:30 a.m., the State filed an emergency motion to vacate the stay in the Eleventh Circuit. Five hours later, Ferguson filed an opposition. And by 10:00 p.m., a divided panel of the Eleventh Circuit dismissed the habeas petition and vacated the stay. App. 1a-8a.

The majority ruled that the District Court applied the incorrect legal standard for determining whether a stay was warranted. According to the panel majority, the court should have used the typical four-prong test for assessing preliminary injunctions. App. 3a. The panel, however, never explained how that rule could be harmonized with this Court's decision in *Barefoot* v. *Estelle*, 463 U.S. 880 (1983), that a non-successive petition warrants a stay of execution if it raises "non-frivolous claims of constitutional error" because such claims merit "careful

attention." *Id.* at 888. Nor did the majority grapple with *Lonchar* v. *Thomas*, 517 U.S. 314 (1996), where this Court again emphasized that, when it comes to first habeas petitions, "[i]f the district court cannot dismiss the petition on the merits before the scheduled execution, it is obligated to address the merits and must issue a stay to prevent the case from becoming moot." *Id.* at 320.

The majority, though, did not stop there. It went on to hold that Ferguson's claims lacked merit and should be dismissed. In its view, that Florida Supreme Court had correctly applied *Panetti*. App. 4a-5a. It also considered the ultimate question of competence to be executed to be a factual question worthy of deference under the Antiterrorism and Effective Death Penalty Act (AEDPA). App. 3a.

Judge Wilson concurred and dissented. Although he favored a remand to let the District Court better articulate its standard for assessing the stay, he disagreed that Ferguson's petition lacked merit. To the contrary, he emphasized that he "ha[d] doubts about whether the Florida courts correctly applied *Panetti*." App. 8a. In Judge Wilson's view, the majority "put[] the cart before the horse" by purporting to resolve the merits of this claim on an emergency motion to vacate the stay. *Id.*

Barring a stay from this Court, Ferguson will be executed today at 6:00 p.m.

## REASONS FOR GRANTING A STAY OF EXECUTION

### I. THIS COURT IS LIKELY TO GRANT CERTIORARI TO REVIEW WHETHER THE STANDARD FOR GRANTING A STAY BASED ON A *FORD*-BASED INCOMPETENCY CLAIM IS GOVERNED BY THE SAME STANDARD USED FOR FIRST-TIME HABEAS PETITIONS.

At last four justices of this Court are likely to grant certiorari on the first question Ferguson will raise in his forthcoming petition for a writ of certiorari:

Whether a petitioner seeking habeas review of a competency-to-be-executed claim under *Ford* must satisfy the *Barefoot* standard used for non-successive petitions. That is an important question that, depending on how the Court resolves it, will determine whether *Ford* and *Panetti* continue to have any practical significance.

That is because competency-to-be-executed claims necessarily can only be brought after a death warrant is signed. As we have explained in our petition in No. 12-6812, Florida—like many States—races to resolve these claims in the space of a few weeks in order to keep the execution on track. That breezy process is "seriously inadequate for the ascertainment of the truth." *Panetti*, 551 U.S. at 954. If States insist on disposing of such important Eighth Amendment questions in a handful of weeks, federal courts should have the power to invoke the Great Writ to ensure that this solemn right is not violated.

But under the panel majority's rule below, district courts are hamstrung in protecting these claims. The majority refused to apply the more lenient stay standard this Court articulated in *Barefoot*, which mandates a stay for non-successive petitions so long as the petition raises "non-frivolous claims of constitutional error." *Barefoot*, 463 U.S. at 888. And the majority likewise ignored this Court's holding in *Lonchar* for first habeas petitions: "If the district court cannot dismiss the petition on the merits before the scheduled execution, it is obligated to address the merits and must issue a stay to prevent the case from becoming moot." 517 U.S. at 320. Instead, it applied the routine standard for assessing injunctions and stay outside the first-habeas context.

