**IN THE SUPREME COURT OF FLORIDA**

**MARSHALL LEE GORE**
**a/k/a MARS L. GORE.,**

**Appellant,**

**vs.** **Case Number SC13-1281**

**STATE OF FLORIDA,**

**Appellee.**
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**APPEAL FROM THE CIRCUIT COURT**
**IN AND FOR THE EIGHTH JUDICIAL CIRCUIT,**
**BRADFORD COUNTY, STATE OF FLORIDA**

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# INITIAL BRIEF OF APPELLANT

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## PRELIMINARY STATEMENT

Mr. Gore appeals the order of the Circuit Court of the Eighth Judicial Circuit, in and for Bradford County, Florida, denying his motion for relief pursuant to Fla. R. Crim. P. 3.811 & 3.812.

The following abbreviations will be utilized to cite to the record in this cause, with appropriate page numbers following the abbreviations:

"R.___." -Record on direct appeal to this Court;

"PCR__." -Record in first postconviction appeal;

"2PCR ____" -Record in instant appeal.

## REQUEST FOR ORAL ARGUMENT

Mr. Gore, through counsel, respectfully requests that the Court permit oral argument in this case.

## TABLE OF CONTENTS

## TABLE OF AUTHORITIES

## INTRODUCTION

Marshall Gore's mental health has been a "recurrent theme" throughout the long history of his criminal cases in both Miami-Dade County and Columbia County. *Gore v. State*, 24 So. 3d 1, 6 (Fla. 2009). Within weeks of the signing of his death warrant, Mr. Gore's then-registry counsel, Steven Hammer, filed a "Notice of Potential Conflict of Interest" in the state circuit court for the Eleventh Judicial Circuit asserting that he had spoken with Mr. Gore, who was "irrational" and "could not be reasoned with" (DE127-1 at 2, No. 03-22736-cv-DLG).[1] According to Hammer, Mr. Gore refused to sign a medical release for his records because he believed that Hammer was "engaged in a conspiracy to get [him] killed" (*Id.*). Hammer also alleged that Mr. Gore "made a number of contradictory and bizarre statements and allegations about counsel, his case, and his family," as well as "statements concerning his potential execution and the nature of these proceedings that were irreconcilably irrational" (*Id.*). Based on Mr. Gore's mental health history

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[1]References to "DE" followed by a docket number and case number refer to docket entries from several cases involving Mr. Gore in the United States District Court for the Southern District of Florida. Docket entries in Mr. Gore's initial habeas case before Judge Graham in the Southern District of Florida will be referred to as DE (docket entry), No. 06-22736-cv-DLG. The habeas petition that was later dismissed without prejudice will be referred to as DE (docket entry), No. 13-22230-cv-DLG. The re-filed habeas petition that is presently pending in the Southern District of Florida will be referred to as DE (docket entry), No. 13-22294-cv-DLG.

and the recent communications, Hammer informed the court that he had notified Governor Scott "that Mr. Gore may be insane to be executed" and invoked the statutory procedures for the Governor to appoint a commission of experts (*Id.* at 3). *See* 2PCR 28.

Mr. Gore's delusional ramblings were also set out in pleadings he filed in the federal district court, which court made a preliminary determination that "Mr. Gore has asserted a reasonable basis to believe that he may have a claim for relief based on *Ford v. Wainwright*, 477 U.S. 399 (1986)" (DE137 at n.3, Case No. 06-22736-CV-DLG). The district court noted, for example, that Mr. Gore "indicated he believes his execution was scheduled for his 'death and organ/harvesting/to be a human sacrifice of both" (*Id.)* (quoting from DE104, Case No. 06-22736-CV-DLG). The court also noted that Mr. Gore has contended that his initial execution date of 06/24/13 adds up to 6-6-6 and that "[b]ecause of his virgin innocence of murder, he is a target of Satan Worshippers who have threatened that date by mail for years" (DE137 at n.3, Case No. 06-22736-CV-DLG) (quoting from DE104, Case No. 06-22736-CV-DLG). Finally, the court noted Mr. Gore's statement in writing that "prisoners are now being gagged (or unable to speak) and denied opportunity to give last words" (DE137 at n.3, Case No. 06-22736-CV-DLG) (quoting from DE105, Case No. 06-22736-CV-DLG).

The above references to some of the delusional statements made in Mr. Gore's federal *pro se* pleadings were only a few examples of his delusional beliefs. Many of his delusions refer to the organ harvesting/human sacrifice language. *See, e.g.* DE122 at 6-7, Case No. 06-22736-CV-DLG) ("Movant has in fact been targetted [sic] for expedited organ harvesting not necessarily for elite need of his organs but because his execution will prevent him from being able to reach the Supreme Court"); *id.* at 10 (Gore writes he is "targeted" with expedited death warrant to prevent case from reaching the Supreme Court "by scheduling him for organ harvesting to begin by death warrant, could not be more unfair nor deliberate nor more evil"). *See also* DE114-6 at 5, No. 06-22736-cv-DLG ("Mr. Gore believes he is going to be killed so that a senator's blind son can have his eyes and that if his eyes are no longer needed, that the governor will grant a stay of execution until such time that another organ donor recipient is found"); *id.* ("in his mind, Mr. Gore's execution will actually be a sacrifice to the Governor's satanic god").

Mr. Gore's delusional belief system has also led him to allege a far-reaching conspiracy among his attorneys. For example, Mr. Gore believes that the undersigned counsel (Mr. Scher) has acted "only as an assistant to Steven Hammer" who he claims is the undersigned's "boss" and that the undersigned has been "obeying" Hammer's direction "all along" (DE104 at 5, Case No. 06-22736-CV-DLG). He also has

expressed the delusional view that the undersigned is one of Hammer's "cherry-picked assistants who defrauded the Court to secure their appointment" (DE104 at 16 n.12, Case No. 06-22736-CV-DLG). According to Mr. Gore's delusions, the undersigned is also "dead-locked into a homicidally indifferent course of action . . . guided by Hammer . . . against Movant's interests" (DE105 at 5, Case No. 06-22736-CV-DLG). He also believes that Mr. Hammer was romantically involved with the victim's sister (DE114-6, No. 06-22736 at 5).

Mr. Gore also expressed his delusional beliefs to the panel of mental health experts appointed by Governor Scott that evaluated him on May 28, 2013, and generated a report that same day (2PCR 37-40).[2] According to the report, these experts viewed their mandate as being to "determine whether Mr. Gore understands the nature and effects of the death penalty, and why it was imposed on him" (*Id.* at 1).[3] According to the report, the evaluation totaled 180 minutes, which included a

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[2]The panel of experts is the same panel of experts that Governor Scott appointed to examine John Ferguson. *See Ferguson v. Sec'y Fla. Dep't. of Corrections*, 716 F. 3d 1315 (11th Cir. 2013). In fact, in the report they prepared for the Governor in Mr. Gore's case, they did not even bother to remove the reference to "Mr. Ferguson" from the report (2PCR 38).

[3]This is decidedly *not* the standard for determining sanity to be executed under the Eighth Amendment. *See Ferguson,* 716 F.3d at 1318 ("The Supreme Court has decided that a convicted murderer cannot be executed unless he has a rational understanding of the fact that he is going to be put to death and of the reason for his execution").

review of medical, mental health, and corrections records spanning the last 23 years, an interview with Mr. Gore, and forensic testing (*Id*). The report states that Mr. Gore repeated his delusions to the experts, which the experts wrote off as a "fantastic, imaginative scenario" that was "patently a fabrication designed to mislead the panel and avoid responsibility for his past actions" (*Id.* at 3).

The panel's report also states that, with the "exception" of a referral by correctional staff on March 1, 2012, for "paranoid and delusional behavior," the corrections records reveal no delusional thinking by Mr. Gore (*Id.* at 2).[4] However, the panel's review of Mr. Gore's records was either not very thorough or it chose not to disclose in its report some highly relevant factors. For example, as far back as 1994, Mr. Gore wrote a request to "PSYCH DOCTOR":

> Doctor,
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> There is a conspiracy to drive me insane going on right now. I have just realized that as of new developments this conspiracy has been in place for quite time. If you know of any way to this prevent please tell me. Do not call me out unless you can stop it.

(2PCR 42). Another report from 1994 reveals that "it has been 6 months now *since*

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[4]It appears that the experts never meaningfully reviewed any of the pleadings filed by Mr. Gore which do reveal delusional thinking by Mr. Gore (DE137 at n.3, Case No. 06-22736-CV-DLG). Moreover, Mr. Gore's previous federal habeas counsel filed a motion in connection with Mr. Gore's federal habeas proceeding alleging that he was incompetent due to delusional and other bizarre behavior (DE62, Case No. 06-22736-CV-DLG).

*I believe I was injected with the tuberculosis* and would request that an HIV test be done immediately to avoid confusion of its origin should I also come up with positive results on that as well" (2PCR 44) (emphasis added). Another report from 1997 reveals that Mr. Gore wrote:

> I am hearing voices and I think I am a threat to myself. The voices keep telling me to hang myself.

(2PCR 46). Yet another corrections report from 2011 reveals that between May and September, 1997, Mr. Gore underwent 4 months of outpatient mental health treatment "due to bizarre behavior" (2PCR 48). However, the treatment ended because Mr. Gore refused to "participate in any treatment modalities" (*Id.*). Another report from 2011, referring to Mr. Gore's past psychiatric history, reveals that in 1997, Mr. Gore "was provisionally diagnosed with Paranoid Personality Disorder (2PCR 50). The same report indicates that in 1991, "it was documented he was on sinequan for three days while in the county jail" (*Id.*). The panel apparently did not see fit to mention ***any*** of these documented instances of delusional behavior and suicidal ideation in its report despite the fact that most of these incidents were detailed in the notes taken by Dr. Werner, one of the experts appointed by Governor Scott.[5] And the one document

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[5]Nor did the panel include an accurate recitation of what the correctional officers with whom they spoke told them. For example, the experts reported interviewing a correctional officer and a sergeant concerning "Mr. Ferguson's" recent functioning. The report provides much negative information gleaned from

it mentioned in the report (the March, 2012, referral by DOC staff for paranoid and delusional behavior") was dismissed as a bothersome "exception."

More recent entries in the documents from the Department of Corrections establish further evidence of Mr. Gore's mental health issues and further contradict the panel's report. For example, the panel report indicates that Mr. Gore's psychiatric grade was changed "after throwing and breaking his personal television set in a fit of rage over other inmates making noise on December 12, 2011" (2PCR 37).[6] Yet a

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these interviews and that neither officer reported anything "clinically significant" (2PCR 38). Yet in the notes that were used to formulate the report, Dr. Werner wrote that Sgt. Kraszewski told her that Mr. Gore "hardly leaves bunk," "doesn't socialize much," has a "fear of life," "freaks out around the wrong people," "doesn't go by others to shower," "doesn't go to yard," "does get paranoid if feels someone wrongs him, and "goes off, yelling, cursing, drops foot locker on floor," and noted that Petitioner's cell is "dirty" (2PCR 52-53). These are hardly clinically insignificant facts particularly given Mr. Gore's history. *Cf. Ferguson*, 716 F. 3d at 1328 (death row counselor noted that Ferguson no "negative symptoms" of mental illness such as "lack of motivation"). However, the panel chose not to make a full disclosure of Sgt. Kraszweski's information to the Governor, further demonstration of the panel's bias.

[6]The report noted that in June, 2012, Mr. Gore's psychiatric grade was dropped to an S-2, meaning that prior to June, 2012, he had been classified at the S-3 level, which is the highest mental health designation in the Department of Corrections; such a designation, according to the Commission report, means "psychopathology requiring medication and counseling" (2PCR 37-38). *Cf. Ferguson*, 716 F. 3d at 1328 (noting that Ferguson had been classified as an S-1 inmate since 2001, the lowest designation given to prisoners "who have no identifiable mental health problems impairing their functioning in the prison setting").

review of the actual records reveals quite a different account.[7] An incident report generated on December 12, 2011, and written by Senior Psychiatrist T.A. Balza, reveals the following:

> Inmate was referred [to psychiatry] for explosive behavior after he broke and threw away his TV set in his death row cell. He denied having any suicidal or homicidal ideas + he claims he has OCD + he needs anti-anxiety medication to help him calm down now. Inmate was sent back to his cell + Vistaril was prescribed until he is followed up again in MHC [Mental Health Clinic] in 7 days.

