
>> ALL RISE.
HEAR YE, HEAR YE, HEAR YE, THE
SUPREME COURT OF FLORIDA IS NOW
IN SESSION.
ALL WHO HAVE CAUSE TO PLEAD,
DRAW NEAR, GIVE ATTENTION, YOU
SHALL BE HEARD.
GOD SAVE THESE UNITED STATES,
THE GREAT STATE OF FLORIDA, AND
THIS HONORABLE COURT.
LADIES AND GENTLEMEN, THE
SUPREME COURT OF FLORIDA.
PLEASE BE SEATED.
>> WELCOME TO THE FLORIDA
SUPREME COURT.
OUR FIRST CASE FOR THE DAY IS
FERGUSON VERSUS STATE OF
FLORIDA.
YOU MAY PROCEED.
>> THANK YOU YOUR HONOR.
MAY IT PLEASE THE COURT.
MY NAME IS CHRISTOPHER
HANDMAN.
I REPRESENT MR. FERGUSON.
I WOULD LIKE TO FOCUS
PRINCIPALLY ON TWO RELATED
CLAIMS THE CIRCUIT COURT'S
DENIAL OF THE CLEMENCY CLAIM AND
ITS RELATED DETERMINATION
REGARDING MOTION FOR
DETERMINATION OF COMPETENCY.
>> ON THE CLEMENCY CLAIM, COULD
YOU START OFF BY EXPLAINING
WHEN MR. FERGUSON WOULD HAVE
FIRST BECOME ELIGIBLE TO BE
CONSIDERED FOR CLEMENCY?
>> THE FIRST TIME HE WOULD HAVE
BEEN ELIGIBLE WAS IN 1986 WHICH
IS WHEN THE GOVERNOR FIRST
INITIATED THAT PROCEEDING.
>> OKAY. 1986.
SO HE HAS BEEN ELIGIBLE TO BE
CONSIDERED FOR CLEMENCY SINCE
1986?
>> THAT'S CORRECT.
>> WELL, ISN'T A LITTLE LATE IT
DAY TO BE BRINGING UP A
CLEMENCY ISSUE HERE ALL THESE
YEARS LATER ONLY WHEN A WARRANT
IS SIGNED?
WHY ARE YOU NOT TIME BARRED?
>> WE'RE NOT TIME BARRED FOR
THE SAME REASON THIS COURT HAS
NEVER APPLIED A TIME BAR.
IN GORE, BUNDY, JOHNSTON,
MAREK, AIL THE CLAIMS THE
STATE IS FOND OF REMINDING THIS

COURT REJECTED TYPES OF
CLEMENCY CLAIMS.
NOT ONE OF THOSE SITUATIONS, NOT
ONE CASE DID THIS COURT
SUGGEST THERE WAS A TIME BAR
PROBLEM.
ALL OF THEM, GORE, JOHNSTON,
DATE BACK TO INITIAL CLEMENCY
HEARING IN 1987.
>> WE CERTAINLY DIDN'T HOLD
EXPRESSLY THERE WAS NOT A TIME
BAR.
I MEAN, IF YOU READ OUR CASE
LAW, YOU WILL KNOW THAT WE WILL
GO OFF IN DIFFERENT DIRECTIONS
DEPENDING WHAT SEEMS TO BE THE
MOST EXPEDITIOUS WAY TO DEAL
WITH A PARTICULAR CLAIM.
>> AND THE, BUT I WOULD SUGGEST
THAT THERE IS SOMETHING MORE TO
IT THAN SIMPLY LOOKING FOR AN
ALTERNATIVE HOLDING.
THE REASON WHY IT MAKES SENSE
NOT TO APPLY A TIME BAR TO THIS
SITUATION AND THE REASON WHY
THE TRIGGERING MECHANISM IS THE
SIGNING OF A DEATH WARRANT
BECAUSE THE PETITIONER HAS NO
OBLIGATION TO GO OUT AND SEEK
THAT CLEMENCY PETITION.
THE ONLY REASON --
>> WHAT DO YOU MEAN OBLIGATION?
IF HE WANTS CLEMENCY, WHY
WOULDN'T HE SEEK IT?
>> BECAUSE THE WAY THE LAW IS
STRUCTURED, YOUR HONOR, IS THAT
CLEMENCY MUST PRECEDE, SOME
CLEMENCY HEARING MUST PROCEED
THE CARRYING OUT OF THE DEATH
SENTENCE.
THAT'S WHAT THE HARBISON CASE
STANDS FOR.
THAT IS WHAT THE SUPREME COURT
DECISION IN WOODARD STANDS FOR.
SO AN INMATE --
>> YOU'RE SAYING EVERY
DEFENDANT IS ENTITLED TO A
CLEMENCY HEARING?
>> SURE.
I DON'T THINK THERE IS ANYTHING
PARTICULARLY RADICAL ABOUT THAT
PROPOSITION.
THAT IS THE FAIL-SAFE MECHANISM
THAT THE SUPREME COURT
RECOGNIZED IN HARBISON.
>> MY QUESTION REALLY IS, IS
THE DEFENDANT ENTITLED TO BE

PRESENT AT THE CLEMENCY
HEARING?

>> YES, ABSOLUTELY AND I THINK
THAT'S A KEY COMPONENT TO THE
MINIMUM LEVEL OF DUE PROCESS
THAT THE SUPREME COURT
RECOGNIZED IN WOODARD AND THAT
THIS COURT IN MAREK
CONFIRMED THERE WERE FIVE VOTES
IN THE WOODARD CASE TO MANDATE
SOME MINIMUM LEVEL OF DUE
PROCESS. AND --

>> WHAT IS, WHAT IS A DEFENDANT
GOING TO PRESENT AT THE
CLEMENCY?

>> OH, THERE ARE ANY NUMBER OF
SITUATIONS THAT THE DEFENDANT
COULD PRESENT.
ONE, HIS PERSONAL BACKGROUND.
IN MR. FERGUSON'S CASE IN
PARTICULAR AS WE'VE
DEMONSTRATED, THIS IS SOMEONE
WHO'S HAD A TORTUOUS MENTAL
HEALTH HISTORY FOR OVER 40
YEARS.
HE CAN BE ABLE TO DISCUSS THAT.
HE CAN TALK ABOUT THE FAMILY
SITUATION.
THAT WAS PARTICULARLY IMPORTANT
HERE BECAUSE ALTHOUGH COURTS
HAVE REJECTED INEFFECTIVE
ASSISTANCE OF COUNSEL CLAIMS
HIS INITIAL COUNSEL AT BOTH OF
HIS TRIALS FAILED TO PRESENT
ANY MITIGATING EVIDENCE FOR
PLEADING --

>> MR. FERGUSON IS GOING TO
PRESENT THIS INFORMATION
HIMSELF.

>> OF COURSE NOT.

>> OR WILL HIS ATTORNEY DO IT?

>> HIS ATTORNEY WILL DO --

>> MR. FERGUSON HAS SO-CALLED
MENTAL HISTORY OF NOT BEING
ABLE TO SPEAK.
HOW CAN HE ALL OF SUDDEN BE
ABLE TO FUNCTION AT A CLEMENCY
HEARING?

>> THAT IS EXACTLY THE POINT.

>> ISN'T THIS LIKE A CATCH 22?
DIDN'T HE HAVE A CLEMENCY
HEARING ONE SCHEDULED FOR HIM
AND HE COULDN'T APPEAR?

>> EXACTLY.

>> BECAUSE OF WHAT?

>> BECAUSE HE WAS INCOMPETENT.

>> OKAY.

