No. _____

IN THE
Supreme Court of the United States

Benjamin Cole,
Petitioner
v.
Jim Farris, Warden,
Oklahoma State
Penitentiary, *Respondent*

On Petition for Writ of Certiorari to the Oklahoma Court of Criminal Appeals

PETITION FOR WRIT OF CERTIORARI

THIS IS A CAPITAL CASE WITH IMMINENT EXECUTION SCHEDULED FOR OCTOBER 20, 2022 AT 10:00 A.M.

October 17, 2022

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QUESTIONS PRESENTED

1. Whether it violates the Eighth Amendment and this Court's decisions in *Ford v. Wainwright*, 477 U.S. 399 (1986), and *Panetti v. Quarterman*, 551 U.S. 930 (2007), for a state court to bypass procedural safeguards when there are disputed issues of fact?

2. Whether it violates the Fourteenth Amendment for a warden, who is directly in charge of carrying out the execution, to also assume the role of gatekeeper to the execution competency process?

3. Whether the State of Oklahoma's procedural framework for determining competency to be executed violates the Eighth Amendment, and the Court's decisions in *Ford v. Wainwright*, and *Panetti v. Quarterman*?

PARTIES TO THE PROCEEDINGS

All parties to this action are named in the caption.

CORPORATE DISCLOSURE STATEMENT

No corporate entities are parties to this lawsuit.

TABLE OF CONTENTS

INDEX OF APPENDICES:

TABLE OF AUTHORITIES

SUPREME COURT CASES

FEDERAL CIRCUIT COURT CASES

FEDERAL DISTRICT COURT CASES

STATE COURT CASES

STATUTES

OTHER AUTHORITIES

PETITION FOR WRIT OF CERTIORARI

Petitioner, Benjamin Cole, respectfully petitions this Court for a writ of certiorari to review the judgment of the Oklahoma Court of Criminal Appeals in *Benjamin Cole v. Jim Farris, Warden, Oklahoma State Penitentiary*, Case No. MA-2022-898.

OPINIONS BELOW

The judgment for which certiorari now is sought is the Oklahoma Court of Criminal Appeals ("OCCA") Opinion in *Cole v. Farris*, Case No. MA-2022-898, issued on October 17, 2022, and is attached as Appendix A. OCCA refused to issue a mandamus writ ordering Warden Jim Farris, Oklahoma State Penitentiary ("OSP"), to refer Mr. Cole for state execution competency proceedings, and denied the trial court had abused its discretion in also refusing same. The underlying October 4, 2022 opinion of the Pittsburg County District Court is attached as Appendix B. The district court held a limited evidentiary hearing on the petition for writ of mandamus; the hearing transcript is attached as Appendix C. The appendix of exhibits presented to the district court upon initiation of the proceeding are attached as Appendix D. Additional exhibits admitted during the September 30, 2022 evidentiary hearing are attached as Appendices E and F. The June 13, 2020 Order for Mental Health Evaluation in *Cole v. Farris*, No. 15-cv-0049-GKF-CDL (N.D. Okla. June 13, 2022) (Doc. 54) is attached as Appendix G.

JURISDICTION

A final order of the Oklahoma Court of Criminal Appeals, the highest state court from which Petitioner could seek relief, was entered on October 17, 2022, denying

Petitioner's Petition for Writ of Mandamus. This Court has jurisdiction under 28 U.S.C. § 1257.

CONSTITUTIONAL AND STATUTORY PROVISIONS

The Eighth Amendment provides: "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." U.S. Const. amend. VIII.

The Fourteenth Amendment provides in relevant part: "[N]or shall any State deprive any person of life, liberty, or property, without due process of law." U.S. Const. amend. XIV

Okla. Stat. tit. 22, § 1005, which governs state competency proceedings, provides:

> If, after his delivery to the warden for execution, there is good reason to believe that a defendant under judgment of death has become insane, the warden must call such fact to the attention of the district attorney of the county in which the prison is situated, whose duty is to immediately file in the district or superior court of such county a petition stating the conviction and judgment and the fact that the defendant is believed to be insane and asking that the question of his sanity be inquired into. Thereupon, the court must at once cause to be summoned and impaneled from the regular jury list a jury of twelve persons to hear such inquiry.

STATEMENT OF THE CASE

Mr. Cole was convicted of killing his nine-month-old daughter and sentenced to death by a Rogers County, Oklahoma jury in 2004. His mental health and adjudicative competency were in question throughout his trial, state post-conviction, and federal habeas proceedings. He was diagnosed with schizophrenia. Once his appeals were exhausted and an execution date set, Mr. Cole in 2015 requested that the warden of OSP refer his case to the Pittsburg County District Attorney's Office for a jury trial on

his competency to be executed, as required under Oklahoma statute when the *prima facie* burden of "good reason to believe" is satisfied. Okla. Stat. tit. 22, § 1005 (originally enacted 1910, amended 1913).[1] The warden refused, and the trial court as well as OCCA denied Mr. Cole's requests to order the warden to undertake the referral through mandamus proceedings. Mr. Cole's execution was stayed indefinitely, however, amid investigation and litigation regarding Oklahoma's lethal injection protocol.