(2PCR 55). Another report from that date reveals that the "fit of rage" described by the panel was actually deemed by the Department of Corrections as a "mental health emergency" (2PCR 57) ("Inmate Gore began mental health treatment on 12/12/11 as the result of being referred to psychiatry as a mental health emergency").

Moreover, despite the panel report's statement that the Department of Corrections lowered Mr. Gore's psychiatric grade to an S-1 on April 11, 2013, to apparently support the conclusion that Mr. Gore "has no current mental illness" (2PCR 40), corrections records reveal that each month of 2013 Mr. Gore was classified as showing "signs of mild to moderate mental or emotional impairment

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[7]The "fit of rage over other inmates making noise" part of the report was how Mr. Gore himself characterized this event to the panel experts. This characterization of the event is not reflected in the corrections records. Apparently the panel believed Mr. Gore about the "fit of rage" but nothing else.

which can be managed on an outpatient basis" (2PCR 59-62).[8]

As the evidence presented at the evidentiary hearing establishes, Mr. Gore has long been plagued with mental illness, and his present fixed delusional system prevents him from having a rational understanding of the reason for his imminent execution. The Eighth Amendment cannot countenance the execution of Marshall Gore and this Court's intervention is needed at this time.

## PROCEDURAL HISTORY AND STATEMENT OF FACTS

### A. Procedural History.[9]

Mr. Gore was indicted on one count of first-degree murder and one count of armed robbery in a case arising out of Miami-Dade County, Florida. In 1995, Mr. Gore was tried and convicted on both counts of the indictment, and sentenced to death. On direct appeal, this Court reversed and remanded for a new trial based on improper questions and comments made by the prosecutor during the course of the

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[8]This is the same level of mental health grade assigned to Mr. Gore in 1997 when, by the Department of Corrections own acknowledgment, he was seen for 4 months for bizarre behavior and had received a diagnosis of Paranoid Personality Disorder (2PCR 64-65).

[9]The death warrant signed against Mr. Gore relates to his conviction and sentence of death arising out of a Miami-Dade County conviction. Thus, the procedural history set forth in this motion refers principally to the Miami-Dade County case. Mr. Gore does have another death sentence arising out of a conviction from Columbia County, Florida. *See Gore v. State*, 599 So. 2d 978 (Fla. 1992); *Gore v. State*, 846 So. 2d 461 (Fla. 2003).

trial. *Gore v. State*, 719 So. 2d 1197 (Fla. 1998).

Mr. Gore was retried in early 1999 and again convicted and sentenced to death after a unanimous jury recommendation in favor of the death penalty. On direct appeal, his convictions and sentences were affirmed, including his sentence of death. *See Gore v. State*, 784 So. 2d 419 (Fla. 2001). No petition for a writ of certiorari was filed in the United States Supreme Court.

On or about June 18, 2002, a motion for postconviction relief was filed pursuant to Fla. R. Crim. P. 3.851.[10] The motion was ultimately denied, and its denial was affirmed on appeal to this Court. *See Gore v. State*, 24 So.3d 1, 16 (Fla. 2009).

While his collateral attack was still pending in the Florida state courts, Mr. Gore filed a *pro se* petition for federal habeas corpus pursuant to 28 U.S.C. §2254 on or about November 8, 2006 (DE92 at 6, No. 06-22736-cv-DLG). After several motions by Mr. Gore seeking the appointment of counsel, and the state collateral

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[10]Mr. Gore had state-appointed counsel, Steven J. Hammer, Esq., to represent him in his collateral attack in the state courts. Attorney Melissa Minsk Donoho assisted Mr. Hammer as co-counsel. Mr. Hammer was appointed from the list of "registry" attorneys. In order to be appointed and compensated, Mr. Hammer signed a contract with the State of Florida and was obligated to conduct representation on Mr. Gore's behalf in accordance with the contract and the relevant statute that set out his responsibilities. The statute in question and the contract he ultimately signed required Mr. Hammer to represent Mr. Gore "throughout all postconviction capital collateral proceedings, including federal habeas corpus proceedings, in accordance with this section or until released by order of the trial court." §27.710 (2), Fla. Stat.

litigation having run its course when this Court affirmed the denial of Mr. Gore's postconviction motion, the district court appointed counsel (Melissa Minsk Donoho) to represent Mr. Gore in his federal habeas corpus case (DE53, No. 06-22736-cv-DLG).[11] The district court later allowed an amended habeas petition to be filed (DE63, No. 06-22736-cv-DLG), and Mr. Gore himself filed a *pro se* amended petition (DE65, No. 06-22736-cv-DLG). It is these pleadings that were addressed and ultimately denied by the district court without affording Mr. Gore a certificate of appealability DE92, 94, No. 06-22736-cv-DLG).[12]

[11]Notwithstanding his contractual and statutory obligation to handle Mr. Gore's federal habeas corpus litigation, Mr. Hammer did not seek the federal appointment.

[12]The litigation that culminated in the court ultimately addressing the merits of Mr. Gore's habeas corpus case does not admit of brief recitation. However, for the sake of completeness, counsel provides a short summary of what occurred. On February 4, 2011, the federal district court entered an order indicating that it had concluded that Mr. Gore's habeas petition was time-barred under the AEDPA's statute of limitations (DE79, Case No. 06-22736-cv-DLG). However, before dismissing the Mr. Gore's petition, the court afforded Mr. Gore the opportunity to submit supplemental briefing on whether he was entitled to any equitable tolling pursuant to the then-recent decision in *Holland v. Florida*, 130 S. Ct. 2549 (2010). However, prior habeas counsel Donoho, who had worked with state appointed counsel Hammer in Mr. Gore's Rule 3.851 case in state court, moved for a substitution of counsel to present the equitable tolling issues because she perceived a conflict of interest (DE80, No. 06-22736-cv-DLG). The federal court granted the motion and the undersigned counsel (Mr. Scher) was appointed (DE81, No. 06-22736-cv-DLG). The undersigned filed a brief in support of Mr. Gore's entitlement to both statutory and equitable tolling (DE85, No. 06-22736-cv-DLG), and a response and reply were filed thereafter (DE86, 90, No. 06-22736-cv-DLG). The federal district court, in March, 2012, ultimately denied relief,

After the district court denied a Certificate of Appealability, Mr. Gore sought one in the Eleventh Circuit Court of Appeals and a single judge and a panel declined to issue the certificate. A Petition for Writ of Certiorari was filed with the Supreme Court and, on April 22, 2013, the Supreme Court denied certiorari. *Gore v. Crews*, 2013 WL 655242 (U.S. April 22, 2013). A few weeks later, on May 13, 2013, Florida Governor Rick Scott signed a death warrant for Mr. Gore.

While Mr. Gore's case was pending in the Eleventh Circuit Court of Appeals on the request for a Certificate of Appealablity, Mr. Gore, acting *pro se*, filed a number of motions in the federal district court including several motions to have the district court substitute Mr. Scher for another attorney (DE95, 96, No. 06-22736-cv-DLG). Those motions were denied (DE99, No. 06-22736-cv-DLG). Mr. Gore's habeas case became final on April 22, 2013, when the Supreme Court denied certiorari, and within weeks the death warrant was signed.

Meanwhile, in state court, proceedings were commenced with the signing of the death warrant. As the federal district court summarized in an order addressing recent proceedings:

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concluding that while it was still of the belief that the petition was time-barred by the AEDPA statute of limitations, the merits of the petition were reached rather than resting a denial on statute of limitations grounds (DE92, Case No. 06-22736-cv-DLG).

On May 13, 2012, the Governor of the State of Florida signed Mr. Gore's death warrant and set his execution for June 24, 2013. At that time, the death warrant was served on Mr. Gore's counsel of record, Steven Hammer, Esq., and Melissa Minsk Donoho, Esq. Immediately following the signing of Mr. Gore's death warrant, the Florida Supreme Court issued a scheduling order and required that all proceedings at the trial court conclude on June 6, 2013 at noon, a notice of appeal must be filed by 4:00 p.m of the same day, and oral argument, if necessary, would be on June 19, 2013 at 9:00 a.m. The trial court also entered a scheduling order setting deadlines for public records requests, setting a *Huff* hearing[[13]], and, if necessary, an evidentiary hearing. However, these proceedings did not take place as scheduled because instead both state court counsel, Mr Hammer and Ms. Donoho moved to withdraw.[].

On May 14, 2013, the trial court denied Mr. Hammer's motion to withdraw[ [14] ] but granted Ms. Donoho's motion the following day. The court ordered Mr. Hammer to remain in the case and stated "[t]he court will not leave the Defendant without counsel with an active death warrant pending." (F90-11445, 11th Judicial Circuit). Thereafter, Mr. Hammer served public records requests on a variety of governmental agencies. The respective agencies filed their objections. While those objections were pending, Mr. Hammer filed a Notice of Conflict again asserting that "it is not certain that counsel cannot continue to represent Mr. Gore altogether. This is due to the fact that there is a potential ethical conflict, which counsel views as largely dependent on the issue of Mr. Gore's sanity, which must be resolved prior to counsel taking further action in Mr. Gore's interest and knowing whether counsel can rightfully proceed to represent Mr. Gore in this matter. Under counsel's interpretation of the Florida Rules of Professional Conduct, whether or

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[13]The *Huff* decision referenced by the district court is this Court's decision in *Huff v. State*, 622 So. 2d 982 (Fla. 1993), which mandates a hearing to allow counsel to argue a defendant's entitlement to an evidentiary hearing on a collateral postconviction motion.

[14]This motion was filed **before** the death warrant was signed (DE114-6, Case No. 06-22736-cv-DLG).

not Mr. Gore is insane is determinative of whether or not a conflict exists between counsel and Mr. Gore, and thus a precondition to counsel asserting claims on Mr. Gore's behalf." (F90-11445, 11th Judicial Circuit) (emphasis added). The following day, on two hours notice, the trial court held a status conference on Mr. Gore's public records requests. After Mr. Hammer did not appear telephonically, the public records requests were denied and the *Huff* hearing cancelled. Mr. Hammer's Notice of Conflict was treated like a Motion to Withdraw and was denied.

While Mr. Hammer failed to appear at the status hearing, he did, pursuant to Florida Statutes 3.811, notify the Governor that it was his belief that Mr. Gore was insane to be executed.[15] On May 22, 2013, Governor Scott granted a temporary stay of execution and appointed a three person Commission to evaluate Mr. Gore's mental condition. On May 29, 2013, the Commission reported its findings to the Governor. The Commission found that Mr. Gore "has no current mental illness and is feigning psychopathology to avoid the death penalty, has Antisocial Personality Disorder, and understands the nature and effect of the death penalty and why it was imposed on him." Thereafter, the stay of execution was lifted. Mr. Hammer again moved to withdraw and requested a stay of the proceedings. Mr. Hammer again cited Mr. Gore's mental health as one of the bases for his request. The motion was again denied. Mr. Hammer appealed the denial to the Florida Supreme Court but was ordered to remain as counsel of record. Mr. Hammer did not file another pleading or make any further appearances on behalf of Mr. Gore. Therefore, the Florida Supreme Court cancelled the oral argument tentatively scheduled. As of today, Mr. Hammer has not filed a single substantive pleading on behalf of Mr. Gore.

(DE16 at 3-5, No. 13-22230-cv-DLG) (footnotes omitted) (emphasis in original).

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[15]Mr. Hammer's letter to the Governor is found in the record at 2PCR 28. This letter, along with the Governor's Commission report, which is in the record at 2PCR 37-40, were the only reports submitted to the governor pursuant to the statutory procedure for executive determination of sanity to be executed. *See* Fla. R. Crim. P. 3.811(d)(3).

In the meantime, after the death warrant was signed, Mr. Gore, acting *pro se*, again moved the federal district court for the appointment of substitute counsel (DE104, 105, 107, No. 06-22736-cv-DLG). The State opposed Mr. Gore's *pro se* motions, noting its position that Mr. Scher was still Mr. Gore's federal counsel (DE109, No. 06-22736-cv-DLG). On May 30, 2013, the district court entered an order denying Mr. Gore's *pro se* request for new counsel, concluding that the undersigned was still Mr. Gore's counsel for federal purposes (DE112, No. 06-22736-cv-DLG). After the undersigned reviewed the district court's order, he filed, on May 31, 2013, a motion to withdraw asserting a number of grounds which counsel believed warranted the substitution of new counsel for Mr. Gore (DE113, No. 06-22736-cv-DLG). This motion, too, was opposed by the State (DE114, No. 06-22736-cv-DLG). On June 10, 2013, the federal district court entered an order denying the undersigned's motion to withdraw (DE119, No. 06-22736-cv-DLG).