>> AND THAT IS EXACTLY THE
POINT THOUGH.
IF YOU RECOGNIZE THAT,
COMPETENCY IS REQUIRED TO HAVE
A MEANINGFUL, SUFFICIENTLY
MINIMAL LEVEL OF DUE PROCESS,
TYPE OF HEARING, THEN OF COURSE
YOU DO WHAT THE PAROLE
COMMISSION DID.
IF YOU LOOK AT EXHIBIT A --
>> BUT THE REALITY IS WE DON'T,
THE MINIMAL LEVEL OF DUE
PROCESS HAS NOT REALLY BEEN
DEFINED BY THE U.S. SUPREME
COURT.
JUSTICE O'CONNOR SUGGESTED IF
CLEMENCY WAS DECIDED BY
FLIPPING A COIN THAT WOULD
RAISE DUE PROCESS CONCERNS.
OR IF A DEFENDANT WAS PRECLUDED
FROM SUBMITTING ANY SORT OF
INFORMATION, I THINK THAT IS
THE OTHER THING THAT SHE
SPECIFICALLY MENTIONED.
BUT WE DON'T HAVE ANYTHING LIKE
THAT HERE.
THERE'S NOTHING THAT SHOWS THAT
TO THE EXTENT THAT MR. FERGUSON
AND HIS COUNSEL WANTED TO
SUBMIT INFORMATION TO THE
GOVERNOR AND THE CABINET WITH,
THAT WOULD BEAR ON A REQUEST
FOR CLEMENCY AND CONSIDERATION
OF CLEMENCY THAT WAS IN ANY WAY
PRECLUDED FOR ALL THESE YEARS
SINCE 1986.
>> YOUR HONOR, I THINK THAT
QUESTION RAISES TWO QUESTIONS.
THE TIME BAR ISSUE AND A MERITS
QUESTION GETTING BACK TO
JUSTICE PERRY'S QUESTION.
ON THE MERITS QUESTION, THE
WHOLE REASON WHY THE PAROLE
COMMISSION IN THE FIRST PLACE
HAD A COMPETENCY HEARING AND
WHY IT SAID AT PAGE 5 OF THE
TRANSCRIPT AND PAGE 8 OF THE
TRANSCRIPT THAT IT WAS
POSTPONING BECAUSE HE WAS
INCOMPETENT AND BECAUSE HIS
LAWYER WAS POWERLESS TO PRESENT
ANY INFORMATION BECAUSE HE
COULDN'T EVEN CONVERSE WITH HIS
CLIENT.
THERE IS TESTIMONY FROM --
>> BUT DON'T WE KNOW FROM
THINGS THAT HAVE HAPPENED IN

FEDERAL COURT THAT THERE WERE
JUDICIAL DETERMINATIONS THAT HE
WAS NOT INCOMPETENT?

>> THERE WERE DETERMINATIONS IN
THE FEDERAL HABEAS THAT HE WAS
COMPETENT AT THAT POINT TO
PROCEED WITH HIS REPRESENTATION.
NOW, THAT DOESN'T, HOWEVER,
THIS GETS BACK TO THE TIME BAR
QUESTION.

IT'S, THE QUESTION IS WHAT'S
THE NATURE OF THE RIGHT?
THE NATURE OF THE RIGHT HERE,
AND WE THINK THIS IS BASED ON
HARBISON AS A FAIL-SAFE, IS
THAT A DEFENDANT IS ENTITLED TO
CLEMENCY HEARING BEFORE THE
EXECUTION IS CARRIED OUT,
BEFORE THE SENTENCE IS CARRIED
OUT.

NOW IF I'M ENTITLED TO SOME
TYPE OF PROCESS, I DON'T HAVE
TO SPEAK UP.

IN A FORECLOSURE SITUATION, IF
YOU CAN'T FORECLOSE UNTIL
YOU'VE RECEIVED A CERTAIN
NOTICE, EVEN IF YOU KNOW YOU'VE
BEEN DEFAULTING FOR MONTHS AND
MONTHS AND MONTHS YOU CAN WAIT
UNTIL YOU GET THAT NOTICE.
THE SAME THINKING IS TRUE HERE.

YOU ARE, AN INMATE DOESN'T HAVE
TO SPEAK UP AND SAY, GIVE ME MY
CLEMENCY HEARING UNTIL IT HAS
BEEN PROVED THERE IS A
VIOLATION.

THE VIOLATION OCCURS WHEN THE
GOVERNOR ATTEMPTS TO CARRY OUT
AN EXECUTION WITHOUT GOING
THROUGH THAT VERY MINIMAL
PROCESS.

THAT'S WHY THIS COURT I WOULD
SUBMIT HAS NEVER UNTIL NOW
SUGGESTED THAT THERE IS A TIME
BAR TYPE OF QUESTION HERE.

>> CLEMENCY IS A MATTER OF, HOW
IS IT STATED? EXECUTIVE GRACE?

>> WELL THAT I THINK AN
IMPORTANT CONTENTION BECAUSE
THIS COURT'S PREVIOUS CASES IN
ASKEW DATING BACK TO THE '70s
DID FORMULATE IN TERMS OF GRACE
BUT I DON'T THINK THAT
FORMULATION IS HARMONIZED.

>> IS THERE TOTAL DISCRETION
ONCE THE GOVERNOR AND THE BOARD

HEARS EVERYTHING THAT IS
PRESENTED ON, IN THIS CASE,
YOUR CLIENT MR. FERGUSON'S
BEHALF, AND THEY DENY
CLEMENCY, WHAT IS THE REVIEW
FROM THE DENIAL OF CLEMENCY?
>> ZERO.
>> ZERO?
>> EXACTLY.
>> SO IT'S COMPLETELY, I MEAN I
UNDERSTAND WHEN YOU'RE DOWN TO
THE WIRE YOU'VE GOT TO COME UP
WITH WHATEVER YOU'RE GOING TO
COME UP WITH, BUT WHAT I DON'T
UNDERSTAND HERE IT IS CLEMENCY
THAT HE IS GOING TO BE, LEAVE
DEATH ROW, SO HE WOULDN'T HAVE
TO BE ON DEATH ROW?
IN OTHER WORDS SINCE 1986 THEY
HAD GRANTED CLEMENCY, WHAT WOULD
HAVE HAPPENED?
>> YES.
THEY WOULD HAVE REDUCED THE
SENTENCE TO LIFE IN PRISON.
>> SO WE HAVE ON ONE HAND A
CLAIM THAT THIS MAN HAS BEEN ON
DEATH ROW FOR HOW MANY YEARS?
>> 34.
>> YET FROM 1986 UNTIL 2012 HE
DOESN'T RAISE THE CLAIM THAT HE'D
LIKE TO BE OFF DEATH ROW
THROUGH CLEMENCY?
SEE, THAT'S WHY TO ME THESE,
THIS IS, I APPRECIATE THAT
YOU'RE RAISING IT BUT IT SEEMS
TO ME THAT IT'S VIRTUALLY A
MEANINGLESS RIGHT FOR A
DEFENDANT WHO IS TRYING TO ASK
FOR CLEMENCY AT THE MOMENT THE
GOVERNOR HAS DETERMINED HE IS
READY TO BE EXECUTED.
THE GOVERNOR MADE THAT
DETERMINATION THAT HE SHOULDN'T
GET CLEMENCY.
>> THAT GETS TO THE VERY
QUESTION WHAT IS RIGHT OF
CLEMENCY IN THE FIRST PLACE AND
WHAT ARE THE MINIMUM DUE
PROCESS STANDARDS?
IF THE GOVERNOR SIMPLY FLIPS A
COIN TO DETERMINE THAT QUESTION
WE KNOW FROM JUSTICE O'CONNOR'S
OPINION IN WOODARD THAT IS
INSUFFICIENT.
WE DON'T KNOW WHAT PROCESS IF
ANY THE GOVERNOR USED HERE.
THAT IS ONE OF THE KEY PROBLEMS