That is an issue of great importance that warrants review. Because "*Ford*-based incompetency claims, as a general matter, are not ripe until after the time as run to file a first federal habeas petition," *Panetti*, 551 U.S. at 943, these claims will almost invariably arise in what is technically a second petition. This Court, however, has already rejected that formalism in another context. In *Panetti*, the Court held that AEDPA's stringent standards for successive petitions are not triggered by *Ford* claims precisely because they could *not* have been raised earlier. *See id.* at 943-944.

This Court should now take the next logical step and confirm that the rules governing stay motions on successive petitions do not apply to a first-time *Ford* claim. By definition, these claims will always be brought with the threat of an imminent execution looming. It would undermine the important categorical prohibition on executing the insane if the usual *Barefoot* rule for assessing stays did not apply. Both common sense and fidelity to *Panetti* require that a habeas petitioner raising a *Ford*-based competency claim for the first time should be entitled to a stay so long as the petition raises "non-frivolous claims of constitutional error." *Barefoot*, 463 U.S. at 888. As with any other non-successive petition, a *Ford*-based competency claim merits "careful attention." *Id.* Otherwise, given the breakneck pace at which *Ford* claims are adjudicated in the States, there is a substantial probability that the "miserable spectacle" of executing the insane will repeat throughout the country. *Ford*, 477 U.S. at 407.

## II. THE DIVIDED PANEL'S DECISION BELOW ONLY CONFIRMS THE DEEP CONFLICT OVER THE SCOPE AND MEANING OF *PANETTI*.

1. Our pending petition in No. 12-6812 explains that the Florida Supreme Court's decision sharply conflicts with *Panetti*, 551 U.S. 930, which in 2007 found unconstitutional the very standard the Florida Supreme Court applied last week. The Eleventh Circuit's decision only underscores the severe problems with the Florida Supreme Court's approach. In the Eleventh Circuit's split opinion, Judge Wilson observed that he has "doubts about whether the Florida courts correctly applied *Panetti*." App. 8a.

He was right. As we have explained, the Florida Supreme Court applied a constitutionally defunct competency standard to Ferguson's appeal. Following *Panetti*, it no longer satisfies the Eighth Amendment for a competency inquiry merely to ask whether " 'a person know the fact of his impending execution and the reason for it.' " *Panetti*, 551 U.S. at 942 (quoting, and reversing, the Fifth Circuit). But yet that is *exactly the standard* the Florida Supreme Court applied to determine that Ferguson is competent to be executed. *See* App. 20a-22a.

Also as Ferguson has explained, had the Florida Supreme Court applied the *Panetti* standard to Ferguson's competency challenge, it would have reached the opposite result it did. For Ferguson is indisputably possessed of the most extreme delusions. He genuinely believes he is the "Prince of God," with special powers from the sun. And he believes he will come back to the earth after he is killed by the State, to save the world from communism. When it failed to apply the proper *Panetti* inquiry to assess the effects of Ferguson's dire mental state on his ability to

rationally understand the reason for and consequences of the punishment he faces, the Florida Supreme Court committed a major constitutional error and placed itself squarely at odds with this Court's precedent.

On habeas review, the Southern District of Florida granted a stay to air this issue as it deserves to be aired. After all, this case presented the Florida Supreme Court with its first opportunity to examine its competency-to-be-executed standard post-*Panetti*, and there is substantial reason to conclude that that court got it wrong. Yet two judges on the Eleventh Circuit vacated the stay. But only two: Judge Wilson felt obliged to issue a partially dissenting opinion *specifically questioning* whether the Florida state courts had properly applied *Panetti*. This Court should take Judge Wilson up on his observation. For if *Panetti* does not apply to Ferguson's case, it applies to no one's.

2. The Florida Supreme Court also cast off *Panetti* in another significant respect. When a prisoner condemned to death challenges his competency to be executed, due process requires that the procedures for assessing the prisoner's competency be "adequate for reaching reasonably correct results," and that the process be adequate "for the ascertainment of truth." *Panetti*, 551 U.S. at 953 (internal quotation and citation omitted). Ferguson's competency proceedings made a mockery of these protections. And when it countenanced the State's heedless rush to judgment, the Florida Supreme Court denied Ferguson's due-process challenge in a manner contrary to clearly established federal law. Panetti requires that the

procedures employed by the State be adequate "for the ascertainment of truth." *Panetti*, 551 U.S at 954. No such procedural protections existed here.

