

**UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF FLORIDA**

**CASE NO. 12-CV-23817-HURLEY**

**JOHN FERGUSON**  
**Petitioner,**

**vs.**

**KENNETH S. TUCKER, in his official  
capacity as the Secretary, Florida  
Department of Corrections,  
Respondent.**

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**ORDER GRANTING EMERGENCY MOTION FOR STAY OF EXECUTION  
PENDING DISPOSITION OF PETITION FOR WRIT OF HABEAS CORPUS**

On October 19, 2012, petitioner submitted a petition for writ of habeas corpus pursuant to 28 U.S.C. § 2254. Together with his petition, petitioner submitted a motion for emergency stay of his execution date pending disposition of the petition for writ of habeas corpus.

Upon consideration, the court issued an electronic order granting the emergency motion for stay of execution on October 20, 2012 [ECF NO. 19]. By this order, the court now memorializes its ruling by entering a “hard copy” of its order.

Title 28 U.S.C. § 2251(a)(1) authorizes a federal court, before whom a habeas corpus proceeding is pending, to “stay any proceeding against the person detained in any State court or by or under the authority of any State for any matter involved in the habeas corpus proceeding.” Once a capital defendant invokes his right to appointed counsel, a federal court also has jurisdiction under § 2251 to enter a stay of execution. *McFarland v Scott*, 512 U.S. 849, 858, 114 S. Ct. 2568, 129 L.Ed. 2d 666 (1994). Upon consideration of all relevant factors, the court has determined to exercise that authority here.

### Discussion

John Errol Ferguson is a Florida death-row inmate. He was scheduled for execution on October 23, 2012 at 6 p.m. On October 19, 2012, Ferguson filed a petition for writ of habeas corpus in this court and moved the court to stay his execution on ground he is incompetent to be executed under the standards set by the United States Supreme Court in *Ford v. Wainwright*, 477 U.S. 399, 106 S. Ct. 2595, 91 L.Ed. 2d 335 (1986) and *Panetti v. Quarterman*, 551 U.S.930, 948, 127 S. Ct. 2842, 168 L.Ed.2d 662 (2007).

Because a claim of incompetency to be executed does not become ripe until execution is imminent, *see Stewart v Martinez -Villareal*, 523 U.S. 637, 644-645, 118 S. Ct. 1618, 1622, 140 L.Ed. 2d 849 (1998); *Herrera v. Collins*, 506 U.S. 390, 406, 113 S. Ct. 853, 863, 122 L.Ed. 2d 203 (1993), the petitioner's claim that he is incompetent to be executed is properly before the court, even though petitioner had filed a previous habeas petition challenging the imposition of the initial death sentence. The statutory bar on "second or successive" application does not apply where, as here, a petition is comprised solely of a *Ford*-based incompetency claim in an application filed when the claim first became ripe. *Panetti v. Quarterman*, 551 U.S. 930, 127 S. Ct. 2842, 168 L.Ed. 2d 662 (2007)(prisoner's *Ford*-based claim of incompetency to be executed is not barred by the Antiterrorism and Effective Death Penalty Act (AEDPA)'s prohibition against "second or successive" habeas applications). *Compare Tompkins v. Secretary, Dept. of Corrections*, 557 F.3d 1257 (11<sup>th</sup> Cr. 2009)(inmate petition which asserted *Gardner*, *Brady* and *Giglio* claims, but not *Ford*-based incompetency claim, was second or successive petition which was properly dismissed).

Accordingly, this court has jurisdiction to adjudicate the petitioner's sole claim that the Eighth Amendment prohibits the execution of a prisoner who is not competent by virtue of gross


delusions preventing him from comprehending the meaning and purpose of the punishment to which he has been sentenced. Since the petitioner properly invokes the jurisdiction of this court to entertain his *Ford*-based habeas petition, the the court also has jurisdiction to issue a stay of execution of the death sentence. 28 U.S.C. §2251(a)(1).

In ruling upon the petitioner's emergency motion to stay, the court must determine whether a stay of execution is necessary in order to permit a "fair hearing" on the petitioner's claim that the Florida Supreme Court's decision is contrary to or constitutes an unreasonable application of the precedent set by the United States Supreme Court. A stay is necessary to permit that "fair hearing." The court recognizes the State has a legitimate interest in carrying out its sentence, but it may do so only if its action is consistent with the Constitution of the United States.

It is accordingly **ORDERED AND ADJUDGED:**

1. Petitioner John Errol Ferguson's emergency application for stay of execution [ECF No. 3] is **GRANTED**.
2. The State of Florida, including its officers, agents, and employees, is prohibited from executing John Errol Ferguson pending further order of this court.

**DONE AND ORDERED** in Chambers at West Palm Beach, Florida this 22<sup>ND</sup> day of October, 2012.

  
Daniel T. K. Hurley  
United States District Judge

cc. All counsel

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c/o Agency Clerk

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