In light of the federal district court's order on June 10, 2013, the undersigned attorney took action on Mr. Gore's behalf. He filed numerous motions for discovery, motions to compel disclosure of Mr. Gore's corrections and mental health records,[16]

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[16]After the death warrant was signed and his first motion to withdraw was denied, Mr. Hammer filed a number of public records requests pursuant to Fla. R. Crim. P. 3.852, including a request for Mr. Gore's records, including mental health records, from the Florida Department of Corrections. The requests were opposed by the State and the Department of Corrections, and the requested records were

a motion for Relief from Judgment Pursuant to Fed. R. Civ. P. 60(b), a motion to authorize funding for a mental health expert to assist in the review of the anticipated disclosure of Mr. Gore's medical records, and responded to the various opposition motions filed by the State of Florida (DE125, 126, 130, 131, 133, 134, 135, 136, 145, 149, Case No. 06-22736-cv-DLG). The federal court noted that once the issue of Mr. Gore's federal representation was settled on June 10, 2013, "Mr. Scher has been zealously advocating on Mr. Gore's behalf" (DE16, No. 13-22230-cv-DLG).

As noted, Mr. Scher was continuing to investigate Mr. Gore's case and, the day following the district court's order denying counsel's motion to withdraw, he filed several discovery motions to compel the State to disclose, *inter alia*, Mr. Gore's medical and corrections records in the possession of the Department of Corrections, and any notes, testing data, raw testing, etc., from the three experts appointed by Governor Scott to evaluate Mr. Gore (DE125, 126, No. 06-22736-cv-DLG). The following day, June 13, 2013, the State filed written oppositions to both of these requests (DE127, 128, No. 06-22736-cv-DLG), and Mr. Gore's counsel replied that same day (DE130, 131, No. 06-22736-cv-DLG). On June 18, 2013, the district court granted Mr. Gore's discovery request in large part, ordering that the State provide Mr.

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never produced during the state court proceedings. The denial of the production of these records was appealed by Mr. Hammer to this Court, but the Court rejected the appeal by Order dated June 6, 2013 (*Gore v. State*, No. 13-947).

Gore's counsel with numerous corrections records, notes and raw data from the Governor's experts,[17] and the materials provided to the experts by the State and the Governor, by 5:00 PM on June 19, 2013 (DE143, No. 06-22736-cv-DLG). By 5:00 PM on June 19, 2013, Mr. Gore's counsel had received the discovery amounting to thousands of pages of records (DE148, No. 06-22736-cv-DLG; DE1, No. 13-22230-cv-DLG). And he provided the discovery materials to the mental health expert authorized by the district court to assist him in this endeavor.

On June 21, 2013, Mr. Gore filed a Petition for a Writ of Habeas Corpus in the United States District Court for the Southern District of Florida alleging he was not sane to be executed under the Eighth Amendment (DE1, No. 13-22230-cv-DLG).[18] Mr. Gore also requested a stay of execution. The habeas petition made extensive allegations concerning Mr. Gore's insanity under the Eighth Amendment, including a report from a mental health expert who had, under extraordinary time pressure,

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[17]Apparently, Dr. Myers, one of the State's experts who testified at the evidentiary hearing, viewed a federal discovery order as a trivial matter. It was established at the hearing below that Dr. Myers violated the federal discovery order not once but twice (2PCR 201, 210).

[18]*See Ford v. Wainwright*, 477 U.S. 399 (1986); *Panetti v. Quarterman*, 551 U.S. 930 (2007). This was a non-successive first habeas petition. *See Stewart v. Martinez-Villareal*, 523 U.S. 637 (1998). When Mr. Gore had raised a *Ford* issue in his prior habeas petition, the district court had dismissed the claim as premature under *Martinez-Villareal* (DE92, No. 06-22736-cv-DLG).

reviewed Mr. Gore's mental health records and other materials that had just been provided to habeas counsel by the district court.[19] Further, the petition requested a stay of execution, leave to amend "with additional information following a more thorough review of the records," a reasonable time for further briefing and discovery, and authorization for funding for additional mental health experts to not only review the extensive records in the case but also to conduct a "thorough and proper evaluation of Petitioner" (DE1 at 22 & n.19, No. 13-22230-cv-DLG).

On June 22, 2013, the State filed a Response opposing the requested relief and raising numerous procedural defenses, including lack of exhaustion (DE6, No. 13-22230-cv-DLG). The State also claimed that the petition was meritless. *Id.* Later that same day, Mr. Gore filed a Reply addressing the State's procedural defenses and its opposition on the merits (DE14, No. 13-22230-cv-DLG).

On June 24, 2013, the district court entered an order dismissing the federal habeas corpus petition because it had not been exhausted by Mr. Gore's state-appointed counsel, Steven Hammer. In its order, the court noted that this case "presents a unique and highly unusual set of circumstances" (DE16 at 2, No. 13-22230-cv-DLG). The court further noted that Mr. Gore's *Ford* claim "is being

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[19]That report, written by Dr. Michele Quiroga, is in the record at 2PCR 66-67.

brought for the first time in federal court without having ever been considered by the state courts" because "Mr. Gore's state court counsel did not assert a *Ford* (or any other) claim in state court after Mr. Gore's death warrant was signed" (*Id.* at 7).[20] According to the district court, "[t]he simple and plain fact is that this Court is unable to hear Mr. Gore's *Ford* claim because his state court counsel did not raise it" (*Id.* at 13). However, the district court granted a certificate of appealability (COA) because it found that "Mr. Gore has demonstrated a `substantial showing of the denial of a constitutional right.'" (*Id.* at 15) (quoting 28 U.S.C. §2253 ( c) (2). The COA certified the following issue:

> "Whether *Martinez v. Ryan* created an exemption to the exhaustion requirement of 28 U.S.C. §2254(b) when counsel is ineffective for failing to assert a Ford claim in state court."

(DE16 at 15-16, No. 13-22230-cv-DLG).

A timely notice of appeal was filed to the Eleventh Circuit Court of Appeals (DE17, No. 13-22230-cv-DLG). The Eleventh Circuit Court of Appeals granted a temporary stay of execution on June 24, 2013, and ordered briefing and expedited oral argument. Oral argument took place three days later on Thursday, June 27, 2013, and that evening the Eleventh Circuit affirmed the federal court's dismissal without

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[20]The court also observed that Mr. Hammer "had allowed the statute of limitations to run" as to Mr. Gore's first-in-time habeas petition (DE16 at 3 n.1, No. 13-22230-cv-DLG).

prejudice. *Gore v. Crews*, 2013 WL 3233303 (11th Cir. June 27, 2013).

Because Mr. Gore's *Ford* claim had not been exhausted in state court by Mr. Gore's state-appointed counsel, Steven Hammer, the Eleventh Circuit affirmed the dismissal and lifted the temporary stay of execution it had previously put in place. The Eleventh Circuit observed that Mr. Gore's federal habeas counsel never attempted to seek authorization from the federal district court to expand his appointment to include returning to the Florida state courts to exhaust Mr. Gore's *Ford* claim. *Gore v. Crews*, 2013 WL 3233303 at n.1. According to the Eleventh Circuit, because Mr. Gore was contending that state-appointed counsel Hammer had not filed a Rule 3.811 motion, Mr. Gore's federal habeas counsel "could have" sought to invoke the federal court's discretionary ability to authorize counsel's expansion of his duties in order to return to the state court and exhaust the *Ford* claim.[21] *Gore v.*

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[21]Mr. Gore's federal habeas counsel made no such request of the federal district court because of the explicit language from the Supreme Court in *Harbison v. Bell*, 556 U.S. 180 (2009), and the explicit language of 18 U.S.C. §3599 (e). Certainly the State never agreed or remotely suggested that Mr. Hammer was providing inadequate representation to Mr. Gore, nor had it agreed that Florida has not provided any representation to Mr. Gore. The adequacy, or lack thereof, of the state court representation is a precondition to a federal court permitting the expansion of federal habeas counsel's duties. *See* §3599(a)(2). Having determined to foist Mr. Hammer onto Mr. Gore, the State took the opposite position by repeatedly insisting that Mr. Hammer be denied the opportunity to withdraw despite his repeated assertions of a conflict of interest. This is hardly the situation presented in *Howell v. State*, 109 So. 3d 763 (Fla. 2013), referred to by the Eleventh Circuit. *Gore v. Crews* at n.1. In *Howell*, when

*Crews* at n.1 (citing *Gary v. Warden*, 686 F. 3d 1261, 1277 (11th Cir. 2012)).

In light of the Eleventh Circuit Court of Appeals' opinion, Mr. Gore's federal counsel, on June 28, 2013, re-filed a federal habeas corpus petition pursuant to 28 U.S.C. §2254, a motion for appointment of counsel, a motion for a stay of execution, and a motion to expand his appointment to authorize habeas counsel to exhaust the *Ford* claim in state court (DE1, No. 13-22294-cv-DLG). Later in the afternoon of June 28, 2013, the parties were informed by the Governor's Office that Mr. Gore's execution had been reset for July 10, 2013, at 6:00 PM.

On July 1, 2013, the federal court issued an order which provided, in relevant part:

> The Court views this issue as one which can and should easily be resolved. Mr. Hammer has made it clear that he does not want to or, otherwise, cannot represent Mr. Gore in the state courts. Mr. Scher, by his own motion here, has agreed to represent Mr. Gore in the state courts. Therefore, the best course would be for Mr. Scher to ask Mr. Hammer to be substituted in as counsel of record in Mr. Gore's state case.[] One or both of these attorneys should file a motion to substitute counsel with the state court. If the state court denies the motion, then the Court will reconsider whether or not Mr. Gore is "unable to obtain adequate representation" such that the Court should "determine, in its

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state registry counsel indicated a conflict of interest, another registry lawyer was appointed "at the State's suggestion." *Howell,* 109 So. 3d at 772. The State in Mr. Gore's case did no such thing; rather, it did the opposite and insisted that Mr. Hammer remain on the case. Moreover, the other "counsel who was not the state registry counsel" in Mr. Howell's case, referred to by the Eleventh Circuit, had been *privately retained* by Mr. Howell to represent him. *Id.*

> discretion, that it is necessary for court-appointed counsel to exhaust a claim in state court in the course of [his] federal habeas representation, so that counsel can go forward with [his] prosecution of the prisoner's federal habeas petition." *See Gore v. Crews*, 2013 WL 3233303, n.1 (11th Cir. 2013) (citation omitted).

DE13, No. 13-22294-DLG.

Following receipt of the federal court order and pursuant to the federal court's instructions, Mr. Gore's habeas counsel filed a motion in the Circuit Court for the Eleventh Judicial Circuit, in and for Miami-Dade County, Florida, requesting that he be allowed to take over Mr. Gore's case from prior registry counsel Hammer. Later that same day, July 2, 2013, the circuit court granted the motion. Counsel then filed a motion with regard to issues relating to the new system for registry appointments with the Justice Administration Commission, and in the afternoon of July 3, 2013, a hearing was held before The Hon. David Miller, Circuit Court Judge for the Eleventh Judicial Circuit in Miami-Dade County, Florida.

On July 9, 2013, Mr. Gore, through counsel, filed a motion for stay of execution and for a hearing pursuant to Fla. R. Crim. P. 3.811 & 3.812 in the Eighth Judicial Circuit in and for Bradford County, Florida (2PCR 1-79). The Chief Judge of the Eighth Judicial Circuit entered an order appointing Circuit Court Judge Ysleta McDonald to hear the matter (2PCR 80). The State served a response to Mr. Gore's motion (2PCR82-425). In the afternoon of July 9, 2013, the Circuit Court entered an

order staying Mr. Gore's execution and ordering a hearing to commence on July 15, 2013 (2PCR 426-27).