AND THE CIRCUIT COURT --
>> WE WILL NEVER KNOW WHAT
PROCESS THE GOVERNOR USES TO
DETERMINE IF HE IS GOING TO
CALL A CLEMENCY HEARING OR NOT.
I MEAN, THE WHOLE NOTION THAT
THIS DEFENDANT, AFTER ALL THIS
TIME IS NOW, OH, PLEASE TAKE ME
OFF DEATH ROW, IT IS TROUBLING.
>> WE DON'T KNOW, OF COURSE, THE
GOVERNOR CAN MAKE IN HIS
DISCRETION WHATEVER
DETERMINATION HE IS GOING TO
MAKE.
BUT WHAT WE DO KNOW IS THAT
DEFENDANTS ARE ENTITLED TO GO
BEFORE A PAROLE COMMISSION.
THERE IS A PROCESS THAT FLORIDA
HAS ENSHRINED AND WE KNOW THAT
THE FEDERAL CONSTITUTION --
>> AT THE TIME WHEN THERE WAS A
SCHEDULED CLEMENCY HEARING WHAT
IF ANYTHING DID THE DEFENSE
ATTORNEYS DO OTHER THAN SAY,
HE'S INCOMPETENT TO APPEAR?
DID THEY PRESENT ANY KIND OF
INFORMATION TO THE CLEMENCY
BOARD?
>> NO.
AND IF YOU LOOK AT EXHIBIT A TO
OUR MOTION BELOW YOU WILL SEE
THIS WASN'T A FAILURE OF
COUNSEL.
THIS WAS, THE COMMISSION ITSELF
RECOGNIZED, AND I THINK THIS IS
IMPORTANT.
BASED ON THE STATE'S OWN
PSYCHIATRIST SAYING THIS MAN IS
INCOMPETENT.
HE DOESN'T EVEN KNOW WHO THE
JUDGE IS.
HE DOESN'T UNDERSTAND WHAT THE
NATURE OF THIS PROCEEDING IS.
HE DOESN'T UNDERSTAND HOW
IMPORTANT IT IS, THE COMMISSION
ITSELF SAID WE CAN'T GO
FORWARD.
WE HAVE TO CONTINUE THIS.
HIS LAWYER WAS NOT ENTITLED TO
SUBMIT ANYTHING.
IN LARGE PART BECAUSE HIS LAWYER WAS
RECENTLY OBTAINED TO REPRESENT
HIM.
WAS NOT ABLE TO COMMUNICATE
WITH HIM AND WASN'T ABLE TO
PRESENT ANYTHING TO THE COURT.
>> HERE IS THE SECOND RELATED

ISSUE.
YOU SAY THE SUPREME COURT
IMPROPERLY DENIED THE MOTION
FOR DETERMINATION OF
COMPETENCY.
COMPETENCY TO PROCEED IN
POST-CONVICTION?
COMPETENCY TO PROCEED IN THE
CLEMENCY PROCEEDINGS?
COMPETENCY TO DO WHAT?
>> COMPETENCY TO PROCEED IN
THIS 3851 PROCEEDING.
>> SO YOUR ARGUMENT REALLY
WOULD BE, IF WE SAID THAT HE IS
ENTITLED TOMORROW TO A CLEMENCY
DETERMINATION, ISN'T YOUR
ARGUMENT THAT HE IS NOT
COMPETENT TO PROCEED IN THE
CLEMENCY PROCEEDING?
>> WELL, I DO THINK THERE IS,
DEFINITELY THAT SORT OF
PROBLEM.
I DON'T THINK THAT IS
ACTUALLY --
>> THAT IS NOT SORT OF A
PROBLEM.
ISN'T THAT THE ACTUAL PROBLEM?
ISN'T THE, IF HE IS INCOMPETENT
AT THE PRESENT TIME, IS
COMPETENCY TO BE EXECUTED THE
SAME AS COMPETENCY TO BE
PRESENT AND PARTICIPATE IN A
CLEMENCY PROCEEDING?
>> NO.
I THINK THOSE ARE SLIGHTLY
DIFFERENT STANDARDS.
>> WHICH ONE, THE LOWEST IS
COMPETENCY TO BE EXECUTED?
>> I THINK, THE FORD
STANDARD FOR COMPETENCY TO BE
EXECUTED IS LOWER STANDARD TO
MEET HERE. BUT I THINK --
>> SO BUT YOU'RE REALLY SAYING,
YOU WANT A CLEMENCY PROCEEDING
BUT ON THE OTHER HAND HE IS NOT
COMPETENT TO PROCEED IN THE
CLEMENCY HEARING?
>> SURE. BUT THERE --
>> THAT IS THE FIRST THING.
YOU WOULD ARGUE THAT WHAT WE
SHOULD FIRST DO IS REMAND THIS
FOR A DETERMINATION AS TO
WHETHER HE IS COMPETENT TO
PROCEED?
>> YES.
>> AND WHAT IS THE, WHAT DID
YOU PUT ON, I MEAN WHAT DID YOU

PUT ON TO MAKE A PRIMA FACIE
SHACASE THAT SHOULD BE
SOMETHING ADJUDICATED BY THE
TRIAL COURT?

>> WE DID, WE SUBMITTED A
MOTION SIGNED BY ONE OF THE
ATTORNEYS, MISS BRANNON, WHO
HAS MET WITH HIM ON SEVERAL
OCCASIONS TESTIFYING TO HIS
DIMINISHED MENTAL CAPACITY.

>> WHAT IS ACTUALLY THE
SITUATION?

I MEAN BECAUSE THERE IS A LOT
IN THE RECORD ABOUT HIM BEING A
MALINGERER.

WHAT IS, AND HOW LONG HAVE YOU
REPRESENTED HIM?

>> OUR FIRM HAS REPRESENTED HIM
SINCE 1987.

>> WELL, AND, I ASSUME YOUR
FIRM DOES THIS PRO BONO?

>> YES.

>> PLEASE UNDERSTAND THESE
QUESTIONS ARE QUESTIONS, WE
APPRECIATE YOUR ADVOCACY.
SO HE HAS BEEN INCOMPETENT
ACCORDING TO OBSERVATIONS OF
YOUR FIRM SINCE 1986 TO THE
PRESENT?

>> YES.

>> BUT YET THE FEDERAL COURTS
HAVE DISAGREED, IS THAT
CORRECT?

>> WELL THE FEDERAL COURTS HAVE
DISAGREED AT TIMES.

IT IS IMPORTANT TO RECOGNIZE
COMPETENCY IS NOT A STATIC
INQUIRY.

JUST BECAUSE SOMEONE MAY BE
FOUND COMPETENT IN 2004 DOESN'T
SUGGEST THEY'RE INCOMPETENT
DOWN THE ROAD.

JUST AS FOR EXAMPLE, STATE OF
FLORIDA CONSISTENTLY FOUND HIM
INCOMPETENT FROM 1975 UNTIL
1978.

SEVEN DIFFERENT STATE APPOINTED
PSYCHIATRISTS CONSISTENTLY SAID
THIS MAN IS CERTIFIABLY
INCOMPETENT AND SHOULD NOT BE
LET OUT AFTER PSYCHIATRIC
INSTITUTION.

>> ISN'T THERE EVIDENCE THAT
SHOWS HE BRAGGED ABOUT HOW HE
WAS ABLE TO FOOL THEM AT SOME
POINT?

>> NO.

