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.
_____/

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

REPLY BRIEF OF APPELLANT

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REPLY TO STATEMENT OF THE CASE AND FACTS

In an attempt to sugarcoat the regrettable status of Florida's appointment-of-counsel system for capital postconviction cases, namely the registry system, the State leaves out a number of facts and makes a number of misstatements and misrepresentations regarding Mr. Gore's legal representation in his state and federal postconviction proceedings. To put this particular issue in its proper context, Mr. Gore provides the following supplemental statement in Reply to the State's Answer Brief.

The State correctly recounts that registry attorney R. Glenn Arnold was appointed to represent Mr. Gore in August, 2001, following this Court's affirmance of Mr. Gore's convictions and sentence of death (AB at 12). Mr. Arnold thereafter was permitted to withdraw and on or about January 17, 2002, attorney Steven Hammer was appointed as registry counsel for Mr. Gore (AB at 13). While the State points out that a Rule 3.851 motion was filed by Mr. Hammer on or about May 9, 2003, the State does not mention that Mr. Hammer actually had earlier filed a "shell" Rule 3.851 motion on or about June 18, 2002. The State moved to strike that shell motion, and the State's motion to strike was granted. Mr. Gore, through Mr. Hammer, appealed to this Court, and this Court treated the notice of appeal as a motion for extension of time. *Gore v. State*, 24 So. 3d 1, 15 (Fla. 2009). Thereafter,

Mr. Hammer filed a more complete Rule 3.851 motion that is referenced in the State's Answer Brief (AB at 13). The "shell" motion filed by Mr. Hammer in June, 2002, caused him to miss Mr. Gore's federal habeas corpus deadline and caused him to file Mr. Gore's federal habeas petition outside the statute of limitations of the Antiterrorism and Effective Death Penalty Act (AEDPA), as codified at 28 U.S.C. §2244(d)(2). *See* DE16, Case No. 06-22736-cv-DLG at 3 n.1 ("This Court had to appoint different counsel [for Mr. Gore's federal habeas corpus proceeding] because the Court found that state court counsel, Mr. Hammer, had allowed the statute of limitations to run").

The federal district court was critical of Mr. Hammer's handling of Mr. Gore's case in state court. In an order requesting additional briefing on whether Mr. Gore would be entitled to equitable tolling of AEDPA's statute of limitations pursuant to *Holland v. Florida*, 130 S. Ct. 2549 (2010), United States District Judge Donald Graham wrote that, in filing the shell motion on Mr. Gore's behalf, Mr. Hammer "knew that the procedure he had employed here was clearly wrong. However, he nonetheless decided to proceed without changing course and filing proper motions in the proper courts requesting the proper relief" (DE79, Case No. 06-22736-cv-DLG). *See also id.* at 21 ("The Court notes that counsel for Mr. Gore [Mr. Hammer] was well aware of the rules and yet chose to proceed in a manner that failed to

comply. As the law makes clear, this conduct cannot be countenanced"). While Judge Graham did not place any blame on the State for Mr. Hammer's conduct, *id.* at 22 ("no evidence to suggest" that Hammer's conduct "was the result of anything improper on the part of the State"), the record should be clear that it was the State that told the circuit court judge in this case during Mr. Gore's Rule 3.851 litigation that it was perfectly acceptable for Mr. Hammer to do nothing with regard to seeking the available public records in Mr. Gore's case and still remain on his case:

> MS. JAGGARD: Your Honor, the State's position would be, [Mr. Hammer] had ample opportunity [to obtain the public records in Petitioner's case]. The reason Mr. Tasoni [sic] had 80 boxes is Mr. Tasoni and the attorney from Columbia County chose to engage in public records litigation. ***Mr. Hammer did not ever seek any public records. He did nothing about it.*** . . .
>
> THE COURT: You don't think that by saying all that you're setting up another problem?
>
> MS. JAGGARD: There's no such thing as ineffective assistance of post conviction counsel.
>
> THE COURT: Really. ***Post conviction counsel can do – can just basically sleep through everything and not have to worry about it; is that the State's position?***
>
> MS. JAGGARD: There is ample case law that there's no such thing as ineffective assistance of post conviction counsel.
>
> THE COURT: That's new to me.