The evidentiary hearing commenced in Bradford County on July 15, 2013. On Mr. Gore's behalf, the testimony of Dr. Jethro Toomer was presented (2PCR 587-687, along with a number of documents introduced into evidence (2PCR 449-571). The State presented two of the three experts appointed by Governor Scott – Dr. Wade Meyers (2PCR 748-827), and Dr. Tonia Werner (2PCR 881-951). The State also presented several correctional officers from Florida State Prison: Dennis Cauwemberghs (2PCR 699-746); Paul Kraszewski (2PCR 833-843); Jamie Williams (2PCR 844-862); and Lance Willis (2PCR 862-880). Finally, the State introduced into evidence numerous documents, including Mr. Gore's corrections and medical records (2PCR 698).[22]

Following the hearing and the submission of post-hearing proposed orders, the lower court entered an order finding Mr. Gore sane to be executed and lifting the previously-entered stay of execution (2PCR 428-442). The order identified the legal

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[22]Despite the fact that the records were admitted into evidence, they were not made part of the Record on Appeal. By separate motion on this date, Mr. Gore is moving the Court to supplement the record and to direct the Clerk of the lower court to reproduce the documents admitted into evidence and include such in the Record on Appeal. Otherwise, this Court will not have a complete record when reviewing Mr. Gore's case.

standard it employed in reviewing Mr. Gore's claim (2PCR at 431),[23] and after setting forth a factual recitation of the testimony presented, reached the following conclusions:

> 42. This Court, after hearing and evaluating the witness' testimony, as well as evaluating the evidence introduced at the hearing, finds that Gore has not met his burden of proving by clear and convincing evidence that he is presently insane or incompetent to be executed.
>
> 43. The only testimony that Gore presented to meet his burden was that of Dr. Toomer. However, this Court finds Dr. Toomer's testimony to be unconvincing. He acknowledged that a complete evaluation involves interviewing a defendant, testing the defendant, and corroborating the information through reviewing records and interviewing individuals familiar with the defendant's functioning. However, he admitted that he did not test Gore at all even though he had the time to do so. Furthermore, he did not review Gore's prison records. While he indicated that he had prior evaluations of Gore and relied on them, he acknowledged that most of these evaluations contained information inconsistent with his conclusions.
>
> 44. Moreover, because Dr. Toomer did not review Gore's medical records or interview any guards, he reached conclusions that are inconsistent with the other evidence in this case. Dr. Toomer relied on heavily on Gore's self reporting of his purported history of mental illness. In fact, Gore's medical records show that he has not been consistently diagnosed with a major mental illness. Furthermore, Dr. Toomer indicated that Gore has problems with sleep and appetite. However, the guards testified that no such problems existed.

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[23]The lower court referred to this Court's decisions in *Provenzano v. State*, 760 So. 2d 137 (Fla. 2000), and *Ferguson v. State*, 112 So. 3d 1154 (Fla. 2012), as well as the Eleventh Circuit Court of Appeals' opinion in *Ferguson v. Sec'y Fla. Dep't. of Corrections*, 716 F. 3d 1315 (11th Cir. 2013).

45. Since this Court finds the evidence which Gore relies on to be unconvincing, he does not carry his burden of proof to show clear and convincing evidence of insanity. Even Dr. Toomer acknowledges that Gore knows that he was going to be executed because for murder. While Dr. Toomer testified that Gore has delusions, having delusions does not prevent a person from being competent to be executed.

46. This Court finds the testimony of Dr. Werner and Dr. Myers to be compelling and supported by the other evidence presented to the court in this case. For example, the testimony of the prison personnel reflects that Gore behaves differently in front of different people and exaggerates his problems to get his way. He throws tantrums when unable to do so and is a manipulator. They reviewed the relevant records, interviewed collateral witnesses, and tested Gore for malingering. They found that Gore was not mentally ill and was, based on their testing, malingering. Based on their findings, they determined that Gore rationally understands that the reason for his pending execution is his conviction and sentence for murdering Ms. Novick.

47. This Court find[s] that Gore is not mentally ill, that he has a rational understanding that he is being executed because he murdered Ms. Novick and will die as a result of that execution. There is not credible evidence that Gore's mental state is such that he believes he is being executed for any reason other than the murder of Ms. Novick.

(2PCR 440-42).

A timely notice of appeal was filed (2PCR 443), and this Initial Brief follows.

**B. Evidence Adduced at Evidentiary Hearing.**

**1. The Defense Case.**

The most recent mental health evaluation was done by defense expert, Dr. Jethro Toomer, an expert in clinical and forensic psychology and retired tenured

professor and director of the graduate training program at Florida International University in Miami (2PCR. 588).[24] Dr. Toomer evaluated Mr. Gore on July 8, 2013 at Florida State Prison (2PCR. 589-90).

Dr. Toomer found that Mr. Gore is presently incompetent to be executed (2PCR. 594). Though he knew that he was going to be put to death, Mr. Gore did not have a rational understanding of the reason for that execution (2PCR. 594-95). "He understands that we're talking about execution. The reason for it is distorted by the underlying psychopathology. The linkage between those two factors I found to be wanting, lacking." (2PCR. 595). It is Mr. Gore's failure to rationally understand the reason for his execution that renders him incompetent. *Id.*

Dr. Toomer relied on a lengthy clinical interview with Mr. Gore and background materials provided by defense counsel. Those materials included Mr. Gore's federal habeas petition, Dr. Michele Quiroga's report, Department of Corrections medical records, inmate grievances, the Governor's experts' report, notes from Dr. Werner regarding prison guard interviews, informed consent forms for psychotropic medication, and prior reports from past competency evaluations (2PCR. 669-81).

Dr. Toomer relied on Department of Corrections (DOC) records from

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[24]Dr. Toomer's CV can be found in the Record on Appeal at 2PCR 76-79.

September 11, 1994, in which Mr. Gore complained of a conspiracy to drive him insane, and that the conspiracy had been in place for quite some time. (2PCR. 670; Def. Ex. A at 2PCR 467). The DOC document shows that Mr. Gore was requesting to see the "psych doctor." *Id.*

An informal grievance dated June 22, 1994, showed that Mr. Gore believed he had been injected with tuberculosis and Mr. Gore requested an HIV test (2PCR. 670-71; Def. Ex. A at 2PCR 469).

Dr. Toomer relied on a September 18, 1997, complaint that Mr. Gore was hearing voices and thought he was a threat to himself because the voices kept asking him to hang himself (2PCR. 671; Def. Ex. A at 2PCR 471). He also relied on a DOC record discussing that between May 15 and September 29, 1997, Mr. Gore was in mental health treatment and had been diagnosed with anxiety and obsessive compulsive disorder or "OCD" (2PCR. 672; Def. Ex. A at 2PCR 473).

Dr. Toomer further identified DOC documents that showed on December 12, 2011, Mr. Gore was prescribed medication for anxiety and OCD. The documents showed a medication history of Sinequan in 1991; and that Mr. Gore had been provisionally diagnosed with paranoid personality disorder (2PCR. 672; Def. Ex. A at 2PCR 477-78).

Dr. Toomer reviewed Dr. Werner's notes regarding her interviews with Sgt.

Kraszewski and Officer Cooper, two prison guards (2PCR. 673; Def. Ex. A at 2PCR 477-78).

Dr. Toomer identified DOC documents that showed delusional orientation on Mr. Gore's part and a history of treatment on March 1, 2012 (2PCR. 676-77; Def. Ex. B). He relied on documents from 1994 showing that Mr. Gore had been prescribed Haldol, a very powerful antipsychotic drug (2PCR. 519; 677). Records from April 3, 1990, showed Dr. Mhatre prescribed Mr. Gore with Sinequan (2PCR 520, 523). DOC records also showed prescriptions for Elavil and Vistaril (2PCR. 523, 527, 677-78).

Between December, 2011, and 2013, DOC medical staff listed Mr. Gore as having mild to moderate mental or emotional impairments (2PCR. 675-78; Def. Ex. A at 2PCR 484-87). He regularly refused medical call-outs though he showed signs of mild to moderate mental impairment (2PCR. 679). Dr. Toomer believed that most people who malinger "will get the message out that they are ill" to show symptoms. Mr. Gore, on the other hand, refused call-outs and did not consistently take medication (2PCR. 679).

On December 19, 2011, Mr. Gore was again diagnosed by DOC doctors as having OCD with a psychiatric grade of 3 (showing the need for medication) and given Vistaril (2PCR. 680).

Dr. Toomer relied on reports of other experts, such as Dr. Leland, who had previously performed a competency evaluation of Mr. Gore in which he diagnosed him with delusional disorder persecutory type and indicated that his conspiracy beliefs did not appear to be malingering (2PCR. 680-87).[25] Dr. Toomer said that even though a court may not have found Mr. Gore to be incompetent did not mean the experts' diagnoses went away or were invalid (2PCR. 687).

Dr. Toomer reviewed attachments to Mr. Gore's federal habeas petition that included *pro se* pleadings by Mr. Gore. In those pleadings, some of which were written before any death warrants had been signed, Mr. Gore referred to organ harvesting and Satanic worship. (2PCR. 683).[26]

Based on these materials and his clinical interview, Dr. Toomer found Mr. Gore to be paranoid and distrustful (2PCR. 593). Before Mr. Gore would speak with Dr. Toomer he had to be provided with a letter of introduction written by counsel, thus proving that he was an acceptable defense expert (2PCR. 592-93). Mr. Gore licked his finger and rubbed it across the signature to make sure the ink was original before he would believe that the letter was real *Id.* After this verification process, Mr.

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[25]Dr. Leland's report is in the Record on Appeal at 2PCR 565-66.

[26]These pleadings are referred to by United States District Judge Graham and referred to extensively in Mr. Gore's Rule 3.811 motion (2PCR 15-17).

Gore spoke with Dr. Toomer. At the end of his interview, Dr. Toomer believed he had sufficient time to reach a conclusion within a reasonable degree of psychological certainty (2PCR. 594).

Dr. Toomer found a parallel between how Mr. Gore presented himself and his past functioning and paranoid behavior (2PCR. 595). Mr. Gore understands that he has been tried, convicted and sentenced, but he believes that the execution is not "in any way linked to the crime, but linked to the fact that he is going to expose information regarding organ harvesting and other aspects of behavior that have not been exposed...that his execution will allow for that...suppression of that information to continue" (2PCR. 595-96). Mr. Gore described a number of organizations that contacted him regarding Satan worship and that his execution had been predicted 10 or 15 years ago by various groups that had written to him. One group was the Illuminati in Tampa and Jacksonville (2PCR. 596). He believes that somehow these individuals are controlling what is going on that nobody else knows about. *Id.*

Mr. Gore believes that the original date set for his execution (06-24-13) adds up to 666, the sign of Satan (2PCR. 596). Mr. Gore connects all of these events as phenomena of Satan.

Dr. Toomer opined that Mr. Gore had a fixed delusional belief system that was firmly entrenched and not a recent development (2PCR. 597). His beliefs are

detailed, persistent, and immoveable (2PCR. 598). His world view is through a persecutory delusional belief system and it is that filter that creates a distortion (2PCR. 598). This is shown consistently through his refusal of medical or mental health treatment. *Id.*

Dr. Toomer believed that Mr. Gore was of average to slightly above average intelligence and had written a number of his own pleadings and filed them in court (2PCR 599). He found that Mr. Gore could manifest mental deficits and still have the intellect to write and file his own pleadings (2PCR. 599-600). "The fact that the person has a delusional system doesn't adversely impact on his ability to engage in every single activity across the board. The misnomer is that every single iota of the person's behavior to the point that if the person even walks a straight line, people say oh he walked a straight line, so therefore nothing's wrong with him and nothing could be further from the truth." (2PCR. 600). The idea that someone has the intellect to write pleadings "in no way neutralizes...the fact that their understanding can be irrational and delusional" (2PCR. 600).

Dr. Toomer found that Mr. Gore had been prescribed antipsychotic medication in the past, such as Sinequan, Haldol, Vistaril and Elavil (2PCR. 600). Mr. Gore did not consistently take his medication. It is not uncommon for a person with a mental illness to be sporadic or erratic in complying with medication (2PCR. 601).

Dr. Toomer relied on DOC records for his information and, in his experience, found them to be true and correct observations of a prisoner's behavior (2PCR. 601). Dr. Toomer believed that DOC records were generally accurate, but their interpretation may be different from his. Prison personnel are "pretty good" at writing down lots of data. (2PCR. 602).

Mr. Gore discussed his delusional belief that the Governor's organ harvesting conspiracy extended to his current and past attorneys and everyone involved in his case, including Dr. Toomer (2PCR. 602). Dr. Toomer is not aware of any organ harvesting program going on in the DOC. (2PCR. 603). Nor had Dr. Toomer heard of such information on television or in the news.