In 2022, after the lethal injection plaintiffs lost their case in federal district court, it was clear plaintiffs' executions were again imminent. Thus, on May 20, 2022, counsel for Mr. Cole contacted OSP Warden Jim Farris, who had replaced the warden from 2015, enclosing updated materials relevant to the execution competency issue. These included 2016, 2018, and 2022 reports from psychologist Dr. George Hough, Ph.D., ABPP, detailing Mr. Cole's severe mental illness, decompensated mental condition, and incompetency for execution, and a 2022 report from neuroradiologist Dr. Travis Snyder, DO, regarding Mr. Cole's abnormal MRI and brain lesion. Mr. Cole again requested the initiation of competency for execution proceedings per statute.

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[1] The statute states:

> If, after his delivery to the warden for execution, there is good reason to believe that a defendant under judgment of death has become insane, the warden must call such fact to the attention of the district attorney of the county in which the prison is situated, whose duty is to immediately file in the district or superior court of such county a petition stating the conviction and judgment and the fact that the defendant is believed to be insane and asking that the question of his sanity be inquired into. Thereupon, the court must at once cause to be summoned and impaneled from the regular jury list a jury of twelve persons to hear such inquiry.

Id.

App. 00192-194, 00211-246, 00277-286. Counsel sent Warden Farris a supplemental letter on May 25, 2022, with an additional expert report from Dr. Snyder. App. 00195, 00287-292. Warden Farris was thereby provided the "good reason to believe" that Mr. Cole's competency was in question, per statute. Okla. Stat. tit. 22, § 1005.

On July 1, 2022, OCCA set execution dates as expected for twenty-five Oklahoma death-row prisoners. Mr. Cole's execution date was set for October 20, 2022. On July 5, 2022, Mr. Cole was evaluated at the Oklahoma Forensic Center (OFC), as agreed to by both parties. The OFC examining psychologist Dr. Scott Orth, Psy.D., deemed Mr. Cole competent for execution.

Counsel for Mr. Cole contacted the warden a third time, providing on August 1, 2022 a declaration from Dr. Hough that offered reason to doubt the accuracy and methods of Dr. Orth's evaluation and report. App. 00196, 00247-273. Nonetheless, on August 2, 2022, Warden Farris advised counsel for Mr. Cole that he was refusing to initiate the state court competency proceedings. App. 00197-198. Despite Warden Farris acknowledging he is not a mental health professional, he stated he "carefully considered all information and material submitted by Mr. Cole's attorneys regarding his mental health," *id.* at 00197, but then he did not reference the reports from Drs. Hough and Snyder, quoting only a passage from Dr. Orth's report. *Id.* at 00197-00198. *See also* App. 00060 (9/30/22 Tr. at 32, Warden Farris testifying "I relied extremely on Dr. Orth's report."). In his letter declining to initiate competency proceedings, the warden did not phrase his inquiry with the objective, threshold burden language of the statute, which requires the warden to act where "there is good reason to believe" "insanity," but instead, substituted his subjective determination of the ultimate

competency question, misstating the statute as asking whether "*I* have good reason" to believe and concluding, "[I]t is my determination that Mr. Cole has not become insane." App. 00198 (emphasis added).

On August 15, 2022, Mr. Cole filed a Petition for Writ of Mandamus in Pittsburg County District Court, asserting that the warden abused his discretion by failing to follow his statutory duty. Included in the contemporaneously filed Appendix of Exhibits were all the above-referenced expert reports, Oklahoma Department of Corrections ("DOC") records, and expert reports from earlier in Mr. Cole's legal proceedings. A limited evidentiary hearing to determine whether the warden had abused his discretion was held in Pittsburg County before the Honorable Judge Michael Hogan on September 30, 2022. At the hearing, counsel for Mr. Cole examined Warden Farris. Judge Hogan did not take testimony from other witnesses. On October 4, 2022, Judge Hogan denied mandamus. App. 00025-28.

Grafting the standard for the ultimate competency determination on to the abuse of discretion determination, Judge Hogan began, "The purpose of this Order is to adjudicate whether Benjamin Cole has become incompetent to be executed." *Id.* at 00025. He concluded, "In considering the totality of the evidence, including Dr. Orth's report, the Court FINDS the Defendant is competent to be executed as currently scheduled." *Id.* at 00028.

On October 10, 2022, counsel for Mr. Cole petitioned the Oklahoma Court of Criminal Appeals (OCCA) for a writ of mandamus. On October 17, 2022, OCCA issued an order denying relief, finding "Petitioner has provided no new evidence regarding

his competence . . . we find there is not a reasonable probability that Petitioner lacks the competence to be executed." App. 00023.