(Record on Appeal to Florida Supreme Court in *Gore v. State*, No. SC05-1848,

Volume 14, Transcript of Hearing of October 27, 2004, at 401) (emphasis added).

At the time that Mr. Gore's death warrant was signed on May 13, 2013, Mr. Hammer remained as Mr. Gore's registry counsel in state court. Days before the warrant was signed, Mr. Hammer filed a motion to withdraw from Mr. Gore's case because, as the State notes, he had taken a new job at a civil law firm and did not wish to continue to represent Mr. Gore (AB at 32). While the State's brief writes that in his motion, Mr. Hammer wrote that "Mr. Scher had stated that he did not plan to continue to represent Defendant either" (AB at 32), this is a misrepresentation of what Mr. Hammer wrote and, consequently, a misrepresentation of Mr. Scher's position. What Mr. Hammer's motion actually stated was: "Additionally, attorney Todd Gerald Scher was brought into the case to assist in the preparation of the Defendant's case in the Federal Courts and to argue the matter in Federal Court, however, once the Federal appeals process is completed, attorney Scher *does not intend to handle the case once it returns to the State Court proceedings.*"[1] Mr. Hammer's motion to withdraw, opposed by the State, was denied, and subsequent attempts by Mr. Hammer

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[1]Mr. Hammer had contacted the undersigned counsel Scher about this matter while Mr. Gore's petition for a writ of certiorari was still pending in the United States Supreme Court. It was denied on April 22, 2013, a mere few weeks before the warrant was signed. An accurate reading of Mr. Hammer's pleading admits of only one interpretation: that Mr. Scher did not intend to seek a registry appointment for Mr. Gore should the court allow Mr. Hammer to withdraw.

to withdraw from Mr. Gore's case during the death warrant were met by opposition from the State and ultimately denied by the lower court. This Court, too, rejected Mr. Hammer's attempt to appeal the lower court's insistence that he remain as counsel on the case. *See Gore v. State*, No. SC13-947 (Order dated June 6, 2013).

The State expended tremendous effort to ensure that Mr. Hammer remain as Mr. Gore's state registry counsel over Mr. Hammer's repeated attempts to withdraw and invocations of a conflict of interest, and the State got what it wanted–a lawyer in a complicated case under a death warrant who it knew, from past experience, would not zealously seek public records, who had already told the court he was too busy to handle a death warrant case, and who had already missed important filing deadlines.[2] Given this situation and the State's own hand in it, the disingenuous nature of the State's remaining statements is laid bare. For example, the State writes that *Mr. Scher–federal habeas counsel*– was "dilatory" in "making a request to come to state

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[2]Indeed, Mr. Hammer never appeared in circuit court for a May 23, 2013, hearing on the public records requests he made on Mr. Gore's behalf, never filed one substantive pleading on Mr. Gore's behalf, and never even filed a proper appeal to this Court. *See* State's Motion to Dismiss, *Gore v. State*, No. SC13-947. To the undersigned counsels' knowledge, this is the first time in over 20 years that counsel for a defendant in a death warrant situation has not filed a single substantive pleading on the inmate's behalf.

court" (AB at 71).[3] What the State neglects to acknowledge in making this statement is its own efforts to ensure that Mr. Hammer remain on Mr. Gore's case. As Mr. Hammer's first motion to withdraw represented, Mr. Scher never intended to seek or accept the state court registry appointment in this case. And Mr. Scher was "zealously advocating" on Mr. Gore's behalf in his federal litigation since June 10, 2013. *See* DE16, No. 13-22230-cv-DLG. To complain now that Mr. Scher was "dilatory" in seeking to elbow aside a court-appointed attorney, who the State itself insisted remain on Mr. Gore's case, admits the obvious. The registry system in this state is irretrievably broken as Mr. Gore's case illustrates.