Dr. Toomer identified the most recent DOC disciplinary reports (DR) given to Mr. Gore on July 16 and 17, 2013, in which he was "written up" for referring to officers as demons and warning them not to approach him. It was his language and demeanor that got him the DR (2PCR. 605; Def. Ex. 3 at 2PCR 510-12). In the DR from July 17, 2013, Mr. Gore had threatened that if anyone was coming to check his blood vessels he had something in store for them. (2PCR. 510-12). Mr. Gore referred to devil worshipers and demons in both the July 16, 2013 and July 17, 2013 incidents (2PCR. 510-12). This was the type of delusional behavior and thought process Mr. Gore was exhibiting during Dr. Toomer's evaluation. (2PCR. 606). Guards believed

Mr. Gore was feigning symptoms by rocking back and forth when Dr. Toomer came to the prison for his evaluation. However, Dr. Toomer did not see any "bobbing back and forth" from Mr. Gore during his examination (2PCR. 652). He only saw a mild tremor in Mr. Gore's hand. *Id.*

Dr. Toomer reviewed the Governor's Commission report by Drs. Myers, Werner and Waldman and raw data of two tests (The Mini Mental Status Exam (MMSE-II) and the Miller Forensic Assessment of Symptoms Test (MFAST)) that they conducted. They found Mr. Gore was malingering or faking his symptoms (2PCR. 606; 609-10).

Contrary to the State's doctor's opinions, Dr. Toomer did not believe Mr. Gore was malingering when he evaluated him (2PCR. 609).[27] Though Dr. Toomer reviewed Dr. Myers' MFAST test data he did not agree with his interpretation that a score of six was a positive indication that Mr. Gore was malingering (2PCR. 609).

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[27] Drs. Waldman, Myers and Werner evaluated and tested Mr. Gore on May 28, 2013. The day after the Governor's evaluation of Mr. Gore, Elmer Carroll, who was housed two cells down from Mr. Gore, was executed. On June 12, 2013, Mr. Van Poyck , Mr. Gore's next door neighbor, was executed. *See* www.dc.state.fl.us/oth/deathrow/execlist. Mr. Gore himself survived his first warrant by a half hour before he was to be executed on June 24, 2013. Dr. Toomer evaluated Mr. Gore on July 8, 2013, two days before the second attempt to execute Mr. Gore on July 10, 2013. Dr. Toomer testified that mental health is not static and that Mr. Gore's delusions could change over time and be triggered by "the environment exacerbating the existence of underlying symptomology." (2PCR. 686 ).

He said there is "no test that definitively with a hundred percent accuracy that can indicate whether or not an individual is malingering..." (2PCR. 609). The MFAST manual specifically points out that it is a "screening instrument" to assist in the determination of malingering and that it should always be used in the context of a full psychological evaluation involving the MMPI (Minnesota Multiphasic Personality Inventory) which is a standard assessment of personality and psychological functioning (2PCR. 610). Dr. Myers did not give Mr. Gore the MMPI test. Dr. Toomer opined that the MFAST is only "one piece of the puzzle," not a "definitive piece" that can be used alone to determine whether a person is malingering. The cutoff score is six because it is highly unlikely that someone who is not malingering would get a score above a six. (2PCR. 610).[28]

The other test given by Dr. Myers, MMSE-II, is not a malingering test, but a cognitive functioning test to see whether there are neurological impairments in functioning (2PCR. 611). Dr. Toomer had never used that test to detect malingering (2PCR. 611).

Dr. Toomer saw Mr Gore on July 8, 2013, and Mr. Gore was scheduled to be executed two days later on July 10, 2013 (2PCR. 612-13; 615). In Dr. Toomer's

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[28]Dr. Myers, the State's expert, agreed that a score of 6 was the cut-off score on the MFAST test for malingering (2PCR 806-07).

opinion, Mr. Gore lacks a rational understanding of the reason for his execution (2PCR. 612). He asked Mr. Gore if he knew what was about to happen. Mr. Gore said he knew there was going to be a hearing and "depending upon what happens, there will be organ harvesting" (2PCR. 612-13). He believed the conspiracy was all connected to the U.S. debt to China, that it is the Governor's connections with China from his past hospital affiliation and making money which allowed him to buy the governorship (2PCR. 612-13).

Mr. Gore said if he were executed, he would not really be dead. He had talked to someone about having a GPS planted under his skin so that his body could be followed after he was executed and to see what would be done with his organs. *Id.* Dr. Toomer specifically asked why this was occurring and Mr. Gore said he was being executed to stop the exposure of the organ-harvesting conspiracy. *Id.* As the execution date was set, the delusional phenomena began to manifest itself as it related to how Mr. Gore viewed the situation (2PCR. 613). It is delusional disorder, the impaired psychological functioning, that eradicates the link between understanding the "why" of his execution. (2PCR. 613). Dr. Toomer opined that Mr. Gore's delusion of organ harvesting fits together with the 666 date, the Iluminati groups who are aware of the conspiracy, and have been in contact with him (2PCR. 613-14). Mr. Gore said he knew about his execution date years ago as it is a vast conspiracy and

Satan is a part of it. *Id.* The specificity of the delusions is significant in that it is woven into every aspect of his functioning and is entrenched and pervasive (2PCR. 614).

Dr. Toomer did not believe Mr. Gore's obsessive compulsive disorder was critical to his present competency to be executed (2PCR. 639-40). He noted that Mr. Gore had been diagnosed with that disorder in the past. *Id.* If Mr. Gore does not have OCD, then his self report should be inconsistent over all aspects of the data. It was not (2PCR. 640).

Dr. Toomer based his opinion on the "totality of the data." (2PCR. 640). But this evaluation was to answer one specific forensic issue–present sanity to be executed–and it was not intended to be a full psychological evaluation (2PCR. 646). Dr. Toomer did not ask about Mr. Gore's familial history because it was not important to determining his current overall functioning for the limited question before the court (2PCR. 647).

Mr. Gore mentioned the crimes he had been charged with and told Dr. Toomer he was innocent (2PCR. 648). He said he had 30 lawyers and who were all part of the "process of the organ harvesting." Id. Mr. Gore said there was an address book that had witnesses' names, that was in the State's possession, but none of his lawyers had been able to retrieve it to prove his innocence. (2PCR. 648).

Dr. Toomer said that the fact that Mr. Gore's delusions were fixed and entrenched did not mean that the details of the delusion could not change over time (2PCR. 649). A delusion may manifest itself more at one point as opposed to another (2PCR. 650-51)

Dr. Toomer also noted that poor hygiene or dirty cell conditions is usually associated with deterioration of the mental status (2PCR. 685). He did not speak with Mr. Gore about his family history and neither did the Governor's experts (2PCR. 685).

Dr. Toomer saw in the DOC documents that Mr. Gore had a history of hearing loss and was wearing a hearing aid to help him hear the courtroom proceedings (2PCR. 685-86).

Dr. Toomer opined that certain people, such as attorneys or certain guards, could trigger Mr. Gore's expression of delusions as stressors within the environment (2PCR. 686-87). Mr. Gore saw some guards as being devil or Satan worshipers. *Id.*

Dr. Toomer reiterated his opinion that Mr. Gore does not currently have a rational understanding of why he is being executed (2PCR. 687).

**2. The State's Case.**

**a. Mental Health Experts.**

Dr. Wade Cooper Myers is a psychiatrist and professor at Brown University for

the last four years (2PCR. 748). He was part of a three-person panel of psychiatrists appointed by Governor Scott on May 22, 2013, to evaluate Mr. Gore (2PCR. 756;782). Dr. Myers has been involved in 10 competency-to-be-executed commission panels (2PCR. 780), and has never found any inmate incompetent to be executed. *Id.*

Dr. Myers evaluated Mr. Gore on May 28, 2013, along with Drs. Tonia Werner and Alan Waldman (2PCR. 756). He reviewed "voluminous records" in the 24 hours before interviewing Mr. Gore (2PCR. 782). These included 'thousands and thousands of pages" including transcripts of competency hearings, post-conviction hearings, two Dade County trials, and one Columbia County trial (2PCR. 783). There were post-conviction hearings in both Dade and Columbia Counties (2PCR. 783-84).

Dr. Myers testified that he read "every single one of those pieces of paper between May 22 and May 28" that were provided by the State from 1990 to the present (2PCR. 784-86). Dr. Myers reviewed more records when he arrived at the prison at 9:00 a.m. on May 23, 2013 when he went to evaluate Mr. Gore (2PCR. 787;789).

Dr. Myers also interviewed two prison guards, who had a "fair amount of experience" with Mr. Gore on a day-to-day basis (2PCR. 790). All three doctors reviewed the records, interviewed the guards and Mr. Gore together. *Id.* The doctors

spoke with Mr. Gore for three hours, including the time tests were administered (2PCR. 801). The doctors concluded that Mr. Gore was malingering, with no significant mental illness, but suffered from an antisocial personality disorder. Dr. Myers found Mr. Gore competent to be executed. The three doctors completed their report at the prison within two hours of evaluating him. *Id.*

The panel interviewed two prison guards. One guard said Mr. Gore's cell was dirty with ants underneath his locker. Dr. Myers said this information was not significant and was not included in the commission report (2PCR. 791-92; 793). One prison guard characterized Mr. Gore as paranoid, but Dr. Myers did not consider his opinion significant and that condition was not recorded in the commission's report. (2PCR. 792). The prison guard told Dr. Myers that Mr. Gore seemed paranoid and was wary of others because he had wronged some other inmates who were mad at him. He would not go out to yard and refused to shower (2PCR. 792-93). Dr. Myers did not find this information significant. Though a prison guard told Dr. Werner that Mr. Gore had a "fear of life," there was nothing in the report that Mr. Gore was fearful (2PCR. 793-94).

During the evaluation, Mr. Gore asked why he was being forced to talk to the doctors. He complained that the Governor might put him in the "nut house" if he talked to them (2PCR. 796-97). Dr. Myers knew that Mr. Gore had refused mental

health evaluations in the past (2PCR. 797-98). Though Dr. Myers had reviewed "thousands" of documents, he did not review any documents regarding Mr. Gore's interactions with his attorneys, specifically Mr. Hammer (2PCR. 798). He did not mention in his report that Mr. Gore was on Sinequan. Despite his "thorough" review of thousands of documents, Dr. Myers did not see that Mr. Gore had been prescribed Haldol, an antipsychotic medication (2PCR. 799).[29]

Dr. Myers tested Mr. Gore for malingering, even though he had previously testified that it was not necessary to document malingering with formal testing when he evaluated death row inmate John Ferguson a few months earlier (2PCR. 802-04). When given the MFAST test for malingering, Mr. Gore scored a six which was a cut-off score (2PCR. 806-07). Dr. Myers said "five would still be suggestive of malingering, but the six is where the author set the cut off." (2PCR. 807). The maximum score is 25. *Id.*

Dr. Myers admitted that other doctors who had evaluated Mr. Gore, such as Dr. Leland, had disagreed with his opinion (2PCR. 808-09), and diagnosed Mr. Gore with delusional disorder, persecutory type, and a personality disorder not otherwise specified with paranoid and antisocial features. *Id.* He did not find Dr. Leland's

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[29]*But see* 2PCR 519 (referring to Mr. Gore being prescribed Haldol in the past).

report significant.

Dr. Myers said there were "a few" DOC mental health reports referring to delusional or paranoid behavior from Mr. Gore (2PCR. 808-09). But he did not know how many years Mr. Gore spent outside DOC custody in county jails while awaiting trial or circuit court proceedings for which there are no records (2PCR. 809).

Dr. Myers acknowledged that the doctors typed their report on the DOC computers and used John Ferguson's competency report as a template (2PCR. 810-11). There was a computer glitch, but all three doctors reviewed the report. Dr. Myers denied that the two reports were similar. *Id.* He agreed that these reports were "significant" documents. All three doctors missed that John Ferguson's name appears on one page of Mr. Gore's report. *Id.*

Dr. Myers acknowledged that a December, 2011, incident where Mr. Gore threw his television was described as a mental health emergency in DOC records and that Vistaril was prescribed (2PCR. 811-12). However, contrary to how the DOC personnel who actually witnessed the event classified it, the commission report did not characterize the incident as anything other than a "fit of rage" (2PCR. 812). Dr. Myers knows Mr. Gore gets frustrated and throws things in a temper tantrum. *Id.* He did not consider this a significant mental health event (2PCR. 813).

Dr. Myers and the other doctors believed Mr. Gore had "no significant

impairment" and had used the psychological staff at the prison in order to get what he wanted (2PCR. 824).