REASONS FOR GRANTING THE WRIT

Mr. Cole's case presents the question of whether a pre-*Ford* state statute imbuing the death row warden—the same official charged with carrying out executions—with the duty of gate-keeper to execution competency proceedings can pass constitutional muster. A new state statute that removes and remedies this particular constitutional defect will go into effect *eleven days* after Mr. Cole's execution. Beginning November 1, 2022, the warden will no longer have decision-making power over the initiation of competency proceedings. *See* 22 O.S. Supp. 2022, § 1005.1 (effective Nov. 1, 2022). Mr. Cole's case also presents the related question of whether, under this Court's dictates in *Ford v. Wainwright*, 477 U.S. 399 (1986), and *Panetti v. Quarterman*, 551 U.S. 930 (2007), a decision made in this already questionable regime, conflating the ultimate competency determination with the substantial threshold burden intended to open the door to further proceedings, can constitutionally stand.

I. THIS COURT SHOULD GRANT CERTIORARI TO DETERMINE WHETHER OKLAHOMA'S EXECUTION COMPETENCY MECHANISM IS FACIALLY UNCONSTITUTIONAL.

A. Oklahoma's Mechanism is an Outlier and Violates the Fourteenth Amendment by Making the Death-Row Warden Gatekeeper to the Execution Competency Process.

Placing the warden in the position of gatekeeper of whether to seek a competency trial violates the Constitution because he is not only an executive officer, but also the executioner. *See Ford*, 477 U.S. at 416 (noting that "the most striking

defect" in the competency procedures at issue was "the State's placement of the decision wholly within the executive branch"); *see also id.* at 427 (Powell, J., concurring) (noting the executive branch cannot be allowed to control both access to such procedure and carry out the execution). *See, also*, *e.g.*, Dupler, Bryan, *The Uncommon Law: Insanity, Executions, and Oklahoma Criminal Procedure*, 55 Okla. L. Rev. 1, 14 (2002) (noting Oklahoma's archaic statutory provision "is of doubtful constitutionality after *Ford v. Wainwright*"). The bipartisan Oklahoma Death Penalty Review Commission saw the same problem noted in Mr. Dupler's law review article. *See Report of the Oklahoma Death Penalty Review Commission* at 157, Oklahoma Death Penalty Review Commission (Apr. 25, 2017), *available at* https://www.courthousenews.com/wp-content/uploads/2017/04/OklaDeathPenalty.pdf. So too did the Oklahoma Legislature, presumably, given that the new statute will remove the warden from the process, bringing Oklahoma in line with other jurisdictions retaining the death penalty. *See* 22 O.S. Supp. 2022, § 1005.1 (effective Nov. 1, 2022).

Ten years ago, the U.S. Court of Appeals for the Tenth Circuit upheld Oklahoma's mechanism as constitutional because of the availability of mandamus review. *See Allen v. Workman*, 500 F. App'x 708, 711 (10th Cir. 2012) (unpub.) (Oklahoma regime comports with *Ford*, despite role of warden, because "a jury is the ultimate arbiter of sanity, and both the state trial court and the OCCA reviewed the warden's gatekeeping function").[2] This Court did not review that decision, *see Allen*

[2] The Tenth Circuit's opinion came within the 28 U.S.C. § 2254(d)(1) framework of deference to the OCCA decision below, denying OCCA unreasonably applied *Ford* in

v. Trammell, 568 U.S. 1005 (2012) (mem.). The proceedings in Mr. Cole's case underscore the flaw in Oklahoma's system, which now require this Court's intervention. Mandamus review does not render Oklahoma's mechanism constitutional; it provides no guarantee of due process since it concerns the warden's exercise of discretion in the discharge of his duties.

That the state legislature recently passed a statute removing the warden from the process changes the landscape from that before the Tenth Circuit in 2012. As it stands, Oklahoma appears to be the only state that names the death-row warden sole gatekeeper to competency proceedings. Arkansas, Missouri, Nebraska, Nevada, and Utah provide statutory authority to the Director of Corrections of their state prison systems, though not to the death-row warden. *See* ARK CODE ANN. § 16-90-506(d)(1)(A)(i)(a)-(b) (West); MO. ANN. STAT. § 552.060(2) (West); NEB. REV. STAT. ANN. § 29-2537(1) (West); NEV. REV. STAT. ANN. § 176.425(1) (West); UTAH CODE ANN. § 77-19-202 (West). The majority of death-penalty jurisdictions, however, do not limit the initiation mechanism to the hands of a corrections official, whether by statute, *see* ALA. CODE § 15-16-23; ARIZ. REV. STAT. ANN. § 13-4022(A) (West); FLA. R. CRIM. P. RULE 3.811(d)(1)-(5); GA. CODE ANN. § 17-10-66 (West); KAN. STAT. ANN. § 22-4006(a) (West); KY. REV. STAT. § 431.2135 (1); LA. REV. STAT ANN. § 15:567.1(c) (West); MISS. CODE ANN. § 99-19-57(2)(a) (West); N.C. GEN STAT. ANN. § 15A-1002 (West);

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upholding the state mechanism. Mr. Cole's case is before this Court without those procedural barriers. *See Madison v. Alabama*, 139 S. Ct. 718, 725 (2019) (internal citation and quotation marks omitted) (reversing state court decision for potential legal error in applying *Ford* and *Panetti*, while recognizing decision from the prior year upholding federal court denial of relief "was premised on AEDPA's demanding and deferential standard").