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[3]The State's complaint about the "eleventh hour" nature of the *Ford* claim under consideration ignores the fact that, by their very nature, *Ford* claims are only raised after a death warrant is signed and an execution is imminent. The State's argument also ignores its own position that, under state law, a motion for a determination of sanity to be executed can be raised at any time.

ARGUMENT IN REPLY[4]

ARGUMENT

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

A. *Panetti*'s holding is not a mere suggestion but an Eighth Amendment standard that this Court is required to follow.

The State remains hidebound to the competency-to-be-executed standard articulated by this Court in *Provenzano v . State*, 760 So. 2d 137 (Fla. 2000), and *Ferguson v. State*, 112 So. 3d 1154 (Fla. 2012) (AB at 65), and stubbornly refuses to acknowledge the prevailing Eighth Amendment standards set out by the Supreme Court in *Panetti v. Quarterman*, 551 U.S. 930 (2007) (AB at 66) ("this Court has already [in *Ferguson*] rejected the argument that *Panetti* altered Florida law regarding the standard for adjudicating claims of incompetence to be executed"). Because of its intransigent view of the Eighth Amendment and *Panetti*, the State insists that the lower court's finding that Mr. Gore did not "lack[] the capacity to understand the

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[4]On July 29, 2013, the Court ordered the Record on Appeal supplemented with the documentary exhibits introduced into evidence at the Rule 3.811 evidentiary hearing. On August 5, 2013, the Clerk filed 78 supplementary volumes. However, the volumes are not properly paginated. In fact, they are not paginated at all. Mr. Gore's Department of Corrections files are, however, Bates-stamped and, therefore, given the time constraints involved, references in this Brief to the supplemental record shall be 2PCR.Supp., following by the volume number, and the Bates-stamp number previously placed on those records by the Department of Corrections.

nature of the death penalty and why it was imposed on him is supported by competent, substantial evidence" (AB at 65). If the Court continues to stick to the *Provenzano* formulation,[5] which mirrors the language of Fla. R. Crim. P. 3.811,[6] then the Court will continue to ignore the explicit ruling of the *Panetti* decision. *But see Ferguson v. Sec'y, Fla. Dep't of Corrections,* 716 F. 3d 1315, 1344 (11th Cir. 2013) (Wilson, J., concurring in the result) (noting that this Court's standard articulated in *Provenzano* and *Ferguson* is "patently incorrect" after *Panetti*).

The Eighth Amendment forbids the execution of the insane, a category of persons defined by their inability to understand the punishment they are to suffer and why they are to suffer it. *Ford v. Wainwright*, 477 U.S. 399, 422 (1986). Following *Ford*, many state and federal courts, including this Court, interpreted *Ford* as merely requiring a factual inquiry into whether a prisoner is aware that he was to be executed

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[5]The Court did just that in *Ferguson*. *See Ferguson*, 112 So. 3d at 1157 (*Panetti* "does not alter our decision in *Provenzano*"). Under the pre-*Panetti* formulation articulated in *Provenzano*, all that matters is that "the prisoner lacks the mental capacity to understand the fact of the pending execution and the reason for it." *Provenzano*, 760 So. 2d at 140.

[6]Fla. R. Crim. P. 3.811(b) defines the legal standard as follows: "A person under sentence of death is insane for purposes of execution if the person lacks the mental capacity to understand the fact of the impending execution and the reason for it." *See also* Fla. R. Crim. P. 3.812(b) ("At the hearing the issue shall be whether the prisoner presently meets the criteria for insanity at time of execution, that is, whether the prisoner lacks the mental capacity to understand the fact of the pending execution and the reason for it").

and that his execution was connected to his conviction. *See, e.g. Coe v. Bell*, 209 F. 3d 815, 826-27 (6th Cir. 2000) (noting that Tennessee state court properly determined that "Coe is aware of his imminent execution and the reason for it, showing what Coe has made the requisite connection between his crime and his punishment") (footnote omitted); *Commonwealth v. Jermyn*, 551 Pa. 96, 102 n.9 (Pa. 1998) (noting that Pennsylvania's formulation of *Ford* standard is that "it is abhorrent to execute one whose mental illness prevents him from comprehending the reasons for the death penalty or its implications").