Dr. Tonia Werner is a psychiatrist and an associate professor at the University of Florida (2PCR. 881). She served on the Governor's commission with Dr. Myers and Dr. Waldman and had done so on four or five previous occasions (2PCR. 887). She reviewed two CDs of records from the Attorney General's Office and reviewed the same documents at the prison as Dr. Myers did for 1.5 hours before interviewing Mr. Gore (2PCR. 894; 934). The doctors interviewed two prison guards, Officers Cooper and Kraszewski, before seeing Mr. Gore (2PCR. 895;899). She and the other doctors spoke to Mr. Gore for 3 hours and of that 20 minutes was consumed by testing (2PCR. 935).

Dr. Werner questioned Officer Cooper on the symptoms of obsessive compulsive disorder that were reported by Mr. Gore to physicians but Cooper did not see them (2PCR. 897).[30] She believed Mr. Gore's cell while "neat and orderly" was not clean. There were "dust bunnies under the bed" and "ants under his foot locker" (2PCR. 897). This is not what she would have expected from someone if they "really had OCD" (2PCR. 898). Mr. Gore did not have any problems with personal hygiene.

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[30]Cooper may not have seen any symptoms of OCD but the Department of Corrections medical staff did and Mr. Gore was prescribed medication (2PCR 475, 473).

Sgt. Kraszewski told her Mr. Gore "hardly left his bunk" and did not socialize much. He had a "fear of life" meaning he "freaks out around the wrong people." (2PCR. 899). Mr. Gore would not walk by other inmates to shower, would not go to yard, and had minimal contact with other inmates. (2PCR. 900). Dr. Werner was not concerned with this information because she believed Mr. Gore was avoiding other inmates because he had tricked them into buying empty Skoal cans and had "stiffed" them (2PCR. 900-01). He blamed others and at times he would "go off and start yelling and cursing," because the tapping by other inmates would bother him (2PCR. 902). None of the officers indicated that Mr. Gore had any hearing loss (2PCR. 903).[31] She did not see any indication of profound hearing loss, but she's not an "expert," and he would have to have evaluations for that (2PCR. 904). Mr. Gore, however, did have difficulty hearing Dr. Waldman during the interview. But, she

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[31]However, DOC records, introduced by the State at the evidentiary hearing, are replete with references to Mr. Gore's hearing loss. For example, in July, 1998, Mr. Gore complained that the hearing aid given to him by DOC was not working. In 2004, similar complaints were made about his prescribed hearing aid not working properly. In 2005, DOC sent Mr. Gore to an audiologist, who diagnosed Mr. Gore with chronic hearing loss. In 2009, Mr. Gore was prescribed a new set of hearing aids. In 2011, DOC medical documentation shows that Mr. Gore has moderate hearing loss in his right ear, and profound hearing loss in the left ear. In 2012, DOC diagnosed Mr. Gore with hearing loss bilateral and profound. In May, 2013, DOC diagnosed Mr. Gore with "profound hearing loss." The "thorough" review of the records by Drs. Myers and Werner was not as "thorough" as their testimony suggested and as they led the lower court to apparently believe.

believed that was because Dr. Waldman was at the end of the table (2PCR. 904).

With regard to Mr. Gore's medication history, Dr. Werner testified that the Vistaril prescribed to Mr. Gore is a "antihistamine, very similar to Benadryl." (2PCR. 907). It is a "minor psychotropic" that is used for anxiety, but it is an antihistamine. *Id.*[32] She said Elavil and Sinequan are both old antidepressants that have "major side effects of sedation." Sinequan is no longer available in the DOC because it was overly sedating (2PCR. 908). She did not see any reference to Haldol in the records (2PCR. 908).[33] It is an older antipsychotic and has significant side effects (2PCR. 909). In her opinion, Mr. Gore does not and never has suffered from a major mental illness (2PCR. 910).

During Mr. Gore's interview, he complained that he was being forced to speak with them because he had received paperwork from the Governor stating that he had to speak with them (2PCR. 912). He refused to tell them his age and told them his attorney had said he was "nuts for the past 15 years." He did not agree with his attorney's assessment (2PCR. 912). Though Dr. Werner attempted to build a rapport

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[32]Notwithstanding Dr. Werner's view, the DOC medical records classify Vistaril as a psychotropic medication (2PCR 527).

[33]*But see* 2PCR 519 (referring to Mr. Gore being prescribed Haldol in the past). This is yet another DOC medical document that Dr. Werner missed or chose to ignore.

with Mr. Gore, he started "this rambling thing" (2PCR. 912). Dr. Werner believed it was going to be a difficult evaluation (2PCR. 913). Mr. Gore was "frustrated" by her questions because she "wasn't kind of going along with him" (2PCR. 918).

She switched topics to the death penalty and Mr. Gore began to "ramble" saying he was not crazy and did not want to say anything to them that would get him sent to the prison psychiatric unit (2PCR. 914). He talked about the Governor and the harvesting of organs. She did not believe any of these topics were based in fact or came from internal stimuli (2PCR.915). She thought it sounded like a movie plot line.

She did not believe Mr. Gore was delusional because his delusion was not "consistent with his presentation or history" (2PCR. 916). It was not a "consistent" delusion and it "doesn't make sense" (2PCR. 917). Instead, she opined, Mr. Gore was malingering (2PCR. 920).

Even though the doctors did not test Mr. Ferguson during their last competency to be executed examination, Dr. Werner said they "typically give a mental status exam with all of our evaluations" (2PCR. 923). On the MMSE-II, Mr. Gore scored a 23 and on the MFAST, he scored a six (2PCR. 924). She believed the two scores indicated malingering. *Id.* She did not believe Mr. Gore suffered from any disorder except antisocial personality disorder (2PCR. 926). Mr. Gore understood that he is

going to be executed and the reason for it. *Id.* Dr. Werner believes that "even individuals with severe mental illnesses can be determined to be competent" (2PCR. 926).

Dr. Myers tested Mr. Gore at the end of the interview. She and Dr. Waldman were not present while Dr. Myers administered the tests, but both tests took only 20 minutes (2PCR. 935-36). The doctors then went back to reviewing records. When Dr. Myers returned from testing, the doctors had a 20-30 minute discussion about their opinion and eventually typed their report on the prison's computers (2PCR. 928;936-37). She denied that they "cut and pasted" Mr. Gore's information from Mr. Ferguson's report (2PCR. 928).

Dr. Werner admitted that during her interview with Officer Cooper she did not ask whether he worked the day or night shift or whether he would have the ability to observe Mr. Gore's repetitive behavior at night. She assumed he was on the day shift since she was speaking to him during the daytime (2PCR. 938). Though her notes were detailed, Dr. Werner said she did not write down every single word of the interview (2PCR. 939).

Dr. Werner could not explain why Mr. Gore would feign OCD in order to get anti-anxiety medication, then not take it (2PCR. 940). She was aware of medical records that showed Mr. Gore would repeatedly refuse medical call outs, counseling

and medications. *Id.* Yet she still believed he "feigned" illnesses in order to get medication that he would not need (2PCR. 941).

Dr. Werner believed that Mr. Gore's "presentation" was not consistent with profound hearing loss, though she acknowledged she was not an expert in hearing loss. (2PCR. 941). She either observed in her notes or Mr. Gore told her that he was hard of hearing. (2PCR. 942).[34]

In her review of Mr. Gore's *pro se* pleadings, she saw "one pleading" in which Mr. Gore discussed his delusion of Satan worshiping and organ harvesting (2PCR. 943). It was not mentioned in any of the other pleadings she reviewed, and she did not know the date of the pleading (2PCR. 944). She did not know if he filed them on his own. (2PCR. 943).

Mr. Gore told her that he had problems with all of his 15-30 attorneys being a part of the conspiracy against him along with the Governor (2PCR. 946). Even though Mr. Gore's attorney, Steven Hammer, attended their evaluation, none of the doctors spoke to him about his interaction with Mr. Gore, nor did they read any of Mr. Hammer's pleadings that initiated the Governor's competency inquiry in the first place (2PCR. 946).

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[34]As noted above, however, the DOC records are replete with evidence of Mr. Gore's hearing loss. And Dr. Werner never explained why Mr. Gore would purportedly "feign" hearing loss over the past several decades.

She admitted that they gave a verbal MMSE-II test to John Ferguson and did not disclose or turn over any results of that test to Mr. Ferguson (2PCR. 948). They did not attempt to file a corrected report in Mr. Gore's case to correct the erroneous reference to Mr. Ferguson or alert the Governor's office to their error (2PCR. 949).

The paper MMSE-II and MFAST tests given to Mr. Gore were screening tests. He was not given a full-fledged battery of psychological tests geared toward determining organic brain damage (2PCR. 950). Dr. Werner opined that there was no indication they needed to do them. *Id.*

**b. Prison Guard Testimony.**

Lt. Dennis Cauwenberghs is a confinement lieutenant at Florida State Prison in charge of death row. He took Mr. Gore to the warden's office to notify him of his death warrant (2PCR. 699-701). Mr. Gore "didn't really respond in any way" to the reading of his warrant (2PCR. 702). Lt. Cauwenberghs believed Mr. Gore understood. He accepted their offer of a phone call and decided what would happen to his remains (2PCR. 702-04). He described Mr. Gore as quiet and not social with anyone (2PCR. 706). Mr. Gore became more anxious as the other inmates next to him were being taken to the death chamber to be executed (2PCR. 706). Most of the time, Mr. Gore sits on his bunk and does legal work (2PCR. 708). Lt. Cauwenberghs did not have much interaction with Mr. Gore while he was on regular death row, so

he did not know if this is a change in behavior. (2PCR. 709). He never had an issue with Mr. Gore unless he did not get his way and then he would throw a temper tantrum. (2PCR. 709).

In those instances, Mr. Gore would mumble under his breath that the guards were "child molesters and the devil and Satan worshipers and he would carry on and on and on." (2PCR. 709-10; 743). Mr. Gore acted differently when the warden and assistant wardens were present (2PCR. 710). He would not talk to them unless they actually pushed him into talking to them. Mr. Gore would not make eye contact. He said "they were trying to steal his eyes and [he] wouldn't let them get into his soul." (2PCR. 710).

Mr. Gore would pace in his cell for hours (2PCR. 712). He limps normally, but he limps worse when he's agitated or upset (2PCR. 726). Sometimes, he cups his ears like he could not hear, especially when administrators come around (2PCR. 727). He complained that the night shift officers make too much noise and keep him awake (2PCR. 729). He "really couldn't say" if Mr. Gore had OCD behaviors (2PCR. 730). He had not seen any OCD behaviors. Mr. Gore did not complain to him of migraine headaches (2PCR. 730).[35] He believes Mr. Gore's behaviors are manipulative.

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[35]The DOC medical records introduced by the State at the evidentiary hearing are also replete with references to Mr. Gore suffering from migraine headaches. Indeed, beginning in 1995, the records reveal consistent complaints by

(2PCR. 730). His only contact with Mr. Gore has been while he was at Florida State Prison (2PCR. 731). Mr. Gore spent considerable time incarcerated at Union Correctional and was recently transferred to Florida State Prison. (2PCR. 731-32).

On Mr. Gore's first execution date, Lt. Cauwenberghs observed that Mr. Gore was not very talkative, so he stayed with him (2PCR. 123). He paced in his cell for quite a while. He was nervous and apprehensive, so he gave him some Copenhagen. *Id.* At 5:30 p.m. before he was to be executed at 6 p.m., Mr. Gore was told by his attorney that he had received a stay. He was sitting on his bunk and gave him a thumbs up sign and was relieved (2PCR. 723). After the first stay, Mr. Gore continued his legal work.

Mr. Gore received two disciplinary reports while on death watch. One, dated July 16, 2013, was for threats on staff and the other was for disrespect to officials (2PCR. 724). The spoken threats were to Officer Williams. Mr. Gore spoke of demons coming down to check on his blood vessels and his arms, and he would not let them get to his blood vessels if they tried (2PCR. 724). The second report, dated July 17, 2013, was an infraction for screaming at officers to "leave me alone demon" and yelling about devil worshipers to Sgt. Stone. (2PCR. 724-25; 744).

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Mr. Gore of, and medications prescribed by DOC for, the migraine headaches reported by Mr. Gore.

Lt. Cauwenberghs acknowledged that when Mr. Gore was not on death watch, he would only see Mr. Gore briefly when he walked his rounds among the 68 other inmates he was in charge of watching (2PCR. 732;742). Mr. Gore was housed at Union Correctional for a large period of time while on death row (2PCR. 732). He did not know whether or when Mr. Gore went to the recreational yard. (2PCR. 742). He is not a medical doctor and does not know what is in Mr. Gore's medical file. (2PCR. 742-43).