YOUR HONOR, THE EVIDENCE OF
MALINGERING WAS FIRST OF ALL --
>> THERE IS NO EVIDENCE OF
THAT?
>> NO, I SAID THE EVIDENCE OF
MALINGERING BEFORE THE FEDERAL
COURT I UNDERSTAND WAS
CONTESTED BUT THE IDEA THIS MAN
WAS MALINGERING AND SOMEONE A
BORDERLINE MENTAL
INTELLIGENCE --
>> MY QUESTION TO YOU, WAS
THERE EVIDENCE THAT HE AT SOME
POINT BRAGGED ABOUT BEING ABLE
TO FOOL THE AUTHORITIES?
>> THAT'S WHAT THE STATE'S
EVIDENCE --
>> I UNDERSTAND. YEAH.
THERE WAS EVIDENCE OF THAT?
>> THERE WAS --
>> IT WAS CONTESTED BUT THERE
IS EVIDENCE OF?
>> SURE.
>> WHICH HAS BEEN ACCEPTED BY
APPARENTLY AT SOME TIME,
EVIDENCE SOMEWHERE TO THAT A
HAS-BEEN ACCEPTED BY THE
FEDERAL COURTS?
>> IT HAS BUT AGAIN THE
IMPORTANT POINT THAT WAS IN
2004.
IT DOESN'T INDICATE THAT HE WAS
FAKING AND THAT THERE IS SOME
GRAND CONSPIRACY OF HIS PART
BACK IN THE '70s KNOWING HE WAS
GOING TO BE ON DEATH ROW IN '78
THAT HE MALINGERED AND FEIGNED
ALL THE SYMPTOMS THAT PERSUADED
SEVEN DIFFERENT STATE APPOINTED
PSYCHIATRISTS THROUGHOUT THE
'70s TO SAY THIS MAN IS
SERIOUSLY, CHRONICALLY ILL.
HE SHOULD NOT BE LET OUT OF A
MENTAL HEALTH INSTITUTION AND
YET THE STATE DID LET HIM OUT
EVENTUALLY.
IT DOESN'T REFLECT THE FACT
WE'RE NOW EIGHT YEARS REMOVED
AND MR. FERGUSON IS NOW 64
YEARS OLD --
>> WHAT ADDITIONAL FACTS WERE
ALLEGED IN THE TRIAL COURT,
OTHER THAN LAWYERS SAYING HE
HAS, I HAVEN'T BEEN ABLE TO
TALK TO HIM COHERENTLY?
WERE THERE ADDITIONAL FACTS
THAT YOU ALLEGE THAT WOULD

DEMONSTRATE THAT THIS MAN IS
INCOMPETENT TO PROCEED?

>> SO THERE WERE NO OTHER FACTS
OTHER THAN WHAT WE WERE ABLE TO
PUT TOGETHER PLUS, AND I DON'T
THINK THIS CAN BE DISCOUNTED,
WE SUBMITTED THE MENTAL HEALTH
SUPPLEMENT WHICH CONTAINS OVER
200 PAGES OF CONSISTENT
DIAGNOSIS OVER 40 YEARS SHOWING
THAT THIS MAN IS INCOMPETENT.
KEEP IN MIND, YOUR HONOR, THAT
THE WARRANT WAS SIGNED ON
SEPTEMBER 5th AND WE PUT THIS
MOTION TOGETHER AND FILED ON
SEPTEMBER 11th.

AND I WILL SAY, I KNOW THIS IS
NOT THIS CASE RIGHT NOW BUT
THERE MAY BE A ANOTHER CASE
SOON, WE HAVE FILED UNDER
922.07 A MOTION ABOUT HIS
COMPETENCY TO BE EXECUTED.
THERE ARE EXPERT REPORTS THAT
HAVE BEEN COMPILED ABOUT THAT.

>> I WANT TO ASK ABOUT THAT.
IT STRIKES ME, ALTHOUGH THIS IS
WHAT THE STATUTE REQUIRES, IS
THAT COMPETENCY TO BE EXECUTED
WILL TAKE PLACE IN BRADFORD
COUNTY, THIS CIRCUIT.

>> CORRECT.

>> THIS CASE IS IN
MIAMI-DADE, THE 11th CIRCUIT.
SO WE'RE GOING TO HAVE, IF WE
FOLLOW YOUR POINT OR AGREE WITH
YOU THAT NEEDS A COMPETENCY
EVALUATION TO PROCEED, IT SEEMS
THERE IS SOMETHING INHERENTLY
INEFFICIENT AND DIFFICULT THAT
WE'RE GOING TO HAVE A JUDGE IN
MIAMI-DADE LOOKING AT ONE SET
OF INFORMATION AND A JUDGE IN
BRADFORD WHO HAS NO FAMILIARITY
WITH THE CASE LOOKING AT
ANOTHER.

SO HE COULD BE OUT -- I'M GOING
TO ASK THAT TO THE STATE.
IT JUST SEEMS THAT THERE'S A
DIFFICULTY IN THAT WE'LL HAVE
DIFFERENT EXPERTS, IF,
CERTAINLY ONE IS ALREADY
HAPPENED.

IS THERE ANY PRECEDENT FOR
THOSE TWO BEING CONSOLIDATED?

>> YOUR HONOR, I THINK THERE IS
AND I'LL, STATE WILL CORRECT ME
IF I'M WRONG ABOUT THIS BUT I

BELIEVE THE LAST TIME A 922.07
COMPETENCY TO BE EXECUTED CLAIM
WAS RAISED WAS IN THE
PROVENZANO CASE.
>> THAT'S WHAT I THOUGHT IT WAS.
>> I THINK IN
THAT CASE, I INVITE THE STATE
TO CORRECT ME IF I'M WRONG,
PRECISELY FOR THE REASONS THAT
MATTER WAS TRANSFERRED FROM THE
8th CIRCUIT BACK DOWN TO THE
ORIGINAL 3.851 COURT.
I THINK THAT PROCEDURE WOULD
MAKE SENSE HERE.
NOT ONLY BECAUSE OF JUDICIAL
ECONOMY BUT ALSO BECAUSE THE
CIRCUIT COURT WHICH WE'RE HEAR
ON APPEAL HAS ALREADY
RECOGNIZED THERE IS, AS A
FINDING OF FACT IF TIME BAR
DOESN'T APPLY THAT THE DEFENSE
WOULD LIKELY BE ENTITLED TO A
EVIDENTIARY HEARING ON
CLEMENCY.
THAT IS AN IMPORTANT FINDING.
WE DON'T COME TO THIS COURT --
>> WHAT WOULD THE EVIDENTIARY
HEARING CONSIST OF?
IN OTHER WORDS, WE KNOW HE HAD
A, HE HAD A HEARING, BUT HE WAS
INCOMPETENT AT THAT TIME.
SO WHAT WOULD BE OFFERED AT AN
EVIDENTIARY HEARING?
>> WELL I THINK IT IS LARGELY
TO DEAL WITH THE STATE'S POINTS
WHICH, THEY HAVE SUGGESTED THAT
HE DID IN FACT HAVE A HEARING.
THAT ALL THE MINIMAL PROCESSES
THAT ARE DUE WERE PERFORMED.
TO THE EXTENT THAT IS A
QUESTION OF FACT ABOUT WHAT
ACTUALLY OCCURRED AND THERE IS
A SPOTTY RECORD AS YOUR HONORS
MAY HAVE SEEN, THAT WOULD BE
IMPORTANT TO PLAY OUT, TO SEE
WHAT WERE HIS RECOLLECTIONS.
WHAT MIGHT HE BE ABLE TO
PROVIDE TO DETERMINE IF IN FACT
THAT CLEMENCY PROCEEDING DID
MEET AND COMPORT WITH THOSE
STANDARDS.
BUT THE IMPORTANT POINT I WANT
TO EMPHASIZE IN MY REMAINING
TIME IS THAT MR. FERGUSON
DIDN'T HAVE THAT MINIMAL
PROCESS.
THAT DISTINGUISHES THIS CASE

FROM ALL OF THE OTHER
SITUATIONS THAT THIS COURT HAS
CONFRONTED CLEMENCY IN GORE, IN
MAREK, JOHNSTON.

>> WHAT ABOUT VALLE?

>> SAME THING.

IN ALL THE CASES THE DEFENDANT
AT ONE POINT AT LEAST HAD A
QUOTE, FULL COMPETENCY HEARING,
END QUOTE.

OUR SUBMISSION AND I THINK THE
CIRCUIT COURT UNDERSTOOD IT HE
DIDN'T IN FACT HAVE THAT.