OHIO REV. CODE ANN. § 2949.28(B)(1) (West); OR. REV. STAT. ANN. § 137.463 (West); S.D. CODIFIED LAWS § 23A-27A-22.1; TEX. CODE CRIM. PROC. ART. 46.05; WYO. STAT. ANN. § 7-13-901 (West), or by case law. *See Com. v. Banks*, 29 A.3d 1129, 1131 (Pa. 2011); *Van Tran v. State*, 6 S.W.3d 257, 267-69 (Tenn. 1999), *abrogated on other grounds by State v. Irick*, 320 S.W.3d 284, 294 (Tenn. 2010); *Singleton v. State*, 437 S.E.2d 53, 60 (S.C. 1993).

Additionally, in recent years, states have reconsidered their execution competency statutes, as Oklahoma now has. A previous version of Arkansas's statute, which, like Oklahoma's, did not include any express mechanism ordering the Director to consider supporting evidence offered by an inmate's counsel, was invalidated as unconstitutional because it was "devoid of any procedure by which a death-row inmate has an opportunity to make an initial substantial threshold showing of insanity . . . to trigger the hearing process." *Ward v. Hutchinson*, 558 S.W.3d 856, 864-65 (Ark. 2018) (internal citation and quotation marks omitted). California has a statute giving the warden sole authority similar to Oklahoma's, but its governor recently signed Assembly Bill 2657, which charges counsel having reason to believe a client is incompetent for execution with the duty to file a petition in the court of conviction alleging same. *See* CAL. PENAL CODE § 3701, *repealed by* 2022 Cal. Legis. Serv. Ch. 795 (A.B. 2657) (West), *available at* https://leginfo.legislature.ca.gov/faces/billCompareClient.xhtml?bill_id=202120220AB2657&.

Oklahoma's procedure is an inherent conflict, in the same vein as that recognized in *Ford*, where the warden is also charged with carrying out an inmate's

execution and thus "cannot be said to have the neutrality that is necessary for reliability" in what the warden and the state courts have turned from a threshold determination to a "factfinding proceeding," *see infra*, II(B). 477 U.S. at 416. Mr. Cole's execution by a state mechanism that will no longer exist eleven days later is impermissibly arbitrary, denying him the process necessary to ensure he is competent for execution and thereby to protect his Eighth Amendment rights. *See Ford*, 477 U.S. at 410 ("Once a substantive right or restriction is recognized in the Constitution, therefore, its enforcement is in no way confined to the rudimentary process deemed adequate in ages past.").

B. Oklahoma's Procedural Competency Framework Violates the Eighth Amendment Under *Ford* and Its Progeny.

The arbitrary nature of Mr. Cole's execution under a state mechanism that will cease to exist soon after underscores the violation of his Eighth Amendment right to be free of cruel and unusual punishment. *Cf. Furman v. Georgia*, 408 U.S. 238, 277 (1972) (Brennan, J., concurring) (most significant function of Eighth Amendment prohibition against cruel and unusual punishment in modern society "is to protect against the danger of [punishment's] arbitrary infliction"). Additionally, Oklahoma's statute dates back one hundred years from the present, significantly removed from current-day understandings of mental illness and due process, and predates *Ford* by seventy-five years. Continued deference to the law of a bygone era without accounting for the passage of time is inherently suspect under Eighth Amendment jurisprudence:

> Not bound by the sparing humanitarian concessions of our forebears, the Amendment also recognizes the 'evolving standards of decency that mark the progress of a maturing society.' In addition to considering the barbarous methods generally outlawed in the 18th century, therefore,

> this Court takes into account objective evidence of contemporary values before determining whether a particular punishment comports with the fundamental human dignity that the Amendment protects.

Ford, 477 U.S. at 406, citing *Trop v. Dulles*, 356 U.S. 86, 101 (1958) (plurality opinion). By way of comparison, only twenty-seven years after *Ford*, this Court saw fit to clarify and expand the meaning of its Eighth Amendment protection, reasoning that "[a] prisoner's awareness of the State's rationale for an execution is not the same as a rational understanding of it." *Panetti*, 551 U.S. at 959. Instead, when a prisoner's condition "prevent[s] him from comprehending the meaning and purpose of the punishment to which he has been sentenced," they are eligible for *Ford*'s protections. And just twelve years after *Panetti*, this Court again made clear the expansive nature of *Ford*: delusions, though suffered by both the *Ford* and *Panetti* petitioners, were not a prerequisite. Instead, "a person suffering from dementia may be unable to rationally understand the reasons for his sentence; if so, the Eighth Amendment does not allow his execution." *Madison*, 139 S. Ct. at 726-27.

