

CASE NO. 12-_____
CAPITAL CASE

IN THE SUPREME COURT OF THE UNITED STATES

JOHN FERGUSON

Petitioner,

v.

KENNETH S. TUCKER, SECRETARY,
FLORIDA DEPARTMENT OF CORRECTIONS,

Respondent.

EMERGENCY MOTION TO VACATE STAY OF EXECUTION

EXECUTION SCHEDULED
OCTOBER 23, 2012 6:00 PM

To: The Honorable Clarence Thomas, Justice of the United States
Supreme Court and Circuit Justice of the Eleventh Circuit

COMES NOW Respondent, Kenneth S. Tucker, Secretary, Florida
Department of Corrections, by and through the undersigned
counsel, and moves this Honorable Court to vacate the stay of
execution issued by the Eleventh Circuit Court of Appeals in the
instant case, and as grounds therefore, states:

Shortly before Ferguson's scheduled execution at 6:00 p.m.,
counsel for Respondent were notified by Ferguson's counsel that
they had District Court Judge Daniel Hurley, Southern District
of Florida, on the phone for a hearing on Ferguson's emergency

motion for a stay of execution. Opposing counsel provided no advance notice of this hearing and had obviously engaged in ex parte communications with the judge prior to arranging this hearing. Judge Hurley had apparently recently denied Ferguson's petition for writ of habeas corpus, but issued a certificate of appealability (COA) on two issues (although this order had not been provided to Respondent's counsel as of the time of the hearing):

A. Whether the decision of the Florida Supreme Court involved an unreasonable application of the United States Supreme Court decision[s] in Ford and Panetti.

B. Whether the Florida Supreme Court's affirmance of the state trial court was based on an unreasonable determination of the facts in light of the evidence presented in the state court proceeding, viz, that (a) the petition has a documented history of of paranoid schizophrenia; (b) he is not malingering, and (c) he has a fixed grandiose delusion that he is the "Prince of God."

At the phone hearing, the Honorable Judge Daniel Hurley heard argument from counsel and orally *denied* Ferguson's motion for a stay. Ferguson's counsel then filed a motion for stay with the Eleventh Circuit Court of Appeals despite the fact that the court of appeals had earlier issued an opinion finding that Ferguson had no likelihood of success on his habeas claim and that Judge Hurley had abused its discretion in granting a prior stay. See Ferguson v. Tucker, Sec'y Dep't of Corr., Case No. 12-15191 (11th Cir. Oct. 18, 2012). Shortly before 6:00 p.m., this

Court denied certiorari review from that decision. See Ferguson v. Tucker, Sec'y Dep't of Corr., Case No 12A402 (Oct. 23, 2012).

At approximately 8:00 p.m., the Eleventh Circuit Court of Appeals issued a stay of execution pursuant to Federal Rule 22-4(a)(7), and set a briefing schedule. In order for a COA to issue, a petitioner must make "a substantial showing of a denial of a constitutional right." 28 U.S.C. §2253(c)(2). This requires a demonstration that "jurists of reason could disagree with the district court's resolution of his constitutional claim or that jurists could conclude that issues presented are adequate to deserve encouragement to proceed further." Miller-el v. Cockrell, 537 U.S. 322, 327, 123 S. Ct. 1029, 1034 (2003). This Court has made clear that issuance of "a COA must not be pro forma or a matter of course." Miller-El, 537 U.S. at 337, 123 S. Ct. at 1040. Thus, the Court has held that the petitioner must actually prove that he meets the above standard before a COA can issue. Id. at 337-38, 123 S. Ct. at 1040.

In the instant case, Ferguson failed to meet this standard, especially given the Eleventh Circuit Court of Appeals' prior decision finding that Ferguson's claims lacked merit and this Court's denial of certiorari review from that decision. Given Ferguson's failure to meet his burden, the court of appeals

erred in granting a stay of execution. This Court should immediately vacate the stay.

The process here makes a mockery of the State's compelling interest in finality after enduring thirty five years of litigation with the department of corrections and family members prepared for the long awaited sentence to be imposed. The Court of Appeals panel in this case had already determined that no stay was warranted and vacated the district court's entry of a stay. The only change was that the district court denied the habeas corpus and issued a certificate of appealability. Under these extreme circumstances, the Court of Appeals' entry of a stay in this case should be vacated.

CONCLUSION AND REQUEST FOR RELIEF

Wherefore, based on the foregoing reasons, Petitioner respectfully requests that this Honorable Court vacate the stay of execution.

Respectfully submitted,

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s/ Stephen D. Ake
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing RESPONSE TO APPLICATION FOR STAY OF EXECUTION was furnished by electronic mail to Christopher T. Handman, Esquire, [chris.handman@hoganlovells.com], Hogan Lovells US LLP, 555 Thirteenth St. N.W., Washington, D.C. 20004, and to Benjamin J.O. Lewis, [ben.lewis@hoganlovells.com], Hogan Lovells US LLP, 875 Third Ave., New York, NY 07054, on this 23rd day of October, 2012. I further certify that all parties required to be served have been served.

s/ Stephen D. Ake

Counsel for Respondents