The Southern District of Florida was willing to give Ferguson's competency and due process challenges significantly more thought than the state courts to that point had. But the Eleventh Circuit undid that effort. Judge Wilson again demurred, urging the majority to remand to the District Court to reevaluate the appropriateness of a stay under the correct legal standard. App. 8a. The majority paid him no mind.

Because Ferguson has demonstrated both a "reasonable probability" that this Court will grant certiorari and a "fair possibility" that it will rule on the merits in his favor on his *Panetti* claims, this Court should grant a stay so that it may potentially consider this question after the lower federal courts have vetted it.

## III. CERTIORARI IS WARRANTED TO RESOLVE A CONFLICT OVER WHETHER COMPETENCY DETERMINATIONS ARE QUESTIONS OF MIXED FACT AND LAW OR, AS THE DIVDED PANEL BELOW HELD, PURE QUESTIONS OF FACT.

Ferguson's forthcoming petition will challenge the Eleventh Circuit's articulation of the standard of review a habeas court affords the state courts' ultimate constitutional competency determination. The Antiterrorism and Effective Death Penalty Act (AEDPA) provides that, on review, questions of law are reviewed *de novo*; determinations of fact are "presumed correct"; and mixed questions of law and fact are reviewed to determine whether the state-court determination resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Supreme Court law. 28 U.S.C. § 2254(d).

In upholding the state court's ultimate conclusion that Ferguson is competent to be executed, and thus that his execution does not run afoul of the Eighth Amendment, the Eleventh Circuit majority applied the "presumption of correctness" standard applicable to pure questions of fact. App. 4a. It applied that most burdensome habeas standard without discussion. In fact, however, the law is all over the lot on this issue. That is because this Court has not yet spoken on it. "Although the Supreme Court usually determines whether a specific issue in one of its habeas cases is a question of law or fact, the *Ford* court never specifically characterized the issue of competency to be executed." *Martin* v. *Dugger*, 686 F. Supp. 1523, 1552 (S.D. Fla. 1988); *see also Coe* v. *Bell*, 209 F.3d 815, 824 (6th Cir. 2000) (noting that this Court has not established a clear "rule" as to what standard of review applies to competency-to-be-executed determinations). And this conspicuous omission has generated substantial confusion among the lower courts.

The Sixth Circuit, for example, has concluded that in light of this Court's silence on the issue, it is most appropriate to apply the standard of review "most favorable to [the condemned]," and thus to treat a trial court's determination of competency to be executed as a mixed question of law and fact, reviewable under Section 2254(d)'s "unreasonable application" prong. *Coe*, 209 F.3d at 823-824. Similarly, the Texas Court of Criminal Appeals in *Green* v. *State* applied a mixed question of law and fact standard when reviewing the lower court's determination of competency. 374 S.W.3d 434, 441 (Tex. Crim. App. 2012). In *Patterson* v. *Dretke*, the Fifth Circuit concluded that a state court's determination that a prisoner is

competent to be executed is entitled to a presumption of correctness under § 2254(e)(1). 370 F.3d 480, 485 (5th Cir. 2004). But the court of appeals quickly qualified its holding, acknowledging the total lack of guidance on the appropriate standard of review for competency determinations and finding in the alternative that the appellant has not shown "that the state court's decision is contrary to, or an unreasonable application of *Ford*." *See also Barnard* v. *Collins*, 13 F.3d 871, 877 (5th Cir. 1994) (identifying, and similarly hedging, the open question of what habeas standard of review applies to state-court competency determinations).

By contrast, the Tennessee and Washington Supreme Courts, like the Eleventh Circuit majority here, have held that a lower court's ultimate finding of competence or incompetence is entitled to a presumption of deference. *State* v. *Irick*, 320 S.W.3d 284, 292 (Tenn. 2010); *State* v. *Harris*, 114 Wash. 2d 419, 441 (Wash. 1990).