The Eighth Amendment inquiry is by well-established case law not a static one, and Oklahoma's adherence to a century-old statute to execute Mr. Cole—on the eve of its repeal—is constitutionally violative. This Court has summarized the thrust of its Eighth Amendment *Ford* jurisprudence:

> *Ford* had explored what lay behind the Eighth Amendment's prohibition, highlighting that the execution of a prisoner who cannot comprehend the reasons for his punishment offends moral values and 'serves no retributive purpose.' 551 U.S. at 958, 127 S. Ct. 2842. Those principles, the *Panetti* Court explained, indicate how to identify prisoners whom the State may not execute.

Madison, 139 S. Ct. at 723.

II. THIS COURT SHOULD GRANT CERTIORARI TO DETERMINE WHETHER THE STATE COURTS VIOLATED MR. COLE'S EIGHTH AND FOURTEENTH AMENDMENT RIGHTS IN BYPASSING THE SUBSTANTIAL THRESHOLD STANDARD.

A. Mr. Cole Meets the "Substantial Threshold" Entitling Him to Competency Due Process.

Mr. Cole can show he made a "substantial threshold showing of insanity," *Panetti*, 551 U.S. at 950, and was thus "entitled to these [due process] protections." *Id.* Mr. Cole submitted multiple reports from psychological experts of various disciplines detailing his severe mental illness and resulting incompetency. Whether his evidence will ultimately be seen to render him incompetent for execution is an issue for a competency jury as trier of fact under state statute; it was not a decision for the warden or trial judge to make in the guise of determining the existence of "good reason to believe" insanity had developed.

Mr. Cole suffers from severe, diagnosed mental illness; his condition has deteriorated slowly but steadily since his conviction. The series of attorneys who represented Mr. Cole throughout the state and federal post-conviction process all reported the same detached, tangential, and increasingly incongruent behavior noted by trial counsel. Evidence from a board-certified psychiatrist, clinical psychologist, and neuroradiologists has established both the nature of Mr. Cole's organic brain disorder and the connection between the disorder and Mr. Cole's mental illness.

Dr. Linda Hayman, a board-certified neuroradiologist, identified the abnormality patent in a 2004 brain study as a lesion in the basal ganglia region of Mr. Cole's brain. In 2004, the lesion was the size of a lima bean. Lesions in this area of the brain are associated with schizophrenia, a neuro-chemical disease. Mr. Cole's

aberrant behavior, noted by prison staff as well as his counsel, is consistent with "negative symptoms" of schizophrenia. App. 00274-276. Dr. Hayman recommended a follow-up study of Mr. Cole's brain using currently available medical technology. Through no fault of Mr. Cole, this could not be accomplished until earlier this year.[3] Dr. Travis Snyder, a physician who is board-certified in radiology with added qualifications in neuroradiology, reviewed an MRI performed on Mr. Cole on March 30, 2022. Dr. Snyder found the results to be markedly abnormal, demonstrating multiple pathological findings, including the previously-mentioned lesion. App. 00277-279. Later, Dr. Snyder accessed the Diffusion Tensor Imaging (DTI) and NeuroQuant volumetric analysis performed at the same time as the MRI on March 30, 2022. Dr. Snyder found that these analyses were "markedly abnormal and concordant with the previously described abnormal MRI findings, demonstrating multiple pathologic findings." App. 00287 (2nd Declaration of Travis Snyder, DO, at ¶ 3). Dr. Raphael Morris, a board-certified psychiatrist, attempted to evaluate Mr. Cole in December 2008, during the preparation of federal habeas corpus pleadings. Dr. Morris observed Mr. Cole's interactions with his counsel. At that time, Dr. Morris opined Mr. Cole was suffering from Schizophrenia, Paranoid Type, rendering him

[3] DOC required a court order before allowing transport of Mr. Cole for brain imaging, and the federal court denied his motion for a brain scan without prejudice and administratively closed his *Ford* action without prejudice on November 24, 2015. *See* Administrative Closing Order, *Cole v. Farris*, 15-CV-0049-GKF-CDL (N.D. Okla. Nov. 24, 2015), Doc. 31. Thereafter, Mr. Cole had no appropriate, active court proceeding through which to request a brain scan. When his stay of execution was no longer indefinite, he was able to re-open the federal action and obtain a court order for the brain imaging.

incapable of assisting his counsel. App. 00293-323 (04/04/2009 Independent Psychiatric Consultation by Raphael Morris, MD).