HE DIDN'T HAVE THE FULL
COMPETENCY HEARING BECAUSE HE
WAS NEVER COMPETENT TO BE THERE
IN THE FIRST PLACE.

I THINK IT WOULD BE AN EMPTY
RIGHT AS THE STATE SUGGESTS
THAT JUST BECAUSE HE HAD A
LAWYER AT HIS SIDE THAT THAT
SOMEHOW FULFILLS THE COMPETENCY
AND, REQUIREMENTS.

>> YOU ONLY ABOUT A MINUTE FOR
REBUTTAL.

>> IN THAT CASE, YOUR HONOR, I
WILL RESERVE MY TIME.

THANK YOU.

>> GOOD MORNING.

SCOTT BROWNE ON BEHALF OF THE
STATE OF FLORIDA.

>> WOULD YOU JUST ADDRESS THIS
LAST ISSUE ABOUT THERE WILL BE
A PROCEEDING IN BRADFORD THAT
THE GOVERNOR FOLLOW THE
PROCEDURE TO BE EXECUTED THAT
IT IS FILED IN BRADFORD.

YET IF WE DETERMINE WASN'T TIME
BARRED THAT THERE, ACTUALLY HAD
A CLEMENCY HEARING WHETHER HE
IS COMPETENT FOR THOSE
PURPOSES.

DIDN'T THE SAME JUDGE MAKE THAT
DETERMINATION?

>> NO, YOUR HONOR, I THINK BY
RULE THERE IS A REASON A
CIRCUIT JUDGE WOULD HANDLE IT
BECAUSE MOST OF WITNESSES WILL
BE IN NORTH FLORIDA.

THERE IS SECURITY CONCERNS WITH
THE INMATE.

AND AGAIN, TWO OF THE DOCTORS
ARE IN NORTH FLORIDA.

AND FACILITY IS ACTUALLY --

>> SHOULD THE 11th CIRCUIT CASE
BE UP THERE?

IF I'M A JUDGE WANTING TO TRY

TO FIGURE OUT WHETHER THIS GUY
IS A MA INK EARLIER -- MALINGER
OR CERTIFIABLY MENTALLY ILL,
NOT ABLE TO COMMUNICATE TO MEET
THE MINIMUM STANDARD, DON'T I
WANT AS MUCH INFORMATION AS
POSSIBLE ABOUT HIS MENTAL
STATUS AT THE PRESENT TIME?
>> WELL, YOUR HONOR, I WOULD
SUBMIT THE ONLY MENTAL STATUS
AT ISSUE NOW WOULD BE THE 311?
>> THE ONE TO BE EXECUTED?
>> THE JUDGE APPROPRIATELY
DENIED HIS MOTION TO DETERMINE
COMPETENCY TO PROCEED BECAUSE
QUITE FRANKLY THESE ALLEGATIONS
ARE WITHOUT MERIT AS A MATTER
OF ESTABLISHED LAW.
THERE WAS ABSOLUTE ANY --
ABSOLUTELY NO ISSUE THAT
REQUIRED FACTUAL DETERMINATION
IN THE COURT THAT IS A
PRELIMINARY QUESTION.
>> LET ME ASK YOU.
IN 1986 IS IT A FACT THAT AT
THE TIME THAT HE HAD A CLEMENCY
HEARING, THAT HE WAS
INCOMPETENT TO PROCEED?
OR IS THAT CONTESTED?
>> NO, YOUR HONOR.
IN FACT I DO CONTEST THAT.
THERE WERE TWO DOCTORS --
>> SO ISN'T THAT SOMETHING THAT
NEEDS TO BE EXAMINED BY THE
11th CIRCUIT TO KNOW WHAT
HAPPENED?
>> NO, YOUR HONOR. HERE'S WHY.
FIRST OF ALL YOU DON'T HAVE A
RIGHT, ASSUMING FOR A MOMENT,
THOSE DOCTORS WHO ADMITTED IN
THEIR OWN TRANSCRIPT, WE JUST
SAW HIM TWO MINUTES BEFORE HE
CAME IN HERE.
HE APPEARS INCOHERENT.
I DON'T CONSIDER THAT A
FULL-BLOWN COMPETENCY
DETERMINATION.
MR. FERGUSON HAS A LONG HISTORY
OF FEIGNING MENTAL ILLNESS.
BUT YOU HAVE TO FIND AN
UNDERLYING RIGHT HERE TO
JUDICIAL INQUIRY INTO THE
CLEMENCY PROCESS.
AND MR. FERGUSON WHOLLY HAS
FAILED TO DO THAT.
WE KNOW FOR A FACT THAT
CLEMENCY IS A MATTER OF

EXECUTIVE GRACE.
IT LIES WITH THE GOVERNOR.
AND EVEN IF YOU FOLLOW JUSTICE
O'CONNOR'S CONCURRING OPINION IN
WOODARD, THE ONLY LIMITATION ON
THE CLEMENCY PROCESS, AND
AGAIN, CLEMENCY IS NOT REQUIRED
BY THE CONSTITUTION, BUT IF YOU
PROVIDE IT CAN'T BE SIMPLY
FLIPPING A COIN.
THERE IS NO EVIDENCE THAT THE
GOVERNOR OR MEMBERS OF THE
COMMISSION FLIPPED A COIN IN
THIS CASE.
THEY SOUGHT OUT MR. FERGUSON.
THEY ATTEMPTED TO INTERVIEW HIM
TWICE.
HE WAS REPRESENTED BY COUNSEL.
>> BUT THERE WAS NO, THERE WAS
NEVER ANY DETERMINATION MADE BY
THAT COMMISSION AS TO WHETHER
OR NOT HE WAS GOING TO GET
CLEMENCY OR NOT, OR WAS THERE?
>> I DISAGREE, YOUR HONOR.
I BELIEVE THEY HAVE SPECULATED
LIKE IN VALLE THAT THERE WAS NO
DETERMINATION.
THAT'S NOT BEEN PROVEN.
THEY DIDN'T CALL THE ATTORNEY
OR THE PROSECUTORS.
>> WHAT DO THEY NORMALLY DO?
>> IN A NORMAL HEARING IN A
CLEMENCY SITUATION DOES THE
BOARD OR GOVERNOR OR STATE
ISSUE AN ORDER DENYING
CLEMENCY?
>> IT IS MY UNDERSTANDING, IT
IS EITHER ORAL OR WRITTEN
ORDER, EITHER, OR.
BUT THEY DENIED IT.
HE HAS CLEMENCY SUBMISSION.
WHAT MORE JUDICIAL INTRUSION
INTO THIS PROCESS?
>> LET ME ASK A FUNDAMENTAL
QUESTION.
RECOGNIZED IT MAY NOT BE
REQUIRED DO YOU AGREE IT SHOULD
MEET MINIMAL STANDARDS?
>> MINIMAL STANDARDS --
>> WE CAN ARGUE ABOUT THE
STANDARDS BUT THERE ARE
STANDARDS AND YOU SEEM TO BE
INTERPRETING FLIP THE COIN THAT
IS WHAT IS PROHIBITED BUT ISN'T
THAT JUST A FIGURE OF SPEECH?
WASN'T THAT USED IN THE CONTEXT
OF THE PROCEEDING MUST BE MORE