As noted above, Florida was one of the states to apply – and to codify – what came to be known as the *Ford* "factual awareness" standard. *See Provenzano*, 760 So. 2d at 140 (explaining that "Florida has adopted the Eighth Amendment standard announced by Justice Powell in *Ford*"); Fla. R. Crim. P. 3.811(b) ("A person under sentence of death is insane for purposes of execution if the person lacks the mental capacity to understand the fact of the impending execution and the reason for it"); Fla. R. Crim. P. 3.812(b) ("At the hearing the issue shall be whether the prisoner presently meets the criteria for insanity at time of execution, that is, whether the prisoner lacks the mental capacity to understand the fact of the pending execution and the reason for it"). As this Court has expressed, "the Eighth Amendment only requires that defendants be aware of the punishment they are to suffer and why they

are to suffer it," *Provenzano*, 760 So. 2d at 140, and nothing the Supreme Court has later said in any way altered this standard, in this Court's view. *Ferguson*, 112 So. 3d at 1157 (*Panetti* "does not alter our decision in *Provenzano*").

The Supreme Court in *Panetti* spoke in unmistakably clear language when it concluded that the competency standard endorsed by this Court in *Provenzano* and *Ferguson* was constitutionally insufficient. *See Ferguson v. Sec'y, Fla. Dep't of Corrections,* 716 F. 3d 1315, 1344 (11th Cir. 2013) (Wilson, J., concurring in the result) (noting that this Court's standard articulated in *Provenzano* and *Ferguson* is "patently incorrect" after *Panetti*). In reviewing the Fifth Circuit Court of Appeals' competency standard, which asked only whether the prisoner "know[s] the fact of his impending execution and the reason for it," *Panetti*, 551 U.S. at 942, the Supreme Court concluded that factual awareness was not enough under the Eighth Amendment: A prisoner is competent to be executed only if he is aware of the reason for his execution *and* has a "rational understanding" of the State's justification for his execution, including the reason the community would want to punish him for his crime. *Id.* at 958. Under the Eighth Amendment, it is error to assess a prisoner's competency to be executed without considering whether a mental illness or gross delusions may affect his ability to rationally understand the meaning and purpose of his punishment. *Id.* at 959-60. The *Panetti* Court explained the difference between

the older *Ford* standard and the new *Panetti* one: "[a] prisoner's *awareness* of the State's rationale for an execution is not the same as a *rational understanding* of it." *Id.* at 959 (emphasis added).

In his dissenting opinion in *Panetti*, Justice Scalia explained that the majority's decision had "imposed a new standard for determining incompetency" and imposed "an additional constitutional requirement" on top of the baseline set forth in *Ford*. *Panetti*, 551 U.S. at 978 (Scalia, J., dissenting); *see also id.* at 980 (writing that "today's opinion can only be understood as holding for the first time that the Eighth Amendment requires 'rational understanding'"). Justice Scalia's observations were correct. *See, e.g. Commonwealth v. Banks*, 29 A. 3d 1129, 1144 (Pa. 2011) ("[F]ollowing *Panetti*, it is clear that the Eighth Amendment requires a petitioner not only to have a factual understanding of the penalty and the reasons for it, but also a rational understanding of it . . . "); *Overstreet v. State*, 877 N.E. 2d 144, 172 (Ind. 2007) (noting that *Panetti* "departed from the Justice Powell formulation and expanded upon the Eighth Amendment's reach for persons with mental illness").