In 2014, counsel attempted to have Dr. Morris conduct a follow-up evaluation of Mr. Cole. Consistent with Mr. Cole's behavior for nearly two years, he refused to leave his cell. The prison and, ultimately, the DOC Director, refused to allow Dr. Morris to observe Mr. Cole in his cell. Dr. Morris reviewed all the information collected since his 2008 evaluation. Dr. Morris reiterated his opinion Mr. Cole is presently suffering from Schizophrenia, Paranoid Type. App. 00324-334 (01/21/2015 Updated Independent Psychiatric Consultation by Raphael Morris, MD). By that time, at least two of the prison medical staff had expressed concerns about Mr. Cole's mental deterioration. Dr. Dave Kerby noted and expressed concern after observing Mr. Cole over several months, and recommended a psychiatric evaluation based on Mr. Cole's decline. The medical coordinator, Patti Stem, Ph.D., noted Mr. Cole's decompensation and continued decline during the summer of 2014. *See* medical record excerpts at App. 00255. Additional new exhibits were presented at the evidentiary hearing showing recent concerns by DOC staff as well. *See* App. 00348-360. (Exhibits 25 and 26 admitted during the September 30, 2022 Evidentiary Hearing, Interoffice Memorandum dated October 23, 2019 to Scott Crow, Interim Warden, from Tommy Sharp, Interim Warden with the Subject, "Relocation of Death Row Inmates," and Select Department of Corrections Medical/Psych Records of Benjamin Cole).

Starting in 2016, Dr. David G. Hough, a clinical psychologist, began working as an expert in this case. Dr. Hough encountered some of the same or similar difficulties as detailed in regard to Dr. Morris above. Dr. Hough conducted evaluations on

February 16-17, 2016, and May 10, 2016. App. 00211-238, 00335-347. (Competency to Be Executed Evaluation, Competency to Be Executed Evaluation: Addendum, and Curriculum Vitae of David Hough, Ph.D.). In his evaluations, Dr. Hough confirmed Mr. Cole's schizophrenia diagnosis (thus increasing the doubt as to Mr. Cole's competence), and specifically opined Mr. Cole is incompetent to be executed. App. 00230, 00237.

On April 25 and 26, 2022, Dr. Hough attempted to conduct a psychological evaluation of Mr. Cole, but was only able to communicate with Mr. Cole through the "bean hole" at the bottom of his cell door. Dr. Hough executed two affidavits about April 25 and 26, in which he described the obstructed access to Mr. Cole and his deteriorated mental and physical condition of Mr. Cole. App. 00241-242 at ¶¶ 11-14. As for the attempted April 25 visit, Dr. Hough attested to observing Mr. Cole "huddled in the corner" of a "completely dark cell," "wearing a rough-hewn prison outfit" that "was tattered and in poor repair," appearing "unkempt with poor hygiene" and "grasping on to something for support" in moving himself to his wheelchair. App. 00240 at ¶¶6-7.

The narrative for Dr. Hough's attempted visit with Mr. Cole the next day did not fundamentally change, though he was helped explain the lack of communication between Mr. Cole and anyone at the prison: "On the way to Mr. Cole's cell, the Case manager said that Mr. Cole had not spoken to her in approximately three months and that he rarely speaks with anyone." App. 00245 (Second Affidavit of Dr. Hough at ¶ 10). Prison staff also described how easily they could bring Mr. Cole out of his cell for an expert evaluation, if they chose to or were ordered to: the case manager and

another corrections officer "acknowledged that [moving Mr. Cole] could easily be done . . . that in the case of Mr. Cole, being in his chronic, debilitated condition, they did not anticipate any sort of struggle with Mr. Cole and that it would not be difficult to bring him out." *Id.* at ¶ 12. Yet DOC refused to facilitate an in-person interview.

On July 14, 2022, forensic psychologist Dr. Scott Orth, Psy.D., of the Oklahoma Forensic Center issued a report based on a single examination of Mr. Cole, occurring on July 5 and lasting approximately 150 minutes.[4] App. 00199-210. Dr. Orth found Mr. Cole has a rational understanding of the reason he is being executed, and a rational understanding that he is being executed and the execution is imminent. *Id.* at 00210. In response, Dr. Hough prepared a declaration critical of Dr. Orth's report and methods. App. 00247-273. He noted that Dr. Orth's description of Mr. Cole as "well-groomed" and receptive of a "high degree of positive rapport rather quickly" contradicted "the historical records . . . of Mr. Cole as presenting with poor hygiene and with a well-known and chronic history of non-relatedness." App. 00249 at ¶ 11. He further questioned Dr. Orth's account of Mr. Cole's alleged spontaneous statements regarding his execution, noting:

> No effort is made to reconcile how Dr. Orth was able to accomplish in quick order what other clinicians, despite repeated attempts, have not, and in particular how he was . . . able to affect such verbal spontaneity and (superficially) direct answers so quickly to the two questions that constitute the heart of the competency to be executed evaluation. Dr. Orth's assertions in this regard are likewise noted, especially since Mr. Cole was transported to meet with a complete stranger, in a strange and unfamiliar environment to him. It is obvious to this writer that Mr. Cole

[4] Mr. Cole and Respondent had agreed to a court-ordered examination. *See* App. 00361-364 (Order for Mental Health Evaluation, *Cole v. Farris*, No. 15-CV-0049-GKF-CDL (N.D. Okla. June 13, 2022) (Doc. 54)).