THAN JUST A GAME?
>> CORRECT, MORE THAN A GAME.
>> RIGHT.
>> WHAT COURTS HAVE DONE IS, IF
THERE'S AN ALLEGATION THAT
CLEMENCY WAS DENIED FOR SOME
IMPROPER BASIS, RACE, RELIGION,
IF THERE WAS BRIBERY, INVOLVED,
COURTS MAY LOOK INTO THAT.
BUT AGAIN IT IS EXCLUSIVELY
UNDER OUR CONSTITUTION A MATTER
FOR THE GOVERNOR.
IT'S A MATTER OF EXECUTIVE
GRACE.
SO THE REMEDY HERE, AND AGAIN
THIS GOES BACK TO TIME BAR.
ALL OF THE UNDERLYING FACTS IN
THIS CASE, JUSTICE CANADY, ALL
OF THESE FACTS, ALL OF THEIR
SUBMISSIONS, ALL OF SHARE FACTS
IN SUPPORT OF THEIR MOTION WERE
AVAILABLE AND KNOWN TO
MR. FERGUSON'S COUNSEL IN THE
'80s.
WHY DID THEY BRING IT SUDDENLY
ON THE EVE OF A WARRANT?
NOT THE EVE OF A WARRANT, THE
EVE OF A EXECUTION.
THE ANSWER TO THAT IS CLEARLY --
>> I'M STILL CONCERNED BECAUSE
YOU SAID THAT THE BOARD WOULD
EITHER, MAKE AN ORAL OR WRITTEN
STATEMENT OF DENIAL OF
CLEMENCY.
IN THIS SITUATION AREN'T WE
JUST ASSUMING THAT THE BOARD
DENIED CLEMENCY SINCE WE DON'T
SEEM TO HAVE A WRITTEN OR ORAL
STATEMENT TO THAT EFFECT?
AND ARE WE TO ASSUME BY SIGNING
THE WARRANT, THAT IS A DENIAL
OF CLEMENCY?
>> YES, YOUR HONOR.
IN FACT YOU SAID AS MUCH IN
VALLE AND MAREK.
WHEN THE GOVERNOR STATES IN HIS
WARRANT THAT I HAVE DETERMINED
THAT EXECUTIVE CLEMENCY IS NOT
APPROPRIATE, THAT IS A CLEMENCY
UPDATE.
THAT IS THE CLEMENCY REVIEW TO
WHICH HE IS ENTITLED BEFORE A
DEATH WARRANT IS SIGNED.
AGAIN IN VALLE YOU PUT THE
BURDEN ON THE STATE TO SHOW IT
OCCURRED, MOST OF THESE RECORDS
WE DON'T WANT JUDICIAL

INTRUSION INTO THE CLEMENCY
PROCESS.
THAT WOULD BE BAD PRECEDENT.
YOU PUT THE BURDEN ON
MR. FERGUSON VALLE THAT HIS
CLAIMS WERE SPECULATIVE.
I THINK THE CLAIMS ARE JUST AS
SPECULATIVE.
MR. FERGUSON WAS REPRESENTED AT
ALL TIMES BY ROBERT MARTIN A
CLEMENCY COUNSEL WHO OVERSAW
HIS CASE.
HE SOUGHT A POSTPONEMENT.
THERE IS NOTHING IN THE RECORD
AFTER THAT MR. MARTIN DID NOT
FULFILL HIS DUTIES TO
MR. FERGUSON AND A CLEMENCY,
FULL CLEMENCY DETERMINATION WAS
NOT PROVIDED TO MR. FERGUSON.
AGAIN THIS TYPE OF JUDICIAL
INQUIRY, ESPECIALLY ON THE EVE
OF A WARRANT, WHEN MR. FERGUSON
HAS LITIGATED HIS CASE OVER THE
PAST 30 YEARS IS PARTICULARLY
UNWARRANTED. AGAIN --
>> WOULD YOU SAY, COME UP
AGAIN, CAME UP IN VALLE.
[INAUDIBLE]
REALLY A PRESUMPTION WHEN THE
GOVERNOR SIGNS A WARRANT SAYS
WHAT THE GOVERNOR SAYS IN
THERE.
CLEMENCY HAS BEEN CONSIDERED
REJECTED?
>> EXACTLY, YOUR HONOR.
>> BECAUSE OTHERWISE, WE GET
INTO THIS, THE ONLY OTHER THING
I WOULD BE HOPEFUL IF THERE
ACTUALLY WAS ONCE CLEMENCY WAS
CONSIDERED AND THERE WAS SOME
KIND OF ORDER THAT WAS SENT OUT
AND FILED SO THAT THE COURT
WOULDN'T BE IN THIS POSITION TO
SAY, CLEMENCY HEARING WAS HELD
ON SUCH AND SUCH A DATE.
IT WAS CONSIDERED AND DENIED,
THAT WAY WE WOULDN'T BE IN WHAT
HAPPENED IN VALLE, WONDER WAS
ONE HELD OR NOT.
THIS IS JUST SOMETHING FOR THE
FUTURE PERHAPS BECAUSE SEEMS
LIKE THIS IS SORT OF A
LAST-DITCH CLAIM SOMEONE CAN
MAKE AT THIS POINT.
I DON'T WANT TO, AGAIN, I DON'T
WANT TO MINIMIZE IT BUT STRIKES
ME WHEN THE GOVERNOR'S MADE A

DECISION TO SIGN THE DEATH
WARRANT AND EXECUTE A PERSON,
HE MADE THE DECISION THAT
CLEMENCY WAS --
>> INAPPROPRIATE.
>> ALREADY BEEN CONSIDERED AND
IT WAS DENIED.
>> EXACTLY, YOUR HONOR.
AND AGAIN, THESE ARE DILATORY
LABORATORY TACTICS IN THIS CASE
HE COULD HAVE
RAISED THIS CLAIM WITH JUDGE CASEY
IN 2010 WHEN CERT WAS DENIED AFTER
THE HABEAS CLAIMS.
>> LET ME ASK YOU THAT.
IF A DEFENDANT WANTS TO HAVE A
CLEMENCY PROCEEDING, WHAT
OBLIGATION IS THERE ON THE PART
OF THE GOVERNOR AND THE
CLEMENCY BOARD TO ACTUALLY HAVE
ONE?
>> WELL, HE CAN SEEK ONE AT ANY
TIME. IT'S A MATTER OF EXECUTIVE
DISCRETION.
ONCE YOU HAVE THE INITIAL
CLEMENCY BY GOVERNOR MARTINEZ
IN THIS CASE, NOTHING PREVENTED
MR. FERGUSON WAS SEEKING AN
UPDATE OR ADDITIONAL CLEMENCY.
THE FACT HE HASN'T DONE SO --
>> HE IS ACTUALLY SAYING, THIS
IS WHERE IT'S -- [INAUDIBLE]
HE IS REALLY THAT HE HAS BEEN
INCOMPETENT AND HE IS STILL
INCOMPETENT.
IF WE WERE TO GIVE, IF THE
GOVERNOR WAS TO SAY TODAY, I'LL
GIVE YOU ONE, SAY NO, I'M NOT
COMPETENT TO PROCEED WITH IT.
SO REALLY GOING AROUND --
>> CLEARLY AN ATTEMPT TO DELAY
HIS EXECUTION, YOUR HONOR.
AND AGAIN, ON THE ISSUE OF
INCOMPETENT, WE HAD A
WEEK-LONG, FEDERAL EVIDENTIARY
HEARING IN 2004 IN FRONT OF
JUDGE DANIEL HURLEY.
ALL OF MR. FERGUSON'S MENTAL
HEALTH HISTORY DATING BACK TO
THE '70s WAS AT ISSUE, EVIDENCE
WAS INTRODUCED AND DISCUSSED.
THE STATE PRESENTED ITS EXPERTS
AND HE PRESENTED HIS.
IT WAS ABUNDANTLY CLEAR THAT
MR. FERGUSON, ONCE AGAIN,
FEIGNS MENTAL ILLNESS.
HE MALINGERS.