In Mr. Gore's case, the lower court, perhaps understandably so given the Court's recent decision in *Ferguson* and the language of Rules 3.811 and 3.812, applied the obsolete "factual awareness" standard without any regard for the most recent standard announced in *Panetti*. Unwilling to cede any ground, the State

endorses the lower court's adherence to the older standard notwithstanding the language of *Panetti* itself. While acknowledging Mr. Gore's argument that *Panetti* "altered" the competency-to-be-executed standard, the State does nothing more than seek refuge in this Court's determination in *Ferguson* to salvage the *Provenzano* holding (AB at 66). Neither *Ferguson* nor *Provenzano* survive *Panetti* and this Court should so acknowledge at this time.

B. The lower court's order lacks competent and substantial support in the record.

The brevity of the State's rebuttal to the factual arguments set forth in Mr. Gore's brief reveals that it has chosen to either not respond to Mr. Gore's arguments or, in reality, it has no cogent response to the criticisms in Mr. Gore's brief of the findings made by the lower court. That the State chooses to dodge Mr. Gore's arguments speaks volumes.

Despite regurgitating the "competent and substantial evidence" standard throughout its argument, the State never actually defines what that standard actually means. "Although the terms substantial evidence or competent, substantial evidence have been variously defined, past judicial interpretation indicates that an order which bases an essential finding or conclusion solely on unreliable evidence should be held insufficient." *Fla. Rate Conference v. Fla. R.R. & Pub. Utilities Comm'n.*, 108 So.

2d 601, 607 (Fla. 1959). *See also DeGroot v. Sheffield*, 95 So. 2d 912, 916 (Fla. 1957) (competent and substantial evidence is sufficiently relevant and material that a reasonable mind would accept it as adequate to support the conclusions reached). Under these definitions, the lower court's order must be reversed.

In his Initial Brief, Mr. Gore argued that the lower court's rejection of his claim rested on the factually unsupported premise that Dr. Toomer had not reviewed any of Mr. Gore's prison medical records. The State appears to embrace this unsupported premise (AB at 68). Yet not once in the State's brief does it address the fact that Dr. Toomer did in fact review "collateral information" (AB at 68) about Mr. Gore, including extensive Department of Corrections records regarding Mr. Gore's mental health, the notes of the interviews of prison guards taken by Dr. Tonia Werner, and the testing data performed by Dr. Wade Myers. Dr. Toomer's testimony is clear that he did, in fact, review many DOC medical records relating to Mr. Gore:

- 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."

- 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);

- Dr. Toomer 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);

- Dr. Toomer relied on documents from 1994 showing that Mr. Gore had been prescribed Haldol, a very powerful antipsychotic drug (2PCR. 519; 677);

- Dr. Toomer relied on records from April 3, 1990, showing that Dr. Mhatre prescribed Mr. Gore with Sinequan (2PCR 520, 523);

- Dr. Toomer relied on DOC records also showing 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);

- Dr. Toomer relied on DOC records showing that Mr. Gore regularly refused medical call-outs though he showed signs of mild to moderate mental impairment (2PCR. 679);

- Dr. Toomer 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. The lower court's order is hardly grounded on reliable and sufficient evidence to pass muster under the competent and substantial evidence test. *Fla. Rate Conference, supra* at 607. Simply repeating, over and over, the unsubstantiated argument that Dr. Toomer did not review medical records, does not make it any more true.

Likewise, the State makes no effort whatsoever to address Mr. Gore's arguments that completely undermine the lower court's reliance on the opinions of Drs. Myers and Werner because they purportedly "reviewed the relevant records" (2PCR at 441). As the actual documents introduced into evidence established, they did no such thing. Nor apparently has the State, since it does not bother to once mention the documents or Mr. Gore's arguments in its brief.