> was prepped physically and verbally for this evaluation, yet Dr. Orth makes no reference to this.

Id. Dr. Hough also described how Dr. Orth's report ignored the historical record of Mr. Cole's "negative symptoms," including "lengthy periods of voluntary social isolation and withdrawal, choosing to live completely in the dark for years, extremely poor hygiene, very flattened affect, and non-communication with staff members for months at a time." App. 00250 at ¶ 13. Dr. Orth further failed to "address the fact that there is no record of Mr. Cole ever being provided with a comprehensive psychiatric evaluation by the Department of Corrections to diagnose his condition," *id.*, to "reconcile his assessment of no mental illness with the longitudinal record from other mental health professionals both within and without the prison system that Mr. Cole has a severe mental illness," *id.*, or to "follow-up with objective, clinically normed psychological testing," which "would have been indicated" based on Mr. Cole's supposed spontaneous conversational ability. App. 00251 at ¶ 15. Dr. Hough concluded that Dr. Orth's findings "should be relied upon, if at all, with a high degree of caution." App. 00252 at ¶ 18. Warden Farris's refusal letter is dated the day after he received Dr. Hough's critiquing affidavit. App. 00197-198.

This "battle of the experts" underscores why the state courts should have directed the warden to initiate competency proceedings, to allow a jury to settle the matter. Instead, the warden misunderstood his statutory burden by acting as the ultimate factfinder on the question of assigning weight to the various experts. *See* App. 00103-105 (9/30/22 Tr. at 75-77). Substantial evidence has been presented to the warden documenting an abnormality in Mr. Cole's brain in a specific region associated

with schizophrenia, a neuro-chemical disease. Mr. Cole's behavior, noted in his prison mental health records, is consistent with the "negative symptoms" of schizophrenia, highly corroborated through brain imaging. Dr. Hough has opined Mr. Cole is incompetent to be executed and has further provided an expert opinion rebutting Dr. Orth's methodology and findings, and Drs. Morris, Hayman, and Snyder presented further prima facie reason to question Mr. Cole's competency to be executed. It was not within the warden's purview to decide to bar this constitutional claim in the face of this "good reason to believe" that Mr. Cole has become insane while confined under a sentence of death, which meets the substantial threshold constitutionally entitling Mr. Cole to due process.

B. Despite Disputed Issues of Fact, the State Courts Bypassed the Procedural Safeguards Set by This Court, Holding Mr. Cole to the Ultimate Incompetency Showing.

Though Oklahoma's statute casts "a jury as the ultimate arbiter of sanity," the warden instead placed himself in that role, making a decision that Mr. Cole is competent, and therefore refusing to initiate proceedings. *Allen,* 500 F. App'x at 711. He did this with an admitted emphasis on the court-appointed expert, Dr. Orth, despite the outlier nature of that report, which differed from the several defense expert reports finding Mr. Cole severely ill with schizophrenia, possessing a damaged brain, and incompetent to be executed. *See Panetti*, 551 U.S. at 949 ("As an example of why the state procedures on review in *Ford* were deficient, Justice Powell explained, the determination of sanity 'appear[ed] to have been made solely on the basis of the examinations performed by state-appointed psychiatrists.'"). This created a compounded constitutional violation in the application of Oklahoma's flawed

mechanism to Mr. Cole: 1) the warden denied Mr. Cole access to competency process based on his unqualified, subjective opinion, and 2) this subjective opinion deemed Mr. Cole competent, but Mr. Cole did not have to prove incompetency at that stage. He need only have met the threshold standard. Instead, in line with the "most striking defect" of the state process at issue in *Ford*, "the final determination of a fact, critical to the trigger of a constitutional limitation upon the State's power," was left up to the warden. 477 U.S. at 416. As explicated below, mandamus review by the state courts did not rectify the constitutional violation.

While no state statute or case law clarifies the quantum of evidence providing "good reason to believe," and the federal "substantial threshold" has also not received specific definition, it cannot be equal to that required to meet the ultimate determination of incompetency. *See Panetti,* 551 U.S. at 950 ("substantial threshold showing of insanity" triggers requirement of further protections and process allowing chance to prove ultimate burden); *cf. Jones v. Mississippi*, 141 S. Ct. 1307, 1315 (2021) (citing *Ford* and recognizing that sanity is an "eligibility criteria . . . that must be met before an offender can be sentenced to death").[5]

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[5] The *Jones* concurrence additionally relied on *Madison v. Alabama*, 139 S. Ct. 718 (2019), as an example of this Court demanding "factual findings when it comes to other classes of criminals that this Court has declared categorically exempt from certain punishments." *Jones*, 141 S. Ct. at 1326 (Thomas, J., concurring). In *Madison*, the Court vacated and remanded "for renewed consideration" of the record after a state court, as here, "found [a prisoner] mentally competent" and thus eligible for execution.