If Ferguson were seeking habeas review of his impending execution in Ohio, then, or even Texas, the state courts' determination of competency would have been reviewed subject to the more deferential "unreasonable application" standard applicable to mixed questions of law and fact. And under that standard, Ferguson plainly is incompetent to be executed. Indeed, the state circuit court's findings of fact *compel* the conclusion that Ferguson is incompetent to be executed. That court found, and the Florida Supreme Court affirmed, that Ferguson is psychotic and suffering from paranoid schizophrenia. App. 41a. The state court found, despite the State's vigorous arguments to the contrary, that Ferguson is not malingering.

App. 40a. And the state court found that Ferguson has a genuine delusion that he is the "Prince of God." *Id.* Notwithstanding these findings—all of which weigh directly on the question whether Ferguson has a rational understanding of why he is to be executed and the consequences of that execution—the state courts concluded that Ferguson was competent to be executed. That final conclusion cannot be squared with the circuit court's other, consistent findings of fact. At most, it is a mixed question of fact and law; and in light of its utterly unsupported conclusion, it is certainly deserving of no "presumption of correctness."

The standard of review to be afforded condemned prisoners challenging their competency to be executed is an important question of federal law that has not been, but must be, settled by this Court. *See* S. Ct. R. 10(c). The lower courts have attempted for over a decade to resolve this open question. They have not come to common ground. Left to their own devices, the lower federal and state courts plainly will not satisfactorily resolve the question of the proper standard of review to apply to competency to be executed proceedings. Indeed, most of the courts to have addressed this issue have openly equivocated over the standard, expressly acknowledging their own uncertainty about what standard to apply. Recognizing this gap, the Sixth Circuit correctly took the path most favorable to the condemned prisoner, applying the "unreasonable application" prong. *Coe*, 209 F.3d at 824. The Eleventh Circuit, in contrast, advantaged itself of this Court's silence by applying the harshest standard of review available, and dismissively casting off the significant findings of fact *in Ferguson's favor* that preceded the state court's

ultimate constitutional determination. To be very plain: The determinations those courts reach quite literally mean the difference between life and death. The confusion over the proper standard of review is wholly avoidable, and it is constitutionally intolerable.

That confusion also is echoed in cases involving other categorical prohibitions on execution. including, for example, *Atkins* claims of mental retardation. *Compare Clark* v. *Quarterman*, 457 F.3d 441, 444 (5th Cir. 2006) ("whether [defendant] suffers from significantly subaverage intellectual functioning is a question of fact"); *Ortiz v. United States*, 664 F.3d 1151, 1164 (8th Cir. 2011) (ultimate determination of mental retardation is a factual determination) *with Black* v. *Bell*, 664 F.3d 81, 100-101 (6th Cir. 2011) (where state court's findings of fact were insufficiently supported, and thus contradicted governing law, courts conduct *de novo* review); *State* v. *Strode*, 232 S.W.3d 1, 16 (Tenn. 2007) ("the question of whether an individual is mentally retarded for purposes of eligibility [for] the death penalty is a mixed question of law and fact.").

Permitting appellate courts to defer to state-court determinations of competency by treating the entire determination as a factual, rather than a mixed, question, effectively insulates state court determinations of competency from judicial review. That result cannot stand. Not when the stakes are so high. Not when the questions raised in such proceedings are important constitutional questions. And not when, as here, the standard of review is outcome-determinative. If courts are to conduct meaningful assessments of competency to be executed, as

*Ford* and *Panetti* require, state courts must not be permitted to so securely cordon off their findings from meaningful appellate review.

## IV. THE BALANCE OF EQUITIES—INCLUDING THE IRREPARABLE HARM FERGUSON WILL SUFFER IF HE IS EXECUTED BEFORE HIS FORD CLAIM IS PROPERLY ADJUDICATED—STRONGLY WEIGHS IN FAVOR OF A STAY.