HE LEADS AN ABSOLUTELY NORMAL
LIFE ON DEATH ROW.
HE WRITES LETTERS.
MEETS HIS NEEDS.
THE PSYCHOLOGICAL TESTING LEFT
NO DOUBT, EVEN BY DR. RICHARD
BILSON, WHO WAS RETAINED BY
FERGUSON HE IS EXAGGERATING.
HIS OWN EXPERT ADMINISTERED THE
NCAIS, A WELL-RECOGNIZED TEST
AND SHOWS THAT HE IS
MALINGERING.
ALL THESE TESTS INCLUDING THE
MMPI COME BACK, HE IS
MALINGERING.
THE GUARDS DON'T NOTICE BIZARRE
UNUSUAL BEHAVIOR.
ACCORDING TO MR. FERGUSON HE IS
CONSTANTLY PSYCHOTIC BUT
NO ONE NOTICES.
MR. FERGUSON FEIGNED MENTAL
ILLNESS BACK IN HIS TRIAL.
HE FEIGNED IT AGAIN AT
POST-CONVICTION IN '80s.
WE HAVE ANOTHER STATE COURT
JUDGE THAT SAYS HE FEIGNS, HE
EXAGGERATES, HE MALINGERS.
>> NO JUDGE HAS FOUND HIM TO BE
INCOMPETENT TO PROCEED AT ANY
TIME?
>> NOT UNDER THESE CAPITAL
CASES. THAT IS CORRECT.
NONE.
>> WHAT DOES THAT MEAN?
>> FROM THE CAROL CITY OR
HIALEAH TRIALS.
THERE WAS AN EARLIER NOT GUILTY
BY REASON OF INSANITY AND I
BELIEVE THERE WAS SOME DELAY.
>> [INAUDIBLE].
>> '75.
>> MUST HAVE, JURY MADE A
DETERMINATION ON THAT?
>> ON ONE OF HIS CASES, THAT IS
CORRECT. IN THE '70s.
>> SO NOT EXACTLY LIKE HAS NO
MENTAL ILLNESS OR --
>> NO, I DON'T BELIEVE THERE
IS.
>> WE THINK HE PUT ONE OVER
ON --
>> HE DID PUT ONE OVER.
MR. FERGUSON CLAIMS THAT HE'S
BORDERLINE RETARDED AND, YOU
KNOW, COULD POSSIBLY FAKE --
COULDN'T POSSIBLY FAKE MENTAL
ILLNESS.

THAT IS NOT TRUE.
DR. RICHARD FILSON ADMINISTERED
WESCHLER INTELLIGENCE TEST AND
FOUND HE WAS AVERAGE
INTELLIGENCE.
>> WHAT INTELLIGENCE?
>> 94.
>> NOT EVEN BORDERLINE.
HE IS OF AVERAGE AND ABOVE
AVERAGE IN THE VERBAL RANGE.
SO HE IS PRETTY SMART.
>> THE CAPITAL CASE THEN, HIS
CAPITAL CASE NEVER BEEN FOUND
INCOMPETENT BY A JUDGE.
>> TO THE CONTRARY, HE HAS BEEN
FOUND NOT ONLY COMPETENT BUT HE
MORE THAN THAT HE MALINGERS AND
HE EXAGGERATES.
>> THEREFORE THE ISSUE WHETHER,
THE COMPETENCY AFTER THE TIME
OF A CLEMENCY HEARING IS
SOMETHING HIS LAWYERS HAS
PRESENTED --
[INAUDIBLE]
>> NO, WHAT THEY DID WAS, HIS,
ROBERT MARTIN SAID THAT I
TALKED TO HIM THIS MORNING.
HE WAS FINE.
I WENT OVER TO THE CLEMENCY
HEARING HE DECOMPENSATED AND
BECAME CRAZY.
WE KNOW HE IS A GOOD ACTOR.
WE KNOW THAT ABOUT
MR. FERGUSON.
THERE WAS NO JUDICIAL
DETERMINATION AT THAT TIME.
NONE IS REQUIRED.
THERE IS NO CASE LAW, EVEN
ASSUMING FOR A MOMENT THAT
MR. FERGUSON IS TRULY MENTALLY
ILL, AND I THINK THE EVIDENCE
NOW IS VERY CLEAR, THAT HE MAY
BE A PSYCHOPATH AND I BELIEVE
HE IS, BUT HE'S NOT A PARANOID
SCHIZOPHRENIC AS HE CLAIMS TO
BE.
AND AGAIN, IT'S, IF YOU GO
THROUGH ALL THE TESTING, ALL OF
HIS HISTORY, GOING BACK TO THE
EARLY DAYS, THEY BLAME THE
STATE FOR RELEASING
MR. FERGUSON IN 1976.
BUT WE RELEASED HIM BECAUSE HE
WASN'T MENTALLY ILL.
THE RELEASING DOCTOR SAID HE IS
NOT MENTALLY ILL.
HE IS A PSYCHOPATH.

NOT GUILTY --
>> NOT GUILTY BY REASON OF
INSANITY?
>> YES, YOUR HONOR.
HE WAS TREATED AT A STATE
HOSPITAL.
>> THEN THE DOCTORS SAID HE IS
NOT MENTALLY ILL AND HE SHOULD
BE RELEASED?
>> RELEASED.
THEY DID SAY HE IS A PSYCHOPATH
AND WE KNOW THAT.
THERE IS ONLY ONE CLEAN
MMPI.
WHAT I MEAN NOT INVALID BY
OVERRESPONDING.
CLINICAL SCALES ARE NORMAL
EXEMPT FOR FOUR, WHICH IS
PSYCHOPATHIC DEVIANT SCALE AND
9 WHICH IS HYPOMANIA.
IS ENERGIZED ANTISOCIAL.
THAT I BELIEVE IS WHAT HIS
GENUINE MENTAL ILLNESS IS.
THAT DOESN'T RENDER HIM
INCOMPETENT.
IT MAKES HIM DANGEROUS.
THERE WAS EXTENSIVE HEARING IN
2004.
THERE WERE FIVE DAYS ON NOTHING
BUT MR. FERGUSON'S MENTAL
HEALTH.
THE RESULTS ACCORDING TO JUDGE
HURLEY WERE VERY CLEAR.
HE MALINGERS.
HE FEIGNS MENTAL ILLNESS.
AGAIN THE MENTAL HEALTH
SUBMISSION BELOW ENDED IN 2004.
SO WHAT MR. FERGUSON PRESENTED
TO THE JUDGE WAS MISLEADING.
THE LAST THINGS THAT HE
ATTACHED WERE TWO DOCTOR
REPORTS, DR. MERIKANGAS AND
DR. FILSON
HE NEGLECTED TO MENTION
THOSE TWO DOCTORS WERE NOT
FOUND CREDIBLE BY DR. HURLEY
AFTER TESTIFYING IN COURT.
>> IS THAT IN A WRITTEN ORDER?
>> YES, YOUR HONOR.
I PROVIDED THAT TO THE COURT
AND COURT BELOW TOOK JUDICIAL
NOTICE OF THE FEDERAL
COMPETENCY HEARING AGAIN.
AND I THINK WHAT MR. FERGUSON
IS DOING, UNDERSTANDABLY
PERHAPS, BUT HE IS TRYING TO
CONFLATE, AGAIN, A COMPETENCY