Taken together, the *Jones* majority opinion and Justice Thomas' *Jones* concurrence establish that a finding that petitioner has "sanity" is an eligibility criterion, or a "factual prerequisite" for the execution of any death sentence. Because sanity is an eligibility criterion, the Sixth Amendment demands that the state cannot execute a petitioner unless and until: (a) a jury; (b) finds beyond a reasonable doubt; that (c) he is sane. *See Hurst v. Florida*, 577 U.S. 92, 99 (2016) ("*Ring* [*v. Arizona*, 536

The district court duplicated the warden's misunderstanding of his statutory role, also casting itself as "ultimate arbiter of sanity" in purporting to "adjudicate whether Benjamin Cole has become incompetent to be executed" and finding Mr. Cole "competent to be executed as currently scheduled." App. 00025, 00028. Both the warden and state trial court, in ostensibly deciding whether Mr. Cole met the substantial burden for entitlement to competency proceedings, held him to the burden of the ultimate question of incompetency, circularly using this to deny him further process to show he met that standard.

OCCA failed to acknowledge the warden and the district court's bypassing of procedural safeguards, and failed to acknowledge the numerous disputed issues of fact. For example, even though the district court's order began by noting *"[t]he purpose of this Order is adjudicate whether Benjamin Cole has become incompetent to be executed*," App. 00025 (emphasis added), and concluded by "FIND[ING] the Defendant is competent to be executed," *id.* at 00028, the OCCA excised these signposts. *See* App. at 00007, 00012, 00023 (OCCA instead repeatedly looked to district court's sole reference to "substantial threshold" burden). Though the district court once recited the correct standard, OCCA failed to engage with the district court's contrary announcements that it had instead erroneously held Mr. Cole to the ultimate burden of proof.

U.S. 584 (2002)] require[s] a jury to find every fact necessary to render [a defendant] eligible for the death penalty.").

Here, Mr. Cole has presented *prima facie* proof that he lacks sanity and is therefore exempt from the death penalty. *Jones* thus counsels this Court should preclude his execution, because there has been no jury finding (or any finding), beyond a reasonable doubt, that he is sane or competent to be executed.

And despite new evidence from experts regarding Mr. Cole's significant brain lesion, brain damage, and severe mental illness resulting in findings of incompetency, OCCA errantly stated "Petitioner has provided no new evidence regarding his competence." App. 00023. Further, while OCCA might have found Dr. Hough's critique of Dr. Orth's evaluation "incredible," App. 00022-23, neither the warden nor the district court referred to Dr. Hough's attack on the sole expert to deem Mr. Cole competent in their respective letter refusing to refer for competency proceedings and order denying mandamus. OCCA did not reference these omissions in its analysis of whether the district court abused its discretion. And neither the warden nor any Oklahoma court has engaged with Dr. Hough's critiques regarding Dr. Orth's failure to take into account Mr. Cole's historical records. App. 00249-251 at ¶¶ 11, 13, 15.

While OCCA's findings would not be out place in the context of a jury weighing experts' credibility, OCCA ultimately leaves unanswered how a single outlier report—attacked by an expert who has worked on Mr. Cole's case for years—prevents the rest of Mr. Cole's substantial body of evidence from reaching the necessary *prima facie* threshold. The "substantial threshold showing of insanity" under the Oklahoma regime and in this specific case was bypassed. *Panetti*, 551 U.S. at 950. Certiorari should be granted to remedy this malfunction and further elucidate the substantial threshold showing under *Ford* and progeny.

CONCLUSION AND PRAYER FOR RELIEF

For the foregoing reasons, Mr. Cole prays that this Court grant a writ of certiorari to resolve the Questions Presented. Mr. Cole further prays the Court grant his Emergency Application for Stay of Execution Pending Filing and Disposition of Petition for Writ of Certiorari filed on October 14, 2022.[6]

Respectfully submitted this 17th day of October, 2022.

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[6] Mr. Cole renews his request for stay of execution. Since the filing of the Petition for Writ of Certiorari is no longer pending, *Rostker v. Goldberg*, 448 U.S. 1306, 1308 (1980), no longer applies. Mr. Cole also satisfies the *Nken v. Holder* factors to allow a stay. *See* 556 U.S. 418, 426 (2009). As he showed with the first and second *Rostker* factors, Mr. Cole "has made a strong showing that he is likely to succeed on the merits." *Id.* And as he demonstrated under the third and fourth *Rostker* factors, he "will be irreparably injured absent a stay," a "stay will [not] substantially injure the other parties interested in the proceeding," and "the public interest lies" in granting a stay to ensure an unconstitutional execution does not take place. *Id.*