Sgt. Phillip Kraszewski testified that he is a wing sergeant supervising "about a hundred inmates." (2PCR. 833-34). In the two to three years he has been working death row, he did not see any concern about Mr. Gore's mental health. (2PCR. 834). He would occasionally write him a disciplinary report. Mr. Gore does not leave his cell and go to yard (2PCR. 834-35). He would write on his legal cases and watch TV. *Id.* He told the commission doctors that Mr. Gore was paranoid and was more cautious and aware around other inmates (2PCR. 836). Sgt. Kraszewski is not qualified to give a medical or psychiatric diagnosis (2PCR. 836). Mr. Gore was afraid of one inmate so they kept them separated.

He did not know Mr. Gore at Union Correctional, only when he was transferred to Florida State Prison in 2011 (2PCR. 837). Mr. Gore spent a substantial amount of his time at Union Correctional. *Id.* He had no interaction with Mr. Gore while he

was on his current death watch (2PCR. 837). All of his observations were when Mr. Gore was on regular death row, before May 13, 2013 (2PCR. 838). He does wing checks on 66 death row inmates with two other officers (2PCR. 839). They walk by cells, make quick observations, and move on to the next cell. *Id.* Mr. Gore would not leave his cell to go to the yard (2PCR. 839-40). As a general rule, most inmates go to the yard to get outside. (2PCR. 840). He recalled telling the doctors Mr. Gore's cell was dirty because underneath his bunk he had a lot of dust and there were ants underneath his foot locker (2PCR. 840).

He is not a medical doctor. They have their own medical staff for that (2PCR. 841). He was not a part of the staff who recommended psychiatric treatment for Mr. Gore in March, 2012, or December, 2011 (2PCR. 842-43).

Sgt. Jamie Williams testified that he worked regular death row while Mr. Gore was at Florida State Prison (2PCR. 845). He was not concerned about Mr. Gore's mental health (2PCR. 846-47). He did not recall whether Mr. Gore had migraine headaches or hearing loss. (2PCR. 847). It is loud on death row and even officers have trouble hearing sometimes (2PCR. 847). Mr. Gore's hearing problems were not out of the ordinary. Mr. Gore does not take "rec" time (2PCR. 847). Mr. Gore can pitch a little temper tantrum, but none that caused him concern for his mental health. (2PCR. 847-48).

Mr. Gore is only disrespectful when administrators come on the wing. Otherwise, he acts normally (2PCR. 848-49). Mr. Gore refuses to acknowledge or look at the administrators. (2PCR. 848). He asked, "why give them respect when they just want to kill me?" (2PCR. 849). When administrators come on the wing, Mr. Gore lays on his bunk and a few minutes after they leave, Mr. Gore will come back and start talking to him. *Id.*

Mr. Gore does not eat regular prison food. He eats only from the canteen with food he purchases (2PCR. 850). That preference is not unusual. *Id.*

Mr. Gore knows if he has a medical issue that he is to write to the medical staff about a headache or any physical issues (2PCR. 852-53). That would not be something Sgt. Williams would resolve, unless there was a medical emergency that he could readily observe (2PCR. 853). When he testified that Mr. Gore acted differently toward administrators, the time period he is referring to is the current death watch. Some of the reasons the warden and others periodically speak with Mr. Gore involves his execution (2PCR. 854-55). These are all people who are going to carry out Mr. Gore's execution (2PCR. 855).

Sgt. Williams wrote a disciplinary report for Mr. Gore on June 16, 2013 for a spoken threat (2PCR. 855-56). The threat was that when devil worshipers and demons come down to his cell to check his blood vessels in his arms that he is not

going to let them and that he has something for them when they try (2PCR. 856). The officer was not concerned about Mr. Gore's mental health. Sgt. Williams was unaware of any other instances of Mr. Gore talking about Satan (2PCR. 856-57).

Sgt. Williams' routine is to walk by the cells and do a visual security check (2PCR. 858). He then does a report. He has no training in detecting compulsive behavior or anything else on a particular inmate (2PCR. 859). If you walk by and notice something, you write it down otherwise you keep going. He considers Mr. Gore manipulative (2PCR. 859-60).

Mr. Gore said he needed sunglasses to keep the demons from coming into his eyes, but he was not sure if he had them in his hands or whether he was wearing them over his eyes (2PCR. 861). Mr. Gore made that comment after he had been given a DR.

Sgt. Lance Willis testified that he is a correctional officer at Florida State Prison assigned to death watch (2PCR. 863-64). He is on night duty from 6 p.m. to 6:00 a.m. (2PCR. 865). Mr. Gore did not appear to have trouble sleeping. He rolls up pieces of soap and sticks it in his ears to block out the noise (2PCR. 865). Mr. Gore paces in his cell, back and forth (2PCR. 866). The officer noticed Mr. Gore having trouble walking when a nurse or administrator comes in, and Mr. Gore will occasionally limp from his bed to the cell front (2PCR. 866-67). Because he is on

night shift, most of his observations are of Mr. Gore sleeping (2PCR. 872-73). He is not medical staff. (2PCR. 873-74).

He was not aware that Mr. Gore wears compression socks on his legs (2PCR. 874-75). His cell is approximately 10-12 feet by 8 feet wide and it is a couple of feet to the cell front (2PCR. 875). He did not note Mr. Gore limping when correctional officers walked. He only noted it when nursing staff walked by (2PCR. 875-76).

Mr. Van Poyck and Mr. Carroll were on death watch in the cells next to Mr. Gore (2PCR. 872; 879-80). When both inmates were taken out to be executed, Mr. Gore knew it.[36] *Id.* The warden and the assistant warden come to the inmate's cell front. (2PCR. 879-80). Mr. Gore saw Mr. Carroll and Mr. Van Poyck being taken to be executed (2PCR. 879).

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[36]Mr. Van Poyck was executed on May 29, 2013. Mr. Carroll was executed on June 12, 2013. See www.dc.state.fl.us/oth/deathrow/execlist.

## SUMMARY OF THE ARGUMENTS

The lower court erred in concluding that Mr. Gore did not meet the standard for insanity to be executed. The lower court evaluated Mr. Gore's claim under the prism of an incorrect legal standard, and the factual basis for its rejection of Dr. Toomer's opinion is not supported by any evidence, much less competent and substantial evidence. Dr. Toomer conducted the most recent evaluation of Mr. Gore and his conclusions are fully supported by the record in this case. On the other hand, the opinions of the State's mental health experts are not supported by the Department of Corrections records in this case, records which they claimed to have reviewed but clearly did not. This Court should reverse the lower court's order and find that Mr. Gore has meet his burden under the Eighth Amendment and forbid the State of Florida from carrying out the execution of Marshall Gore at this time.

## ARGUMENT

### THE LOWER COURT ERRED IN CONCLUDING THAT MR. GORE WAS SANE AND COMPETENT TO BE EXECUTED.

#### A. Standard of Review.

In this appeal from the denial of a motion pursuant to Fla. R. Crim. P. 3.811 & 3.812, this Court reviews the lower court's order to determine if it is supported by competent, substantial evidence. *See Ferguson v. State*, 112 So. 3d 1154 (Fla. 2012); *Provenzano v. State*, 760 So. 2d 137 (Fla. 2000); *Medina v. State*, 690 So. 2d 1255 (Fla. 1997). Legal conclusions are reviewed *de novo*. *See State v. Coney*, 845 So. 2d 120, 137 (Fla. 2003).

#### B. The Lower Court Applied an Incorrect Legal Standard.

"[T]he Eighth Amendment to the United States Constitution prohibits a State from carrying out a sentence of death upon a prisoner who is insane." *Ford v. Wainwright*, 477 U.S. 399, 409-10 (1986). *See also Panetti v. Quarterman*, 551 U.S. 930, 934 (2007). "[O]nce a prisoner makes out the requisite preliminary showing that his current mental state would bar his execution, the Eighth Amendment, applicable to the States under the Due Process Clause of the Fourteenth Amendment, entitles him to an adjudication to determine his condition." *Panetti*, 551 U.S. at 934-935. *See also Ford*, 477 U.S. at 418.

The Eight Amendment forbids the execution of a prisoner so mentally impaired that he cannot rationally "perceive the connection between his crime and his punishment." *Ford*, 277 U.S. at 422 (Powell, J., concurring). *See also Panetti*, 551 U.S. at 960 (recognizing that "[g]ross delusions stemming from a severe mental disorder may put an awareness of a link between a crime and its punishment in a context so far removed from reality that the punishment can serve no proper purpose"); *Ferguson v. Sec'y, Fla. Dep't of Corrections*, 716 F. 3d at 1318 ("The Supreme Court has decided that a convicted murderer cannot be executed unless he has a rational understanding of the fact that he is going to be put to death and of the reason for his execution") (citing *Panetti*, 551 U.S. at 954-60). As the Eleventh Circuit has recently written regarding the present state of the law post-*Panetti*:

> The bottom line of the *Panetti* decision is that there is not yet a well-defined bottom line in this area of the law. Instead of attempting to answer more specifically the question of what is required for a rational understanding of death by execution and the reason for it, the Supreme Court preferred to leave "a question of this complexity" to be addressed in a fuller manner and on a better record by the district court and the court of appeals in that case. *Id.* The decision not to decide more is, unfortunately, the last word from the Supreme Court on the "question of complexity," one variation of which is presented by the facts of our case.

*Ferguson*, 716 F. 3d at 1318.

Mr. Gore submits that the Constitution of the United States forbids his execution under the *Ford/Panetti* standard and the Eighth Amendment. In *Panetti*,

the trial court had rejected Panetti's incompetency claim on the ground that the relevant test for competency to be executed "require[d] the petitioner to know no more than the fact of his impending execution and the factual predicate for the execution." *Panetti*, 551 U.S. at 941-42. The Fifth Circuit affirmed. The Supreme Court, however, reversed, finding "the Court of Appeals' standard [] too restrictive to afford a prisoner the protections guaranteed by the Eighth Amendment. *Id.* at 956-57. As the Court explained, a prisoner must not only be *factually* aware of the reason for his execution – the crime – but must also have a "rational understanding" of the State's *rationale* for his execution, including the purpose of the punishment. *Id.* at 960. Panetti, like Marshall Gore, was possessed of no such understanding. Marshall Gore's delusions are relevant to the inquiry under the Eighth Amendment. Under *Panetti*, the Eighth Amendment requires a capital defendant to not only have a factual understanding of the penalty and the reasons for it, but also a rational understanding of the purpose of the punishment, unaffected by delusional beliefs. Marshall Gore is entitled to relief under *Ford* and *Panetti*.

In explaining its view of the appropriate legal standards, the lower court cited to this Court's decisions in *Provenzano v. State*, 760 So. 2d 137 (Fla. 2000), and *Ferguson v. State*, 112 So. 3d 1154 (Fla. 2012), as well as the Eleventh Circuit's opinion in Mr. Ferguson's case as providing the "Florida law" for determining

whether a prisoner is insane to be executed (2PCR 431). However, when setting forth its legal conclusions, the lower court ignored that the Eighth Amendment and the Supreme Court's decisions in *Ford* and *Panetti* provide the controlling legal framework for this issue. Whether Mr. Gore "lacks the mental capacity to understand the fact of the impending execution and the reason for it" (2PCR 431) (citing *Provenzano*, 760 So. 2d at 140), is not the *Ford/Panetti* standard and does not comport with the Eighth Amendment.

The lower court's misunderstanding or misapplication of the controlling Eighth Amendment standards is evident in the conclusions it reached. For example, the lower court wrote that "[w]hile Dr. Toomer testified that Gore has delusions, having delusions does not prevent a person from being competent to be executed" (2PCR 441). However, under *Panetti*, the Eighth Amendment requires a condemned inmate to not only have a factual understanding of the penalty and the reasons for it, but also a rational understanding of the purpose of the punishment unaffected by delusional beliefs. *Ferguson,* 716 F. 3d at 1318 ("The Supreme Court has decided that a convicted murderer cannot be executed unless he has a rational understanding of the fact that he is going to be put to death and of the reason for his execution"); *see also Commonwealth v. Banks*, 29 A.3d 1129, 1146 (Pa. 2011) (applying *Panetti* and concluding that although the defendant "recognize[d] his responsibility for most of

the murders," "underst[ood] that he was sentenced to death," and "appear[ed] to understand what the execution entails and . . . that he would die as a result of it," the defendant "had a significant number of fixed delusions relating to his crime and punishment" that precluded any finding that he had a "rational understanding of the death penalty or the reasons for it").