Florida's interest in John Ferguson's timely execution must be weighed against John Ferguson's continued interest in his life. *See Ohio Adult Parole Authority* v. *Woodard*, 523 U.S. 272, 289 (1998) ("[I]t is incorrect * * * to say that a prisoner has been deprived of all interest in his life before his execution.") (O'Connor, J., plurality opinion). Florida has an interest in the enforcement of judgments handed down by its courts. Ferguson—through his counsel since his delusions prevent him from rationally understanding the consequences of his execution—has a constitutional entitlement to an execution that comports with the Eighth Amendment and due process. This right includes the ability to have meaningful judicial review, including from this Court, of the complex constitutional claims he has raised. It also goes without saying that Ferguson plainly will be harmed in the absence of a stay. "[T]hat irreparable harm will result if a stay is not granted * * * is necessarily present in capital cases." *Wainwright* v. *Booker,* 473 U.S. 935, 935 n.1 (1985) (Powell, J., concurring).

This Court held in *Barefoot* that "a death sentence cannot begin to be carried out by the State while substantial legal issues remain outstanding." 463 U.S. at 888. This case presents substantial legal issue upon legal issue: Did the Florida Supreme Court issue a decision in conflict with *Panetti* when it declined to depart

from the very standard *Panetti* found unconstitutional? Did the Florida Supreme Court issue a decision in conflict with *Panetti* and *Ford* when it blessed a comically hasty competency evaluation process and a corner-cutting trial-court review? Did the Eleventh Circuit generate a circuit conflict when it found without discussion that the ultimate constitutional determination of competency to be executed is a mere finding of *fact*? Is Ferguson, who believes himself to be the "Prince of God," confined to prison to "prepare" him for ascension to his place,[1] persecuted by guards jealous of his powers, protected from death by his dead father, who will return again in glory after death to save the world from communism, competent to be executed at the hands of the State?

If Ferguson is executed before this Court hears his case, he will forever be deprived of the opportunity to vindicate his rights. In *Gardner* v. *Florida,* 430 U.S. 349, 357-358 (1977), Justice Stevens explained: "[D]eath is a different kind of punishment from any other which may be imposed in this country." It is thus "of vital importance to the defendant and to the community that any decision to impose the death sentence be, and appear to be, based on reason." The State's unreasoning march to execution here fails that test miserably.

[1] Circuit Court Tr. 56:21-22.

## CONCLUSION

For the foregoing reasons, a stay of execution should be granted.

Respectfully submitted,

E. BARRETT PRETTYMAN, JR.
PATRICIA A. BRANNAN
CHRISTOPHER T. HANDMAN*
CATHERINE E. STETSON
LINDSAY D. BREEDLOVE
MARISA F.L. CRUZ
SARAH M. CUMMINGS
KATHRYN L. MARSHALL
HOGAN LOVELLS US LLP
555 Thirteenth Street, N.W.
Washington, DC 20004
(202) 637-5719
chris.handman@hoganlovells.com

BENJAMIN J.O. LEWIS
HOGAN LOVELLS US LLP
875 Third Avenue
New York, NY 10022
(212) 909-0646

*Counsel for Petitioner*
**Counsel of Record*

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## CERTIFICATE OF SERVICE

I, Christopher T. Handman, a member of the Bar of this Court, hereby certify that on this 23d day of October, 2012, copies of the Application for Stay of Execution were served by electronic mail and first-class United States mail, postage prepaid, to:

Stephen Ake
Assistant Attorney General
3507 East Frontage Road, Suite 200
Tampa, FL 33607-7013
stephen.ake@myfloridalegal.com

Scott A. Browne
Assistant Attorney General
3507 East Frontage Road, Suite 200
Tampa, FL 33607-7013
scott.browne@myfloridalegal.com

Counsel for Respondent

I further certify that all parties required to be served have been served.

Christopher T. Handman
HOGAN LOVELLS US LLP
555 Thirteenth Street, N.W.
Washington, DC 20004
(202) 637-5719