CLAIM THAT HAS BEEN REPEATEDLY
REJECTED AND NOW HE IS ADDING
IN A CLEMENCY CLAIM, THE FACTS
OF WHICH WERE KNOWN TO HIM AND
HIS PRESENT ATTORNEYS BACK IN
THE '80s.
WHY ARE THEY RAISING IT NOW?
IT IS SIMPLY AN ATTEMPT TO
DELAY HIS EXECUTION.
>> HAVE WE EVER HELD IT IS TIME
BARRED ANYTHING CALLED CLEMENCY
AND DIDN'T RAISE IT -- WELL,
AGAIN, I GUESS THAT IS THE
QUESTION.
HE IS SAYING HE REALLY DIDN'T
HAVE ONE.
IF HE DIDN'T HAVE ONE, THEN
WHERE'S, WHEN DOES THE TIME
START TO RUN FOR RAISING THAT
YOU DIDN'T HAVE ONE?
>> I THINK JUDGE SAFETY THOUGHT
IT RAN FROM THE TIME CERTIORARI
WAS DENIED ON THE DENIAL OF
HABEAS.
THE STATE SUBMITS UNDER RULE
3.851.
WHEN THE FACTS COULD HAVE BEEN
KNOWN BY DUE DILIGENCE.
HE COULD HAVE, A LETTER FROM
MR. PRETTYMAN FROM HOGAN AND
HARTSMITH AT THAT TIME
NOTING THE CLEMENCY PROCESS AND
COMPLAINING ABOUT IT SO WHY ARE
WE NOW HERE?
CLEARLY IT IS TIME BARRED.
AGAIN YOUR HONOR, I AGREE WITH
MR. FERGUSON'S COUNSEL THAT
THIS COURT RECENTLY NOT FOUND
ANY OF THE CLEMENCY CLAIMS TIME
BARRED BUT I THINK IT SHOULD.
WHAT WE'RE SEEING IN EVERY
CAPITAL CASE, UH-OH, CLEMENCY,
WE'RE NOT SURE WHAT IT MEANS
AND WE'LL THROW IT OUT THERE
AND DELAY YOUR EXECUTION.
IT IS NOT A LEGITIMATE CLAIM.
IT IS A MATTER OF EXECUTIVE
GRACE.
THE GOVERNOR MADE THE
DETERMINATION THAT CLEMENCY NOT
APPROPRIATE.
>> WHATEVER WE DECIDE, I KNOW
WHEN THE WARRANT IS SIGNED AND
THERE IS A WHOLE SERIES OF
PROCEEDINGS THAT ARE PRESENTED,
REALLY WOULD HELP THIS COURT,
AT LEAST THIS PERSON HERE, IF

THE STATEMENT WAS MADE CLEMENCY
HEARING WAS HELD ON THIS DATE
JUST SO WE HAVE IT.
MAYBE IS IT IN THERE BUT IT
WOULD JUST FOR THE FUTURE.
>> I APPRECIATE THAT, YOUR
HONOR.
>> COUNSEL IS, ISN'T THE FACT
THAT IN THE WARRANT THERE'S AN
EXPRESS STATEMENT THAT THE
GOVERNOR HAS DETERMINED THAT
CLEMENCY WILL BE DENIED?
>> EXACTLY, YOUR HONOR.
>> NOW, IS THERE ANY LAW THAT
ESTABLISHES THAT THERE IS A
RIGHT TO A HEARING THAT CAN NOT
BE WAIVED?
OR ANY RIGHT TO A HEARING AS A
OPPOSED TO CONSIDERATION OF
CLEMENCY?
>> NO, YOUR HONOR, ABSOLUTELY
NOT.
AND HE GOT CONSIDERATION OF
CLEMENCY.
AND THE STATE REJECTS ANY
NOTION THAT HIS SUBMISSION SHOW
THAT HE DID NOT GET SUCH A
HEARING.
>> YOU'RE SAYING, THERE ARE TWO
DIFFERENT THINGS.
ONE IS, CAN THE GOVERNOR JUST
MAKE THAT DETERMINATION BUT I
THOUGHT WHAT WE WERE TALKING
ABOUT SOMETHING THAT HAPPENED
IN 1986?
>> WELL, THE UNDERLYING FACTS
WERE CLEAR TO MR. FERGUSON AND
HIS COUNSEL.
YES, THERE'S AN INITIAL
CLEMENCY AND THERE IS THE
CLEMENCY UPDATE.
SO WHAT IS FERGUSON REALLY
ASKING THIS COURT TO DO?
IS SEND IT BACK TO THE GOVERNOR
ANOTHER DETERMINATION WHERE HE
ALREADY DETERMINED THAT
CLEMENCY IS NOT APPROPRIATE?
>> THAT'S WHAT I'M ASKING.
ISN'T THERE PRESUMPTION AT THE
TIME THAT THE GOVERNOR SIGNS
THE WARRANT, JUST WHAT JUSTICE
CANADY SAYS, THAT CLEMENCY HAS
BEEN CONSIDERED AND BEEN
DENIED?
>> EXACTLY, YOUR HONOR.
THAT'S TRUE.
BUT AGAIN, AND I WISH THIS

COURT, AGAIN, WE SEE THESE KIND
OF CLIMBS ON EVERY DEATH
WARRANT NOW.

I THINK IT IS IMPORTANT TO
START ENFORCING RULE 3.851
WHICH REQUIRES DILIGENCE IN
BRINGING CLAIMS.

IF HE THOUGHT HIS CLEMENCY
PROCESS WAS UNSOUND OR INFIRM
IN 1980s AND HIS COUNSEL KNEW
ABOUT IT HE SHOULD BE TIME
BARRED.

WE ASK THIS COURT DENY OR
AFFIRM, I'M SORRY, THE DENIAL
OF THOSE CONVICTION RELIEF IN
THIS CASE.

THANK YOU.

>> TO CLARIFY THAT THE NATURE
OF THIS RIGHT, IT IS, THE
GOVERNOR CLEARLY HAS THE
ABILITY TO DENY CLEMENCY BUT HE
CAN'T DO THAT UNLESS, AS WE
KNOW FROM WOODARD, MINIMUM
LEVELS OF DUE PROCESS ARE
FOLLOWED.

>> BUT WE DON'T KNOW FROM WOODARD
OR FROM ANY OTHER CASE THAT
IS THE GOVERNOR IS REQUIRED TO
HOLD A HEARING ON THAT.

>> WHAT WE DO KNOW THERE HAS TO
BE MINIMUM LEVELS OF DUE
PROCESS AND WHAT IS THE VERY
MINIMUM HERE IN AT LEAST THE
WAY FLORIDA HAS ENSHRINED THE
CLEMENCY PROCESS IS A HEARING.
THAT'S WHY THERE ARE
REGULATIONS IN FACT LAYING THAT
OUT.

THAT'S WHY, AT THIS TIME, WHEN
MR. FERGUSON WAS GOING THROUGH
IT, YOU HAD TO EXPRESSLY SIGN A
WAIVER, IF YOU DIDN'T WANT TO
BE INTERVIEWED.

THAT'S RECOGNIZED BY THE STATE.
THIS IS NOT SIMPLY COUNSEL
INVENTING THIS RIGHT.

AND IF THAT'S TRUE, IT IS NOT
ENOUGH FOR THE GOVERNOR TO
CONCLUSORY ASSERT AND BY THE
SAME TOKEN WE'RE NOT VALLE
WE'RE NOT AS IN VLAE SIMPLY
SPECULATING WHETHER OR NOT
THERE WAS HEARING.

WE'RE SIMPLY POINTING TO A
HEARING AND SAYING THAT IS NOT
ENOUGH.

THIS IS NOT ENOUGH.

WHEN YOU PUT SOMEONE THROUGH
THE STATE'S OWN
PSYCHIATRISTS, TWO OF THEM BY
THE WAY, DR. INFANTE AND
DR. FRADO, BOTH
SAY THIS MAN IS INCOMPETENT.
IF NOT CRAZY, WE THINK HE MIGHT
HAVE SOME PROBLEMS. IF YOU READ
THE TRANSCRIPT, EXHIBIT A TO THE
3.851 MOTION. PAGE 5 AND 8.
THAT TESTIMONY COULDN'T BE
CLEARER.
THIS GUY DOESN'T KNOW WHAT
THE IMPORTANCE OF TODAY WAS.
DOESN'T UNDERSTAND WHAT A
LAWYER IS.
DOESN'T UNDERSTAND THESE
PROCEEDS.
THAT IS THE ESSENCE OF OUR
CLAIM WE RESPECTFULLY REQUEST
THIS COURT REVERSE STATE
EXECUTION AN REMAND AS THE
CIRCUIT COURT SAID AT FINDINGS
3 AND 4 THERE HAS BEEN NO
ADEQUATE HEARING.
REQUIRES ONCE YOU DETERMINE
THERE HAS BEEN NO TIME BAR.
>> THANK YOU, YOUR HONOR.
>> THANK YOU FOR YOUR
ARGUMENTS.