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.[7] They testified that Mr. Gore was "feigning" migraine headaches. The DOC medical records clearly establish otherwise.[8] They testified that Mr. Gore had never been diagnosed with any major mental illness by DOC. The DOC medical records clearly establish otherwise. *See,*

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[7]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 (2PCR. Supp. LXXI, Med.2; LXXIII, Med.377, 420, LXXIV, Med. 667). In 2004, similar complaints were made about his prescribed hearing aid not working properly (2PCR. Supp. LXXI, Med 2; LXXIII, Med. 417, 420). In 2005, DOC sent Mr. Gore to an audiologist, who diagnosed Mr. Gore with chronic hearing loss (2PCR.Supp. LXXII, Med.112). In 2009, Mr. Gore was prescribed a new set of hearing aids (2PCR. Supp. LXXIII, Med.377) . 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 (2PCR. Supp. LXXI, Med.2). By 2012, DOC had diagnosed Mr. Gore with hearing loss bilateral and profound (2PCR. Supp. LXXII, Med.195). In May, 2013, DOC diagnosed Mr. Gore with "profound hearing loss." (2PCR. Supp. LXXII, Med. 221).

[8]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 (2PCR. Supp. LXXII, Med. 264; LXXIII, Med. 390,407,423,424, 428, 442, 444, 459, 463; LXXIV, Med. 615, 620, 622, 624, 629, 665; LXXV, Med. 718-19, 760, 764, 767) .

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, and the State ignores, 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 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.

Relying on a few snippets of testimony from DOC employee Lt. Cauwenbergs,[9] the State contends that could not have been any change in Mr. Gore's mental health as a result of witnessing two other inmates, William Van Poyck and Elmer Carroll, taken from their cells and executed (AB at 69). But the State never explains how Mr. Gore coughing, or being relieved after being informed that a stay of execution, or that he "appeared happy," has anything to do with Mr. Gore's mental health or his delusional belief system. As Cauwenberghs himself acknowledged, he is not a medical doctor or a psychologist (2PCR. 742-43).[10]

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[9]In order to marshal evidence to use against Mr. Gore at the evidentiary hearing, three assistant state attorneys were granted permission to enter Florida State Prison on Sunday, July 14, 2013, where they were provided a private room and up to nearly a dozen correctional officers, mostly off-duty, were summoned for interviews (2PCR. 733-38; 851-52; 867-68). Contrast the ease by which the State was able to gather evidence with the difficulty of Mr. Gore's counsel to even get a copy of their own client's medical files; the request for Mr. Gore's records made by Mr. Hammer was denied, and it was only because the federal court granted federal habeas counsel's motion to compel production of the records, over the State's objection, were the records ever disclosed.

[10]Dr. Toomer evaluated Mr. Gore **after** he had witnessed his two cell neighbors, Mr. Van Poyck and Mr. Carroll, taken away to be executed. The Governor's doctors could have no opinion on Mr. Gore's reaction to these events because they did not see him after he experienced these executions. Contrary to the State's argument, Dr. Toomer could not have testified about the difference between the Governor's doctor's observations and conclusions before Mr. Gore witnessed his cell neighbors' executions and Dr. Toomer's conclusions afterward. He was not a party to the Governor's doctors' evaluations, nor did the Governor's doctors ask to re-evaluate Mr. Gore closer in time to the evidentiary hearing. Clearly, Dr. Toomer's observations closer to the time of Mr. Gore's own execution

Because the essential factual premise underlying the rejection of Dr. Toomer's opinion is faulty and consequently lacks competent and substantial evidentiary support, a point which the State apparently concedes by silence, it provides no basis for this Court to defer to the lower court's discounting of Dr. Toomer's opinions. *See Hardwick v. Crosby*, 320 F.3d 1127, 1158-59; n.141 (11th Cir. 2003)(no deference due state court fact findings when "some factual issues decided by the state trial judge were 'not fairly supported by the record.'"). 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, who clearly did not read the records they claimed to have read. 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. This Court should reverse.

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and after seeing his neighbors taken away for execution, would be a more valid snapshot of Mr. Gore's current mental status.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on August 7, 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
Todd G. Scher

/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
Todd G. Scher

/s/ Terri L. Backhus
Terri L. Backhus