In rejecting Mr. Gore's legal claim, the lower court further wrote that "[e]ven Dr. Toomer acknowledges that Gore knows that he was going to be executed because [sic] for murder" (2PCR 441). This, too, is, is not consistent with the *Ford/Panetti* standard or the Eighth Amendment. That Mr. Gore knows that he is going to be executed because he was convicted is not the standard; rather, the Eighth Amendment forbids the execution of a prisoner so mentally impaired that he cannot rationally "perceive the connection between his crime and his punishment." *Ford*, 277 U.S. at 422 (Powell, J., concurring). *See also Panetti*, 551 U.S. at 960 (recognizing that "[g]ross delusions stemming from a severe mental disorder may put an awareness of a link between a crime and its punishment in a context so far removed from reality that the punishment can serve no proper purpose"). *Panetti* does not ask whether an inmate understands "the fact of" his execution. It requires courts to ask whether an inmate understands "the meaning and purpose of the punishment to which he has been sentenced." *Panetti*, 551 U.S. at 960. "A prisoner's awareness of the State's

rationale for an execution is not the same as a rational understanding of it. *Ford* does not foreclose inquiry into the latter." *Id.* at 959.

The lower court's misapprehension, misapplication, and misunderstanding of the Eighth Amendment's requirements is reason alone to reverse the lower court. However, as explained below, many of the lower court's conclusions also are bereft of factual support, lending further support for reversal.

**C. Lack of Factual Support of the Lower Court's Findings.**

The lower court found Dr. Toomer's opinions to be "unpersuasive" for a number of reasons which are not actually supported by the record. Credibility determinations by a trial court are only valid to the extent that they are supported by competent and substantial evidence. *See Stephens v. State*, 748 So. 2d 1028, 1034 (Fla. 1999). Here, the lower court's rejection of Dr. Toomer's opinion that Mr. Gore did not meet the *Ford/Panetti* standard is premised on faulty factual premises not based on the actual record below or the evidence presented during the evidentiary hearing.

The principal reason that the court found Dr. Toomer's opinion unpersuasive is because he purportedly did not review Mr. Gore's medical records and thus he "reached conclusions that are inconsistent with the other evidence in this case" (2PCR 441). However, it is the lower court that did not review Mr. Gore's medical

records, all of which were introduced during the evidentiary hearing and discussed extensively by Dr. Toomer. In fact, when Mr. Gore's counsel questioned Dr. Toomer about the records he reviewed, the State objected and the lower court overruled the objection (2PCR 674-75).

Dr. Toomer's testimony is clear that he did, in fact, review many DOC medical records relating to Mr. Gore. For example, Dr. Toomer relied on Department of Corrections (DOC) records from September 11, 1994, in which Mr. Gore complained of a conspiracy to drive him insane, and that the conspiracy had been in place for quite some time. (2PCR. 670; Def. Ex. A at 2PCR 467). The DOC document shows that Mr. Gore was requesting to see the "psych doctor." *Id.* Dr. Toomer reviewed a grievance dated June 22, 1994, showed that Mr. Gore believed he had been injected with tuberculosis and Mr. Gore requested an HIV test (2PCR. 670-71; Def. A at 2PCR 469). Dr. Toomer relied on a September 18, 1997, complaint that Mr. Gore was hearing voices and thought he was a threat to himself because the voices kept asking him to hang himself (2PCR. 671; Def. Ex. A at 2PCR 471). He also relied on a DOC record discussing that between May 15 and September 29, 1997, Mr. Gore was in mental health treatment and had been diagnosed with anxiety and obsessive compulsive disorder or "OCD" (2PCR. 672; Def. Ex. A at 2PCR 473).

Dr. Toomer further identified DOC documents that showed on December 12,

2011, Mr. Gore was prescribed medication for anxiety and OCD. The documents showed a medication history of Sinequan in 1991; and that Mr. Gore had been provisionally diagnosed with paranoid personality disorder (2PCR. 672; Def. Ex. A at 2PCR 477-78). Dr. Toomer reviewed Dr. Werner's notes regarding her interviews with Sgt. Kraszewski and Officer Cooper, two prison guards (2PCR. 673; Def. Ex. A at 2PCR 477-78).[37] Dr. Toomer identified DOC documents that showed delusional orientation on Mr. Gore's part and a history of treatment on March 1, 2012 (2PCR. 676-77; Def. Ex. B). He relied on documents from 1994 showing that Mr. Gore had been prescribed Haldol, a very powerful antipsychotic drug (2PCR. 519; 677). Records from April 3, 1990, showed Dr. Mhatre prescribed Mr. Gore with Sinequan (2PCR 520, 523). DOC records also showed prescriptions for Elavil and Vistaril (2PCR. 523, 527, 677-78).

Dr. Toomer also relied on DOC records that showed that between December, 2011, and 2013, DOC medical staff listed Mr. Gore as having mild to moderate mental or emotional impairments (2PCR. 675-78; Def. Ex. A at 2PCR 484-87). He regularly refused medical call-outs though he showed signs of mild to moderate mental impairment (2PCR. 679). Dr. Toomer believed that most people who

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[37]Because Dr. Toomer had the benefit of the interviews of prison guards done by the Governor's experts, the lower court faulting him for not doing so is unduly critical and unfounded (2PCR 440-41).

malinger "will get the message out that they are ill" to show symptoms. Mr. Gore, on the other hand, refused call-outs and did not consistently take medication (2PCR. 679). He also relied on a record from December 19, 2011, where Mr. Gore was again diagnosed by DOC doctors as having OCD with a psychiatric grade of 3 (showing the need for medication) and given Vistaril (2PCR. 680).

It is thus clear that the factual premise by the lower court–that Dr. Toomer "did not review Gore's prison records"– is not at all supported by any evidence, much less competent and substantial evidence. Indeed, the lower court credited the opinions of Drs. Myers and Werner because they purportedly "reviewed the relevant records" (2PCR at 441). Yet as the actual documents introduced into evidence established, they did no such thing. For example, Drs. Werner and Myers testified that they saw no document that Mr. Gore had ever been administered Haldol or any other antipsychotic or psychotropic medications. The DOC records clearly establish otherwise. *See* 2PCR 519, 520, 523, 527. They testified that Mr. Gore was "feigning" hearing loss. The DOC medical records clearly establish otherwise.[38]

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[38]DOC records, introduced by the State at the evidentiary hearing, are replete with references to Mr. Gore's hearing loss. For example, in July, 1998, Mr. Gore complained that the hearing aid given to him by DOC was not working. In 2004, similar complaints were made about his prescribed hearing aid not working properly. In 2005, DOC sent Mr. Gore to an audiologist, who diagnosed Mr. Gore with chronic hearing loss. In 2009, Mr. Gore was prescribed a new set of hearing aids. In 2011, DOC medical documentation shows that Mr. Gore has

They testified that Mr. Gore was ""feigning" migraine headaches. The DOC medical records clearly establish otherwise.[39] They testified that Mr. Gore had never been diagnosed with any major mental illness by DOC. The DOC medical records clearly establish otherwise. *See, e.g.* 2PCR 473; 477-78; 484-87; 520; 523; 676-77. In short, the very thing that the lower court faulted Dr. Toomer for not doing (reviewing Mr. Gore's DOC medical records) was not only incorrect as a matter of fact, but that same thing was demonstrably *not* done by the State's experts.

The lower court further concluded that Mr. Gore's medical records show that he has "not been consistently diagnosed with a major mental illness" (2PCR at 441). However, as noted above, Dr. Toomer detailed the DOC medical records that contradict this finding by the lower court. Moreover, the lower court failed to review the evidence in this case that established that between December, 2011, and May, 2013, the DOC medical staff in 2013 consistently assigned an S-2 psychiatric grade to Mr. Gore (2PCR. 675-78; Def. Ex. A at 2PCR 484-87; 531-547). The lower court

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moderate hearing loss in his right ear, and profound hearing loss in the left ear. In 2012, DOC diagnosed Mr. Gore with hearing loss bilateral and profound. In May, 2013, DOC diagnosed Mr. Gore with "profound hearing loss."

[39]The DOC medical records introduced by the State at the evidentiary hearing are also replete with references to Mr. Gore suffering from migraine headaches. Indeed, beginning in 1995, the records reveal consistent complaints by Mr. Gore of, and medications prescribed by DOC for, the migraine headaches reported by Mr. Gore.

failed to acknowledge the other extensive documentation from the DOC that Mr. Gore in fact had been diagnosed with mental illness, delusional disorder, had a number of mental health emergencies, and was prescribed a number of medications over the years. Simply because the State's experts discounted these documents and their import does not mean that the documents do not exist.

Moreover, it is vital to take into account that the State's experts evaluated Mr. Gore in May, 2013, well before his initial execution date. On the other hand, Dr. Toomer evaluated Mr. Gore after the federal court had stayed one execution date and his second execution date was 48 hours away from when Dr. Toomer conducted his evaluation. The timing here is important. *Panetti*, 551 U.S. at 943 ("All prisoners are at risk of deteriorations in their mental state"). When Drs. Myers and Werner evaluated Mr. Gore, his execution was weeks away. More importantly, in the time since they evaluated Mr. Gore, Mr. Gore personally witnessed two other inmates being taken out of their cells and executed. Drs. Waldman, Myers and Werner evaluated and tested Mr. Gore on May 28, 2013. The day after the Governor's evaluation of Mr. Gore, Elmer Carroll, who was housed two cells down from Mr. Gore, was executed. On June 12, 2013, Mr. Van Poyck , Mr. Gore's next door neighbor, was executed. See www.dc.state.fl.us/oth/deathrow/execlist. Mr. Gore himself survived his first warrant by a half hour before he was to be executed on June

24, 2013. Dr. Toomer evaluated Mr. Gore on July 8, 2013, two days before the Governor's second attempt to execute Mr. Gore on July 10, 2013. Dr. Toomer testified that mental health is not static and that Mr. Gore's delusions could change over time and be triggered by "the environment exacerbating the existence of underlying symptomology." (2PCR. 686 ). The timing of the evaluations here did not enter into the court's evaluation of Mr. Gore's claim, but it should have.

In conclusion, Mr. Gore submits that the essential factual premise underlying the rejection of Dr. Toomer's opinion is faulty and thus provides no basis for this Court to defer to the lower court's discounting of Dr. Toomer's opinions. And if Dr. Toomer's opinions are to be discounted for the reasons set forth by the lower court, so too are the opinions of Drs. Myers and Werner. Dr. Toomer's evaluation was the most recent, took into account the relevant DOC medical records, and was consistent with the other evidence in this case. The opinions of Drs. Myers and Werner were not.

**D. Conclusion.**

The Eighth Amendment forbids the execution of a prisoner so mentally impaired that he cannot rationally perceive the connection between his crime and his punishment. *Ford*, 277 U.S. at 422 (Powell, J., concurring). *See also Panetti*, 551 U.S. at 960 (recognizing that "[g]ross delusions stemming from a severe mental

disorder may put an awareness of a link between a crime and its punishment in a context so far removed from reality that the punishment can serve no proper purpose"). To execute someone like Marshall Gore would disserve the penological purposes of the death penalty and exact a uniquely cruel punishment at odds with the core value of the Eighth Amendment – human dignity. Accordingly, Mr. Gore, through his counsel, asks this Court to reverse the lower court's order and find that Mr. Gore's execution at this time would violate the Eighth Amendment.

## CONCLUSION

For the reasons set forth above, Mr. Gore submits that the lower court's order should be reversed.

Respectfully submitted,

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## CERTIFICATE OF SERVICE

**I HEREBY CERTIFY** that on July 26, 2013, a true copy of the foregoing has been furnished by Federal Express and/or facsimile and/or e-mail to the following: Tangy R. Williams, Capital Case Clerk, Florida Supreme Court, 500 South Duval Street, Tallahassee, FL 32399 via e-mail at warrant@flcourts.org; and to Assistant Attorney General Sandra Jaggard of the Office of the Attorney General, 444 Brickell Avenue, Suite 950, Miami, Florida 33131 via e-mail at capapp@myfloridalegal.com and sandra.jaggard@myfloridalegal.com.

/s/ Todd G. Scher
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/s/ Terri L. Backhus
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## 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/ Todd G. Scher
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